Scottish Civil Courts Review VOLUME 1: CHAPTERS 1 - 9

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Volume 1 of 2 (not to be sold separately)

RR Donnelley B60185 9/09

Report of the Scottish Civil Courts Review

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VOLUME 1

REPORT OF THE SCOTTISH CIVIL COURTS REVIEW

Introduction by the Lord Justice Clerk

The theme of this Report is that the legal system is a public service and that in the allocation of the resources available to it the public interest is of vital importance. Since resources are limited, the excellence that the system cannot at present achieve must be pursued in the most cost-effective way.

The basic structure of civil jurisdictions in the Scottish courts remains much as it was in the late nineteenth century. Meanwhile, fast moving changes in the social and economic life of Scotland in recent decades have left us with a structure of civil justice that is seriously failing the nation. Reform is long overdue.

The structural and functional flaws in the working of the Scottish civil courts prevent the courts from delivering the quality of justice to which the public is entitled. The Scottish civil courts provide a service to the public that is slow, inefficient and expensive. Their procedures are antiquated and the range of remedies that they can give is inadequate. In short, they are failing to deliver justice. Public confidence in our system is being eroded. The much admired qualities of fairness, incorruptibility and expertise of our judicial system will have little significance if the system cannot deliver high quality justice within a reasonable time and at reasonable cost.

One of our basic propositions is that since the legal system, as a public service, must be adequately resourced, its structures and its procedures must be so arranged as to eliminate needless delay and unreasonable cost. If the civil justice system cannot do that, it perpetrates injustice.

An efficient civil justice system is vital to the Scottish economy. It is also vital to the survival of Scots law as an independent legal system. Some Scottish commercial undertakings have so little confidence in our system that they enter into contracts providing for English jurisdiction and choice of law. If the Scottish civil courts and their procedures continue to fail the public, it is inevitable that Scots law itself will atrophy.

We consider that minor modifications to the *status quo* are no longer an option. The court system has to be reformed both structurally and functionally.

We consider that in this public service it is not for the user to decide what use he shall make of it, nor in what manner he shall do so. It is for the legislature to decide which level of adjudication and which modes of procedure are proportionate and appropriate for the type of dispute in question. If the nature or the importance of a dispute is such that it can be resolved competently at a particular level of the judicial hierarchy, the litigant ought not to be entitled to have it resolved at any higher level:

and when a dispute goes to litigation, control of the progress of the action should be in the hands of the court and not of the parties. In this way, public resources can be deployed to best effect.

On that view, it is apparent to us that there are fundamental weaknesses in a system in which a pursuer has access to the highest court in the land to pursue an action with a value as little as £5,000, and in which, in many cases, control of its progress is in the hands of the parties themselves.

In a legal system in which most litigations are conducted by solicitors or counsel, the court should no longer be tolerant of professional inefficiency where the effects of it are to put an added burden on the judiciary and the court administration, to cause needless expense to the parties and to add to the law's already notorious delays. In these respects too, it is for the court to assert the public interest. Nor should it tolerate its own inefficiencies.

We have carried out this review in a short period, with a small team and with a remit that, although entitling us to consider the relationship between the civil and criminal courts, constrains us from conducting an exhaustive study of the impact of criminal business on civil justice. My colleagues and I consider that the decision of the Scottish Ministers to commission a limited exercise such as this was the correct one.

If we were to start from scratch and devise a system of civil justice, it is unlikely that we would come up with the present system. In an ideal world, unconstrained by considerations of cost and time, we could devise a fundamentally new system with new forms of courts, new locations for courts, a new system of procedure and so on.

A major long-term project of that kind would cast a blight on interim reform while it was underway. In such an exercise, in our opinion, the best would truly be the enemy of the good. The urgency of the matter is such that we cannot await the outcome of an exercise of that kind.

Rather than make proposals requiring major investment that we could not cost, we have considered what practicable changes can be made to the existing system, accepting many of its limitations and trying as best we can to adapt it to meet current problems with best use of the existing infrastructure.

Our priority has been to make recommendations for pragmatic reforms that can be readily implemented at reasonable cost and will reduce the cost of litigation to the public purse and to the litigant, but will lead to new ways of thinking about the civil justice system and to the creation of mechanisms by which it can be reformed by continual evolution rather than by *ad hoc* changes. In this way, immediate and long-overdue gains will be the precursors of more fundamental gains in the long term.

We hope that in this way our proposed reforms will make Scotland an attractive forum for the resolution of disputes by providing high-quality judicial decisions at

every level and by dealing with litigations economically and expeditiously at both first instance and appeal.

Our remit requires us to consider to some extent the interaction of the criminal courts with the civil justice system. We remain convinced that no real progress can be made in the civil justice system until the distorting effects of criminal business are removed. In the sheriff court, the start of the day's civil business is often delayed by a variety of criminal matters. Lengthy proofs are disposed of a day at a time over a period of months, and sometimes over more than a year. We propose a major transfer of criminal work within the sheriff court from the sheriffs to a new body of district judges and at appellate level from the Appeal Court to a new Sheriff Appeal Court. Further and more radical proposals affecting jurisdiction and procedure in the criminal law are, in our view, beyond the reasonable interpretation of our remit.

It has been obvious to us from the outset that the one of the key areas for reform in the civil justice system is the sheriff court. For the purposes of this review, we have taken the present system and structure of the sheriffdoms as a given; but have sought to rationalise their jurisdictions and to add to them a vital element of flexibility. The reforms that we propose for the sheriff court, and in particular the creation of a lower tier judiciary within it, are critical.

The practitioners of 100 years ago would have little difficulty in picking up the threads of today's system. In the Scottish civil courts, processes are still conducted as a paper exercise. Data keeping is done by manual counts. The format of pleadings and many of their stylised formularies have not changed in over 100 years. In the Court of Session only a very small proportion of actions lodged ever come to proof. Most of the Court's caseload consists of actions of modest value and of no legal importance. On some days there are not enough Outer House judges available to hear the day's cases. Since litigants have virtually unrestricted access to the Court of Session for minor litigations and since almost all disappointed litigants have the right to appeal to the Inner House without leave, the Court of Session is now a court whose first instance business is to great extent that of acting as a settlement medium in personal injury claims and whose appellate business consists to a great extent of cases of small value and little legal significance. Many of its appeals are on points special to the facts of the case. In many appeals, the expenses exceed the sum at stake. With neither case management nor a requirement of leave to appeal, the Court of Session at both levels has become a playpen for certain frivolous and irresponsible party litigants.

In this Report we provide statistical data never before collected in a single source which demonstrate the extent to which the situation is deteriorating.

The statistics do not give the full picture. They do not convey the waste of resources in terms of last minute settlements, continuations, late starts, early finishes and the like, nor do they tell us the public cost of backing-up cases or of the wasted time caused to witnesses.

Inefficiency in procedure comes at three main costs: the public cost in unnecessary and avoidable judicial and administrative procedures; the cost to the client or to the Scottish Legal Aid Board in payment for avoidable court appearances and for unnecessarily complex procedural steps; and the unquantifiable costs in stress and frustration to the litigant. All of these diminish public respect for the law and cause a loss of confidence in society's ability to resolve disputes justly.

Our research indicates that since 2006 the situation, particularly in relation to delays in appellate business, has worsened. We leave out of account the inordinate delays in the criminal appeal system and the human rights questions that they may be thought to raise.

For the last twenty years, the Court of Session has been run on principles of crisis management. In attempting to cope with the increased workload, the court administration has been preoccupied with having a sufficient number of judges and sheriffs to allocate to the workload. Questions of the expertise of individual judges and of the quality of the judicial output have not, so far as we can see, been at the forefront of its attention. The response to backlogs has been to keep enlarging the judicial complement and to rely increasingly on the services of retired judges and of temporary judges recruited from the shrieval bench and the Bar. In the sheriff court, the full-time judicial complement has increased from 74 in 1979 to 146 just 30 years later. Part-time sheriffs now account for 20% of the work of the court. In both courts this approach has been both costly and short-sighted. Perhaps worst of all, the opportunity to throw more and more judicial resources at the problem, wastefully in our view, has diverted attention from the fundamental systemic flaws that create the problem in the first place.

The constant attritional process of attacking backlogs and attempting to achieve civil service performance targets has thrown an unreasonable burden onto the judges. The haphazard organisation of the business of the Court has survived only through their goodwill and commitment. They have repeatedly accepted excessive intrusions into their free time. That is not good for judges' health, for their family lives or for the quality of the work that they do.

The root of the civil justice problem is that Scotland, uniquely among the major jurisdictions of the British Isles, has no proper hierarchy of civil courts at first instance or at appellate level. It has a flat, two-level structure of first instance courts whose jurisdictions for the most part overlap. It has only one appellate court, to which most litigants can appeal without leave.

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.

In the Court of Session the lower limit of value is much too low. It enables actions to be raised in that court that should be beneath the proper countenance of a supreme court. They are a needless burden on its resources. There is an open appeal, with no requirement of leave, from the sheriff or the sheriff principal to the Court of Session. This right of appeal brings before the Court of Session numerous appeals of no legal significance or material value, the burden of which adds to the inefficiency of the court. In effect, the court has little control over its workload.

The extensive jurisdiction of the sheriff court creates inefficiencies. It has no upper limit of value in petitory actions and deals with a broad range of family actions and proceedings relating to the welfare of children; but it also has jurisdiction in small claims, debt recovery actions and housing repossession cases. In criminal cases, its jurisdiction extends from cases in which the sheriff may impose a sentence of five years down to minor summary prosecutions.

In both the Court of Session and the sheriff court, therefore, time is taken up unnecessarily by low value claims. In the result, much of the work of these courts is being done by judges and sheriffs who are over-qualified for it. No judge of the High Court in England would hear minor claims of the kind that are frequently made in the Outer House or preside at the sort of routine criminal trials that are dealt with in the High Court of Justiciary. It is inconceivable that an English circuit judge would ever have to deal with the sort of minor business, civil and criminal, that constitutes so much of the workload of the sheriff court.

The obvious weakness is the lack of a judicial third tier. A third tier civil judiciary is common throughout the English-speaking world. It exists in every other major jurisdiction in the British Isles.

The self-evident need is to ensure that cases are directed to the lowest level at which they can be competently dealt with. We propose that this should 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 privative jurisdiction of the sheriff court and the creation of the office of district judge to deal with a large part of the business of the sheriff court.

We therefore propose a new structure of courts, with a radical reallocation of jurisdictions. The transfer of litigation with a value of up to £150,000 to the privative jurisdiction of the sheriff court will ensure that the time of Outer House judges will be deployed to better effect on major litigations. By being freed from summary criminal business and a large proportion of the civil business with which they now have to deal, the sheriffs will have the opportunity to concentrate on solemn criminal trials and on more important civil actions. They will also have an opportunity to specialise within a small number of subject areas. The district judges will have a clearly defined civil jurisdiction covering all civil litigation involving claims for up to £5000 and residential property repossessions. It is to be expected that they will

acquire special expertise in these areas and deal with their work by means of expedited procedures.

We propose that the professional district judges in the sheriff court should, in addition to their civil jurisdiction, assume jurisdiction in criminal trials conducted in that court under summary procedure. This, in our view, will free up a substantial amount of shrieval time to cope with the increased civil workload that will result from our other proposals.

Our proposals leave the jurisdictions of the justices of the peace intact.

We also propose that there should be a sheriff appeal court to which all civil appeals from sheriffs and district judges and all appeals in summary criminal cases will have to go. From this court there will be a further appeal, to the Court of Session or the Appeal Court as the case may be, but only with leave.

To eliminate the waste of time and money involved in the bringing of unmerited appeals, we propose that in all appeals to the Inner House there should be a requirement of leave.

To give the system the flexibility that it has never had, we propose that there should be wide powers of transfer of cases between courts within a sheriffdom, between courts in different sheriffdoms and between the Court of Session and the sheriff court.

To make the system operate with greater efficiency, we propose that there should be a number of specialist sheriffs in every sheriffdom in a small number of subject areas such as criminal law, family law, personal injury law and commercial law.

We have concluded that the present practice by which many personal injury litigations of any value above £5,000 are raised in the Court of Session cannot continue. Nevertheless, we recognise the advantages to the litigant in a personal injury case that specialist solicitors and the centralisation of resources can bring. Being persuaded of that, we propose that there should be a national personal injuries court based in Edinburgh sheriff court. This court would retain many of the perceived advantages of the present system while ensuring that the cases are dealt with at a more appropriate level. Nothing in these proposals will affect the right of the individual pursuer to sue in his local sheriff court, or to sue in the Court of Session if the case is of sufficient value.

We have given the question of civil jury trial anxious consideration. For many years, the profession has been divided in its opinion on the merits of civil jury trial. It was represented to us that with the transfer of the bulk of personal injury litigation to the sheriff court, where civil jury trial was abolished decades ago, the institution of civil jury trial should be allowed to die out. There was a strong body of opinion to that effect within our Policy Group.

We have come to the view that with the creation of the sheriff personal injury court, the existing institution of civil jury trial in the Court of Session, and its procedures, should be transplanted to that court. Our discussions with the profession and our own experience satisfy us that, while jury trials seldom take place, the allowance of jury trial, or the possibility of it, has a significant influence in the maintenance of settlements in personal injury cases at realistic levels. There seems to be a general tendency for judge-made awards of damages to fall behind the level of jury awards as time goes by, with the result that it takes the occasional large jury verdict to return negotiated settlements to realistic levels. In our view, jurors in such cases have often had a more perceptive appreciation of the value of damages than the courts over the years.

We claim for these proposals the merit that they introduce specialisation at every level of the court hierarchy. At the third tier level, in particular, they extend the benefit of specialisation to consumers.

To expedite procedures and to eliminate wasteful procedural steps, we propose that there should be a system of case management and the introduction of a docket system in the allocation of actions within the courts.

A key objective of the Woolf Reforms was to front-load litigation by requiring the parties to observe certain pre-action protocols with a view to encouraging early settlement and simplifying the course of a litigation once it began. It is now generally accepted that pre-action protocols can front-load pre-litigation costs considerably. In one case noted in Lord Justice Jackson's Preliminary Report of the Review of Litigation Costs in England and Wales, the cost of pre-action procedures alone was about £1m.

While we accept that in certain types of case pre-action protocols are valuable, we consider that in other types of case competent and efficient case management will offer the best opportunity to expedite litigations and substantially reduce their overall costs.

In our consideration of the procedures of the Inner House, we have benefited greatly from Lord Penrose's research and his proposals for reform, and from the advice that he has given us. We support his proposals in their entirety.

We acknowledge the valuable role of alternative dispute resolution in certain types of dispute and we favour the idea that the court should draw the possibility of ADR to the attention of litigants.

We do not see litigation in the courts of law as merely one of a range of methods of dispute resolution in a modern society. Access to the courts is a constitutional matter. The work of the civil courts is the practical manifestation of the rule of law. The courts exist to vindicate parties' rights and to enforce their obligations. In our view, every citizen should have the right to take his case to the courts of law. So we do not accept the idea that access to the courts should be impeded by a requirement

that parties should resort to ADR as a first stage or by indirectly coercive measures, such as rules of expenses, that are directed to the same purpose.

Within these general requirements, we hope that there will be greater control over party litigants and an encouragement, in appropriate cases, for ADR.

By these means we hope to achieve our overall aims that there should be civil justice that is of the highest quality and is delivered expeditiously and economically.

One of the most significant advances in civil justice in recent years was the introduction of the remedy of judicial review in the Court of Session. Our study of the work of the Outer House has shown that the aims of promptness and efficiency in that procedure are no longer being fulfilled. We have therefore proposed certain improvements to the procedural rules that will, we think, meet those aims by giving the court a greater measure of procedural control.

Judicial review filled a gap in the Court's array of remedies. We have identified further gaps of which the most important is the absence of an efficient procedure for multi-party actions. We consider that, subject to suitable safeguards, multi-party litigations have a valuable role to play in modern civil justice.

One of the fundamental questions in every system of civil justice is that of the funding of litigation. With this goes the separate, but closely related, question of recoverability of legal expenses. The principles and practice of litigation funding and of the incidence of litigation costs vary widely from one jurisdiction to another. In England Lord Justice Jackson is conducting a review of the subject. He has published a preliminary report and is consulting widely. In the course of our review, it has become obvious to us that litigation funding is a major study in itself.

The scope of the topic is so wide that it is quite beyond the resources of our review, particularly in the timescale that we have been given. We say this with regret, since questions of funding and expenses lie at the heart of many current controversies in civil justice. We have formulated limited proposals for reform on the question of expenses and on the office of auditor; but have not made recommendations on matters such as conditional fee agreements and after the event insurance. It is our impression that certain aspects of current practice in this area raise important questions of principle that should be the subject of a systematic examination.

The opportunity offered by this Review has been too long delayed. If it is not taken now, many years may pass before it arises again. In that event, the scale of necessary reform will continue to grow.

For the last 50 years or more criminal justice has commanded by far the greater share of the attention of Ministers and legislators. Whereas criminal procedure has been regularly advanced by legislation, law reform in the field of civil justice has proceeded by way of sporadic changes in the light of recommendations of *ad hoc* bodies such as Committees, Royal Commissions and the like, by piecemeal

provisions in Law Reform (Miscellaneous Provisions) Acts and by the procedural reforms recommended by Rules Councils in the Court of Session and the sheriff court.

Changes of this kind constitute reform by way of *ad hoc* responses to individual problems. It is in a sense a form of legislative crisis management. The Rules Councils have done valuable work over the years. Thanks to the public spirited service of practitioners, there has been monitoring of the problems that emerge in the operation of the Rules of Court; but the Rules Councils have tended always to deal with issues of procedural detail. They have never been required to look at the broad picture of civil justice overall.

It is with these considerations in mind that we propose as a key element in our recommended reforms that there should be a Civil Justice Council for Scotland.

The functions of such a Council would be to keep the structures and processes of the civil justice system under constant review; to react promptly to change; to promote law reform in the field of civil justice; and to do so by anticipating problems rather than reacting to them, by applying a coherent philosophy of civil justice and by devising a strategy with clear long-term aims.

Such a body would have to be adequately resourced by a permanent secretariat, with a high level membership under the chairmanship of a senior judge and with a wide remit. It would carry out detailed monitoring of the work of the courts, carry out or commission research, receive regular statistical analysis, receive representations from interested parties, and generally promote the case for reform. The Council could also monitor research and reform in other jurisdictions, benefiting from such work instead of having always to learn its own lessons.

Good justice does not come cheap; but, just as importantly, it requires the effective expenditure of money. An efficient civil justice system will achieve many economies which, in our view, will more than justify the cost of the Council.

Our recommendations are capable of early and straightforward implementation, many without the need for primary legislation. No doubt, as with the recent High Court reforms, there will be unintended consequences of our recommendations. That points all the more to the need for some continuing system of constant review.

Our proposals, if adopted, will lead to major changes in civil justice and in legal practice. To those members of the profession who will be opposed to our proposals, we observe that two of the outstanding features of the legal profession are its resistance to change and its endless adaptability. The history of the abolition of the two-thirds rule, the two-counsel rule, the transfer of divorce jurisdiction to the sheriff court, the extension of rights of audience and the introduction of licensed conveyancing is a history of reforms that one or other branch of the profession saw at the time as roads to ruin; yet the profession has adjusted to them, often to its

advantage. The content of legislation itself constantly throws up new areas of dispute and new problems. The growth of litigation in the fields of employment, immigration, extradition, judicial review, all of these being subjects that scarcely existed 30 years ago, is reflected in the growth of the Faculty of Advocates from a membership of 276 in 1990 to its present membership of 456 and in the growth of the solicitor branch of the profession from 7,087 in 1990 to 9,873 in 2008.

In two years we have carried out the sort of detailed research that should be carried out on a continuing basis throughout the life of any mature legal system. We have consulted widely and thoroughly. In preparing our recommendations we have benefited greatly from the lucid and imaginative thinking of Dame Hazel Genn, to whom all workers in this field are indebted. Our own approach is in general similar to that of Dame Hazel in her recent Hamlyn lectures.

Our proposals 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. We put these proposals forward as an integrated solution.

It is a pleasure to acknowledge the extraordinary achievement of the Review Team in the evidence gathering process that enabled us to publish a Consultation Paper only eight months after we began our work. We have carried out a remarkably successful consultation exercise that has left us with a clear vision for the future of civil justice in Scotland.

In this Report we express our thanks to the many people who have helped us. I should like to express my own thanks to the Review Team whose commitment and skills are beyond praise; and to the members of our Policy Group, who have made their expertise freely available to us, at great sacrifice of their time, in a truly public spirited way.

I extend my thanks to my Court of Session colleagues, judicial and administrative, with whom I have had valuable discussions during the course of the Review. In particular, I thank Lady Paton for her help in relation to personal injury claims and Lord Wheatley and Lord Macphail for their help in relation to the jurisdictional aspects of the roles of sheriff and sheriff principal.

Lastly, I extend my thanks to my three colleagues on the Board of the Review. They have made this a stimulating and enjoyable exercise. I am indebted to them for their perceptive approach to civil justice reform. The key area in all of this is the sheriff court. All three of my colleagues have extensive sheriff court experience. I have learned much from them in the course of the project. Our proposals in relation to the sheriff court are based on their knowledge and experience of it. I am pleased to say that we are unanimous on every recommendation in this Report.

Rt Hon Lord Gill
September 2009

CHAPTER 1 INTRODUCTION

The remit of the Review

1. In February 2007 the then Minister for Justice, Cathy Jamieson, asked the Lord Justice Clerk, the Rt Hon Lord Gill, to undertake a wide ranging review of the civil court system in Scotland. The remit of the Review is as follows:

> 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 to the public purse;
> - the role of mediation and other methods of dispute resolution in relation to 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.

The Review Board, the Policy Group and the Review Team

2. The Review began its work in April 2007, when the Lord Justice Clerk was joined by the Hon Lord McEwan, Sheriff Principal James Taylor and Sheriff Mhairi Stephen on the Project Board. The Board has been assisted by a Policy Group comprising individuals with particular knowledge and expertise in various aspects of civil justice, and is provided administrative and research support by a Review Team. Further information about the membership of the Policy Group and the Review Team is provided at the end of this chapter.

3. In May 2007 a press release was published on the Review's website, http://www.scotcourts.gov.uk/civilcourtsreview/index.asp, seeking views about the topics covered by the remit and any other matters within its scope. The Review contacted a number of people and organisations by letter and invited them to indicate their concerns. We received about 40 submissions. In November 2007 we published a wide ranging Consultation Paper. It was published on our website and was sent to over 450 key consultees. We received over 200 responses to the Consultation Paper, all of which (apart from those which were confidential) were published on the website.

4. During the consultation period the Board and the Review Team held a number of meetings with interest groups, practitioners, court managers and the judiciary. The Board members also undertook a fact finding visit to London where they visited the Royal Courts of Justice, the Central London Civil Justice Centre, the Ministry of Justice and the Civil Justice Council; and to Dublin where they visited the Supreme Court, Dundalk Courthouse, and held meetings with the Personal Injuries Assessment Board, solicitors specialising in personal injury work, a representative of the Bar Council, trade unions, insurers, and the State Claims Agency. In the course of the Review, members of the Project Board and of the Review team have attended a number of conferences and seminars and have undertaken various speaking engagements. Details of the meetings held, visits undertaken, seminars attended and speaking engagements are given in Appendix 1.

Principles underpinning the Review

5. In formulating our proposals for reform we have adopted as our overarching aim the objective of ensuring that the civil courts provide the public with a high quality system of civil justice. In our view the principles by which such a system should operate can be summarised as follows:

- 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; and
- it should have regard to the effective and efficient application of the resources of others.

6. It is essential that the courts have at their command sufficient judicial, administrative and physical resources to meet the demands upon them in a manner consistent with the above principles.

The European Convention on Human Rights

7. The Convention is an integral part of our constitution. The courts as public authorities must comply with it. Awareness of that fact has as a matter of course underpinned all our considerations. During the course of the Review we have examined a number of specific questions relating to the Convention and considered whether current practice and procedure are compatible with it. We have also always had in mind that any recommendations we make must be capable of being implemented compatibly with the Convention. We consider that all our recommendations meet that test.

Form and Content of the Report

8. Volume 1 of the report contains Chapters 1 to 9 with their associated Annexes and Volume 2 contains Chapters 10 to 15, their Annexes, two Appendices and a Bibliography.

9. Chapter 2 of the report summarises the problems with the civil justice system identified by the consultation that we undertook and the investigations that we have made and gives an overview of the structural and functional reforms that we propose.

10. Chapter 3 contains a short description of the civil courts in Scotland, their jurisdiction, and the most common forms of procedure. It is aimed primarily at the lay reader who may be unfamiliar with the court system or some of the terminology used in the report.

11. Chapter 4 is concerned with the structure of the courts and appropriate use of resources.

12. In Chapter 5 we discuss a new model for the case management of civil litigation.

13. Chapter 6 discusses the use of information technology in the courts and how this could be used to improve efficiency and access to justice.

14. Chapter 7 is concerned with mediation and other forms of dispute resolution.

15. Chapter 8 contains our proposals for facilitating settlement by way of pre-action protocols and the introduction of a system of formal offers in settlement which may be made by any party to the proceedings.

16. Chapter 9 endorses the principle that the court should control the conduct and pace of litigation and proposes a series of reforms aimed at enhancing the court's case management powers.

17. Chapter 10 is concerned with the form and content of judgments and sets out our recommendations to address the problem of delay.

18. Chapter 11 deals with our proposals to improve access to justice for party litigants.

19. Chapter 12 recommends reforms in relation to judicial review and the creation of an express power for the court to make special orders for expenses in cases raising questions of public interest or importance.

20. Chapter 13 recommends the introduction of a special procedure for multi-party actions.

21. Chapter 14 addresses a variety of issues concerning the cost and funding of litigation.

22. Chapter 15 is concerned with the system for making rules of court and recommends the creation of a Civil Justice Council for Scotland.

23. A full list of the recommendations that we make can be found at the end of each volume.

Acknowledgements

24. In his introduction the Chairman extended his warm thanks to the members of the Policy Group who have been of enormous assistance to us. They have played an important role in identifying the issues for inclusion in the Consultation Paper and in developing our proposals for reform. Their expertise has been a valuable resource to us. We should, however, in deference to them, make it clear that the recommendations that we make are our own.

25. We should also like to acknowledge the very substantial assistance afforded to us by the Scottish Court Service. Staff at all levels of the Court Service have contributed to the development of our proposals by providing us with statistical data and other information and comments and observations based on their own knowledge and experience. They have also helped us to evaluate the impact of our proposed reforms. The conclusions that we have reached based on this information are, of course, our own.

26. We are also extremely grateful to the many individuals and organisations who responded to our consultation and who made time to meet with us. Their input has been of great assistance in identifying and understanding the problems and providing information and ideas which have helped us to formulate our recommendations.

Project Board

The Rt Hon Lord Gill, Lord Justice Clerk

Lord Gill was appointed Lord Justice Clerk and President of the Second Division of the Inner House in November 2001 and is Chairman of the Lands Valuation Appeal Court. He was appointed a Judge in 1994 and was Chairman of the Scottish Law Commission from 1994 to 2001. He is a graduate of the Universities of Glasgow (MA, LLB) and Edinburgh (PhD). He has been awarded the honorary degree of LLD by the Universities of Glasgow (1998), Strathclyde (2003) and St Andrews (2006). He is a Fellow of the Royal Society of Edinburgh and a Fellow of the Royal Scottish Academy of Music and Drama.

Lord Gill lectured in the Faculty of Law of Edinburgh University before being admitted to the Faculty of Advocates in 1967. He was appointed Queen's Counsel in 1981. He is a member of the English Bar (Lincoln's Inn, 1991; Bencher 2002). He was an advocate depute 1977-1979; Standing Junior Counsel to the Foreign and Commonwealth Office (1974-1977), the Home Office (1979-1981) and the Scottish Education Department (1979-1981); and Deputy Chairman of the Copyright Tribunal (1989-1994). He was Keeper of the Advocates Library 1987-1994. He is the author of *The Law of Agricultural Holdings in Scotland* (3rd ed, 1997) and founder and General Editor of the *Scottish Planning Encyclopaedia*.

The Hon Lord McEwan

The Hon Lord McEwan, having served as a Temporary Judge of the Court of Session and of the High Court of Justiciary since 1991, was appointed a Judge in March 2000. He studied at the University of Glasgow, obtaining the degrees of LL.B and Ph.D., and held the Faulds Fellowship in Law at Glasgow University. Admitted to the Faculty of Advocates in 1967, he served as Standing Junior Counsel to the Department of Energy from 1974 to 1976, and as an Advocate Depute from 1976 to 1979. He was appointed Queen's Counsel in 1981, the year in which he also took up office as a Chairman of Industrial Tribunals. From 1982 he was a Sheriff of South Strathclyde, Dumfries and Galloway (initially at Lanark and then at Ayr). He also served as a member of the Scottish Legal Aid Board from 1989 to 1996.

Sheriff Principal James Taylor

Sheriff Principal James Taylor was admitted as a solicitor in 1977 and as a solicitor advocate in 1993, a solicitor in private practice, first in Aberdeen and then in Glasgow where he was a partner in McGrigor Donald. Appointed Sheriff of Lothian and Borders at Edinburgh in 1998, he transferred to Glasgow and Strathkelvin in 1999 where he was designated Commercial Sheriff. Other appointments include Law Society representative on the Court of Session Commercial Court Users Committee (1993-1998), Chairman of the Disciplinary Tribunal for the Institute of Chartered Accountants of Scotland (2000 to date) and member of the Advisory Committee to the Scottish Law Commission in relation to the review of the law on Interest on Debt and Damages.

Sheriff Mhairi Stephen

Sheriff Mhairi Stephen was admitted as a solicitor in 1978. Mhairi Stephen was a solicitor in private practice and partner in Allan McDougall Edinburgh until she was appointed Sheriff in 1997 firstly as a floating sheriff based at Edinburgh and since 2000 Sheriff of Lothian and Borders at Edinburgh.

Policy Group

The Hon Lord Hodge

The Hon Lord Patrick Hodge has been a judge of the Court of Session since 2005. He is a full-time commercial judge and intellectual property judge. His other judicial duties include serving on the Judicial Council of Scotland and the Judges' Council, and acting as liaison judge in relation to the implementation of the new United Kingdom tribunal system. Like other Outer House judges in the Court of Session he spent much of his time presiding over criminal trials in the High Court until he took up his post as a commercial judge in 2008. He is a graduate of Cambridge University where he studied history and Edinburgh University where he studied law.

He worked for three years in the UK civil service after leaving Cambridge. He then studied law at Edinburgh and joined the Faculty of Advocates in 1983. He became a QC in 1996. His practice was principally in the fields of commercial law and administrative law. In addition he served as standing junior counsel to the Inland Revenue in Scotland from 1991 until he took silk in 1996. His other professional activities included serving as a part-time commissioner in the Scottish Law Commission between 1997 and 2003, as Procurator to the General Assembly of the Church of Scotland and as a part-time judge in the Courts of Appeal of Jersey and Guernsey, both between 2000 and 2005.

Sheriff Principal Edward Bowen QC

Sheriff Principal Edward Bowen QC was called to the Scottish Bar in 1970 and practised as a junior counsel until 1983. During the last four years of that period he was a High Court prosecutor. He was appointed Sheriff at Dundee in 1983 and served in that capacity until 1990 when he resumed practice. He represented a major party at the Orkney Child Abuse Inquiry in 1991-92. He was appointed a Queen's Counsel in 1992; a Chairman of Employment Tribunals in 1995 and became a Member of the Criminal Injuries Compensation Board in 1996.

In October 1997 he was appointed Sheriff Principal of Glasgow and Strathkelvin. Whilst in that office he brought about significant changes to the management of sheriff court business, introducing in the civil field specialist Family and Commercial Courts and drove through the establishment of a Drugs Court and Domestic Abuse Court. He was appointed a Temporary Judge of the Court of Session in 2000, and became Sheriff Principal of Lothian and Borders in 2005. He is the Convener of the Sheriffs Principal in Scotland.

Sheriff Charles Stoddart

Sheriff Stoddart was Sheriff of North Strathclyde at Paisley from 1988-1995 and thereafter Sheriff of Lothian and Borders at Edinburgh until retirement at the end of February 2009. He was the first Director of Judicial Studies 1997-2000 and is a former member of both the Sheriff Court Rules Council and the Council of the Sheriffs' Association.

Before joining the Bench he was a Lecturer in Scots Law at the University of Edinburgh and a solicitor in private practice. He is also the author of a number of legal texts and articles on various topics.

Dr Kirsty J Hood

Dr Kirsty J Hood has been an Advocate at the Scots Bar since 2001. She enjoys a general civil practice, but has a particular interest in private international law. She obtained her undergraduate and postgraduate qualifications at the University of Glasgow, with her doctoral studies being in the field of private international law. She is the author of *Conflict of Laws Within the UK*, and is also the contributor of the 'Court of Session' chapter of the *Greens Scottish Lawyers Factbook*.

Nick Ellis QC

Nick Ellis QC was educated at the Royal High School, Edinburgh and Edinburgh University. He was a solicitor in private practice from 1981 to 1989. He was called to the Bar in 1990. He has an extensive civil practice with expertise in personal injury work and judicial review. His practice is now predominantly in commercial litigation. He was a standing junior counsel to the Scottish Executive from 1997 to 2002. Nick was appointed a QC in 2002.

Robert Carr

Robert Carr is the Chairman of Anderson Strathern. He heads up Anderson Strathern's Healthcare Public and Regulatory team. He qualified as a Solicitor-Advocate with extended rights of audience in Scotland's highest civil courts in 1994. Robert has over 25 years' experience across a full range of issues including administrative law, civil litigation, delictual liability and property.

He is the lead partner under Anderson Strathern's client relationship management programme for a significant number of public, commercial and professional bodies. He is accredited by the Law Society of Scotland as a specialist in medical negligence and personal injury.

Robert chairs the Law Society of Scotland's Rights of Audience Committee and their Professional Negligence Accreditation Committee. He is a member of the Law Society's Medical Negligence Accreditation Committee. Robert is President of the SSC Society and is also a WS as from June 2009.

Lindsay Montgomery

Lindsay Montgomery is Chief Executive of the Scottish Legal Aid Board. His professional background is in public finance, accountancy and audit. He is a member of a number of groups involved in the justice system including the International Legal Aid Group, National Criminal Justice Board and a member of the Debt Action Group. Outside the justice arena he is Deputy Chairman of Scotland's Charity Regulator (OSCR), Chairman of the Non Departmental Public Bodies Chief Executives' Forum and Chairman of the Central Government Centre for Procurement Excellence Supervisory Board.

Sarah O'Neill

Sarah O'Neill is a qualified solicitor, with experience in both private practice and the advice sector. She is also an accredited mediator. Sarah has led the policy team at Consumer Focus Scotland since the new organization was created in October 2008. Prior to that, she was Legal Officer at the Scottish Consumer Council (SCC) for 10 years, responsible for the SCC's legal policy, including access to justice and legal services. She was previously employed as the in-court adviser at Edinburgh sheriff court.

Sarah was the Secretary to the Civil Justice Advisory Group, set up by the SCC and chaired by The Right Honourable Lord Coulsfield, which in November 2005 published a report recommending review of various aspects of the civil justice system. She has been a member of the Sheriff Court Rules Council since 2005.

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Ewan Malcolm

Ewan Malcolm set up the Scottish Mediation Network office in September 2002 and was appointed as its first Director. He was in private practice as a solicitor for nearly two decades and started his mediation training in 1995. Ewan is trained as a commercial, family and community mediator. He freelances as a mediator in high value and complex disputes. He also volunteers with both the Edinburgh Sheriff Court and the Edinburgh Community Mediation Services, where he has achieved the Level IV SVQ in mediation. Ewan has presented training across the UK and is an associate member of the Chartered Institute of Personnel and Development.

He is Director of Training for CALM, the association of Family Law Mediators accredited by the Law Society of Scotland. Ewan is a Director of Evaluation Support Scotland and a Trustee of the John Watson's Trust

Norman McFadyen

Norman McFadyen is the head of department for the Crown Office and Procurator Fiscal Service, which is responsible for all prosecution of crime and investigation of deaths in Scotland. Educated in Glasgow University, Norman McFadyen joined the Crown Office as a Legal Apprentice in 1978 and served in the Procurator Fiscal Offices in Airdrie and Glasgow before returning to Crown Office in 1988. He was appointed Depute Crown Agent in 1994 and Regional Procurator Fiscal for Lothian and Borders in 1999. He was involved in the Lockerbie criminal investigation and headed the Crown Office Trial Team at Camp Zeist in the Netherlands. Norman McFadyen was appointed as Crown Agent (Designate) in March 2002, as part of the restructuring of the Crown Office and Procurator Fiscal Service and was confirmed in the post of Crown Agent in March 2003.

In December 2004 he was appointed as Crown Agent and Chief Executive. He is also the Queen's and Lord Treasurer's Remembrancer (QLTR) by virtue of his appointment as Crown Agent. The QLTR is responsible for administering the estates of those who die intestate and without known relatives and of other property falling to the Crown as bona vacantia (ownerless property), including Treasure Trove. He was appointed a Commander of the British Empire in the New Year Honours List in December 2001.

David Forrester

David Forrester joined the Scottish Court Service (SCS) in 1974 and is currently Deputy Director of Field Services (Delivery) with Scotland wide responsibility for the Sheriff and Justice of the Peace Courts. He has been a Director and member of the SCS Executive Board since 2001. He has held a number of Policy and Operational Delivery posts throughout his career, the most recent of these being Sheriff Clerk at Falkirk and Airdrie where he was also an Auditor of Court. He is a former member of the Integration of Scottish Criminal Justice Information Systems (ISCJIS) Programme Board, and is currently a member of the Reference Group supporting the Review of Sheriff and Jury Procedure

Review Team

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CHAPTER 2 OVERVIEW

The problems with the current system

1. In this Chapter we summarise the problems with the civil justice system identified by the consultation that we undertook and the investigations that we have made, and give an overview of the structural and functional reforms that we propose. The key issues and principles for reform are addressed in the Chairman's introduction. We set these out in greater detail in this chapter.

2. In Chapter 1 we described the consultation process and the various meetings that we held with practitioners, court managers, the judiciary and others having an interest in the issues canvassed in the Consultation Paper.

3. A number of key themes emerged:

- The pressure of criminal business and the impact which this has on the quality of civil justice in terms of delay and judicial continuity
- The need for a greater degree of judicial specialisation
- The hierarchy of the courts and appropriate use of judicial resources
- Over reliance on temporary resources
- The need for effective case management and reformed procedures
- Investment in information technology
- Party litigants and a new forum or method of dealing with lower value cases
- Problems relating to the cost and funding of litigation

The pressure of criminal business

4. There was a strong feeling that the pressure of criminal business, in terms of volume and the priority assigned to it, is having a detrimental impact on civil business in both the Court of Session and the sheriff court. Respondents complained that civil cases are routinely deferred or interrupted to make way for criminal business. This causes unacceptable delay and adds to expense when hearings are postponed or part heard.

5. In the Court of Session the performance target for appeals (18 weeks) was not met in any of the years 2001/02 to 2007/08, with waiting periods as long as 39 weeks. The target is expressed in "term weeks". Since there are 16 weeks of recess and vacation each year, the real delays are considerably longer. In spite of the recent reforms to the criminal justice system, delay remains a problem, particularly at appellate level: see Annex B to Chapter 4, Table 1.

6. Although the waiting periods for first instance business in the Court of Session have reduced in the last year or so, respondents complained of lengthy waiting periods for diets of more than a day or two. Complaints about proofs or other

hearings being discharged through lack of availability of a judge are supported by the statistics: in the 12 month period September 2005 to August 2006, 26 proofs or hearings did not proceed as there was no judge available to hear the case; in the period September 2006 to August 2007 the figure was 12 and in the period from September to December 2007 the figure was 10. It was suggested by some respondents that a scheme for compensating parties in such circumstances, similar to the one run by HMCS in England and Wales, should be introduced. Pressure for the introduction of such a scheme is likely to grow if diets continue to be discharged through lack of availability of a judge.

7. There has been a steady decline in the proportion of Supreme Court sitting days allocated to civil business: from 44% in 1995/1996 to just 34% in 2008/2009.

8. Respondents also complained of delays in issuing judgments in the Court of Session and attention was drawn to a small number of cases in which there was excessive delay. An audit of opinions delivered during the period 1 January to 1 July 2008 shows that, in general, opinions are delivered within a reasonable period of time. However, there are instances of opinions being issued as long as two or even three years after the proof or other hearing. There are unacceptable delays in the sheriff court also. These are particularly regrettable in cases involving the welfare of children. If the delays inherent in the current system are not addressed, then applications to the European Court alleging a breach of article 6 of the European Convention on Human Rights can be expected.

9. For those litigants, particularly in the commercial field, who may have a choice of where to litigate, the prospect of delay can outweigh the competitive advantage which Scottish solicitors are able to offer in terms of charge out rates. A number of solicitors practising in the commercial field said that they had lost business as a result of the length of time it takes for cases to be resolved in Scotland, particularly if there is an appeal.

10. In the sheriff court the targets for waiting periods for the allocation of proofs are being met. However, this masks the problem. Due to the way in which the court programme is drawn up, a diet may be offered within the target period but may be restricted to a day or two in cases where a longer diet is required. This leads to cases being part heard over a period of weeks or months. Those involved in adoptions or appeals and referrals from the children's hearing mentioned this as a particular difficulty. The view was expressed that the court is losing sight of the interests of the child. In many sheriff courts the start of civil business is delayed, often for several hours, until deferred sentences are dealt with. In smaller courts civil business is routinely interrupted to deal with accused persons appearing from custody.

The need for a greater degree of specialisation

11. Although views were mixed about the need or desirability for a greater degree of judicial specialisation in the Court of Session, whether at first instance or on appeal, there was a strong call from practitioners and court users for a greater degree of specialisation in the sheriff court, coupled with a more pro active system of case management. The way in which court programmes are structured at present and the demands of summary criminal business make it difficult to ring fence civil business or to provide a degree of specialisation or continuity in all but the largest sheriff courts.

12. Family practitioners in particular were concerned about lack of continuity and consistency of decision making in relation to cases involving children. There were calls for sheriffs to specialise in one or more areas, principally family law, commercial law, personal injury, consumer and housing cases.

The hierarchy of the courts and appropriate use of judicial resources

13. The structure of the civil courts in Scotland is unusual in that the jurisdiction of the Court of Session and the sheriff court largely overlap. With the exception of small claims actions there is an unrestricted right of appeal to the Inner House. Parties are free to chose in which forum to litigate regardless of the importance or complexity of the case. Many respondents to the consultation favoured the status quo, citing the success of the procedural reforms for personal injury actions in the Court of Session, and arguing that as a matter of principle choice of forum should be for the parties. Others submitted that there was too much low value litigation in the Court of Session and that this has an adverse effect on the conduct of other business. It was suggested that it was not a cost effective or appropriate use of the time of the most senior judges for low value cases that do not raise any broader issues or points of principle to be litigated in the Court of Session. The suggestion that there is a great deal of low value litigation in the Court of Session is supported by data provided to us and our findings as set out in Chapter 4.

14. Similar points can be made about the extensive jurisdiction of the sheriff. A sheriff may hear a commercial action worth hundreds of thousands of pounds, a contested petition for the adoption of a child and, sitting with a jury, a serious criminal offence, all of which may raise complex questions of fact or law. In contrast, hearing an application to pay a debt by instalments or deciding whether the quality of material of a wedding dress was of a reasonable standard also fall to the sheriff.

15. In our view the current allocation of business between the Court of Session and the sheriff court is an inefficient and wasteful use of resources.

We consider that litigation should be conducted in a court appropriate to the nature, value and importance of the case.

16. Many respondents agreed that the current appellate arrangements are unsatisfactory and that a second stage appeal should be subject a requirement to obtain leave or that there should be a filter mechanism to identify unmeritorious appeals.

Over reliance on temporary or part time resources

17. We asked for views on the use made of temporary or part-time resources in the Court of Session and the sheriff court. Although part-time appointments can provide flexibility in dealing with emergencies and unexpected peaks of work, part-time members of the judiciary form a permanent and integral part of the court programme in both the Court of Session and the sheriff court and the programme could not be delivered without them. The use of temporary judges has increased dramatically in recent years. In the past three years alone the number of sitting days undertaken by temporary judges has doubled. In the sheriff court one fifth of all sitting days are conducted by part-time sheriffs. Respondents have complained of lack of experience or commitment to a particular court which leads to inconsistent decision making and poor case management. Respondents also expressed concern about the appropriateness of a practising solicitor or advocate appearing in a court and sitting in a judicial capacity in that same court on a part-time basis. It was thought that this could give rise to an appearance of conflict of interest even where no such conflict exists.

Effective case management

18. In our Consultation Paper we asked whether the court should control the conduct and pace of litigation and whether court procedures should involve a greater degree of active case management on the part of the judge or sheriff. The overwhelming majority of respondents endorsed the proposition that the court should control the conduct and pace of litigation. This was said to be crucial to the success of any programme of reform and it was argued that supervision by the court would lead to a more effective use of public resources. Many respondents drew attention to the model of active judicial case management exemplified by the commercial procedure in the Court of Session and for the case management procedures that may be adopted in Glasgow Sheriff Court in commercial, personal injury and family actions. There was general agreement that the positive impact of the reforms to the ordinary cause rules in the sheriff court had lessened with time.

19. In response to the specific questions posed in the Consultation Paper on whether existing court procedures were operating satisfactorily there was

considerable support for the proposition that the court's case management powers required to be enhanced and that there was a need for reform in relation to disclosure of evidence, pleadings, expert witnesses and the manner in which hearings are conducted. Many respondents proposed reform of particular procedures such as applications for summary decree and judicial review.

20. Over half of our respondents thought that the courts should have greater powers to impose sanctions in cases where parties have behaved unreasonably or failed in a material respect to comply with court rules. Some respondents drew a picture of a *laissez faire* approach with repeated failures to comply with the rules and time limits being tolerated. It was said that the delays and costs suffered by opponents were not adequately recognised by the court.

21. There was also a high degree of support for the introduction of new procedures such as pursuers' offers and a special procedure for multi-party actions: the former to facilitate settlement and promote equality of arms and the latter to broaden access to justice.

Information Technology

22. Respondents were strongly of the view that the court system is currently not taking full advantage of the opportunities that information technology offers to improve the efficiency of the conduct and management of civil business. Significant improvements to efficiency could be achieved by transmitting documents to court electronically; communicating with the court by email; creating electronic processes or case files; using telephone or videoconferencing facilities; processing certain types of claim on line; recording evidence digitally; and providing information and guidance for the public and the legal profession online.

Party litigants and a new forum or method for dealing with lower value cases

23. We received many representations on this topic. Two broad themes emerged. The first was that for those litigants who do not have legal representation even those court procedures designed with them in mind may be inaccessible. The aspirations of the small claims and summary cause reforms in 2002 have not been met. There is a need for better information about where to go for advice and assistance, including how disputes might be resolved without going to court. It was said that the in-court advice services that exist do a good job but are only available in a small number of courts and cannot meet the demand for their services. It was thought that there was considerable scope for improving the procedures for dealing with lower value cases. Housing cases were identified as presenting a particular problem.

24. The second theme was that party litigants are often a source of trouble to the court, creating additional burdens on judges and extra expense for their opponents, and that firmer measures were required to deal with those who pursue claims that are without merit or who behave in an unreasonable fashion.

The cost of litigation

25. Many respondents drew attention to the cost of litigation and observed that only those with considerable wealth or those who are eligible for legal aid can afford to litigate. The financial eligibility criteria for civil legal aid were increased significantly in April 2009 and the Scottish Legal Aid Board estimates that around three quarters of the adult population are now likely to be financially eligible.[1] This increase may go some way to meet some of the concerns expressed to us in the responses to the Consultation Paper which predated the increase.

26. The majority of reparation actions in Scotland are funded, however, not by legal aid but on the basis of speculative fee arrangements. Unlike in England and Wales, success fees and 'after the event' insurance premiums are not recoverable and will have to be paid by a successful pursuer from the damages recovered, unless they are waived or absorbed by the pursuer's solicitor. Some respondents thought this was wrong in principle. Yet others warned against permitting the recovery of success fees and ATE premiums, and pointed to the satellite litigation that this had spawned in England and Wales.

27. The shortfall between what a client has to pay his legal advisers and what can be recovered in judicial expenses was raised by many respondents as a matter of concern. It appears that in commercial litigation recovery rates are much lower than in England and Wales and that this is a powerful disincentive to litigating in Scotland.

28. We received many representations to the effect that the system of taxing judicial accounts of expenses requires modernising.

Proposed Solutions

29. We propose a mixture of structural and functional reforms to address the problems we have identified.

[1] See http://www.slab.org.uk/getting_legal_help/Extended_eligibility.html Eligibility depends on the income and capital of the applicant, as well as criteria relating to the case, and there is a tapering scale of contributions.

Structural reforms

The allocation of business between the Court of Session and the sheriff court

30. The resources of the civil justice system should be allocated in the fairest and most effective way. This requires that cases are dealt with by a court of a level commensurate with the importance and value of the issues at stake. The solution to the problem of low value litigation in the Court of Session is to raise the threshold below which actions must be raised in the sheriff court (known as the privative jurisdiction of that court) to £150,000. The Court of Session should retain exclusive jurisdiction in relation to judicial review, trusts, more complex corporate matters, patents, Exchequer cases, actions under the Hague Convention and devolution issues. It should continue to have concurrent jurisdiction in family matters.

31. Some other work currently exclusive to the Court of Session could be competently dealt with by sheriffs. The sheriff court should acquire concurrent jurisdiction with the Court of Session in relation to actions of reduction and proving the tenor of lost or destroyed documents. Its jurisdiction to deal with the winding up of companies should be extended.

32. We also recommend that the jurisdiction of both the Court of Session and the sheriff court should be extended to make positive orders of the kind set out in section 84 of the Agricultural Holdings (Scotland) Act 2003 and that the Court of Session should have jurisdiction to grant a decree of removal or ejection.

Sheriff Appeal Court

33. About one third of all civil appeals to the Inner House come from the sheriff courts. Almost two thirds of the sheriff court appeals are appeals direct from the sheriff to the Inner House. Summary criminal appeals account for almost two thirds of all appeals to the High Court. The vast majority of these appeals raise no complex points of law and could be dealt with by a new appellate court at sheriff court level There should be a national Sheriff Appeal Court comprising the sheriffs principal together with a small number of additional judges of equivalent rank. The decisions of the court would be binding on sheriffs throughout Scotland, to allow the creation of a consistent and coherent body of case law. The proposed 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. On the civil side it should deal with appeals from decisions of the sheriff and the district judge, (see below).

34. Civil appeals from a sheriff should normally be heard within the sheriffdom from which they emanate by a bench of three, chaired by the

sheriff principal of that sheriffdom. Appeals from cases heard by a district judge under the simplified procedure (see below) should normally be heard by a single member of the Sheriff Appeal Court, unless the sheriff principal of the relevant sheriffdom determines otherwise. All civil appeals should go to the Sheriff Appeal Court in the first instance, unless the court grants leave to take an appeal which raises complex or novel points of law direct to the Inner House of the Court of Session. Leave should also be required for an appeal from the Sheriff Appeal Court to the Inner House.

35. For criminal appeals the quorum of the Sheriff Appeal Court should be: three for an appeal against conviction, or conviction and sentence; three for an appeal by the Crown against acquittal or sentence; and two for an appeal against sentence only.

Specialist personal injury court

36. Much personal injury litigation is handled by specialist practitioners under special procedures in the Court of Session. This offers considerable benefits to litigants in these cases but adds to the pressure of business on the court and adversely affects other litigants. The solution is a specialist personal injury court with an all-Scotland jurisdiction in Edinburgh sheriff court, but with the continued right of any personal injury claimant to sue in any sheriff court having jurisdiction. Pursuers will have the choice between local access to justice or the advantages of a dedicated specialist court with an all-Scotland jurisdiction. The right to a civil jury trial should be extended to proceedings in the dedicated court.

District judge

37. To eliminate delay and interruptions to civil business in the sheriff court and to provide a more targeted service in lower value cases, there should be a new level of professional judicial officer in the sheriff court: the district judge. The district judge should have jurisdiction to hear: all actions with a value £5,000 or less; actions for recovery of possession of property subject to residential tenancies; mortgage repossession actions; and appeals and referrals from children's hearings. The district judge should have concurrent jurisdiction with the sheriff in relation to family actions.

38. The volume of lower value civil business would not justify the creation of a new level of judge with only a civil jurisdiction. In addition there will be limited scope for sheriffs to specialise and to take on the more active case management role that we recommend if summary criminal cases are to continue to form the major part of their workload. District judges should therefore have jurisdiction to deal with all summary criminal business currently heard by sheriffs. Transferring responsibility for dealing with summary crime to district judges will allow sheriffs to deal with a greater volume of solemn criminal work and with the additional civil business which

will now come to the sheriff court as a result of raising its privative jurisdiction to £150,000.

39. Criminal cases dealt with by the district judge should, so far as practicable, be programmed to be heard on days when civil business is not being heard, in order to avoid a replication of the current problems with delayed starts and interruptions to civil business in the sheriff court.

Specialisation

40. Specialist sheriffs will be required for the specialist personal injury court in Edinburgh. There is also a justified demand for further specialisation in family cases, commercial work and personal injury cases in the sheriff court generally. There should be a system of designating sheriffs as specialists in one or more of the following areas: crime, general civil, personal injury, family and commercial. Sheriffs principal should designate one or more sheriffs to each of these practice areas in their respective sheriffdoms. Sheriffs principal may also consider it appropriate to designate sheriffs to additional areas of court business as the need arises. Sheriffs should be able to be designated for more than one class of business at a time, and should not be restricted to the same areas of specialisation for their entire career.

41. Since district judges and sheriffs will have a concurrent jurisdiction in family cases, parties will have the choice of prioritising either specialist knowledge, by requesting that the case is allocated to a specialist sheriff, or local access, by having the case dealt with by the district judge at the local sheriff court.

Temporary judges and part-time sheriffs

42. The use of temporary judges and part-time sheriffs should be reduced and restricted to cover for leave, illness and emergencies. Where they are appointed, they should not be practitioners. Temporary judges should be drawn from the ranks of retired judges of the Court of Session or serving or retired sheriffs or sheriffs principal; part-time sheriffs should be drawn from the ranks of retired sheriffs or retired practitioners. We accept that in the short term this ideal may not be achievable and that it may not be practicable to restrict the appointment of part-time sheriffs as we propose until the full complement of district judges is in place.

Functional reforms

Case management - general

43. The court should control the conduct and pace of litigation. Case management should be introduced into all of Scotland's civil courts. For personal injury actions, case-flow management should be the norm. All other types of proceedings should be subject to the appropriate degree of judicial case management, to be determined at the discretion of the Lord Ordinary or sheriff. A docket system of allocating all contested cases to a designated judge or sheriff should be introduced in both the Court of Session and the sheriff court. So far as possible there should be judicial continuity throughout the course of a case. The distinction between ordinary and petition procedure in the Court of Session and between ordinary cause and summary application procedure in the sheriff court will no longer be necessary.

44. In the Court of Session, case-flow management is currently the norm for personal injury actions in the Outer House and this should continue. For other Outer House business, there should be a form of case management for all ordinary actions not falling within the scope of Chapter 43 similar to that adopted under commercial procedure. Lord Penrose's recommendations for the reform of business in the Inner House, which combine elements of 'case-flow' and active judicial case management, should be implemented without delay.

45. In the sheriff court, a form of case flow management will apply to personal injury actions under new rules to come into effect in November 2009. This should continue. All other contested civil actions under the jurisdiction of the sheriff should be subject to active judicial case management by a designated sheriff.

46. All family actions should be actively managed to ensure early focusing of the issues, full and frank disclosure, compliance with time limits and control of the use of expert evidence.

Improving access to justice

47. There is a particular need for changes to court practices and procedures in cases of low monetary value and in housing cases, so that people who do not have legal representation can enter and move through the court process effectively. Summary cause and small claims procedure should be replaced by a new simplified procedure for all actions with a value of £5,000 or less, actions for recovery of residential tenancies and mortgage repossession actions. The procedure should be designed with unrepresented litigants in mind. The district judge should take an interventionist approach to identify the issues and assist the parties to settle if possible, and to determine how the case progresses. Suitable lay representation should be permitted.

48. Public legal education can improve general knowledge of the legal system, raise awareness of how to deal with legal problems and help people find sources of help and advice. It should be promoted as part of any strategy to improve access to justice in Scotland.

49. The Scottish Court Service website should have a self-help section containing all the information and guidance necessary to enable a member of the public to start or defend a case under the simplified procedure. There should be links to the websites of other relevant sources of advice and information about mediation and other methods of dispute resolution.

50. In-court advice services should be developed and extended to become more widely available, as part of the Scottish Legal Aid Board's plans for the improvement and coordination of publicly-funded civil legal assistance and advice. Attention should be given to the quality and consistency of the advice provided and the appropriate management structure of services to ensure fairness and equality of access.

51. If the court considers that it would be helpful in any case, a person without a right of audience (a 'McKenzie friend') should be permitted to address the court on behalf of a party litigant. The court should have discretion to refuse to allow any particular person to act as a McKenzie friend on grounds relating to character or conduct and to withdraw a permission to act as such at any time. The rules of court should specify the role to be played by such persons and should provide that they are not entitled to remuneration.

Information technology

52. Improved use of information technology is crucial to our proposed reforms. The Scottish Court Service should develop an up to date strategy for enhanced use of IT. There should be greater use of email for communicating with the court and the development of an on-line claims system should be actively pursued. There should be greater use of video and telephone conferencing for procedural and substantive hearings and digital recording of evidence in civil cases. The SCS website should be a source of information and guidance for the public and the legal profession.

Mediation and ADR

53. Mediation and other forms of alternative dispute resolution (ADR) have a valuable role to play in the civil justice system. The court should ensure that litigants and potential litigants are fully informed about the dispute resolution options available to them and should encourage parties, in appropriate cases, to consider ADR. The development of an ADR telephone help-line and court-linked mediation schemes should be considered.

Measures to facilitate settlement

54. The existing pre-action protocols for personal injury and industrial disease cases should be extended to cover all claims in these categories and compliance should be compulsory. The Civil Justice Council for Scotland (see below) should consider the development, extension and adaptation of pre-action protocols in the light of experience.

55. It should be open to any party to make a monetary or non-monetary offer in full or partial settlement of a claim before the commencement of, or at any point during, proceedings. The court should have regard to the conduct of the parties and the whole circumstances of the case in deciding how such an offer should affect an award of expenses.

Enhanced case management powers

56. In order to highlight the importance of the role of the court in case management, there should be a preamble to the rules of court. This should set out that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner, with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court.

57. As part of its case management function, the court should be able to:

- regulate the disclosure, recovery and lodging of documents and evidence;
- determine, in the light of any witness statements, affidavits or reports produced, that proof is unnecessary on any issue;
- determine whether adjustment of the abbreviated pleadings (which should be the norm for all actions) is necessary and if it is, what further specification is required;
- regulate the use of expert evidence (see also below);
- limit the time allowed for a hearing; and
- order that a statement of written arguments be lodged in advance of a hearing and prescribe the level of detail required.

58. Where there is a failure to comply with a rule or court order, the court should be able to impose such sanctions as it considers appropriate, including power to dismiss an action or counterclaim, grant decree, award expenses and make legal representatives personally liable for expenses occasioned by their fault or an abuse of process.

Expert witnesses

59. One of the main causes of the increasing cost of civil litigation is the growth in experts' fees and the lengthening of proofs and other hearings. The rules should make explicit that the overriding duty of an expert is to assist the court. A Code of Conduct for experts and guidance on the format of their reports should be developed. There should be a presumption that an expert's report would be treated as his evidence in chief and that oral evidence will be restricted to cross examination and comment on the evidence or reports of other expert witnesses. The court should have the power to direct that expert witnesses confer and produce a statement of the points on which they agree and disagree, with reasons for any disagreement.

Cases with no reasonable prospect of success

60. The current arrangements for summary disposal of court business are not even handed. A pursuer may apply for summary decree, but a defender who seeks dismissal of an action on the ground that it is clearly without merit must incur the cost and the delay of going to debate. The test for summary decree to be granted is also too high. There should be a procedure for summary disposal that is open to both pursuers and defenders, and that the court should be entitled to invoke itself. The test should be that the pursuer or defender, as the case may be, has no real prospect of success and there is no other compelling reason why the case should not be disposed of at that stage.

Unmeritorious cases brought by party litigants

61. Unrepresented parties can place an additional burden on the court and on the legal representatives of other parties. Some party litigants attempt to pursue cases which have no merit. Recommendations made by Lord Penrose regarding appeals to the Inner House, together with Rule 4.2 of the Rules of Court as regards other actions in the Court of Session, enable the Court to identify and filter out unmeritorious cases at the outset. There should be an equivalent provision in the sheriff court, whereby the sheriff clerk may refer any ordinary action or summary application presented by a party litigant to a sheriff, who may direct that the action may not proceed if he is satisfied that the writ does not disclose a stateable case. The sheriff's decision should be final.

Vexatious Litigants

62. In order to regulate the behaviour of parties who persist in conduct which amounts to an abuse of process, the necessary legal powers should be put in place to provide for the introduction of a graduated system of civil restraint orders similar to those available to the courts in England and Wales.

Judgments

63. There should be greater flexibility as to how judgments are delivered. At the conclusion of a case under ordinary procedure in the sheriff court, the sheriff or district judge should decide whether to pronounce judgment at that point or reserve judgment to a later date. In ordinary causes, where the judgment has been given *extempore,* parties should able to request a written judgment within 7 days. In the Court of Session, it should be for the Lord Ordinary or Division to decide whether to deliver judgment orally, in short form or by means of a full written judgment.

64. Delay in the issuing of judgments is an impediment to an effective system of civil justice. There should be a register of cases awaiting written judgment on the Scottish Court Service website showing cases where judgment has been outstanding for more than three months. The judge, sheriff or district judge should provide an explanation for the delay and indicate when the judgment is likely to be issued. The Lord President or appropriate sheriff principal should give personal attention to outstanding cases.

Judicial Review

65. The current restrictive approach of Scots law to title and interest to sue makes it difficult for campaigning groups to bring proceedings to test the lawfulness of controversial policies or decisions of public bodies. The law should be amended so that the test of standing should be whether the applicant has demonstrated a sufficient interest in the matter to which the proceedings relate.

66. The application of the law on *mora,* or delay in bringing proceedings, can be uncertain in its application. It is contrary to the principles of good administration and legal certainty for decisions to be open to challenge long after the event. A time limit of three months should be introduced. The court should have discretion to admit a late application on cause shown.

67. There is no requirement for leave to bring an application for judicial review. An applicant must satisfy the court that it is appropriate to grant a first order, but a first order may be granted, though not refused, without representations by the petitioner. Accordingly in some cases first orders may be granted where the court's understanding of the case is incomplete. A leave stage for applications for judicial review would prevent this happening and should be introduced.

68. Active case management should apply in applications for judicial review as in other forms of process.

69. Parties who may be unable to meet an adverse finding in expenses sometimes wish to bring cases raising important questions of public importance or interest. In order to prevent a potential liability in expenses acting as a disincentive to such proceedings, courts in other jurisdictions have developed a range of orders that may be made at the beginning or in the course of proceedings, limiting the applicant's potential liability. The court may also impose a costs capping order that limits the amount of expenses that the applicant may recover in the event of success, in order to prevent the applicant litigating in an unreasonable or disproportionate way. There is some doubt as to whether such orders are competent in Scotland. There should be an express power to enable the Scottish courts to make special orders in relation to expenses of the kinds referred to, in cases raising significant issues of public interest.

Multi-party actions

70. The pragmatic approach to handling multi-party litigation in Scotland has worked satisfactorily in the past but the problems arising from the lack of a formal procedure have been highlighted by recent mass litigation. There is now a need for a special multi-party procedure. It should involve a procedure whereby the court would certify that an action is suitable for group proceedings. Pursuers should also be required to demonstrate a *prima facie* cause of action. The procedure should be designed to be usable by representative bodies which have standing. It should be for the court to decide whether the action proceeds on an 'opt-in' or 'opt-out' basis after an assessment of the particular circumstances of the case. The court should have a wide range of case management powers to enable it to regulate procedure as it sees fit.

71. The procedure should be introduced initially only in the Court of Session, and there should be a mechanism to enable multiple actions raised in the sheriff court to be transferred to the Court of Session and managed on a group basis, at the instance of a party or the court itself.

72. There should be a special funding regime for multi-party actions, administered by the Scottish Legal Aid Board. There should be special criteria to be satisfied in order for financial assistance to be granted to a representative party, including the prospects of success, the number of members in the group, the value of their claims, the resources of the proposed defenders and whether the proposed action raises issues of wider public importance that justify the expenditure of public funds.

The Cost of Litigation

73. Our recommendations regarding allocation of cases to the appropriate level of the court hierarchy, case management, the new simplified procedure

in the sheriff court, greater use of information technology, the encouragement of ADR where appropriate, and measures to facilitate settlement should all contribute towards making the cost of litigation more proportionate to the issues or sums of money in dispute.

74. We have given careful consideration to the use made of speculative fee arrangements in this country and the experience of conditional fee agreements in England and Wales. We consider that it would be premature to recommend any changes to speculative fee agreements as they are presently constituted in Scotland. The civil costs review in England and Wales chaired by Lord Justice Jackson should be monitored for its research findings and its conclusions.

75. A system of full recovery of expenses on an agent and client basis would add considerably to the cost of litigation and only increase the deterrent effect of the risk of an award of expenses against a potential litigant. But we are satisfied that the gap between party and party and agent and client expenses is in general too great. It can cause hardship to pursuers in personal injury actions when a significant part of the sum awarded goes to meet the shortfall in the recovery of expenses. It can also operate as a disincentive to litigants in commercial cases.

76. It may be possible to devise other systems that provide for special tariffs of judicial expenses related to the nature, value or complexity of the action. It has not been possible for us, in the context of this Review, to consult in depth on this specialised topic. Reform of litigation costs is a major exercise in itself, as Lord Justice Jackson's current review demonstrates. The cost of litigation should be one of the Scottish Civil Justice Council's (see below) earliest concerns.

77. We are however in no doubt that the limited recovery of expenses under the present system is a barrier to access to justice. As an interim measure, we suggest that: the block fees for pre litigation work and preparation for proof should be reassessed by the Lord President's Advisory Committee; a judicial table of fees for counsel should be introduced in the Court of Session and in the sheriff court for those cases in which sanction for the instruction of counsel is given; and the court should have the power to award interest at the judicial rate on outlays from the date on which they are incurred. There should also be provision for sanction for the employment of a solicitor advocate to be sought in a case in the sheriff court. Where such sanction is given the fees of the solicitor advocate should be on the same scale as counsel and recoverable as an outlay.

78. The current arrangements for taxing accounts of expenses are complex, lacking in transparency and consistency. The offices of Auditor of the Court of Session and of sheriff court auditors should be salaried posts subject to the usual rules on public appointments. The position of auditor in the sheriff

court should be open only to those with appropriate professional qualifications and relevant experience, and the Auditor of the Court of Session should have a role as head of profession. He should be able to issue guidance to auditors of the sheriff court in relation to the interpretation of the rules of court and tables of fees, and other aspects of practice and procedure, to ensure that a consistent approach is taken to the taxation of accounts across Scotland.

79. 'Before the event' legal expenses insurance, within its limitations, can play a valuable role as part of a mixed economy of funding for legal advice and litigation. While it should not be promoted at the expense of the legal aid system, the Scottish Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance.

80. Scotland is fortunate in continuing to have a civil legal aid system under which people who meet the eligibility criteria can obtain publicly-funded legal help of some kind for virtually any type of legal problem, and where the size of the legal aid budget is not capped but determined on the basis of demand. A legal aid system which aims to ensure that the less well-off members of society can obtain access to legal advice and help is a vital component of a modern civil justice system. Otherwise, except in relation to some matters consequential to our main recommendations, we do not consider it appropriate for us to comment on legal aid policy.

A Civil Justice Council for Scotland

81. It has not been possible in the context of this Review to undertake a comprehensive review of the rules of the Court of Session and the sheriff court, but there is a strong case for their modernisation and harmonisation. It is inefficient for the Court of Session Rules Council and the Sheriff Court Rules Council to examine similar procedural questions separately and to adopt different solutions to them. We have no criticism of the members of the Councils, who give freely of their time and expertise, but they do not have the resources to undertake a comprehensive review of the rules of court; to commission research into their operation; to conduct surveys of court practitioners, court users or other interested parties; or to undertake a systematic analysis of procedure in other jurisdictions. The membership of the Councils is also too narrow.

82. A unified Rules Council might go some way to meeting these concerns but its remit would be limited to keeping the rules under review and proposing any desirable changes. We believe that the benefits of reform can only be maintained if there is a body with a wider remit and a more strategic vision, similar in purpose if not in scale, to the Civil Justice Council in England and Wales. A Civil Justice Council for Scotland (CJCS) should be established with the aim of keeping under review the provision of civil justice

by the courts in Scotland. This would include matters such as the structure of the courts, their jurisdiction, procedures and working methods, and the cost of litigation. It should monitor the implementation and operation of our recommendations, commission research and keep abreast of reforms and developments in other jurisdictions. Its should also advance proposals for reform of the civil justice system and give expert advice on proposals made by the Scottish Government in relation to civil justice. In this way, reform and improvement of the civil justice system would be an ongoing process.

CHAPTER 3 SHORT GUIDE TO THE CIVIL COURTS IN SCOTLAND

1. In this Chapter we give a brief description of the civil courts in Scotland, their jurisdiction and the most common forms of procedure. It is aimed primarily at the lay reader who may be unfamiliar with the structure of the system or some of the terms that are used in this report.

The Court of Session

2. The Court of Session is the highest civil court in Scotland. It sits in Edinburgh and has jurisdiction throughout Scotland. It is divided into the Outer House, which hears cases at first instance, and the Inner House, which deals mainly with appeals.

3. The Court deals with a wide range of civil matters including commercial, personal injury, property, taxation, and family cases. It alone can hear applications for judicial review, by which an affected person can challenge the lawfulness of a decision by a public or administrative body such as a Government department, local authority or regulatory body. An action for payment of a sum of money can only be brought in the Court of Session if the sum sued for is more than £5,000[1].

4. If the sum sued for is more than £5,000 the person making the claim, known as the pursuer, can choose to raise his action in either the Court of Session or the sheriff court.

5. Formerly only practising members of the Faculty of Advocates were entitled to appear in the Court of Session, except in certain limited circumstances. Since 1990 solicitors have also been entitled to obtain extended rights of audience entitling them to appear: they are known as solicitor-advocates. An individual can appear on his own behalf as a party litigant.

6. The court year consists of three terms: in 2008/9 these were from 23 September - 19 December 2008 (winter term), 6 January - 20 March 2009 (spring term) and 21 April - 10 July 2009 (summer term).[2] At other times the court is in vacation or recess, during which time a much reduced programme of civil business is carried on.

7. The current version of the Court's rules is the Rules of the Court of Session 1994, as amended. The Court has power to make rules regulating its own procedure.[3] It does so through statutory instruments known as acts of sederunt which are laid before the Scottish Parliament; it also issues Practice Notes directing

[1] See Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2007 (SI 2007 No. 507), increasing the privative jurisdiction of the Sheriff Court from £1,500 to £5,000 with effect from 14th January 2008.
[2] Direction No. 1 of 2006 Sittings of the Court of Session for the Legal Years 2007/2008; 2008/2009; and 2009/2010
[3] Court of Session Act 1988, section 5.

how particular rules will be implemented. A Rules Council meets from time to time to consider draft rules.[4] The Court has a sizeable administration, with its administrative functions carried out largely by a General Department and a Petitions/Extracts Department.

8. Since 1998, written opinions (judgments) issued by Court of Session judges have been posted on the Scottish Court Service website, http://www.scotcourts.gov.uk. This provides a searchable database updated at approximately 2.00 pm on any day on which new opinions are to be published. It also includes some sheriff court judgments where there is a significant point of law or particular public interest. The website is intended to provide a single access point for information relating to civil and criminal courts within Scotland, and also provides information about the court rules and forthcoming court business, amongst other things.

The Outer House

9. In the Outer House cases are heard by a judge (known as a Lord Ordinary) sitting alone or, in certain cases, with a jury. There are currently 24 judges in the Outer House, most of whom also sit in the High Court of Justiciary, the supreme criminal court.

10. Subject to other provisions in the Rules, all actions in the Outer House are commenced by a document known as a summons.[5] Generally the summons must contain one or more conclusions (the remedies sought, such as payment of damages), a condescendence (a detailed statement of the facts the pursuer offers to prove, in the form of short sentences called averments), and pleas in law (the legal propositions applicable to the case).[6]

11. The summons is presented to the General Department where it is signeted (stamped with the sovereign's seal); it can then be served on the defender.[7] The pursuer may ask the Court to grant certain orders at this early stage, such as interim interdict (an order prohibiting a person from doing something pending resolution of the case). Persons anxious that proceedings may be brought against them can lodge with the Petitions Department a document called a caveat: this ensures that certain

[4] Greens Annotated Rules of the Court of Session, March 2009, note 1.1.1-1.1.3.
[5] RCS 1994 Rule 13.1. Some proceedings are instead commenced by petition, for which separate rules apply. In summary, a petition contains a statement of facts setting out the facts and circumstances on which it is founded and a prayer setting out the orders sought (Rule 14.4): it will also contain a schedule of the respondents on whom it is to be served. On being lodged the court will grant an order for such intimation, service and advertisement as may be necessary (Rule 14.5). Respondents generally have twenty-one days within which to lodge answers (Rule 14.6). If answers are lodged the court will make such order for further procedure as it thinks fit (Rule 14.8). The petition can then proceed in the same way as a defended action, with adjustment of pleadings and the fixing of a Procedure Roll hearing or proof, as described in more detail in this chapter. Applications for judicial review commence by petition but have their own particular rules (Chapter 58).
[6] Rule 13.2
[7] Rule 13.5-13.6

orders cannot be granted without notification to the defender, giving him the opportunity to oppose the granting of the order.

12. After service the summons is returned to the General Department to be called, the formal process by which the action is brought into court.[8] Generally it cannot be called until the expiry of twenty-one days after the date on which it was served.[9]

13. If the defender wishes to defend the action he must formally enter appearance within three days[10] and lodge written defences within seven days after the date on which the summons called[11]: the defences should answer each of the pursuer's averments, and contain their own pleas in law. If the defender fails to enter appearance or lodge defences the pursuer can ask the court to grant decree (judgment) in absence.[12]

14. If the action is defended, the pursuer lodges a document known as an open record, which consists of the parties' written pleadings thus far and any interlocutors (court orders) pronounced in the case.[13] Parties are then allowed a period of eight weeks in which to adjust (revise) their pleadings.[14]

15. Here it can be noted that written pleadings are of central importance, both in the Court of Session and in ordinary cause procedure in the sheriff court: a party cannot lead evidence of matters not covered by the written pleadings. Parties may therefore spend considerable time and effort in ensuring their pleadings are comprehensive, with pleadings often becoming very lengthy. The eight week adjustment period is frequently extended on the motion (application to the court) of one or both of the parties to allow them further time.[15] Thereafter the pleadings can be amended only with the court's permission,[16] and the party amending will generally be liable for the expenses of the amendment procedure.

16. After the adjustment period the record closes[17] and the pursuer must ask the court to fix further procedure. This can include a Procedure Roll hearing (a debate, at which parties' legal arguments can be disposed of), a proof (a hearing of evidence), a proof before answer (evidence is heard under reservation of parties' legal arguments, which are decided at the end), or a jury trial. Generally parties can agree on what further procedure is appropriate but if not a hearing is required. [18]

[8] Annoted rules, note 13.13.1.
[9] Rule 13.4, 13.13.
[10] Rule 17.1
[11] Rule 18.1
[12] Rule 19.1. In the Court of Session decree in absence can be granted where the defender either fails to enter appearance, or having entered appearance fails to lodge defences. The Rules make provision for the defender to apply to have the decree recalled and to lodge defences.
[13] Rule 22.1
[14] Rule 22.2
[15] Rule 22.2(3)
[16] Rule 24.1
[17] Rule 22.1
[18] Rule 22.3

17. Further detailed rules specify the steps parties must then take, for example the lodging of notes of argument[19] and inventories (lists) of productions (items of evidence to be referred to during the proof or trial, such as contractual documentation or expert reports).[20] Procedures exist to enable parties to recover relevant documents, including documents in the hands of third parties by a process called commission and diligence.[21] The parties are often able to reach agreement on uncontroversial aspects of the evidence, thus limiting what has to be proved. One party may serve on the other a notice calling on him to admit particular facts[22]: if the other party does not respond with a notice of non-admission he will be deemed to have admitted the facts in question.[23]

18. A party who wishes to ask the court to do something – for example, to allow the pleadings to be amended or to grant him interim damages – does so by making a motion, either orally during the course of a hearing or in writing via the General Department.[24] Generally the other party must first be given notice that a written motion is to be made,[25] giving him the opportunity to oppose it. Many motions are unopposed and can be granted by a judge or clerk without the necessity of a court hearing. A 'starred motion' is one in which a hearing is required[26], either because the motion is opposed[27], because of the type of motion or because the court requires it, perhaps to seek an explanation from counsel. Motions are generally dealt with by whichever judge happens to be dealing with motions that day: the motions in a particular case may thus be dealt with by different judges over the lifetime of the case. Due to pressure of business starred motions may not be allocated to a judge until late in the day, with counsel and solicitors required to wait until a judge becomes free; if no judge becomes available the motion may have to be heard on a later date.

19. The court itself can require parties to appear before it, for a variety of reasons: this is known as a 'by order' hearing.

20. Procedures exist to prevent delay and penalise non-compliance with the rules. If a party fails to attend a hearing the court can grant decree by default against him[28]:

[19] Rule 22.4
[20] Rule 36.3
[21] Chapter 35
[22] Rule 28A.1
[23] Rule 28A.2
[24] Rule 23.2
[25] Rule 23.3. In general, a written motion must be intimated to the other party two days before it is enrolled and will be heard on the second court day after enrolment. In the sheriff court a party wishing to oppose a motion generally has seven days in which to do so: rule 15.3(1).
[26] Rule 23.2(7)
[27] Rule 23.4.(6)
[28] Rule 20.1: the hearings specified are callings of the case on the By Order roll or Procedure Roll, a proof or a jury trial. Decree by default provides a sanction for failure to comply with rules and court orders. The sanction is that decree plus expenses can be granted against the party who is in default: if the pursuer, decree of absolvitor or dismissal; if the defender, decree as concluded for by the pursuer. Rule 20.1 provides that without prejudice to the Court's power to grant decree by default in other circumstances, a party is in default if he fails to attend on the calling of a cause on (a) the By Order Roll, (b) the Procedure Roll, (c) for a proof, or (d) for jury trial.

if the failure is by the pursuer, the decree is dismissal (the action is dismissed but the pursuer is entitled to bring a new action on the same grounds) or absolvitor (the pursuer cannot bring a new action).[29] The pursuer can ask the court to grant summary decree on the grounds that the defences lodged disclose no defence to the action or part of it[30]: the court is entitled to seek clarification of the facts from any documents, affidavits etc, and will grant summary decree only if satisfied that the defender's case must fail even if he succeeds in proving the substance of his defence.[31] A new rule, introduced in December 2008, allows a party (generally the defender) to ask the court to dismiss a claim due to inordinate and inexcusable delay by another party in progressing it resulting in unfairness: the court is directed to take into account the procedural consequences, both for the parties and for the work of the court, in allowing the claim to proceed.[32]

21. At any time the defender can make a formal written offer to settle the action, known as a tender. This must include an offer to pay the pursuer's expenses incurred thus far. The money is not lodged in court. A judge hearing the case does not know about the tender. If the pursuer rejects the tender but ultimately is awarded no more than the sum that was offered, he is liable to pay the defender's expenses from the date of the tender.[33]

22. In most cases parties are able to agree a settlement of their dispute without the court having to hear evidence. If not, evidence is generally heard by a judge sitting alone. However, in the Court of Session in certain categories of case (called 'enumerated causes') evidence must instead be heard by a jury of twelve members, unless special cause to the contrary is shown or the parties agree otherwise: these include actions for damages for personal injuries,[34] although in practice the parties often agree that a proof should be fixed instead. The judge to whom the proof or trial is allocated may have had no previous involvement in the case.

23. There are specific rules dealing with particular types of case, such as family actions[35], applications for judicial review[36] and intellectual property (patents, copyright, trademarks etc).[37]

24. A special procedure exists for dealing with commercial actions (actions arising out of or concerned with any transaction or dispute of a commercial or business nature).[38] The present arrangements were introduced in 1994 to make the disposal of such actions swifter, more flexible and with less emphasis on written pleadings.[39]

[29] Annotated rules, note 20.1.2
[30] Rule 21.2
[31] *Henderson v 3052775 Nova Scotia Ltd* 2006 SC (HL) 85, 90, para. 19, per Lord Rodger of Earlsferry
[32] Rule 21A
[33] Annotated rules, note 36.11.8
[34] Court of Session Act 1988 section 9(b), 11
[35] Chapter 49
[36] Chapter 58
[37] Chapter 55
[38] Rule 47.1(2)
[39] Annotated rules, note 47.1.1

The pursuer can choose to raise his action as a commercial action.[40] There is a pre-action protocol: it is expected that prior to raising the action the pursuer's solicitors will have fully set out in correspondence to the intended defender the nature of the claim and the grounds on which it proceeds, and supplied him with copies of any documents relied upon and an expert report, if expert evidence is necessary. The defender's solicitors are expected to respond by setting out the defender's position in substantial terms and disclosing their own documents or expert report. Unless there is urgency a commercial action should not be raised until the nature and extent of the dispute has been carefully discussed and the action can be said to be truly necessary.[41] The initial pleadings are to be in an abbreviated form, their purpose being to give notice of the essential elements of the case to the court and the other parties.[42] The pursuer is to produce along with the summons the essential documents on which he intends to rely.[43] The case is then allocated to a designated commercial judge. The procedure in, and progress of, the action is under the direct control of the judge, who is directed to take a proactive approach.[44] Within fourteen days of the lodging of defences a preliminary hearing takes place, at which the judge has an extensive range of powers to enable him to progress the case.[45] Further preliminary hearings can be, and frequently are, held. The judge will then fix a procedural hearing at which to decide on further procedure[46]: the parties (or more probably counsel on their behalf) are expected to be in a position to discuss realistically the issues involved and how to dispose of them. It is expected that by that time their positions will have been fully ascertained and that all prospects for settlement will have been fully discussed, and that consequently once a case passes beyond the procedural hearing it will not settle.[47] Failure to comply with the rules or with any court order entitles the judge to grant decree, dismiss the action or award expenses as he thinks fit.[48]

25. Since 2003 there has been a special procedure (referred to in this report as 'Chapter 43 procedure') for dealing with actions for damages for personal injuries. This was intended to address the many deficiencies in the existing practice that were found by a Working Party headed by Lord Coulsfield. Cases were taking on average two years to reach a resolution. Large numbers of cases were settling on the day of the proof or shortly before, resulting in inconvenience, wasted expenditure, wasted court time and pressure to reach hurried settlements. The new rules apply to all personal injury actions unless there are exceptional reasons why a particular action should be dealt with under the ordinary procedure, having regard to the likely need for detailed pleadings, the length of time required for preparation and any other

[40] Rule 47.3(1)
[41] Practice Note no.6 of 2004, rule 11
[42] Practice Note no.6 of 2004, rule 3(1)
[43] Rule 47.3(3), Practice Note no.6 of 2004, rule 3(2)
[44] Practice Note no.6 of 2004, rule 5
[45] Rule 47.8
[46] Rule 47.11(3)
[47] Practice Note no.6 of 2004, rule 13(1)
[48] Rule 47.16

relevant factors.[49] The summons is to contain a brief statement of only those facts necessary to establish the claim.[50] When the summons is signeted an order is automatically granted allowing the pursuer to recover relevant documents.[51] When defences are lodged parties are given a date for a proof and a timetable for various procedural steps in the case, including the dates by which they must lodge statements of their valuations of the claim[52]: motions for extension of the timetable are most unlikely to be granted.[53] Failure to comply with the timetable may result in the court awarding expenses against the defaulting party or making any other appropriate order, including dismissal of the action.[54] The rules provide for a mandatory pre-trial meeting not later than four weeks before the proof or trial, to discuss settlement and agree so far as possible the matters that are not in dispute.[55] This is to be a 'real' meeting conducted by the legal advisers in charge of the case along with the parties or someone with complete authority to act on their behalf.[56] The overwhelming majority of personal injury actions do settle prior to proof or trial.

The Inner House

26. The Inner House hears appeals from the Outer House, sheriff court and certain tribunals and other bodies. It is divided into two Divisions: the First Division, presided over by the Lord President, and the Second Division, presided over by the Lord Justice Clerk; both Divisions are of equal authority. It is common for an Extra Division to sit, due to pressure of business. Appeals are generally heard by a bench of three judges. On occasion, if a case is of particular difficulty or importance or if the Court has to consider overruling a binding authority, a larger bench will be convened.

27. The Rules make detailed provision for the different types of appeal, including the applicable time limits and whether leave to appeal is required.

28. A further appeal lies from the Inner House to the House of Lords. Leave may be required depending on the decision sought to be appealed.[57] The Inner House's judgment on an appeal from the sheriff court is appealable to the House of Lords on matters of law only.[58] In practice appeals to the House of Lords are quite rare.[59] In 2003 the Government announced its intention to transfer the judicial function of the

[49] Rule 43.5. Separate provision is now made for actions involving alleged clinical negligence: rule 43.1A.
[50] Rule 43.2
[51] Rule 43.4
[52] Rule 43.6(1)
[53] Practice Note no.2 of 2003
[54] Rule 43.6(3), 43.7
[55] Rule 43.10
[56] Practice Note no.2 of 2003
[57] Court of Session Act 1988, section 40
[58] 1988 Act, section 32
[59] See Ministry of Justice Judicial and Court Statistics 2007, table 1.4: in 2007 the House of Lords disposed of fourteen appeals from the Court of Session, allowing four and dismissing ten. In 2006 it disposed of ten Court of Session appeals, allowing five, dismissing two and disposing of three without a judgment: Ministry of Justice Judicial and Court Statistics 2006, table 1.4.

House of Lords to a new Supreme Court. Statutory provision for this change was made by the Constitutional Reform Act 2005. The Supreme Court is due to commence work in October 2009.

The Sheriff Court

29. Scotland is divided into six sheriffdoms, each presided over by a sheriff principal who amongst his other duties hears appeals in civil matters and is responsible for the management of the sheriff courts in his sheriffdom. The sheriffdoms are sub-divided into a total of forty-nine sheriff court districts, each with a court presided over by one or more sheriffs. In the larger urban areas, particularly Edinburgh and Glasgow, a number of resident and floating sheriffs hear a large volume of cases every day; in rural areas one sheriff may cover a number of courts and sit only on particular weekdays. The sheriff principal and sheriffs of a sheriffdom have jurisdiction throughout the sheriffdom.

30. Sheriff courts deal with civil, criminal and commissary matters. A wide range of civil matters are heard, including personal injury, contractual disputes, housing and family cases. If the sum sued for is £5,000 or less the action must be raised in the sheriff court; there is no upper limit. Criminal cases dealt with are either solemn (more serious cases involving trial on indictment before a sheriff sitting with a jury) or summary (less serious cases involving a trial where there is no jury). Commissary business concerns the administration of property after death. Each court has an administrative office, headed by the sheriff clerk.

31. Rights of audience depend on the procedure involved. Generally only solicitors, advocates and party litigants (individuals appearing on their own behalf) can appear: bodies such as partnerships or companies must therefore always be represented by a solicitor or counsel. In summary cause[60] and small claims[61] proceedings a party can also be represented by an authorised lay representative, provided the court considers that person suitable.[62]

[60] See paragraph 40
[61] See paragraph 43
[62] Act of Sederunt (Small Claim Rules) 2002 No. 133, Rule 2.1; Act of Sederunt (Summary Cause Rules) 2002 No. 132, Rule 2.1. The rights of audience of lay representatives are more restricted in summary cause procedure than in small claims procedure. In ordinary cause procedure a party to any proceedings arising solely under the provisions of the Debtors (Scotland) Act 1987 shall be entitled to be represented by a person other than a solicitor or an advocate provided that the sheriff is satisfied that such person is a suitable representative and is duly authorised to represent that party: OCR rule 1.3..

Ordinary cause procedure

32. Ordinary cause procedure applies where the sum sued for is more than £5,000.

33. Actions are commenced by a document called an initial writ, similar to a summons in the Court of Session. In an initial writ the conclusions are instead known as 'craves'. Here too the pursuer may seek interim orders, such as interim interdict.

34. Before the initial writ can be served on the defender a warrant of citation must be obtained from the sheriff clerk or, in certain circumstances, the sheriff.[63] This specifies the period, generally twenty-one days[64] from the date of service, within which the defender must lodge any notice of intention to defend the action.[65] If the defender does not do so the pursuer can obtain decree in his absence.[66]

35. If the action is defended, the defender must lodge written defences within fourteen days of the expiry of the period of notice.[67] The sheriff clerk must also fix a date for an options hearing, to be held not sooner than ten weeks after the expiry of the period of notice.[68]

36. Parties are permitted to adjust their written pleadings until fourteen days before the options hearing: thereafter they can be amended only with the court's permission, and again the party amending will generally be liable for the expenses of the amendment procedure.[69] An open record is prepared and lodged prior to the options hearing. In practice initial writs and defences often contain only rudimentary averments that are then extensively adjusted. If either party wishes to argue a preliminary plea he must lodge a note of argument (also known as a Rule 22 note) not later than three days before the options hearing.[70] A preliminary plea is one that if upheld will result in the action being disposed of without the court having to examine the merits of the action, such as a plea that that court has no jurisdiction.

37. The options hearing will generally be the first time the case calls in court. Introduced in 1993, options hearings were intended as a major innovation. The sheriff is directed to secure the expeditious progress of the case by ascertaining from parties the matters in dispute.[71] The parties have a duty to provide the sheriff with

[63] Rule 5.1
[64] Rule 3.6
[65] Rule 9.1
[66] Rule 7.2. In ordinary cause procedure if the defender does not lodge a notice of intention to defend, decree in absence can be granted. The defender can apply to have a decree in absence recalled by a process known as reponing: to do so he must lodge a 'reponing note' setting out his proposed defence and explaining his earlier failure to appear: OCR Chapter 8. In contrast to the Court of Session, if the pursuer fails to lodge defences the pursuer can seek decree by default, not decree in absence: OCR Rule 16.2(1)(a)
[67] Rule 9.6
[68] Rule 9.2
[69] Rule 9.8
[70] Rule 22.1
[71] Rule 9.12(1)

sufficient information to enable him to conduct the hearing.[72] In practice, particularly in busy courts where a large number of options hearings may be fixed for the same day, these are often brief hearings without much detailed discussion. Commonly the solicitors who appear at the options hearing will not be those with principal involvement in the case. The Rules give the sheriff a limited range of options for fixing further procedure.[73] He can continue the options hearing on one occasion only for a period not exceeding twenty-eight days[74]: parties often seek a continuation to give them further time to adjust, or to negotiate. He can fix a proof, proof before answer, or debate (it is not possible under the current rules to fix a jury trial). Where the difficulty or complexity of the case makes it unsuitable for the usual procedure, he can order that it should proceed under the 'additional procedure', which gives parties further time to adjust their pleadings and is followed by a procedural hearing performing the same functions as an options hearing.[75] The sheriff also now has power to fix a pre-proof hearing, at which parties must be able to inform him of the state of their preparations for proof and whether the action is likely to go to proof on the date fixed.[76]

38. The Rules make provision for the various procedural steps discussed above in respect of the Court of Session, such as the granting of motions, the recovery of documents and the requirements to lodge lists of the witnesses and productions that will be relied upon at any proof. By Order hearings are relatively rare. As in the Court of Session, the action is not allocated to a particular sheriff, and particularly in the larger courts, the likelihood is that it will be dealt with by a number of different sheriffs as it progresses.

39. Special provision is made in the Rules for actions relating to family proceedings and children.[77]

40. In light of the perceived success of the equivalent reforms in the Court of Session[78], since 2001 a special procedure has been available for commercial actions (Ordinary Cause Rules, Chapter 40).[79] The sheriff principal must first direct that the procedure should be available in a particular court.[80] It is currently available only in Glasgow, Aberdeen, Jedburgh, Selkirk, Duns, Inverness, Dingwall and Portree.

[72] Rule 9.12(2)
[73] Rule 9.12(3)
[74] Rule 9.12(5)
[75] OCR Chapter 10
[76] Rule 9.12(8); Chapter 28A
[77] Chapter 33 *et sequitur*
[78] *Stewart Milne Group Limited –v- Ritchie* CA31/08 26 May 2009, per Sheriff Tierney; Macphail, paragraph 25.01.
[79] Rule 40.1(2)(a) defines "commercial action" as an action arising out of, or concerned with, any transaction or dispute of a commercial or business nature including, but not limited to, actions relating to- (i) the construction of a commercial document; (ii) the sale or hire purchase of goods; (iii) the export or import of merchandise; (iv) the carriage of goods by land, air or sea; (v) insurance; (vi) banking; (vii) the provision of services; (viii) a building, engineering or construction contract; or (ix) a commercial lease. Actions in relation to consumer credit transactions are specifically excluded: rule 40.1(2)(b).
[80] Rule 40.1(3)

Commercial actions are dealt with by a nominated commercial sheriff[81], who has power to make such order as he thinks fit for the progress of the case insofar as not inconsistent with the provisions of Chapter 40.[82] Unlike commercial procedure in the Court of Session, there is no pre-action protocol. The pursuer can elect to raise the action as a commercial action[83], failing which either party can apply for it to be transferred to the commercial procedure.[84] The period within which the defender can lodge defences is shortened from fourteen to seven days.[85] If defences are lodged the sheriff clerk fixes a case management conference, to take place not sooner than fourteen nor later than twenty-eight days after the expiry of the period of notice.[86] There is no automatic adjustment period or options hearing. At the case management conference the sheriff is directed to seek to secure the expeditious resolution of the action.[87] To this end he has a range of powers at his disposal: these include making orders for the lodging of written pleadings[88], statements of facts[89] or expert reports[90], fixing a debate or proof[91] and making any order which he thinks will result in the speedy resolution of the action, including the use of alternative dispute resolution (ADR).[92] Parties are expected to be able to provide the information he requires to determine which orders to make.[93] Further case management conferences can be held. Unlike in the Court of Session, case management conferences routinely take place by way of conference call. This enables the solicitors principally involved in the case to participate without having to travel to court and wait for their case to be heard. Solicitors can also communicate directly with sheriffs by email, copied to other parties: this may allow the disposal of procedural matters that would otherwise have required a court hearing. There are sanctions for failure to comply with the sheriff's orders: he can refuse to extend the time allowed for compliance, dismiss the action, grant decree or make an award of expenses.[94]

41. From 2 November 2009 a new procedure will apply to sheriff court actions of damages for, or arising from, personal injuries or death from personal injuries.[95] This is closely based on Chapter 43 procedure in the Court of Session.

42. There are two possible routes for appeals from a decision of the sheriff. A party can appeal to the sheriff principal; there is then a further right of appeal from

[81] Rule 40.2
[82] Rule 40.3(1)
[83] Rule 40.4
[84] Rule 40.5
[85] Rule 40.9
[86] Rule 40.10
[87] Rule 40.12(1)
[88] Rule 40.12(3)(a)
[89] Rule 40.12(3)(b)
[90] Rule 40.12(3)(g)
[91] Rule 40.12(3)(j)
[92] Rule 40.12(3)(m)
[93] Rule 40.12(2)
[94] Rule 40.15
[95] Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009 (SSI 2009/285)

the sheriff principal to the Inner House. Alternatively a party can appeal directly to the Inner House.

Summary cause procedure

43. Summary cause procedure applies where the sum sued for is over £3,000 up to £5,000.[96] It also applies to most actions for recovery of possession of heritable property (land, buildings) and is commonly used by landlords seeking to evict their tenants.

44. The form of procedure is much expedited. An action commences with a summons, with a statement of claim giving the defender fair notice of the claim against him: this must include details of the basis of the claim including relevant dates and, if it arises from the supply of goods or services, a description of them and the dates on which they were ordered and supplied.[97] When authenticating the summons prior to service the sheriff clerk will insert two dates: the return day, which is the last date on which the defender can return a form of response, and a calling day seven days after that, when the action will call in court. Generally the defender has twenty-one days in which to respond.[98] If he does not, the action need not call in court and the pursuer must lodge a form asking the court to grant the orders sought. An action for recovery of possession of heritable property must call in court even if no response is lodged.[99]

45. If the action is defended a hearing takes place at which the sheriff is directed to ascertain the factual basis of the action and any defence and the legal basis on which they proceed, and seek to negotiate and secure settlement of the action between the parties.[100] It has been suggested that in practice he may continue the hearing to enable parties' solicitors to negotiate.[101] If settlement proves impossible the sheriff must identify and note the facts and law in dispute and any facts which are agreed. If the claim or the defence is not soundly based in law he can grant decree at that stage. Otherwise he can either hear parties on the merits or, more likely in a busy court, fix another date for a proof.[102] Rights of appeal are limited: a party can only appeal against a final judgment on a point of law to the sheriff principal, and thereafter to the Inner House only if the sheriff principal certifies the cause as suitable for such an appeal.[103]

[96] The Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2007 (SSI 2007/507)
[97] Summary Cause Rules, Rule 4.2
[98] Summary Cause Rules, Rule 4.5
[99] Summary Cause Rules, Rule 7.1
[100] Summary Cause Rules, Rule 8.3
[101] I Macphail, *Sheriff Court Practice*, third edition (2006), para 31.139
[102] Summary Cause Rules, Rule 8.3
[103] Sheriff Courts Act 1971, section 38(a)

Small claims procedure

46. Small claims procedure applies where the sum sued for is up to £3,000.[104] It is intended as a simple procedure suitable for use by party litigants. Many of the rules are similar or identical to those for summary causes. In particular, at the hearing the sheriff is again directed to ascertain the factual basis of the claim and any defence and the legal basis on which they proceed, and to seek to negotiate and secure settlement between the parties.[105] If settlement cannot be secured he should if possible reach a decision on the whole dispute on the basis of the information before him.[106] The rules envisage that the sheriff will take an interventionist approach. If evidence requires to be led, he is to direct parties to lead evidence on the disputed issues of fact; indicate the matters of fact that require to be proved and may give guidance on the nature of the evidence to be led; and fix a hearing on evidence for a later date.[107] Hearings are to be conducted as informally as the circumstances of the claim permit, with such procedure as the sheriff considers fair, best suited to the clarification and determination of the issues before him, and gives each party sufficient opportunity to present his case. The sheriff himself may put questions to witnesses or parties in order to assist resolution of disputed facts, and shall if he thinks necessary explain any legal expressions used.[108] He must, where practicable, give his decision at the end of the hearing, or in any event within twenty-eight days.[109] The only right of appeal is to the sheriff principal on a point of law.[110] There is no further right of appeal from the sheriff principal.

Transfer of proceedings between courts and different forms of procedure

47. The rules make provision for proceedings commenced under one procedure to be remitted (transferred) to another. For example, an ordinary cause action can be remitted to the Court of Session if the sheriff is of the opinion that the importance or difficulty of the cause make it appropriate to do so.[111] The sheriff may direct that a summary cause action be treated as an ordinary cause, again if he is of the opinion that its importance or difficulty make it appropriate to do so.[112] He may direct that a small claim be treated as a summary cause or ordinary cause if he is of the opinion that a difficult question of law or a question of fact of exceptional complexity is involved.[113]

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[104] The Small Claims (Scotland) Amendment Order 2007 (SSI 2007/496)
[105] Small Claims Rules, Rule 9.2(2)
[106] Small Claims Rules, Rule 9.2(3)(c)
[107] Small Claims Rules, Rule 9.2(4)
[108] Small Claims Rules, Rule 9.3
[109] Small Claims Rules, Rule 9.8
[110] Sheriff Courts Act 1971, section 38
[111] 1971 Act, section 37(1)(b)
[112] 1971 Act, section 37(2)
[113] 1971 Act, section 37(2B)

CHAPTER 4 STRUCTURE OF THE CIVIL COURT SYSTEM

Using Resources Appropriately

1. In this chapter, we discuss how business in Scotland's civil courts could be allocated to achieve the most appropriate use of resources. We consider the tension between civil and criminal business and the scope for separating them; the current reliance on temporary and part-time resources; the need for judicial specialisation; the establishment of a national sheriff appeal court; first instance business in the Court of Session; the privative jurisdiction of the sheriff court; the exclusive jurisdiction of the Court of Session; the establishment of a specialist personal injury court; the retention of civil jury trials; the organisation of the sheriff court; the creation of a new level of judicial officer in the sheriff court - the district judge; the allocation of business between district judges and sheriffs; and the Scottish Land Court.

2. In the Consultation Paper we canvassed views on the option of creating a single civil court in Scotland. The great majority of respondents saw no real benefit in unification that could not be achieved by greater use of powers of remit between the Court of Session and the sheriff court and of transfer within sheriffdoms and between sheriffdoms. We also sought views on whether the Court of Session should become an appellate court only. The overwhelming majority of respondents were in favour of retaining the Court's first instance jurisdiction. We have not pursued these options further.

The tension between civil and criminal business

3. In the foreword to the Consultation Paper our Chairman observed that reform in the civil courts cannot be seen apart from the growth in criminal business, which is taking up an increasing amount of the judicial and administrative resources of the courts. We are convinced that, as the Chairman said, unless that problem is dealt with effectively, any proposals for civil justice reform will have only the most limited practical significance.

Separate civil and criminal divisions

4. We have considered whether there would be merit in assigning Senators on a permanent basis to either the High Court or the Outer House, or in creating separate civil and criminal divisions in the sheriff court. The majority of respondents were of the view that specialisation at appellate level was neither practical nor desirable. As to first instance civil and criminal business, we are persuaded that to assign Senators exclusively to criminal or civil business would have serious implications for the composition of the bench at appellate level, where experience of both civil and criminal work is essential. Moreover we conclude that the allocation of judges to either the High Court or the Outer House on a permanent basis, creating in effect

two separate cadres of judges, would deprive the programming of these courts of much of its flexibility.

5. Similarly, the creation of separate divisions in the sheriff court would lead to inefficiencies in the larger courts by reducing flexibility. It would require additional resources in the smaller courts.

6. Many practitioners favour a system in which civil business would be ring-fenced. In our view, this would be difficult to achieve and might not make the most efficient use of resources, particularly since only a small percentage of civil actions go to a proof or hearing.

7. We therefore reject these options. We consider that efficiency in the system can be achieved by further specialisation, by the creation of a new judicial office below that of sheriff and by active case management.

An intermediate level of judiciary to hear serious criminal cases

8. In recent years there has been a substantial increase in the number of High Court trials, even though there was some decrease in 2008-9 from a high-point in 2007/8, see Annex A of this chapter, Table 1. Nevertheless, while the number of indictments has decreased by more than 33% in the past 6 years, the likelihood of cases going to trial is now twice as high as it was 6 years ago. The demands on judicial time have also increased because of the greater incidence of lengthy trials, resulting in part from the wider prosecution of white collar and organised crime.[1] This has had an inevitable impact on the conduct of civil proceedings in the Court of Session. Between 1995/6 and 2008/9, the number of sitting days allocated to criminal business in the Supreme Courts increased by 51%, while the number of sitting days allocated to civil business remained stable, see Annex A of this chapter, Table 2. In 1995/6, 44% of all sittings days in the Supreme Courts were allocated to civil business. By 2008/9, this had decreased to 34%.

9. A further consequence of the increased workload of the High Court has been an increasingly heavy reliance on part-time resources. In the 22-months period from 1 January 2006, more than one third (216) of the 566 first instance sitting days allocated to temporary or retired judges were accounted for by serving sheriffs acting as temporary judges, see Annex A of this chapter, Table 3. The number of sitting days allocated to temporary and part-time judges in the Supreme Courts rose from 526 in 2006, to 710 in 2007, and to 940 in 2008, representing an increase of 79% in the three-year period, see Annex A of this chapter, Tables 3a, 3b and 3c. The number of sitting days in the High Court of Justiciary allocated to serving sheriffs sitting as temporary judges increased from 74 in 2006, to 276 in 2007 and to 466 in 2008, an increase of 500% in the 3-year period. While just under one quarter of the 312 first instance sitting days allocated to temporary or retired judges were accounted for by serving sheriffs acting as temporary judges in 2006, this had increased to almost

[1] Scottish Court Service, *Annual Reports 2005-6* and *2007-8*

two-thirds of the 719 first instance sitting days allocated to temporary and retired judges in 2008, see Annex A of this chapter, Tables 3a, 3b, 3c. Several experienced sheriffs sit as temporary judges of the High Court more often than they sit as sheriffs. This has had a disruptive effect on the conduct of business in the sheriffdoms from which they are drawn since cover is provided by part-time sheriffs who may be unable to commit sufficient time to hear civil proofs or jury trials. A greater burden is thereby imposed on the permanent sheriffs who remain in the sheriff court. This causes a problem for morale. Drawing heavily on the criminal specialists in any one sheriffdom also upsets the balance between those sheriffs who do mostly civil and those who do mostly criminal work.

10. We considered at length whether the pressure on the civil system might be relieved by the creation of a judicial mid-tier, the judges of which would deal with the bulk of serious crime, while High Court judges dealt only with trials that raised difficult questions of law or issues of public interest or importance. During the consultation period we discussed this idea with interested parties. Representatives of the Faculty of Advocates who practised criminal law thought that if important criminal cases were to be heard by less senior judges, there could be a loss of confidence in the system.

11. An alternative option would be to supplement the resources of the High Court by the appointment of a number of Commissioners of Justiciary from the ranks of serving or retired sheriffs. However, this option would replicate the problems of the disruption of business in the sheriff court that we apprehend in relation to the previous option. If this option were to be pursued, the system for appointing Commissioners of Justiciary would have to be carefully considered, in view of the concerns that have been expressed to us about the fairness and transparency of the current system of appointing temporary High Court judges.

12. Since the system now relies heavily on the engagement of temporary judges, and since sheriffs who are temporary judges do the full range of High Court work capably and efficiently, a third option would be to increase the sentencing powers in the sheriff court and in this way give the Crown the opportunity to indict more serious cases in the sheriff court for trial before specially designated or ticketed sheriffs.

13. These options are not within the formal remit of this Review and have not been the subject of detailed consultation with all interested parties. We therefore consider that it would be inappropriate for us to make radical recommendations of this kind that would affect the criminal justice system. But since the pressure of criminal business continues to have an adverse impact on the proper conduct of civil business, any recommendations made by us for reform of the civil courts system will have limited success unless this problem is urgently resolved.

Reliance on temporary and part-time resources

14. The power to appoint temporary judges was introduced in 1985 on a restricted basis and was extended in 1990. Since then, temporary judges have sat on a regular basis in the Supreme Courts. Since 1971 temporary and part-time sheriffs have been regularly employed in the sheriff court. We set out the legislative framework in Annex A to this chapter. There are now 34 Senators of the College of Justice and 27 temporary judges. The temporary judges are retired Senators, retired and serving sheriffs and sheriffs principal, and members of the Bar. There are now 142 full time sheriffs and 80 part-time sheriffs.

15. The use of temporary judges was originally envisaged as a short term expedient, but their use has steadily increased. In the past three years alone, the number of sitting days allocated to temporary and retired judges in the Supreme Courts has almost doubled, rising from 526 in 2006, to 710 in 2007 and to 940 in 2008, see Annex A of this chapter, Tables 3a, 3b and 3.

16. One fifth of all sitting days in the sheriff court are now conducted by part-time sheriffs. In 2008/9, there were 30,988 sitting days in the sheriff court, including sheriffs principal, floating sheriffs, resident sheriffs, honorary sheriffs and part-time sheriffs. Of them, 5,904 days or 19% were conducted by part-time sheriffs. In the first quarter of 2009/10, there were 7,825 judicial sitting days in the sheriff court, with 1,571 days or 20% conducted by part-time sheriffs.

Responses to the consultation

17. In Chapter 4 of the Consultation Paper we invited views on the advantages and disadvantages of using temporary judges and part-time sheriffs. We suggested that temporary judges and part-time sheriffs had now become an essential element of the normal judicial complement, that that was a matter for concern, and that it raised questions of public confidence.

18. No respondent disagreed with the conclusion that temporary judges and part-time sheriffs are now an integral element in the judicial structure. Many respondents considered that the current reliance on temporary judges and part-time sheriffs was excessive. On the question of public confidence, respondents were not so much concerned by the performance of temporary judges or part-time sheriffs, although several were, but with the presentational problems that arise whenever a temporary judge or part-time sheriff also practises as an advocate or solicitor.

Advantages identified by respondents

19. Several themes emerged from the consultation exercise in relation to the advantages of temporary and part-time appointees.

20. *Legal careers*: The appointment of temporary judges and part-time sheriffs was thought to play an important role in a justice system that has no career judiciary.

Not only may it may assist in the selection of permanent appointees, it also gives practitioners an opportunity to consider their suitability for a permanent appointment. At the same time, it provides essential training and experience for those considering a permanent appointment and assists in the phased introduction of new judges and sheriffs by providing a useful transition to full-time judicial office.

21. *Impact on the courts:* Some respondents observed that the appointment of temporary judges and part-time sheriffs can provide the court with flexibility in the planning of its timetable by making available additional resources at short notice, evening out the peaks and troughs of demand and clearing up the bottlenecks. It also frees permanent sheriffs for case continuity in longer running cases and provides judges and sheriffs with cover for leave, illness and training at a cost which is advantageous over salaried posts.

22. *The benefits of breadth of experience*: A theme running through many of the responses was that temporary appointees bring to the courts the expertise and talent that exists in the wider legal community. Temporary judges and part-time sheriffs contribute their knowledge and experience to the benefit of the court, for example, by enabling specialist practitioners to hear cases in their area of expertise.

23. *Bridging the gap*: Some respondents suggested that the bench has a tendency to become isolated and apart from the 'real' world. The employment of temporary judges and part-time sheriffs was said to help bridge that gap by introducing a diversity of backgrounds into the court and injecting a breath of fresh air into the system. It helped sustain a vital connection between the bench and practitioners, while providing practitioners with the opportunity to fulfil a public service role and alerting the judiciary to the demands on practitioners and to the concerns of their clients. At the same time, practitioners are afforded the opportunity to experience the constraints and pressures to which the bench is subject.

Disadvantages identified by respondents

24. Respondents also identified certain disadvantages to the current reliance on temporary judges and part-time sheriffs:

25. *Public confidence*: Several issues were raised relating to public confidence. Part-time judicial appointments were thought by many to undermine the authority of the court by representing 'justice on the cheap'. The question was raised as to whether those who hold office on a part-time basis can ever truly be said to be judicially independent. Certainly, many regarded it as unseemly that practitioners should sit and practise in the same court.

26. *Impact on the court*: While respondents agreed that temporary appointments may provide the court with flexibility, adverse consequences were also identified. The appointment of serving sheriffs as temporary judges was said to deprive the sheriff court of significant shrieval resources, sometimes for extensive periods of time. Reliance on part-time sheriffs increased the multiplicity of decision makers

through the life span of a case, was responsible for disrupting judicial continuity in the hearing and disposal of business, undermined efforts to introduce judicial case continuity and 'case ownership' into the court and could be responsible for introducing inconsistencies of approach between permanent and part-time sheriffs during the course of an action. Part-time appointments introduced less flexibility than might be expected. The restricted availability of part-time sheriffs increased the risk that lengthy hearings would be part-heard. As a result, jury trials, proofs and debates had become unsuitable for most part-time sheriffs. Some respondents voiced concerns as to their approach. Part-time sheriffs may be over-cautious and reluctant to make difficult or final decisions. Temporary appointees may allow cases to drift or 'churn' through lack of confidence, lack of knowledge and experience of the area or lack of commitment to the court and its case load, particularly in housing and social welfare cases. Some practitioners also observed that they are familiar with the approaches of their local sheriffs and find it difficult to advise clients where a part-time sheriff is brought in.

27. *Matching resources to needs:* While some respondents thought that the appointment of temporary judges and part-time sheriffs made good use of the range of experience available in the profession, many others thought that such experience was often not matched appropriately to the business that they were given and that insufficient training was given to temporary appointees. It is clear to us that many part-time appointees do not or cannot undertake the full range of judicial or shrieval work and that this is a particular problem in children's hearings matters, and in family, housing and other social welfare cases.

Discussion and recommendations

28. There are obvious advantages to the Scottish Court Service in the flexibility that temporary judges and part-time sheriffs can provide, but in our view there are other more important considerations.

29. There is a long history of part-time service in the sheriff court. It was the custom in former times for the sheriff principal to commission one or two practitioners, usually members of the Bar, to assist in the courts of his sheriffdom when the need arose. But for many years temporary sheriffs, and now part-time sheriffs, have been treated as part of the shrieval complement. Instead of being available in emergencies, part-time sheriffs are relied upon in the planning of essential business. The same process has taken its course in the Court of Session and in the High Court. In 1985 there were 22 Senators of the College of Justice. Today there are 34 Senators and 27 temporary judges. In the sheriff court there are 142 sheriffs and 80 part-time sheriffs.

30. In our view it simply cannot be right that the provision of a justice system in Scotland should depend to any extent on part-time judicial resources. In Ireland, this is unheard of. In our view, the Scottish Court Service should plan for the elimination of part-time judicial resources instead of constantly adding to them. If there are to be part-time judges or sheriffs at all, they should be available for emergencies only.

31. We have already described the impact of the appointment of serving sheriffs as temporary judges in the High Court. In the sheriff court reliance on part-time resources causes difficulties in programming business. Part-timers may be unable or unwilling to take on civil proofs or debates or jury trials. If civil actions allocated to part-time sheriffs are part heard, continuations cause delay and cost to the parties. In a criminal case where sentence is deferred or reports are called for by a part-time sheriff, it may not be cost effective when the part-time sheriff has to be sent to deal with the continued hearing or hearings, especially when this involves a journey to a remote or rural court.

32. Heavy reliance on part-time resources undermines the principles of case management and judicial continuity that are fundamental to our recommendations. It can lead to inconsistency and unpredictability in decision making. It makes it difficult for practitioners to advise clients and it undermines public confidence in the judiciary.

33. We recognise, however, that the complete elimination of part-time judicial work is unlikely to be achieved in the short term and our proposals are based on that assumption. Nevertheless, even on that assumption, we consider that an urgent priority is to bring to an end the use of those still in practice as temporary judges or part-time sheriffs.

34. The following comments are typical of the views of those who responded to us on this subject:

"We believe that it is inappropriate for a Judge to be practising as an advocate or solicitor for part of their working week and as a Judge for the remainder of the time. Such a dual approach may give rise to the appearance of potential conflict even though no actual conflict exists."

"So far as concerns the use of temporary judges who are also practising advocates, we think there can be a serious issue of perception about whether justice is seen to be done, when the same individual sometimes acts as an advocate and sometimes as a judge."

35. In our opinion, temporary judges or part-time sheriffs who are already members of the permanent judiciary, serving or retired, have an uncomplicated judicial commitment. There is however a serious question of public confidence in the appearance of things when a part-time judicial officer practises in the courts in which he sits. The problem is reduced, to an extent, in the case of part-time sheriffs who do not sit in the courts of the area in which they practise[2]. But that very principle acknowledges that there is a presentational problem. Even then part-time sheriffs cannot be certain that they or their firms will never be involved in litigation in any of the courts in which they appear. In the case of members of the Bar the problem is intractable. Temporary judges recruited from the Bar both sit and practise in the Court of Session and the High Court and may be instructed as counsel to appear in

[2] See section 11B(9) of the Sheriff Courts (Scotland) Act 1971 and Annex A to this chapter.

the High Court or in any sheriff court in Scotland in which they may also sit from time to time. It is inappropriate in our opinion that a temporary judge may sit in the Outer House one week and appear in it as counsel the next. We are aware of one case where a member of the Bar sat as a temporary judge in a particular High Court venue and defended in a trial in that court the following week.

36. We imply no criticism of the integrity and judicial quality of those practitioners to whom we refer. That is not the issue. In our view, the objection goes to the appearance of things. The problem is not where the temporary judges or part-time sheriffs practise. It is the fact that they practise. Eventually, when such judges or sheriffs become employed on a regular basis, the question arises whether they are practitioners who act as part-time judicial officers or part-time judicial officers who practise.

37. In our view, if there are to be temporary judges at all, they should be drawn from the ranks of retired judges of the Court of Session,[3] or serving or retired sheriffs or sheriffs principal; and if there are to be part-time sheriffs at all, they should be drawn from the ranks of retired sheriffs or retired practitioners.

38. The problem of over-reliance on temporary resources will be lessened by the appointment of district judges, which we discuss later in this chapter. In the sheriff court district judges will take on work currently done by part-time sheriffs. There may have to be a small number of part-time sheriffs to cover for leave, unexpected absences and unforeseen peaks and troughs of work. These changes will not take place over-night. Until the full complement of district judges is in place, it may not be practicable for the appointment of part-time sheriffs to be restricted as we propose. Later we give further attention to the mechanisms by which this transition would be achieved and its timescale.

39. We consider that the need for temporary judges will be reduced by our proposed procedural reforms to Inner House business and by the diversion of both civil and summary criminal appeals to the Sheriff Appeal Court that we recommend should be established later in this chapter. That still leaves the problem of first instance business in the High Court where there continues to be a significant demand on shrieval resources. Although we do not consider that it would be appropriate to make any firm recommendations on this matter, for the reasons that we have given, we emphasise that the problem is becoming more urgent by the day.

The need for specialisation

40. In our view there should be a greater degree of specialisation in Scotland's civil courts. In our Consultation Paper we asked in which types of case and in which

[3] Or those holding or having held any of the judicial offices mentioned in section 10(2)(a)to(c) of the Judiciary and Courts (Scotland) Act 2008

courts such specialisation should be introduced. We also asked whether some judges and some sheriffs should be designated to deal with civil business only.

41. We rehearsed the arguments for further specialisation in the courts, such as, the increasing complexity of the law; specialisation in the legal profession; the potential for early identification of key issues; and the opportunity for enhancing the reputation of Scotland's civil courts. We related specialisation to procedural questions such as case management, case continuity and case ownership. We acknowledged that the case for further specialisation might be tempered by the problems that it might raise for the efficient and flexible use of court resources and for the maintenance of local justice.

Court of Session

42. There was considerable opposition among respondents to the consultation to increased specialisation in the Court of Session. Those who feared that a greater degree of specialisation between civil and criminal work would diminish the quality of the Supreme Courts suggested that it would reduce the incentives for senior members of the profession to apply for judicial office; and that specialist judges assigned to the High Court of Justiciary and to the Court of Session for extended periods would become unfamiliar with developments in other areas of the law.

43. Many respondents considered that specialisation at appellate level was neither practical nor desirable and that further specialisation in the Outer House would in due course cause difficulty at appellate level. Some argued that a specialist judiciary was not necessary in an adversarial system with a Bar that was increasingly specialised. Others argued that increasing specialisation might reduce flexibility in the management of the business of the Supreme Courts.

44. Against that there was a strong body of opinion that specialisation had improved and would continue to improve the quality of civil justice. Judges without specialist knowledge had to be taken through a greater number of legal authorities in the course of a hearing and took longer to issue their decisions. This was not in the interests of the parties or of the court. Specialisation brought efficiencies in procedure and led to decision making of higher quality and greater consistency.

45. There was considerable support for retaining the Commercial Court, specialist intellectual property judges and specialist procedures with a view to developing sound case law, maintaining Scotland's competitiveness with other jurisdictions and enhancing the international reputation of Scotland's legal system.

46. Some respondents favoured the creation of a specialist administrative court to deal with judicial review and statutory appeals, or of a specialist forum for asylum and immigration appeals. They argued that specialisation in asylum and immigration matters in the Inner House might create a uniquely Scottish approach to this area of the law.

47. Others argued for the establishment of an environmental court, a specialist court dealing with consumer and competition law, and a specialist family court to deal with matters such as international abduction.

Sheriff court

48. Opposition to further specialisation in the sheriff court was frequently linked to a concern that it would undermine the principle of local access to justice, particularly if work were to be transferred to specialist centres, with additional costs to the parties, where the specialist sheriffs might be unfamiliar with local conditions.

49. Others suggested that a breadth of knowledge was a judicial strength, that there was value in cross fertilisation and that there were dangers in creating "silos of specialisation without regard to the whole justice system."

50. Some respondents thought that the adversarial system limited and even eliminated the need for judicial specialisation. Others argued that sheriffs required a substantial degree of knowledge to preside efficiently in cases where solicitors and counsel were specialists. Case management increased the need for this. Some respondents thought that case management cannot be undertaken effectively without some form of specialisation. They argued that the Adoption and Children (Scotland) Act 2007, which requires substantial case management, would necessitate the use of designated sheriffs. More generally, respondents favoured an inquisitorial approach in family matters. There was a generally favourable verdict on the work of designated sheriffs in the case-managed family, commercial and personal injury courts in Glasgow Sheriff Court and support for the introduction of similar facilities in other courts.

51. There was a view that further specialisation is also necessary to reflect the training and experience of new recruits to the shrieval bench. It appears that fewer all-rounders are now in the recruitment pool. Many sheriffs have had a background in general legal practice; but this is less common with newer recruits. If those who have spent the bulk of their professional career in one area of the law remain in that area while on the bench, decision-making is likely to be a higher quality, of greater consistency across Scotland, and of greater predictability. It is implicit in this view that many areas of the law that are new to a sheriff cannot be picked up simply by reading the authorities and that quality decision-making depends, in the words of one respondent, on instinct grounded in experience.

52. Other respondents thought that judges with specialist knowledge may resolve cases more expeditiously, with resultant savings in costs. These efficiencies may benefit not only the court and other public bodies, but also the parties. For example, specialist judges are more likely to have the competence and confidence to impose limits on the use of experts and the commissioning of reports. They may reduce the lifecycle of litigated cases by early intervention and by focussing the issues in dispute. They may ensure that reports have clearer terms of reference and are

instructed only where they are needed. They are more likely to restrict the parties' opportunities for delay than sheriffs who are unfamiliar with particular areas of practice. For their part, the parties need refer only briefly to legislation, authorities, and institutional writers, to their own benefit and the benefit of the court. Lastly, improvements in quality and speed as a result of increased judicial specialisation are more likely to keep actions within the sheriff court where concurrent jurisdiction with the Court of Session is available. The number of appeals is also likely to be reduced.

53. In general, practitioners tended to favour specialisation more than judges and sheriffs. There were concerns that specialisation would lead to inflexibility and an inefficient use of resources. It was suggested that specialist sheriffs should not be excluded from taking part in a wide range of court work and that a specialist sheriff should not be confined to that area for the remainder of his judicial career. There was little consensus amongst respondents as to the likely impact of specialisation on recruitment.

54. There was considerable support for specialisation in the following subject areas: commercial including intellectual property; corporate insolvency and personal bankruptcy; competition law; personal injury; referrals from children's hearings; family and children; adoption and other orders made under the Adoption and Children (Scotland) Act 2007; applications under the Adults with Incapacity (Scotland) Act 2000; housing; consumer and personal debt; administrative law; environmental law; and planning.

55. In the Consultation Paper we asked whether there should be specialist civil justice centres. A few respondents supported the idea for the larger cities. Some acknowledged that civil justice centres might provide a focus for expertise in particular areas of the law; a greater opportunity for consistency and an opportunity for continuity of hearings uninterrupted by criminal business. Overall, however, there was little support for this idea.

56. Many respondents were of the view that any proposal for specialisation could not be advanced Scotland-wide. Some felt that while specialisation may work well in Glasgow Sheriff Court, smaller courts may have other requirements and be less able to support it. In such courts, the need for local justice may take priority over the need for specialisation. The question that exercised many respondents was when and how to take account of these competing needs.

57. Some respondents felt that specialisation should be provided according to the volumes of business in the sheriffdom, rather than in any individual sheriff court. Some suggested that local justice was more likely to take priority over specialisation in family cases than in commercial actions. One respondent argued that the need for judicial expertise in family cases was now so strong that the local principle must, to an extent, give way to it.

58. A suggestion to resolve this dilemma was the introduction of peripatetic or floating specialist sheriffs. There was some opposition to this. Some respondents were concerned that the link between the sheriff and the local community would be lost. Others argued that the introduction of specialist floating sheriffs would lower the morale of resident sheriffs, reduce the flexibility of the sheriff court programme, be unduly expensive and lead to an inefficient use of the time of both the floating sheriff and the local sheriff. Another suggestion for resolving the dilemma was an increased use of telephone and video conferencing facilities for procedural hearings.

Discussion and recommendations

Court of Session

59. We have come to the conclusion that it would be undesirable to promote specialisation at the appellate level in the Court of Session. In our opinion, the real benefit of specialisation lies in the active judicial case management of actions at first instance. We considered whether there might be merit in creating a specialist appellate court that would have jurisdiction in appeals relating to planning, appeals from the Land Court and from the Lands Tribunal and those appeals currently within the jurisdiction of the Lands Valuation Appeal Court. Our findings suggest that, at present at least, these appeals would not constitute a volume of business sufficient to justify a separate appellate court.

60. There is considerable satisfaction with the way in which the current system of designated commercial and intellectual property judges now operates. We therefore make no recommendations on these points.

61. In other possible areas of specialisation, such as consumer law, competition law or family law with an international element, the number of such cases would not, in our view, warrant a specialist court. However, our recommendations in relation to active judicial case management and the introduction of a docket system will go some way towards the growth of specialisation in these areas.

62. There is at present a significant volume of applications for judicial review in the Outer House. Many relate to decisions in immigration and asylum cases. The Borders, Citizenship and Immigration Act 2009 permits the transfer of such cases to the Upper Tier Tribunal established by the Tribunals, Courts and Enforcement Act 2007. No decision in principle has yet been taken as to whether applications for judicial review which fall into this category will be transferred to the Upper Tribunal. If they were to be transferred to the Upper Tribunal the volume of business on other categories would not warrant the establishment of a specialist administrative law court, but our proposals for the reform of judicial review procedure and for case management will deal with the main concerns expressed about lack of specialisation in this area.

63. On balance, we are persuaded that Outer House judges benefit from having the broader judicial experience that the present system affords. That range of experience is a valuable preparation for appointment to the Inner House.

Sheriff Court

64. While there was limited support for specialisation in the Court of Session, there was a powerful demand for it in the sheriff court, as noted above. We are persuaded that this demand is soundly based. In our view specialisation is one of the keys to the success of a sheriff court whose jurisdiction will be significantly re-aligned. We therefore recommend the introduction of a system by which a number of sheriffs in each sheriffdom will be designated as specialists in particular areas of practice. In our view, this recommendation will be all the more important when the court is run under a system of active case management. We agree entirely with the view that

"A single civil court style, run on assembly line principles, offering a one-size fits all justice, will not satisfy the civil justice needs of different civil court users. As well as expertise in the relevant area of the law, specialisation is about tailoring the service to the dispute and about understanding the different worlds out of which different kinds of dispute emerge, the different worlds that different parties inhabit and the different kinds of remedies that they may be seeking."[4]

65. We also agree with those respondents who observed that while a generalist sheriff might be acceptable in a purely adversarial system, a sheriff with experience of the subject matter will bring significant benefits to a system that adopts active case management. We have been influenced by the conclusions of research commissioned by the Scottish Executive into the operation of the commercial procedure in Glasgow Sheriff Court.[5] The research confirms that case management may be effective only where the presiding sheriff has the confidence and respect of the lawyers in the case, the knowledge and authority to direct procedure, the ability to challenge, sometimes by reference to authority what is submitted at a case management hearing and the confidence and experience to indicate those lines of argument that are unlikely to be relevant. In our opinion, many of the benefits to be gained from the introduction of active case management would be lost if, for example, the presiding sheriff in an actively managed personal injury case had no experience of personal injury work.

66. To retain the flexibility of the existing arrangements, we consider that there should be no strict demarcation between civil and criminal business in the sheriff court. The categories of designation should include at least solemn crime, general civil, personal injury, family and commercial. Designation may also be appropriate in other areas according to the needs of the sheriffdom and at the discretion of the sheriff principal. Additional areas of specialisation might include personal and corporate insolvency, commissary business and proceedings under the Adults with

[4] E Samuel (2007), 'Court Specialisation', Paper presented at Holyrood Conference on *Civil Justice: Modernising the System*
[5] E Samuel (2005), *Commercial Procedure in Glasgow Sheriff Court*, Scottish Executive

Incapacity (Scotland) Act 2000. These proposals have no implications for remuneration as far as we are concerned. It should also be possible, in the course of their career, for sheriffs to seek to become designated in additional areas, if they have the necessary experience to case manage effectively.

67. We recommend that the sheriffs principal should have responsibility for designating sheriffs within their sheriffdom to hear cases in a particular area of specialisation. We do not propose that every sheriff in a jurisdiction should be designated to every specialist area of practice. That would undermine our whole approach.

68. We propose that an action in a designated area of specialisation will continue to be raised in the sheriff court having jurisdiction under the current rules. If no sheriff has the relevant designation in that court the action will be transferred to a court where there is such a sheriff. Procedural business in the action will be presided over by the designated sheriff who may conduct the procedural stages in writing, including email, or by telephone or video conferencing. Our proposals are discussed more fully later.

69. It is the practice of the Judicial Appointments Board for Scotland to draw up a slate of individuals whom it recommends for appointment as sheriffs. Sheriffs principal are expected to accept the first name on the slate when a vacancy arises. Few exceptions are admitted to this rule. In our view, this practice will no longer be appropriate. When a vacancy arises in a sheriffdom, the sheriff principal will require to assess what skills the appointee should have. The Judicial Appointments Board for Scotland will then have to select a candidate who matches those skills. We think it unlikely that a candidate who has had an exclusively criminal practice will have the necessary skills to case manage substantial commercial actions. It would defeat our proposals if the Judicial Appointments Board were to recommend such a candidate for appointment to a sheriffdom in which the sheriff principal requires a sheriff who has commercial experience. If practitioners are to have confidence in the enhanced civil jurisdiction that we recommend for the sheriff court, a change in the Judicial Appointments Board's approach will be essential.

70. We have come to the conclusion that the creation of civil justice centres would involve a high initial capital outlay and would reduce flexibility in the management of the present court system. We have concluded that they would limit access to justice on matters of a routine nature, such as family cases, by removing civil business from the local sheriff courts. We are also impressed by the lack of enthusiasm for civil justice centres across all interest groups. We do not recommend that the idea should be pursued.

Sheriff Appeal Court

Appellate business in the supreme courts

Civil appeals

71. In 2006, on the invitation of the then Lord President, the Rt Hon Lord Penrose conducted a review of the business of the Inner House.[6] The review was based on statistical data obtained from cases initiated in the Inner House in 2002- 2003. Lord Penrose's key findings were that a significant amount of judicial time was being taken up with incidental business, often as a result of failures by parties to comply with procedural requirements; that appellants were dilatory in approaching the Keeper to have a date fixed for the hearing; that cases were abandoned or settled at a late stage when judicial resources could not be reallocated effectively; that the time estimates given by parties were frequently inaccurate with the result that hearings had to be continued to a later date or dates; and that cases were often sisted for lengthy periods.

72. Delay continues to be a problem in relation to waiting periods in the Inner House. Waiting periods have lengthened quite significantly recently. The following table expresses the delay in "term weeks". Since there are 16 weeks of recess and vacation each year, the real delays are considerably longer.

Table 4.1 Appeal hearings in the Inner House: target waiting periods and potential appointments (in term weeks) 2001/2 to 2007/8

	2001/02	2002/03	2003/04	2004/5	2005/06	2006/07	2007/08
Target	18	18	18	18	18	18	18
Outturn	33	27	30	27	27	30	39

Source: Scottish Court Service Annual Report 2007/08

Criminal appeals

73. There is a considerable back log of criminal appeals. The performance of the High Court falls far short of the Ministerial targets set for the Scottish Court Service. A comparison of the targets for disposal of criminal appeals with the time actually taken for their disposal is shown in Annex B: Table 1.

74. Summary appeals from the sheriff court, stipendiary magistrates and district or JP courts account for 61% of all appeals to the High Court. The Summary Justice Review Committee chaired by Sheriff Principal McInnes[7] found that the targets for disposal of criminal appeals were being missed by a substantial margin and considered how the problem might be solved:

[6] The Rt Hon Lord Penrose (2009), *Review of Inner House Business.* A copy of the report is at Appendix 2, Volume 2

[7] The Summary Justice Review Committee (2004), *Report to Minister*, Scottish Executive

"These figures confirm our view that if summary justice is to be truly summary, appeals should, in most cases, also be dealt with significantly more quickly than they are at present. We suggest that one way of assisting the High Court of Justiciary to achieve the targets which have been set for it without causing distortions elsewhere, would be for a new court to relieve it of much of the summary criminal appeal work which it currently undertakes."

Responses to the Consultation

75. About one third of all civil appeals to the Inner House come from the sheriff courts. Almost two thirds of sheriff court appeals are appeals direct from the sheriff to the Inner House.[8] Summary criminal appeals from the sheriff court, stipendiary magistrates and justices account for almost two thirds of all appeals to the High Court. In view of the problems of delay in disposing of both civil and criminal appeals identified above, we thought that it might be useful to look at appeal routes and consider whether a degree of rationalisation was called for. We asked questions in the Consultation Paper on the suitability of current appeal arrangements and on the appropriate number of levels of appeal that should be available.

76. Respondents favoured the retention of the right of appeal to the sheriff principal in civil cases. They saw it as an inexpensive and prompt form of appeal which diverts minor cases from the Inner House. However, a significant disadvantage of the current system is the status enjoyed by a decision of the sheriff principal. According to Macphail's *Sheriff Court Practice*:

"Sheriffs principal are not bound by the decisions of a Lord Ordinary or of one another, although they treat the former as strongly persuasive and may treat the latter as persuasive. Occasionally, however, justifiable differences of view among sheriffs principal as to a matter of procedure may remain unresolved for many years, to the detriment of the development of uniformity in practise. A sheriff principal, although not formally bound by his own decisions or by those of his predecessors in office in his sheriffdom, normally follows any such decision unless satisfied that it was given per incuriam. The decisions of a sheriff principal, while he holds office, are normally followed by the sheriffs of his sheriffdom. A sheriff is not, however, bound by the decisions of a Lord Ordinary, or of the sheriff principal of another sheriffdom, or of another sheriff, although he will treat the two former as persuasive and may treat the latter as persuasive. It is submitted that where a sheriff is faced with two or more conflicting decisions in point by sheriffs principal of other sheriffdoms, he should prefer the later decision if it has been reached after full consideration of the earlier decision, except where he is convinced that the later decision was wrong in not following the first, as where some binding or persuasive authority has not been cited in either case."[9]

77. Some respondents to the consultation also drew attention to the perceived anomaly of having an appeal from a single judge to another single judge.

[8] *Scottish Civil Courts Review Consultation Paper*, Annex D, Section 3
[9] Macphail I (2006), *Sheriff Court Practice*, 3rd edition, Edinburgh: W Green, p 631

Discussion and recommendations

78. In our view, there was merit in the recommendation of the Summary Justice Review Committee that there should be an appeal court at sheriff court level. That Committee made the cautious proposal that the court should deal only with appeals against sentence, with power to refer any appeals that raised questions of law or sentencing principle of wider application to the High Court of Justiciary. The Committee recommended that all appeals involving conviction or Crown appeals in relation to acquittal or sentence should continue to be marked to the High Court of Justiciary. The Committee recommended that the judges for the summary criminal appeal court should be drawn from the shrieval bench, that sheriffs principal should be part-time members of the court and that experienced sheriffs should be appointed as part-time members of the court for a term of years.

79. We recommend the establishment of a national Sheriff Appeal Court, the decisions of which should be binding on all sheriffs throughout Scotland, thereby creating a consistent and coherent body of case law. The court should hear summary criminal appeals from lay justices, district judges and sheriffs (during the transitional period when both sheriffs and district judges would be dealing with summary criminal cases). It would also hear civil appeals from district judges and from sheriffs in those civil cases within their new jurisdiction.

80. We consider that if summary criminal appeals were dealt with by the Sheriff Appeal Court that we propose, there would be scope for a significant improvement in the time taken to dispose of them. We also agree with the view of the Summary Justice Review Committee that part of the role of the court should be to enhance sentencing consistency in summary criminal courts throughout Scotland.[10] However, we consider that the Sheriff Appeal Court should have jurisdiction to hear all types of summary appeal. Summary appeals against sentence account for 50% of all appeals to the High Court. Summary appeals against conviction, including appeals against conviction and sentence, account for around 11%. The average waiting period for summary conviction appeals increased by 70% in 2007/08. It is now 220 days. One fifth of all summary conviction appeals take more than a year to be disposed of. Most such appeals do not raise complex or novel points of law. If an appeal raised such points, it could be remitted to the High Court.

81. It would be possible, as proposed by the Summary Justice Review Committee, for a number of experienced sheriffs to be seconded to the Sheriff Appeal Court for a period of time; but in our view it would be inappropriate for an appellate court to consist of members of the same level of the judicial hierarchy as those from whom an appeal is marked. Sheriffs might be reluctant to sit in appeals from sheriffs within their own sheriffdom. This could lead to difficulties in programming the business of the Sheriff Appeal Court efficiently. In addition, ad hoc secondments to the Sheriff

[10] The Summary Justice Review Committee (2004), *op. cit*, para 31.19

Appeal Court would be disruptive to the programming of first instance business were sheriffs to be seconded.

82. Our estimates of the volume of civil and criminal business that would come before the Sheriff Appeal Court suggest that there would be a need for more members than the current number of sheriffs principal. We recommend, therefore, that a small number of judicial officers of equivalent rank to a sheriff principal should be appointed to sit as members of the court with the existing sheriffs principal who will be ex officio members of the court. This will avoid the problem of sheriffs doing a mix of first instance and appellate work. In our view, the additional costs would be marginal and insignificant when compared with the benefits that would follow for the High Court and the Inner House.

83. The additional judicial officers should have the status and powers of a sheriff principal and, when not sitting in the Sheriff Appeal Court, should be available to provide cover at this level. There would be scope for them to undertake some of the administrative duties currently undertaken by sheriffs principal. They would not, however, have specific responsibility for the administration of business within any particular sheriffdom. These appointments would be permanent and would fall within the remit of the Judicial Appointments Board.

84. We consider that the creation of these new offices would provide an opportunity to review the range of non- judicial responsibilities currently held by sheriffs principal, such as their holding appointment as Commissioners of the Northern Lighthouse Board.

85. We propose that criminal appeals should be administered centrally. When hearing criminal appeals, the court would sit in Edinburgh, to continue the current arrangements for summary appeals. Each of the sheriffs principal would be programmed to preside in the Sheriff Appeal Court for a specified period. The other members would carry out sifts in relation to summary appeals and hear bail appeals in relation to both summary and solemn proceedings in the sheriff court.

86. In criminal matters the Sheriff Appeal Court would hear all summary appeals against conviction or sentence; or both; and Crown appeals against acquittal and against sentence. For appeals in relation to sentence only the bench would comprise two members. For appeals against conviction, or conviction and sentence, the appeal would be to a bench of three. Since a Crown appeal against sentence is based on grounds of undue leniency and since such appeals often raise questions of general application, we consider that they should be heard by a bench of three.

87. On the civil side we propose that there would generally be a bench of three. All civil appeals would go to the Sheriff Appeal Court in the first instance, although parties could apply to it for leave to appeal directly to the Inner House, if the appeal should raise complex or novel points of law.

88. If the hearing of civil appeals were to be centralised this would add significantly to the cost to parties and would result in delay and inconvenience. Accordingly, we propose that although the Sheriff Appeal Court would have a national jurisdiction, civil appeals should be administered and heard within the sheriffdom from which they emanate. The sheriff principal of that sheriffdom would normally preside although one of the other sheriffs principal or members of the court might do so where that was expedient.

89. In Chapter 5 we recommend the introduction of a new simplified procedure for dealing with monetary claims up to £5,000 and all housing cases. We are of the view that the majority of appeals from such cases should be dealt with by a single judge of the Sheriff Appeal Court. While on one view an appeal to a single judge is anomalous, the sum sued for in simplified procedure cases will generally be out of all proportion to the delay and cost that may be involved in convening a bench of three. Furthermore, under current arrangements the right of appeal to the sheriff principal is very popular. Appeals to a single judge are a feature of English procedure, where a senior circuit judge hears certain appeals from the district judge. We recognise, however, that some cases where the sum sued for is small may raise questions of wider public importance, such as the interpretation of legislation or common contractual terms, for example the recent cases involving the lawfulness of bank charges. We therefore recommend that appeals in cases subject to the new simplified procedure should be heard by a single member of the Sheriff Appeal Court unless they raise questions of wider public importance. It would be for the sheriff principal to decide whether a particular appeal should be heard by a bench of one or three. In simplified procedure cases an appeal would only lie on any point of law from the final judgment of the sheriff, as is currently the case for summary causes and small claims.[11]

90. We recommend that within the Sheriff Appeal Court a single member of the court should have the power to conduct procedural business. This would be consistent with a recent amendment to the Court of Session Act 1988, which permits a single judge to deal with procedural business in the Inner House, see below.

91. In our view the creation of a Sheriff Appeal Court would result in a significant improvement in the length of time taken to dispose of appeals to the Inner House and to the High Court. We estimate that the transfer of summary criminal appeals from the High Court to the Sheriff Appeal Court would result in a saving of 134 sitting days per year. That figure does not include the time spent on bail appeals and in carrying out sifts. In civil appeals, the saving would be about 117 sitting days per year. This does not include time spent on procedural hearings.

[11] Sheriff Courts (Scotland) Act 1971, section 38(a)

Appeals from the Sheriff Appeal Court

92. The Summary Justice Review Committee recommended that there should be a further appeal from its proposed Summary Appeal Court to the High Court of Justiciary, but not as of right. We agree that there should be a right of appeal from the Sheriff Appeal Court that we propose to the High Court on a point of law but only with leave of the High Court. Since the appeal would already have received careful consideration, we would expect that the High Court would grant leave only in cases where there were clearly arguable grounds of appeal.

93. We recommend that there should be a restricted right of appeal from the Sheriff Appeal Court to the Inner House in civil matters. The decision of the court or tribunal of first instance is upheld in about 80% of appeals to the Inner House that proceed to a determination. Many of our respondents favoured the restriction of the current rights of appeal and proposed several mechanisms: imposing a requirement to seek leave to appeal; introducing some form of sift process to weed out appeals with no reasonable prospect of success; requiring all appeals from the sheriff court to go to the sheriff principal; or limiting the number of stages through which an appeal may proceed.

94. We are satisfied that there should be a mechanism for sifting out appeals which are without merit. We recommend that an appeal from the Sheriff Appeal Court to the Inner House should be subject to a requirement to obtain leave, which should in the first instance be sought from the Sheriff Appeal Court. If leave is refused then the party seeking to appeal should be able to seek leave from the Inner House. Since the first stage appeal from the district judge or the sheriff to the Sheriff Appeal Court will be available as of right, we consider that any further right of appeal should be subject to a stringent test. In England and Wales the test applied by the Court of Appeal is that:

a) the appeal would raise an important point of principle or practice; or
b) there is some other compelling reason for the Court of Appeal to hear it

95. This is the test that applies to appeals from the Upper Tribunal to the Court of Session.[12] In the interests of consistency, we think that the same test should be adopted, with the qualification that the principle of proportionality should form part of the test and that the court should have regard to the stage of proceedings to which the appeal relates. We would expect that leave would rarely be given in an interlocutory matter except where it was decisive of the dispute.

96. In summary cause procedure an appeal currently lies to the Inner House on any point of law from the final judgment of the sheriff principal, if the sheriff principal certifies the cause as suitable for such an appeal.[13] The requirement to

[12] Rule of Court 41.59 inserted by Act of Sederunt (Rules of the Court of Session Amendment No.5)(Miscellaneous) 2008
[13] Sheriff Courts (Scotland) Act 1971, section 38(b).

obtain leave to appeal from the Sheriff Appeal Court to the Inner House will replace the certification procedure. At present there is no right of appeal to the Inner House in small claims procedure. Under our proposals it would be competent to appeal from the Sheriff Appeal Court to the Inner House in an action where the sum sued for was £3,000 or less, provided leave to appeal is granted. The value of the claim would be a factor to be taken into account in deciding whether the granting of leave would be proportionate.

Other appeals to the Inner House

97. In reclaiming motions and statutory appeals, Lord Penrose has recommended that there should be a sift mechanism under which a single judge of the Inner House should consider the grounds of appeal, answers and any appendices and, if he thought fit, put the case out for submissions on whether the reclaiming motion or any ground of appeal should be refused on the grounds that it was not arguable (see Appendix 2). A decision of the procedural judge to refuse the reclaiming motion or to refuse any ground of appeal on the basis that it was unarguable would be final and not open to review. Notwithstanding the finality of that provision, a Division of the Inner House comprising three or more judges would have the power to reopen a final determination by the single judge that the appeal was unarguable if

a) it was necessary to do so to avoid real injustice;
b) the circumstances were exceptional and made it appropriate to reopen the issue decided by the procedural judge; and
c) there was no effective alternative remedy.

98. These proposals have not been put into operation. 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. Disposal of an appeal on its merits would not fall into this category. Under the proposals, a single judge could accelerate the appeals procedure to enable a Division of three or more judges to dispose of an allegedly unarguable appeal. This would, however, be cumbersome. Lord Penrose thought that Scottish Ministers should consider introducing legislation that would make provision for a sift mechanism. We agree.

99. When the Judiciary and Courts (Scotland) Bill was introduced, section 42 of the Bill provided the Court with flexibility to vary the quorum of business of the Inner House depending on the nature of proceedings under consideration. At stage 2 an amendment was carried which limited the reduction of the quorum to a single judge to procedural matters only. We consider that it would not be an efficient use of resources for a sift to be undertaken by three members of the Inner House. The sift mechanism proposed by Lord Penrose would be the equivalent of a requirement to obtain leave to appeal in other jurisdictions. It is common for an application for leave to appeal to be determined by a single judge of the appeal court. This is the position, for example, in England and Wales, Victoria and Queensland. The opportunity to reopen a determination by a single judge that an appeal is unarguable

provides a valuable safeguard and should, we consider, meet the concerns that led to the amendment of section 42 of the Bill.

The organisation of the Inner House

100. At an early stage in our Review the Lord President asked us to consider a proposal that the Divisions of the Inner House should be abolished. In 2007-2008 the Lord President advanced this proposal with the Justice Department during the preparation of the Bill but, after consultation with the judges, withdrew it and invited the judges to make representations to us on the matter if so advised. We have received no such representations from any of the judges or from any other respondent. In our opinion, the efficiency and consistency of the work of the Inner House is best served by the continuity that the existing Divisions provide. We also expect that, with the inevitable reduction in the workload of the Inner House that we foresee, there will be much less need for the deployment of Extra Divisions. In the absence of any support for the proposal, we do not propose to consider it in any further detail.

First instance business in the Court of Session

101. In Chapter 4 of the Consultation Paper we asked a number of questions about the factors that influence parties in their choice of forum, the types of action in which the Court of Session or the sheriff court should have exclusive jurisdiction, and at what level the privative jurisdiction of the sheriff court should be set.

102. Many of the responses to those questions also dealt with the forum most appropriate for personal injury litigation. Those acting for pursuers in personal injury cases were strongly of the view that the Court of Session should continue to be their court of first choice. Some argued that it should have exclusive jurisdiction in PI cases. Their views were based on the expertise available in the Court of Session, the success of Chapter 43 procedure in the Court of Session in reducing delay, and the economies of scale made possible by litigating in a single court with an all-Scotland jurisdiction. Those acting for insurers or defenders were more likely to take the view that routine low value claims are being litigated in the Court of Session at disproportionate cost and that there should be a significant increase in the privative level of the jurisdiction of the sheriff court, notwithstanding the recent increase to £5,000.

Low value claims and the cost of litigation in the Court of Session

103. There is little in the way of published research as to the monetary value of cases litigated in the Court of Session. The Court of Session, unlike the sheriff court, does not record the value of monetary claims in its case management system (CMS). There are plans to do so in the future. While the values of judicial awards are recorded, the vast majority of actions raised in the Court of Session are disposed of

by settlement. The values of settlements are not formally recorded by the court and are not available for public inspection. Some primary research has been conducted to fill in these gaps in information,[14] though it is limited to personal injury litigation. Research commissioned in the 1990s by the Scottish Office found that the mean average of judicial awards in Court of Session personal injury actions was 47% of the original claim. The study is based on 1989 data that may not reflect current ratios of claims to awards. In addition, actions disposed of by judicial decision are unlikely to be representative of personal injury actions as a whole.[15] Research conducted by the Scottish Executive in 2002 to inform proposals to raise the privative jurisdiction of the sheriff court to £5,000 provides more contemporary data but is limited by the small number of respondents to the study, the impressionistic nature of the information given, and by its focus on cases that were raised for sums in excess of £5,000 but settled for under £5,000.[16]

104. We sought systematic evidence as to the monetary value of all types of cases litigated in the Court of Session, both in terms of the sums sought and the sums settled for. We therefore conducted an audit, in which all actions initiated by summons in the General Department of the Court of Session over two one-week periods in 2007 were inspected. The audit yielded 128 actions, more than two-thirds of which were personal injury cases. A full breakdown of actions by procedure, case type and conclusion[17] may be found in Annex C of this chapter: Tables 1a, 1b and 1c. The audit reveals that 36% of actions raised by summons in those periods contained conclusions for less than £50,000 and 47% contained conclusions for £50,000 or more, with the remainder either containing no monetary conclusion (13%) or lacking the relevant information (4%). Only 23% of all actions in the audit periods contained a conclusion for £150,000 or more.

105. Because the two-week audit picked up few actions raised under commercial procedure, a further audit was undertaken of all actions raised between 1 January and 30 June 2008. In the first half year of 2008, 64 actions were initiated under the commercial procedure. A full breakdown of actions by procedure, case type and orders sought, including their monetary value, may be found in Annex C, Tables 2a, 2b and 2c. Compared with the general audit, the results were quite different. Almost half (49%) of all commercial actions contained a conclusion for £150,000 or more, compared with 23% in the general audit. Only 23% of actions raised under commercial procedure contained a conclusion for under £150,000 - and a quarter of them had been remitted from the sheriff court. The remainder either contained no monetary conclusions (25%) or the conclusions were unknown (2%). Compared with 36% of cases in the general audit, only 9% of commercial actions contained conclusions for less than £50,000.

[14] See especially G Cameron with G Johnston (1995), *Personal Injury Litigation in the Scottish Courts: A Descriptive Analysis*, Scottish Executive. Also, S Coope with S Morris (2002), *Personal Injury Litigation, Negotiation and Settlement*, Scottish Executive Social Research

[15] G Cameron with G Johnston (1995), *op. cit*

[16] S Coope with S Morris (2002), *op cit.* See especially p 7 for warnings as to robustness of data

[17] In the Court of Session, a conclusion is the means by which a specific order is sought. There are a variety of conclusions, including for payment, interdict and declarator. Not all conclusions contain a monetary claim.

106. Anecdotal evidence, supported by some research evidence, suggests that the sum sued for is generally much higher than the value of the claim, both in the Court of Session and the sheriff court. One aim of the 2002 research conducted by the Scottish Executive was to find out how much cases settle for in proportion to the amount that they were originally raised for.[18] The research provided rich qualitative data as to how specialist personal injury practitioners choose the sum sued for and how this sum compares with their estimate of the 'true value' of the claim. Quantitative information was limited, however, and was based on the responses of a small number of respondents. One indicative finding was that although no actions were raised in the Court of Session for under £5,000, about 29% settled for under that figure.

107. We were able to explore this issue further by information that respondents gave to us. One respondent provided information on the sum sued for and the value of settlement in 93 personal injury actions that proceeded in the Court of Session and 94 actions that proceeded in the sheriff court between 2004 and 2007 (Annex C of this chapter: Table 3a and Table 3b).[19] In the Court of Session, the value of settlement compared with the sum sued for achieved a ratio of almost 50% only in the highest value personal injury actions. Thus, where conclusions were for £150,000 and over (in 33 cases), the average sum sued for was £373,000 and the average value of settlement was £178,090. In lower value actions, the average value of settlement to sum sought was 28% or less; 21% in (13) actions where £100,000-£149,999 was sought; 24% in (13) actions where £50,000-£99,999 was sought; 27% in (29) actions where £20,000-£49,999 was sought; and 28% in the few actions (6) where under £20,000 was sought. Except in cases where £150,000 or more is sought, the value of settlements in personal injury actions initiated in the Court of Session is on average between 21% and 28% of the sum sought.

108. The data also permit some comparison between cases raised in the Court of Session and the sheriff court where similar sums have been sought. Except for actions where £150,000 or more was sought, the value of settlements in the sheriff court was on average between 28% and 34% of the sum sought, that is, slightly higher than achieved in the Court of Session (21% to 28%) other than for the highest value actions (48%). In the few (5) actions where £150,000 and over was sought in the sheriff court, a slightly lower ratio (23%) of settlement to sum sought was achieved. Except in cases where £150,000 or more is sought, the value of settlements in personal injury actions initiated in the sheriff court is on average between 28% and 34% of the sum sought (Annex C: Table 3a and 3b).

[18] S Coope with S Morris (2002), *op. cit*, p.13

[19] According to the respondent, these cases were "drawn essentially randomly from databases in relation to reparation cases on behalf of insurers resolved within the last three years". The data provided should be treated with care. Though cases might have been scrupulously selected according to principles of scientific random sampling, there is no guarantee that the cases handled by this respondent's firm are representative of the general population of personal injury actions proceeding in the Court of Session or the sheriff court.

109. There is little in the way of published research on the cost of litigation in Scotland. For this reason, we asked respondents to the Consultation Paper to provide us with data concerning the cost of litigating in the Court of Session and the sheriff court. The data provided affords some insight into the cost of litigation in both courts.

110. The same respondent gave us details of the cost of litigation in 93 personal injury cases in the Court of Session and 94 actions in the sheriff court. Table 4.2 shows the ratio of damages (awarded or negotiated) to the expenses incurred. Due to the distorting effect of a few very high value claims on the arithmetic mean, the median has also been calculated.

111. The data included the sum sued for, the sum awarded or agreed by way of settlement, the sum paid to the pursuer as agreed or taxed expenses, and the amount paid to the defender's solicitors in agent and client expenses. In order to compare the cost of litigation with the value of the action we have added together the judicial expenses paid to the pursuer and the cost to the defender of defending the action, giving a figure of 'total expenses'. This figure does not include any shortfall in expenses between the agent and client expenses payable by the pursuer and the judicial expenses recovered by the pursuer. It may therefore underestimate the actual cost of the litigation.

Table 4.2 Settlement values and expenses: 93 personal injury actions in the Court of Session between 2004 and 2007

Arithmetic mean	**£**	**Ratio of expenses to damages**
Average sum sued for	163,387	
Average settlement in Court of Session(damages)	**79,642**	
Average defenders' expenses	8,404	*11:100*
Average pursuers' expenses recovered	10,157	*12:100*
Average total expenses per case	**18,561**	***23:100***

Median	**£**	**Ratio of expenses to damages**
Average sum sued for	80,000	
Average settlement in Court of Session (damages)	**11,500**	
Average defenders' expenses	6,851	*60:100*
Average pursuers' expenses recovered	8,000	*70:100*
Average total expenses per case	**15,697**	***136:100***

112. In this data set of 93 Court of Session personal injury actions, the mean average of total expenses was £18,561 per case compared with a mean settlement value of £79,642, that is, 23% of the mean settlement value. When the median was calculated, however, the median value of total expenses was £15,697 compared with a median settlement value of £11,500; that is, total expenses were 136% of the settlement value. Put another way, total expenses were 36% higher than the settlement value (damages) in more than 50% of all cases litigated in the Court of Session.

113. These data were also subjected to analysis by value banding (see Annex C: Tables 4a to 4d). The ratio of total expenses to damages agreed or awarded increased steadily as the value of settlement decreased (see Annex C: Table 4b). Total expenses were just 15% of the mean settlement value (£178,090) in actions where £150,000 or more was sought, 92% of the mean settlement value (£21,457) in actions where £100,000 to £149,999 was sought, 111% of the mean settlement value (£14,961) in actions where £50,000 to £99,999 was sought, 159% of the mean average settlement value (£7,624) in actions where £20,000 to £49,000 was sought and 222% of the mean settlement value (£3,275) in the small number (6) of actions initiated in the Court of Session where under £20,000 was sought. Where the sum sought was less than £150,000, therefore, the total cost of litigation was likely to be 100% or more of the settlement value of the claim. Where the sum sought was less than £50,000, the total cost of litigation was likely to be more than 150% of the average value of settlement.

114. Data provided by another respondent with regard to 8 actions raised in the Court of Session shows a similar pattern. The ratio of total expenses to damages varied between 19% and 24% for the two cases that settled at £66,000 and £75,000 but rose to 187% and 322% for the two cases that settled at £7,000 and £4,000 respectively (see Table 4g). Other respondents provided information only with regard to the pursuers' recoverable expenses and did not include defenders' expenses (see Annex C: Tables 4e and 4f). In 11 low value (under £20,000) actions raised in the Court of Session, the ratio of pursuers' expenses recovered to average settlement value (£6,232) was 101% (see Annex C: Table 4e). In 42 low value actions (under £10,000) raised in the Court of Session, the judicial expenses paid to the pursuer exceeded the value of settlement in 4 out of 5 cases.

115. In the sheriff court, expenses of actions of similar value (whether measured by sum sought or damages achieved) are lower. In 893 low value actions (where the sum sued for was under £10,000) raised in the sheriff court, the judicial expenses paid to the pursuer exceeded the value of settlement in less than 3 out of 5 (58%) cases compared with 81% in the Court of Session (see Table 4f). In the sheriff court, the ratio of judicial expenses to the average value of settlement (£3,188) was 78% in a sample of 595 low value actions (craves under £20,000) (see Table 5h) and 87% in a sample of 44 low value actions (craves under £20,000) that settled for an average of £3,017 (Annex C: Table 5c). This is to be compared with the Court of Session, where the ratio of judicial expenses to the average value of settlement (£3,275) was 139% (Table 5c). While the level of expenses increases proportionately as the value of settlement decreases in the sheriff court as well as in the Court of Session (compare Annex C: Tables 4a -d with Tables 5a-d), the cost of litigating lower value actions in the Court of Session is substantially higher than the cost of litigating actions of similar value in the sheriff court.[20]

[20] Expenses were calculated in the Court of Session as being 37% higher, excluding counsel's fees, by one informant in S Coope and S Morris (2002), *op. cit*, p.57. It should be noted, however, that the research was conducted prior to the introduction of Chapter 43 and the information was based on one hypothetical comparable case of outlays in the sheriff court and Court of Session.

116. We conclude, therefore, that there is a significant volume of relatively low value cases being litigated in the Court of Session. We do not consider it to be appropriate for Scotland's Supreme Court to be the forum in which these cases are litigated. Given the higher costs involved, it is not in the public interest. At the same time, we acknowledge the advantages that the Court of Session has conferred on the litigation of personal injury actions. We make three major recommendations in this regard: raising the privative jurisdiction of the sheriff court; realigning the exclusive jurisdiction of the Court of Session; and establishing a specialist court with an all-Scotland jurisdiction for personal injury actions in the sheriff court.

Raising the privative jurisdiction of the sheriff court

117. In the previous section we concluded that there is a significant volume of low value litigation in the Court of Session and that this is an inappropriate and inefficient use of resources. One of the fundamental principles upon which we have based our proposals is that cases should be heard at the appropriate level of the court hierarchy. This ensures that the resources of the court are used efficiently and that the cost of litigation is reduced for parties and the public purse. The fact that the respective jurisdictions of the Court of Session and sheriff court are almost concurrent has resulted in a distortion which allows all but the simplest and lowest value actions to be litigated in the Court of Session. In our view 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. Such business will be conducted by specialised sheriffs and under enhanced case management powers.

118. Some respondents favoured a central gate-keeping system by which each case would be allocated to the appropriate level of the court hierarchy based on an assessment of the complexity of the case rather than its value. Others thought that such a procedure would create a significant burden on judicial time and would be an unnecessary expense to parties.

119. Another option would be the introduction of a system of certification by solicitor or counsel on specified criteria. In England and Wales, the Department for Constitutional Affairs (DCA) issued a consultation paper in 2005 in which it was proposed that a claim issued in the High Court (in a case in which the High Court and county court have concurrent jurisdiction) should be supported by a certificate setting out the reasons why it was appropriate for the case to be litigated in the High Court. At the point of allocation of a case to the fast or multi track, the relevant procedural judge would consider whether the certified reasons were justified. It was recognised that a case might have to move between tiers of court thereafter if it became more or less complex. Responses to this proposal were generally favourable, although there were concerns about the additional workload that would be placed on district judges who would be the principal gatekeepers. A system of certification of the kind proposed by the DCA could be accommodated with relative ease in a jurisdiction where procedural judges allocate cases to different types of case

management procedures or tracks. Scrutiny of the certificate would then be merely an aspect of case management.

120. We do not recommend the appointment of procedural judges to perform the case management functions exercised by district judges in the county court or Masters in the High Court in England and Wales. Nor do we propose a system of active case management for personal injury actions. Accordingly, we do not consider that a central gate-keeping system would be practicable or a sensible use of resources for the court or for the parties.

121. Although we accept that there is no necessary relationship between the value and the complexity of an action, a monetary threshold is the simplest mechanism to administer and apply. In our view, it provides a simpler and more predictable criterion for the selection of the appropriate forum.

122. The Consultation Paper asked at what level the privative jurisdiction of the sheriff court should be set. A majority of respondents to the Consultation Paper supported an increase in the privative limit of the sheriff court. Many of those respondents in favour of a substantial increase in the privative threshold did so with the caveat that this would need to be coupled with specialisation of sheriffs. We have had regard to their views and have recommended further specialisation in the sheriff court to accommodate higher value claims.

123. In our view, the objective of ensuring that cases are dealt with at the appropriate level of the court hierarchy and at proportionate cost can be attained only if there is a significant increase in the jurisdiction of the sheriff court. If the privative level were to be increased by only a modest amount the status quo would remain and only the lowest value cases would be raised in the sheriff court. We recommend that the privative jurisdiction of the sheriff court is raised to £150,000. This recommendation cannot be viewed in isolation. It goes hand in hand with the introduction of specialist sheriffs and a system of active case management.

124. A monetary threshold is open to abuse if parties can, without sanction, sue for a figure above the threshold when this bears no relationship to the value of the claim.

125. The risk of this happening can be reduced if the threshold is set at a high level, as we propose, so that cases that are clearly of a value below the threshold are identified. We recommend that the court should have the power to remit an action from the Court of Session to the sheriff court at the stage of signeting if it is apparent from the averments in the summons and supporting documents that the value of the action is likely to be below the privative limit of the sheriff court.

126. Under the active judicial case management model that we propose, it would be for the judge at the first or any subsequent case management hearing to consider whether the value of the case was likely to be less than the privative limit and, if so, whether there were any special features that would justify the retention of the case in

the Court of Session. If there were not, the case would be remitted to the sheriff court in exercise of the enhanced powers of remit that we recommend later.

127. We also propose that those actions raised in the Court of Session that do not have a monetary conclusion should remain there, subject always to the exercise of our proposed power of remit under the active judicial case management model.

128. We recommend the adoption of a rule that where a pursuer is awarded a sum less than the privative jurisdiction of the sheriff court, expenses should be awarded on the sheriff court scale unless the pursuer can show cause why it was necessary or appropriate to raise the action in the Court of Session. The Court has, on occasion, been reluctant to award expenses on the sheriff court scale except in those cases where the level of damages ultimately awarded or accepted fell significantly below the level of the privative jurisdiction of the sheriff court[21]. In so deciding the Court was influenced by the fact that jury trial was not available in the sheriff court and that the streamlined Chapter 43 procedure for personal injury actions is available only in the Court of Session. The extension of Chapter 43 to the sheriff court as recommended by the Sheriff Court Rules Council[22], the creation of a specialist personal injury court with an all-Scotland jurisdiction in the sheriff court and the extension of the right to a jury trial to personal injury actions raised in that court would replicate the benefits which are said to justify the litigation of low value cases in the Court of Session. Accordingly, where the pursuer is awarded a sum less than the privative jurisdiction of the sheriff court, he should show cause why expenses should not be awarded on the sheriff court scale.

129. Such a rule would only affect the small percentage of cases that go to proof. It would not be effective in preventing parties from litigating cases in the Court of Session which they knew to be below the threshold, but which were likely to settle. We accordingly recommend the introduction of a rule that enables a tender of a value below the threshold to be accompanied by an offer of sheriff court expenses in full and final settlement. If it were possible to tender on this basis, defenders might offer expenses only on the sheriff court scale when settling actions at sums below the threshold. This would deter the raising of actions in the Court of Session when it was known at the outset that the value was below the privative limit.

130. There is of course the possibility that defenders or their insurers might have reasons of their own for agreeing to pay expenses on the Court of Session scale in such actions where they were settled for sums below the privative limit of the sheriff court. If that practice were to become widespread, it would subvert the purpose of our proposals and be against the Court's own interests. For the present, this possibility is theoretical. We make no recommendation on this subject. We suggest that this would be the sort of question that the Civil Justice Council that we propose

[21] See, for example, *Wilson and Gould v Glasgow City Council* 2004 SLT 1189; *Benson v City of Edinburgh District Council* (14 September 2004); *Hunt v British Bakeries Ltd* (20 October 2004) and *Hylands v Glasgow City Council* (2008) CSOH 69

[22] See footnote 36

should be established[23] could monitor and resolve by whatever means seemed appropriate at the time.

131. We have assessed the potential impact on the Court of Session of raising the privative jurisdiction of the sheriff court to £150,000. During the audit period, 23% of all actions raised by summons in the General Department of the Court of Session contained claims for £150,000 and over, while a further 13% sought no monetary order (see Annex C, Table 1c.). The audit of commercial actions found that 49% of actions raised under commercial procedure sought payment of £150,000 or more, while a further 25% sought no monetary orders (see Annex C, Table 2a). If actions seeking no monetary orders were to remain in the Court of Session, an increase of the privative jurisdiction of the sheriff court to £150,000 would reduce the number of all actions initiated in the General Department by 64% and the number of actions initiated under the commercial procedure by around 26%.

132. This estimate is based upon the sum sought rather than the 'true value' of the claim. If, as we suggest, sanctions were to be introduced to ensure that only those actions with a value of over £150,000 were litigated in the Court of Session, the audits - based, as they were, on the sum sued for - might underestimate the impact of raising the threshold. For the following reasons we do not consider that this is the case. In our audits, we found that most actions for payment of £150,000 and over are for sums substantially over £150,000. The median value of actions raised in the General Department for payment of £150,000 or over was £300,000. Only 3% of all actions were for £150,000 and over but less than £200,000. The median value of actions raised under commercial procedure for payment of £150,000 or over was £650,000, and only 6% of all actions were for £150,00 and over but less than £200,000 (see Annex C: Table 2b). We also found that the relationship between the sum sued for and the value of settlement in personal injury cases raised in the Court of Session was far closer in actions raised for £150,000 and over than in lower value actions. The ratio of settlement to value of the sum sued for was 48% in actions where payment for £150,000 or over was sought, compared with between 21% and 28% in other value bands (see above and Annex C of Chapter 4: Table 3a). We therefore conclude that somewhere just below 36% of business initiated in the General Department, and somewhere just below 74% of all actions raised under commercial procedure, would remain in the Court of Session if the privative jurisdiction of the sheriff court were raised to £150,000.

[23] See Chapter 15

Powers of remit

133. At present a sheriff may, on the motion of a party, remit a case to the Court of Session if he considers that its importance or difficulty makes it appropriate to do so, provided that the value of the case exceeds the privative jurisdiction of the sheriff court.[24]

134. We consider that if the privative limit of the sheriff court were to be increased to £150,000, as we recommend, the legislation governing remit from the sheriff court to the Court of Session would have to be amended to enable actions below the privative limit to be remitted to the Court of Session in exceptional cases. The final decision as to whether a case falling within the privative jurisdiction of the sheriff court is suitable for litigation in the Court of Session should, however, rest with the Court of Session. It should, therefore, have the power to decline a proposed remit if the judge to whom the case is assigned, having heard the parties, is not satisfied that the case is one that should be heard in the Court of Session.

135. The Court of Session has power, at its own instance or on the application of a party, to remit an action to the sheriff court within whose jurisdiction it could have been brought, where, in the opinion of the court, the nature of the action makes it appropriate to do so.[25] The Court has interpreted this power restrictively by holding that where the Court of Session and the sheriff court have concurrent jurisdiction, the Court will not easily restrict or overturn the pursuer's choice of forum.[26] We consider this to be an unsatisfactory principle, but one that stems largely from the position that the jurisdictions of the Court of Session and the sheriff court so extensively overlap.

136. Where the value of an action raised in the Court of Session is likely to be below the privative limit, as assessed by the judge at a case management hearing, we consider that there should be a presumption in favour of a remit to the sheriff court. It should, however, be open to the parties to submit that there are special reasons why that presumption should not apply. These might include factual or legal complexity, or the fact that the case raised issues of wider application or public interest. In considering whether or not it would be appropriate to remit a case to the sheriff court the Court should be entitled to take into account the business and operational needs of the Court as well as the interests of the parties.[27] The fact that

[24] 1971Act, s 37(1)(b), as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 16

[25] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 14.

[26] *McIntosh v British Railway Board* 1990 SC 338. In the most recent decision, *Colin Paterson v Advocate General for Scotland*, Lord Hodge considered himself bound by the decision in *McIntosh*. He declined to treat as relevant the consideration of the pressure of business in the Court of Session, except insofar as that pressure had an impact on the pursuer's case.

[27] This was the approach taken by temporary judge R Macdonald QC in the case of *Colin McKay v Lloyd TSB Mortgages Limited* 2005 SCLR 547 where he distinguished *McIntosh* and took into account in deciding the motion for remit the fact that the Court of Session was at that time under considerable pressure of business and from time to time proof diets had to be discharged in high-value cases due to the lack of available judicial resources

that is not at present a relevant consideration is, in our view, a serious weakness in the system.

Exclusive jurisdiction of the Court of Session

137. The Court of Session has exclusive jurisdiction in proceedings for judicial review, in proceedings to compel statutory bodies to perform their duties, and in actions of reduction, actions for proving the tenor of documents, certain proceedings relating to trusts, proceedings for the winding up of companies with a paid up capital exceeding £120,000,[28] proceedings relating to patents, Exchequer cases, actions under the Hague Convention in relation to child abduction and certain devolution issues.

138. In our opinion, the Court of Session should retain exclusive jurisdiction in relation to more complex corporate matters, patents, Exchequer cases, actions under the Hague Convention and devolution issues.

139. Some respondents thought that the sheriff court should have exclusive jurisdiction in relation to family actions. Others argued that there should continue to be concurrent jurisdiction in the Court of Session. Relatively few family actions are raised in the Court of Session. Some involve the division of matrimonial assets of significant value. Some parties chose to litigate family actions in the Court of Session for reasons of privacy and confidentiality. Our respondents suggested that little judicial time is expended on family actions since they tend to settle before proof and since the parties adopt a collaborative approach.

140. There were mixed views in relation to judicial review. Many respondents observed that the sheriff court already has jurisdiction in numerous statutory appeals and applications that involve the review of decisions of administrative or public bodies. Others favoured the extension of the jurisdiction of the sheriff court to applications for judicial review in cases that are essentially of a private nature such as a dispute between a club and its members or office bearers. Scots law does not recognise the rigid distinction made in other jurisdictions between private law and public law[29] and in our view it would be difficult to identify satisfactory criteria by which claims of a private nature could be distinguished from those of a public nature.

141. We recommend that the Court of Session should retain concurrent jurisdiction in family actions. We also recommend that concurrent jurisdiction should be conferred on the sheriff court in relation to actions of proving the tenor of lost or destroyed documents and of reduction, except actions of reduction of sheriff court decrees. As regards the winding up of companies, we recommend that there should

[28] Section 1 of the Insolvency Act 1976. The equivalent threshold, uprated by reference to the RPI as at January 2008, was £670,800.
[29] *West v Secretary of State for Scotland* 1992 SC 385

be a significant increase in the value of the paid up share capital which limits the jurisdiction of the sheriff court, since that has been set at the same level for over 30 years. Otherwise the exclusive jurisdiction of the Court of Session should remain as it is at present.

Other jurisdictional issues

142. Under section 46 of the Court of Session Act 1988 the Court may, in the context of proceedings for interdict, ordain the respondent to perform any act which may be necessary for reinstating the petitioner in his possessory right, or for granting specific relief against the illegal act complained of. Further, under section 47(2), the Court may make an order regarding the interim possession of any property to which the cause relates. Although an interim order *ad factum praestandum* is in general competent in the sheriff court,[30] the sheriff court does not have a power equivalent to section 47(2) to make an order regarding the interim possession of any property to which the case relates, except pending appeal.[31]

143. These powers are not as wide ranging as those conferred on the Land Court by section 84 of the Agricultural Holdings (Scotland) Act 2003 which enables that Court to make orders *ad factum praestandum* and orders for specific implement on an interim or final basis. This section was introduced on the recommendation of the Scottish Law Commission in its Report in 2000 on jurisdiction under the Agricultural Holdings (Scotland) Acts. The Commission suggested that this power would enable the court to make orders on questions such as the accommodation of livestock, the repair and maintenance of fixed equipment, the payment of grants and subsidies, and the management of quotas. We consider that such powers should be conferred on the Court of Session and the sheriff court so that they, too, should have a full range of powers to regulate matters on an interim basis.

144. In addition, there are anomalies as between the jurisdictions of the Court of Session and the sheriff court in relation to decrees of removing and ejection. The sheriff court has exclusive jurisdiction in summary actions of removing and of ejection. Even where an action containing a conclusion for removing is raised in the Court of Session, in order to give full effect to the decree of removing pronounced by that court, it is necessary to obtain the authority of the sheriff with jurisdiction in the area where the property concerned is located to eject the party. This is because a Court of Session decree of removing is not a warrant for diligence.[32] Respondents drew attention to this anomaly and observed that it seemed odd that the Court of Session may grant declarators of heritable right, and decrees reducing heritable rights, but cannot grant a decree of ejection following on from them. We agree. We

[30] *Menzies v Templeton* (1896) 12 Sh Ct Rep 323
[31] OCR, r 31.10.
[32] *Beriston Limited v Dumbarton Motor Boat and Sailing Club and Others* [2006] CSOH 190, 15 December 2006

recommend that the Court of Session should have jurisdiction to grant a decree of removal or ejection.

Specialist personal injury court in the sheriff court

The success of Chapter 43 procedure for personal injury actions

145. There is general agreement that the Chapter 43 reforms have been successful in bringing settlement dates forward and reducing the amount of judicial time spent on personal injury actions in the Court of Session. Research commissioned by the Scottish Executive provides evidence to prove this.[33]

146. Personal injury actions represent a considerable proportion of the business of the Court of Session. In 2008, 2,425 personal injury actions were raised in the Court of Session. They constituted more than 62% of all actions raised in the General Department.[34] In 2008, 123 actions (or 5%) were remitted out of Chapter 43 on grounds of complexity or inability to comply with the Chapter 43 timetable. The great majority of these were clinical negligence claims.

147. Under Chapter 43 procedure a proof diet is fixed at an early stage of procedure. A standard diet of 4 days is allocated to each case. The court programme allows for the high settlement rate in personal injury actions. Each week many more cases are programmed than the court could possibly hear. On average 90 cases are programmed per week, of which 70 are personal injury cases. In addition, 4 civil jury trials, which are almost always in personal injury actions, are programmed for each week.

148. The volume of procedural business generated by personal injury actions is considerable. The table below shows the number of unstarred motions, starred motions and By Orders recorded on the CMS database for personal injury cases in the Court of Session for the period 1 January 2006 to 30 June 2008.

Table 4.3 Personal injury actions (Ch. 43) in the Court of Session: Procedural business

Period	Actions initiated	Unstarred motions	Starred motions	By Orders
1 Jan 06 – 31 Dec 06	2343	9880	757	442
1 Jan 07 – 31 Dec 07	2487	9757	706	366
1 Jan 08 -31 Dec 08	2425	8854	703	274

149. Some of the starred motions enrolled may not have proceeded but it is not possible to ascertain from court records the percentage that were heard or the length of time taken to deal with them. Some motions may be dealt with in a matter of minutes while others may take several hours or a whole day. In modelling carried

[33] E Samuel (2007), *Managing Procedure: Evaluation of New Rules for actions of damages for, or arising from personal injuries in the Court of Session (Chapter 43)*, Scottish Executive
[34] PIUG report for 1 October 2008 to 31 December 2008 provides data for 2008

out for us by the Scottish Court Service, it was suggested that 30 minutes would be a reasonable average. Many of the By Order hearings fixed are subsequently cancelled. In the period 1 October to 1 December 2008, for example, 20 By Orders for late records were fixed. Only 6 went ahead. In the same period, 64 By Orders were fixed in respect of late pre-trial minutes. Only 12 went ahead.

150. The figures given above demonstrate 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.

An alternative forum for personal injury claims

151. We do not recommend the introduction of a non court-based model for compensation. In our Consultation Paper we mentioned the Personal Injury Assessment Board (PIAB) in Ireland. It was not favoured by our respondents, even those in the insurance industry. The idea provoked strong opposition from many quarters.

152. We examined PIAB closely on our visit to Ireland in Spring 2008. We interviewed barristers, solicitors, insurers, trade unions and governmental bodies. It appears to us that PIAB was set up to deal with a number of problems, such as high insurance premiums and fraudulent or exaggerated claims that have not been identified in this jurisdiction. Many of those with whom we spoke during the course of the visit were critical of certain features of it, such as the inability of claimants to prepare the claim adequately without legal assistance, their inability to recover legal expenses in connection with submission of the claim, and the ability of defendants to contest liability at a late stage of the process. These problems seemed to be antithetical to access to justice. A number of other problems in the operation of PIAB have become apparent over time; for example, the number of claimants who reject PIAB's award and go to court with the advice and assistance of solicitors is rising. We are of the view that the long term effectiveness of the PIAB solution should be assessed before its introduction to Scotland is considered further.[35]

A new court for personal injury actions

153. Apart from the benefits that Chapter 43 procedure confers, practitioners on both sides point to the economies and efficiencies of scale that accrue through centralising all but the lowest value personal injury litigation in the Court of Session.

[35] A study funded by the Irish Research Council for Humanities and Social Sciences is currently being conducted at University College Dublin School of Law by J Ilan and C Scott. See, for example, http://archives.tcm.ie/businesspost/2009/03/15/story40233.asp

They argue that these economies would be lost if much of the personal injury litigation were to be dispersed throughout the sheriff court system were the privative jurisdiction of the sheriff court to be raised. That might make it uneconomic for the profession to provide the current level of service and access to the courts that personal injury claimants currently enjoy.

154. For these reasons, we consider that the case for a centralised, specialist personal injury court is proved. We recommend that an all-Scotland jurisdiction for personal injury actions should be conferred on Edinburgh Sheriff Court. Parties who wish to raise personal injury actions locally could continue to do so. Such actions would be allocated to the designated personal injury sheriff in the sheriffdom in which they originate. The specialist personal injury court would not be a separate institution but a specialist division of Edinburgh Sheriff Court. It would be presided over by sheriffs designated as specialists in this field.

155. The amended version of Chapter 43 that is to be extended to the sheriff court in November 2009[36] would apply to all personal injury actions raised in the sheriff court including the specialist personal injury court, that is to say, a case flow management model would be adopted. However, parties could apply, on cause shown, for a case to be remitted out of Chapter 43. In that event, an active judicial case management model would be applied. These issues are discussed in greater detail in Chapter 5.

Civil Jury Trials

156. We received strong arguments for and against the retention of civil jury trials. Respondents in favour of retention pointed out that the right to a civil jury trial has been part of the Scottish civil justice system for nearly 200 years. Although the number of trials that take place is small, the significance of jury awards is considerable, particularly in relation to awards of solatium and loss of society. In *Girvan v Inverness Farmers Dairy*[37] it was recognised that judges should have regard to jury awards as well as judicial decisions in assessing quantum, the 'overall philosophy' of Scottish practice being that the assessment of damages is first and foremost a matter for a jury. In *Shaher v British Aerospace Flying College*[38] the court said that it was this very philosophy that gives awards of damages their essential legitimacy. In cases such as *Shaher* and *McLean v William Denny & Bros Ltd*[39], the court has had regard to jury awards and has recalibrated awards for loss of society when it considered that judicial assessments were falling behind the public view reflected by juries.

157. Respondents have pointed out that the policy in England and Wales of restricting the allowance of a jury trial to exceptional cases, and leaving the

[36] Act of Sederunt (Ordinary Cause Rules Amendment)(Personal Injuries Actions) 2009
[37] *Girvan v Inverness Farmers Dairy (No 2)* 1998 SC (HL) 1
[38] *Shaher v British Aerospace Flying College* 2003 SC 540
[39] *Shaher* and *McLean v William Denny & Bros Ltd* 2004 SC 656

assessment of damages almost entirely to judges, has caused awards of damages to fall behind the general estimate of the public. The Report of the Law Commission on Damages for Non Pecuniary Loss (1999) (Law Com No 257) recommended a significant increase in the level of general damages in that jurisdiction. That led to the guidance given by the Court of Appeal in *Heil v Rankin & Anr*[40] that for awards above £10,000 there should be a tapered increase up to a maximum of one-third for the most catastrophic injuries; that increases should apply to all future decisions, irrespective of when the tort occurred; and that the retail price index should be used to update guideline cases.

158. As it was put in *Heasman v JM Taylor & Partners*[41], the choice is between, on the one hand, a system that relies greatly on awards in comparable cases, and may therefore be more predictable, but carries the risk of falling behind the levels that ordinary people would consider reasonable; and, on the other hand, one that allows persons other than professional judges to make the assessment, at the risk of variations in the level of awards. Lord Coulsfield observed that the disadvantages of the judicial system were graphically illustrated by the decision in the *Heil* case which implies that, before that decision, many claimants had been denied fair compensation for their injuries, and that judicial assessment of damages, compared with that of juries, gave little cause for enthusiasm.

159. Those in favour of abolition thought that a fair system of compensation requires predictability, openness and transparency. Because juries are not given guidance on quantum and, as the test for the grant of a new trial based on the amount of the award is high, it is difficult to advise on quantum. This inhibits pre-trial settlement. The system also gives rise to inconsistencies. Two claimants with similar injuries may receive significantly different awards.

160. In Scotland juries are not given any guidance as to the appropriate award for solatium or loss of society. If the Inner House is satisfied that the jury's award was excessive, it cannot substitute an award that it considers to be reasonable. It must appoint a new trial. The second award can, in turn be challenged. There have been cases in which there have been three jury trials. In *Girvan*, the House of Lords was invited to express a view on these features of the Scottish system. The House of Lords considered that it would be inappropriate for it to make any recommendations on this issue as it was for the Court of Session to regulate its own practice. The general question raised in that case remains unresolved.

161. Over the past five years, the number of actions appointed to a civil jury trial in the Court of Session has more than doubled, from 55 in 2004 to 134 in 2008, see Table 4.4 below. This has put some demands on resources, for example, with regard to the procedure for allowing civil jury trials. Since actions initiated prior to the introduction of Chapter 43 have now mainly been disposed of, however, almost all actions currently appointed to a civil jury trial are proceeding under Chapter 43.

[40] *Heil v Rankin & Anr* [2001] QB 272
[41] *Heasman v JM Taylor & Partners* 2002 SC 326

This may explain why, given Chapter 43's success at achieving early settlement, the number of civil jury trials for which jurors are cited has remained more or less level over the past 5 years. Only 25% of civil jury trials were settled before precepts were issued in 2004. Though more cases were appointed to a civil jury trial in 2008, the number of citations issued was not substantially different than in 2004 with 76% settled before citations were issued, see Table 4.4 below. We also found that 'out of pocket' expenses to civil jurors in the Court of Session have been minimal over the past five years.

Table 4. 4: Jury trials fixed and precepts issued in actions proceeding under ordinary procedure and Chapter 43 in the Court of Session 2004-8

	2004		**2005**		**2006**		**2007**		**2008**	
	Fixed	**Precepts**	**Fixed**	**Precepts**	**Fixed**	**Precepts**	**Fixed**	**Precepts**	**Fixed**	**Precepts**
Ordinary	35	31	50	25	14	9	9	5	3	2
Chapter 43	20	10	56	23	87	40	101	31	131	43
TOTAL	**55**	**41**	**106**	**48**	**101**	**49**	**110**	**36**	**134**	**45**
Ratio of precepts to jury trials		*75:100*		*45:100*		*49:100*		*33:100*		*34:100*

162. We are persuaded that the right to a civil jury trial in the enumerated causes should be retained. 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 resources expended on civil jury trials appear to be minimal, especially in view of the earlier dates of settlement achieved by Chapter 43, and in our view are not to be compared with the benefits of the availability of jury trials in maintaining damages at a reasonable level.

163. If it is right to retain civil jury trial, 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. The responses to our question about the factors that influence choice of forum show that the right to a civil jury trial, as well as the availability of Chapter 43, were key factors in influencing pursuers to raise proceedings in the Court of Session rather than the sheriff court. In effect, the existing Court of Session practice and procedure in relation to jury trials would be transplanted in its entirety into the personal injury court. The jury would consist of 12 members and the rules for the allowance of issues and conduct of the jury trial would be the same as those in the Court of Session. We therefore recommend that civil jury trial be extended to the new specialist personal injury court, but not to those actions that are litigated in other sheriff courts.

Organisation of the sheriff court

164. The Consultation Paper asked whether the current division of the sheriff court into geographical jurisdictions presented difficulties or had advantages, whether there was a case for a national sheriff court, and whether sheriffs should have an all-Scotland jurisdiction.

165. Most respondents thought there were no significant problems with the current system and saw no need for radical reform. Some considered that the boundaries between sheriff court districts and between sheriffdoms should not prevent cases from being reallocated between courts to deal with peaks and troughs of business.

166. At present, a sheriff may transfer a case to another sheriff court, whether in the same sheriffdom or another, in three situations.[42] First, in a case with one or more defenders, a sheriff may transfer the action to any other sheriff court that has jurisdiction over any of the defenders. Second, where a sheriff finds that his court has no jurisdiction, he may transfer the case to the sheriff court where it should have been brought. In both instances, the transfer must be at the request of one or more of the parties and the sheriff must consider it expedient having regard to the convenience of the parties and their witnesses. Third, a sheriff has a general power on his own accord to remit a case to another sheriff court but only on cause shown.[43] On making any order for transfer, the sheriff must state his reasons, and the court to which the case is transferred must have jurisdiction over the defender. The powers of transfer between different sheriff courts are therefore limited. There is no general power available to sheriffs principal to transfer cases between different sheriffdoms where that would be expedient.

167. In their response to the consultation the sheriffs principal proposed that each sheriff principal should have authority, where the administration of justice so required, to direct that a case raised in one sheriff court district should be transferred to another sheriff court district within the same sheriffdom or, with the agreement of the relevant sheriff principal, to a sheriff court in another sheriffdom. In our view there should be no artificial barriers which inhibit the efficient allocation of business between sheriff courts within the same sheriffdom or between sheriffdoms and we endorse this proposal.

168. The main problem with the current system identified by respondents is the fact that sheriff court orders, particularly those granting interim interdict, are enforceable only in the sheriffdom in which they are granted. This can create difficulties in cases involving domestic abuse and in regulatory and enforcement proceedings at the instance of local authorities or public bodies. We agree that this is an anomaly that requires to be addressed.

[42] OCR 26.1(2) to (4)
[43] OCR 26.1(1)

169. Another problem identified by respondents is that the boundaries of the sheriffdoms do not always coincide with those of other public bodies such as local authorities, the police and the Crown Office and Procurator Fiscal Service. We note the difficulties identified but the rationalisation of the boundaries of the courts and other public authorities is beyond the remit of this Review and would involve consultation with the various authorities having an interest in this issue.

170. There was little support for the idea that sheriffs should have an all-Scotland commission. It was thought that this would operate as a deterrent to recruitment and that it might militate against diversity. We agree.

171. Most respondents were in favour of retention of the office of sheriff principal. They saw a need for the sheriff court to be managed on a regional rather than a national basis and thought it important that such management should be carried out by a senior judicial office holder. We accept that there is merit in managing the business of the sheriff court on a regional basis.

172. In conclusion, we recommend that there should be a review the purpose of which is to rationalise the boundaries of the sheriffdoms with those of other public authorities; that the relevant legislation and rules of court should be amended to enable actions to be transferred between sheriff courts within a sheriffdom and between sheriffdoms; and 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. We do not recommend that sheriffs should have an all-Scotland commission.

Creation of the office of district judge

173. Scotland is unusual in having a first tier court in which the judges hear both civil and criminal business; which has unlimited jurisdiction in relation to the pecuniary value of civil business; and in which the judges conduct both summary and solemn criminal proceedings. This means that a sheriff could, in theory, preside over a trial in relation to a serious assault on Monday, hear a small claims action involving a consumer dispute worth £50 the following day, deal with a relatively minor road traffic offence on Wednesday, hear a commercial action worth hundreds of thousands of pounds on Thursday and finish off the week by hearing an adoption case. Of course, a sheriff would not be programmed to hear such a wide range of business in any one week but the point about the range and breadth of work is a valid one. On one view, this is an efficient system as a single sheriff can be deployed to do any type of work, civil or criminal, within the jurisdiction of the sheriff court. It provides maximum flexibility in drawing up the court programme. On the other hand, 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.

174. In most jurisdictions minor offences and small claims are heard by a separate court or tribunal or by a more junior judge. Steps to improve the efficiency of the summary justice system have, as we have already noted, been taken. We consider that the summary criminal work which remains in the sheriff court could easily be done by a more junior judge than a sheriff, leaving sheriffs to concentrate on more serious crimes. We note that in other jurisdictions in the United Kingdom summary criminal charges are dealt with by lay magistrates or by a first tier professional judge, with solemn proceedings being dealt with by a professional judge or a second tier professional judge, respectively.

175. Following the recent increase in the fast track limit, district judges in England and Wales now routinely hear trials in cases with a value of up to £25,000; district judges in Ireland hear claims for damages up to 6350 Euros and district judges in Northern Ireland hear claims worth up to £5,000. District judges in those jurisdictions also hear small claims. The position is similar in many other common law jurisdictions where the norm is for there to be a first tier court or tribunal with jurisdiction to deal with civil claims of a modest value.

176. In accordance with our principle that business should be dealt with at the appropriate level of the court hierarchy, we consider that a new judicial office should be created, that of district judge. This would also promote the development of specialisation at shrieval level while maintaining, where practicable, the principle of access to local justice. It would also lessen the impact of summary crime on ordinary civil business and provide a better service in lower value cases. The volume of defended small claims and summary cause actions would not justify the appointment of a new level of judge with only a civil jurisdiction. If summary crime were to continue to be dealt with at shrieval level, the problems created by continued sentencing diets, deferred sentences and the like, and the consequent delay and interruption of civil business would continue unchecked. For these reasons, in addition to a civil jurisdiction, we consider that the district judge should deal with all criminal summary business currently conducted by sheriffs.

177. A district judge would sit in the sheriff court and would hear summary criminal business and civil claims of a modest value. The district judge would also have concurrent jurisdiction with the sheriff in family actions and would hear appeals and referrals from the children's hearing as explained more fully below. There would also be scope in some courts or sheriffdoms for district judges to specialise in civil or criminal business. We also think that there would be scope for appointments to be made on a permanent but part-time basis which might suit those taking a break or retiring from practice. It is hoped that this would attract a pool of able and experienced practitioners who might not be interested in a full time judicial appointment but who might apply for the office of district judge (part-time) thus offering not only expertise but flexibility to that level of the system. Appointments of this type would be available to those no longer in practice.

178. We consider that the office of district judge would be attractive to practitioners with experience of advising and representing clients on the range of disputes falling

within the jurisdiction of the district judge, described more fully below, such as family matters and the welfare of children, contractual and consumer disputes, housing issues, lower value personal injury claims including less serious road traffic accidents and problems relating to debt. We think that practitioners in these areas would bring a wealth of experience and a problem solving approach to the resolution of disputes. They would have a clear understanding of the law relating to the parties' competing claims yet would be able to conduct proceedings with a degree of pragmatism.

179. If we had been considering this issue from first principles, we would have been minded to recommend that all summary crime should be dealt with by professional judges and that district judges should also assume responsibility for those summary cases presently dealt with by justices of the peace.

180. This issue was considered in some depth by the Summary Justice Review Committee chaired by Sheriff Principal McInnes. A large majority of that Committee recommended that summary justice should be dealt with only by professionally qualified judges. They thought that if their other recommendations were accepted, there would be significantly fewer prosecutions for the minor offences that form the bulk of the business of the district courts. If lay justice were to be retained, lay courts would have to have much greater sentencing powers. The majority of the Committee were not convinced that that would be appropriate. They thought that there was a need for lower courts to relieve pressure on the higher courts by taking on more serious cases. The principal theme of the report was that the summary justice system needed proactive judges who would challenge defence and prosecution delays. The majority of the Committee were not convinced that lay justices could do this. Although they recognised that the principle of community involvement in the criminal justice system was valuable, they did not consider that lay justices necessarily contributed to that principle and thought that there were other ways in which this could be achieved. They were also of the opinion that a professional system would not be significantly more expensive than the current system.

181. The minority view was that lay justice is a powerful expression of community participation in the regulation of society and that it would seem inconsistent to retain it in the most serious cases, in which untrained juries make key decisions on the evidence, but to remove it in the context of summary justice. They referred to the absence of concrete evidence that an all-professional judiciary would significantly improve the quality of justice and observed that there was no evidence of public dissatisfaction with lay justices.

182. The Scottish Executive invited views on the recommendations of the McInnes Review and concluded that there continued to be a place for lay justices in Scotland although there was a need to invest in recruitment, training and appraisal of lay justices and to review the way in which they are appointed.[44]

[44] Scottish Executive (2005), *Smarter Justice, Safer Communities: Summary Justice Reform-Next Steps*

183. The issue of lay justice has been considered in reviews of the criminal justice system in neighbouring jurisdictions, in particular, the Auld Review in England and Wales (2001)[45] and the Northern Ireland Criminal Justice Review (2000)[46], and there is a body of research on the subject. We need not go into the matter in any depth.

184. The Auld Review recommended that lay magistrates should continue to exercise their traditional summary jurisdiction. However, there was considerable scope for making them, as a body, more representative of the community, nationally and locally, and for improving the method of their appointment, the provision for their training, management structures and working procedures. This recommendation has to be seen in the context that there are over 30,000 lay magistrates in England and Wales and that they account for around 91% of summary work, which in itself accounts for 95% of all prosecuted crime. Less than 1% of their decisions are the subject of appeal to the Crown Court. Even smaller percentages of their work are the subject of appeals to the High Court by way of stated case or judicial review

185. The Northern Ireland Criminal Justice Review rejected the suggestion that there should be a greater degree of lay involvement in the criminal justice system. It recommended that there should be no change to the current system in which a professional magistrate sits alone in all summary adult trials. There are no lay justices in the Republic of Ireland. Summary crime is prosecuted in the district court which has a professional judiciary.

186. Scotland is unusual in having a system in which lay justices, sitting alone, have power to impose significant sentences, including sentences of imprisonment. For the purposes of our Review, however, we do not wish to argue this issue all over again. As far as we are concerned, the recent summary justice reforms which include improvements in the appointment and training of lay justices, are a given. We therefore proceed on the basis that lay justice will continue to be part of the Scottish criminal justice system for the foreseeable future. We make no recommendation touching the existing role of the lay justices; and we recommend that the jurisdiction of the district judge in relation to summary crime should be limited to those summary criminal cases that are currently tried by sheriffs.

187. One respondent proposed that a civil jurisdiction, which might be set at or near the current small claims limit of £3,000, should be conferred upon justices of the peace. There was no support for this from other respondents. Historically, justices had a limited jurisdiction in small debt actions where the value of the action did not exceed £5. This was abolished by the District Courts Act 1975.

188. Depending on the practice of the local court, justices of the peace sit singly or in a bench of three. They are always assisted by a professionally qualified legal adviser.

[45] The Rt. Hon Lord Justice Auld (2001), *A Review of the Criminal Courts of England and Wales*
[46] Criminal Justice System Review (2000), *Review of the Criminal Justice System in Northern Ireland*

The summary justice reforms have involved an extensive programme of training for justices who have acquired new powers in relation to discretionary disqualification, careless driving, taking and driving away, speeding charges and driving without insurance. Training is now mandatory and is supervised by the Judicial Studies Board. Every justice has undertaken basic refresher training and has agreed to undertake a minimum of 12 hours training per year and to sit at least 12 days in the year.

189. The justices decide questions of fact and seek advice from the legal adviser when required. In the event of an appeal against conviction and/or sentence, the appeal documents are, we were informed, written up by the legal adviser supported by notes taken by the justices at the time.

190. Although we appreciate that justices of the peace have recently taken on new duties and have a more extensive jurisdiction than before we do not think that they have the necessary legal skills to enable them to conduct civil cases, particularly the more interventionist role that we envisage being taken by the district judge in actions under the simplified procedure which will include monetary claims up to £5,000 and all housing cases regardless of the amount of arrears of rent or mortgage payments. The district judge will play an active part in identifying the legal and factual issues between the parties and in giving guidance and direction on how the action will proceed, as well as making the parties aware of the options of mediation and other forms of ADR. Justices of the peace are not, at present, called upon to write judgments or to make detailed findings in fact and law following an evidential hearing.

191. We doubt whether, with all the other responsibilities that justices of the peace have taken on such as the new requirements for training and appraisal, it would be practicable to give them the in depth training on the wide range of civil law that they might encounter in cases under the simplified procedure. We also doubt whether this would be a cost effective solution given the amount of training that would be required and the fact that a legal adviser would sit with the justices. We have concerns that the legal adviser would be drawn into the role of adjudicator rather than adviser.

192. We agree that there should be a more proportionate and accessible means of resolving lower value cases and it is for this reason that we are recommending the creation of the office of district judge.

The jurisdiction of the district judge

Civil jurisdiction

193. A district judge will be a professional judicial office holder within the sheriff court. We propose that a district judge would have a civil jurisdiction comprising actions with a value of £5,000 or less, housing actions, and appeals and referrals from the children's hearing.

194. So far as actions with a value of £5,000 or less are concerned, the district judge would have jurisdiction to hear cases that currently fall within the scope of the small claims and summary cause rules. In Chapter 5 we propose a new simplified procedure for dealing with those cases.

195. After the publication of our Consultation Paper, the limits for small claims and summary cause actions were raised to £3,000 and £5,000 respectively. Annex E: Table 1 of this chapter contains statistics showing the changes to the relative ratios of ordinary actions, small claims and summary cause actions before and after the increase in the limits on 14 January 2008. In 2008, 62% of all actions in the sheriff court were raised under small claims and summary procedure compared with 50% in 2007. The number of ordinary actions initiated decreased by 21% and the number of small claims increased by 79%.

196. No research has yet been undertaken in relation to the general impact of the increase in these limits. For that reason we recommend that the pecuniary limit of the district judge's jurisdiction should be fixed for the time being at the current summary cause limit of £5,000. This is a matter that should be kept under review by the Civil Justice Council that we propose should be established.[47]

197. At present actions relating to residential property are conducted by different procedures depending on whether the action is brought by a landlord seeking payment of arrears of rent or to recover possession of the property, or by a creditor who is seeking payment of mortgage arrears or recovery of possession of property subject to a mortgage (i.e. a standard security). The summary cause procedure applies to the former and ordinary procedure applies to the latter. Summary cause procedure also applies to actions by landlords seeking to recover possession of commercial property. In our view, all actions for recovery of possession of residential property, including those which also seek payment of arrears of rent or mortgage, should be conducted by a new procedure for housing cases which is described in Chapter 5. For this purpose, housing cases will be defined as actions for recovery of property subject to a residential tenancy, applications under Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 where these relate to residential properties, and applications by debtors under the Mortgage Rights (Scotland) Act 2001, whether or not these include a crave for payment of arrears of

[47] See Chapter 15

rent or mortgage payments. An action will be classified as a housing action even if it includes a crave for payment of arrears of rent or mortgage payments in excess of £5,000. However, an action that relates only to arrears of rent or mortgage payments of more than £5,000 would proceed as an ordinary action. Housing actions will be heard by the district judge. Actions for recovery of possession of non-residential property will proceed as ordinary actions before the sheriff.

198. The district judge will also hear appeals and referrals from children's hearings under Chapter 3 of the Act of Sederunt (Child Care and Maintenance Rules) 1997. Many of these actions are formal in nature, for example, where the child is too young to understand the grounds of referral, and do not present any complex issues of fact or law. However, we accept that there are some complex and sensitive cases that should be heard by the sheriff. We propose, therefore, a procedure whereby an appeal or referral that is initially allocated to a district judge may be transferred to a sheriff where appropriate. This is discussed in greater detail on Chapter 5.

199. The district judge will have concurrent jurisdiction with the sheriff in relation to family actions, as defined by Chapter 33 of the Ordinary Cause Rules as well as civil partnership actions under Chapter 33A, actions for financial provision for former cohabitants under Chapter 33B, actions under the Protection from Abuse (Scotland) Act 2001 as well as common law and statutory actions for interdict in relation to domestic abuse. For ease of reference, we shall refer to all of these types of proceedings as 'family' actions. We expect that most actions relating to contact and residence will be dealt with by the district judge and that sheriffs would mainly hear cases involving the division of matrimonial assets. However, if parties chose to bring proceedings in their local court before the district judge rather than before a specialist sheriff the district judge would have full jurisdiction to make any orders in relation to financial provision even if the value of the assets was greater than £5,000. If the jurisdiction of the district judge in family actions was restricted in relation to financial provision this might lead to a proliferation of court actions, with one set of proceedings before the sheriff dealing with financial provision and another set before the district judge dealing with residence and contact. We think that this would be highly undesirable and would lead to unnecessary expense and duplication.

200. The district judge would also have jurisdiction to hear urgent motions for interim orders in those ordinary actions that would normally be dealt with by a specialist sheriff. The case would then be transferred to a court where a sheriff with the relevant specialisation was based.

Criminal jurisdiction

201. As discussed above, justices of the peace will continue to deal with summary criminal cases. Over time, district judges will assume responsibility for the summary criminal trials that are presently heard by sheriffs. In addition, where an accused person appears on petition in a court in which there is no resident sheriff the district judge would have jurisdiction to deal with the examination of the accused and to grant bail.

Accommodation

202. We propose that both district judges and sheriffs would be accommodated in the existing sheriff court and JP court estate. Smaller or rural courts where there is limited accommodation would generally be presided over by a district judge rather than a sheriff. Where the volume of business would not justify there being a resident district judge on a full time basis, a single district judge might cover more than one court, as sheriffs presently do; for example, Banff and Stonehaven. District judges would also sit in the larger courts to deal with summary crime and with civil business falling within their jurisdiction in those courts.

Programming of Business

203. To meet the concerns expressed by our respondents about delayed starts to civil business and the interruptions of it, we propose that specific days or half days should be set aside for the conduct of civil business by district judges. These might take place on a weekly, or even a fortnightly, basis in the smaller courts. In smaller courts where there is only one court room, criminal business other than custody cases should not be programmed for those days.

Transitional period

204. Under transitional arrangements we suggest that district judges should in the short term assume responsibility for the summary crime and the less complex civil business that is now being done by part-time sheriffs. We propose that part-time sheriffs would be employed only where there were unexpected absences or unforeseen peaks in demand. Part-time sheriffs would be drawn from the ranks of retired sheriffs or retired practitioners. In the short to medium term, permanent sheriffs would continue to do summary crime and less complex civil business, but as they retired or moved to other sheriffdoms they would usually be replaced by district judges. There would accordingly be a gradual transfer of business of this kind from sheriffs to district judges. The management of this process and the judicial staffing needs would be assessed at sheriffdom level.

Flexibility and transfer of complex cases

205. If pressure of business and efficiency required it, a sheriff could be allocated to undertake the work of a district judge but district judges would not be entitled to undertake the work of a sheriff. Part-time sheriffs would play a role in providing cover for district judges in the event of their absence through ill-health or other reasons.

206. From time to time a lower value case may raise important or complex issues of fact or law. In addition, our proposals would confer on the district judge an unlimited jurisdiction in relation to financial matters in family actions and no upper limit in relation to arrears of rent or mortgage payments in housing actions.

Although many referrals and appeals from the children's hearing are straightforward, some are not as we discuss more fully in Chapter 5. For these reasons we consider that there should be a mechanism for a district judge to transfer a case to a sheriff, on the application of one or more of the parties or on his own initiative, subject to consultation with and approval of the sheriff principal.

Reformed civil jurisdiction for sheriffs

207. In consequence of these new arrangements, as regards criminal business, sheriffs would preside over solemn trials. On the civil side, they would hear ordinary actions, actions relating to the adoption of children under Chapter 2 of the Act of Sederunt (Child Care and Maintenance Rules) 1997, summary applications, actions concerning personal and corporate insolvency, commissary business and fatal accident inquiries. Edinburgh Sheriff Court would retain its special jurisdiction in relation to extradition proceedings. Sheriffs would have a concurrent jurisdiction with district judges to hear family actions as defined by Chapter 33 of the Ordinary Cause Rules as well as civil partnership actions under Chapter 33A, actions for financial provision for former cohabitants under Chapter 33B, actions under the Protection from Abuse (Scotland) Act 2001 as well as common law and statutory actions for interdict in relation to domestic abuse.

208. With the exception of family actions, all actions falling within the jurisdiction of the sheriff would be raised in the local sheriff court and would be governed by the current rules on jurisdiction. For administrative purposes that action would be transferred to a court where a sheriff designated as a specialist in that particular class of case was resident. Procedural business in the action would be dealt with in writing or by telephone or video conferencing. There would be a presumption that any proof or hearing would be heard at the court to which the action had been transferred although parties could apply for the case to be heard at their local court by a designated sheriff. In family actions, the parties would have the option of having the case heard locally by a district judge or by a specialist sheriff at a court where a family sheriff was based. The relevant procedures are described more fully in Chapter 5.

209. These reforms would resolve the problem of late starts to civil business caused by summary criminal cases. It would be easier in a more pro-actively case managed system for diets of an appropriate length to be assigned. The sheriff would play a greater role in ensuring that longer diets were entered into the court programme when required.

Reallocation of business and transitional arrangements

210. In developing our proposals for reform we have had the invaluable assistance of the Scottish Court Service which has undertaken some modelling work to assess the impact of our proposals on the volume of business in the courts. In particular, it has examined the impact of establishing a Sheriff Appeal Court, raising the privative jurisdiction of the sheriff court to £150,000, establishing a specialist personal injury court as a division of Edinburgh Sheriff Court, and creating the office of district judge. The conclusions that we draw from that work are, however, our own.

211. As mentioned above, the number of sitting days that would be required for civil and criminal appeals in the proposed Sheriff Appeal Court is such that it would be necessary to appoint a small number of additional sheriffs principal, although the cost of this is marginal and would relieve the burden on the High Court and on the Outer House so far as bail appeals and sifts are concerned.

212. So far as the implications of raising the privative level of the sheriff court to £150,000 are concerned, we estimate that most of this work will transfer to the specialist personal injury court in Edinburgh as practitioners are likely to take advantage of its all-Scotland jurisdiction and its location will enable them to continue to benefit from the economies of scale that flow from centralisation. The number of commercial and ordinary actions that would be affected would be small and could easily be absorbed into the sheriff court programme. We estimate that the business of the specialist personal injury court could be conducted by two specialist sheriffs, depending on how much work might be diverted from other sheriff courts to the specialist court.

213. We estimate that it would be necessary to build up to around 120 district judges over a transitional period to assume responsibility for summary criminal business in the sheriff court and to undertake the civil business described above. This estimate is based on the assumption that district judges would carry out the work currently undertaken by part-time sheriffs and that the role of part-time sheriffs would be restricted to providing cover for leave and other absences. The precise figure would depend upon the extent to which parties chose to litigate family actions before the district judge or a specialist family sheriff. These appointments would be made on a phased basis. District judges would initially assume responsibility for the work undertaken by part-time sheriffs and would gradually assume responsibility from permanent sheriffs for all summary criminal work and for the civil work we have described. We estimate that it would take between 8 to 10 years for the full complement of district judges to be appointed, though this would depend upon the rate at which sheriffs currently in office retire. We do not envisage that there would be any 'redundancies'. By the end of the transitional period, we estimate that the existing shrieval complement would be reduced by around half the current number of permanent posts. However, we accept that it is paramount that there be an appropriate minimum number of sheriffs in each sheriffdom to ensure the efficient conduct of business in that sheriffdom and to provide a reasonably

accessible specialist service. That will be particularly true in sheriffdoms which cover a wide geographical area.

214. We have also assessed whether sheriffs and district judges could be accommodated within the unified SCS estate and are satisfied that this could be done.

215. We have not made a precise estimate of the longer term impact of our proposals on the number of Senators of the College of Justice that may be required. We estimate a substantial reduction in the business of the Inner and Outer House. We forecast that once the impact of the transfer of first instance and appellate business to the sheriff court and the Sheriff Appeal Court is evaluated, there will be a substantial reduction in the number of Senators.

216. So far as overall costs and savings are concerned, this would depend on the level of remuneration of district judges. This, we think, would be a matter for the Scottish Government and, potentially, the Senior Salaries Review Body. Substantial savings would, however, flow from the reallocation of business to the Sheriff Appeal Court and to the sheriff court, and from the sheriff to the district judge. Establishing the district judges within the sheriff court will avoid the need for a new court estate or a new court administration.

The Scottish Land Court

217. This Review encompasses all of Scotland's civil courts. For sake of completeness, we would not wish to overlook the Scottish Land Court which was established by the Small Landholders (Scotland) Act 1911 in consequence of the creation of crofting tenure in the crofting counties under the Crofters Holdings (Scotland) Act 1886 and its extension by the 1911 Act, under the term landholders' tenure, to the whole of Scotland. The legislation provided that the Land Court should be a court of exclusive jurisdiction in disputes between landholders and their landlords and that its Chairman should have the status of a Court of Session judge.

218. In the last 50 years, the jurisdiction of the Land Court has been extended to disputes between landlord and tenant under the Agricultural Holdings (Scotland) Acts and to miscellaneous agricultural questions on matters such as milk quotas and deer control schemes. Part 3 of the Land Reform (Scotland) Act 2003 gave the Court an important jurisdiction in relation to the community right to buy. Part 7 of the Agricultural Holdings (Scotland) Act 2003 gave it an almost universal jurisdiction in agricultural holdings disputes. It now has jurisdiction also in questions of entitlement to subsidies.

219. The reputation of the Court has grown under a succession of distinguished Chairmen in the last 40 years. The modern extensions of its jurisdiction reflect the confidence that the Court enjoys from litigants and practitioners.

220. In consequence of its clearly delimited subject areas, the flexibility of its procedures and the fact that most of the lawyers who practise in it are experienced in agricultural law, the Land Court has become a model of a specialist court.

221. None of our respondents proposed any reforms to the jurisdictions and procedures of the Land Court. We propose none.

CHAPTER 5 A NEW CASE MANAGEMENT MODEL

1. In Chapter 5 of the Consultation Paper we invited views on the extent to which the court should control the conduct and pace of litigation. We suggested the options of an active judicial case management model and a case flow model. We now consider these options in the light of the various procedural reforms that have taken place over the last 15 years.[1] The history of the attempts to introduce case management into various areas of civil procedure in Scotland exemplifies the piecemeal approach that has affected all civil justice reform. Different types of case management systems have different, and often competing, advantages. In this chapter we review the merits of a docket system and of procedural judges and consider what can be learned from experience here and in other jurisdictions. In our view, some degree of management by the court of all types and values of case is an essential feature of an effective civil justice system. A single model of case management for all types of case is however unlikely to be appropriate.

Should the court control the conduct and pace of litigation?

2. The overwhelming majority of respondents endorsed the proposition that the court should control the conduct and pace of litigation. Some thought this crucial to the success of any programme of reform. Some argued that there should be mechanisms to deal with unco-operative or obstructive parties. It was said that supervision by the court would lead to a more effective use of public resources. Among those who argued most strongly for greater judicial involvement were court users with experience of litigation in other jurisdictions who found the general lack of case management in Scotland inefficient and frustrating.

3. Some respondents cautioned that a more proactive approach might cause additional work and expense. Those involved in personal injury litigation cited the success of the Chapter 43 procedure in the Court of Session and submitted that no further intervention was required in these cases. Others suggested that while control by the court should encourage the prompt and proportionate use of resources, the primary aim of judicial case management should be to secure the just resolution of the parties' dispute.

4. Some referred to article 6(1) of the European Convention on Human Rights which provides that:

> "In the determination of his civil rights and obligations (…), everyone is entitled to a (…) hearing within a reasonable time by [a] (…) tribunal (…)"

[1] See paragraphs 5.36 to 5.49 of the Consultation Paper

Under the Convention, the United Kingdom, and under the Human Rights Act 1998, the courts as public authorities, are responsible for the efficiency of the system:

"The manner in which [the state] provides for mechanisms to comply with the reasonable time requirement - whether by automatic time limits and directions or some other method - is for it to decide. If a State allows proceedings to continue beyond the "reasonable time" prescribed by Article 6 without doing anything to advance them, it will be responsible for the resultant delay."[2]

5. We are satisfied that it is essential that in every case parties should identify the key issues at an early stage. That minimises drift or delays caused by late amendments and the amount of time and preparation required. Effective supervision by the court will also help to redress any inequality of arms, and promote a fairer result. It will also promote an element of proportionality, especially in relation to cost. In some cases shorter time scales may result in lower costs.

6. We are therefore firmly of the view 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 does not follow, however, that this control should be exercised in the same manner in all types of case.

Active judicial case management or case-flow management?

7. A key theme that emerged from the consultation responses on this topic was that a rigid approach is neither appropriate nor proportionate and that procedures should be adapted to the needs of particular cases or types of case.

8. In the discussion that follows we use the term 'active judicial case management' to describe a case management model of the type used, for example, in the commercial procedure in the Court of Session. The core features of such a model are the early allocation of each case to a particular judge who is a specialist in the area of law and the fixing of one or more case management hearings at which the judge seeks to identify the issues and to determine further procedure. A model of this kind enables the judge to manage complex cases, to ensure that the parties are focused on the main points at issue, that the resources of the court and the parties are managed efficiently and proportionately, and that early resolution of disputes is facilitated. The court has extensive case management powers to call for further specification of parties' cases; the disclosure of documents and the identity of witnesses; to supervise the leading of expert evidence; to call for written submissions; and to determine the mode of proof.

9. We use the term 'case-flow management' to describe a model akin to that prescribed in Chapter 43 of the Rules of the Court of Session, which applies to

[2] *Blake v United Kingdom* (2007) 44 EHRR 29 at para 45

personal injury actions. The core feature of such a model is that the case is conducted by reference to a standard timetable with limited scope for variation and sanctions for non-compliance. Judicial supervision of the case is limited to policing the timetable and dealing with any specific applications to the court, by way of motion. A model of this type is used to deal efficiently with a large volume of routine cases, to eliminate unnecessary delay, to minimise the cost to the parties and to make the most efficient use of the court's time. Under Chapter 43 there is a fixed timetable governing the progress of the case; automatic orders for the recovery of documents and adjustment of the pleadings, the lodging of statements of the parties, valuation of the claim, exchange of lists of witnesses and the holding of a pre-trial meeting. A standard diet of proof is allocated once defences are lodged. There are no case management hearings, although a case may be put out By Order if a party fails to comply with the timetable. The case is not allocated to a specific judge.

10. Some respondents suggested that the success of the procedures for personal injury actions in the Court of Session, for commercial actions in the Court of Session and in some sheriff courts including Glasgow, and for family actions in Glasgow Sheriff Court, demonstrated that significant improvements could be made to civil justice in Scotland, whether by case-flow management or by active judicial case management.

11. Respondents agreed that the Ordinary Cause Rules 1993 (OCR 1993) had been a major advance in introducing aspects of case flow management and active judicial case management into the sheriff court, but there was evidence that their effect has waned over time. Options hearings in particular had in many courts become ineffective as an opportunity for active judicial case management, mainly because of the absence of principal solicitors and the inadequate instruction of local agents, the lack of shrieval continuity and the increasing constraints upon shrieval time. The timing of options hearings, not sooner than 10 weeks after the expiry of the period for lodging notice of intention to defend the action, was too late for early judicial case management and too early for effective pre-trial case management. Moreover, the timetabling provisions introduced by OCR 1993 covered only procedure up to and including the options hearing. When pleadings were amended after that stage, judicial control was lost and progress was left to the parties, with some cases going off the rails.

12. Respondents generally supported active judicial case management as improving the quality and speed of litigation and reducing cost. Those with direct experience of the commercial, personal injury and family courts in Glasgow Sheriff Court, and the commercial court in Aberdeen Sheriff Court, considered that these benefits gave parties greater satisfaction. Their perceptions are supported by empirical research.[3]

13. Respondents generally agreed that case-flow management was appropriate where the issues were straightforward or routine, as in many personal injury cases.

[3] E Samuel (2005), *op. cit.*

Active judicial case management was required where the issues were not clear cut and where standard timetables were inappropriate.

14. Many respondents considered that the two models were complementary. They thought active judicial case management could usefully be employed at a number of points in a case-flow management system, for example in setting and enforcing a realistic timetable. Some family practitioners considered that judicial case managers should be active in drawing up timetables tailored to the needs of individual cases. Others saw advantages to the court, and to parties, in the joint setting of goals in a wide variety of cases.

15. The introduction by OCR 1993 of timetabling and options hearings has already given the sheriff court a hybrid system of this kind. Its weakness lies in the lack of judicial control after the options hearing.

16. Many respondents supported case-flow management under Chapter 43 for most personal injury actions but proposed that judicial intervention should be more readily available, for example, where one party considered that the other's pleadings were not candid and needed further specification.

17. A number of respondents pointed to the benefits of judicial continuity as an aspect of judicial specialisation and case management. Indeed, some respondents considered that active judicial case management was inseparable from issues of judicial continuity and specialisation. Some thought that judicial continuity, by eliminating the need to rehearse the background at every hearing, led to more effective case management and to savings both in judicial time and in cost and time to the parties. Although judicial continuity may reduce administrative flexibility, some respondents considered that that was outweighed by the overall time efficiencies it achieved. We therefore examined this issue more closely.

Judicial continuity and a single docket system

18. One way to manage procedural business more efficiently and with judicial continuity is for each case to be allocated to a particular judge or sheriff. Although there is no formal docket system in Scotland, this is being developed in some courts where circumstances permit. For example, the commercial judges in the Court of Session have their own lists of cases. In Glasgow Sheriff Court the commercial court, personal injury court and to some extent family cases operate on a similar basis.

19. The key elements of a docket system are that a case is allocated to a judge at the outset and stays with him until conclusion; if it involves a specialised area of law it may be allocated to a specialist judge; the docket judge may direct that special procedures be used, such as case management hearings or referrals to mediation; and the docket judge monitors compliance with directions, deals with interlocutory issues and ensures that hearing dates are maintained.

20. The benefits of this system come from judicial continuity. It encourages consistency of approach throughout the litigation. It prevents parties' representatives from attempting to re-open matters already ruled on. It discourages unnecessary court appearances. Procedural hearings, which are often conducted by telephone, lead to earlier exchange of information and to the narrowing of the issues. The system leads to the early fixing of dates for substantive hearings, and these dates are generally maintained.

21. The Federal Court in Australia[4] has identified a number of perceived benefits of the docket system, including:-

- Savings in time and cost resulting from the docket judge's familiarity with the case: in particular, the system seeks to eliminate the necessity to explain the case afresh each time it comes before a judge;
- Consistency of approach throughout the case's history;
- Fewer management events with greater results: in particular, the system aims to reduce the number of directions hearings and other events requiring appearances before the court;
- Discouragement of interlocutory disputes or, alternatively, swift resolution of those disputes;
- Better identification of cases suitable for alternative dispute resolution (ADR);
- Earlier settlement of disputes, failing that, a narrowing of the issues and a consequent saving of court time;
- Early fixing of trial dates and maintenance of those dates.

All of these benefits were found to be operating in cases proceeding under the commercial procedure in Glasgow Sheriff Court.[5]

22. The Australian Law Reform Commission consulted with several hundred practitioners experienced in Federal Court litigation, with expert witnesses and litigants, as well as judges and administrative staff from the Court. The Commission found "unanimous positive feedback in consultations and submissions about the operation of the Individual Docket System," which it considered to be a "significant accolade" for the Australian Federal Court's docket system.[6] The benefits of the system included

"…discouraging unnecessary court appearances, making interlocutory hearings more productive, allowing the early exchange of information, and narrowing issues in dispute…"

[4] Victorian Law Commission (2008), *Report of Civil Justice Review*, Chapter 5
[5] E Samuel (2005), *op. cit*, pp39-40. For example, allocating an action to a single sheriff provides that sheriff with the knowledge and understanding to steer it to a speedy conclusion as well as the opportunity and motivation to do so.
[6] Australian Law Reform Commission (1999), *Review of the Federal Civil Justice System*, *Discussion Paper 62*, pp285-97

23. In the light of the enthusiasm shown by many for the Federal Court of Australia's system, in 2000 it was recommended that the State of Victoria give careful consideration to the adoption of a docket system throughout its civil court system.[7] By 2008, the Victorian Law Reform Commission could report that the Commercial List in the Supreme Court of the State of Victoria already operated on a docket system and that other lists, including the Admiralty List, the Intellectual Property List and the Valuation, Compensation and Planning List, had followed suit - with others shortly to follow.[8] So, for example, Judge Byrne of the Supreme Court has commented that the proposed docket system in the Building List

> "…will have the consequence that the judge will commence the trial having had an intimate knowledge of the progress of the litigation and a consequent ability to identify the positions of the parties before the trial commences." [9]

24. The Victorian Law Reform Commission also reported that the Family Court of Victoria proposed to introduce a new docket listing system in 2008, which was in the process of being designed in consultation with the profession. It also observed that judge-managed lists had existed in the county courts since 1996, with judges expected to manage cases in their lists from first directions hearing until trial. Despite several perceived problems, such as the potential for inconsistent workloads, the Victorian Law Reform Commission considered that there was merit in further extending the individual docket system in its Supreme and county courts.

25. A docket system operates with considerable success in the United States District Court for the Eastern District of Virginia, for the management of all kinds of cases, and not only complex litigation. Its success is said to rest on the availability of the docket judge to hear interlocutory motions, the early fixing of a trial date and the immutability of that date. Indeed, it has kept to its system of firm trial dates for more than 30 years. The system is renowned for its simplicity and effectiveness, handling twice the national average of civil and criminal cases, disposing of the equivalent of 647 cases per judge per year, with an average of 59 civil and criminal cases per judge going to trial each year. Each year, the court is among the two or three fastest in the United States federal system for resolving civil cases and is known throughout the United States as the 'Rocket Docket'.[10]

26. The Woolf Report on *Access to Justice* in England and Wales rejected a docket system on the grounds that it would (i) provide continuity and commitment, but only "at the cost of flexibility and the efficient deployment of judges"; (ii) require a significant increase in the number of judges; (iii) not allow for the flexible movement of cases between tiers of the legal system; and (iv) lead to a far more specialised judiciary whereas the preference was for generalist judges, especially in appellate

[7] P Sallmann and R Wright (2000), *Going to Court – A Discussion Paper on Civil Justice in Victoria*
[8] Victorian Law Reform Commission (2008), *op. cit*, Chapter 5
[9] Quoted by the Victorian Law Reform Commission (2008), *op. cit.*
[10] Mr. Justice D A Ipp (1995), 'Reforms to the Adversarial Process in Civil Litigation', *Australian Law Journal*, *69*, pp.790-1

courts.[11] Lord Woolf considered that because the judiciary in England and Wales were limited in numbers, divided into tiers and had different and uncertain commitments at any one time, an alternative to the single docket system was required. Nevertheless, he saw benefits in the single docket system that he considered indispensable in the new case management system he envisaged: continuity, consistency and commitment. He was concerned that alternatives should be found to preserve these key features.[12] He therefore recommended that in the larger court centres, judges dealing with civil proceedings should be grouped into teams, a case being dealt with primarily by members of the same team. In this way, he hoped to replicate the key features of the single docket system tailored to the complex stratification of the civil court system in England and Wales.

27. Research conducted in 2003-4 in the county courts following the introduction of Lord Woolf's reforms found that case management conferences were one of the major successes of the new civil procedure rules. There was considerable agreement, however, that a docket system would improve case management, though some resistance from court staff who felt that it was inflexible and would not allow the efficient employment of judicial resources. The research found that in practice the listing system for multi-track cases in the county court matched cases to whichever circuit judges were available and there was little continuity.[13]

28. More recently, there have been calls from the legal profession in England and Wales for the introduction of a docket system to support case management, considered a central pillar of the Woolf reforms.[14] In Gordon Pollock QC's view, for example, case management cannot work effectively until a docketed judge is given responsibility for the case from start to finish. Other practitioners added that parties must be allowed access to their allotted judge on a systematic basis, procedural matters should be dealt with by e-mail (or exceptionally by telephone) and docketed judges must be given sufficient administrative support to be effective in their role.

29. Until such time, the Woolf reforms might have improved some aspects of civil procedure, but they will have

> "…barely touched the deeply seated procedural traditions that stand in the way of real progress towards greater efficiency."[15]

[11] Lord Woolf (1995), *Access to Justice: Interim Report*, Chapter 11.
[12] *Ibid* Chapter 11, para 19 and 20
[13] J Peysner and M Seneviratne (2005), *The Management of Civil Cases: The courts and post-Woolf landscape*, *Research Series 9/05*, DCA, pp 48-49
[14] At a meeting of the *Legal Week* Litigation Forum, held on 20 September 2006 and chaired by Richard Susskind, reported in *Legal Week*, 28 September 2006.
[15] M Humphries and S Cody of Linklaters in *Legal Week*, 28 September 2006

30. A number of respondents to Lord Justice Jackson's recent review of civil litigation costs[16] favour the introduction of a docket system in England and Wales as a means of making case management more effective and reducing costs. In his preliminary report, Lord Justice Jackson stated:

> "My terms of reference do not extend to judicial deployment. However, it may be of assistance if I proffer some brief observations concerning the effect of docketing on civil litigation costs. In common law systems around the world there is a general perception amongst both practitioners and judges that docketing promotes efficient case management and reduces the costs of civil litigation. See in particular chapters 58 (Australia) and 60 (USA). Furthermore, my own experience supports the same conclusion. Between 2004 and 2007 I sat in a court where it was possible for judges to run heavy civil cases on a docket system. My impression from those three years is that a docket system makes it distinctly easier for the court to deliver a cost effective service to users."

31. He went on to say:

> "All seven assessors who are assisting me with the Costs Review are strongly of the view that a docketing system should be introduced for civil litigation. They believe that this would promote effective case management and help to reduce costs."

32. He concluded:

> "As stated above judicial deployment lies outside my terms of reference. It may, however, be appropriate to place on record the view of the assessors and myself that, where possible, civil cases should be (a) assigned to a single judge or (b) assigned to a team of specified master/DJ and specified judge. Any structural reforms which facilitate this arrangement are likely to reduce the costs of civil litigation."

33. Proposals for the introduction of docket systems have met with mixed success elsewhere. The final report of the Hong Kong Chief Justice's Working Party on Civil Justice Reform (2004) [17] noted that the weight of opinion of those it consulted was against the introduction a docket system. Nevertheless, the Law Society of Hong Kong favoured the proposal, with the proviso that significant resources should be devoted to training and improving the case management capabilities of the judiciary and its staff. Moreover, the Working Party recognised that specialist lists in Hong Kong already operated very much along docket lines, with all contested interlocutory applications, as well as the trial, being dealt with by the same judge. The Working Party supported the continuation of this docket-type system in relation to specialist lists.

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[16] Lord Justice Jackson (May 2009), *Civil Litigation Costs Review: Preliminary Report*, available at http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm. Lord Justice Jackson's report is discussed in more detail in Chapter 14.

[17] Working Party on Civil Justice Reform Hong Kong (2004), *Reform of the Civil Justice System in Hong Kong*. Available at http://www.civiljustice.gov.hk

34. Some perceive that a single docket system may be labour intensive and costly. This is a view frequently put forward by court administrators. Certainly, many practitioners are of the view that a docket system is effective only if judges are given sufficient administrative support. However, there has been no systematic study of the relative costs of different systems for organising case throughput and management.

35. An empirical survey in the United States Federal Court was conducted by the Rand Institute for Civil Justice following the introduction of the Civil Justice Reform Act of 1990, which required ten federal district courts to incorporate certain case management principles into their plans, including differential case management, and early judicial management and monitoring and control of complex cases. The research suggests that while case management appeared to reduce delay in these 10 pilot districts, it did not reduce costs to parties. In fact it seemed to have increased them.[18] This study is frequently quoted and is given much credence, mainly because it represents a significant exploration of the costs associated with early case management and the early setting of a trial date. However, it has been wrongly associated with evidence as to the cost to parties of a docket system as this was not an essential feature of the pilot. The study concludes that a balanced 'package of case management policies,' including monitoring of deadlines, early judicial case management and control of disclosure, has the potential to reduce the overall time taken to dispose of cases without adversely affecting costs, lawyers' satisfaction or lawyers' views about the fairness of the process.

36. Other options for managing procedural business canvassed in the Consultation Paper included the appointment of a dedicated judge or sheriff to hear all procedural business. For example, in the Outer House a Lord Ordinary could be designated to deal with motions, By Order hearings and applications for interim orders. That Lord Ordinary would also be responsible for prioritising the allocation of impending proofs and other hearings. A Lord Ordinary could be designated to deal with procedural business for a set period. Designated sheriffs and district judges could be appointed in the sheriff court on a similar basis where the need warranted it.

37. Those respondents who favoured this option thought that it would lead to the more efficient despatch of substantive business, reduce parties' frustration, ease the burden on court time, and improve consistency in decision making. However, just over half of our respondents opposed it on the grounds that it was in conflict with case management principles and judicial continuity.

38. Alternatively, a separate judicial office could be created, equivalent to that of the Master in the High Court in England and Wales, to deal with procedural business in the Court of Session. District judges or designated sheriffs could perform a similar function in the sheriff court. Section A of the Annex to this chapter describes the use of procedural judges in other jurisdictions.

[18] J Kakalik et al (1996), *Just Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 1990*, Rand Institute for Civil Justice, see especially pp 13-15

39. Such a judicial office holder could deal with motions, By Order hearings and applications for interim orders. Major procedural orders and the prioritising of forthcoming proofs and other hearings could remain with a designated Lord Ordinary. The creation of such a judicial post would leave senior judges more time to deal with substantive or more complex procedural matters. It would also provide some continuity. Such an office might be a useful starting point for potential judges and sheriffs.

40. Those who opposed this idea feared it would create a career judiciary with a hierarchical structure, which could undermine confidence in the justice system. Other respondents thought it would be difficult to define the routine procedural matters that would be allocated to the procedural judges. Since procedural decisions could have profound implications for the course of a case, parties should be entitled to have them made by a Lord Ordinary or sheriff, as the case might be. Other respondents thought that this option would increase expense and delay; that the office of procedural judge would not be an attractive career prospect; and that it would give rise to uncertainty and greater likelihood of appeals. More fundamentally, since Scotland is a small jurisdiction with limited resources, some respondents questioned whether there was a genuine need for such an office.

41. The Review Team monitored the volume and allocation of business for one court term[19] from information in the Rolls of the Court of Session. In that period 721 starred motions, By Order hearings, Rule 43.7 hearings, in family actions and Single Bills were set down in the Inner House and the Outer House. On the Scottish Court Service's estimate of an average length of 30 minutes per starred motion, with a court day of five hours, these motions would take 72 court days. If the privative jurisdiction of the sheriff court were to be raised to £150,000, as we recommend, it is questionable whether there would be sufficient business fully to occupy a procedural judge and to justify the costs associated with that office.

42. It is clear from the responses to the Consultation Paper that there is general dissatisfaction with the current arrangements for dealing with procedural business in the Court of Session. Substantive hearings are often delayed by procedural business. For those motions that have yet to be allocated to a particular judge, solicitors and counsel often have to wait, sometimes for long periods, for a hearing. In the sheriff court there is a general lack of availability of court time to hear civil business and a lack of judicial continuity. There is therefore limited opportunity in either court for a judge or sheriff to manage a case throughout its life and become familiar with it.

43. Having weighed the options, we do not recommend the designation of a single judge or sheriff to deal with all procedural business. We have concluded that such a recommendation would be in conflict with case management principles and with the objective of judicial continuity. For the same reason we do not favour the creation of a separate judicial officer whose role would be restricted to dispose of procedural

[19] 3/1/08 to 21/3/08 – 57 court days

business. Furthermore, if our recommendation that the privative jurisdiction of the sheriff court be increased to £150,000 is accepted, the likely volume of procedural business in the Court of Session would not justify it.

44. Instead, we recommend that a docket system should be introduced in the Court of Session and the sheriff court. The benefits of expeditious decision making, consistency of approach and experience in the particular field are fundamental to successful case management. A docket system will also assist in creating a more specialised judiciary at sheriff court level. If our proposed reforms to the jurisdiction of the Court of Session are implemented the volume of business will be such that it will be possible for a judge to manage a case from beginning to end. Although case management may, to a degree, front load costs, there may be overall savings if cases are dealt with more expeditiously, if issues are identified at an early stage and case preparation is limited to those issues genuinely in dispute. Proactive management by a specialist judge with knowledge of the case may facilitate settlement or in those relatively few cases that proceed to proof, the scope of the hearing can be limited to the key issues. This will result in savings for the parties and for the court.

45. The docket system should operate on the basis that a case is allocated to a judge or sheriff prior to the first case management hearing. There should be a presumption that, wherever practicable, all procedural and substantive hearings in the case will thereafter be dealt with by that judge or sheriff. In the sheriff court, if the case is in a specialist area, it should be allocated to a designated specialist sheriff.

46. It would be difficult to operate a docket system in the Court of Session if Outer House judges were to continue to undertake civil and criminal business concurrently. But it would be possible for work to be programmed on the basis that an appropriate number of judges would be allocated exclusively to civil cases for a fixed period of, say, two years. Transitional issues would arise in those cases that were not completed at the end of that period. That could be dealt with by having procedural hearings conducted on a remote basis if the judge was on circuit, or by having cases reallocated to another civil judge.

47. To maximise the efficiency of the docket system, we also recommend the adoption of an appointment-based system for the hearing of procedural business, whether by representation in person or by telephone or video conferencing. Where representation in person is required, the appointments should be fixed on a "not before" basis.[20] This will provide maximum flexibility to the court and minimise wasted time for the parties and their agents.

[20] That is, a system where the representative / party is told that their case will not be dealt with by the judge before a particular time during the sitting e.g. 10:30 or 11:00, rather than, as currently happens, everyone having to be present at the beginning of the sitting. Cases would be programmed in tranches within the sitting.

A new case management model of general application

48. We are satisfied that, with the exception of certain specified types of action, all actions in the Court of Session and the sheriff court should be subject to judicial case management. On the lodging of defences, a case should be allocated to the docket of a particular judge or sheriff. A case management hearing should be fixed shortly thereafter. This would normally take place by means of a telephone conference call. Parties would make submissions as to further procedure and any other matters arising, such as disclosure of documents. The judge or sheriff would identify the factual and legal issues in the case and decide what form of case management is most appropriate. In complex cases this may take the form of active judicial case management akin to the commercial model that we have described, with further case management hearings as the case progresses. In straightforward cases the court might decide that a timetable and related orders akin to the case-flow procedure under Chapter 43 would be appropriate. In that event, no further case management hearings would be required. In certain cases a mixture of these techniques would be appropriate.

49. This is the case management model that would apply generally to all civil cases. We recognise that for certain types of action, specific case management models have been adopted and are working well, and that their further development is in hand. We now set out how our general case management model would apply in specific types of action.

Case Management in the Court of Session

The Inner House

50. In 2006, Lord Penrose conducted a review of the business of the Inner House. He identified numerous shortcomings.[21] He made recommendations that combine elements of case-flow and active judicial case management, namely:

- a single Inner House judge should deal with procedural business;
- cases should not be allocated until they are ready for a hearing;
- there should be a degree of judicial continuity in managing appeals, and particularly those involving party litigants;
- control over the progress of an appeal should be vested in the court rather than parties;
- the court should fix a timetable to which parties would be required to adhere;
- late amendments and late lodgings of documents should be penalised to encourage frontloading of preparation.

[21] The Rt. Hon. Lord Penrose (2009), *Review of Inner House Business*. Report and a draft Act of Sederunt are contained in Appendix 2, Volume 2.

51. The problems identified by Lord Penrose have remained unresolved. Over the last 7 years, waiting periods for appeal hearings have fallen short of their target of 18 term weeks by between 9 and 22 weeks. As at November 2008, the waiting period fell short of its target by 21 weeks. [22]

52. Lord Penrose proposed a new procedural hearing at which the judge would ascertain the parties' state of preparation. If the judge determined that their dispute may appropriately be disposed of by any form of ADR, he would make such order as he thought fit for the disposal of the dispute. Otherwise he would appoint the cause to be heard on the Summar Roll or Single Bills, or make such other order as he thought fit. As we go on to discuss in Chapter 7, we do not consider that the court should have power to compel parties to enter into ADR. Accordingly, while the availability of ADR and parties' willingness to engage in it would be a factor to which the judge could have regard in ascertaining whether parties were ready for their appeal to be heard, we do not consider that it should be a pre-condition for obtaining a hearing. Subject to that caveat, we endorse Lord Penrose's recommendations and recommend that they should be implemented without delay.

The Outer House

Commercial actions under Chapter 47

53. New optional rules for commercial actions, Chapter 47, were introduced into the Court of Session in September 1994 in response to Lord Coulsfield's Working Party on Commercial Causes. The rules are designed to provide a speedy and efficient procedure, primarily through the introduction of active judicial case management at two hearings – a preliminary hearing to focus the issues in dispute and a procedural hearing to determine how they are to be dealt with. Under the commercial procedure, the judge presiding at the preliminary hearing takes ownership of the case.

54. The Chapter 47 procedure has achieved its aim of reducing delay, but after the rules had been in operation for a few years there was a drop in the number of cases using the procedure[23] and the number of cases that involved three or more preliminary hearings increased. In 2005, for example, 112 cases used the procedure as compared with 207 in 2004 and there were seven court hearings for every commercial action initiated in that year. To deal with this problem a compulsory

[22] This calculation was on the basis of the first four day gap in the Inner House diary, which was 39 (term) weeks. The actual average waiting period is 34 (term) weeks. See also *Moore v Scottish Daily Record and Sunday Mail*[2008] CSIH 66, 2009 SLT 27, in which a bench of five judges considered whether the Court had power to find either or both parties liable to the Scottish Court Service for the court fees that would have been due had a diet not been discharged. The parties in *Moore* had agreed settlement shortly before a reclaiming motion was due to be heard, the Court having been advised at a By Order hearing that the reclaiming motion would go ahead. It was held that the Court had no power to make such an order. The issue of late settlements, in the context of an unsatisfactory and deteriorating, situation in regard to waiting times, is discussed: see the Opinion of the Lord Justice Clerk at paras 19-25.

[23] See section B of the Annex to this Chapter for tables of statistics

pre-action protocol[24] was introduced in January 2005 with a view to focusing the issues before the first preliminary hearing.

55. More recently, the number of actions litigated under the commercial procedure has returned to the levels achieved in the late 1990s. In 2008, 188 actions were either initiated under, or transferred to, the commercial procedure, a substantial increase over the figures in 2005 and 2006. It suggests that there is a growing confidence in Chapter 47 and the commercial judges. There was an even greater increase in the number of defended commercial actions between 2005 and 2008. At the same time, the average number of preliminary hearings in each commercial action has shown a significant decrease, from seven for actions initiated in 2005 to five for those raised in 2008.

56. We understand that the pre-action protocol is now being applied with a lighter touch, and that a degree of flexibility has been introduced in orders made at preliminary hearings. It is not always possible or desirable to adhere to a strict timetable when the availability of experts is in doubt. The Court now encourages parties to agree the steps to be taken and propose a reasonable timetable.

57. We support the active judicial case management procedures for commercial actions. The Court uses the preliminary hearing to case-manage proceedings by drawing up a procedural timetable that is suitable for the individual case. At the same time, the Court engages in active judicial case management with due regard to economy in terms of controlling costs and making effective use of court time. Accordingly, we make no recommendation for changes to Chapter 47.

Personal injury actions and Chapter 43

58. Case-flow management has operated for personal injury actions in the Court of Session under Chapter 43 since April 2003. The formal evaluation of Chapter 43 procedure[25] found that, for the most part, it had met its main policy goals. Respondents to our Consultation Paper, including many personal injury practitioners, reported that Chapter 43 procedure required little judicial involvement and that case-flow management was operating well. Most such cases now settle at or before the pre-trial meeting and, in the normal course of events, have little or no judicial involvement. Practitioners support the procedure by which, at the outset, the Court fixes a provisional timetable for the entire course of the case.

59. All personal injury actions in the Court of Session are begun under Chapter 43; a party may apply to have a case transferred to the ordinary roll.[26] In deciding whether to transfer the case, the Lord Ordinary must have regard to (a) the likely need for detailed pleadings, (b) the length of time required for preparation of the

[24] We discuss pre-action protocols in Chapter 8
[25] Samuel (2007), *op. cit.*
[26] In 2008, 2,427 personal injury actions were registered in the Court of Session under Chapter 43. On average, each month defences were lodged in 212 cases. Of these, fewer than 6% (mainly clinical negligence actions) were transferred to the ordinary roll.

action, and (c) any other relevant circumstances (Rule 43.5(3)). Most of the cases transferred out of Chapter 43 relate to clinical negligence. To minimise the cost of applying for transfer out of Chapter 43, the Rules were amended in 2007 to provide that in a clinical negligence action, the Court may direct that it should proceed as an ordinary action when the summons is presented for signeting. The motion is dealt with in chambers unless the Lord Ordinary directs otherwise.

60. More recently, the Personal Injuries Users Group (PIUG) suggested that actions transferred out of Chapter 43 might nevertheless benefit from some of the features of Chapter 43 procedure continuing to apply to them after they had been transferred. The Court of Session Rules Council agreed with this suggestion and Rule 43.5 was amended in 2008 to give the Lord Ordinary power to ordain a party in such an action to take certain steps that he would have had to take had the action not been withdrawn from Chapter 43. Rule 43.5(4)(aa) now provides that the Court may ordain a party or parties to lodge a medical report; to lodge a statement of valuation; to hold a pre-trial meeting, and to lodge a minute of the meeting.[27]

61. Cases withdrawn from Chapter 43 are therefore now subject to a modified form of case-flow management. Several respondents favoured a more proactive case management model for such actions on the view that these actions were in danger of drift and required more rather than less case management. The Court can deal with this problem *ad hoc* by putting the case out By Order some weeks after the case is transferred out of Chapter 43; but this is rarely done.[28] Our respondents thought it preferable that there should be a specific rule applying to such cases. Some respondents suggested that it was possible and desirable for the Rules to provide a form of judicial case management in every such case, tailored to the circumstances, but ensuring that no case fell out of the case management system altogether. Some respondents referred particularly to clinical negligence cases, which are often complex, as being the cases that were likely to benefit most from active judicial case management, so long as the judges had an understanding of the issues.

62. We welcome the continuing success of the case-flow management procedures under Chapter 43 and support the Sheriff Court Rules Council's recommendation to extend Chapter 43 to the sheriff court. From 2 November 2009 such a procedure will be available in the sheriff court.[29] Under our proposals, personal injury actions that remain within the jurisdiction of the Court of Session and are not transferred to the ordinary roll will continue to be subject to the case-flow model of Chapter 43. To progress a case justly and effectively however, case management by way of a timetable may be insufficient. Active judicial intervention may be necessary at

[27] Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2008 No.349

[28] Samuel (2007), *op. cit*., particularly Section 9.57. Parties concerned with procedural breaches may themselves request that the case be brought before the Court either by approaching the Keeper to put out a case By Order if the matter relates to a stage in the timetable, or by enrolling a motion if the matter is outwith the control of the timetable. However, respondents reported that it was the court administration's policy to refuse By Order requests from parties.

[29] See the Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009 (SSI 2009/285), which will come into force on 2 November 2009 and introduce a new procedure for dealing with personal injuries actions in the sheriff court.

specific points in the proceedings.[30] We therefore recommend that in exceptional cases active judicial intervention should be available in a Chapter 43 action at any stage, on application of either party or by the Court on its own initiative.

63. Those actions that are transferred out of Chapter 43 will be subject to active judicial case management. With that in view, we recommend that the grounds upon which a personal injury action may be appointed to proceed as an ordinary action should be extended to include the desirability of active judicial case management in the particular circumstances of the case.

Ordinary actions

64. Table 4 of section B of the Annex to this Chapter shows the numbers of ordinary actions registered and defences lodged in the Court of Session in 2008. 1,035 actions were initiated under ordinary procedure.[31] Defences were lodged in 388 cases, about 38% of those initiated.[32] Of the defended cases, 163 (42%) were actions for damages, 106 (27%) were personal injury actions that were transferred out of Chapter 43, and 52 (13.5%) were 'other actions - miscellaneous'. The only other classes of defended actions of any numerical significance on the ordinary roll are actions for interdict (18 or 5%) and actions relating to land or heritable estate (28 or 7%).

65. On the classification set out in Table 4, most of the cases subject to active judicial case management on the ordinary roll will be in the categories of 'actions for damages', 'other actions-miscellaneous' and 'personal injury (clinical negligence) actions'. As we explain in Chapter 4, we estimate that if the privative jurisdiction of the sheriff court is raised to £150,000, as we recommend, the Court of Session will retain about 36% of the existing level of first instance business under the ordinary procedure.[33] This will create capacity for active judicial case management of the actions remaining, including the more complex cases transferred out of Chapter 43.

Family actions

66. Table 3 of section B of the Annex to this chapter shows the numbers of family actions registered and defences lodged in the Court of Session in 2008. 222 family actions were raised and defences were lodged in only 31 cases. Most of the family

[30] See E Samuel (2007), *op. cit*, sections 9.60 to 9.64. There were calls for active judicial case management within case-flow management particularly with regard to asbestos related injuries. Respondents referred to the case management powers under the Civil Procedure Rules in England and Wales, which were designed to eliminate blanket denials by requiring defendants to set out the factual grounds or legal arguments on which denial was based.

[31] This figure does not include actions initiated under Chapter 43.

[32] Some defences lodged in 2008 related to actions initiated in 2007, while defences are likely to be lodged in 2009 for some actions that were initiated in 2008. The percentage of cases which are defended is therefore only an approximation.

[33] This calculation takes into account the abolition of actions of adjudication for debt and adjudication in security. The relevant sections of the Bankruptcy and Diligence Etc (Scotland) Act 2007 (sections 79 and 172) are not yet in force.

actions were for simplified divorce. Most of those that were defended were actions for divorce.

67. We received only one consultation response on the subject of family actions in the Court of Session. Our respondent suggested that any attempt to impose case management might be counter-productive. We are not persuaded that that is likely. In our view, active judicial case management should be introduced in the Court of Session for defended family actions, with judicial continuity as an essential element. Like active judicial case management elsewhere, however, the degree of judicial intervention required will depend on the case. It will be open to parties to make representations at the initial case management hearing as to the steps that are likeliest to bring the dispute to a just and expeditious resolution.

Judicial Review

68. We set out our recommendations in relation to applications for judicial review in Chapter 12.

Petition procedure and specialised forms of action

69. Our proposals for a new general model for case management in the Court of Session apply to all ordinary actions and to all actions under petition procedure. We consider that the distinction between ordinary actions and petitions could be done away with, since the essential procedural elements of the two types of action are the same: there is a writ containing an application to the Court to make an order; the writ must set out the names of other parties who have an interest in the application, the facts on which the application is based and the legal justification for the order desired; the Court gives its authority for the writ to be served on the other parties; the other parties have a specified time in which to respond to the writ; and in the absence of any response it is open to the originating party to ask the Court to make the order requested. This should be the standard initial procedure for all actions. If the action is defended the case will be allocated to a judge who will decide what further procedure is necessary.

70. The Rules of Court presently contain a large number of chapters containing special provisions for particular types of action, some of which involve their own case management regimes for example, actions relating to intellectual property under Chapter 55, and admiralty actions under Chapter 46. It is likely that it will be appropriate to continue to have specific rules for some types of action, which would supplement the standard initial procedure. There is, however, considerable scope for reducing the number of special procedures and for a greater degree of standardisation. We recommend that the Civil Justice Council for Scotland (CJCS) that we recommend should be established should, as part of its comprehensive review of the rules of court, address the amendments that would require to be made to abolish the distinction between ordinary and petition procedure in the Court of Session. All actions in the Court of Session should be initiated by a single document

known as a writ and, in the event of the action being defended, the standard term of 'defences' should apply to all forms of procedure. Provision would continue to be made for counterclaims, third party notices and minutes by interested parties and interveners. The CJCS should also examine the need to modernise the terminology used in the rules, both in the Court of Session and in the sheriff court. Respondents, particularly court users, have drawn attention to the use of archaic terms which need to be explained or 'translated' to clients. This modernisation would not necessarily involve adopting the terminology used in other jurisdictions, although it might be useful to look at how other jurisdictions have taken steps to modernise and simplify their court rules to make them more accessible. We are also of the view that, apart from proceedings which are exclusive to either court, the terminology that applies to proceedings in the Court of Session and in the sheriff court should be the same. There is no good reason why an action in the Court of Session should be brought by way of a summons containing conclusions, and an action in the sheriff court by way of an initial writ containing craves.

Case Management in the Sheriff Court

Actions before the sheriff

71. For the reasons that we give in Chapter 4, we recommend that jurisdiction in civil actions in the sheriff court be shared between sheriffs and district judges. Sheriffs will have jurisdiction to hear all civil business in the sheriff court. District judges will have jurisdiction to hear housing actions, actions for payment of £5,000 or less, referrals and appeals from children's hearings, and will have concurrent jurisdiction with sheriffs in family actions. District judges hearing family actions may deal with financial matters of unlimited value. Our reasons for recommending concurrent jurisdiction in family matters are explained more fully below. Financial matters and child care and contact matters are frequently closely interlinked. District judges require to have unlimited jurisdiction in family matters in order to meet our twin objectives of offering litigants the choice of prioritising either specialist knowledge or local access, and giving the judge full ownership and management of the case.

72. We recommend that, with the exception of personal injury actions, all civil business for which the sheriff has jurisdiction - that is to say, all ordinary cause actions, summary applications, petitions for adoption, applications relating to personal and corporate insolvency, contentious commissary actions and fatal accident inquiries – will be heard by designated sheriffs and be subject to their active case management. It will be open to the sheriff principal to designate sheriffs to categories of court business as the need arises. We expect that most sheriffs will be designated in one or more specialist areas and that it will be open to sheriffs, by way of career development, to apply for designation in a different area from time to time, providing they have sufficient experience in that area to case manage efficiently.

73. We agree with those respondents who regarded judicial continuity as critical to efficient case management. We therefore recommend the introduction of a docket system in the sheriff court on the basis that we have already described.

74. We recommend that actions and other court proceedings that are under active judicial case management will proceed on the lines that we have described. We consider that there will be no need to retain the distinction between ordinary cause procedure and summary application procedure. If a summary application is to be opposed a notice of intention to defend and defences will be lodged as in an ordinary action. On the lodging of defences, the case will be allocated to a suitably designated sheriff. A case management hearing will be held two weeks after defences are lodged and will normally be conducted by telephone or video conferencing. It will be open to parties to request that the case management hearing takes place in open court.

75. At the case management hearing, the court will decide what form of case management is appropriate. Further case management hearings, if required, will be fixed by the sheriff, on his own accord or on the motion of either or both of the parties. Case management hearings will replace the present options hearings. The rules should provide (1) that the court will expect the case management hearing to be conducted by the solicitors having principal responsibility for the case and will expect them to be able to inform the court of the factual and legal issues in dispute and to propose further procedure; (2) that the court will expect the parties' representatives to have discussed these matters in advance of the hearing, to focus the issues and to agree, if possible, on further procedure, subject to the approval of the court; and (3) that the court will expect the parties to co-operate in exchanging information about witnesses and documents.

76. We propose that actions subject to the sheriff's jurisdiction may be raised in any sheriff court having jurisdiction, but may be transferred to a court where a suitably designated sheriff is resident; that procedural business should be conducted by email, telephone, video conferencing or in writing; and that there should be a presumption that any proof or other hearing will be heard in the court to which the action has been transferred, although parties may apply for the designated sheriff to hear the proof or debate at the local court, if court accommodation permits. A relevant consideration will be the cost to the parties and their witnesses of travelling to the court of the designated sheriff.

Personal injury actions under the sheriff's jurisdiction

77. We recognise that there are economies of scale in litigating personal injury actions in the Court of Session. We have welcomed the success of the Chapter 43 procedure and support the Sheriff Court Rules Council's recommendation to extend the procedure to the sheriff court so that litigants there can benefit from it. New

rules to this effect are due to come into force by Act of Sederunt in November 2009.[34] However we also acknowledge the benefits that accrue to litigants and personal injury practitioners in raising actions in a single central court where expertise exists and case law can be developed. The economies of scale and convenience for the skilled personal injury solicitors and advocates, who in the main are concentrated in the central belt, also confer clear advantages on their clients in terms of cost and access to specialist expertise. We have therefore recommended that an all-Scotland jurisdiction be conferred on a specialist personal injury court in the sheriff court. All personal injury cases with a value of over £5,000 may be raised in this court which, since it will have an all-Scotland jurisdiction, may sit in any sheriff court on cause shown. All actions raised in the specialist personal injury court would be initiated in Edinburgh Sheriff Court, where machinery for case flow-management and for monitoring compliance with the timetable would be used and where the court would normally sit.

78. When the Act of Sederunt comes into force, all personal injury actions other than summary causes will be subject to case-flow management with a standard timetable.

79. We recommend that all substantive hearings in personal injury actions proceeding under case-flow management be heard by a designated personal injury sheriff, who will also deal with motions to vary the timetable or other procedural business.

80. We recognise that compliance with a timetable may sometimes be insufficient to ensure that a case progresses justly and effectively, and that active judicial intervention may be required to make it work. We therefore recommend that active judicial intervention may be introduced at any stage in the procedure on the application of either party or by the court on its own initiative. If the application is granted the case will be transferred to the docket of a specialist personal injury sheriff.

81. In the Court of Session special procedures apply to clinical negligence actions under which an application may be made on commencement of proceedings for the case to be transferred out of Chapter 43. The application is dealt with on the papers. The new procedure for personal injury actions in the sheriff court makes similar provision for clinical negligence actions in the sheriff court.[35]

[34] Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009 (SSI 2009/285)
[35] Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009 (SSI 2009/285), Rule 36.C1.

Family actions

Responses to the Consultation

82. The Consultation Paper did not ask any questions specifically about family cases, but there were a significant number of responses from practitioners, groups and individuals who had an interest in this field. The written responses and meetings with family practitioners revealed a fairly consistent view about the problems with the current system and what is needed to improve it. Concerns centred round the adverse effect of criminal business on the programming of family cases and difficulties caused by a lack of judicial continuity. Judicial continuity and consistency in family cases were considered by many to be absolutely essential. Lack of knowledge of the case and the inconsistent approaches of different sheriffs could increase parties' anger and exasperation, especially if sensitive information had to be repeatedly provided. Many believed that sheriffs specialising in family cases needed an understanding of family dynamics and the issues surrounding separation, abuse etc, as much as expertise in black letter law. Inquisitorial case management was proposed by many as the way to reduce the number of actions going to proof and to reduce costs by ensuring early disclosure with regard to financial matters and early focusing of the issues in dispute. There was also support for greater judicial control over the use of expert evidence. For situations where a hearing is required, it was suggested that specialist sheriffs should travel between the courts and/or use video-conferencing, particularly for procedural matters.

83. There was widespread recognition of the benefits of mediation and family support services in the great majority of cases, with the generally recognised caveat that mediation is not appropriate where there is domestic abuse or threats of violence. Many practitioners considered that the court should be the last resort once parties have exhausted efforts to resolve the issues by way of mediation, negotiation or collaborative law.[36] Parenting classes or other public legal education on issues arising on divorce or separation were also thought to have a role to play.

Balancing the demand for specialisation with the need for local access

84. The responses reveal a desire both for a specialist service for family cases and for access to justice in family cases to be provided locally. Judicial continuity and an interventionist approach from the court are seen by many respondents as very important and many believe that these can best be achieved by having a specialist judiciary. Local access is also seen as important in order to ensure, for example, that in Child Welfare Hearings the parties do not have to incur significant travel costs when attending court.

[36] Collaborative law is defined by the Scottish Collaborative Family Law Group as a process where "both parties to the divorce retain separate, specially trained lawyers whose only job is to help them settle the case. If the lawyers do not succeed in helping the clients resolve the issues, the lawyers are out of a job and can never represent either client against the other again. All participants agree to work together respectfully, honestly, and in good faith to try to find win-win solutions to the legitimate needs of both parties." See the SCFLG's website at www.scottish-collaborativelawyers.com

85. There is a tension between these two desires. There would be significant challenges in providing a specialist service in all the sheriff courts in Scotland. There are also potential disadvantages to attempting to do so, in terms of the loss of flexibility in deployment of judicial resources and the risk of wasting court and judicial time. In the smaller outlying courts there is insufficient volume of business to justify a specialist sheriff. The solution suggested by a number of respondents, of having specialist sheriffs travelling to a number of different courts, is impractical and inefficient. For example, it is simply not a good use of resources to have a specialist sheriff travel to an outlying court to deal with a single Child Welfare Hearing which may last only 15 minutes. In addition, cases frequently do not go ahead at the last minute, which could mean a completely wasted journey for a specialist sheriff who has travelled to the court to hear the case. There would also be difficulties in providing accommodation for a specialist sheriff in a court where there is only one courtroom.

86. We believe that our proposal for a concurrent jurisdiction for sheriffs and district judges in family cases offers a practical and effective way of "squaring the circle" and easing the tension between the desire for specialisation and the need for local access to justice. We propose that all family actions would continue to be raised at the pursuer's local court, but parties will be able to request that the case is dealt with by a designated family sheriff rather than by the district judge at the court where the action has been raised. They will have the choice of prioritising either specialist knowledge or local access.

Judicial continuity and case management in family cases

87. On lodging the initial writ the pursuer will specify a preference for a district judge or a family sheriff. If the case is defended it will be allocated to the docket of a particular sheriff or district judge. This will provide the judicial continuity and interventionist approach that respondents consider so important, which we agree is key to dealing effectively with family cases.

88. If the case involves an application for urgent interim orders, it will be dealt with by an available sheriff or district judge and will then be transferred to the docket of either a family sheriff or a district judge as requested by the pursuer. A pursuer may request that an application for interim orders is dealt with by a specialist family sheriff but may then have to travel to a court where such a sheriff is sitting unless the urgent application can be dealt with by video or telephone conference.

89. We recognise that the flexibility that we propose in enabling the pursuer to chose the court in which to litigate might be used to gain tactical advantage, particularly in cases where the specialist family sheriff was based at some distance from where the parties reside and where there was an inequality in the parties' resources. A defender may have legitimate reasons for taking a different view from

the pursuer as to whether the case should be heard by a family sheriff or a district judge. Therefore, we propose that it should be open to the defender at the first case management hearing to submit that the case should be transferred from the family sheriff to a district judge or vice versa.

90. In cases allocated to the docket of a family sheriff there would be a presumption that all procedural business would be conducted by telephone or videoconference (provided the parties consent) and that substantive hearings would take place in the court in which that sheriff sits. If there were special circumstances which made it unreasonable to expect parties or witnesses to travel to that court, arrangements could be made for a hearing to take place in a more convenient court or other venue. In some areas there may be scope for the court to make use of other suitable accommodation such as tribunal hearing rooms.

91. In cases in which issues relating to the welfare of children are in dispute the first case management hearing would also fulfil the function of a Child Welfare Hearing. At present these are oral hearings and the attendance of the parties is mandatory. Where a case is allocated to a district judge Child Welfare Hearings could continue to take place on that basis. Child Welfare Hearings before a specialist family sheriff are more problematic. It might not be practicable for parties to attend in person at a Child Welfare Hearing before the family sheriff. We consider that most Child Welfare Hearings before the sheriff could be conducted by videoconference although there may be some cases in which personal attendance may be necessary. Other cases in which an oral hearing might be required would be those in which a child wishes to be heard.

92. In England and Wales a pre-application protocol has been in place since 2000 for family proceedings where there is a claim for periodical payments or a lump sum.[37] The protocol emphasises the "obligation of parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues" and stipulates that "Parties must seek to clarify their claims and identify the issues between them as soon as possible. So that this can be achieved they must provide full, frank and clear disclosure of facts, information and documents which are material and sufficiently accurate to enable proper negotiations to take place to settle their differences. Openness in all dealings is essential." We endorse those sentiments. We do not consider it necessary to introduce a formal pre-action protocol for family proceedings in Scotland, but believe the same result can be obtained by the sheriff or district judge taking a firm approach and making the requirement for full and early disclosure clear at the first case management hearing. Active case management throughout the case should include firm action to deal with failure to comply with time limits and control of the use of expert evidence.

[37] See the Family Division Practice Direction, Pre-Application Protocol, 25 May 2000, available at http://www.hmcourts-service.gov.uk/cms/937.htm.

Programming of family business

93. It will be important for sheriffdom business managers to consider, in consultation with their sheriff principal, how family cases should be programmed in order to meet some of the concerns expressed by respondents about delays in starting or interruptions in civil cases due to the demands of criminal business. In the larger courts, where some sheriffs will be designated as specialists in family work, it should be possible to programme family business so that it is kept separate from criminal work. This is already being achieved in the larger courts and should be possible to achieve in other courts where there are several sheriffs and courtrooms. In the smaller courts there may be some challenges in programming a proof likely to take more than a single day, but such cases are not likely to be common. One of the reasons given by sheriffdom business managers for normally allocating no more than one day to a proof was that in practice very few proofs actually proceed. While this is understandable, we do not consider that it is generally good practice. With active case management and judicial continuity, the number of cases that do proceed to proof may further reduce. In addition, where a proof is required the issues should be better focused, and the judge will have powers to ensure that it proceeds expeditiously. It should therefore be possible to predict with greater accuracy how long a case is likely to take and to programme it accordingly so that it is heard at one sitting.

94. In courts where the resident judicial officer is a district judge, who will also be dealing with summary criminal business, it will be desirable to set aside in the court programme specific days or half days for the conduct of civil business, in particular family actions. When such days or half days are programmed will depend on the volume of cases, but where practicable criminal business in courts where there is only one court room should not be programmed for those days. Deferred sentences should not be fixed for days or parts of days programmed for civil business.

Judicial training for family cases

95. Many respondents considered that an understanding of the dynamics of family disputes and domestic abuse and knowledge of child development were as important as good knowledge and experience of the relevant law for judges dealing with family cases**.** We recommend that a forum of family sheriffs and district judges be established so that knowledge and experience can be shared and issues of common concern discussed, and that district judges should receive appropriate training when they are appointed.

Children's referrals

96. Family law practitioners, including those who specialise in children's hearings, were generally of the view that children's hearing referrals should be dealt with by a sheriff rather than a district judge.

97. Our experience is that some referrals are formal in nature, for example, when a case is referred to the sheriff because the child is too young to understand the grounds of referral. A large proportion of referrals are "settled" effectively by discussion or negotiation between legal representatives and the Reporter leading to a softening amendment of the statement of facts, thus avoiding the need for proof. A significant proportion of referrals are also, in effect, summary criminal trials, where the ground of referral is that the child has committed or is the victim of an offence, and that is disputed. We consider that the objective of dealing with children's hearing cases expeditiously and effectively can be achieved as well by district judges as by sheriffs. Most cases are fairly straightforward with no complex factual or legal issues. They could easily be dealt with by a district judge. In the first instance all appeals and referrals from children's hearing should be allocated to a district judge. There are a small number of complex or lengthy cases more suitable for determination by a sheriff. If these can be identified at the outset by the sheriff clerk, in consultation with the Scottish Children's Reporter Administration (SCRA) and the sheriff principal, they may be allocated to a sheriff. Otherwise there should be a procedure for transfer of a case by the district judge to the sheriff, after consultation with the sheriff principal, should it prove more complex than it seemed at the outset.

98. Family law practitioners and SCRA saw advantages in more active case management in complex or potentially long running cases. The practice in Glasgow of allocating complex referral cases to sheriffs experienced in this area of practice is favoured by the Association of Children's Hearing Practitioners. Children's hearing proceedings have their own set of rules,[38] which do not contain much in the way of provision for detailed case management. By contrast, the rules for adoption cases[39] are supplemented by practice notes designed to encourage firm case management by the court. They cover the setting and enforcement of a timetable, encourage the use of affidavits and joint experts and the agreement of evidence wherever possible, and require that all representatives who appear at a hearing are familiar with the case and have authority to deal with any points that arise. One respondent familiar with adoption cases and children's hearing referrals suggested that these practice notes and rules ensure that issues are focused at an early stage and that children's hearing referrals raising complex issues could benefit from a similar approach.

[38] Chapter 3 of the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997/291)(S.19). The Act of Sederunt also covers adoption, registration of child custody orders, registration of maintenance orders and applications under the Social Security Administration Act 1992.

[39] The adoption rules have recently been reviewed by the Sheriff Court Rules Council as a consequence of the Adoption (Scotland) Act 2007. See now the Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, which comes into force on 28 September 2009. The Sheriff Court Adoption Rules 2009 thus introduced provide *inter alia* for a mandatory preliminary hearing 6-8 weeks after the lodging of an application for an adoption order. At that hearing, if no response has been lodged the sheriff must dispose of the case or make such other order as he considers appropriate. If a response has been lodged the sheriff must ascertain from parties the anticpated length of any proof, fix a proof for 12-16 weeks hence, fix a pre-proof hearing for 2-6 weeks before the proof and order the lodging of answers and any other documents within 21 days. The sheriff may also make such other order as he considers appropriate for the expeditious progress of the case.

99. We recommend that the rules for children's hearing referral cases be should be amended and supplemented by practice notes to permit active case management in those cases that require it.

Curators, reporting officers, safeguarders and court reporters

Children

100. Civil proceedings involving or affecting a child frequently require that one or more people be appointed to safeguard the child's interests and/or to provide a report on matters affecting the child. There are a number of different types of appointment, both statutory and at common law, depending on the proceedings. [40] They may be required in family law proceedings where parties disagree on the arrangements for the care and upbringing of, and contact with, children; in children's hearings and referrals from children's hearings to the sheriff; in proceedings for adoption or for freeing for adoption; and in parental responsibilities order proceedings.

101. The work they do is very important. As well as helping to ensure that the child's interests are protected in the proceedings, they may also help to identify and narrow the issues in dispute and provide information to assist the court or the hearing in deciding the case. Concerns have however come to our attention about certain aspects of the systems for appointment and remuneration of people fulfilling these roles, about their qualifications and training, the standards of their work in some instances and about whether there is sufficient clarity and consistency about what is expected of them.

102. Reporters may be appointed by the court in family law cases under Rule 33.21 of the Ordinary Cause Rules (sometimes referred to as "bar" reporters). There are no formal requirements as to their qualifications and experience, and no consistent practice for identifying suitable candidates for appointment. In practice, although the rules do not require the reporter to be legally qualified, they are frequently solicitors with experience in child-related litigation who have applied to the sheriff principal to have their name included on a list kept by the court. Enquiries may be made of sheriffs familiar with the applicant, but often no further investigation into suitability is made. Appointments to individual cases are at the discretion of the sheriff.

103. There are no requirements in Rule 33.21 as to the form and content of the reporter's report. How much direction is given to the reporter is a matter for the sheriff's discretion. We have been told that reports can sometimes be of poor quality, very lengthy and not always well focused on the relevant questions. There are also

[40] A useful summary of the main different types of appointment in adoption, fostering and children's hearing cases is contained in Chapter 19 of A Plumtree (2003), C*hoices for Children in Fostering and Adoption: a discussion paper on legal issues for the Adoption Policy Review Group*, Scottish Executive.

no set parameters for reporter's fees. Where a solicitor is appointed, as is common practice, he or she will normally charge on a per hour basis at their usual charging rate. Where one or both of the parties is in receipt of legal aid, the fees, which can be quite considerable, will usually be paid by the Scottish Legal Aid Board (SLAB).[41]

104. One respondent thought that an accreditation process for reporters and provision of relevant training were essential. Another suggested that there may be a case for a specialist body of reporters, who need not necessarily be legally trained, to provide such reports for the court. This might result in cost savings, which could be utilised to resource other services.

105. Our attention was drawn to the report of the Adoption Policy Review Group (APRG)[42], published in June 2005. Their concerns included the lack of rules on the qualification and appointment of curators and reporting officers in adoption, freeing for adoption and parental responsibilities cases; inadequate training, support and monitoring of those appointed; and dissatisfaction with the level of fees paid by local authorities in relation to the time and work required in complex cases.[43]

106. The APRG's Report recommended a centralised national system to lay down the criteria and qualifications for appointment and to provide uniform training for curators, reporting officers, and safeguarders. Recruitment and individual case appointments would still be made locally, as might some aspects of management, but remuneration would be paid centrally and take account of the varying amounts of work required in individual cases. The Report suggests that appointment and training of children's panel members, which is run by the Scottish Government with substantial local input, could provide the model.

107. Safeguarders in the children's hearing system have also recently been the subject of examination and comment.[44] A research study[45] of the role of safeguarders

[41] In its Corporate Plan for 2009-11, SLAB says that it is working with the Scottish Government to develop a table of fees for curators and reporters. They propose to consult on the proposed table of fees with implementation planned for late 2009. In July 2008 SLAB issued guidance explaining the legal aid provisions as regards payment of curators *ad litem* and safeguarders. The guidance notes that there is at present no statutory payment mechanism for a person appointed to act as a curator *ad litem*.

[42] Adoption Policy Review Group Phase II Report (2005), *Adoption: better choices for our children*, Scottish Executive

[43] Each local authority is required under the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001/477) to maintain a panel of persons from whom curators *ad litem* and reporting officers may be appointed for the purposes of section 87(4) of the Children (Scotland) Act 1995 (parental responsibilities orders) and section 58 of the Adoption (Scotland) Act 1978 (adoption and freeing for adoption orders). Local authorities determine the qualifications and experience for membership of the panel, in consultation with the sheriff principal for their area, and are responsible for the payment to panel members of their expenses and "such fees and allowances as they think fit." Until 2005 the Convention of Scottish Local Authorities (CoSLA) had a scheme of recommended rates for such fees, but we understand that this has been discontinued and it is now up to each local authority to set their own scale. Anecdotal information suggests that some authorities offer a single flat fee in the region of £100-£200, while others offer a fixed appointment fee of around £200, but with additional fixed fees payable for written reports and attendance at court hearings.

[44] Each local authority is required under the Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001 (SSI 2001/476) to maintain a panel of person from whom safeguarders under section 41(1) of the Children (Scotland) Act 1995 (safeguarders at children's hearings or before

commissioned by the Scottish Executive concluded that the role carried out by the great majority of safeguarders was generally recognised to be valuable, but that alterations were desirable to improve the management of the safeguarding service. Changes considered necessary included greater consistency and openness in recruitment, training and monitoring; better remuneration commensurate with the work done; a dedicated core training programme; a more open and fair system for allocating safeguarders to cases; and some clarification about the safeguarder's role.

108. The recent consultation by the Scottish Government about the reform of the children's hearing system[46] sought views on a suggestion that safeguarders should be brought within the ambit of a new national body which the Government proposed to establish to undertake the functions currently delivered by SCRA, the Children's Panels and the Children's Panel Advisory Committees. The consultation paper noted that no provision currently exists to agree remuneration and best practice for safeguarders nationally, to deal with complaints or to monitor performance. The report on the responses to the consultation identified as one of its themes that national training, monitoring and payment systems would help improve and maintain standards, while noting the importance that respondents attached to safeguarders maintaining their independence. In May 2009 the Scottish Government announced plans to establish a new national body, the Scottish Children's Hearings Tribunal, with a bill to be introduced into the Scottish Parliament in autumn 2009. The draft Children's Hearings (Scotland) Bill has now been published. This provides *inter alia* that the Scottish Ministers may by regulations make provision for the establishment of a panel from which safeguarders are to be appointed, their qualifications, training, and payment.

109. Curators, reporters, reporting officers and safeguarders were also discussed in the report by the Research Working Group on the Legal Services Market in Scotland,[47] looking at whether the relevant rules could have potential implications for the Scottish legal services market. The report identified what it refers to as a "transparency issue" relating to the appointment of curators and reporters by the court and a "consumer protection" issue with regard to the charges made for their reports and other work. The Group concluded that there was a lack of common procedure across sheriffdoms for the appointments of curators and reporters and that the variation in charges could raise matters of public and consumer concern. They were unclear as to whether the system could be said to operate fairly for appointees or prospective appointees or in the public interest, given the lack of transparency or objective standards in the appointments procedure.

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the sheriff) may be appointed. Local authorities determine the qualifications and experience for membership of the panel, in consultation with the chairman of the children's panel and the sheriff principal for their area. They are also responsible for payment of expenses and "fees and allowances as they think fit" for safeguarders in the same way as for curators *ad litem* and reporting officers.

[45] M Hill et al (2002), *The Role of Safeguarders in Scotland*, Scottish Executive

[46] Scottish Government (2008), *Strengthening for the Future: A Consultation on the Reform of the Children's Hearing System*

[47] Scottish Executive (2006), *Report by the Research Working Group on the Legal Services Market in Scotland.*

110. It is clear from the various views and comments summarised above that there are some common issues of concern about the systems for appointment, training, management and payment of curators, reporters and safeguarders in all types of civil proceedings involving or affecting children. We recognise that the different types of appointee have distinct roles and that different types of proceedings will make different demands on the individuals appointed. However, there are sufficient similarities to suggest that there should be a consistent approach to recruitment and training. There would also be benefits in having a system of national standards for the work being done and which enabled best practice to be identified and shared more consistently across the country. Given the similarity of the roles, it also seems hard to justify the divergence between, on the one hand, the fees paid to safeguarders in children's hearing cases and to curators *ad litem* and reporting officers in adoption cases and, on the other hand, the fees which can be charged by solicitors acting as reporters in private family law cases[48].

111. It appears to us that the following are required:

- An open, fair and transparent system of recruiting panels of people from whom curators, reporting officers, safeguarders and reporters can be appointed by the court.
- Clarity and consistency as to the qualifications and experience required for each type of appointment.
- Rates of remuneration which reflect the actual work required to fulfil the remit of the particular appointment.
- Access to appropriate induction and training for people appointed to panels, as well as opportunities for continuing professional development and the sharing of good practice.
- Clarity for appointees as to what is expected of them. For some appointments this may be laid down in rules of court, for others it may be appropriate to have non-statutory guidance. In any event, the sheriff or children's hearing making the appointment should always ensure that the person appointed is clear as to what is required of them, if necessary by specifying this in detail in the order.
- A system for monitoring the quality of the work done and reports provided by appointees and for dealing with situations where they fall below the standard expected.

112. In order to achieve these outcomes it will be necessary for a number of different bodies to work together. The courts, the Scottish Government, local authorities, SCRA, SLAB and the legal profession all have an interest in these matters

[48] The contrast between the level of fees offered by the local authority to a curator *ad litem* and reporting officer who happened to be a solicitor, and what the solicitor wished to charge for the work carried out according to the table of fees for solicitors in the sheriff court, is highlighted in the note by Sheriff McCulloch on 12 November 2007 in the cases of *Dundee City Council -v- FD & Anr* (B319/06) and *Dundee City Council -v- VW* (B550/06 & B551/06). Sheriff McCulloch's note is available on the Scottish Court Service website.

and we recommend that they collaborate to develop systems which will meet these objectives. It may be necessary to consider whether there is a need to organise some matters on a national rather than on a local basis in order to improve standards and achieve consistency. The Scottish Government has recently announced proposals to set up a new national body to improve consistency and practice in the children's hearing system. It is not clear from the announcement whether the new body will, as proposed in the consultation paper, have responsibility for managing a single national panel of safeguarders, but it appears to us that the new national body could play a leading role in addressing many of the issues identified above.

Adults

113. In addition to the common law rules empowering a court to appoint a curator *ad litem* for an adult involved in civil proceedings who lacks capacity to manage his own affairs, there are provisions for the appointment of a safeguarder to an adult under the Adults with Incapacity (Scotland) Act 2000 and the Adult Support and Protection (Scotland) Act 2007. Responses from organisations with a particular interest in mental health and incapacity issues raised concerns about the lack of a clear procedure for the appointment of a curator *ad litem*, and uncertainty about the payment of safeguarders and curators in applications under these two Acts. There will be different considerations as regards the appropriate qualifications, training and experience of people appointed to these roles as compared with those involving children, but we think that the basic requirements of the systems of appointment, training and remuneration are the same as set about above. We recommend that the relevant organisations work together in a similar way to develop appropriate systems.

Expert evidence in family cases

114. Several respondents commented on the use of expert evidence in family law. We consider the question of the use of expert evidence generally, and make recommendations, in Chapter 9.

Information, family support and mediation services

115. Many respondents thought that parties in family law cases should have better information about family law and about the dispute resolution options available to them. Some suggested that parties should be required to attend an information meeting at which the option of mediation would be explained to them. A report by the National Audit Office in March 2007 found that family breakdown cases resolved through professional mediation are cheaper and quicker to settle, and deliver better outcomes.[49]

116. In Chapter 7 we consider the provision of information about dispute resolution options. Our general recommendations have particular relevance to family cases.

[49] National Audit Office (2007), *Legal aid and mediation for people involved in family breakdown*

117. The court has power under Rule 33.22 of the Ordinary Cause Rules, at any stage of the action, to refer an issue in relation to parental responsibilities or parental rights to a mediator accredited by a specified family mediation organisation. None of our respondents criticised the existence or operation of this rule, subject to the generally recognised caveat that a referral to mediation will not be appropriate in a case involving domestic abuse or threats of violence. On the contrary, most respondents supported the rule and there was a proposal that it should be extended to permit the court to make a referral to mediation of any issue arising in the course of a family action. We recognise that in family cases the court should sometimes take a more interventionist approach in either bringing about a resolution of the issues at its own hand or in encouraging the use of ADR, and we recommend that the current rule be broadened to allow referral to mediation of any matter arising in a family action. Guidance as to when a referral may be appropriate could be made available to sheriffs and district judges.

118. Any concerns our respondents had about mediation in family cases related mainly to the availability and funding of family support and mediation. We have concerns about the sustainability of services that rely on the use of unpaid volunteers. Child contact centres have a valuable role; but we are not convinced that they are sufficient in number or adequately resourced. They are a vitally important and safe but scarce resource which the court can use to promote or re-instate contact between children and absent parents.

119. The Justice 1 Committee undertook an inquiry into family support services in 2006/07. It appointed Mary Mulligan MSP as a reporter. Her report[50] dealt with couple counselling and family mediation services, children's and parenting services and family contact centres. It identified some gaps in provision and expressed concerns about funding. The Committee adopted the recommendations of the report and in February 2007 sought further information and assurances about funding and development of services from the Deputy Minister for Education and Young People. At that time responsibility for family support services had been transferred from Justice to Education Ministers and funding arrangements were also being modified. The Committee identified several matters that should be kept under review by the Parliament and made recommendations to that effect in its legacy report at the end of the Parliamentary session in April 2007.

120. It appears that neither the Justice Committee nor the Education, Lifelong Learning and Culture Committee has yet taken action on the Justice 1 Committee's final report, but pressure for progress continues. The Public Petitions Committee has had to deal with Petition PE1120 which calls for the Parliament "to urge the Scottish Government to review its family law policies and spending levels to ensure that

[50] Justice 1 Committee (13 Dec. 2006), *Reporter's report on the inquiry into the provision of family support services in Scotland*. Available at http://www.scottish.parliament.uk/business/committees/justice1/papers-06/j1p06-50.pdf

greater emphasis is attached to family mediation services and in providing more focused family support to children". The Scottish Government's Education Directorate has sent three letters to the Committee with information about current and projected levels of funding for family mediation services and about the Scottish Government's policies on family mediation and support services.

121. The Scottish Government provides funding to the national mediation and family support bodies and to the local family mediation services. It is satisfactory to see that the Government recognises the vital role these services play. We have concerns as to whether they can meet the demands upon them with their existing level of funding. We expect that there will be an increase in those demands with the rising incidence of family break-up and the additional pressures on families in the current financial climate. We recommend that the provision and funding of these services, and in particular of family contact centres, should be treated as a priority by the Scottish Government and kept under review by the Scottish Parliament.

Actions before the District Judge

122. In Chapter 4 we give our reasons for recommending that there should be a new judicial office of district judge within the sheriff court. We propose that the district judge would have jurisdiction in all actions with a value of £5,000 or less and in actions for recovery of possession of residential tenancies and mortgage repossession actions, and would have concurrent jurisdiction with the sheriff in family actions and referrals from children's hearings. The procedures for family actions and children's hearing referrals would be the same, whether the case was dealt with by a district judge or a sheriff. An important question arises as to the procedures that are appropriate for dealing with actions with a monetary value of £5,000 or less.

Responses to the Consultation

123. Respondents were generally in favour of new ways of dealing with low value cases. Some suggested that at least some, such as debt or consumer cases, might be better handled by a separate tribunal with specialist members. Later we discuss the possibility of a new forum for housing cases. In general, we are not convinced that the problems in low value cases are so intractable that they cannot be solved by procedural reforms in the sheriff court. We are persuaded that the handling of small claims and summary causes is unsatisfactory and must be radically reformed. A separate tribunal for consumer or debt cases would be expensive to set up and run. We are not convinced that it would necessarily be more efficient than a reformed procedure in the sheriff court.

124. Many respondents submitted that procedures for low value cases should be streamlined and made more accessible to party litigants, and that a more inquisitorial approach should be adopted. Several questioned whether it would be

appropriate to continue with two separate procedures[51] for cases under £5,000. The small claims procedure applies to monetary claims up to £3,000. It is intended to be quick and cheap to be convenient for party litigants. Summary cause procedure applies to claims for sums over £3,000 up to £5,000. In many respects the small claims and summary cause procedures are similar. Apart from the forms, the most significant differences are (a) that legal aid is not available for small claims cases and (b) that the expenses that can be awarded in small claims are limited.[52] We discuss the question of legal aid for cases for £5,000 or less in Chapter 14. We discuss the question of expenses later in this chapter.

A new simplified procedure

125. We think that it is unnecessary to have two different sets of procedures for cases for £5,000 or less. We recommend that there should be a single new set of rules for such cases. Since the limit of jurisdiction in summary causes was recently raised to £5,000, and because there has been no formal research on the impact of raising the limit, we think it premature to make any recommendation for a higher limit. In England and Wales the upper limit for the small claims track is £5,000. In a recent consultation by the Ministry of Justice, 94% of respondents agreed that it should remain at that level. The Ministry of Justice has agreed that it should.

126. The new rules for low value cases should be based on a problem solving or interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. In many respects the current small claims and summary cause rules reflect these aspirations, but they are not fulfilled in practice. One respondent commented that the small claims procedure, although intended to be an informal forum, has in practice operated much more formally than was originally envisaged, and that despite simplification of the rules in 2002 and the creation of a glossary of legal terms with plain English guidance for party litigants, the procedure remained complex and adversarial.

127. We recommend the new rules should be written in plain English and be as clear and straightforward as possible. The most difficult question is how to reconcile informality with procedural propriety. One respondent considered that the small claims procedure was a fudge between formal and informal resolution and that the sheriff had to perform two incompatible roles, mediatory and judicial. The sheriff is required, under both the small claims and summary cause rules, to "seek to negotiate

[51] Act of Sederunt (Small Claim Rules) 2002 No. 133 and Act of Sederunt (Summary Cause Rules) 2002 No. 132

[52] If the value of the claim is £200 or less, and the case has been defended to a judgment, there will normally be no award of expenses and any court fees paid will not be recoverable. If the value of the claim is between £200 and £1,500, and the case has been defended, the maximum amount of expenses which can normally be awarded by the court to the successful party is £150. If the value of the claim is between £1,500 and £3,000, and the case has been defended, the maximum amount of expenses which can normally be awarded by the court to the successful party is 10% of the value of the claim. The restrictions fly off if a defence is stated and not proceeded with - see Macphail (2006), *op .cit*, para 32.123

and secure settlement of the action between the parties."[53] If the case goes to a proof, the sheriff has to apply the normal rules of evidence and ensure that each party is given a proper opportunity to lead evidence and cross-examine witnesses.

128. The current rules contemplate that the sheriff will take a practical approach by trying to identify the issues in dispute and the possibility of compromise. From the comments of respondents and from our own experience, we think it is often not practical or appropriate for the sheriff to encourage settlement at the first hearing. Often the necessary information is not available because the substance of the defence has not yet been notified. At that point the parties may be in no mood to settle. This is particularly true of the pursuer who, on many occasions, will just have heard the nature of the defence which might include an attack on the pursuer's credibility. The pressure of business on the day may inhibit discussion. We therefore recommend that at the first hearing the district judge should decide what further information is required and what the next stage of procedure should be. He should be able to continue the case to a later date if he considers that to do so will enhance the prospects of achieving a settlement. There should be a permissive provision that will allow the district judge to assist the parties to reach a settlement at any point in the case, rather than a requirement that he should do so at the first hearing in every case.

129. The current small claims rules provide that a hearing shall be conducted as informally as the circumstances of the claim permit.[54] This provides scope for sheriffs to adopt differing approaches as they think fit while still maintaining the authority of the court. For example, the hearing may proceed as a discussion between the sheriff and parties, or as a proof at which witnesses are led and the court hears submissions from parties' representatives. We would envisage that that flexibility would continue under the new simplified procedure.

130. Even if legal aid is in principle available for cases of any kind or value, as we recommend, it is likely that there will be many party litigants in simplified procedure cases. We therefore consider that the simplified procedure should enable a party litigant, with the help of written explanatory guidance and/or support from an in-court or other advice agency, to initiate a claim or lodge a defence and conduct his case to a conclusion. Such a party should be entitled, with the permission of the court, to have his case presented for him by a suitable lay representative.

131. We recommend that the rules should be drafted for party litigants[55] rather than practitioners. They should describe in outline how the case will proceed; what approach the district judge will take in identifying the issues; how he will deal with questions of fact and of law; the oral evidence and documentation that will normally be required; the significance of time limits; the in-court advice service, if any, that is available; and the availability of other forms of dispute resolution. The rules

[53] Summary Cause Rule 8.3 (2) (b) and Small Claim Rule 9.2 (2) (b)
[54] Rule 9.3(2)
[55] See Section C of the Annex to this chapter for a more detailed description of our recommendations about the simplified procedure.

themselves should specify the circumstances in which the judge may grant a decree by default or a decree in absence, dispose of the case at the first hearing, or continue it for negotiations or mediation. The rules should also entitle the judge to permit lay representation and to hold any hearing in chambers.

Actions which include a claim in respect of personal injury

132. At present any action for damages for personal injury for up to £5,000 is dealt with as a summary cause action. We consider that such an action should be raised under the simplified procedure; but in keeping with our priority of flexibility we recommend that the rules should provide that such an action can be transferred to the ordinary court or to the specialist personal injury court, if it raises complex or novel issues.

Housing cases

133. Our Consultation Paper did not seek views on housing cases specifically, but numerous respondents raised the topic. Their main concerns were that in the larger courts such as Glasgow, the sheer volume of business, particularly in actions to recover rent arrears, puts the court under undue pressure of time, and that it was not an efficient use of court and judicial time to have rent arrears cases calling repeatedly simply to monitor payment arrangements. Respondents also commented that tenants do not seek or accept advice early enough and may not fully understand their obligations or know where and how to get help. There was a view that there was a lack of co-ordination between agencies involved in housing provision and in supporting tenants; that problems with applications for housing benefit are a major cause of difficulty; and that some landlords raised actions without having tried to reach agreement about repayment of arrears. Other respondents identified the practical problems that arise from the fact that in rent arrears cases the tenant is more often than not unrepresented; the unsuitability of summary cause procedure for such cases; the inexperience of some sheriffs, especially part-time sheriffs, in housing law; and the difference in treatment between rent arrears cases and mortgage repossession cases, the latter being dealt with under ordinary procedure with formal pleadings.

A separate forum for housing cases

134. One of the most commonly suggested options was that housing cases should be dealt with in a specialist forum. Several respondents mentioned the Private Rented Housing Panel (PRHP) as a possible model for a new tribunal. Others thought its remit could encompass a wider range of disputes about residential property. There was a strongly argued contrary view that housing cases should be retained within the sheriff court because of the importance of the loss of a home as a result of eviction. The PRHP was created[56] from the former Rent Assessment Panel. It came into existence in September 2007. It deals with disputes between landlord

[56] By virtue of section 21 of the Housing (Scotland) Act 2006

and tenant in the private rented sector. Its jurisdiction is limited to fixing rents in assured, regulated and short assured tenancies and dealing with disputes over the landlord's repairing obligations under Section 13 of the Housing (Scotland) Act 2006. It is difficult for us to judge how the PRHP would cope with a greatly enlarged jurisdiction. We therefore looked at how Ireland and England deal with similar questions.

135. In Ireland the Residential Tenancies Act 2004 made significant reforms to the law regulating private/rented housing. It introduced a measure of security of tenure, specified minimum obligations for the parties and provided for the establishment of a Private Residential Tenancies Board (PRTB) to resolve disputes, operate a system of tenancy registration and provide information and policy advice. The PRTB's dispute resolution function covers matters such as the refund of deposits, breaches of tenancy obligations, termination of tenancies, rent arrears and the amount of the rent.

136. The PRTB's latest report shows that it has still to overcome some of its early problems. The Chairman says in his foreword that it became increasingly apparent during 2007 that the PRTB was understaffed, "given the unanticipated levels of registrations, dispute applications and, crucially, a very high volume of telephone queries". These had created a substantial backlog. The Chairman also comments that the PRTB is concerned that "a minority of tenants may be abusing the PRTB's dispute resolutions mechanisms in order to remain in their rental accommodation without paying rent, while their case is being processed through the PRTB"; a problem that we assume is worsened by the backlog.[57]

137. In England, in 2005 the Department for Constitutional Affairs asked the Law Commission to undertake a wide-ranging review of the law and procedure relating to housing disputes and to make recommendations for reforms that would "secure a simple, effective and fair system". The Commission published an issues paper in March 2006 that set out the problems it had identified. It discussed a wide range of options, including a co-ordinated system of giving advice in individual and collective housing problems on ways of resolving the dispute ("triage plus"), management responses, ombudsmen, mediation and adjudication. In relation to the last of these, the Commission noted that the current structure for formal determination in England and Wales includes both a generalist element, the county court, and a specialist element, the various specialist tribunals that make up the Residential Property Tribunal Service (RPTS). The Commission accepted that there should be a formal adjudicatory body to provide authoritative interpretations of the law, hear appeals and comply with ECHR requirements. It identified the strengths of the current structure as being independence, procedures based on transparency and fairness and the production of authoritative and accurate outcomes. It also identified its weaknesses as being cost, delay, inequality of arms and failure to consider underlying issues.

[57] PTRB Annual Report and Accounts 2007.

138. In May 2007 the Commission published a consultation paper specifically on the question of whether there was a need for greater specialisation in formal adjudicatory processes in housing disputes, and therefore whether there should be a transfer of jurisdiction in certain types of housing dispute from the county courts to the RPTS in the context of the new Tribunals Service. The consultation paper proposed the transfer of jurisdiction to the RPTS in *inter alia* claims for possession and disputes about disrepair. Homelessness statutory appeals and housing and homelessness judicial reviews would be transferred to the Upper Tribunal of the Tribunals Service. The case for the proposal was based on the desirability of specialisation, reduction of delays and greater consistency in decision-making and practice.

139. There was significant support for the proposal but also significant hostility. The Association of District Judges and the Civil Justice Council argued that housing law disputes were too important to be decided by a tribunal, and that the courts were the only adequate forum for resolving them. There were also concerns about whether the RPTS could be adequately resourced for the additional case load. The Commission's final conclusions drew back from recommending a significant transfer of jurisdiction in housing cases to a tribunal. Instead it proposed some re-balancing of jurisdictions as between the county court and the First-tier and Upper Tribunals, and modernisation of procedural rules in the county courts. It thought that the possibility of further reform in the longer-term should remain open and that the creation of a more specialist jurisdiction should remain a long-term goal.

140. In its response to the Law Commission's report the Ministry of Justice noted the recommendation to transfer jurisdiction for a number of different types of cases, including stand-alone disrepair cases, from county courts to tribunals. The Ministry had already announced that it would transfer dispute resolution and other proceedings under the Mobile Homes Act to Residential Property Tribunals; however, it was not satisfied that a case had been made out for any other transfers.[58]

141. We are not convinced that there is a sufficiently strong case for the transfer of responsibility for housing cases out of the court system, whether to a newly-established tribunal or to an expanded PRHP. We were impressed by comments from respondents representing both landlords and tenants to the effect that housing matters should remain within the jurisdiction of the sheriff court. Improvements in procedure may be required, but a dispute that can lead to the eviction of a family from its home requires a level of judicial consideration that, in our view, can best be provided by the courts. There would be very significant costs involved in either establishing a new tribunal, or expanding the jurisdiction of the PRHP. We consider that additional investment of that kind would be better applied to (a) the provision and co-ordination of advice and representation for parties to housing disputes; and (b) improving the procedures and working practices of the sheriff court in such cases. We make recommendations about advice and representation below. The

[58] Announcement made on 16 July 2009, www.justice.gov.uk/news/announcement170609b.htm

recommendations that we have made about a new simplified procedure apply equally to housing cases, with some modifications that we shall discuss.

Advice and representation in housing cases

142. Many respondents thought that there should be better provision of advice and assistance for parties involved in housing disputes and greater availability of legal aid or assistance by way of representation (ABWOR) to bring about a better level of legal representation in the interests of the parties and the court.

143. It is beyond the scope of the Review to examine the whole landscape of advice provision in Scotland. There are many sources of information, advice and help for those who are in difficulties with rent or mortgage payments or are involved in housing disputes generally. Money Advice Scotland, for example, has a database of advice agencies providing free, independent advice about managing debt, and provides contact details for Citizens Advice Bureaux and debt advice centres throughout Scotland.

144. There are also relevant statutory duties. Local authorities have a statutory duty under section 2 of the Housing (Scotland) Act 2001 to ensure that

> "advice and information about—
> (a) homelessness and the prevention of homelessness, and
> (b) any services which may assist a homeless person or assist in the prevention of homelessness,
> is available free of charge to any person in the authority's area."

145. The Scottish Ministers have power to issue guidance as to the form and content of such advice and information and there are national standards on the point.[59] Local authorities vary in their approaches to this duty. North Ayrshire Council's website, for example, includes a link to its Homelessness Assessment Prevention and Advice service which offers specialist housing advice and information to anyone in North Ayrshire who is at risk of homelessness, or is homeless. It also offers assistance on more general housing questions. Aberdeenshire Council's website provides a Homeless Advice and Information leaflet with contact details for support services and a leaflet describing its Housing Support Outreach Service which "gives support to people who have been assessed as having difficulty coping with their tenancy or other accommodation."

146. Good advice is available from these many different sources; but it is our impression that there is a lack of co-ordination among them and there may well be gaps in some areas, including housing advice. There has been a strategic review by the Scottish Executive of the delivery of legal aid, advice and information.[60] The

[59] Home Point: Scottish National Standards and Good Practice for Housing Information Services.
[60] Scottish Executive (2004), *Strategic Review on the Delivery of Legal Aid Advice and Information: Report to Ministers and the Scottish Legal Aid Board*

Scottish Executive's publication *Advice for All*[61] proposed in 2005 that there should be a national co-ordinating body "with responsibility proactively to plan, co-ordinate, support and develop civil PFLA [publicly funded legal assistance] in all its forms". The new powers available to SLAB under the Legal Profession and Legal Aid (Scotland) Act 2007 seem to us to be a good basis for future development in this area.

147. The problem of tenants and owner occupiers who are in difficulty but fail to seek or accept help at an early enough stage is of major importance. We recommend that the Scottish Government should develop and extend in-court advice services, including services offering specialist help in housing matters,[62] as part of a broader strategy to improve and co-ordinate the provision of publicly-funded civil legal assistance and advice generally. We discuss public legal education and in-court advice services more fully in Chapter 11.

148. There seems also to be a relatively low level of representation of defenders in housing cases. The tables in Section D of the Annex to this chapter show that only a small proportion of ordinary cause and summary cause heritable cases are defended (on average 2.23% and 4.89% respectively). The figures for summary cause notices of intention to appear suggest that, on average, less than 1 case in 20 rent arrears cases is defended. Whether or not the defender is represented in these cases is not recorded in the Scottish Court Service's case management system, but there is evidence to suggest that, in rent arrears cases at least, the defender is more often than not unrepresented, and more often than not faces a legally represented opponent.[63] Some of the advice services offer representation at court, but these are not available in all courts. The services that do exist appear already to be at full capacity. It is therefore likely that there is a significant unmet need for representation in housing cases. We have been told of sheriffs who make strenuous efforts to give party litigants every opportunity to present their case; but this is not always easy to achieve. Good quality representation of both parties in housing cases is the best assurance of good procedure and a reliable result. We recommend that legal aid should continue to be available for housing cases, but we believe that there is also considerable scope for representation by specialist lay advisers.

149. Some respondents called for the introduction of a pre-action protocol for rent arrears cases. More recently, some have suggested that there should be a pre-action protocol for mortgage repossession cases. We discuss pre-action protocols in

[61] Scottish Executive (2005), *Advice for All: Publicly Funded Legal Assistance in Scotland-The Way Forward-A Consultation*

[62] It is satisfactory to note that this is already under way. In May 2009 SLAB launched a Scottish Government funded initiative to enhance legal advice services for people affected by the economic downturn and dealing with related issues such as repossession and debt. Organisations such as advice agencies, charities, law centres and firms of solicitors were invited to apply for grants to provide new or enhanced legal advice or representation services. The aim of the grants programme is to provide more legal advice and representation for people facing repossession and other problems such as debt, including making relevant services at court available nationally.

[63] Sue Morris et al (2005), *Uniquely Placed: Evaluation of the In-court Pilots*, *Phase 1*, Scottish Executive Social Research. One of the key findings of the evaluation of the In-Court Advice Pilots was that 78% of clients of the pilots faced legally represented opponents in court.

Chapter 8 and conclude that there is no need for a formal pre-action protocol in either rented housing or mortgage repossession cases, given the legal protections available to tenants and owner occupiers.

Procedure in housing cases

150. One of the main criticisms of summary cause procedure in housing cases was that it is unsuited to the importance and complexity of the subject matter. All summary actions for recovery of possession of heritable property have to call in court, even if no intention to defend has been lodged. The summary cause procedure is intended to be quick and informal. However before granting the landlord an order for possession on the grounds of non-payment of rent or anti-social behaviour[64] in tenancies which are covered by the Housing (Scotland) Act 2001,[65] the sheriff has to be satisfied that it is "reasonable" to do so.[66] In these cases the sheriff has to have regard to the nature, frequency and duration of the conduct complained of, the extent to which it is caused by an act or omission of someone other than the tenant, and any action taken by the landlord before raising the proceedings with a view to securing the cessation of the conduct. In rent arrears cases, these requirements mean that the court should consider not only how the arrears arose and what the tenant has done to reduce them, but also whether there have been delays on the part of the local authority or Department for Work and Pensions in processing any housing benefit claims, and what action the landlord has taken to recover the arrears before raising the action.

151. Housing legislation provides important protections for tenants. Some respondents with considerable experience of housing matters suggested that the lack of formality in summary cause procedure and the fact that the summary cause forms do not require much detail to be provided about the circumstance of the case are incompatible with the complexity of housing law and do not support the protections given by the legislation. They suggested that the procedure is against the interests of the tenant. Respondents reported that some sheriffs do allow continuations of the first hearing for further information to be provided or for the tenant to seek advice, or they may set a date for a proof, but that others are more inclined simply to grant the order on the basis that the facts are clear enough.

152. Mortgage repossession cases are normally dealt with under ordinary cause procedure, with its more formal requirements. An initial writ sets out the factual and legal basis of the pursuer's case. In an action relating to the calling up of a standard security or a notice of default under the Conveyancing and Feudal Reform (Scotland) Act 1970, the pursuer is obliged to specify anyone who appears to the

[64] These are the most commonly used grounds, but there are others – see section 16 and Schedule 2 of the Housing (Scotland) Act 2001. A separate statutory scheme applies to private sector tenancies.
[65] That is Scottish secure tenancies, where the landlord is a "social landlord" i.e. a local authority, housing association or registered social landlord - see section 11 of the Housing (Scotland) Act 2001 for the full definition. The majority of cases on the heritable rolls of the sheriff court relate to such tenancies.
[66] Section 16 of the Housing (Scotland) Act 2001

pursuer to be entitled to apply for an order under section 2 of the Mortgage Rights (Scotland) Act 2001. The 2001 Act gives significant protections to debtors. The court has a broad discretion to suspend the exercise of a creditor's rights to such an extent, for such period and subject to such conditions as it thinks fit, if it considers it reasonable to do so in all the circumstances. In making its decision, the court has to have regard to:

> "(a) the nature of and reasons for the default,
> (b) the applicant's ability to fulfil within a reasonable period the obligations under the standard security in respect of which the debtor is in default,
> (c) any action taken by the creditor to assist the debtor to fulfil those obligations, and
> (d) the ability of the applicant and any other person residing at the security subjects to secure reasonable alternative accommodation."[67]

153. We agree that some aspects of summary cause procedure are not appropriate in actions for recovery of possession of rented property. We consider that it makes sense for actions by creditors for recovery of possession of owner-occupied property to be dealt with by the same procedure as those by landlords for recovery of possession of rented property. We consider that the new simplified procedure, with certain modifications that we shall describe, should apply to all housing cases.

154. We agree that the procedural protections available to defenders in rented housing repossession cases should be of the same order as those available to defenders in mortgage repossession cases. In both types of case the judge should be given sufficient information to apply the statutory tests. The form for initiating a repossession action should therefore require the pursuer to provide information about the matters to which the court must have regard under the relevant legislation. Similarly, the defender should be required to give information about his circumstances for the same purpose.

155. We have considered whether there should be a requirement that all housing cases under the new procedure should be called for a first hearing, whether they are defended or not. At present all summary cause housing cases are called for a hearing at the date specified in the summons, even if they are undefended. In mortgage repossession cases under the ordinary cause procedure, the court does not set a hearing date unless a notice of intention to defend is lodged. If a case is undefended, the pursuer can lodge a minute for decree in absence, which is granted without the case calling in court; the pursuer can thus obtain decree against the defender without a court hearing.

156. The calling of a summary case action gives the tenant at least one opportunity to state a defence orally before an order for possession is granted. If the summons does not contain sufficient information to enable the sheriff to decide whether it would be reasonable to grant the order, the first hearing also gives the sheriff an

[67] Mortgage Rights (Scotland) Act 2001, section 2(2)

opportunity to decide what further information he requires. These opportunities do not exist at the moment in mortgage repossession cases where the defender has not lodged a notice of intention to defend.

157. Although we recommend that the defender should be required to provide information about his circumstances when responding to the claim, we accept that in practice a significant number of defenders will fail to do so. We also accept that no matter how straightforward the forms, and how much information they provide about advice services, there will be some defenders who do not return the forms or seek advice before the first hearing. Given the significance of a decree in a repossession case, whether of rented or owner-occupied property, we recommend that all such cases should be called in court to give the defender at least one opportunity to appear in person and defend the action. If in-court advice services become more widely available, as we recommend, it would also allow the advisers an opportunity to offer assistance to those defenders who appear at court in person.

Report of the Repossessions Group

158. Early in 2009 Scottish Ministers set up a short term Repossessions Group, in response to the current economic downturn and consequent rise in repossessions. The Group was asked to consider urgently whether the legal protection for homeowners in Scotland at risk of repossession was adequate and, if necessary, to make recommendations on ways in which the law should be strengthened. It was also asked to consider what else the Scottish and UK Governments and others might do to help those at risk of repossession. The Group reported in June 2009[68] and made a range of recommendations. Some of the recommendations involve changes to primary legislation and to rules of court. We believe that our recommendations are consistent with those made by the Group. For example, the Group recommends (at paragraph 6.34) amendments to the Conveyancing and Feudal Reform (Scotland) Act 1970 and the Mortgage Rights (Scotland) Act 2001 to the effect that lenders be required to raise court proceedings in all actions for the repossession of residential property, and that actions under section 24 of the 1970 Act must call in court and be subject to a hearing at which the borrower may be represented, irrespective of whether an application is made by the borrower under the 2001 Act. This is consistent with the recommendation we make above. The Group also recommended (at paragraph 5.14) that borrowers in repossession proceedings should be able to be represented other than by a solicitor or advocate if they would find that helpful. This is line with our own view that there is scope for increased lay representation in cases under the new simplified procedure. We also note that the Group considered pre-action protocols but did not recommend that one should be introduced.

[68] The Report is available at http://www.scotland.gov.uk/Publications/2009/06/08164837/0

Expenses under the new simplified procedure

159. At present there are two tables of expenses, one for claims up to £3,000 and another for claims between £3,000 and £5,000. The justification for that may disappear if a single simplified procedure is adopted but if the present small claims model were to apply to all cases under £5,000 successful litigants would be able to recover only a fraction of the costs incurred by them in pursuing or defending the action. This would be particularly controversial in the context of personal injury claims. Currently there is a separate table of expenses for defended summary cause personal injury actions; the figures are significantly higher than those for defended summary cause actions generally.[69] Under the current rules a personal injury action in which the sum sued for is £3,000 or less is brought as a summary cause,[70] although the expenses can be abated in low value claims.[71] On the other hand, if the summary cause scale were to be adopted for all cases under simplified procedure, potential claimants might be deterred from pursuing claims of modest value by reason of their potential liability for the other side's expenses. We therefore recommend that there should continue to be separate tables of expenses. One would be for claims up to £3,000. Another would be for claims between £3,001 and £5,000, to include all housing cases regardless of the amount of any arrears. Finally, there would be a separate table of expenses for any action which includes a claim for damages for personal injury.

Programming of cases under the new simplified procedure

160. Our recommendations will affect the programming of what are currently small claims and summary cause cases, as well as mortgage repossession cases which are dealt with under ordinary cause procedure. Many courts already have a separate heritable court dealing with housing cases under summary procedure. We agree that this is good practice where the number of cases justifies it. In the larger courts, large numbers of undefended tenancy repossession cases are called at every heritable court. If all mortgage repossession cases are also to be called the practical consequences will be significant. In most courts all cases listed are called for the same time. Some litigants therefore will have a long wait before they are heard. In some courts the practice is for the clerk, at the beginning of the heritable court, to call over a list of cases in which the parties have notified the court that they have agreed on the order that the court should make. These cases are disposed of early. This leaves more court time for the disputed cases. We recommend that this practice is adopted where the numbers justify it.

[69] Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and further provisions) 1993 (SI 1993/3080), as amended.
[70] The Small Claims (Scotland) Order 1988, as amended by the Small Claims (Scotland) Amendment Order 2007, which increases the category of actions that cannot be brought as small claims to include actions for personal injury.
[71] Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and further provisions) 1993 (SI 1993/3080), General Regulations regulation 14

161. With the expanded jurisdiction that we propose, the problems of programming will increase. A system of appointed times is likely to be wasteful of court time where there are non-appearances. If may be better to group cases and give them a "not before"[72] time; or to have some kind of checking-in procedure, so that the court staff could know which parties were in court and organise the calling order. This could allow the defenders to speak to an adviser before the case was called. Such arrangements could apply to debt and consumer claims as well as to heritable cases where there are significant numbers of such cases. The appropriate arrangements will be a matter for the sheriff principal and will vary according to local circumstances.

Specialisation by the district judge

162. We deal with the issue of specialisation in more detail elsewhere. It was clear from the responses to the consultation and from our meetings that there is a strong view that housing cases and family cases should be dealt with by judges with a special interest in and knowledge of the relevant law. We think that having such cases dealt with by district judges will allow specialisation to be developed. The office of district judge is likely to be attractive to applicants who have an interest in and experience in law-centre work and housing cases of this kind and in family/child law.

163. In the larger courts it should be possible for some district judges to be designated primarily for civil cases and for some to develop a special interest in housing or family law. The fact that such cases will form a significant part of the district judge's workload will in any event lead to the development of expertise. A degree of judicial continuity should also result from the narrower focus of the district judge's work and in family cases judicial continuity will in any event be the norm. In smaller courts with only one or two district judges, judicial continuity should exist as a matter of course. In our view, there will be scope for some district judges to be appointed on a permanent but part-time basis. Such appointments could be filled by practitioners with specialist experience. It may be that some district judges will sit in more than one court in a sheriffdom to deal with particular kinds of case.

164. District judges should receive special training relevant to the scope of their work.

[72] See footnote 20

CHAPTER 6 INFORMATION TECHNOLOGY

1. In this chapter we consider the current use of information technology (IT) in the civil court system in Scotland and in other jurisdictions and, taking account of the consultation responses, make recommendations as to its future development.

2. We deal with the use of electronic communication between parties and the courts; online services for handling undefended claims; the use of video conferencing or conference calls; the transcription of evidence; and the general provision of information and online self-help services to court users.

The use of IT in other jurisdictions

3. Many jurisdictions[1] have made significant progress in realising the ideal of a paperless litigation system. Such systems typically have the following features: the facility to file or lodge documents electronically; an electronic document management system that takes the place of a paper process or case file; the document management system is integrated with the court's case management or tracking system; where a docket system is employed, the linking of an electronic case file to the judge's diary; electronic case files incorporating commercial software such as legal databases or other research tools; routine correspondence with the court by email; the conduct of hearings on procedural matters by telephone or videoconferencing; the taking of evidence by video link; the displaying on screens of documents or other materials, such as photographs, maps and plans; the digital recording of oral evidence and real time transcription; and the electronic issuing of court orders.

4. Court websites have been developed which provide information for party litigants, professional court users and the media. These provide users' guides, court rules and practice notes, searchable databases of court judgments and other reference materials, and links to advice and mediation services.

5. Many of these developments have run in parallel with the development of practice management systems adopted by law firms. There may be opportunities for courts to adapt commercially available systems rather than create a stand alone system:

> "As law firms move towards the use of client intranet systems that give their clients the ability to track the progress of their litigation matter as it is handled within the firm, the next step may be to integrate court systems with law firm practice management systems. This would truly provide a 'one stop shop' for clients. The

[1] See, for example, the Electronic Filing System adopted in Singapore, the Next Generation Court System pilot project in Israel and recent developments in other jurisdictions, referred to in J Walker and G Watson (2007), 'New Technologies and the Civil Litigation Process', International Association of Procedural Law XIII World Congress 2007

> Federal Court of Australia has foreshadowed a move in this direction with its mooted 'My Files' concept."[2]

6. The benefits of such systems include cost savings and efficiencies through increased productivity; more effective utilisation of staff, space, and other resources; reduced physical handling, maintenance, and copying of file documents; improved docketing, scheduling, case management, and statistical reporting; and enhanced accuracy and efficiency in record maintenance.[3] There may also be environmental benefits in a system less reliant on paper files.

7. The electronic filing system adopted in Singapore is particularly ambitious and perhaps easier to achieve in a small jurisdiction where a relatively high proportion of the population has access to computers.[4] Other jurisdictions, however, are moving in the same direction.

8. Progress has tended to take place in a piecemeal fashion, with existing IT systems acting as a constraint to more strategic and radical developments. Nevertheless, there are a number of common features in the development of the use of IT in civil proceedings. We shall discuss them under the following headings:

- E-filing and electronic document management systems;
- Telephone conference calls and the use of email;
- Court room technology and the presentation of evidence; and
- Access to justice and electronic information systems

E- filing and electronic document management systems

9. Many jurisdictions permit the electronic filing of court documents and forms. In some jurisdictions it is mandatory. In Singapore electronic filing is universally available and mandatory. In Israel and the US federal courts it is universally available but voluntary.

10. In some jurisdictions "e-filing" has been developed to process high volume undefended court actions on a centralised basis. An example of this is the County Court Bulk Centre (CCBC) based in Northampton county court. The CCBC is part of the Northampton Bulk Centre, an innovation intended to facilitate the removal of repetitive staff-intensive work from local courts to a central, computer-supported office.[5] The CCBC offers the facility of processing in one place large volumes of claims for payment of fixed sums of money. 95% of claims filed with the CCBC are undefended. If a claim is defended, the claimant is given the option of withdrawing it. About 50% of claims in which defences are lodged are resolved at this stage. If a

[2] A Wallace (2007), 'New Technologies and the Civil Litigation Process: Report from Australia', The International Association of Procedural Law XIII World Congress 2007.
[3] Administrative Office of the United States Courts (1997), *Electronic Case Files in the Federal Courts: A preliminary examination of goals, issues and the road ahead.*
[4] J Walker and G Watson (2007), *op. cit.*
[5] For a description of the Bulk Centre, see http://www.hmcourtsservice.gov.uk/cms/bulkcentre.htm

defended action is to proceed it is transferred to the county court with jurisdiction to hear the matter. There is an incentive for claimants to use the CCBC as court fees for claims processed through it are reduced. Centralising the processing of large numbers of undefended actions has resulted in significant savings for Her Majesty's Court Service (HMCS) in England and Wales. One member of staff in a local county court could be fully occupied with work occasioned by 3,000 claims per year. At the CCBC, the figure is 25,000.

11. Further developments include the ability to file or defend claims online. In April 2002 HMCS launched the Money Claim Online (MCOL) service, also part of the Northampton Bulk Centre, which enables claimants to file claims for payment of fixed sums of up to £100,000 online. They may also make applications online to enter a judgment or for a warrant for execution. A defendant may file online an acknowledgement of service, a part admission or a defence. Reduced court fees are charged for claims dealt with online. Where a case is defended it is transferred to the relevant county court. A similar service has been developed for claims for possession of residential property for non-payment of rent or mortgage, known as Possession Claim Online (PCOL).

12. Currently 60% of all claims are issued through Northampton. It is HMCS's strategic aim that it will eventually deal with all money claims.

13. Facilities to lodge small claims online have been introduced in both Northern Ireland and the Republic of Ireland.[6]

14. It has been suggested that the benefits which flow from e-filing will be fully realised for litigants and court administrators only if e-filing is integrated with the court's case management system, and if that includes a system for creating and storing an electronic record of a case file. For this reason many jurisdictions are now looking at the feasibility of electronic document management systems. In England and Wales, the Department for Constitutional Affairs (DCA) in April 2005 commissioned a feasibility study into the potential for introducing an Electronic Filing and Document Management (EFDM) service for the civil and family courts. A summary of the report was published in January 2006.[7] EFDM would allow parties to file documents electronically in a secure and authenticated manner; they would then be held, accessed and managed by the courts electronically:

"It is also envisaged that implementing such a system would ultimately facilitate an electronic case file, which would become the official court file of record with paper copies produced only when needed, though this is likely to be some way off."[8]

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[6] See the website of the Northern Ireland Court Service at http://www.courtsni.gov.uk/en-GB/Services/Online_Services/. The Republic of Ireland's small claims online service can be found at http://www.courts.ie/Courts.ie/Library3.nsf/0/C9A6DFDC008962218025721B00553F3B?OpenDocument

[7] PA Consulting Group (2006), *Feasibility study into a commercial model for Electronic Filing and Document Management (EFDM) in the civil and family courts: Summary of Final Report*,

[8] A Johnson and M McIntosh (2007), 'New Technologies and the Civil Litigation Process Report for England and Wales,' The International Association of Procedural Law XIII World Congress 2007.

15. HMCS has decided in principle to proceed with the EFDM project. It is likely to be brought in through a phased implementation over a period of years.

Telephone conference calls and the use of email

16. There have been several reviews on the use of conference calls in this jurisdiction and elsewhere. In the first evaluation of the Woolf reforms commissioned by DCA, Professors Peysner and Seneviratne found a "startlingly widespread take-up of case management conferences being conducted by telephone conferencing".[9] This was rapidly becoming the norm: most courts reported that a half or more of cases were being dealt with in this way. This reflected not only the financial disincentives of waiting in court but also changes in the legal markets, with solicitors acting for a wider range of clients and conducting litigation in courts far from their home base. The authors found that the increased use of conference calls went in tandem with a change in culture: it "goes with the grain of the profession shifting from a delay based approach to litigation to one based on rapid turnover."[10] It was their impression that cases in which there was a telephone conference call were often better prepared for. Lawyers were fully instructed and, unlike the pre-Woolf position, had sufficient authority to engage constructively with the case managing judge. Peysner and Seneviratne observed that the time was perhaps now ripe for telephone conferences to be the standard approach, with those cases requiring personal attendance at court the exception.

17. In 2005 DCA consulted on telephone hearings in civil proceedings in the county court. At that time the use of telephone hearings was limited to application hearings or those where parties had applied to have a telephone hearing. DCA set up a pilot scheme to examine the scope for their use in a wider range of procedural hearings and in interim applications, case management conferences, and pre-trial reviews with time estimates of no longer than an hour.

18. DCA found strong support for telephone hearings:

> "In terms of overall support, 91% of respondents welcomed the intention to extend the general scope of hearings that could be dealt with by telephone and were broadly supportive of our proposals for it to be rolled out to civil courts nation wide. However, there was almost universal agreement that telephone hearings were unsuitable for litigants in person due to the perceived lack of control the court would have on proceedings. There was also concern that telephone hearings with time estimates over 30 minutes were invariably more complex and therefore not suitable for a telephone hearing.
>
> There was widespread support for increased use of telephone hearings and agreement to the benefits that would emerge as a result of their much wider use. In fact 31

[9] J Peysner and M Seneviratne (2005) *op. cit*, pp 26-7
[10] *Ibid*, p27

> respondents [out of 34] agreed that they were beneficial. Some of those benefits identified by respondents included reduced waiting time involved, or the necessity to instruct agents or counsel, giving solicitors more time to familiarise themselves with the case before hearings, and a reduction in associated costs. Stricter adherence to time estimates and hearing start times were among the other benefits identified."[11]

19. As a result, the Civil Procedure Rules were amended in April 2007 to introduce a presumption that certain types of procedural business, including case management conferences, will take place by way of telephone hearings. The court has discretion to hold a telephone hearing on a point that would normally be dealt with in open court, if the parties agree. Telephone hearings are used where the issues are straightforward and the cost of an oral hearing would not be justified. The practice varies. For example, case management hearings are routinely conducted by telephone in fast track cases in the county court. The normal practice in the Admiralty and Commercial Courts and in the Technology and Construction Court is to have an oral case management hearing. Telephone case management hearings are common in the Mercantile Court, which generally deals with smaller and more straightforward cases than the Commercial Court and where procedures are intended to be less formal and more expeditious. The court has the power in family proceedings to direct that a case management hearing will take place by telephone.

20. A later review[12] identified the cost savings for many cases of the increased use of telephone hearings and video conferencing. It was also likely to have increased the accessibility of the civil justice system, particularly for individuals and smaller corporate litigants.

21. These observations were confirmed in a detailed study of commercial procedure in Glasgow Sheriff Court,[13] where case management conferences had been established under Chapter 40 of the Sheriff Court Rules "to secure the expeditious resolution of the action" (Chapter 40.12 [1]). Most case management conferences were conducted by conference call. This had several benefits. The conduct of case management conferences and other business by telephone and email permitted principal solicitors, rather than their local agents, to be involved throughout the proceedings. This was efficient for the court, as well as for the firm and client, since principal solicitors were able to provide the court with whatever information was necessary to expedite the case.

22. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 provide that a case management discussion may be conducted by electronic communications if the chairman considers it just and equitable to do so. Where a hearing that would otherwise be held in public is to be conducted by use of electronic communication, it must be held in a place to which the public has access using equipment that lets the public hear all parties to the communication.

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[11] Department of Constitutional Affairs (2005), *Telephone Hearings in Civil Proceeding: Response to* Consultation CP 14/05, p5.
[12] A Johnson and M McIntosh (2007), *op cit*
[13] E Samuel (2005), *op. cit*, p42

23. Reports from Canada tell a similar story. One review found it telling that

> "the technology with the most day-to-day impact on communications with the court is the humble telephone conference call. The current ease and low cost of conference calls with the court and their widespread acceptance by the court, which avoids the time involved in scheduling and attending a physical hearing, has made telephone conferences fairly ubiquitous in more routine procedural matters."[14]
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> .

24. The Victorian Law Commission[15] made an extensive examination of the use of telephone conference calls in Victoria and other jurisdictions in its recent Civil Justice Review. The Commission observed that conducting directions hearings by telephone is one means by which pre-trial matters may be determined more efficiently, and at less cost to the parties and the court, than by traditional court hearings requiring personal attendance. Conference calls may also facilitate participation by parties and lawyers who are not located close to a court and who may otherwise need to travel a distance or arrange for another lawyer to attend on their behalf, either option involving time and expense. At present considerable time was often spent in travelling to the court and waiting for matters to be called. If there are delays in court, a five-minute hearing could take an entire morning as lawyers waited for their case to be reached on the list. However, in many instances, business could be progressed with minimal court waiting time and without necessarily requiring court attendance. The Commission therefore concluded:

> "The use of telephone for directions hearings seems likely to increase access to the civil justice system and to reduce costs, particularly for individuals and small businesses where the time and cost spent travelling to courts may be significant. Therefore, we consider there should be greater use of telephone directions hearings to save the parties the time and the cost involved of physical attendance at court." [16]

25. The Commission also noted the increased use of email for correspondence with the courts in Victoria:

> "In the County Court, email correspondence is encouraged. The court accepts email requests for standard timetabling orders where consent orders are not attached, as long as the text of the email includes certain information, including, for example, the proceeding number, names of parties and their legal representatives and an assurance that all parties have conferred and agreed to the timetable sought. Some of the Supreme Court judges (of Victoria) encourage the use of email for consent orders."[17]

[14] T Pinos (2007), 'New Technologies and the Civil Litigation Process: Report for Canada', The International Association of Procedural Law XIII World Congress 2007
[15] Victorian Law Reform Commission (2008), *op. cit*, p333
[16] *Ibid*, p335.
[17] *Ibid*, p328.

26. It went on to note that all around Australia:

> "Courts are amending their rules or issuing practice directions to provide for email communication between litigants and the courts more generally. For example, the Queensland Supreme Court has issued a protocol for this. Some courts are experimenting with email communications for pre-hearing conferences and case-preparation."[18]

27. On this point, the Commission concluded that a number of the arguments for and against telephone directions hearings also applied to the use of email by courts. However, email had the added advantage that the parties and the court did not have to be in communication at the same time. The Commission supported the use of email and Internet messaging systems for directions hearings and noted that in a number of jurisdictions extensive use of email was made by courts for the purpose of giving directions for the conduct of civil litigation.[19]

28. The Commission considered whether a greater use of conference calls would be compatible with section 24(1) of the Victorian Charter of Human Rights and Responsibilities (2006), which provides that a party to a civil [or criminal] proceeding 'has the right to have the … proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.'[20] It noted that section 24(3) provides that 'all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits'. It then went on to conclude that:

> "Presumably in this context, 'hearing' and 'judgments or decisions' mean the final adjudication of the matter rather than interlocutory hearings at which procedural matters are determined. In any event, telephone directions hearings can be conducted in open court, as often happens in other jurisdictions (e.g. the United States and Finland)."[21]

29. Similarly, the Ontario Civil Justice Reform Project has recommended that all parties and their counsel should be encouraged to explore methods of using technology to share information and achieve savings in time and cost. It recommended that the judiciary and courts administration should make every reasonable effort to accommodate requests for the use of technology in individual cases, where possible;[22] that the rules of court should be amended to permit certain matters to be heard by telephone or video conference;[23] and that additional training

[18] *Ibid*, p328
[19] *Ibid*, p335.
[20] As the Victoria Law Commission observes, this echoes other provisions on human rights: for example, Article 14(1) of the International Covenant on Civil and Political Rights (entered into force 23 March 1976) provides that everyone has the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law'.
[21] Victorian Law Reform Commission (2008), *op. cit*, p334
[22] Justice CA Osborne (2007), *Civil Justice Reform Project, Summary of Findings and Recommendations*, Ontario Justice Reform Project, p126.
[23] *Ibid*. p121.

should be provided to judges on all aspects of the use of technology in and out of the courtroom.

30. There may, however, be disadvantages. Greater use of telephones and other technology may give rise to tensions with other aspects of civil procedural reform. For example, there may be advantages in parties participating in person in the litigation process. Their presence at case management conferences may enable them to be informed of the harsh realities of the process, including its financial consequences, while face-to-face communication may facilitate settlement.[24] The court may also be at a disadvantage in assessing evidence or submissions delivered through telephone hearings or video conferencing rather than seen and heard face-to-face.[25] Some lawyers may also feel they could have been wrong-footed at times by not appearing in person, or by being too conciliatory over the telephone.[26]

Court room technology and the presentation of evidence

31. Several jurisdictions have developed practice notes or protocols on the electronic exchange of documents and their presentation electronically in court. These often apply to cases where there are a significant number of documents. For example, in the Supreme Court of British Columbia Chief Justice Brenner issued a practice direction[27] on electronic documents and evidence, which sets out:

> "a framework for both the electronic exchange of documents between the parties and the presentation of electronic documents to the court at trial. It applies where parties agree or where the court has made an order. Parties are encouraged to adopt the Practice Direction where a substantial part of the discoverable documents is in an electronic form, where there are more than 1,000 potentially discoverable documents or where there are more than three parties to the proceeding. The Practice Direction includes checklists and a glossary of terms to assist with effective implementation. The Judges Technology Advisory Committee of the Canadian Judicial Council is monitoring the British Columbia Practice Direction and is considering it as a model for adoption by other jurisdictions throughout Canada."[28]

32. In England and Wales a Data Exchange Protocol for Electronic Disclosure Documents has been developed by the Litigation Support Technology Group (LiST) to set out best practice for exchanging copies of documents electronically, including file naming conventions and directory structure. It can be used by agreement or upon the direction of the court.[29]

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[24] Civil Procedure Rules 1998, r.3.1(c) gives courts the power to order a client to attend. In practice, clients rarely attend case management conferences and are rarely ordered to do so.
[25] A Johnson and M McIntosh (2007), *op. cit.*, p. 9
[26] E Samuel (2005), *op. cit*, p.68
[27] Chief Justice Brenner (1 July 2006), 'Practice Direction re: Electronic Evidence', online at: British Columbia Courts Website
[28] Justice CA Osborne (2007), *op. cit*, p122
[29] J Walker and G Watson (2007), *op. cit*, p15.

33. The benefits and cost savings of the use of technology in managing and presenting documentation to the court was considered by Justice Osborne in his review of the civil justice system in Ontario in 2007. He drew attention to the benefits to parties of discussing the use of technology early in the litigation process, in particular, how documents may be produced electronically and how information could be shared. This would enable documents to be imported into litigation management software, which could then be used to search and retrieve all documents relevant to the case and make cross-references to pleadings, transcripts and other notes made by counsel. It would also offer significant time savings that cannot be achieved in a paper world, as well as significantly lower costs to the parties. He observed that large volumes of paper documents could be scanned as image files and exchanged on CDs, often at substantially less cost than would be involved in producing a similar number of photocopied sets. So, for example, he contrasted a case involving 50,000 documents, in which the cost of producing five hard copies of each at $0.25 per page amounted to $62,500, with scanning the documents, which would cost approximately $12,000. In his view the court should encourage parties to use new technologies where cost or time savings can be achieved. Failure to handle documents in a cost-efficient way should be taken into account when the costs of the proceeding are dealt with.[30]

34. Technology has also been used to enhance the presentation of evidence, such as the use of document cameras to capture paper and other physical evidence and to project the image in the courtroom[31], as well as in the use of digital recording of evidence and the production of real time transcripts.

35. In England and Wales videoconferencing facilities are used for pre-trial meetings and directions hearings as well as for trials. At substantive hearings or trials they are used most commonly to take the evidence of vulnerable witnesses or those who are overseas or would otherwise have to travel a significant distance to court. As well as any potential savings in cost, the court will consider whether the use of a video link would be suitable for that particular witness. For example, the Commercial Court guide says, "In considering whether to give permission for evidence to be given in this way the court will be concerned in particular to balance any potential savings of costs against the inability to observe the witness at first hand when giving evidence."[32]

36. Videoconferencing is also used widely in Australia, both at first instance and on appeal. It is said to have overcome 'the tyranny of distance' and to be particularly apt in jurisdictions with widely distributed population centres, where judges, lawyers, litigants and witnesses may have to travel great distances to attend court.[33]

[30] Justice CA Osborne (2007), *op. cit.*, pp 120-121
[31] *Ibid*, p123
[32] A Johnson and M McIntosh (2007), *op. cit.* p6
[33] A Wallace (2007), *op. cit.*, *p*12

Access to justice and electronic information systems

37. A number of recent articles and reports have described the use of websites as a means of enhancing access to justice and providing information to litigants and their advisers. Australian courts, in particular, have put the internet to use with this aim:

> "Nearly all Australian courts now have an online presence. Making website information relevant, useful and easy to find is a primary goal for court administrators. Well-designed websites are a significant aid to the community's access to justice…..Most of the court websites include information about court process, court forms, court lists, contact details and links to other resources. The websites of most state courts provide extensive 'self-help' guides designed to assist the public when taking legal action in the courts, some providing information about what to expect in court through the use of 'virtual guides' to the courtroom."[34]

38. As well as promoting access to justice, courts are able to save and redirect valuable resources by making a wide range of information and services available online. The Family Court of Australia, for example, is reported to have a direct relationship with its clients because of the nature of its jurisdiction. There were more than 1,500,000 'hits' on its website in 2004, and it has continued to broaden the services available across the Internet. The potential for administrative savings is obvious if it is assumed that each hit is a potential telephone enquiry.[35]

39. It has been suggested that Australia has long been a pioneer in the area of court websites, which have significantly advanced the development of jurisprudence, civil justice and socio-legal research:

> "On the websites of Australian courts can be found their rules, practice directions, hearing lists and other information that make the sites a major vehicle for communication between the court and the public. The web publication of information has obviated the need for many routine telephone enquiries and provided better and quicker information to lawyers and the public, as it becomes the primary tool for communication between the court and many users. Furthermore, the prompt availability of decisions has facilitated legal research, and the posting of High Court transcripts has further enhanced the understanding of the decisions reached. In addition, the Federal Court has begun to stream "live" judgment summaries on its site in major cases. The trend towards greater case management in Australia has naturally entailed the development of databases and associated software packages for entering the details of matters to be tracked, permitting notices to be generated, managing court listings, and storing documents. This has further enabled courts to undertake more complex case management, such as setting timetables and assigning cases to various dispute resolution options or litigation tracks. E-filing will facilitate electronic case files and electronic case management systems and access by judges in chambers, the parties in court and others anywhere in the world, but this is a long way off. These databases

[34] S Jackson and R Macdonald (2004/05), 'Using the Internet to assist court processes: Delivery of justice in an electronic age', Australian Law Reform Commission, *Reform Issue 8*, Summer
[35] *Ibid*

> will certainly facilitate research under protocols set by the courts to ensure the privacy concerns are addressed." [36]

40. In Singapore the Subordinate Courts' website was updated and launched in December 2006. It includes user-friendly features which group information separately for lawyers, litigants, members of the public and the media. It is linked to the Civil Justice Division's website and provides information for anyone wishing to learn more about the civil justice system or to commence a proceeding. The new website includes an enhanced electronic Alternative Dispute Resolution page (e@dr) for online mediation, so that potential litigants may save time and litigation costs by first seeking to resolve their dispute by this means.[37]

41. One obvious concern is whether greater use of technology will disadvantage those without ready access to a computer. This problem has been dealt with in jurisdictions such as Singapore, where service bureaus have been set up from which litigants without access to computers can seek assistance.

42. Our recommendations on the self-help services that we consider should be developed in this jurisdiction are set out in Chapter 11.

Responses to the Consultation

43. The Consultation Paper asked in what respects modern communications and IT could be harnessed to improve access to the civil courts. There were 72 responses. Most considered that the use of email between parties and the courts should be encouraged. One respondent thought that courts should make electronic communication the norm for communications between litigants and the court. Many favoured some form of electronic transmission of documents. One respondent considered that in civil cases the lodging and execution of all initiating writs, alterations to pleadings by way of adjustment or minute of amendment and all motions should be done electronically. It also proposed that there should be a website for summary causes and small claims, the vast majority of which are undefended, and that undefended cases should be dealt with by way of an electronic back office system at a single site.

44. Respondents thought that the use of telephone conference calls was of particular benefit to those in remote and rural areas and to the parties in procedural hearings. There was support for the use of video links to the courts, particularly for case management conferences or options hearings. Some respondents suggested that in appropriate cases witnesses could give evidence by video link from locations remote from the court.

[36] J Walker and G Watson (2007), *op. cit.* pp. 20-21
[37] *Ibid*, p29

45. One respondent favoured the idea of electronic diaries to keep a record of case management conferences, interim hearings and proofs; an electronic case management system working in tandem with case management conferences, allowing court orders to be issued at specific stages in the course of an action; and an electronic case record and file containing all the information presently contained in the paper process, searchable by date and event.

46. Several respondents considered that effective use could be made of IT in providing advice and assistance for unrepresented litigants. One suggested that forms for initiating documents should be available online, with appropriate guidance on their completion and on court procedures.

47. One respondent considered that the public could be assisted by access to "smart systems" online, and perhaps also by terminals in the foyer of the court that could be interrogated to direct and inform the user. This is used in some US courts to help those enquirers who seek advice on land registry or probate matters to obtain the correct forms or find the appropriate court office.

48. Another respondent suggested that a court document management and display system and a real time transcription service such as "Livenote", which was used in *McTear v Imperial Tobacco*[38], could produce time savings and convenience to the court, although it observed that this technology is expensive.

Rules and Legislation

49. The IT Committees of the Court of Session Rules Council and the Sheriff Court Rules Council held joint meetings under the chairmanship of Lord Macphail and Sheriff Iain Peebles QC, as he then was. Their work recognises that IT provides opportunities for substantial improvements in the services provided by the Scottish civil courts to litigants, with significant reduction in delay and expense. The committees have considered the signature or other authentication of parts of process; the steps in procedure that should be undertaken by electronic means; and the giving of evidence by video link.[39] Their recommendations have led to the adoption of new rules, such as those concerning the use of live links by telephone or videoconferencing. The Joint Committee has agreed that further rules on the electronic transmission of documents, which are still somewhat limited, should await the outcome of the Scottish Court Service (SCS) pilot, to which we shall refer.

Article 6 and the use of information technology

50. In contrast with other jurisdictions, the use of information technology in the Scottish civil courts has been controversial.

[38] [2005] CSOH 69; 2005 2SC 1
[39] Rule 93.1, Rules of the Court of Session and Rule 32A.1, Sheriff Court Ordinary Cause Rules.

51. In *Jackson v Hughes Dowdall*[40] an Extra Division of the Inner House commented on the conduct of case management conferences under Chapter 40 of the sheriff court Ordinary Cause Rules (which provides a procedure for dealing with commercial actions), in particular, by means of telephone conference calls and the making of legal submissions by email. The Court did not hear detailed submissions on these matters but considered that the use of conference calls and emails might raise questions under article 6(1) of the European Convention on Human Rights, which requires that proceedings should be held in public.

52. Article 6(1) provides:

> "In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

53. Their Lordships in *Jackson* said *inter alia*:

> "The sheriff's interlocutor stipulated that the case management conference was to be conducted by means of a conference call. We note that most of the hearings during the course of the present proceedings, including hearings of opposed motions, were conducted by those means. Since the use of that form of procedure was not the subject of detailed discussion before us, it would not be appropriate for us to consider it in detail. In the absence of such discussion, however, we would not wish to be taken to have tacitly approved the procedure followed in the present case. It is a general principle, of constitutional importance, that the administration of justice should take place in open court. As Lord Diplock observed in *Attorney General* v *Leveller Magazine Ltd* [1979] A.C.440 at page 450:
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> > "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice ....requires that [proceedings in court] should be held in open court to which the press and public are admitted".
>
> Similar observations have been made by the European Court of Human Rights in relation to article 6 of the European Convention on Human Rights:
>
> > "The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity

[40] 2008 SC 637

> contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention" (*Diennet* v *France* (1995) A 325-A, paragraph 33).

> The common law principle is illustrated by such cases as *McPherson* v *McPherson* [1936] A.C. 177 and *Storer* v *British Gas plc* [2000] 1 W.L.R. 1237. It applies to commercial cases as much as it does to any other type of case: a sheriff dealing with a commercial case is not conducting an arbitration. Exceptions to the general principle, created by judicial practice, require to be considered with care, bearing in mind that convenience is not the only (or the most important) consideration."

Their Lordships in *Jackson* went on to say:

> "The use made of emails in the present proceedings was the subject of some criticism during the hearing before us, but, apart from one particular instance which we consider below (the sequence of emails following the second debate), was not considered in detail. In the circumstances, it would be inappropriate for us to enter into a detailed discussion. Again, however, we would not wish, in the absence of such discussion, to be taken to have tacitly approved the practice which was followed in the present case. It is apparent that the discussion in the emails passing between the sheriff and the parties' solicitors went beyond administrative matters of the kind which might otherwise have been dealt with by a clerk of court (such as the enrolling of motions, the lodging of pleadings, and the ascertainment of dates when counsel were available). As in the example just mentioned, some of the emails contain legal submissions which could have been made at a judicial hearing. As we have explained, the general rule is that such hearings should take place in public, and exceptions to that rule require careful consideration and justification."

54. The practice of holding case management conferences by telephone conference call was commented on by a differently constituted division of the Inner House in *ASC Anglo Scottish Concrete Limited v Geminax Limited*[41]. The pursuers had enrolled a motion for summary decree, which was heard at a telephone case management conference held shortly after defences were lodged. The sheriff granted the motion. On appeal, the Inner House recalled the interlocutor, holding that the sheriff had erred in concluding that there was no defence to the action. The Court took the opportunity to comment on the practice of holding telephone conference calls and expressed the view that a motion for summary decree should not have been dealt with in this way:

> "Finally, we must record our distinct impression that much - if not all - of the difficulty which has arisen for consideration in this appeal flows from the sheriff's willingness to deal with an opposed motion for summary decree by means of a telephone conference call discussion appointed for a very different purpose. The practical problems of dealing with such a motion by that means are manifest. It is impossible for any party to tender any additional document; it is impossible to make any useful or effective reference to authorities; it is very difficult even to have regard to the terms of documents which have been lodged. We are aware that in *Jackson* v *Hughes Dowdall* a

[41] [2008] CSIH 55; 2009 SLT 75

> differently constituted division of the Inner House remarked on the constitutional issues arising from the practice, in Glasgow, of transacting court business by private telephone conference calls and noted some of the practical issues arising. For our part, we express concern that the sheriff should have thought it appropriate to deal with an opposed motion for final decree in the private and, in practical terms, highly unsatisfactory, circumstances of a telephone conference call."[42]

55. In its jurisprudence on the right to a public hearing the European Court of Human Rights has identified two principal goals: the protection of litigants from the secret administration of justice; and the maintenance of public confidence in the judicial system.[43]

> "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society."[44]

56. Although article 6 expressly defines the circumstances in which the press or public may be excluded from a hearing, the Strasbourg Court has developed further principles. These are summarised in its judgment in *Döry v Sweden*[45]:

> "37. The Court first finds that the entitlement to a "public hearing" in Article 6§1 necessarily implies a right to an "oral hearing". However, the obligation under Article 6§1 to hold a public hearing is not an absolute one. Thus, a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary. A waiver can be done explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing (see, among other authorities, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66; and *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58).
>
> Furthermore, a hearing may not be necessary due to exceptional circumstances of the case, for example, when it raises no question of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations (see, *mutatis mutandis Fredin v. Sweden* (no. 2), judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; and *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, pp. 20-21, § 44)."

57. In *Miller v Sweden*[46] the Court observed that:

> "29…The exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases. For example, the Court has recognized that disputes concerning benefits under social security schemes are generally rather technical, often involving numerous figures, and their outcome

[42] *Ibid*, at para 17 *per* Lord Eassie
[43] R Reed and J Murdoch (2008), *A Guide to Human Rights Law in Scotland*, 2nd ed, p509
[44] *Axen v Germany* (1983) A 72, at para 25
[45] Application no. 28394/95
[46] [2005] ECHR 55853/00

> usually depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument. Moreover, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in social security cases (see the following judgments: *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263 pp. 19-20, § 58; *Salomonsson v. Sweden*, no. 38978/97, 12 November 2002 § 38; *Lundevall v. Sweden*, no. 38629/97, 12 November 2002 § 38; and *Döry v. Sweden*, no. 28394/95, 12 November 2002, § 41)".

58. In other cases the Court has indicated that exceptional circumstances justifying a departure from an oral hearing might include cases where the proceedings were exclusively legal or technical (*Schelling v Austria* [2006] ECHR 55193/00; *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, p. 19-20, § 58; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; *Speil v. Austria* (dec.) no. 42057/98, 5 September 2002).

59. In proceedings before the Strasbourg Court itself there are exceptions to the general rule that hearings must take place in open court. Applications to the Court are referred to a rapporteur who decides whether to refer an application to a three member Committee or to a Chamber. A Committee may decide, by unanimous vote, to declare inadmissible or strike out an application where it can do so without further examination. The issue of admissibility is determined on the papers. There is no oral hearing. In cases referred direct to a Chamber, the Chamber determines both admissibility and merits in separate decisions or, in appropriate cases, together. The first stage of the procedure is generally conducted in writing. The Chamber may hold a public hearing, in which case questions relating to the merits will also be dealt with. Merits hearings are held in open court.

60. Similarly, the rules of the European Court of Justice confer on the Court a discretion to dispense with an oral hearing. Once the written procedure has been completed the judge rapporteur makes a recommendation to the Court as to whether there should be a hearing. The Court will consider his report and any submissions by the Advocate General on this point. It may decide not to hold an oral hearing if none of the parties has requested one.[47]

61. The cases to which we have referred were concerned with an applicant's right to request an oral hearing, rather than rely on written submissions, where the hearing involved a decision on the merits. They were not concerned with procedural hearings such as case management hearings. In a number of cases the Strasbourg Court has held that article 6 does not apply to hearings that relate to procedural steps, as these do not involve a determination of civil rights or obligations[48].

[47] Articles 44 and 44a of the Rules of Procedure of the Court of Justice of the European Communities

[48] See, for example, *X,Y and Z v Switzerland* (Application Number 6916/75, decisions of 12 March and 8 October 1976) and *H v United Kingdom* (Application No 11559/85, 2 December 1985)

62. In any event, it is clear from the Strasbourg case law that article 6 does not require a public hearing to take place in all cases. The Strasbourg Court has confirmed that an oral hearing may not be required where questions of fact or law can be resolved on the case file and the parties' written submissions, or where the issues are technical or legal. It is permissible for a national court to adopt a rule that an oral hearing will not take place unless one of the parties requests it, where there are no questions of public interest that make a hearing necessary.

63. We consider that there should be no bar to conducting case management hearings by means of telephone or videoconferencing, if certain safeguards are in place. In deciding whether it would be compatible with article 6 for a case management hearing to take place in private, the court should have regard to the questions to be decided; whether the parties have consented or have by implication waived their rights to a hearing in open court; and whether the questions to be decided involve the public interest or are of such importance that the public would have an interest in having the hearing take place in open court.

64. As happens in other jurisdictions and in employment tribunals in Great Britain, arrangements can be made for the public to have access to telephone conference calls.

Current SCS initiatives

65. The SCS has considered the extension of IT in relation to the transmission of documents in civil cases and the development of a pilot which would

- initially involve only small claims and summary cause payment cases;
- be conducted from a "virtual court";
- engage online web-based applications for individual litigants and bulk processing facilities for bulk users;
- require only those cases that are defended or in which offers to pay are rejected to be transmitted to individual courts for calling there; and
- require users to pay by debit card.

66. We understand, however, that the SCS has decided not to proceed at this stage with this pilot.

67. In the recent past the SCS has been heavily involved in the provision of IT to support criminal business in the courts. It has had to deal with significant IT requirements caused by the summary criminal justice reforms. The use of IT in Scottish courtrooms was improved considerably during 2007-08. All but three courts now have vulnerable witness facilities that could also be used to link participants in a civil case and to display evidence. Over the last three years there have been almost 1,000 cases in which remote facilities have been used, with only five failures. They are used routinely in social work referrals and occasionally in adoption proceedings and fatal accident inquiries.

68. SCS have laptops that can be made available to any party if required.

Communications in the court room

69. An IT service provider, which provides IT services to HMCS, made a submission to us on the way in which IT could improve the efficiency of the court system. Members of the Review Board were invited to a demonstration of IT that could be used to support communication within the courtroom. Items covered included an organised conference call facility based on the service available to HMCS; a self-service conference call system; video conferencing; the web link necessary for the sharing of documents, which runs in parallel with the voice and video conference systems; and a facility which could be used to take notes directly, complete forms and annotate documents. It is apparent that the technology exists to support increased communication between the courts and users and that it could be customised to meet the needs of the Scottish civil courts. Some systems such as conference calls are already in use.

70. The IT service provider's view was that rather than purchasing IT systems, in terms of the required hard and software, customers should explore the option of purchasing a guaranteed service from a suitable provider. There might be scope for sharing services with other users. For example, it appears that links could be provided in a variety of locations, perhaps shared with other potential users such as local authorities, and that charges would be made only for usage. The potential for access to facilities such as video conferencing and lodging documents online to be made available at locations such as libraries or council offices is attractive. A cost/benefit analysis would be necessary to establish whether there would be advantages in purchasing a guaranteed service rather than incurring capital expenditure for the necessary equipment and software. Much would depend on the charging structure for the service.

Discussion

71. Scottish Ministers have a policy commitment to increase the use of IT in the public sector. The SCS has been developing its practices in the light of this. The use of online systems to deal with undefended small claims and summary causes would be a practical extension of that policy. We are disappointed to learn that the SCS is not to proceed with the proposed pilot. The experience of other jurisdictions is that dealing with such cases electronically is more efficient and more cost effective. We recommend that the proposed pilot should begin as soon as is practicable and that consideration should be given to extending the system to other undefended actions.

72. The Scottish Court Service website htpp//www.scotcourts.gov.uk/ plays an important role in giving members of the public access to information that they would find useful before becoming involved in court proceedings. It could be enhanced to give guidance on other sources of advice or information on alternatives to litigation

and providers of ADR. Other sources of advice on rights and responsibilities should also be readily accessible.

73. If litigants are to make use of online services, it is important that these should be supported by online or telephone help facilities. Such support will be of particular benefit to parties in cases under the new simplified procedure that we propose.

74. There is undoubtedly potential for a much more extensive use of IT within the civil courts in Scotland. There would be noticeable benefits to the efficient running of the courts if communications between a litigant's representative and the court were conducted electronically. IT could be used to minimise the number of hearings at which personal attendance of legal representatives is required. This would significantly reduce travel and waiting times and hence the cost of litigation. It would free accommodation in the courts. We understand that sheriffs were at first sceptical of the use of telephone conferencing but those who have used the facility are now enthusiastic advocates. We are informed by such sheriffs that reference to productions does not usually present a problem. Even if it did, we have had technology demonstrated to us that would overcome any difficulties. In situations where submissions may be made in writing we consider that there is no reason in principle why these could not be submitted to the court by way of email.

75. Significant benefits would also flow from the development of SCS's existing case management system to include an electronic document recording system that would replace paper files and processes.

76. Currently where evidence is recorded in civil cases this is done manually by a shorthand writer. In our view it would be more efficient to record digitally all evidence in civil cases, as happens in criminal cases. The cost of this should be borne by the SCS. The availability of digital recording facilities in all courtrooms would contribute to more flexible usage of accommodation. We understand, however, that to equip a court fully for digital recording could cost up to £15,000. That may be prohibitive in smaller courts. Mobile facilities could be made available in those courts when required. If parties required a transcript of the evidence a charge would be made for this service. In many instances a recording of the evidence would be all that would be required.

77. The Scottish civil courts lag behind many jurisdictions in their use of IT. IT can provide obvious advantages in facilitating communication in a country with extensive rural areas. Failure to keep up with developments will create an ever increasing gap between the citizen's experience of work and society and his experience of the justice system. This is a matter not just of hardware, but of procedures, rules and attitudes.

78. The responses to our Consultation Paper indicate a desire to make more use of IT. There are several questions that remain to be considered in greater detail. These include the technology that could be used and how it could be customised to Scottish

procedures; the extent to which the business of the courts could be managed more efficiently by the use of IT; the ability of legal professionals to use IT; the implications of changes to procedure for individuals' rights; and of course the important question of resources.

79. We have not attempted to cost any IT systems. This would be an operational matter for the SCS. While we recognise that the SCS already makes some provision and has plans for the increased use of IT, we suggest that a programme, including a timetable for the introduction of appropriate systems, should be developed with the following priorities:

- Ensuring the SCS website provides links to other relevant organisations including those offering ADR, and self-help and online services;
- The electronic transmission of documents and the use of electronic case files;
- The availability of video or telephone conferencing for both substantive and procedural hearings; and
- The electronic recording of evidence in civil proofs.

80. An important objective of any such programme should be to ensure that systems are compatible with those used by other bodies operating in the justice system, and that they take account of the context in which those bodies operate and of the needs of others.

81. The fact that Scotland is some distance behind other jurisdictions may offer the opportunity to benefit from their experience and avoid making similar mistakes. Scotland may be able to co-ordinate the application of proven systems more easily than larger jurisdictions.

82. The positive attitude of potential users is crucial to the success of further developments. For members of staff and, to some extent the judiciary, this can be encouraged by means of training. It is also important to involve staff in the development of systems to ensure these are practical and meet their needs. For others different approaches will be required. The use of online systems needs to be attractive to users and offer advantages in terms of speed and cost. Legal professionals will be at different stages in introducing IT into their own working practices, but the court service cannot develop at the speed of the slowest. There will be a need for the foreseeable future to provide for those who do not have access to IT.

83. For some litigants the advantage of not having to appear in court would encourage them to deal with matters through the use of IT. For many it would simply be an extension of many aspects of their lives, such as online shopping. For this growing sector of society, the concept of personal attendance and hard copies of paperwork will appear increasingly old fashioned and inefficient.

Recommendations

84. Generally, we would encourage the increased use of IT to support the work of the civil courts in Scotland. In particular we recommend that:

- The SCS should develop an up to date strategy for enhanced provision of IT based on research commissioned to identify the needs of all court users;

- The SCS website should be a source of guidance and support particularly for parties in cases covered by the proposed simplified procedures falling within the jurisdiction of the district judge. It should include information on
  - Other sources of advice and assistance;
  - Providers of mediation and other forms of ADR including links as appropriate; and
  - Self help materials;

- The use of email as a means of communicating with the courts and the judiciary should be encouraged;

- The proposed pilot of an online small claims and summary cause system should be actively pursued as soon as is practicable and consideration should be given to extending the system to other undefended actions;

- Video and telephone conferencing should be encouraged;

- Consideration should be given to means of encouraging court users to communicate electronically. This may involve entering into some sort of agreement with a provider to allow access to systems locally; managing the provision of such access directly, for example with local authorities; or by lower court fees; and

- All evidence in civil cases, apart from those under the simplified procedure, should be recorded digitally.

CHAPTER 7 MEDIATION AND OTHER FORMS OF DISPUTE RESOLUTION

1. We asked consultees whether the court should be regarded as the last resort for the resolution of disputes after all other suitable methods of dispute resolution have failed; or whether it is simply one of several options open to the parties. The great majority of respondents agreed with the proposition that the system should encourage early resolution of disputes. Several said that it already works in that way. Many respondents, while supporting the encouragement of early resolution, insisted that access to the courts was still a fundamental requirement of the civil justice system. They gave examples of the types of dispute that will always require litigation. We also asked what the key features would be of a system that encouraged early resolution. Many respondents pointed to mediation or other informal methods of dispute resolution.

Information and evidence about mediation and other forms of dispute resolution

Responses to the Consultation

2. There was broad acceptance that mediation, the form of Alternative Dispute Resolution (ADR) most frequently mentioned by respondents, could be useful in resolving certain disputes.

3. Respondents who had experience as litigants or as interest groups had a more positive attitude towards mediation and other forms of ADR than respondents from the legal profession. This may suggest that litigation is not providing all that people seek by way of dispute resolution processes and that there is a desire for the civil justice system to provide a broader range of options.

4. Personal injury practitioners generally took the view that mediation was not particularly useful in PI cases and that any requirement to use it would simply add to expense. Some accepted that it might have a role to play in complex cases, such as those involving catastrophic injuries.

5. There was a fair degree of consensus that mediation was not appropriate in cases where there was a need for a judicial precedent or a declaration of legal rights, but there was no evidence of concern that greater use of mediation might harm the development of Scots law. Some respondents suggested that one of the benefits of mediation would be that court resources would be freed to deal more expeditiously with cases which genuinely need judicial determination.

6. The great majority of respondents thought that it was the essence of mediation, and critical to its success, that the parties entered into it voluntarily, and that it was not appropriate for the court to compel parties to attempt to settle their dispute by mediation.

7. Many respondents considered that it would be worthwhile to encourage early resolution of disputes and to inform litigants of the options available to them, and for the court to require parties to consider the option of ADR. They had mixed views on the question whether there should be specific sanctions in expenses when that option was ignored.

8. Most respondents who considered the question of funding thought that mediation services in lower value claims should be provided free to the user. They thought that in higher value cases, the costs of mediation should be met by the parties. There was no consensus on the question whether on awarding expenses after an unsuccessful mediation the court should include the expenses of the mediation in its award.

Academic research on mediation schemes

9. Annex B to this chapter contains summaries of findings of research carried out in Scotland, England and Wales, and other jurisdictions into some aspects of mediation, based largely on studies of pilot mediation projects. Taking these studies as a whole, we consider that the following conclusions can be drawn:

- Mediation is most likely to be successful when entered into willingly and when the parties are prepared to negotiate;
- Referral to mediation, or a suggestion that it be considered, is most likely to result in a high settlement rate if it is done on a case-by-case basis; whereas a policy of blanket referral or diversion is likely to result in a high opt-out rate;
- If ADR is successful, it is generally less expensive than litigation, but if it is unsuccessful, it can increase costs;
- Although the majority of people in Scotland have heard of mediation, most do not have a clear idea of what it involves and what it can offer;
- Those who have taken part in mediation generally react positively to it and would use it again. They appreciate its privacy and informality, the opportunity to each party to be listened to, and the qualities of the mediators;
- Mediation and facilitated negotiation schemes targeted at lower value claims cases seem to achieve a good settlement rate and a high level of user satisfaction. They may also save court time;
- The legal profession has not yet uniformly accepted mediation as a worthwhile dispute resolution option. [1]

[1] Solicitors and advocates in Scotland are obliged in terms of their respective codes of professional conduct to act in their client's best interests. While there is no explicit requirement under the codes of conduct to advise the client of alternatives to litigation, a solicitor or advocate who considered that mediation or another form of alternative dispute resolution may be a suitable option for dealing with the dispute would be professionally obliged to advise the client to that effect. Where a solicitor or advocate is acting in a situation covered by the Code of Conduct for European lawyers (i.e. in cross-border activities) the requirement at 3.7.1 of that Code will apply. It states that "The lawyer should at all times strive to achieve the most cost effective resolution of the client's dispute and should advise the

Current use of mediation in Scotland

10. The Code of Practice for Mediation in Scotland,[2] which has been adopted by the Scottish Mediation Network and is generally accepted in Scotland as a practice benchmark, defines mediation as:

> "A process in which disputing parties seek to build agreement and/or improve understanding with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves."

In practice it is a flexible process and can take a variety of forms. It can be conducted face-to-face, using telephone communication or in a series of private meetings. The parties will usually take part personally and may be represented by legal or professional advisers. The costs may be shared, or met by one side, or paid or subsidised from public funds. Mediation may be time-limited or allowed to continue for as long as the participants wish. The mediator may be a generalist or may deal only in certain types of dispute.

11. Annex A to this chapter contains information about the use of mediation in various contexts in Scotland. It can be seen from this that although there is limited experience of court-linked mediation services in Scotland, the use of mediation has developed quite strongly in a number of other sectors. Increasing familiarity with the process and experience of both the positive things it can offer, and what it can help to avoid, may lead to increased demand for mediation or assisted negotiation services to be available alongside traditional litigation.

12. From information obtained from mediation providers, there does not seem to be any shortage of trained mediators in Scotland. An increased demand would not present practical problems.

Provisions about mediation in rules of court in Scotland

13. In small claims and summary cause actions the sheriff is under a duty to seek to negotiate and secure settlement of the claim at the first hearing of the action.[3] The court may direct a referral to mediation in family cases in an action in which an order in relation to parental responsibilities or parental rights is at issue, at any stage of the action.[4]

14. In commercial actions in the Court of Session the Rules of Court provide that at the preliminary hearing the commercial judge may make such order as he thinks fit

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client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution."

[2] This is reproduced in Annex E to this chapter.

[3] Rule 9.2(2) of the Small Claim Rules 2002; Rule 8.3(2) of the Summary Cause Rules 2002

[4] Rule 49.23 of the Rules of Court of Session; rules 33.22 and 33A.22 of the Ordinary Cause Rules of the Sheriff Court 1993

for the speedy determination of the action.[5] A Practice Note introduced in 2005 further provides that it is important that before a commercial action is commenced, matters in dispute should have been discussed and focused in pre-litigation communications between the prospective parties' legal advisers. It provides that:

> "Both parties may wish to consider whether all or some of the dispute may be amenable to some form of alternative dispute resolution."[6]

The sheriff is also under a duty in commercial matters to secure the expeditious resolution of the action by means of a range of orders including the use of alternative dispute resolution.[7]

15. The Court of Session Rules Council and the Sheriff Court Rules Council have considered whether the current rules relating to ADR should be extended to other types of cases. The Court of Session Rules Council has 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; 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. The Sheriff Court Rules Council has decided that a rule should be introduced that encourages, but does not compel, parties to consider ADR. The rule would apply to ordinary actions, at any stage, with the exception of commercial and personal injury actions. The Sheriff Court Rules Council's proposals differ from those of the Court of Session Rules Council in that they do not require the parties to make averments about ADR and do not propose that the court should take into account a failure to utilise ADR in making an award of expenses. As we go on to explain, we favour the approach of the Sheriff Court Rules Council.

ADR in England and Wales

16. Annex C to this chapter provides some information about the background to the growth of interest in and use of mediation and other forms of ADR to resolve civil disputes in England and Wales, and about current Ministry of Justice policy in this area.

17. The courts in England and Wales have embraced ADR more enthusiastically and on a more widespread basis than in Scotland. Two main factors seem to have been influential: first, the attitude of many senior members of the judiciary in actively encouraging litigants and their advisers to consider ADR, using the powers available to them under the Civil Procedure Rules; and second, efforts by the Department for Constitutional Affairs and now the Ministry of Justice to establish

[5] RCS rule 47.11
[6] Practice Note 6 of 2005.
[7] Rule 40.12 of the Sheriff Court Rules.

and evaluate a number of different models of mediation services and their adoption of a strategy on court-linked service provision for England and Wales. This strategy has drawn back from automatic referral to mediation. Its key elements are the provision of a free court-linked mediation service for claims up to £5000 and a telephone helpline for higher value claims. There is also a significant emphasis on improving awareness and understanding of mediation as an option at an early stage of a dispute and on ensuring that all settlement options have been fully considered before proceedings are raised.

ADR in other jurisdictions

18. Annex D to this chapter provides some brief information about the use of mediation and other forms of dispute resolution in other jurisdictions, and about how other civil justice reviews have approached this topic.

19. Many countries in Europe have incorporated mediation or conciliation into their civil justice systems and have adopted policies that encourage parties to attempt to resolve their dispute other than by litigation. In Australia, New Zealand and Canada interest in and use of mediation and other forms of dispute resolution has grown. In these jurisdictions it is accepted that they are important elements of a modern civil justice system.

Discussion

General approach to mediation and other forms of dispute resolution

20. The aim of this Review is to provide the public with a high quality system of civil justice. The aim of any proposal relating to mediation and other forms of ADR is to ensure that the parties to a civil dispute get the best possible service from the civil justice system. In many cases a negotiated settlement will be the outcome most desired by all sides. The system should offer mechanisms that are conducive to that outcome. We are satisfied that mediation and other forms of ADR can provide such mechanisms. ADR in general provides a valuable way in which the burden on the civil courts can be lifted. More importantly, it provides an opportunity for dispute resolution in cases where the confrontational process of litigation is inappropriate. It is therefore a valuable complement to the work of the courts.

21. In our Consultation Paper we asked the question whether the courts should be regarded as a resource of last resort. One distinguished commentator took from that the impression that we would like the answer to be in the affirmative.[8] We were surprised by that reaction. It seemed to us that effective consultation required us to put forward certain options, even though we did not favour them, to test the strength of the arguments in support of them. Our own view is that this is a constitutional matter. We insist on the fundamental right of the citizen to have access to the courts.

[8] Lord Rodger of Earlsferry (2008), 'Civil Justice: Where next?' 53 *JLSS* 14

Mediation may, in some cases, offer advantages over litigation, particularly in cases where it is important to preserve relationships. But an efficient court system which is, and is seen to be, capable of resolving disputes expeditiously, economically and fairly is the cornerstone of the civil justice system.

22. That mediation and other forms of ADR should properly be seen as supplementing an effective court system, rather than being alternative to it, was one of the main themes of the second of Professor Dame Hazel Genn's 2008 Hamlyn Lectures[9]. She observed that the basic message conveyed by Lord Woolf in his final report was that seeking justice through the courts is always going to be time-consuming, stressful, unpredictable and expensive. In her view, this was based on the erroneous premise that it is impossible to make the process of litigation much quicker or less unpleasant and that sensible people do not wish to litigate. She argued that there is a threat to civil justice in the drive by the United Kingdom government, supported by senior members of the judiciary in England and Wales, to divert cases away from the courts and into private dispute resolution as a way of reducing expenditure on the civil justice system. She said:

> "We should be facilitating mediation and educating people about the range of dispute resolution options. In a complex developed society it is entirely reasonable that we should have invented more than one way of resolving disputes. But once cases have been issued in court we should not be indiscriminately attempting to drive them away or compelling them, unwillingly, to enter into an additional process."

She also observed that:

> "ADR cannot supplant the machinery of civil justice precisely because, in civil cases, the background threat of litigation is necessary to bring people to the negotiating table."

and that:

> "mediation without the credible threat of judicial determination is the sound of one hand clapping."

As Professor Genn said at the end of her lecture,

> "a well-functioning civil justice system should offer a choice of dispute resolution methods."

We agree entirely with her views.

[9] Dame Hazel Genn (2008), 'ADR in Civil Justice: What's Justice Got To Do With It?' *Judging Civil Justice: Lecture 2*, (The Hamlyn Lectures 2008), delivered on 2 December 2008 at Old College, University of Edinburgh

The role of the court

23. We consider it right that the courts should ensure that litigants and potential litigants are fully informed about the various dispute resolution options that are available to them. We adopt the principles that the civil justice system should encourage early resolution of disputes, that cases should be dealt with proportionately and that efficient use should be made of resources. It is consistent with those principles that the court should encourage ADR in any type of case, and at any stage of a case, where that is appropriate.

24. We do not consider that the court should have power to compel parties to enter into ADR. That is entirely contrary, in our view, to the constitutional right of the citizen to take a dispute to the courts of law.

Recommendations

25. We propose a combination of specific measures involving the provision of information about dispute resolution options, case management procedures, and the development of resources to support the diversion or referral of appropriate cases to ADR.

Information provision

26. There is a wide range of sources of information about ADR. The *Paths to Justice Scotland* study[10] found that three in ten people who sought advice went first to a solicitor. Just under one in five people went first to a Citizen's Advice Bureau. Over half of those who obtained advice went to only a single source. The advice given by that source as to the options available is therefore of great significance in determining how the problem is dealt with. It is important that advisers and agencies who provide first line advice should be aware of all the dispute resolution options that are available.

27. Many people look for advice and information on the internet. Googling the word "mediation" alone throws up nearly 17 million hits. In England and Wales Her Majesty's Court Service website has a sizeable section on the subject and provides further links to information, including details of HMCS's Small Claims Mediation Service and the National Mediation Helpline. The website of the Scottish Court Service contains mainly information directly related to the courts. The Guidance Notes for small claims and summary cause actions are available on the website and in booklet form. They contain suggestions about sources of advice. They advise claimants to try to find a way of settling the dispute before raising an action. They provide two examples of the kind of letters that might be written before the action is raised, but do not mention ADR.

[10] H Genn and A Paterson (2001), *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hart Publishing

28. Elsewhere we discuss the possibility that the SCS website should be developed to provide a greater range of self-help information for court users. An easy first step would be for the website to contain some explanatory material on ADR, along with links to other sources of help; such as the Scottish Mediation Network,[11] Relationships Scotland,[12] the Family Mediation Helpline,[13] the Scottish Government's *advicefinder*[14] site, and other similar government or public information gateways. It could also provide information and contact details about existing court-linked mediation services, such as the Edinburgh Sheriff Court mediation service.

29. It would also be useful for such information to be available at all courts in leaflet form. The 2004 Scottish Government publication, *Resolving Disputes without Going to Court*[15] could be updated and made more widely available, perhaps in shorter format.

30. The current Guidance Notes for small claims and summary cause actions could be amended to provide more information of this kind. In due course there could be suitable guidance on the simplified procedure that we propose for claims for £5,000 or less.

31. Lastly, front-line court staff and notices on court forms could be valuable sources of information to party litigants.

Case management procedures

32. Our proposals in relation to pre-action protocols and active judicial case management provide the opportunity for the court to encourage parties to consider alternatives to litigation. Guidance could be made available to judges and sheriffs.

33. Since we consider that parties should be encouraged, but not compelled, to consider ADR in appropriate cases, we reject the idea that parties should have to make averments in their pleadings about the steps, if any, taken to resolve their dispute by alternative means.

34. Since most personal injury actions are resolved by negotiation, and since there is a high opt out rate for PI actions in pilot mediation schemes in England and Wales,[16] we are satisfied that compulsory pre action protocols for PI cases would be more conducive to settlement than steering the parties towards mediation. However, in more complex cases that are transferred out of Chapter 43, any potential benefit of mediation could be explored at case management hearings.

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[11] http://www.scottishmediation.org.uk/
[12] http://www.relationships-scotland.org.uk/
[13] http://www.familymediationhelpline.co.uk/
[14] http://www.infoscotland.com/advice/CCC_FirstPage.jsp
[15] Scottish Executive (2004), *Resolving disputes without going to court*
[16] See H Genn et al (2007), *Twisting Arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice and Annex B to this chapter.

35. We do not consider it necessary to make any specific provision in court rules for sanctions in expenses where a party has refused to engage in ADR. Nor do we consider that parties should have to justify to the court why they did not engage in ADR or, if they did, why it did not result in settlement. These, in our view, are not proper matters for the court to raise. There is case law in England and Wales where the conduct of parties in relation to mediation has been found relevant to the awarding of costs.[17] We would regret it if such an approach were to become a feature of litigation in Scotland. There may, however, be exceptional cases where it may be clear to the court that a party's refusal to consider ADR has been wholly unreasonable. In such exceptional situations we consider that the court's general discretion at common law in the awarding of expenses is a sufficient safeguard. As a general rule, however, we consider that parties should bear their own expenses in relation to mediation, unless they agree otherwise, and that such expenses should not normally be part of an award of expenses by the court.[18]

Development of resources to support diversion or referral

36. Action by the court to raise awareness of the different options available needs to be supported by mechanisms to enable litigants or their advisers to find a provider of the type of ADR service that they wish to use.

37. The model developed by the Ministry of Justice for its Mediation Small Claims Service, described in Annex C to this chapter seems to be effective for that type of case. We recommend that the Scottish Government consider providing a similar type of service in Scotland for claims for £5,000 or less. In the Ministry of Justice model, the mediators for each area are employed by the Ministry. There are other models. The service could be run by a co-ordinator with a panel of freelance mediators. The co-ordinator might be a member of the staff of the Scottish Court Service. There might be some difficulties in providing a service in rural areas, but experience in England shows that much can be done by telephone. Mediators and co-ordinators could also be based in specific sheriff courts. They might also use video links and online services.

38. We also recommend that the Scottish Government consider establishing an information service by telephone help-line. The National Mediation Helpline set up

[17] E.g. *Hurst v Leeming* [2001] EWHC 1051 (Ch); *Dunnett v Railtrack plc* [2002] 1 WLR 2434; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004]1 W.L.R. 3002 and subsequent cases

[18] We are aware that this means that a successful party who is in receipt of legal aid will not normally be able to recover the costs of any mediation from the other side and that, as a result, where the mediation has been funded by the Scottish Legal Aid Board, the cost of it may be recovered by SLAB from damages awarded to the successful party under the claw back provisions. While it might be argued that this could create a disincentive for legally-aided parties to enter into mediation, we consider that cases where a party may be significantly disadvantaged by the general approach set out above will be rare. In practice most cases will be settled by negotiation between the parties, with the expenses of any proposed mediation being one of the items to be subject to negotiation.

by the Ministry of Justice provides this kind of service in England and Wales.[19] In Scotland, the Scottish Mediation Network already has a Mediation Register with nearly 60 providers.

39. The court-linked type of scheme, providing mediation free or at a nominal cost, seems likely to be most appropriate for lower value claims of the kind that we propose would be dealt with by the new simplified procedure. Experience suggests that take-up of mediation in such cases will be poor unless it is provided free. We do however have some concerns about the sustainability of mediation services that rely on the use of unpaid volunteer mediators, although we note that the mediation service in Edinburgh Sheriff Court has operated successfully on that basis. We think it likely that such services will have to be publicly funded, at least in the short to medium term. It will also be important to ensure that parties to lower value claims have access to independent advice about their rights, so that they can make a properly informed choice.

[19]See Annex C to this chapter

CHAPTER 8 FACILITATING SETTLEMENT

1. In this chapter we examine two methods of facilitating the early resolution of claims: the use of pre-action protocols and the introduction of a new system for making formal offers to settle.

Pre-Action Protocols

2. There are currently four pre-action protocols in Scotland. In the Court of Session a pre-action protocol was introduced for commercial actions in January 2005 by way of a Practice Note.[1] Compliance with this protocol is expected. A pre-action protocol for personal injury claims was introduced for all claims intimated after 1 January 2006. This is designed primarily for claims up to £10,000 although parties may agree to use it for claims of a higher value. A pre-action protocol was introduced for professional negligence claims intimated after 1 July 2007 having a value up to £20,000. It may also be used for higher value claims if the parties agree. The protocol applies to claims against solicitors and other professional persons, with the exception of medical negligence cases. A further pre-action protocol applies to industrial disease claims intimated on or after 1 June 2008. The protocols for personal injury, professional negligence and industrial disease claims were agreed by the Law Society of Scotland with the Forum of Scottish Claims Managers who represent the insurance industry. Compliance with these protocols is voluntary.

3. As we pointed out in para 6.9 of the Consultation Paper, there has been no formal evaluation of the protocols currently in use in Scotland.

Responses to the Consultation

4. We invited views on the advantages and disadvantages of pre-action protocols; whether greater use should be made of them and, if so, in which courts and for what types of action; and whether compliance with them should be voluntary or compulsory. We had 72 responses on the subject. They expressed mixed views.

Advantages and disadvantages

5. Respondents thought that the key advantage of a pre-action protocol is that it should focus the factual and legal issues in dispute so that a meaningful assessment of the merits and value of the claim can be made in advance of litigation. It can also act as a checklist or guide to thorough preparation. One respondent said that pre-action protocols reflect a fundamental principle of litigation, namely

[1] Court of Session Commercial Court Practice Note 6, paragraph 11.

> "that parties should not be in court without having first carefully assessed their case and collated the relevant information they will need to pursue it. To commence litigation and only then give thought to the details of one's case is tantamount to an abuse of process and should not be tolerated by the courts."

6. Another respondent said that the spirit of the pre-action protocols was to ensure that there is as much pre-action ventilation of the issues as possible. This can significantly improve the chances of a prompt settlement and can reduce court time and the cost of litigation.

7. The main concern that respondents had with the operation of pre-action protocols was that they involve the front-loading of costs. In some cases this was thought to result in legal costs far in excess of the settlement value of the claim. There were also concerns that they may give rise to protracted correspondence and can act as a disincentive to litigation, especially in relatively low value claims. They may also be open to abuse if one party causes undue work and inconvenience for the other or may be used as a stalling tactic to prolong a dispute and wear an opponent down. Compliance with a pre-action protocol may become a simple formality that does not, in fact, promote early settlement.

8. Those representing pursuers in personal injury actions said that the pre-action protocol for personal injury actions had failed to deal with the practice of insurers of making low pre litigation offers that are increased to realistic levels only when an action is raised.

Greater use of pre-action protocols

9. Most respondents favoured greater use of pre-action protocols, with only about one in ten disagreeing. Respondents who favoured them suggested that pre-action protocols would be valuable in cases involving medical negligence; mesothelioma;[*] construction and engineering; family disputes; defamation; possession claims based on rent arrears; housing; debt recovery and administrative law. There were mixed views on whether a pre-action protocol for judicial review would be worthwhile.

10. One respondent, a social landlord, reported that it had adopted its own policies and procedures to attempt to resolve disputes with tenants without taking court action, which it regarded as a last resort. It considered that these procedures prevented unnecessary court action and enabled other agencies to provide support and advice to the tenant.

11. One respondent thought that although there may be scope for greater use of pre-action protocols, they would not, in its view, be appropriate in matters relating to

[*] This is pending.

housing and anti-social behaviour, in many matters concerning children, or in low value claims since these often involve party litigants and are conducted under less formal procedure.

12. Some respondents suggested that the current upper value applicable to the pre-action protocol for personal injury actions should be increased from £10,000. One suggestion was that it should be extended to claims with a value up to £50,000.

Voluntary or compulsory?

13. About three quarters of respondents considered that compliance with pre-action protocols should be compulsory. They thought where compliance is voluntary this defeats the purpose of a pre-action protocol and enables a party to frustrate the process by refusing to engage in it. On this view, a robust and compulsory pre-action protocol would encourage parties to disclose relevant information as early as possible and to reach early settlement of disputes at sums that are commensurate with court awards. It was said that the operation of the voluntary pre-action protocol for personal injury claims is unsatisfactory since not all claimants' representatives or insurers participate or comply with its terms.

14. Those respondents who were not in favour of voluntary pre-action protocols thought that if the personal injury pre-action protocol was to be made compulsory, it would cause needless delays, for example in getting medical records or medical reports, that would be against the interests of pursuers.

Sanctions

15. Respondents raised the related question of whether sanctions should be imposed for breach of pre-action protocols. Several thought that sanctions underpin the success or failure of protocols. Without sanctions, there will always be parties who are unwilling to adopt a co-operative approach. Formalising pre-action conduct by making the pre-action protocol compulsory and imposing sanctions for non-compliance would encourage all parties to consider pre-litigation steps seriously, ensure that court proceedings are not raised unnecessarily and reduce settlement times, provided that appropriate fee structures are in place.

16. So far as sanctions are concerned, respondents suggested that breach of the protocol should be a relevant factor for the court to take into account in awarding expenses.

Other jurisdictions

17. A summary of the use of pre-action protocols in other jurisdictions can be found in Annex A to this chapter.

Experience in England and Wales

18. Pre-action protocols were recommended by Lord Woolf in 1996 as part of his *Access to Justice Report*. There are now ten pre-action protocols in force in England and Wales. They cover personal injury, clinical negligence, construction and engineering, defamation, professional negligence, judicial review, disease and illness, housing disrepair, rent arrears and, most recently, mortgage arrears**.** This proliferation led the Civil Justice Council in February 2007 to seek views on a proposal to introduce a consolidated pre-action protocol incorporating the core steps and guidance common to all protocols then in force, but with subject specific appendices. There was considerable opposition to the proposal as it was thought that different types of action require different procedures. However, a Practice Direction on Pre-Action conduct was introduced in April 2009. The aim of the Practice Direction is to encourage settlement without the need to start proceedings and to support the efficient management of proceedings that cannot be avoided. The Practice Direction encourages early exchange of information and consideration of ADR. It applies to all types of proceedings including those governed by pre-action protocols (subject to certain modifications).

19. An early evaluation of the Woolf reforms in England and Wales indicated that by establishing clear ground rules on how claims should be formulated and responded to, pre-action protocols focused minds on the key issues at an early stage and encouraged greater openness.[2] This is supported by a Department for Constitutional Affairs (DCA) research paper published in 2005 which found that protocols generated better preparation of cases, a more co-operative attitude between parties, more voluntary disclosure and more widespread employment of single joint experts.[3] The same paper also commented that it is generally agreed that one of the effects of the protocols has been the front loading of costs both for cases that are ultimately contested and for those that settle, including cases that would previously have settled at lower cost. Indications from a variety of sources, however, seem to indicate that pre-action protocols in England and Wales are promoting earlier settlements and probably more settlements. Cases that would have settled anyway, are now likely to settle on the basis of fuller information. This is linked to what are known in England as Part 36 offers, in particular the ability of a claimant to make a formal offer in settlement, which seem to be conducive to earlier and perhaps more settlements.[4]

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[2] T Goriely et al (2002), *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour*, The Law Society and Civil Justice Council
[3] J Peysner and M Seneviratne (2005), *op. cit*
[4] M Zander (2007), *Cases and Materials on the English Legal System*

Problems with the existing system in Scotland

Personal injury actions

20. One experienced personal injury litigator has commented that many insurers are unable or unwilling to comply with the pre-action protocol time limits, which they had agreed to, and that the culture of under-settlement appears to be more firmly embedded than ever.[5] He argues that the introduction of the protocol has demonstrably failed to tackle the principal causes of litigation, namely a serious under-resourcing of the claims-handling process and the deliberate policy of under-settlement that the insurance industry has adopted. He refers to the growing practice amongst insurers of using software programmes to find settlement levels which, he contends, are expressly designed to produce valuations well below the level of judicial awards.[6] This view was echoed by other respondents.

21. Respondents drew attention to the relationship between the fees payable under the pre-action protocols and those payable for pre-litigation work in the table of fees for judicial expenses. The former are considerably higher. It may therefore be more cost effective for insurers to wait until proceedings are initiated and to lodge a tender with the defences than to make a reasonable pre-litigation offer in settlement. We discuss this in greater detail in Chapter 14.

Commercial actions

22. A review of practice in commercial actions in the Court of Session in 2006[7] reported that the general view was that pre-action correspondence was sensible unless proceedings had to be raised urgently, that the protocol had resulted in some disputes being settled without proceedings, and that it had narrowed the issues in dispute in some actions. However, the cost of compliance with the protocol was estimated, on average, at £10,000 per party. The requirements of the protocol appeared to encourage prolonged correspondence. The requirement to obtain and disclose expert evidence in advance of raising the action was thought to cause unnecessary expense and delay. There was disquiet about experts who committed themselves at too early a stage.

23. The extent to which the cost of complying with a pre-action protocol can be recovered by way of judicial expenses is unclear and was identified as a problem by respondents. There is a view that pre-action protocols result in a lower rate of recovery of expenses. We discuss this in Chapter 14.

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[5] G Garrett (2008) 'A Breach of Protocol' *JLSS 2008 53(2)*, p14.
[6] See also R Conway (2008), 'A Colossus in the room' *JLSS 2008 53(1)*, p14
[7] The Hon Lord Reed (2007), 'Clean sheet at the Commercial Court' *JLSS 2007 52(2)*.

Discussion and Recommendations

24. We recognise that pre-action protocols are not the only way in which to promote openness and co-operation and encourage settlement. We consider that the advantages of pre-action protocols outweigh the disadvantages. We support the use of pre-action protocols in certain types of action to identify the factual and legal issues at an early stage so that a meaningful assessment of the merits and value of the claim can be made in advance of litigation.

25. We received no representations in favour of a general pre-action protocol for all types of action. Having considered the subject closely we advise against (a) the creation of a general pre-action protocol for all types of action, or (b) a general pre-action protocol for use in cases to which subject-specific pre-action protocols do not apply.

26. It is clear from the responses to the Consultation Paper and from experience in England and Wales and other jurisdictions that there has to be a careful assessment of the need for a protocol in relation to a particular type of claim and that protocols need to be tailored to the type of claim in question. In some cases it may be possible for the court to determine the content of a protocol by way of a Practice Note. In other cases, it may be necessary for representatives of interested parties to agree on the terms of a protocol in relation, for example, to a timetable for investigation of the claim, the exchange of information and the payment of fees. In other situations, for example, in housing cases it may be sufficient for landlords to adopt their own standard pre-litigation procedures.

27. The pre-action protocol for commercial actions in the Court of Session was introduced by way of a Practice Note, whereas the protocols for personal injury, professional negligence and industrial disease claims, which are voluntary in nature, were agreed by the Law Society of Scotland with the Forum of Scottish Claims Managers. In England and Wales the Civil Justice Council acts as principal adviser to the Master of the Rolls, as Head of Civil Justice, on the future development of the pre-action protocol regime, and ensures that any proposals for change are subject to wide consultation. The Civil Procedure Rule Committee is responsible for reviewing the drafting of protocols with a view to ensuring overall consistency of style and presentation with the Civil Procedure Rules.

28. In Chapter 15 we recommend that a Civil Justice Council for Scotland should be established. That body would keep under review the practice and procedure in the civil courts. Its remit would include the development, extension and adaptation of pre-action protocols in the light of experience.

29. Pending a comprehensive review of the matter by our proposed Civil Justice Council for Scotland, we consider that there are a number of reforms which could

usefully be made to the current system. We discuss them by reference to certain categories of claim.

Commercial actions

30. In 2006 there was some dissatisfaction with the operation of the pre-action protocol for commercial actions in the Court of Session. This has since been allayed, to an extent, by a lighter touch in the application of the protocol. The number of actions raised under the commercial procedure has increased significantly over the last year or two. As the procedures appear to be working well[8], we make no recommendation regarding the pre-action protocol.

31. The problems identified regarding the recovery of the expenses involved in complying with a pre-action protocol are discussed in Chapter 14.

32. We considered whether there would be merit in introducing a pre-action protocol for commercial actions in the sheriff court. There was no call for this from respondents and, in our experience, many actions raised in the sheriff court under the commercial procedure settle before or just after the first case management conference. A pre-action protocol would front load costs and might result in unnecessary work given that it is relatively common for actions to settle at an early stage after informal discussions between the parties.

Personal Injury actions

33. There is considerable support for making the current pre-action protocols in relation to personal injury and industrial disease claims compulsory, for increasing the value of the claims to which they apply, and for extending them to all types of personal injury claim. We are persuaded that compliance with the pre-action protocols should be compulsory as they reflect good practice. From the responses to the Consultation Paper, it appears that this proposal would have the support of both those acting for claimants and those acting for insurers.

34. We consider that, in principle, the pre-action protocols should apply to all categories of personal injury claim. If the protocols were extended to higher value, more complex cases, the timetables for investigation and exchange of information might have to be revised. The types of documentary evidence that currently have to be disclosed are identified in the annexes to the personal injury and industrial disease protocols. These, too, might have to be revised.

35. We note that the current protocol for professional negligence claims does not apply to claims in relation to clinical negligence. A number of respondents have

[8] See Chapter 5

submitted that a protocol for clinical negligence should be introduced and that the clinical negligence protocol in England and Wales works well. In our opinion it should be possible to develop a similar protocol in this jurisdiction. We recommend that, pending the establishment of a Civil Justice Council for Scotland, the Law Society should take the lead in consulting interested parties such as practitioners in this area, the medical defence insurers, APIL, AvMA, CLO and SLAB on the merits of such a proposal.

36. Several respondents submitted that the financial limits that apply to claims processed under the protocols (£10,000 for PI and industrial disease cases) should be increased. In our view, the personal injury and industrial disease protocols should be extended to cover all claims in this category. There appears to us to be no good reason to restrict the benefits of those protocols to claims for £10,000 or less.

Family actions

37. We considered whether a pre-action protocol for family actions should be introduced. The lack of a mechanism for early disclosure of financial information was identified by respondents as a failing of the current system. It would be possible to introduce a protocol which provided for exchange of financial information before proceedings are commenced but we are conscious that in family cases there is often a need for an action to be initiated without delay. Our preference, as discussed in Chapter 5, would be for the court to make any necessary orders in relation to disclosure of financial information at the first case management hearing.

Housing cases

38. Several respondents suggested that there should be a pre-action protocol to deal with possession claims based on rent arrears. Such a protocol was introduced in England and Wales in October 2006 for possession claims raised by social landlords. Research indicates that it has been generally effective in preventing unnecessary court action, although the extent of compliance with it varies.[9] The rent arrears pre-action protocol does not cover mortgage lenders or private landlords. Recently, mortgage lenders and private landlords have issued the majority of possession claims in England and Wales. A mortgage arrears pre-action protocol was, therefore, introduced with effect from 19 November 2008. It mirrors in many respects the rent arrears pre-action protocol. In Scotland there are no pre-action protocols in such litigation.

39. Some respondents thought that some landlords were too willing to resort to eviction proceedings as the primary method of recovering arrears and that landlords should have to demonstrate that they had exhausted all means of recovery before taking

[9] L Phelps (2008), *Unfinished business*, *Housing associations' compliance with the rent arrears pre-action protocol and use of Ground 8*, Citizens Advice

court action. Others said that it was not the policy of social landlords to initiate court action without having made strenuous attempts to resolve matters with the tenant. In social housing there is a regulatory framework in place which sets standards of procedure for the recovery of rent arrears with a view to helping tenants to sustain their tenancies and avoid homelessness. Private landlords must be registered with local authorities and are expected to comply with national core standards of good practice. These include an obligation on the landlord to communicate clearly, promptly and informatively with the tenant on any matter that affects the property, its management and the tenant's safe and peaceful occupation of the accommodation.[10]

40. In mortgage repossessions, creditors who are regulated by the Financial Services Authority are bound by the requirements of the Mortgage Conduct of Business sourcebook (MCOB/13),[11] part of the FSA's Handbook, which requires the lender to provide the borrower with certain information, such as the amount of the shortfall and any charges, as soon as possible on becoming aware that the borrower is in arrears, and to clearly state the action that will be taken before commencing action for repossession.

41. On the face of it, the introduction of the protocol on rent arrears in England seems to have had a beneficial effect, but a number of other considerations must be taken into account. A pre-action protocol may increase the costs in a case. It is arguable that the role of the court is to interpret and apply the law and not to act as an instrument of social policy; and that the court should not take on a role that is properly that of the regulatory authorities. We doubt whether a formal pre-action protocol would add anything useful to the extensive good practice guidance that already exists.

42. We also question what value a formal pre-action protocol would have, given the requirements of housing law. Under section 16 of the Housing (Scotland) Act 2001, where the property is the subject of a Scottish Secure Tenancy,[12] the court has to be satisfied that it is "reasonable" to grant the landlord an order for possession and has to enquire into the circumstances of the particular case. The court must have regard to the nature, frequency and duration of the conduct giving rise to the ground on which recovery of possession is sought, the extent to which the conduct is the consequence of an act or omission of someone other than the tenant, and any action taken by the landlord before raising the proceedings, with a view to securing the cessation of the

[10] *Scottish Core Standards For Accredited Landlords* (2008). These standards follow the Scottish National Core Standards and Good Practice Guidance for Private Landlords developed by Communities Scotland in 2006, and were endorsed by the Scottish Government. http://www.landlordaccreditationscotland.com

[11] The provisions on mortgage arrears and repossessions are available at http://fsahandbook.info/FSA/html/handbook/MCOB/13

[12] A tenancy will only be an Scottish Secure Tenancy if certain conditions are met: these include that the house is let as a separate dwelling, the tenant is an individual, and the house is the tenant's only or principal home and the landlord is a local authority landlord, a registered social landlord, or a water or sewerage authority: 2001 Act section 11. All existing secure and assured tenants of such landlords were converted into Scottish Secure Tenancies on 30 September 2002, by virtue of an order under section 11.

conduct.[13] In rent arrears cases, these requirements would mean that the court should take account of how the arrears arose, what the tenant has done to reduce them, whether there have been delays on the part of the local authority or the Department for Work & Pensions (DWP) in processing any housing benefit claims and what action the landlord has already taken to recover the arrears.

43. In relation to private landlords, the regime for regaining possession of a privately rented property puts stringent demands on landlords regarding the timeous service of formal notices.

44. In the light of these various provisions, we see no need for a pre-action protocol in rented housing repossession cases.

45. It is not yet clear what effect the pre-action protocol in England and Wales will have on mortgage repossessions. In Scotland there are significant protections for debtors under the Mortgage Rights (Scotland) Act 2001. The court has a broad discretion to suspend the exercise of a creditor's rights to such an extent, for such period and subject to such conditions as it thinks fit, if it considers it reasonable to do so in all the circumstances. In making its decision, the court is to have regard to:

> "(a) the nature of and reasons for the default,
> (b) the applicant's ability to fulfil within a reasonable period the obligations under the standard security in respect of which the debtor is in default,
> (c) any action taken by the creditor to assist the debtor to fulfil those obligations, and
> (d) the ability of the applicant and any other person residing at the security subjects to secure reasonable alternative accommodation."[14]

46. This provision allows the court to take into account, for example, a re-structuring of the loan or an agreement on an alternative payment plan to avoid the need for repossession of the property. Whether the creditor has met its obligations under MCOB/13 of the FSA handbook[15] is a relevant consideration.

47. In the light of these statutory and regulatory provisions, we see no need for a formal pre-action protocol in mortgage repossession cases.[16]

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[13] Section 16(2)(a)(ii) and (3) of the Housing (Scotland) Act 2001
[14] Mortgage Rights (Scotland) Act 2001 s 2(2)
[15] See footnote 11
[16] The Repossessions Group set up by Scottish Ministers to look at the legal protections available to homeowners at risk of repossession considered the mortgage arrears pre-action protocol introduced in England and Wales. It thought that the protocol may apply here in practice because most lenders seek to operate repossession processes in a uniform way across the UK. The Group did not recommend the introduction of a mortgage repossession pre-action protocol in Scotland. See Repossesions Group (2009), *The Final Report*, Scottish Government.

Sanctions for non compliance

48. In England and Wales the Civil Procedure Rules enable the court to take into account the extent of the parties' compliance with the Practice Direction on Pre- Action Protocols or the relevant protocol when giving directions for the management of the case and when making orders for costs. The court expects the parties to comply with the relevant protocols and may ask for an explanation for any failure to comply.

49. When considering compliance the court will have regard to (a) whether the parties have complied in substance with the relevant principles and requirements and will be less concerned with minor or technical shortcomings; (b) the proportionality of the steps taken in relation to the size and importance of the matter; and (c) the urgency of the matter.

50. The court may decide that there has been a failure to comply if a party has not provided sufficient information to enable the other party to understand the issues; has not acted within a time limit set out in a protocol; has unreasonably refused ADR; or, without good reason, has not disclosed documents of which disclosure has been requested.

51. Where there has been non-compliance the court may order that the proceedings should be stayed until steps that should have been taken are taken; order a party at fault to pay the costs, or part of the costs, of the other; order the party at fault to pay costs on an indemnity basis (see para 82 and footnote 24); if the party at fault is a claimant in whose favour an order for payment of a sum of money is later made, order that the claimant be deprived of interest on all or part of that sum, or order that interest is to be awarded at a lower rate than would otherwise have been ordered; if the party at fault is a defendant, and an order for payment is later made in favour of the claimant, order that the defendant shall pay interest on all or part of that sum at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded.

52. In Scotland the voluntary pre-action protocol for personal injury claims contains an acknowledgement by the subscribing parties that the standards within it are to be regarded as the normal, reasonable approach to pre-action conduct in cases to which it applies, and that it is open to any party to lodge communications relating to the protocol for the sole purpose of assisting the court in any determination of expenses. There are similar provisions in the protocols relating to industrial disease claims and professional negligence claims. Where, therefore, parties have agreed to process a claim under the protocol there is scope for the court to take account of a failure to comply with the standards outlined in the protocol when dealing with expenses. However, it appears that participation in the personal injury protocol is patchy. One respondent insurer indicated that its experience was that the pre-action protocols were used by pursuers'

agents in about 20% of liability claims. Even in respect of motor claims, the take up was still only just over 50%.

53. We consider that where a pre-action protocol is adopted, compliance with it should be compulsory, and that the court should have the power to make orders in relation to expenses and interest, along the lines of those specified in the Practice Direction in relation to Pre-Action Protocols in England and Wales, for non compliance. The Guidance Notes in the pre-action protocol for personal injury claims in England and Wales explain that the power to impose sanctions will not be exercised in relation to minor infringements; that one minor breach will not exempt the innocent party from following the protocol and that the court will look at the effect of non-compliance on the other party when deciding whether to impose a sanction. Similar guidance would be appropriate in Scotland.

Offers in Settlement

54. A schematic review of defenders' and pursuers' offers in settlement in a selection of jurisdictions, including England and Wales, is contained in Annex B to this chapter.

Responses to the Consultation

55. In our Consultation Paper, we invited views on whether a system of pursuers' offers should be introduced and, if so, what features such a system should have.

56. A large majority of respondents, including those representing defenders' interests, argued in favour of a system of pursuers' offers. At common law a defender may make a formal offer to settle an action by lodging a minute of tender. A system of pursuers' offers would enable a pursuer to make a formal offer to settle the claim. If that offer was rejected by the defender and the pursuer was subsequently awarded more than the sum stated in the pursuer's offer, the defender would be liable to pay an additional sum, by way of expenses or otherwise, over and above the sum awarded and the usual award of judicial expenses on a party and party basis. This, it was argued, would achieve symmetry and promote equality of arms. As one respondent observed, "pursuers and defenders should have the same incentive to reach a settlement and suffer the same consequences if reasonable settlement offers are rejected".

57. Such a system would raise numerous practical questions. For example:

- Whether offers may include monetary and non-monetary offers;
- Whether they may relate to the whole or part of the claim;
- At which stages of legal proceedings offers may be permitted;

- Whether offers in settlement prior to litigating should be taken into account in the consideration of expenses;
- Whether there should be provisions for offers near to, or at, proof/trial;
- How much time should be allowed for consideration of offers;
- Whether late acceptance of offers may be permitted and how they should be dealt with;
- Whether permission should be required to withdraw an offer within the period for consideration;
- What penalties should be available with reference to pursuers' offers, how should they be calculated and from when;
- How much discretion should be given to the court in relation to expenses and any penalty to be imposed on a defender; and
- Whether documentation and information supporting the offer should be required to enable the defender to evaluate the offer.

58. The Court of Session introduced a system of pursuers' offers by act of sederunt,[17] which came into force on 23 September 1996, following comment in the Inner House that the lack of such a system was regrettable: *Morrison v Barton (No 2)* 1994 SLT 685. The Court of Session's decision to alter its rules by introducing a system of pursuers' offers was made in the hope of encouraging the parties to reach agreement at an earlier stage, with consequential benefits to the administration of justice. The act of sederunt was enacted by virtue of the powers conferred by sections 5 and 6 (ii) of the Court of Session Act 1988. It introduced a new Rule 34A.6 (2)(b) which provided that a pursuer might, at any time before the court made avizandum or gave judgment, make an offer to the defender to settle a claim, and that if the pursuer was awarded the same or a greater amount than made in the offer, he was entitled to receive from the defender a sum equal to the taxed amount of his expenses, in addition to the normal expenses of process. Rule 34A was soon seen to be problematic. It was repealed in less than two months by Act of Sederunt (Rules of the Court of Session Amendment No 6) (S.I. 1996 No.2769 (s.213)), which came into effect on 14 November 1996.

59. The validity of Rule 34A during its short life was considered by the Inner House in 1998, some time after its revocation. In *Taylor v Marshalls Food Group Ltd (No2)*[18], a minute of offer to settle the action at £45,000 was made by the pursuer on 24 September 1996, while Rule 34A was in force. After proof, the pursuer was awarded £51,850.[19] He sought the expenses of the action, together with the additional sum to which we have referred. The Lord Ordinary, having heard submissions on the validity of the Rule, reported the case to the Inner House.

[17] Rules of the Court of Session (Amendment No 4) (Miscellaneous) 1996 S.I. 1996 No.2168 (s.175))
[18] *Taylor v Marshalls Food Group Ltd (No 2)* 1998 SLT 1022
[19] 1998 SLT 869

60. The Inner House refused the pursuer's motion for the additional sum on the ground that Rule 34A.6 (2)(b) was *ultra vires*.[20] It held that rule 34A.6 (2)(b) did not fall within the powers conferred by section 5 of the Court of Session Act 1988. The additional sum could not properly be described as expenses. The wording of the Rule, "a sum equal to the taxed amount of those expenses," showed that the sum in question was not intended to fall within the category of expenses. The court did not therefore have the power to provide for payment of such a sum under its powers "to regulate the expenses which may be awarded to parties."

61. The Inner House observed that no pursuer had lodged an offer to settle a case at a certain figure and asked the court to have regard to that offer in its decision on expenses; and that it would not be impossible "to design a different rule which would operate satisfactorily and promote the desirable aim of promoting the more efficient administration of justice which this rule was designed to achieve."

62. After that decision, an informal system of pursuers' offers developed but does not appear to have become well established. [21]

63. Those who supported the introduction of a system of pursuers' offers thought that the model introduced in the Court of Session in 1996 was flawed and that a different approach would be necessary.

64. The principal drawback of the system of pursuers' offers introduced in 1996 was that a pursuer who was awarded a sum equal to or more than the sum specified in the offer to settle was entitled to the expenses of process as taxed plus the additional sum. The additional sum was calculated by reference to the expenses from the date on which the action was initiated rather than from the date of the offer. This meant that a pursuer could offer to settle at a very late stage of an action and expose the defender to the risk that the expenses would be doubled. It was also unfair that the additional sum should be calculated by reference to the judicial expenses, which included disbursements as

[20] Section 5 of the 1988 Act provides that the court shall have power to regulate or prescribe certain matters by act of sederunt. The Act of Sederunt creating Rule 34A did not specify under which sub-paragraph of Section 5 it was made, but the pursuer in *Marshall* identified only three possibilities: (a)
to regulate and prescribe the procedure and practice to be followed in various categories of causes in the Court or in execution or diligence following on such causes, whether originating in the said Court or brought there by way of appeal, removal, remit, stated case, or other like process, and any matters incidental or relating to any such procedure or practice including (but without prejudice to the foregoing generality) the manner in which, the time within which, and the conditions on which any interlocutor of a Lord Ordinary may be submitted to the review of the Inner House, or any application to the Court, or any thing required or authorised to be done in relation to any such causes as aforesaid shall or may be made or done; (h) to regulate the expenses which may be awarded to parties in causes before the Court; and (l) to make such regulations as may be necessary to carry out the provisions of this Act or of any Act conferring powers or imposing duties on the Court or relating to proceedings therein. Section 6(ii) relates to the allocation of Inner House and Outer House business.

[21] See, for example, *Cameron v Kvaerner Govan Ltd* 1999 SLT 638 *and Tenbey v Stolt Comex Seaway Ltd* 2001 SLT 418

well as fees. Several respondents submitted that the rule was indiscriminate and unbalanced and that it often produced unmerited windfalls for pursuers.

65. Respondents made the following suggestions for reform:

Supporting documentation and information

66. Since the previous system of pursuers' offers did not require the pursuer to disclose information by way of a reasoned valuation of the claim or by way of supporting medical or other evidence, it operated unfairly to defenders. A revised system of pursuers' offers should be linked to full and open disclosure of all evidence on which the pursuer intends to rely. Some respondents argued that any further disclosure should invalidate all earlier offers.

67. One respondent proposed a settlement bundle, to include GP records, a wage loss calculation, documentary support for other heads of claim, and reference to case law. Since parties were already required to lodge in process a statement of valuation of the claim by reference to supporting documentation under Chapter 43, this valuation could be provided at any stage of the proceedings and, if accompanied by a suitably worded offer, could attract the consequences of a tender. Some respondents wished to link entitlement to penalties, as well as their specific amount, to the information that was made available to the other party at the time of the pursuer's offer or defender's tender.

Investigation and time to consider

68. Some respondents referred to the need for fair notice and opportunity to investigate. As well as the supporting documentation, defenders should be given a reasonable time to consider a pursuer's offer. One respondent suggested a 21-day acceptance period. Another suggested 28 days.

Extending offers and tenders to the pre-litigation stage

69. Several respondents proposed that offers in settlement before litigation should be taken into account in the consideration of expenses. One respondent called for the codification of the law and practice relating to tenders and pre-litigation offers. He observed that a sanction was needed to compel compliance with pre-action protocols since the matter was "much too important to be left to the uncertainties and vagaries of post settlement arguments over the general discretion of the court to award or refuse to award expenses."

Penalties

70. Several respondents agreed that the difficulty with pursuers' offers is in devising a system of sanctions that is both fair and effective. As one respondent observed, a system of pursuers' offers is attractive in theory, but it is difficult to envisage what penalty might be exacted from a defender. The pursuer, having been awarded a greater sum, will be awarded the expenses for the further procedure in any event. To be awarded more than this, so some observed, would be more prejudicial to defenders than pursuers in similar circumstances because they would be penalised doubly by expenses: for losing the case and for losing it later rather than earlier.

71. Most respondents were of the view that the pursuer should be entitled to recover over and above what is normally recovered if the court should award a sum that is equal to or greater than the pursuer's offer. They differed in their views as to how that penalty should be determined.

72. A substantial number of respondents suggested that expenses should be taxed from the date of the pursuer's offer on an agent/client basis. One respondent suggested that this could apply to both pursuers' and defenders' offers.

73. Several respondents proposed that the rate of interest payable on the principal sum awarded should be increased. One suggested a percentage increase in the sum awarded "perhaps 5%, as an incentive for putting his cards on the table". Another suggested a penalty of 2% above the judicial rate of interest on the damages awarded.

74. A number of respondents suggested that there should be an entitlement to an additional fee or a percentage uplift on fees.

75. Several respondents thought that while penalties should be imposed, neither the entitlement itself, nor the specific amount to which parties were entitled, should be automatic. As one respondent observed, pursuers are in an unusual position in that they have full knowledge of their own circumstances, which defenders will invariably lack. When deciding whether and what level of uplift was appropriate, the court should therefore consider whether the pursuer has given the defender access to all necessary documentation and information to substantiate the pursuer's offer.

England and Wales

76. Several respondents to the Consultation Paper reported favourably on the operation of offers under Part 36 of the Civil Procedure Rules (CPR) in England and Wales and called for some system of pursuers' offers to be introduced in Scotland on the basis of that experience. Further details on the operation of Part 36 offers prior to and

following changes introduced on 6 April 2007 is schematically represented in Annex B to this chapter. It also provides information on similar systems in other jurisdictions.

77. Under Part 36, offers may be made by any party. The party refusing the offer is liable for additional costs if the judgment is no more favourable to him than the offer made to him. The regime introduced by Part 36 is an exception to the general rule that costs follow success. When Part 36 was introduced, it was not clear to what extent the court had discretion to depart from the costs consequences laid down in CPR 36 nor how that rule related to the exercise of the court's overall discretion on costs in the context of informal offers of settlement and the conduct of the parties. There were a number of cases on the questions whether the court should give effect to a formal offer by a defendant who chose not to make a payment into court, whether the costs consequences of Part 36 should apply in cases in which there had been a technical failure to comply with the requirements of the rule, and how the court should judge success where the claimant was awarded little more than his Part 36 offer in circumstances where there had been an unwillingness to negotiate in good faith or an element of exaggeration of the claim.

78. The Department for Constitutional Affairs (DCA) commissioned research into the operation of the Woolf reforms, including Part 36. The researchers concluded that Part 36 was a key element in "levelling the playing field and producing equality of arms between parties to litigation, one of the key objectives of the reforms."[22] It opened up discussions at an earlier stage. It was useful in commercial work, as well as in personal injury cases and debt collecting. There were two disadvantages. If offers are made in advance of disclosure, the party to whom the offer is made may not be in possession of the information needed to evaluate the offer. This creates problems for solicitors in discharging their duty of care towards their clients. The researchers found that the provisions of Part 36 are "fiendishly complicated and solicitors have to spend some time advising clients on them". They advised that it might now be time to re-examine Part 36 to build on its success while reducing its complexity. This would involve consideration of not only the design of the procedural rules but also the sanctions built into the rule (additional interest and penalty costs) to make them more effective and increase the propensity to settle.

79. In 2006, the DCA issued a consultation paper proposing a number of reforms intended to streamline the procedure and to ensure a better balance between claimants' and defendants' offers. The amended rule which came into effect on 6 April 2007 abolished, with certain minor exceptions, the requirement for defendants' offers to be accompanied by a payment into court.

[22] J Peysner and M Seneviratne (2005), *op. cit*

80. The basic rule now provides for two situations:

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
(b) the judgment given against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer.

81. Where (a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to his costs from the date on which the relevant period expired, plus interest on those costs.[23]

82. Where (b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to interest on the whole or part of any sum of money awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired; costs on an indemnity basis[24] from that date; and interest on those costs at a rate not exceeding 10% above base rate.

83. In a series of decisions the courts have emphasised that the costs consequences specified in Part 36 are subject to the overriding discretion of the court in relation to costs and the overriding objective to reach a just result. In deciding whether it would be unjust to make the usual order in relation to costs, the court will take into account the

[23] A Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted: rule 36.2(c). The 'relevant period' means (i) in the case of an offer made not less than 21 days before trial, the period stated under rule 36.2(2)(c) or such longer period as the parties agree; (ii) otherwise, the period up to end of the trial or such other period as the court has determined: rule 36(3)(c).

[24] In England and Wales the court can award costs on either the standard basis or the indemnity basis. Indemnity costs were considered by the House of Lords in *Fourie (Appellant) v Le Roux and others* [2007] UKHL 1. Lord Scott of Foscote said (at paragraph 39) that "I think it needs to be understood that the difference between costs at the standard rate and costs on an indemnity basis is, according to the language of the relevant rules, not very great. According to CPR 44.5(1), where costs are assessed on the standard basis the payee can expect to recover costs "proportionately and reasonably incurred" or "proportionate and reasonable in amount"; and where costs are assessed on the indemnity basis the payee can expect to recover all his costs except those that were "unreasonably incurred" or were "unreasonable in amount". It is difficult to see much difference between the two sets of criteria, save that where an indemnity basis has been ordered the onus must lie on the payer to show any unreasonableness. The criterion of proportionality, which applies only to standard basis costs, seems to me to add very little to the reasonableness criterion. The concept of costs that were unreasonably but proportionately incurred or are unreasonable but proportionate in amount, or *vice versa*, is one that I find difficult to comprehend." Lord Hope of Craighead said (at paragraphs 9-10) that the Civil Procedure Rules contained a new procedural code "the object of which is to enable the court to deal with cases justly, and that it is no longer necessary to show that there has to be some sort of moral lack of probity or conduct deserving moral condemnation on the part of the paying party: *Reid Minty v Taylor* [2001] EWCA Civ 1723; [2002] 1 WLR 2800, para 27, per May LJ. But, as the judgments that were given in that case show, the award of costs on this [indemnity] basis will not be justified unless the conduct of the paying party can be said in some respect to have been unreasonable: see May LJ at para 32, Kay LJ at para 37. For example, as Kay LJ said in para 37, if one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis."

terms of the Part 36 offer; the stage in the proceedings at which it was made; the information available to the parties at that stage; and the conduct of the parties with regard to giving or refusing to give information to enable an offer to be made or evaluated.

84. In *Carver v BAA plc*[25], the claimant's employers made a relatively early admission of liability. They made a payment into court of £4,000 in June 2006 having previously made an interim payment of £520 in respect of outlays. The offer was rejected. The claimant made no counter proposals. The action went to trial and the claimant was awarded £4,686.26 inclusive of interest. The district judge decided that, looking at the matter as a whole and having regard to the claimant's unwillingness to negotiate, it could not be said that she had succeeded in obtaining a judgment more advantageous than the Part 36 offer. On appeal the claimant argued that the requirements of Part 36 were met if the judgment was for a penny more than the offer. The purpose of Part 36 was to draw a line in the sand so that the parties knew where each stood and the court could determine the costs consequences with ease and without the uncertainty attendant upon an analysis of non monetary advantage and disadvantage inherent in the trial process. This submission was rejected. Lord Justice Ward's view was as follows:

> "The answer must, in my judgment, take account of the modern approach to litigation. The Civil Procedure Rules and, Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion.
>
> It follows that Judge Knight was correct in looking at the case broadly. He was entitled to take into account that the extra £51 gained was more than off set by the irrecoverable cost incurred by the claimant in continuing to contest the case for as long as she did. He was entitled to take into account the added stress to her as she waited for the trial and the stress of the trial process itself. No reasonable litigant would have embarked upon this campaign for a gain of £51."

Discussion and Recommendations

85. We are satisfied that the current system of judicial tenders is unfair in that there is no formal mechanism which enables a pursuer to put to the defender a formal offer to settle that will carry a penalty in expenses should the sum awarded be equal to or greater than the sum offered. The introduction of such a system, particularly if formal offers could be made in advance of litigation, would encourage early settlements.

[25] [2008] EWCA Civ 412

86. We agree that the model introduced in 1996 was flawed. We propose that the common law system of judicial tenders should be replaced by a rule regulating the making of formal offers by any party. We consider that it should be open to any party to make a monetary or a non-monetary offer in full or partial settlement of the action, and that it should be open to any party to make such an offer before the commencement of proceedings.

87. In exercising its discretion in relation to expenses the court should consider whether the party to whom the offer is made has obtained an outcome as favourable as or less favourable than the offer made.

88. In relation to defenders' offers, we are of the view that the usual rule should be that, where the pursuer fails to achieve an outcome that is as favourable as the offer made, the defender should be entitled to expenses on a party and party basis from the date on which the offer was made.

89. In relation to pursuers' offers, we are of the view that if the pursuer obtains an outcome more favourable to him than his offer, the defender should be liable to pay an uplift of 50% on the fee element of expenses on a party and party basis from the date of the pursuer's offer, but that the court should have a discretion to award a higher or lower percentage uplift.

90. We note the concerns expressed about the potential injustice which may arise if rules on offers are applied inflexibly, particularly in cases in which the difference between the sum offered and the outcome is marginal. The application of the rules that we propose should, therefore, be subject to the overall discretion of the court. That discretion should be exercised as the Court of Appeal laid down in the *Carver* case: success should be judged by looking at the conduct of the parties and the whole circumstances of the case. We are aware that the decision in *Carver* is regarded in some quarters as unfair in that it introduces an element of uncertainty. However, we are of the view that the advantages outweigh the disadvantages as the court has the discretion to look at the conduct of proceedings as a whole and to decide which party caused the unnecessary expense.[26]

91. This discretion should also address the concerns expressed about whether it is fair to expose defenders to the risk of an enhanced award of expenses when they may not have sufficient information properly to assess the pursuer's offer. If a pursuer's offer is not accompanied by sufficient information, the court should take this into account in its decision on expenses. If a defender who receives a pursuer's offer takes the view that

[26] See J Rowley (2008) 'Case and Comment', *Journal of Personal Injury*, *Issue 3/08*, pp 147-52 and J Sorabji (2009) 'Costs – CPR Part 36 – when success is not to your advantage', *Civil Justice Quarterly*, *28* re *Carver v BAA Plc* and *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*

there is insufficient supporting information, he should be obliged to specify to the pursuer what further information he requires.

92. We take the view that it should be open to a party making an offer to specify that it is open for acceptance only for a specified period. We are not persuaded that there is a need in this jurisdiction for further regulation as to the timing of offers. That should be considered by the court in the exercise of its overall discretion. If an offer is made too late, the normal consequences in expenses may not be applied or may be applied to a modified extent. The court should have regard to the conduct of the parties and the whole circumstances of the case.

CHAPTER 9 ENHANCING CASE MANAGEMENT

1. Chapter 5 outlined the system of active judicial case management that we recommend and endorsed the principle that it is for the court to control the conduct and pace of litigation. In this chapter we first discuss whether there is a need for a guiding principle to be enshrined in the rules of court in the form of a preamble in order to achieve the cultural change required in the way in which litigation is conducted and to underpin the exercise of the court's case management powers. We then go on to examine the range of case management powers that, in our view, the court should have at its disposal. Finally, we look at the case management challenges created by party litigants and the problems caused by vexatious litigants.

Guiding principles

2. In Chapter 5 of the Consultation Paper we sought views on whether the rules of civil procedure should have an overriding objective or statement of philosophy and, if so, what the main elements of that objective or statement should be. Some other jurisdictions which have adopted proportionality as a guiding principle for civil procedure have incorporated an explicit statement of philosophy or an overriding objective in their rules of civil procedure, as well as implementing measures aimed at ensuring that the cost of a case is proportionate to its size and complexity. The underlying goal is to increase access to justice by making litigation less expensive and by ensuring that litigants use no more of the system's resources than their case requires. That is a goal which we also wish to achieve.

3. The overriding objective contained in the Civil Procedure Rules of England and Wales as a result of the Woolf reforms has influenced procedural reform in some tribunals. This influence is felt in Scotland in, for example, Regulation 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004[*] and Rule 3 of the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2005,[**] both of which include an overriding objective.

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[*] SI 2004/1861. Regulation 3 states: (1) The overriding objective of these regulations and the rules in Schedules 1, 2, 3, 4 and 5 is to enable tribunals and chairmen to deal with cases justly.
(2) Dealing with a case justly includes, so far as practicable: —
(a) ensuring that the parties are on an equal footing;
(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues;
(c) ensuring that it is dealt with expeditiously and fairly; and
(d) saving expense.

[**] SSI 2005/514. Rule 3 states: (1) These Rules are a procedural code with the overriding objective of enabling a Tribunal with the assistance of the parties to deal with references fairly and justly.
(2) Dealing with references fairly and justly includes–
(a) dealing with the reference in ways which are proportionate to the complexity of the issues and to the resources of the parties;
(b) seeking informality and flexibility in the proceedings under these Rules;
(c) ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of his or her case without advocating the course he or she should take;

Responses to the Consultation

4. Nearly three quarters of our respondents considered that the rules of civil procedure should have a statement of philosophy or an overriding objective. Reasons given for supporting such a change included the view that it was essential if a true cultural change was to take place; that even if there already is a general consensus about the fundamental principles underlying the court system, it was beneficial to have these set out clearly to ensure that they can be referred to by all participants; that it would be a benchmark or reference point for good practice; that it supported the exercise of judicial discretion; and that it was necessary to ensure that the court was able to fulfil the principle of allocating resources to a case in a way that is proportionate to its importance and complexity.

5. Several respondents included the principle of proportionality within what they considered should be the main elements of a statement of philosophy or an overriding objective. Proportionality was linked to factors such as the cost of a case, the amount of money at stake, the importance and complexity of the issues involved and the requirement to do justice between the parties. One respondent considered that assessing proportionality could involve differing and subjective value judgements. We discuss proportionality in relation to the expense of litigation in Chapter 14. Elements that could make up a statement of philosophy or an overriding objective, as suggested by respondents, included:

- encouraging and facilitating early settlement on mutually acceptable terms;
- promoting a sense of reasonable proportion and procedural economy in respect of how cases are litigated;
- increasing cost-effectiveness in the court's procedures;
- promoting greater balance between parties;
- the expeditious disposal of cases;
- distributing the court's resources fairly, always recognising that the primary aim should be to secure the just resolution of the parties' dispute in accordance with their substantive rights.

6. Respondents who opposed the expression of a statement of philosophy or an overriding objective generally thought that there would be no advantage in having it or that it was unnecessary. One suggested that civil procedure is too wide a topic to have a statement of philosophy or an overriding objective. Another respondent was concerned that a statement of philosophy or an overriding objective "could become effectively constitutional and used as an element of substantive law." This would have limited usefulness and could "carry dangers in that it may restrict the flexibility of the Court process for the parties."

(d) using a Tribunal's special expertise effectively; and
(e) avoiding delay, so far as compatible with the proper consideration of the issues.

Other jurisdictions

7. Rule 1 of the Civil Procedure Rules[1] (CPR) in England and Wales sets out the ethos of the Rules. It provides that the Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. Rule 1 prescribes that dealing with a case justly involves, so far as is practicable, ensuring that the parties are on an equal footing; saving expense; dealing with the case in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, while taking into account the need to allocate resources to other cases.

8. The overriding objective is intended to govern the operation of all the rules, in particular, the choices that the court makes in managing each case and in interpreting the rules. The court is required to give effect to this overriding objective when exercising any power under the rules, or interpreting any rule. Parties to litigation are required to help the court to further the overriding objective. Rule 1.4(1) links the overriding objective with the concept of case management by providing that the court must further the overriding objective by actively managing cases.

9. The breadth of the overriding objective has caused concerns. It has been observed that in almost any circumstance in which the court exercises a power given to it by the CPR, it would be possible to justify, at least in part, the particular manner in which the power is exercised in the light of one or other of the aspects of the overriding objective. [2] An over-reliance on the overriding objective may lead to a failure to recognise that it does not provide all the answers and may mean that specific procedural provisions are ignored or given insufficient weight.

10. Jurisdictions that have adopted an overriding objective in their rules of court include New South Wales,[3] Queensland[4] and Northern Ireland.[5] Others set out in their rules of court the objects of those rules.[6] One exception to the trend of adopting an overriding objective or purpose can be found in the Final Report of the Chief Justice's Working Party established to review the civil rules and procedures of the High Court in Hong Kong.[7] It considered that the introduction of an overriding objective consisting of broad concepts, expressed in general terms, but apparently

[1] SI 1998/3132 as amended. The current version of the rules is available on the Ministry of Justice website.
[2] *Civil Procedure*, Sweet and Maxwell, 2005, paragraph 1.3.2
[3] Civil Procedure Act 2005, section 56
[4] The Uniform Procedure Rules of the Supreme Court of Queensland 1999 incorporate a statement of philosophy which sets out the overriding obligations of the parties and the court.
[5] The Rules of the Supreme Court Northern Ireland
[6] E.g. South Australian Supreme Court Rules 2006 Chapter 1, part 2; and Rule 1(5) of the Supreme Court Rules of British Columbia
[7] Working Party on Civil Justice Reform Hong Kong (2004), *op. cit*

endowed with overriding qualities, was likely to give rise to misguided arguments and interlocutory applications. The Working Party concluded that it would be useful to introduce a rule expressly acknowledging as legitimate aims of judicial case management:-

- increased cost-effectiveness in the court's procedures;
- economies and proportionality in the way cases are mounted and tried;
- the expeditious disposal of cases;
- greater equality between parties;
- facilitating settlement; and
- distributing the court's resources fairly,

but always subject to recognition that the primary aim of case management should be to secure the just resolution of the parties' dispute in accordance with their substantive rights. The Working Party thought it wise not to suggest that any such rule has an overriding character, so that over-elaborate and misguided reliance would not be placed on it. Instead, it should be made clear that such a rule merely makes explicit what are implicit objectives which underlie specific rules and support their internal logic. Such specific rules should accordingly continue to demand intelligent application informed, but not overridden, by the underlying principles.[8]

Recommendation

11. In Chapter 5 we outlined the system of active judicial case management that we recommend. This, together with judicial continuity provided by a docketed judge, should, in our view, bring about a cultural change in the way that litigation is conducted in Scotland. We consider that the adoption of a guiding principle for the interpretation of the rules of civil procedure, which embodies the fundamental purpose of the rules and of the underlying system of procedure, will assist in guiding the court and litigants in the operation of the rules.

12. We share the concerns expressed by the Chief Justice's Working Party in Hong Kong. We too are concerned that an objective of an overriding nature capable of trumping the express provisions of the rules might lead to inconsistent and uncertain results. We believe that the adoption of a guiding principle will assist the court and litigants in the operation of the rules, but that the guiding principle should not be overriding.

13. We therefore recommend that a preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court. Such a preamble is necessary, we think, in order to highlight the importance of the role of the court in case management.

[8] *Ibid*, para 100

Enhanced powers of case management

14. We sought views on whether the rules relating to disclosure are satisfactory; whether there should be a single initiating document; whether a system of abbreviated pleadings should be introduced; whether the court should have control over the leading of expert evidence; whether the existing powers in relation to summary disposal are satisfactory; whether the court should have a greater say in allocating the length of time for a hearing; whether court hearings should be time limited or conducted by reference to a timetable determined by the court; whether in the conduct of substantive hearings there should be greater use of written arguments; and whether the court should have a greater range of powers to impose sanctions for non-compliance with its rules or orders.

15. We shall deal with these questions under the following headings:

(A) identifying the issues in dispute;
(B) managing time efficiently; and
(C) effective sanctions for non compliance with the court rules or orders.

(A) Identifying the issues in dispute

16. In Chapter 7 we discussed ways in which the early resolution of disputes could be promoted by the use of pre-action protocols and offers in settlement. Where litigation is necessary it is important to ensure that it is conducted in the most efficient manner possible, minimises costs to the parties, provides a prompt and effective determination of the dispute, and makes the best use of the limited resources of the court. Respondents have stressed the need for the issues in dispute to be clarified at the earliest opportunity with a view to facilitating settlement or limiting the scope of proof or debate to what is material.

17. We now discuss ways in which the issues can be identified. We deal with:

(i) disclosure of evidence;
(ii) the use of witness statements;
(iii) pleadings;
(iv) expert evidence; and
(v) summary disposal.

(i) Disclosure of evidence

18. The arrangements for disclosure of evidence during litigation are part of a means for ensuring a fair and effective system of civil justice. A party denied access to crucial documents in the control of an opponent may be prejudiced and, in extreme cases, may find it impossible to proceed. Disclosure is also closely linked to the wider aim of securing the expeditious resolution of an action.

19. The courts in Scotland have, in general, declined to allow automatic or general disclosure of documents or other materials in the course of ordinary procedure. If parties seek the recovery of documents or property under the general powers of the court, they must apply by motion for a commission and diligence for recovery by lodging a specification of the documents or property that they seek to recover. There are exceptions to this general rule in the Chapter 43 procedure for personal injury actions and in the rules of procedure for both Court of Session and sheriff court commercial actions. In practice the only documents that are disclosed are those that a party recovers from its opponent and those that the parties intend to rely on themselves. There is no positive obligation to disclose a document that is prejudicial to a party's case or supports another party's case if the opposing party does not know of its existence and therefore does not seek its recovery.

20. Until relatively recently the granting of a commission and diligence before the closing of the record and the allowance of proof was exceptional. However, the courts now adopt a more pragmatic approach. They allow earlier recovery of documents where they are necessary for the purpose of enabling a party to make more pointed or specific averments or replies.[9] In *Degrémont Société Anonyme and Amec Capital Projects Ltd v Caledonian Environmental Services Plc,*[10] Lord Brodie, in approving a specification before the closing of the record, observed that as the defenders were required to give adequate and specific answers to the claims made against them, there was no reason for the preparation of the pursuers' averments to be delayed while the defenders finalised their pleadings. In his opinion recovery by the pursuers should result in an earlier focusing of the issues.

21. Although it is now possible in certain cases to seek to recover documents from an opponent before the closing of the record, the rules relating to the lodging of documents in ordinary actions in the Court of Session and the sheriff court require only that the documents on which a party intends to rely at proof should be lodged 28 days before the proof in the Court of Session and 14 days in the sheriff court.[11] This does not encourage early exchange of information. It can be contrasted with the procedure for commercial actions in both the Court of Session and the sheriff court, which enables the commercial judge or sheriff to order at the preliminary hearing or case management conference the disclosure of the existence and nature of documents relating to the action, to give authority to recover documents either generally or specifically and to order that documents constituting, evidencing or relating to the subject-matter of the action, or any invoices, correspondence or similar documents relating to it, should be lodged in process within a specified period. In personal injury actions under Chapter 43 parties are required to lodge in process any

[9] *Moore v Greater Glasgow Health Board* 1978 SC 123, followed in *Degrémont Société Anonyme and Amec Capital Projects Ltd v Caledonian Environmental Services Plc* [2007] CSOH 203

[10] [2007] CSOH 203

[11] Chapter 43 procedure for personal injury actions in the Court of Session provides for greater disclosure, including the requirement to lodge medical reports at the commencement of an action. Practice Note No. 1 of 2007 also reminds practitioners of the principles of early disclosure of evidence underlying the Chapter 43 procedure by stating that parties will be expected to lodge in process, within a reasonable time after receipt, all expert reports on which they intend to rely. Failure to do so without reasonable cause may have a consequence in expenses.

productions on which they intend to rely in accordance with the timetable issued by the Keeper of the Rolls, that is to say, generally eight weeks before the diet of proof or jury trial.[12]

Disclosure of evidence - responses to the Consultation

22. The key themes that emerged from the consultation were that there should be earlier and wider disclosure of evidence and that parties should be permitted to seek recovery of documents at any stage in the proceedings.

23. More than half of our respondents considered that there should be earlier and wider disclosure. Many thought that this would help to clarify and focus the issues, allow each party to assess the strengths and weaknesses of their own and their opponent's case and that early disclosure was likely to lead to an earlier and more cost effective resolution. Family practitioners favoured the early disclosure of evidence, in particular, financial information.

24. There were some caveats about balancing the potential benefits of earlier and wider disclosure against the risk of incurring undue expense or creating complication. One respondent warned that there was a risk that wider powers or obligations of disclosure could be abused, for example, by disproportionate demands for information or the over-supply of irrelevant material for tactical reasons. Another commented that judicial control over motions for specifications of documents is a useful check on fishing diligences.[13]

25. Several respondents linked the disclosure of evidence with active judicial case management. There was a suggestion that the procedure used for commercial actions in the Court of Session, whereby the court can direct documents to be produced, could be employed in all cases where there was active judicial case management. The judge could establish at a case management hearing what additional evidence should be produced and how long the parties would require to obtain it. Another respondent suggested that if judges were to be assigned cases from the outset then they would be in a position to implement the current procedures more effectively. Several respondents commented that if pre-action protocols were made compulsory there would be more disclosure before litigation.

26. There were comments on the process for the recovery of documents. One respondent thought parties should be able to seek approval of a specification at any stage in the proceedings, with a proviso that a party who sought approval of a specification without first having sought the documents informally should be penalised in expenses.

[12] Court of Session Practice Note No. 1 of 2007

[13] A fishing diligence is "an attempt to recover documents in the hope that they will disclose material which will enable the party to make a case not yet averred on record." *Boyle* v *Glasgow Royal Infirmary and Associated Hospitals* 1969 SC 72, Lord President Clyde at 79

27. Several respondents saw no need for earlier disclosure of evidence in personal injury cases; but others referred to recent decisions that allowed defenders access to a pursuer's medical records in their entirety[14] and suggested that this should be reciprocated with a full disclosure by defenders of relevant records, for example, in relation to previous accidents.

Disclosure of evidence - other jurisdictions

28. The Consultation Paper referred to the disclosure regime under the Civil Procedure Rules (CPR) in England and Wales as a possible model for reform. In his Interim Report, Lord Woolf suggested that disclosure should be curtailed. He concluded that it had become disproportionate, especially in larger cases where large numbers of documents had to be searched for and disclosed but only a small number were significant. In his Final Report, he recommended that disclosure should be retained, but in a more limited form. [15]

29. Under CPR there is no automatic obligation to disclose documents. For small claims track cases, parties are obliged only to provide copies of documents on which they intend to rely at the hearing. For fast track or multi-track cases, the court gives directions on documentary disclosure. Courts usually order "standard disclosure" which requires a party to disclose:

(a) the documents on which the party relies;
(b) the documents which adversely affect the party's own case, adversely affect another party's case or support another party's case; and
(c) the documents which the party is required to disclose by a relevant practice direction.

30. Where disclosure is ordered, parties have a positive obligation to conduct a reasonable search for documents, but one that is proportionate to the issues involved in the case. Proportionality is determined with regard to the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieving any particular document and the significance of any document that is likely to be located during the search.

31. Where necessary, the judge can actively case manage the disclosure process. Parties have a wide scope for making agreements as to disclosure, including agreements in writing to make disclosure without a list and without having to make a disclosure statement. The court also has power to order disclosure in advance of proceedings, where desirable, in order to dispose fairly of the expected proceedings; assist the dispute to be resolved without proceedings; or save costs.

[14] *Hendry v Alexander Taylor & Sons* [2007] CSOH 178; *Wilkie v D B Stuart Ltd* [2007] CSOH 197; 2008 SLT 917
[15] The Rt. Hon. Lord Woolf (1995) and (1996), *op. cit*

32. One respondent to our consultation, who has a London litigation practice, thought that the English process increased the cost of litigation hugely and that the benefits of such an exercise rarely justify the costs. Another thought that the English process is much fairer and more just than the current practice in Scotland, where a party has to apply to the court for the disclosure of evidence. Research has found that the disclosure regime introduced by CPR in light of Lord Woolf's proposals was working well in the 'general run' of county court litigation.[16]

33. Lord Justice Jackson has contrasted this with the position in larger multi-track cases where the facts are often the subject of extensive dispute and may be complicated and technical.[17] He cited a notorious case in which the cost of the disclosure exercise was over £2 million. He was told that this is by no means a large amount to be spent on disclosure. A number of options for reform are canvassed in his Preliminary Report, one of which is the adoption of an approach to disclosure similar to that of the IBA rules which are used in international arbitrations. The Preliminary Report summarises its key features as follows:

(i) Each party submits the documents upon which it relies (unless already submitted by another party).

(ii) Each party has the right to submit a "Request to Produce". This must: (a) either be a request for specific identified documents or narrow categories of documents; (b) describe how each requested document is relevant and material to the outcome of the case; and (c) include a statement that each document is not within the possession or control of the requesting party and explain why it is assumed to be in the control of the other party.

(iii) The other party must then provide all documents from the list within its possession or control, unless it provides a written objection to the tribunal. Objections may be raised on the grounds that the document is (a) insufficiently relevant or material; (b) privileged; (c) unreasonable to search for; (d) lost or destroyed; e) confidential; or (f) politically sensitive.

(iv) The tribunal will rule upon whether the documents which each party objects to.

(v) Each party may subsequently submit any additional documents which become relevant and material as a result of issues raised by the other party in its documents, witness statements, expert reports or submissions.

34. Most common law jurisdictions have court rules requiring parties to disclose documents on which they propose to rely and regulating how and when this is to be done. In Canada, for example, most jurisdictions impose a general obligation on parties to disclose documents within their power or control which are relevant to the

[16] J Peysner and M Seneviratne (2005), *op. cit*
[17] Lord Justice Jackson (May 2009), *op. cit*, Part 8, Chapter 41, p 396.

matters in issue, although jurisdictions vary as to whether parties are required to disclose documents which adversely affect their case. Discovery by means of oral pre-trial examination is also common. Practice in much of the USA is in many respects similar to Canada, although generally there is an obligation to disclose documents only on request. North American jurisdictions are increasingly introducing mechanisms to manage disclosure better and to encourage parties to reach agreement early in the litigation about the parameters of disclosure, in response to concerns about untimely, excessive or disorderly production of documents.[18]

Disclosure of evidence - recommendations

35. The process of disclosure is an important means for ensuring a fair and effective system of civil justice. It can lead to the focusing of issues, reduce the scope of disputes and encourage early settlement. But, in our view, that process of disclosure must be exercised proportionately and must be subject to judicial controls.

36. Although respondents called for earlier and wider disclosure of evidence, there was no call for radical reform of the Scottish system. Few supported the adoption of a system based on a standard disclosure principle. Such an obligation might encourage parties to disclose large amounts of irrelevant material in the hope that any damaging document might be lost from sight.

37. We consider that early and wider disclosure of evidence should be facilitated by a system of active judicial case management, backed up by judicial continuity. The first case management hearing should establish what additional evidence it is necessary for the parties to produce, and how long the parties will require to obtain it. If a Specification of Documents should be required at any stage, judicial continuity should ensure that the judge's or sheriff's decision is based on a thorough knowledge of the case.

38. We accordingly recommend that as part of the case management function a judge, sheriff or district judge should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover documents either generally or specifically; and order the lodging of documents constituting, evidencing or relating to the subject matter of the action, or any invoices, correspondence or similar documents relating to it, within a specified period. The normal procedures for recovery of evidence should also be available to the parties. Recovery of documents should be competent at any stage in the proceedings.[19] Any documents founded on in the pleadings should be lodged in advance of the first case management hearing.

[18] For a useful comparison of discovery processes in a number of jurisdictions in Canada, USA, Australia and New Zealand, see Task Force on the Discovery Process in Ontario (2003), *Report of the Task Force*.

[19] Documents can be sought before any proceedings are commenced, by means of an order under section 1of the Administration of Justice (Scotland) Act 1972, Chapter 64 of the Rules of the Court of Session applies to such an application.

(ii) The use of witness statements

39. Narrowing the areas of dispute may also be achieved by the exchange of witness statements.

Witness statements - responses to the Consultation

40. Some respondents were in favour of a procedure for the lodging and exchange of statements, akin to that in England and Wales described below. They considered that this would encourage the "front-loading" of actions and allow parties to assess the strengths and weaknesses of their case at an early stage. One respondent commented that their use could save a substantial amount of time in Scottish proofs, where an inordinate amount of time is spent in the leading of uncontroversial evidence.

41. Other respondents cautioned against that procedure. One suggested that while detailed witness statements can have some value in supplementing abbreviated pleadings, the system in England and Wales made the witness statements effectively the evidence in chief of the witness. Such statements, being prepared by solicitors and reviewed by the witness and counsel, deprived the court of much of the spontaneity and impression of the witness's character.

Witness statement - other jurisdictions

42. Witness statements are exchanged in England and Wales in fast and multi-track cases several weeks prior to trial. If a witness statement is not served within the time specified, the witness may be called only with the court's permission. In his Interim Report, Lord Woolf endorsed the practice of requiring the exchange of witness statements, on the basis that they ensured that the parties were fully aware before the trial of the strengths and weaknesses of the case which they have to meet. But in his Final Report, he concluded that witness statements in England and Wales had ceased to be the authentic words of the witness. Instead, they had become an elaborate and costly branch of legal drafting.

43. The CPR appear to have adopted three strategies in an effort to counteract this: rules giving the court greater powers to regulate and limit the evidence to be adduced by the parties; greater flexibility in the treatment of witness statements, allowing them to be reasonably supplemented by the witness's oral evidence or in a supplemental statement; and deterring over-elaboration by appropriate costs orders. Submissions made to Lord Justice Jackson in the context of his review of civil litigation costs suggest that the reforms have not been fully effective. Written witness statements have been useful in shorter and less substantial cases, leading to a saving of time and cost. However, in larger and more complex cases the use of written witness statements, instead of saving costs and promoting fairness, has had the opposite effect. Lord Justice Jackson has canvassed a number of options including the court taking a more robust approach to imposing sanctions for leading evidence that is irrelevant or does not go to the facts of the issue. He sees control

over the length and content of written witness statements as a function of effective case management.[20]

44. Although it is standard practice in Hong Kong for the parties to be required to exchange witness statements and for such statements, unless the court otherwise orders, to stand as the witness's evidence in chief, the final Report of the Chief Justice of Hong Kong's Working Party on Civil Justice[21] considered that such a high level of judicial proactivity as is required to operate the English rules of procedure was neither necessary nor desirable. It considered that steps including tighter case management should mean that the issues between the parties and the relevance or otherwise of evidence ought generally to be clear and sufficient to prevent the over-elaboration of witness statements.

45. Other jurisdictions also use witness statements to minimise the need for oral evidence in examination in chief at proof. For example, in New South Wales, the Uniform Procedure Rules 2005[22] allow the court to direct any party to provide the other parties with witness statements of factual evidence that it is intended to adduce as evidence in chief from the witness. If the witness is called, the statement stands as the witness's evidence in chief so long as the witness testifies to the truth of the statement and no other evidence in chief may be adduced from that witness without the leave of the court. A party who fails to comply with the direction to provide a witness statement may not adduce evidence to which the direction relates without the leave of the court.

46. The Civil Justice Reform Working Group in British Columbia[23] did not go so far as recommending the exchange and lodging of witness statements. Instead it recommended that parties should exchange a list of the witnesses that each party intended to call, along with a summary of the evidence that the party believed that the witness would give. It considered that such statements would, in a cost-effective manner, provide each party with a concise summary of the other's case. In its view, such knowledge would advance the discussions between the parties and promote settlement.

Witness statements - recommendation

47. In our view the advance intimation and lodging of witness statements is particularly helpful in the case of expert evidence. It gives the judge a proper opportunity to prepare and it shortens the proof. Rule 47.11(1)(b)(vii) of the Court of Session Rules provides that the commercial judge may make an order requiring the reports of skilled persons or witness statements to be lodged in process. At the procedural hearing the commercial judge may determine, in the light of any witness

[20] Lord Justice Jackson (May 2009), *op. cit*, Part 8: Chapter 42
[21] At paragraph 580
[22] Rule 31.4 of Uniform Civil Procedure Rules 2005 of New South Wales. Available at http://www.legislation.nsw.gov.au/viewtop/inforce/subordleg+418+2005+FIRST+0+N/
[23] The Civil Justice Reform Working Group in British Columbia (2006), *Effective and Affordable Civil Justice*, See recommendation 3.3 of the Report.

statements, affidavits or reports produced, that proof is unnecessary on any issue.[24] We consider that these are useful provisions which should apply generally to all types of action that are subject to active judicial case management.

(iii) Pleadings

48. There is currently a wide range of forms for initiating actions of different types and at different levels of the court structure, with different requirements as to the amount, nature and format of the information to be given. A short summary of the systems of pleading in ordinary, commercial and personal injury actions in the Court of Session and in ordinary and commercial actions in the sheriff court can be found in Section A of the Annex to this chapter. The current system generally leaves the parties to determine the content of their pleadings and to decide what evidence ought to be led. Incremental reforms have resulted in a number of specialised procedures, some of which do not require, or actively discourage, the use of full written pleadings, for example, Chapter 43 of the Court of Session Rules. In commercial actions in both the Court of Session and the sheriff court, brevity in pleadings is encouraged.[25]

Pleadings - responses to the Consultation

49. We asked for views on whether there should be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure and, if so, what format that document should take. We also asked to what extent a system of abbreviated pleadings should be introduced. The key themes that emerged were:

- although a single initiating document may be desirable it would be difficult to create one for all types of action and for all levels of the court structure
- there are too many sets of procedure in the sheriff court
- any system of pleading must meet the requirement of fair notice
- a system of abbreviated pleadings should be linked to a system of case management.

Just over half of the responses favoured a single initiating document, although some of these responses were qualified. Some respondents thought that it should be possible to introduce a single, simple initiating document which would modernise the current system of reliance on written pleadings and lead to reduced costs. Others thought that specialised forms would still be required for certain types of action. Examples given of the types of action requiring specialised forms of initiating document included adoptions, commercial causes, personal injury claims, statutory appeals, judicial reviews and actions of interdict. There were mixed views as to whether initiating documents should be the same for the Court of Session and sheriff court.

[24] Rule 47.11(2)(d)
[25] Practice Note No 6 of 2004, paragraph 3(1); OCR 40

50. One respondent commented that the purpose of an initiating document is to give the other side fair notice of the case against it and, related to that, to limit the scope of any enquiry. Different forms of initiating documents had been developed over time to meet the different needs of different types of action in different forums. Another thought that, in practice, it would be difficult to introduce a single initiating document for all types of actions and all levels of court while retaining a clarity of pleading which would be sufficient to satisfy a reasonable test of relevancy and specification.

51. Just over half of our respondents favoured the idea of abbreviated pleadings. One respondent commented that far too many cases involve massive pleadings, often by paraphrasing expert evidence at great length and that the formulaic nature of the existing system of pleadings could obscure the real issues. Another thought that the delay occasioned by formal written pleadings had an excessive influence over the entire procedure of a case and delayed the focussing of issues. Others supported the traditional approach to pleadings, with each party giving proper notice to the other of his factual case and being required, by way of pleas in law or otherwise, to specify its basis in law.

52. The Chapter 43 procedure in the Court of Session was cited by a number of respondents as a system of abbreviated pleadings that has worked well. Several called for a similar system to be introduced for personal injury cases in the sheriff court. Others were less impressed. One suggested that in the experience of a number of judges, the pleadings in such actions often mask irrelevant cases or fail to focus the mind of the pursuer's advisers on the basis of liability. Several respondents linked a system of abbreviated pleadings with increased case management and, in particular, the need for a greater disclosure of evidence, with power for the court to call for further particulars of a party's factual case or position in law.

Pleadings - our practical exercise

53. To assist in our consideration of these issues we instructed a practical exercise to be carried out by two advocates experienced in pleading. The remit was to devise a standard application covering all types of remedy and a standard response, to test whether it was possible to devise a new system of written pleadings which retained the positive advantages of the existing system, whilst attempting to discourage the current excesses in written pleadings. The aim was not simply to make pleadings in general either shorter or longer, but to ensure that they were more focussed and concise. The format which was felt most likely to achieve this goal was a form which prompted logical analysis and concise expression of the key issues, rather than an unthinking form-filling, or style-following, exercise.

54. It was soon obvious that it was unrealistic to devise a single initiating document and a single responding document, for all actions, and at all levels of the court system. We concluded that although it should, in theory, be possible for uniform initiating documents and responding documents to differ only according to

subject-matter across both the Court of Session and the sheriff court, it would not be possible to devise initiating and responding documents that could be completed by professionals and lay people alike, since that would sacrifice many of the advantages of written pleadings in identifying the relevant law.

55. We thought a possible alternative would be to draw up a small sample of initiating and responding documents in a prompting format, which might fulfil the current role of traditional written pleadings. The following examples of initiating documents were drafted: contract; personal injuries; property obligations; proving the tenor of a document; reduction; specific orders; judicial review; dissolution of an adult relationship; and a family case. Responding documents in actions relating to contract and personal injuries were also drafted. The format was a series of questions to be answered relating to the identity and capacity of the parties, the jurisdiction of the court, the remedy sought, and the factual and legal basis of the claim.

56. From this exercise, we concluded that (i) a full and proper completion of the exercise would simply generate a multiplicity of forms, effectively replicating Green's Litigation Styles; (ii) even the introductory sections of the forms would differ as between the types of actions, so that it would be difficult to achieve any uniformity even at the broadest, and most introductory, of levels; (iii) there were acute difficulties in adapting even a simple form to a hybrid action, for example, one founded in contract and in delict; (iv) there was a danger that completion of such forms would be viewed as a mere form-filling exercise; and (v) it would be difficult to allow for the easy incorporation of adjustments to such pleadings into something akin to a closed record.

Pleadings - recommendation

57. The modern rules for written pleading reflect the fact that it is for the parties to control the content of the pleadings. The detailed rules regulating admissions, deemed admissions, the requirement for formal denial, and the circumstances in which a party may aver that he does not know the truth of an averment all operate against this background of party control. There is now considerable diversity in the forms of pleadings; in pleading styles and in the skill levels of pleaders.

58. We accept the argument that there is a correlation between abbreviated pleadings and case management. The more abbreviated the pleading, the greater is the need for judicial intervention. Abbreviated pleadings appear to work well in procedures in which there is active judicial case management, although some respondents were of the view that they also worked well in the case-flow model of Chapter 43 procedure. The pleadings in cases in the Scottish Land Court are an excellent example of pleadings that are not prolix. This is partly the result of the high level of case management in that court and partly the result of highly specialised experience of those who practise in it.

59. The overall increase in specialist procedures and the decreasing use of the system of traditional written pleadings in civil procedure raises the question of whether the system as conventionally practised can remain part of Scottish civil procedure. We consider that a system of written pleadings is worth retaining. The giving of fair notice and the focussing of issues are necessary for the due administration of justice. We also recognise that there are legitimate concerns as to the system of written pleadings, as now practised in Scotland.

60. In the light of our practical exercise we do not recommend that the idea of a single initiating document and a single responding document should be pursued. Nevertheless, we consider that brevity in pleadings should be encouraged. Under the commercial procedure in Glasgow Sheriff Court many cases that start as simple debt actions with minimal pleadings are adjusted, once defended, under the supervision of the sheriff. This procedure has worked well in practice as has the system of abbreviated pleadings in commercial actions in the Court of Session. Accordingly, for all actions in the Court of Session and sheriff court we recommend that pleadings should be in an abbreviated form. A docketed judge or sheriff should determine whether adjustment of the pleadings is necessary to focus the issues in dispute and should have the power to determine what further specification is required and how that should be provided.

(iv) Expert evidence

61. At present it is for the parties to decide whether they need to lead expert evidence, what type of expert evidence is necessary and the number of experts required. The permission of the court is not required before expert evidence can be adduced. With certain limited exceptions, the court has no formal role in deciding what expert evidence is required. It has no express powers to limit the evidence that may be led. If a witness is called unnecessarily, the only sanction available to the court is to refuse to certify the witness as an expert.[26]

Expert evidence - responses to the Consultation

62. We sought views as to whether the court should have control over expert and other evidence. Overall there was little support for radical reform in this area. Most respondents thought that it was for the parties to decide what expert evidence was necessary, subject to the court's powers in relation to expenses and the certification of witnesses. There was little support for a system of court appointed experts. Some respondents thought that, as part of its general case management powers, the court should have discretion to decide what expert evidence is required. Others thought that, in the interests of cost and efficiency, there should be a greater emphasis on having the parties' experts discuss the issues with a view to highlighting the matters in dispute.

[26] See *Ayton v National Coal Board* 1965 SLT (Notes) 24

63. Those involved in family law cases argued that the court should have a more proactive role in controlling expert evidence. There is clear evidence that numerous cases involving children are prolonged unduly by contested expert evidence.

64. Some respondents expressed concerns about a trend towards greater reliance on expert evidence with consequent cost to the parties and the public purse. The Scottish Legal Aid Board expressed concern about the mounting costs associated with the employment of experts. In cases with multiple assisted persons, particularly children's cases, each party may separately employ an expert to provide an opinion on their case and to comment on the other experts' views.[27]

Expert evidence - other jurisdictions

65. In other jurisdictions there has been a trend towards greater judicial control over expert evidence, partly in response to the difficulties experienced where expert witnesses act as 'hired guns' and partly in response to concerns about the undue prolongation of hearings.

66. In his Interim Report in 1995, Lord Woolf recommended that the calling of expert evidence should be under the complete control of the court. He argued for wider use of single or neutral experts who would be jointly selected and instructed by the parties or, if the parties could not agree, appointed by the court. He made other recommendations designed to achieve a more economical use of expert evidence in cases where opposing experts were involved, by narrowing the issues between them at as early a stage as possible. These proposals were controversial. Many respondents to Lord Woolf's consultation argued that they would be at odds with an adversarial system.

67. Lord Woolf's proposals in relation to a single joint expert were intended to apply primarily to fast track cases, that is to say, those then under £10,000 and now under £25,000. The instruction of a single expert was linked to his proposals in relation to pre-action protocols. For more complex cases he expected that parties would appoint their own experts but recommended the use of meetings and other forms of communication to focus the issues in advance of the trial.

68. The position in England and Wales is now governed by Part 35 of the Civil Procedure Rules. The principal features of the system are that:

- Expert evidence is to be restricted to that which is reasonably required to resolve the proceedings. It may be adduced only with the leave of the court and the court may direct that the evidence on a particular issue is to given by a single joint expert only. We understand that single joint experts are the

[27] Our attention was drawn to two such cases of particular concern. In one the outlays incurred amounted to more than £101,700: the total costs to SLAB, including solicitors' and counsels' fees, were more than £1,370,000. In the other case total outlays were approaching £103,000; total costs to SLAB were more than £782,000. The costs incurred by the Reporter would be in addition to this.

norm in small claims track and fast track cases, but that in more complex cases, where there is a major issue on liability or causation, the court does not usually order a single joint expert.

- Where a single joint expert is appointed, the court may give directions on fees and may cap the amount that may be paid by way of fees and expenses. The general rule is that parties bear the cost of the expert report on a joint and several basis.
- The court has the power to limit the amount of the expert's fees that a party may recover.
- In cases where parties instruct their own experts, the court has power to direct that a discussion should take place between experts to identify the issues upon which they disagree. The court may direct that the experts prepare a statement of the points of agreement and disagreement. Where experts reach agreement after discussion, the agreement does not bind the parties.
- Expert evidence is to be given by written report unless the court otherwise directs. The norm is that the expert's report is treated as the evidence in chief, and oral evidence is confined to cross examination.
- The expert has an overriding duty to the court.

69. In 2005 the Civil Justice Council developed a protocol for the instruction of experts to give evidence in the civil courts. This is now annexed to the Practice Direction associated with CPR 35. Experts and those instructing them are expected to have regard to the guidance contained in the protocol.[28]

70. Some concerns had been expressed by practitioners about consistency of approach by the court in making orders for a single joint expert. The Experts Committee of the Civil Justice Council thought that some additional guidance might be useful and drafted a short paper with a proposed amendment to the Practice Direction which was sent to the Civil Procedure Rules Committee. In June 2007 the Civil Justice Council carried out a consultation exercise in anticipation of a review of Part 35 by the Ministry of Justice and the Civil Procedure Rules Committee. The Council's conclusion was that the Part 35 of the CPR, the Practice Direction and the protocol were working satisfactorily and that there was no need for fundamental reform. Any problems remaining related to non-compliance with the existing rules and orders made by judges.[29]

71. A number of jurisdictions in Canada and Australia have carried out reviews of their rules in relation to expert evidence. Section B of the Annex to this chapter contains information about the provisions on expert evidence in various jurisdictions

[28] The Civil Procedure Rules and Practice Directions are available on the Ministry of Justice website. http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm CPR 35 and the supporting Practice Direction will be amended with effect from 1 October 2009 to clarify the definition of an expert; provide guidance to reduce any inconsistency in the appointment of single joint experts; revise the expert's statement of truth; and ensure that the questions posed to experts are proportionate and appropriate

[29] Civil Justice Council Annual Report 2007 See also the discussion by Lord Justice Jackson (May 2009), *op. cit*, Part 8: Chapter 42

and recommendations which have been made. Some jurisdictions have adopted, as part of their case management powers, rules similar to those in England and Wales. Some have adopted a permission rule and provide for mandatory appointment, in certain circumstances, of single joint experts or court appointed experts. However, these aspects of the Woolf reforms have, in the main, been seen as controversial.

72. The general principle that the court should have control over the giving of expert evidence and that this should be restricted to what is reasonably required has however been endorsed by a number of other jurisdictions. For example, the Victoria Law Commission recommended in 2007 that Victoria should adopt the recently introduced expert witness provisions in New South Wales, modified to reflect some of the provisions regarding control of expert evidence already in place in that jurisdiction. The British Columbia Task Force (2002) recommended reform of the rules to 'reduce expert adversarialism and limit the use of experts in accordance with proportionality principles'. Its recommendations included close judicial management of expert evidence including control over the number of experts. The Ontario Civil Justice Reform Project (2007) recommended that the court should have case management powers enabling it to give directions in relation to the issues upon which expert evidence may be adduced and limiting the number of experts that may be called.

Expert evidence - discussion and recommendations

73. The following are the main issues:

a) whether the court should have control over the expert evidence to be adduced;
b) whether the court should require or encourage the parties to instruct a joint expert in suitable cases;
c) the expert's role and duties in relation to the court;
d) whether, in cases in which the parties appoint their own experts, the court should have the power to direct the experts to confer; and
e) whether an expert's written report should be treated as his evidence in chief, with oral evidence being confined to cross examination, unless the court directs otherwise.

a) Whether the court should have control over the expert evidence to be adduced

74. On the whole, there was no call from respondents for the introduction of a rule requiring the permission of the court to adduce expert evidence. Respondents were overwhelmingly of the view that it was for the parties to decide what evidence to lead and that the court has adequate powers to control unreasonable behaviour by its powers in relation to expenses and certification of expert witnesses.

75. The principal area in which respondents thought that a greater degree of control by the court would be useful was in proceedings involving children. It can be particularly important for the court to have a supervisory role in such cases so

that children are not unnecessarily exposed to multiple interviews on matters which they may find distressing.

76. Respondents drew attention to the Practice Notes relating to adoption proceedings which provide that the sheriff should discourage the unnecessary use of expert witnesses. If expert evidence is essential, the sheriff should encourage the joint instruction of a single expert by all parties. If one party instructs an expert report, it should be disclosed to the other parties with a view to agreement of as much of its contents as possible.[30] At proof the sheriff may exercise his existing common law power to intervene to discourage prolixity, repetition, the leading of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision.[31]

77. We are not persuaded that it is necessary to introduce a general 'permission rule' in Scotland or to introduce express case management powers that would enable the court to regulate the type of expert evidence to be adduced or the number of experts that parties may lead. With the exception of proceedings relating to children, respondents did not identify any problems relating to inappropriate use of experts and if witnesses are called unnecessarily this can be addressed by the court's powers in relation to certification of witnesses.

78. However, given the concerns that have been expressed in relation to cases involving children we recommend that the provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals.

b) Whether the court should require or encourage the parties to instruct a joint expert in suitable cases

79. In general, respondents were not in favour of a presumption in favour of the instruction of joint experts or a system that would give power to the court to impose an expert upon the parties, either by instructing an expert of its own or by requiring the parties to jointly instruct an expert. It was considered that this would lead to additional expense as parties would be tempted to instruct their own shadow experts to advise on the opinion of the court-appointed or joint expert and to assist in preparation for cross examination.

80. Family practitioners were more favourable to the idea on issues such as the valuation of matrimonial assets. Others thought that there could be a case for single joint experts to be appointed in relation to welfare matters. There is clearly a problem in child cases where children are sometimes over-interviewed by experts, which our recommendation above should address.

[30] See, for example, paragraph 4.3.3.2 of Practice Note 1 of 2006 of the Sheriffdom of North Strathclyde
[31] *Ibid*, para 6.3

81. On balance, we do not favour a presumption in favour of the instruction of joint experts. However, in those cases subject to the active judicial case management model, parties should be required to consider whether it would be appropriate to instruct one or more joint experts in relation to either liability or quantum and should be in a position to address the court on this issue at case management hearings. Where the court thought it appropriate to do so it could order the parties to instruct a joint expert. The exercise of this power would, we think, be relatively rare. Where a joint expert is instructed by consent or on the basis of an order by the court, the court should have the power to make directions in relation to his remuneration. Where the parties cannot reach agreement on the expert to be appointed, the court would seek a nomination from the relevant professional body.

82. Some respondents thought that the appointment of a single joint expert might be appropriate in lower value cases as a means of avoiding disproportionate costs. One of the primary purposes of Part 35 of the CPR is to ensure that costs are proportionate. An agreement on fixed fees for medical reports has been reached in England and Wales between the leading medical referral agencies and a number of insurers in road traffic cases for claims worth up to £10,000. The Civil Justice Council hopes that further agreements can be reached in other categories of personal injury claims.

83. We recommend the introduction of a presumption in personal injury cases falling within the proposed simplified procedure, that is to say cases of £5,000 or less, that medical evidence should be restricted to the GP and the treating consultant, subject to the court's discretion.

c) The expert's role and duties in relation to the court

84. Rules relating to the duty of an expert have been introduced in jurisdictions in which it was thought that experts were acting as "hired guns" and that the court was hindered rather than helped by partisan evidence. Part 35 of the CPR imposes on an expert an overriding duty to the court that must be expressly acknowledged in the report. Similar rules have been adopted in other jurisdictions such as Queensland, New South Wales and Victoria and are under active consideration in Ontario, British Columbia and the Federal Court in Canada. The duty of impartiality and independence has also been adopted in the field of arbitration; for example, in the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration. Evaluations from those jurisdictions suggest that judges have found that an expert statement of duty makes it easier for them to resolve complex disputes.[32]

85. Many jurisdictions have also adopted rules requiring expert witnesses to disclose any financial interest that they may have in the litigation. For example, the CIArb Protocol requires an expert to disclose any past or present relationship with any of the parties and the basis of his remuneration. The Academy of Experts Model

[32] J Peysner and M Seneviratne (2005), *op. cit*, 22-24

Form of Report contains a confirmation that the expert has not entered into any arrangement where the amount or payment of the expert's fees is in any way dependent on the outcome of the case. In South Australia a party seeking to rely on an expert report must, on request, disclose details of any fee or benefit which the expert has received or will become entitled to receive.[33]

86. We recommend that a rule should be introduced which clarifies that the overriding duty of an expert witness is to assist the court. A Code of Conduct and guidance on the format and information to be contained in expert reports, similar in content to Part 35 of the CPR, the relevant Practice Direction and Protocol for the Instruction of Expert Witnesses in England and Wales or the NSW Code on Expert Evidence should be adopted. Parties who wish to rely upon an expert report should be obliged, on request, to disclose all written and oral instructions to the expert and the basis upon which the expert is remunerated. They should expressly disclose whether the expert is retained on a contingency basis, has agreed to defer his fees, or has a continuing financial relationship with the agents of the party instructing him.

d) Power to direct experts to confer

87. Rule 47.12(2)(e) of the Rules of the Court of Session provides that the commercial judge may direct that there should be consultation between skilled persons with a view to reaching agreement about any points held in common. Paragraph 15(3) of the Practice Note relating to commercial actions provides that at the pre proof hearing the court will review the up to date position with regard to any expert reports which are to be relied upon by the parties. Parties should be in a position to advise the court of what consultation, if any, has taken place between their respective experts with a view to isolating the matters truly in dispute between them.[34]

88. A number of respondents suggested that it would be helpful if the court had powers to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements.

89. We consider that in all cases to which the active case management model applies, the court should have this power.

e) Written and oral evidence

90. Many jurisdictions operate a presumption that an expert's written report will be treated as evidence in chief, with oral evidence being limited to cross examination.[35] The adoption of such a rule would save time and cost and would not prevent evidence in chief from being given in the traditional manner in appropriate cases. In commercial actions in the Court of Session the practice has evolved of

[33] Supreme Court Rules 2006, Rule 160(5)
[34] Practice Note 6 of 2004
[35] As well as Part 35 of the CPR in England and Wales, see for example Rule 169 of the Supreme Court Rules South Australia, and Rule 31.29 of the NSW Uniform Civil Procedure Rules.

treating the expert's report as evidence in chief, with the expert supplementing this with oral evidence on the reports submitted by other parties. We consider this to be a useful procedure that could be adopted in other types of case.

91. We recommend that a rule should be adopted to introduce a presumption that an expert's report would be treated as the evidence in chief of that witness and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence.

(v) Summary disposal

92. The current position is that the court, on the application of a pursuer, may grant summary decree where it is satisfied that there is no defence to the action, or to any part of it to which the motion relates.[36] In assessing whether or not there is a defence to the action, or part of it, the court is entitled to look not only at the pleadings but at the history of the case and any affidavits or productions lodged in process.[37] The test to be applied is a high test and is often difficult to satisfy. The House of Lords said in *Henderson v 3052775 Nova Scotia Ltd*[38] that

> "…before he grants summary decree, the judge has to be satisfied that, even if the defender succeeds in proving the substance of his defence as it has been clarified, his case *must* fail."

93. The stage at which the proceedings have reached is also relevant. The Inner House pointed out in *ASC Anglo Scottish Concrete Ltd v Geminax Ltd*[39] that

> "…whether the court may be satisfied as respects the key issue, namely that there is no defence to the action, is naturally dependent upon the stage at which the proceedings have reached and the information or material then available. Particularly at the early stages of litigation, the latter includes information, not just directly before the court, but information as to the existence of a basis for a possible defence."

94. With certain limited exceptions, the summary decree procedure applies only to a pursuer.[40] A defender who wishes to argue that the summons or initial writ discloses no cause of action must take the case to debate once the time for adjusting the pleadings has expired.

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[36] Chapter 21 of the Rules of the Court of Session; Rule 17 of the Ordinary Cause Rules in the sheriff court with the exception of certain types of case: family, multiplepoinding, actions for proving the tenor and actions under the Presumption of Death (Scotland) Act 1977. The court has the power to require a party to produce any relevant document or article or to lodge an affidavit in support of any assertion of fact made in the pleadings or at the hearing of the motion.

[37] *Henderson v 3052775 Nova Scotia Ltd* [2006] UKHL 21; 2006 SC (HL) 85

[38] *Ibid*, at para 21

[39] [2008] CSIH 55, at para 10

[40] Where a defender has lodged a counter claim he may apply for summary decree against the pursuer on the grounds that there is no defence to the counterclaim, or part of it, disclosed in the answers to it. There is a procedure whereby defenders and third parties who have made claims against each other may apply for summary decree.

Summary disposal - responses to the Consultation

95. In Chapter 6 we asked whether the current arrangements for summary disposal are satisfactory. Two thirds of respondents thought that the current arrangements were not satisfactory and nearly all of those respondents thought that there should be a procedure available to a defender to seek summary dismissal of a claim. It was said that this would provide equality of arms for both pursuers and defenders. One respondent pointed out that under the current system defenders regularly have to incur significant costs and suffer long delays in the adjustment process before they can have an unmeritorious claim dismissed. This can often take a year or more, even where the claim is clearly spurious. Another respondent thought that the ability of a pursuer, but not a defender, to seek summary decree is unbalanced. By the time an action is raised, a pursuer has had far more time to formulate his case than a defender, yet is not exposed to the same risk of early disposal. At present, a defender who faces a spurious claim can only seek to have the case dismissed if the pleadings fail the test of relevancy. In an action where a case which satisfies that test has been pled, the defender has no option but to prepare for proof, or to settle the case on economic grounds, however spurious the claim.

96. This issue is closely linked with other proposed reforms. One respondent suggested that if there is a move away from more detailed pleadings and an encouragement on the part of the courts to avoid debates and arguments concerned with form rather than substance in pleadings, a type of summary disposal procedure open to either party would be appropriate.

97. Other respondents suggested that the procedure for summary decree is itself in need of reform as it is difficult to secure summary decree even in cases where a pursuer will obviously be successful. Some sheriffs will not allow a summary decree motion to be made before the options hearing, allowing spurious defences to be raised simply as a delaying tactic.

Summary disposal - other jurisdictions

98. In most jurisdictions there is implied or inherent power, or express provision in the rules, for allegations to be struck out, or for judgment to be given, where the court is satisfied that the pleaded claim does not disclose a cause of action or where a defence does not disclose an answer.

99. Under the Civil Procedure Rules in England and Wales both claimants and defendants may apply for summary judgment, in whole or in part, which the court may grant if it is satisfied that the claimant has no real prospect of success or that the defendant has no real prospect of successfully defending the action and there is no other compelling reason why the case should be disposed of at trial. Applications may be made at any stage of the proceedings. The court may give summary judgment against a claimant in any type of proceedings or against a defendant in any type of proceedings, except in residential possession proceedings against a mortgagor or person whose occupancy is protected and in admiralty claims. The

court may also fix a summary judgment hearing on its own initiative.[41] The party resisting summary judgment has to show more than that its case is arguable. Instead, the party has to show that it has a realistic, as opposed to fanciful, prospect of success. Where a case is entirely without substance or completely contradicted by documentary evidence, it is fanciful. In exceptional circumstances the court can allow a case or an issue to continue although it does not satisfy this test, namely, if it is considered that there is a public interest in the matter being tried.

100. In New South Wales the plaintiff may obtain judgment where the defendant has no defence to the claim.[42] That is also the position in Western Australia.[43] However, the Law Reform Commission of Western Australia recommended in 1999 that the test for summary judgment should be reformulated so that it could be used against a party who cannot show that his case has a reasonable prospect of success. That recommendation has been implemented in the magistrates' court.[44] In Queensland the procedure for summary judgment for the plaintiff and for the defendant is based on a test of 'no real prospect' of defending or succeeding on the claim and where there is no need for trial of the claim or part of the claim.[45]

101. In the Supreme Court in Victoria summary judgment may be obtained against either a defendant or a plaintiff. Where the plaintiff makes the application the test for summary judgment is that the defendant has no defence to the claim. On a summary judgment application brought by a defendant, he must show by evidence that he has a complete defence on the merits to the claim. In the magistrates' court the procedure is available only for a plaintiff to obtain judgment against a defendant and only where the claim is for a debt or liquidated demand. The High Court has held that the summary judgment procedure should be reserved for 'actions that are absolutely hopeless.'[46] The court has also said that

> "The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear there is no real question to be tried."[47]

Consistently with this approach, the Supreme Court has suggested that

> "the classic approach is that summary judgment should be awarded sparingly."[48]

Summary disposal - recommendation

102. There is considerable pressure for a procedure similar to that for summary decree to be made available to defenders. We are satisfied that the rules of court

[41] CPR Part 24 and relevant Practice Direction
[42] Rule 13.1 of the Uniform Civil Procedure Rules, New South Wales
[43] Order 14 of the Rules of the Supreme Court 1971, Western Australia
[44] Magistrates Court (Civil Proceedings) Act 2004, s 18
[45] Uniform Civil Procedure Rules 1999, Queensland
[46] *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62
[47] *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87
[48] Submission CP 58 (Supreme Court of Victoria)

should be amended to this effect. We consider that a single procedure for both pursuers and defenders is required, incorporating a liberalised test. The present test, set out in *Henderson v 3052775 Nova Scotia Ltd,* is too high. The procedure cannot be used to deal with the mischief that it was intended to remedy. It is therefore failing those litigants that it is designed to assist. The adoption of a more liberalised test, together with a power to dispose of an action or defence summarily at any stage of the proceedings, should considerably reduce the burden on the courts and avoid expense and delay to litigants.

103. A procedure for summary disposal that is open to both pursuers and defenders[49] can be created by an amendment of the current procedure for summary decree. It should enable any party to seek summary disposal at any stage in the proceedings. The test should be whether the pursuer or the defender has no real prospect of success and where there is no other compelling reason why the case should proceed. The judge or sheriff should be entitled, as now, to call for relevant documents or affidavits in support of assertions of fact made in the pleadings or at the hearing. The stage at which the proceedings have reached will be a relevant consideration. The court should also have the power *ex proprio motu*, and as part of its active case management function, summarily to dispose of an action or defence by applying the same test. In that circumstance the court should fix a hearing, giving the parties not less than 14 days' notice. Summary disposal should not prevent a pursuer from raising proceedings again on further evidence.

(B) Managing time efficiently

104. We sought views on whether the court should have a greater degree of control over the time set aside for hearings and how hearings are managed; for example, by

(i) introducing measures to achieve greater accuracy in estimates of the time required for a hearing;
(ii) having hearings conducted on a timetable determined by the court; or
(iii) making greater use of outline arguments.

(i) Time estimates

105. When a debate, proof or other type of hearing is fixed in a case at first instance, or when an appeal is set down for hearing in either the sheriff court or the Court of Session, it is the parties who indicate how long they expect the hearing to last. These estimates are seldom accurate and often cause inconvenience to the court and delay and expense to the parties themselves.

106. In the Court of Session parties have been required since 7 January 2008[50] to provide written estimates of the likely duration of all Inner House diets, proofs, jury

[49] The same exceptions should apply as detailed in footnote 36
[50] Rules 6.2 and 43.6 of the Rules of the Court of Session as amended by Act of Sederunt (Rules of the Court of Session Amendment No. 10)(Miscellaneous) 2007; SSI 2007 No. 548

trials, procedure roll hearings, diets of preliminary proof and proof or jury trial in personal injury actions. The estimates must be certified by counsel or other persons having a right of audience. In the case of procedure roll hearings, where another party considers the estimate to be too low, he must record his own estimate on the enrolled motion. Where the estimate of the length of a diet of a procedure roll hearing, proof or jury trial changes, the parties must lodge a further estimate no later than 14 days before the date of the hearing.

107. Dr Rachel Wadia's research on the business of the Inner House, carried out to assist Lord Penrose's review, showed that because of inaccurate estimates, cases often have to be adjourned and continued to a later date. She found that in the case of half day and one day hearings, duration was accurately predicted in only 36% of cases. For two day hearings there was 41% accuracy; for three day hearings 17% accuracy; for four day hearings 40% accuracy and for five day hearings 50% accuracy. Only one case – a seven day case – was predicted accurately. Inaccurate predictions resulted in discharged diets in a high proportion of cases, further delaying final disposal. In other cases, the result was a continued diet requiring the same bench of judges and counsel to be assembled, with consequent delay.[51]

108. Inaccurate time estimates are also a problem at first instance in the Court of Session, particularly in relation to judicial review. For the year September 2005 to August 2006 approximately 22% of all substantive hearings did not conclude in the time allocated. For September 2006 to August 2007 the figure was 15%. It is the practice in some sheriff courts to allocate a one day hearing even in cases where it can reasonably be predicted that more than one day will be required to dispose of the matter. Parties themselves often understate the number of days required in order to be allocated an earlier diet.

109. In order to prevent such a practice in the Inner House, Lord Penrose recommended that court fees for continued diets extending beyond the parties' forecast should be at higher rates. Lord Penrose's report on the business of the Inner House is presented in full in Appendix 2[52] He was concerned by the number of appeals that are withdrawn at a late stage. Research shows that around 90% of appeals that are withdrawn in the last five weeks before the Summar Roll hearing. Cases that were discharged on the day of the hearing had been allocated 50 court days, equivalent to 150 judge days that were irretrievably lost. Within the period after the Rule 6.3 By Order hearing, discharges lost 82 court days, equivalent to 246 judge days. For this reason he recommended that within a short prescribed period of the fixing of a diet of hearing for disposal of an appeal, parties should be required to pay court fees for the whole of the duration of the substantive diet. All such sums would be liable to forfeiture if the diet fell for any reason, subject to liability in expenses *inter partes*.

[51] The Rt Hon Lord Penrose (2006), *op. cit* , Parts IV and V
[52] *Ibid*, Recommendation 18

110. The court has, on occasion, criticised the conduct of agents for inaccurate time estimates for hearings. The Inner House in *McDonald-Grant v Sutherland & Company and Ors*[53] expressed its dismay at the waste of public resources that had occurred because of the discharge of a diet caused by an inaccurate estimate of duration. The court emphasised that in its view, those who are professionally involved in litigation must take reasonable care to avoid wasting the court's time. In *Henry v Rentokil Initial plc*[54] a hearing before the Inner House set down for four days, on the basis of an estimate by the appellants, took no more than a day and a half. The court commented that

> "In consequence, two and a half days of court time were wasted and other litigants were deprived of the opportunity of an earlier hearing of their case."

111. Nevertheless, the Lord Justice Clerk said in the recent case of *Moore v The Scottish Daily Record and Sunday Mail Ltd*[55] that the idea that a late settlement wastes the judges' time is an oversimplification. He said

> "The judges of this court have a heavy burden of chamber work. Late settlements give the judges concerned an opportunity for other productive work, such as writing judgments and reports, dealing with criminal appeal sifts and immigration appeals, and preparing for other cases. If it were not for late settlements, the judges would require a formal allocation of time for such work, the consequences of which might impose even greater strains on the system."

Time estimates - responses to the Consultation

112. Most respondents to the Consultation Paper agreed that the court should have greater control in the allocation of hearing time. Some thought that this could be done only if there were to be active case management. Some were concerned that estimates cannot be accurate if it is not known which judge or sheriff will hear the case, nor what other business there will be before the main work of the day starts. One respondent thought that the court is the least likely to make an accurate assessment of the length of a hearing. Another thought that if the court allocated time on its own estimate, there would be a risk of over-timetabling.

Time estimates - recommendation

113. In our view, a system of active judicial case management will ensure that judges or sheriffs will be involved in assessing the length of time required for a hearing. This already happens under commercial procedure in the Court of Session and sheriff court. We therefore do not propose to make any specific recommendations on this issue. The assessment of time required for a hearing will be one of the case management functions of the docketed judge or sheriff in charge of the case. Lord Penrose's recommendations should deal with the problem of inaccurate time estimates in appeals to the Inner House.

[53] 2007 SC 651
[54] 2008 SC 447
[55] [2008] CSIH 66

(ii) Time limited hearings

114. A further option for the management of court business is for hearings to be time limited or conducted by reference to a timetable determined by the court. This would mean that once a hearing was fixed for a particular length of time the court would ensure that a timetable was fixed to which parties would be required to adhere.

Time-limited hearings - responses to the Consultation

115. The majority of our respondents were against time limited hearings or hearings conducted by reference to a timetable determined by the court. Some considered that there would be significant problems for the judge. Others thought that it would not be practicable since many factors affecting the length of a case are outwith the parties' and the court's control. Some suggested that it might diminish respect for the court's impartiality by giving rise to the perception that a party's case was being rushed; might restrict the ability to advance arguments fully; and might inhibit the discussion between bench and bar which can test the strengths and weaknesses of a case.

116. Those in favour of time limited hearings were of the view that skilled advocates in court should be able to be concise. Time limited hearings would also prevent the greatest evil of a part-heard case which some said is "ghastly" to return to and reduces the quality of decision-making.

Time-limited hearings - recommendation

117. We are of the view that, having discussed and agreed an appropriate diet, the court should expect parties to agree on a timetable for presentation of the evidence or submissions so that the most effective use is made of court time. A judge or sheriff should, as part of his case management functions, have the power to time limit hearings in particular types of case where he considers it appropriate.

(iii) Use of outline arguments

118. Another option to ensure that more efficient use is made of the time allocated to hearings is for there to be a greater use of outline arguments. The aim would be to encourage parties to prepare their cases well in advance, to plan the presentation of their cases more carefully and to limit submissions to the salient points. Under the current system, the court can require parties to produce written notes of argument. Practice varies between courts and judges. It can result in frontloading of costs if outline arguments are exchanged in advance of a hearing that does not go ahead. Time also has to be allocated for the judge and sheriffs to read the outline arguments in advance of the hearing, which is wasted if the hearing does not go ahead.

119. Lord Penrose considered the use of outline arguments in detail. He concluded that a requirement for the exchange of written notes of argument would improve openness in communication, would inform decisions about the relative strengths and weaknesses of appeals at an early stage. It would also improve efficiency by removing cases with poor prospects of success, by identifying cases that required accelerated or extended treatment and by facilitating rational decisions on the extra judicial disposal of business. He proposed that written notes of argument should be lodged following the exchange of the grounds of appeal and answers, but before the court ordered a substantive hearing. He also thought it would be necessary to formulate and publish clear guidance on the scope and content of notes of argument, by way of practice notes.

120. For commercial actions in the Court of Session paragraph 15(4) of the Practice Note[56] provides that in cases where a proof before answer has been allowed, parties should produce, for consideration at the pre-proof By Order hearing, a statement of legal arguments and lists of authorities on which they may rely at the diet. For procedure roll hearings in ordinary actions in the Court of Session, Practice Note No 4 of 1997 provides that the court will order a note of argument to be lodged in all cases appointed to the procedure roll within 28 days, unless otherwise ordered.[57] Rule 22 of the Sheriff Court Ordinary Cause Rules provides that a party intending to insist on a preliminary plea must, not later than three days before the Options Hearing or Procedural Hearing, lodge a note of the basis for the plea. At any proof before answer or debate, parties may on cause shown raise matters in addition to those set out in the note.[58]

121. With these limited exceptions there is no general requirement to provide a written note of argument in advance of a hearing. Practice on the matter varies.

122. Skeleton arguments are required for almost all High Court trials in England and Wales, and are often thought desirable for county court trials. Directions for the exchange of skeleton arguments are often incorporated in ordinary case management directions. The content of a skeleton argument is prescribed in the Guides applicable to each court. The Queen's Bench Guide stipulates that a skeleton argument should summarise the party's submissions in relation to each of the issues; cite the main authorities relied on, which may be attached; contain a reading list and an estimate of the time it will take the judge to read; be as brief as the issues allow and not normally be longer than 20 pages of double-spaced A4 paper; be divided into numbered paragraphs and paged consecutively; avoid formality and use understandable abbreviations; and identify any core documents which it would be helpful to read beforehand.

[56] Practice Note No 6 of 2004

[57] This sits uneasily with Rule of Court 22.4 of the Rules of the Court of Session 1994 which provides that where a cause has been appointed to the procedure roll, the court may, either at its own instance or on the motion of a party, ordain a party to lodge in process a concise note of argument. See comments of Lord Osborne in *Fairburn v Vayro* 2001 SLT 1167. Also see RCS 1994, r. 55.3(4)(b) for notes of argument in intellectual property actions.

[58] See OCR 1993 r40.12 (3)(i) for commercial actions in the sheriff court.

Use of outline arguments - responses to the Consultation

123. Over three quarters of our respondents agreed that in the conduct of substantive hearings there should be greater use of written arguments. One respondent said that in order to improve the system of hearings involving legal argument in the Court of Session there should be a requirement for skeleton arguments to be lodged in advance with a note of the authorities relied on, and a note of the productions that the judge should read in advance of the hearing. Another suggested that Rule 22 of the Sheriff Court Ordinary Cause Rules might be extended to provide for a full statement of argument. Other respondents preferred the use of summary notes of argument rather than detailed written submissions, mainly on the ground of expense.

124. Those respondents not in favour of a greater use of written arguments consider that it is more efficient to hear oral arguments to which the judge can react, and that it is unlikely that the greater use of written arguments would make a proportionate saving in time.

Use of outline arguments - recommendation

125. Skeleton arguments enable the parties to agree in advance of the hearing what points are contentious and to narrow the scope of the oral submissions. They also give the judge the opportunity to read the arguments and core documents in advance and therefore give counsel guidance as to the relevant points. The current informal practice in the Scottish courts, although affording flexibility, leads to inconsistency in approach. Some judges encourage the use of written notes of argument in certain types of actions. Others are unenthusiastic. Problems can arise where counsel or solicitors attempt to raise new points of argument at the hearing.

126. We endorse the recommendations made by Lord Penrose and believe that the approach he recommends for the Inner House can be applied generally. We recommend that as part of his case management function a judge or sheriff should have the power to order that written arguments should be lodged and to prescribe the level of detail required. The exact approach, including deadlines, will depend in each case on considerations such as subject matter, value and complexity. The notes of argument should be cross referenced to productions and legal authorities. The authorities on which it is intended to rely should be lodged with the relevant passages highlighted. Parties should not be entitled to raise new issues without the permission of the court on cause shown. Notes should be exchanged between the parties and lodged with the court in advance of the hearing in accordance with the timetable set by the court. Different arrangements may apply following a proof before answer.

(C) Effective sanctions for non-compliance with rules or court orders

127. At present a judge or sheriff has a wide discretion to impose sanctions. These most commonly take the form of a penalising award of expenses. The court may refuse to allow a late amendment of the pleadings.[59] The rules of procedure for commercial actions in both the Court of Session and sheriff court provide the judge or sheriff with specific sanctions including: a refusal to extend any period for compliance with a provision in the Rules or an order of the court; dismissal of the action or counterclaim in whole or in part; the granting of decree in respect of all or any of the conclusions of the summons, or craves of the initial writ, or counterclaim; and the making of an award of expenses.

128. In awarding expenses a court may order taxation on the basis of solicitor and client, client paying, instead of the normal basis of party and party, as a mark of disapproval of a party's unreasonable conduct.[60] In *McKie v The Scottish Ministers*, Lord Hodge summarised the law in five propositions:[61]

> "First, the court has discretion as to the scale of expenses which should be awarded. Secondly, in the normal case expenses are awarded on a party and party scale; that scale applies in the absence of any specification to the contrary. But, thirdly, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale. Fourthly, in its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances. Those circumstances include the party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose, and the way in which a party has used court procedure, for example to progress or delay the resolution of the dispute. Fifthly, where the court has awarded expenses at an earlier stage in the proceedings without reserving for later determination the scale of such expenses, any award of expenses on the solicitor and client scale may cover only those matters not already covered by the earlier awards."

129. Awards of expenses may also be made against solicitors personally for expenses occasioned by their own fault or where they are guilty of an abuse of process.[62] It is not competent to make an award of expenses against counsel. That has been the subject of comment by Lord Maclean[63] and more recently by Sheriff Ross.[64] In England and Wales and in other jurisdictions such as New South Wales, there is a statutory power to make such an award.[65]

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[59] Examples include *Rodwell v The City of Edinburgh Council* 2001 GWD 2-82 and *Henderson v The Royal Bank of Scotland plc* [2006] CSOH 164.
[60] *Bell v Inkersall Investments Ltd and Others* 2007 SC 823
[61] 2006 SC 528. Followed in *Appa (UK) Ltd v The Scottish Daily Record and Sunday Mail Ltd* [2007] CSOH 196 and *UPS Supply Chain Solutions v Glasgow Airport Ltd* [2007] CSOH 202
[62] *Stewart v Stewart*, 1984 S.L.T (Sh. Ct.)58; *Bremner v Bremner* 1988 S.L.T. 844
[63] *Reid v Edinburgh Acoustics Ltd (No 2)* 1995 S.L.T 982
[64] *Bell v Inkersall Investments Ltd and others* Dumfries 7 December 2007
[65] Supreme Court Act 1981, section 51, as amended by the Courts and Legal Services Act 1990

130. Where a court does not have an explicit power under the Rules of Court to impose a particular sanction, it may rely on its inherent power. In the decision of a bench of five judges in *Moore v The Scottish Daily Record and Sunday Mail Limited*, the Lord Justice Clerk confirmed that

> "The court has an undoubted inherent jurisdiction to take action where there has been a contempt of court or an abuse of process; or where for some other reason a fair trial of a case has become impossible. In the case of contempt of court, the court has the power to fine. The court also has a wide discretion in the awarding of expenses."[66]

He went on to say:

> "It is well-established in Scots law that the court can exercise its inherent jurisdiction in the case of an abuse of process by way of a procedural sanction such as dismissal (*Tonner v Reiach and Hall*, 2008 SC 1)."

131. In *Moore v The Scottish Daily Record and Sunday Mail Limited*, the court had to consider whether, on the late settlement of a reclaiming motion, it was competent for the court to make an order against either or both parties in respect of its administration costs, as had been done in *Billig v Council of the Law Society of Scotland*.[67] It ruled that such an order was *ultra vires*. In the opinion of the Lord Justice Clerk,

> "The court's disapproval of the petitioner's conduct in *Billig* would have been appropriately marked by the severer penalty of an award of expenses to the respondents on an agent and client (client paying) basis."

He continued:

> It is a legitimate and necessary function of the court to minimise the occurrence of late settlements and their impact on its efficiency; but I think that problems in this area should be remedied through the normal processes of law reform."

132. The decision in *Tonner v Reiach and Hall* has now been put on a formal footing in an act of sederunt which provides for the dismissal of a claim on the ground of inordinate or inexcusable delay. [68] This was necessary in order to set out the appropriate procedure for the determination of such an application. The court had expressed the view that the procedure to be adopted should not be the subject of extensive pleadings or other time-consuming or costly requirements. It further considered that in view of the drastic nature of the remedy sought, the pursuer was

[66] [2008] CSIH 66

[67] 2008 SC 150. The Inner House ordered a party which had abandoned its appeal shortly before the date set for the hearing to pay the court fees which would have been charged for the hearing had it gone ahead. The court held that the making of the order demonstrated the court's inherent jurisdiction to exercise real control of its procedures and timetables.

[68] Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2008; SSI 2008 No. 349

entitled to fair notice of the arguments and that the court should be provided with at least the minimum of documentary material upon which it could rely in reaching its decision. The relevant Rule gives effect to the court's views and provides for a minute and answers procedure.[69]

Sanctions for non-compliance - responses to the Consultation

133. Just over half of the respondents on this issue considered that the courts should have greater powers to impose sanctions in cases in which parties or their representatives behaved unreasonably or failed in a material respect to comply with the court rules. Some considered that the court's powers at common law, or as provided for in the rules, are sufficient and that the difficulty lies in an apparent reluctance to exercise them. It was proposed that the court should adopt a more proactive role in this respect. Some respondents drew a picture of a *laissez faire* approach with repeated failures to comply with the rules and time limits being tolerated. It was suggested that the delays and costs suffered by opponents were not adequately recognised by the court.

134. Others suggested that there should be more rigorous sanctions available in relation to expenses. In serious cases, payment of expenses should be a condition precedent of further procedure by the offender. In the most extreme cases, it was suggested that judges should be able to dismiss claims or to grant decree on the ground of abuse of process.

135. One respondent considered that reliance on judicial activism based on the inherent powers is too uncertain. Instead, specific rules or regulations should be promulgated with express penalties and enforcement procedures.

136. Respondents who favoured a greater range of sanctions made the following suggestions:

- serious consideration should be given to dismissal;
- the court should be given the power to specify on a broad brush basis the amount of expenses to be paid;
- a charge for late lodging of documents should be levied;
- forfeiture of the right to charge clients or SLAB for steps taken;
- termination of a legal aid certificate;
- more swingeing penalties in expenses – finding agents and counsel liable;
- wasted costs orders; and
- expenses sanctions to reflect actual costs.

[69] The Sheriff Court Rules Council is currently considering whether to introduce a similar rule in the sheriff court.

137. Several respondents were of the opinion that if judicial case management is introduced, sanctions for non-compliance will be essential.

Sanctions for non-compliance - other jurisdictions

138. The need for an effective system of sanctions for non compliance with rules, practice directions and orders was endorsed by Lord Woolf in his Final Report on Access to Justice. He stressed four important principles:

(a) The primary object of sanctions is prevention, not punishment.
(b) It should be for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach, for example that a party may not use evidence which he has not disclosed.
(c) All directions orders should in any event include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively.
(d) The onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.[70]

139. The range of sanctions provided for by the Civil Procedure Rules 1998 in England and Wales is set out in Annex C to this chapter together with a brief review of the use of 'unless orders'[71] and 'wasted costs orders'[72] in that jurisdiction. In practice it is open to the parties to apply for extensions of time and to apply to the court for relief from any sanction imposed by the rules, practice directions or court orders.

140. The approach in England and Wales has been followed in other jurisdictions. Section C of the Annex provides further information about the position in Ireland and in parts of Australia and Canada. The recent work done by the Victorian Law Reform Commission is particularly interesting. The Commission agreed with the view of Lord Woolf that the primary object of sanctions is prevention, not punishment. It also agreed in principle that it is desirable for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach; for example, a rule to the effect that a party may not use evidence that has not been disclosed. It thought that it is also desirable, where practicable, for all orders for directions to include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively. In principle, the Commission agreed with the position taken by Lord Woolf that the onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.

[70] Lord Woolf (1996), *op. cit*, Chapter 6 para 4
[71] An unless order is an order of the court requiring somebody involved in the case to do something, usually within a certain time limit, failing which certain sanctions will apply e.g. the claim or defence will be struck out. It is only made if there has previously been a breach of some order or rule.
[72] A wasted costs order is an order that costs which were incurred improperly, unreasonably or negligently by or on behalf of a party's legal representative should be disallowed from an award of costs to be paid to that party, or that they should paid by the party's legal representative. See section 51 of the Supreme Court Act 1981(c.54) as amended by the Courts and Legal Services Act 1990(c.41)

141. However, the Commission was also mindful that there are many understandable reasons why parties, particularly those who may be less experienced or less wealthy, may not always be able to comply with orders and directions within the required time. Large law firms acting for affluent clients or large corporations or insurers can usually mobilise resources to ensure that required tasks are completed within time limits. Not all litigants are in the same position. Accordingly, the Commission concluded that although there is considerable scope for the use of presumptive sanctions to apply in the case of default, in large measure sanctions will have to be applied in light of the circumstances and the conduct of litigants and lawyers. This will usually require the exercise of judicial discretion.

142. Although the courts in Victoria already have extensive general and specific powers to impose sanctions, including costs orders, the Commission concluded that there was benefit in having a clear framework of rules incorporating express provision for a range of disciplinary and case management orders. It considered that a range of disciplinary and case management orders that included, but were not limited to, costs sanctions, would be useful. It was of the view that sometimes costs might not be the most appropriate sanction, particularly where a party had substantial resources.

Sanctions for non-compliance - recommendations

143. We consider that the object of sanctions is to encourage efficiency and high standards of competence. The cost of litigation, when coupled with a system of judicial case management, places a duty on a judge or sheriff to have regard to the efficient management of resources.

144. In a judicially case managed system, there is a need for sanctions to encourage parties and their representatives to comply with case management orders. On one view, explicit and specific powers to impose sanctions may be of greater use than a broad general power. Clearly identifying the range of sanctions for non-compliance with case management orders may also enhance the effectiveness of case management.

145. Another view is that the courts already have extensive express powers and an inherent jurisdiction to impose sanctions. Accordingly, further rules are not required. There is also a concern that sanctions will be overused, and may be automatically imposed for procedural default, without proper regard for extenuating circumstances. Some consider that parties are entitled to control adversarial civil proceedings and that the courts should not be unduly interventionist. Others think that applications and hearings in respect of sanctions may also add to costs and delays and give rise to undesirable satellite litigations and appeals.

146. We do not consider that parties are entitled to control adversarial civil proceedings without the intervention of the court. Under our recommended system of case management, parties will remain responsible for the progression of the

action, subject to the supervision of the court. Where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the court to impose such sanctions as it considers appropriate. This power is without prejudice to the court's inherent jurisdiction to take action where there has been a contempt of court or an abuse of process, or where for some other reason a fair trial of a case has become impossible.[73]

147. In addition to a general power, we consider that the rules of court should specify types of sanctions that may be imposed in particular instances. Such sanctions may also apply where parties or their representatives have behaved unreasonably.

148. We recommend that the rules of court should entitle the court to:

a) dismiss the action or counterclaim, in whole or in part;
b) grant decree in respect of all or any of the conclusions of the summons, or of the craves of the initial writ, or counterclaim;
c) refuse to extend any period for compliance with a provision in the rules or an order of the court;
d) make an award of expenses;
e) disallow a party from amending or updating part of its claim;
f) disallow a party from calling one or more witnesses, including expert witnesses;
g) deprive a pursuer who is in default of all or some of the interest that would otherwise have been awarded;
h) order caution for expenses; and
i) order immediate payment of expenses incurred in procedural matters and assess them summarily. Payment of the sum would be a condition precedent of further procedure.

We do not propose this as an exhaustive list.

149. As far as the conduct of legal representatives is concerned, we recommend that the court's power to make solicitors personally liable for expenses occasioned by their own fault, or where they are guilty of an abuse of process, ought to be incorporated in statute; and that it should be extended to cover all those with rights of audience.

150. In addition, we recommend that the courts should have the power to order that agents or counsel may not charge their clients or SLAB for any work that is occasioned by any improper, unreasonable or negligent act or omission on their part. The court should have the power to order that a copy of the court's interlocutor be notified by the clerk of court to the client personally or to SLAB. This, we hope, will meet the objection that has been urged on us that in current practice mistakes make money.

[73] *Moore v The Scottish Daily Record and Sunday Mail Limited* [2008] CSIH 66

Party litigants and vexatious litigants

Managing party litigants

151. It is recognised that the right of an individual to represent himself places additional burdens upon the courts. Party litigants are not subject to the control of any professional rules or codes of discipline and are not normally familiar with the advocacy methods appropriate to their case. Party litigants also place additional burdens on any counsel or solicitor advocate representing other parties who, in accordance with normal professional standards, can be expected to assist the party litigant insofar as he is able to do so without prejudicing the interests of the party that he represents. An excessive amount of court time may be taken up where a party seeks to represent himself. As Lord Glennie commented in *Kenneil v Kenneil:*[74]

> "This right of a party litigant to speak in Court often raises problems. Neither his conduct in Court nor what he says is constrained by any code of professional conduct. His submissions may not focus as closely as would those of a professional advocate upon the relevant issues. He may not be aware of some of the intricacies of the law or the law of evidence. He may not appreciate the constraints imposed upon an advocate, for example, in making any allegation of fraud or dishonesty. All of this puts a burden on the Court. It also puts a burden on the legal representatives of other parties who will be expected to assist party litigants – or more accurately to assist the Court in dealing with issues raised by party litigants – insofar as they are able to do so without acting against the interests of their client."

152. Lord Penrose's review of Inner House business found that a significant proportion of cases in the Inner House - 13% - involved party litigants. There was a relatively high proportion in appeals from sheriff court decisions, where there were fewer constraints on parties initiating litigation at first instance. Issues of competency arose in a high proportion of these cases, and absorbed a disproportionate amount of court time, despite the assistance given by officials. Progress was also subject to unpredictable disruption when party litigants failed to appear for hearings. A higher proportion of cases involving party litigants required continued hearings. While it might be more appropriate to attribute the delays involving party litigants to ignorance of, rather than inefficiency in observance of, the Rules of Court and the applicable law generally, the disruptive impact of such cases on the work of the Inner House was considerable.

153. The time devoted by three-judge Divisions to motions on Single Bills generally and to By Order hearings, in particular, was found to be considerable. The baseline data indicated that procedural business was running at a level of about 400 hours per calendar year.

[74] 2006 SLT 449

154. A disproportionate part of this total was related to business involving party litigants. Such business generated higher numbers of procedural hearings per case. The inability of the Court to manage this business effectively, and if necessary to discipline its conduct, emerged as a major factor contributing to the total time absorbed.

155. For these reasons, Lord Penrose recommended:

> "The management of cases involving party litigants could be facilitated by management by a dedicated individual judge. It is clear that in the case of such litigants confidence in the individuals dealing with cases is a material consideration. That can be difficult to develop when the complement of judges in a division changes frequently, and the litigant is confronted by different individuals, sometimes tendering differing advice. Further, there can be a need for firm discipline in dealing with party litigants. That would be facilitated by having the case management in the hands of a single individual."

156. Party litigants would appear to occupy a disproportionate amount of time in relation to appeals to the sheriff principal. Statistics were collated by the Review from a number of sheriffdoms regarding the number of appeals heard by the sheriff principal in 2006 in which one of the parties to the appeal was a party litigant. These are as follows:

Sheriffdom	**Number of appeals heard**	**Number of party litigants**	**% of appeals involving party litigants**
Grampian, Highlands and Islands	27	8	*29*
Tayside, Central and Fife	29	9	*31*
South Strathclyde, Dumfries and Galloway	60	13	*21*
Glasgow and Strathkelvin	90	19	*21*

157. As the figures only record the number of appeals heard they do not reflect the shrieval time taken up once an appeal has been marked in preparing a stated case in relation to appeals in summary cause or small claims and in writing a note in the case of an ordinary action.

158. As para 6.80 of the Consultation Paper points out, various rules have been developed in Scotland which attempt to ensure that a case can only proceed where it has legal merit. For example, Rule of Court 4.2 of the Rules of the Court of Session provides that a party litigant may not normally sign an initiating document without the leave of the Lord Ordinary. In 2006, leave was sought in 53 cases. Leave was refused in 43 (81%) cases, granted in 8 (15%) and no order made in 2 (4%). One party litigant has sought the leave of the court to commence proceedings on 84 occasions over the past four years. Leave was refused on each occasion.

159. With regard to Court of Session appeals, Rule of Court 38.14(4) provides that where the Deputy Principal Clerk considers that a reclaiming motion may be incompetent he may, before the cause is brought before the Inner House, refer it to a single judge nominated for that purpose by the Lord President. Where such a referral is made the judge may (a) order any party to make representations to him in respect of the competency of the reclaiming motion (b) refuse the reclaiming motion on the ground that it is incompetent (c) direct that the reclaiming motion is to proceed (d) make such order as otherwise he sees fit. The decision of the judge is final. This provision was introduced to prevent the time of the Inner House being wasted on incompetent reclaiming motions. It applies to all appeals, not only those brought by party litigants. Rules 40.12 and 41.3A replicate these provisions for appeals from inferior courts and other appeals respectively.

160. Although these rules may assist in filtering out unmeritorious appeals, they only apply where an appeal is incompetent. For example, because the reclaiming days or days of appeal have expired before the reclaiming motion or appeal is enrolled or marked; because leave was not sought or because the interlocutor or decision is not one that may be appealed. The judge has no power to refuse an appeal at this stage on the merits alone.

161. There are no equivalent rules in the sheriff court to identify unmeritorious causes at the initiation stage or to filter out unmeritorious appeals from the sheriff to the sheriff principal. Although a sheriff clerk may refuse to sign a warrant where a case is considered to be incompetent,[75] this power does not extend to unmeritorious causes. Indeed, it has been held that a warrant should not be refused by the sheriff, on a consideration of the merits at that stage.[76]

Managing party litigants - responses to the Consultation

162. Chapter 6 of the Consultation Paper sought views on a number of issues related to party litigants. Very few respondents thought that the current measures available to the courts to identify and manage unmeritorious actions or appeals brought by party litigants were effective. One respondent, whilst appreciating the understandable concern of the court to ensure that party litigants are afforded proper access to justice, thought that they were afforded considerable flexibility and leniency and were more readily able to pursue unmeritorious causes or appeals than their represented equivalents. This could result in significant inconvenience and expense for their opponents. Others thought that judicial latitude is given to party litigants with the courts seeming to be very reluctant to take a firm line with them. This was said to cause significant problems, delay and expense for legally represented litigants.

[75] OCR 1993 r 5.1. Where the sheriff clerk refuses to sign a warrant the party presenting the initial writ may apply to the sheriff for the warrant.
[76] *Secretary of State for Social Security v Ainslie* 2000 SLT (Sh Ct) 35

163. It must, however, also be recognised that not all claims brought by party litigants are unmeritorious. Some party litigants do achieve success in the pursuit of their claims before the courts.[77]

164. Those respondents who considered the current arrangements to be unsatisfactory proposed a number of solutions including: imposing on party litigants a requirement to seek the leave of the court before bringing proceedings; a process of screening or sifting cases at an early stage; introducing special case management powers applicable only to party litigants; making greater use of the court's powers in relation to caution for expenses; and imposing a requirement upon party litigants to seek the leave of the court to mark an appeal. Others thought that problems could better be addressed by a more robust exercise of the court's case management powers coupled with enhanced powers of summary disposal. Active judicial case management was thought to be particularly important in family actions involving unrepresented parties.

Managing party litigants - recommendations

165. We considered several options for reform including compulsory representation for all litigants. We concluded, however, that this would give rise to a disproportionate burden on the legal aid fund and the courts, and was an extreme measure which found no measure of support amongst consultees. We consider that a more effective way in which to manage unmeritorious claims brought by party litigants is to impose a requirement upon them to seek the leave of the court to bring an ordinary action or summary application. For Court of Session first instance actions, Rule of Court 4.2(5) already serves this function. As far as sheriff court actions are concerned, there is no requirement for an initial writ to be signed by a legal representative. An alternative form of sifting mechanism would therefore be required. One option would be to introduce a rule in terms of which a party litigant must seek the leave of the court to commence an ordinary action or summary application.

166. We therefore recommend the promulgation of a rule whereby the sheriff clerk is given discretion to refer any ordinary action or summary application presented by a party litigant to a sheriff who may direct whether or not the action should be allowed to proceed. That decision should be based on whether or not, in the sheriff's opinion, the writ discloses a stateable case. There should be a presumption against an oral hearing unless the party litigant specifically requests it. The decision of the sheriff should be final and not subject to review.

167. Many respondents considered that there should be a greater use of case management in actions involving one or more party litigants. Lord Penrose took

[77] *Mowbray v Valentine* 1998 SC 424; *Mowbray v Valentine* 1992 SLT 416

such an approach in his Report on Inner House Business, recommending that cases involving party litigants could be managed by a dedicated individual judge.[78]

168. In Chapter 5 we outline the system of judicial case management that we recommend. As far as party litigants are concerned, we recommend that at any case management hearing the court should explain to a party litigant the requirements of any order made, for example, in relation to specification of pleadings or production of documents and the need to comply with any orders made by the court. It should be made clear that failure to comply, without good reason, may result in appropriate sanctions being imposed which may include dismissal, or decree being granted, as the case may be.

169. So far as leave to appeal is concerned, we recommend that there should be a first stage appeal as of right from the district judge or the sheriff to the Sheriff Appeal Court. Appeal from the Sheriff Appeal Court to the Inner House should be subject to a requirement to obtain leave. The requirement to obtain leave to appeal from the Sheriff Appeal Court will apply to all litigants, including party litigants, and should act as a means of filtering out unmeritorious appeals. That, along with Lord Penrose's recommendations for the reform of the business of the Inner House, which we endorse, should assist in the management of party litigants in the Inner House.

Vexatious litigants

170. As paragraph 6.84 of the Consultation Paper identifies, litigants who conduct their cases in an unreasonable manner present a growing problem for the administration of justice. Their conduct impacts not only on their opponents but also on the efficient use of court resources and on other litigants with meritorious cases.

171. Section 1 of the Vexatious Actions (Scotland) Act 1898[79] ("the 1898 Act") provides that where the Lord Advocate has applied to and satisfied the Inner House that "any person has habitually and persistently instituted vexatious legal proceedings without reasonable ground for instituting such proceedings," the Inner House may then order that no legal proceedings shall be instituted by that person in the Court of Session or any other court unless leave is obtained of a Lord Ordinary, having been satisfied that such legal proceedings are not vexatious and that there is *prima facie* ground for such proceedings. There is no right of appeal against a decision of the Lord Ordinary to refuse leave.

172. The reference to 'habitually and persistently' has been interpreted by the court as meaning that there must be more than one proceeding. 'Instituted' is given a

[78] A Policy Statement of service standards for party litigants in the Court of Session was drafted and put out for consultation in November 2007. This was intended to bring more clarity to the relationship between party litigants and court staff in the front line. The intention is to provide a designated party litigant clerk of session who will arrange an appointment, in private, with the party litigant within 7 days of their initial approach to the court. Templates and guidance on legal procedure will be provided as well as information on the progress of the case.

[79] c.35

wider meaning than 'commenced' so that, for example, the lodging of a counterclaim might be regarded as the institution of proceeding, as might the marking of a reclaiming motion.[80] In the case of *Lord Advocate v Martin Frost*, the Inner House also considered the meaning of 'vexatious.' It said:

> "It appears to us that legal proceedings may be properly seen as "vexatious" if they are devoid of reasonable grounds for their institution. However, it does appear to us possible that legal proceedings might properly be seen as "vexatious", even if there were "reasonable grounds for instituting such proceedings", although proceedings instituted in those circumstances would not be a sufficient basis for an application under section 1." [81]

173. Their Lordships made reference to what was said by Lord Bingham of Cornhill C.J. in *Attorney General v Barker*:[82]

> " 'Vexatious' is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process. Those conditions are in my view met in this case."

174. A limitation imposed to restrict the activities of a vexatious litigant is compatible with the requirements of article 6 of the European Convention on Human Rights. Although the Inner House in *Lord Advocate v Martin Frost*[83] were not addressed on this issue they considered it their responsibility to consider the matter. They concluded that they were in no doubt that there would be no incompatibility. Indeed they considered that it is well recognised that the kind of restraint which is available in terms of section 1 of the 1898 Act is in fact compatible with article 6. They referred to what was said by Lord Coulsfield in *Lord Advocate v James Bell*[84] where he pointed out that an order under the 1898 Act does not prevent the respondent from raising actions altogether: it only requires that he should obtain leave from a Lord Ordinary before doing so.

Vexatious litigants - responses to the Consultation

175. Less than a third of respondents thought that the current legislation on vexatious litigants is satisfactory. One thought that sufficient sanction already exists in the present legislation on vexatious litigants and in the rules relating to expenses, while another thought that there is currently a reasonable balance between enabling

[80] *Lord Advocate v Martin Frost* [2006] CSIH 56
[81] *Ibid*
[82] [2000] 1 FLR 759
[83] *Op. cit*
[84] 23 March 2001 (unreported)

access to justice and discouraging vexatious litigants. Another respondent considered that what is needed is a change in emphasis rather than new legislation. Respondents representing those who practise in the field of family law pointed out that because of the high level of emotion involved in family law cases, it would be difficult to categorise a litigant in a family action as "vexatious."

176. Nearly two thirds of respondents considered that the current legislation on vexatious litigants is in need of reform.[85] A variety of problems were noted and options for reform were suggested.

(i) Review of threshold required to declare a litigant vexatious

177. Several respondents considered that the current provisions are too restrictive and unduly onerous. One respondent thought that in a modern justice system it should be sufficient to establish that proceedings are "without reasonable ground" and have been raised "habitually and persistently" rather than have to establish that proceedings are "vexatious". Another thought that it is a weakness of the current legislation that there is a requirement of habitual and persistent prior proceedings: it is of scant comfort to a party who happens to be the first to face a particular vexatious litigant to know that he is helping to provide grounds for subsequent proceedings to be taken by the Lord Advocate against his opponent. This respondent suggested that if party litigants were required to persuade the court that their action or appeal has sufficient merit to be allowed to proceed, that would effectively supplant the 1898 Act in the case of those without legally qualified representation.

(ii) Who may institute proceedings to declare a litigant vexatious

178. Some respondents thought that consideration should be given to whether or not it remains appropriate for the Lord Advocate, acting in the public interest, to be solely vested with the power to apply for a declaration. It was suggested that interested parties should also be entitled to make an application.

(iii) Procedure

179. One respondent suggested that an order under the 1898 Act should be capable of being made by an Outer House judge rather than by the Inner House, with an appeal only with the leave of the Lord Ordinary or of the Inner House.

(iv) Increased ambit of the Act

180. A problem identified with the current legislation in para 6.87 of the Consultation Paper is that there is no system of control under the current legislation over the vexatious continuation of existing proceedings and the making of vexatious

[85] The reform most commonly requested was for the names of those litigants declared as vexatious under the current legislation to be published. This is now available on the Scottish Courts Website.

applications in the course of proceedings. Several respondents suggested that the current legislation should be amended to make it clear that such behaviour would justify an application to have the litigant in question declared vexatious.

(v) Court to be given more flexible powers

181. One respondent noted that the English courts have a wider range of potential orders available to the court to deal with vexatious conduct in the context of litigation, including powers to restrain the making of applications without the leave of the court, both in a particular litigation and in any litigation. He suggested that similar powers might usefully be exercised by the Scottish courts in appropriate cases.

(vi) Proceedings in other jurisdictions

182. In order for an application to be made under section 1 of the 1898 Act the proceedings relied upon must be proceedings "whether in the Court of Session or any inferior court". The Inner House has held that these words imply that the proceedings must be proceedings within Scotland so that it is not possible to found upon relevant proceedings in England and Wales.[86]

Vexatious litigants - position in England and Wales

183. The Attorney General, or someone acting on his behalf, can apply to the High Court for a Civil Proceedings Order (CPO) under section 42 of the Supreme Court Act 1981. A CPO can only be made where the litigant has "habitually and persistently and without any reasonable ground" instituted "vexatious civil proceedings" or "vexatious applications". The effect of a CPO is that the litigant cannot start or continue any proceedings without the High Court's permission, not only in the High Court but also in the Court of Appeal and the county court. The Order lasts indefinitely unless expressed otherwise. If permission is refused there is no right of appeal.

184. Such orders are, however, viewed as draconian and rarely used. The Court of Appeal, using its inherent powers to address abuse of process, clarified and extended the range of orders which a court in England and Wales can use to deal with vexatious litigants in a succession of cases[87] which have now been incorporated into the Civil Procedure Rules.[88] A Court of Appeal judge, a High Court judge, or a designated civil judge or his deputy now has power to make three kinds of restraint orders known as limited, extended and general civil restraint orders. All of these orders can be imposed either by the court of its own motion or on the application of defendants or respondents to the vexatious litigant's activities.

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[86] *Lord Advocate v Martin Frost* [2006] CSIH 56
[87] *Grepe v Loam* (1887)37 ChD 168; *Bhamjee v Forsdick and Others (No 2)* [2003] EWCA Civ 1113; *Mahajan v Department of Constitutional Affairs* [2004] EWCA Civ 946
[88] CPR 3.11 and Practice Direction 3C

(a) Limited Civil Restraint Order

185. A limited civil restraint order may be made by any judge, including a master, circuit judge or district judge, of his/her own motion, barring the litigant from making any further applications within any one particular set of proceedings without first obtaining the court's permission. An order may be made where a party has made two or more applications which are totally without merit. The order will last as long as the proceedings remain pending. Any application issued without such permission stands automatically dismissed without the need for the other party to respond to it.

(b) Extended Civil Restraint Order

186. An extended civil restraint order restrains a party from issuing particular claims or making particular applications in specified courts where these involve, relate to, touch upon or lead to the proceedings in which the order is made. A Court of Appeal judge, a High Court judge or a designated civil judge may make such an order where a party has persistently issued claims or made applications that are totally without merit. Masters, circuit judges and district judges have no power to make such an order. If they consider that such an order is necessary, they must transfer the case to a High Court or designated judge. An extended civil restraint order may apply to any court where the order is made by a Court of Appeal judge; to the High Court or the county court where the order is made by a High Court judge; or to any county court where the order is made by a designated civil judge. An order remains in place for a specified period of not more than two years, although it may be extended beyond that period.

(c) General Civil Restraint Order

187. Where a litigant has persistently issued claims or applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate, a Court of Appeal judge, a High Court judge or a designated civil judge may consider whether it is appropriate to make a general restraint order restraining that person from issuing any claim or making any application in specified courts without obtaining the permission of a particular judge specified in the order. It may be made for a period not exceeding two years, unless subsequently extended. Any application for permission must be in writing and is determined without a hearing.

188. A party subject to a civil restraint order may apply to vary or discharge the order only with the permission of the judge specified in the order. The restrained party may also appeal against the order, but again only with permission. Issuing a claim or making an application without permission will result in automatic striking out or dismissal. In addition, where a person who is subject to a civil restraint order makes repeated applications for permission which are totally without merit, a further order may be made by a Court of Appeal judge, a High Court judge or a designated civil judge or his deputy refusing any further right of appeal unless the judge who refused permission to appeal now grants it.

Vexatious litigants - other jurisdictions

189. A summary of how some other jurisdictions deal with vexatious litigants can be found at Annex C to this chapter.

Vexatious litigants - recommendations

190. We note the comments made by respondents in relation to the limitations of the 1898 Act and endorse these. It would, however, be difficult to address the problem of vexatious behaviour (including the conduct of a defender) within the course of a single action by amending the existing legislation. Accordingly, we recommend 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. In considering whether or not to impose a civil restraint order, we recommend that the court should be entitled to take into account proceedings in other jurisdictions.

Rule making powers of the Court of Session and the sheriff court

191. We recommend that the rule making powers of the Court of Session and the sheriff court should be reviewed to ensure that they are sufficiently wide to accommodate the range of case management powers that are necessary in a modern civil justice system. The difficulty encountered in introducing a system for pursuers' offers, see Chapter 8, is one example of the limitations of the current rule-making powers set out in the Court of Session Act 1988. It would also be desirable to have a special procedure for adopting rules on an emergency basis and a specific provision that would allow the court to set up pilot projects by way of Practice Notes.

RECOMMENDATIONS

Chapter 4 Structure of the civil court system

Reliance on temporary and part-time resources

1. The Scottish Court Service should plan for the elimination of part-time judicial resources instead of constantly adding to them. If there are to be part-time judges or sheriffs at all, they should be available for emergencies only. (Paragraph 30)

2. An urgent priority is to bring to an end the use as temporary judges or part-time sheriffs of those still in practice. (Paragraph 33)

3. If there are to be temporary judges at all, they should be drawn from the ranks of retired judges of the Court of Session, or serving or retired sheriffs or sheriffs principal. If there are to be part-time sheriffs at all, they should be drawn from the ranks of retired sheriffs or retired practitioners. (Paragraph 37)

The need for specialisation

4. A system should be introduced whereby a number of sheriffs in each sheriffdom will be designated as specialists in particular areas of practice. (Paragraph 64)

5. There should be no strict demarcation between civil and criminal business in the sheriff court. The categories of designation should include at least solemn crime, general civil, personal injury, family and commercial. It should be possible for sheriffs to seek to become designated in additional areas, providing they have the necessary experience. (Paragraph 66)

6. Sheriffs principal should have responsibility for designating sheriffs within their sheriffdom to hear cases in a particular area of specialisation. (Paragraph 67)

7. When a vacancy arises in a sheriffdom, the sheriff principal will require to assess what skills he would like the person who is to fill that vacancy to have. The Judicial Appointments Board for Scotland will then require to select a candidate who matches those skills. (Paragraph 69)

Sheriff Appeal Court

8. A national Sheriff Appeal Court should be established. The court would hear summary criminal appeals from lay justices, district judges, and sheriffs during the transitional period when both sheriffs and district judges would be dealing with summary criminal cases, and civil appeals from district judges and sheriffs. (Paragraph 79)

9. A small number of judicial officers of equivalent rank to a sheriff principal should be appointed to sit as members of the court with the existing sheriffs principal who will be ex officio members. (Paragraph 82)

10. Criminal appeals should be administered centrally. When hearing criminal appeals, the court would sit in Edinburgh, to continue the current arrangements for summary appeals. Each of the sheriffs principal would be programmed to preside in the Sheriff Appeal Court for a specified period. The other members would carry out sifts in relation to summary appeals and hear bail appeals in relation to both summary and solemn proceedings in the sheriff court. (Paragraph 85)

11. The Sheriff Appeal Court would hear all summary appeals against conviction or sentence; or both; and Crown appeals against acquittal and against sentence. For appeals in relation to sentence only the bench would comprise two members. For appeals against conviction, conviction and sentence and Crown appeals, the appeal would be to a bench of three. (Paragraph 86)

12. For civil appeals there would generally be a bench of three. All civil appeals would go to the Sheriff Appeal Court in the first instance, although parties could apply to it for leave to appeal directly to the Inner House, if the appeal should raise complex or novel points of law. (Paragraph 87)

13. Although the Sheriff Appeal Court would have a national jurisdiction, civil appeals would be administered and heard within the sheriffdom from which they emanate. (Paragraph 88)

14. Appeals in cases subject to the new simplified procedure should be heard by a single member of the Sheriff Appeal Court unless they raise questions of wider public importance. (Paragraph 89)

15. Within the Sheriff Appeal Court a single member of the court should have the power to conduct procedural business. (Paragraph 90)

16. There should be a restricted right of appeal from the Sheriff Appeal Court to the Inner House. (Paragraph 93)

17. An appeal from the Sheriff Appeal Court to the Inner House should be subject to a requirement to obtain leave, which should in the first instance be sought from the Sheriff Appeal Court. If leave is refused then the party seeking to appeal should be able to seek leave from the Inner House. (Paragraph 94)

18. The test for granting leave should be that (a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Inner House to hear it. The principle of proportionality should form part of the test and the court should have regard to the stage of proceedings to which the appeal relates. (Paragraphs 94-95)

Other appeals to the Inner House

19. We share Lord Penrose's view that the Scottish Ministers should consider introducing legislation that would make provision for a sift mechanism for reclaiming motions and statutory appeals. (Paragraphs 97-98)

First instance business in the Court of Session

20. The privative jurisdiction of the sheriff court should be raised to £150,000. (Paragraph 123)

21. The court should have the power to remit an action from the Court of Session to the sheriff court at the stage of signetting if it is apparent that the value of the action is likely to be below the privative limit of the sheriff court. (Paragraph 125)

22. It would be for the judge at the first or any subsequent case management hearing to consider whether the value of the case was likely to be less than the privative limit and, if so, whether there were any special features that would justify the retention of the case in the Court of Session. (Paragraph 126)

23. Those actions raised in the Court of Session which do not have a monetary conclusion should remain there, subject always to the exercise of our proposed power of remit under the active judicial case management model. (Paragraph 127)

24. Where a pursuer is awarded a sum less than the privative jurisdiction of the sheriff court, expenses will be awarded on the sheriff court scale unless the pursuer can show cause why it was necessary or appropriate to raise the action in the Court of Session. (Paragraph 128)

25. A rule should be introduced enabling a tender of a value below the threshold to be accompanied by an offer of sheriff court expenses in full and final settlement. (Paragraph 129)

Powers of remit

26. If the privative limit of the sheriff court is increased to £150,000 the legislation governing remit from the sheriff court to the Court of Session would have to be amended to enable actions below the privative limit to be remitted to the Court of Session in exceptional cases. The Court of Session should have the power to decline a proposed remit if the judge is not satisfied that the case is one that should be heard there. (Paragraph 134)

27. Where the value of an action raised in the Court of Session is likely to be below the privative limit, as assessed by the judge at a case management hearing, there should be a presumption in favour of a remit to the sheriff court. In considering

whether or not to remit the Court should be entitled to take into account the business and operational needs of the Court as well as the interests of the parties. (Paragraph 136)

Exclusive Jurisdiction of the Court of Session

28. The Court of Session should retain exclusive jurisdiction in relation to more complex corporate matters, patents, Exchequer cases, actions under the Hague Convention and certain devolution issues. (Paragraph 138)

29. The Court of Session should retain concurrent jurisdiction in family actions. Concurrent jurisdiction should be conferred on the sheriff court in relation to actions of proving the tenor and of reduction, except actions of reduction of sheriff court decrees. As regards the winding up of companies, there should be a significant increase in the value of the paid up share capital which limits the jurisdiction of the sheriff court. Otherwise the exclusive jurisdiction of the Court of Session should remain as it is at present. (Paragraph 141)

Other jurisdictional issues

30. The powers to make orders *ad factum praestandum* and orders for specific implement on an interim or final basis conferred on the Land Court by section 84 of the Agricultural Holdings (Scotland) Act 2003 should be conferred on the Court of Session and the sheriff court. (Paragraph 143)

31. The Court of Session should have jurisdiction to grant a decree of removal or ejection. (Paragraph 144)

Specialist Personal Injury Court in the Sheriff Court

32. An all-Scotland jurisdiction for personal injury actions should be conferred on Edinburgh Sheriff Court. (Paragraph 154)

33. The amended version of Chapter 43 that is to be extended to the sheriff court would apply to actions raised in the sheriff court including the specialist personal injury court. Parties could apply, on cause shown, for a case to be remitted out of this procedure. In that event, an active judicial case management model would be applied. (Paragraph 155)

Civil Jury Trials

34. The right to a civil jury trial in the enumerated causes should be retained. (Paragraph 162)

35. Civil jury trial should be extended to the new specialist personal injury court, but not to those actions that are litigated in other sheriff courts. (Paragraph 163)

Organisation of the sheriff court

36. There should be a review the purpose of which is to rationalise the boundaries of the sheriffdoms with those of other public authorities. The relevant legislation and rules of court should be amended to enable actions to be transferred between sheriff courts within a sheriffdom and between sheriffdoms. 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. (Paragraph 172)

Creation of the office of district judge

37. A new judicial office should be created, that of district judge. A district judge would sit in the sheriff court and would hear summary criminal business and civil claims of a modest value. (Paragraph 176)

38. The jurisdiction of the district judge in relation to summary crime should be limited to those summary criminal cases that are currently tried by sheriffs. (Paragraph 186)

39. A district judge would have a civil jurisdiction comprising actions with a value of £5,000 or less, housing actions, and appeals and referrals from the children's hearing. (Paragraph 193)

40. The district judge will have concurrent jurisdiction with the sheriff in relation to family actions. If parties chose to bring proceedings in their local court before the district judge rather than before a specialist sheriff the district judge would have full jurisdiction to make any orders in relation to financial provision even if the value of the assets was greater than £5,000. (Paragraph 199)

41. The district judge would also have jurisdiction to hear urgent motions for interim orders in ordinary actions. (Paragraph 200)

Criminal jurisdiction

42. Over time, district judges will assume responsibility for the summary criminal trials that are presently heard by sheriffs. Where an accused person appears on petition in a court in which there is no resident sheriff the district judge would have jurisdiction to deal with the examination of the accused and to grant bail. (Paragraph 201)

Accommodation

43. Both district judges and sheriffs would be accommodated in the existing sheriff court and JP court estate. Where the volume of business would not justify there

being a resident district judge on a full time basis, a single district judge might cover more than one court. (Paragraph 202)

Programming of Business

44. Specific days or half days should be set aside for the conduct of civil business by district judges. (Paragraph 203)

Transitional arrangements

45. Part-time sheriffs would be employed only where there were unexpected absences or unforeseen peaks in demand. They would be drawn from the ranks of retired sheriffs or retired practitioners. District judges should in the short term assume responsibility for the summary crime and the less complex civil business that is now being done by part-time sheriffs. As sheriffs retired or moved to other sheriffdoms they would usually be replaced by district judges. (Paragraph 204)

Flexibility and transfer of complex cases

46. If pressure of business and efficiency required it, a sheriff could be allocated to undertake the work of a district judge but district judges would not be entitled to undertake the work of a sheriff. Part-time sheriffs would play a role in providing cover for district judges. (Paragraph 205)

47. There should be a mechanism for a district judge to transfer a case to a sheriff, on the application of one or more of the parties or on his own initiative, subject to consultation with and approval of the sheriff principal. (Paragraph 206)

Chapter 5 A new case management model

48. 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. (Paragraph 6)

Judicial continuity and a single docket system

49. A docket system should be introduced in the Court of Session and the sheriff court. (Paragraphs 44, 73)

50. The docket system should operate on the basis that a case is allocated to a judge or sheriff prior to the first case management hearing. There should be a presumption that, wherever practicable, all procedural and substantive hearings in the case will thereafter be dealt with by that judge or sheriff. In the sheriff court, if the case is in a specialist area it should be allocated to a designated specialist sheriff. (Paragraph 45)

51. There should be an appointment-based system for the hearing of procedural business, whether by representation in person or by telephone or video conferencing. Where representation in person is required, the appointments should be fixed on a "not before" basis. (Paragraph 47)

A new case management model of general application

52. With the exception of certain specified types of action, all actions in the Court of Session or the sheriff court should be subject to judicial case management. On the lodging of defences, a case should be allocated to the docket of a particular judge or sheriff. A case management hearing should be fixed shortly thereafter. This would normally take place by means of a telephone conference call. (Paragraphs 48, 72, 74)

Case Management in the Court of Session

The Inner House

53. We endorse Lord Penrose's recommendations and recommend that they should be implemented without delay. (Paragraph 52)

The Outer House

54. In exceptional cases, active judicial intervention should be available in a Chapter 43 action at any stage, on the application of either party or by the court on its own initiative. (Paragraph 62)

55. Actions transferred out of Chapter 43 will be subject to active judicial case management. The grounds upon which a personal injury action may be appointed to proceed as an ordinary action should be extended to include the desirability of active judicial case management in the particular circumstances of the case. (Paragraph 63)

56. The Civil Justice Council for Scotland should address the amendments required to abolish the distinction between ordinary and petition procedure in the Court of Session. The Council should also examine the need to modernise the terminology used in the rules, both in the Court of Session and in the sheriff court. Apart from proceedings which are exclusive to either court, the terminology that applies to proceedings in the Court of Session and in the sheriff court should be the same. (Paragraph 70)

Case Management in the Sheriff Court

Actions before the sheriff

57. Jurisdiction in civil actions should be shared between sheriffs and district judges. Sheriffs will have jurisdiction to hear all civil business in the sheriff court. District judges will have jurisdiction to hear housing actions, actions for payment of

£5,000 or less, referrals and appeals from children's hearings, and will have concurrent jurisdiction with sheriffs in family actions. District judges hearing family actions may deal with financial matters of unlimited value. (Paragraph 71)

58. With the exception of personal injury actions, all civil business for which the sheriff has jurisdiction will be heard by designated sheriffs and be subject to their active case management. (Paragraph 72)

59. Actions and other court proceedings under active judicial case management will proceed on the lines we have described. There will be no need to retain the distinction between ordinary cause procedure and summary application procedure. On the lodging of defences, the case will be allocated to a suitably designated sheriff. A case management hearing will be held two weeks after defences are lodged and will normally be conducted by telephone or video conferencing. It will be open to parties to request a hearing in open court. (Paragraph 74)

60. At the case management hearing, the court will decide what form of case management is appropriate. The rules should provide (1) that the court will expect the case management hearing to be conducted by the solicitors having principal responsibility for the case and will expect them to be able to inform the court of the factual and legal issues in dispute and to propose further procedure; (2) that the court will expect the parties' representatives to have discussed these matters in advance of the hearing, to focus the issues and to agree, if possible, on further procedure, subject to the approval of the court; and (3) that the court will expect the parties to co-operate in exchanging information about witnesses and documents. (Paragraph 75)

61. Actions subject to the sheriff's jurisdiction may be raised in any sheriff court having jurisdiction, but may be transferred to a court where a suitably designated sheriff is resident. Procedural business should be conducted by email, telephone, video conferencing or in writing. There should be a presumption that any proof or other hearing will be heard in the court to which the action has been transferred although parties may apply for the designated sheriff to hear the proof or debate at the local court, if court accommodation permits. (Paragraph 76)

Personal injury actions under the sheriff's jurisdiction

62. All substantive hearings in personal injury actions proceeding under case-flow management will be heard by a designated personal injury sheriff, who will also deal with motions to vary the timetable or other procedural business. (Paragraph 79)

63. Active judicial intervention may be introduced at any stage in the procedure on the application of either party or by the court on its own initiative. (Paragraph 80)

Family actions

64. If the case involves an application for urgent interim orders, it will be dealt with by an available sheriff or district judge and will then be transferred to the docket of either a family sheriff or a district judge as requested by the pursuer. (Paragraph 88)

65. It should be open to the defender at the first case management hearing to submit that the case should be transferred from the family sheriff to a district judge or vice versa. (Paragraph 89)

66. If the case is allocated to a family sheriff there would be a presumption that all procedural business would be conducted by telephone or videoconference (provided the parties consent) and that substantive hearings would take place in the court in which that sheriff sits. Arrangements could be made exceptionally for a hearing to take place in a more convenient venue. (Paragraph 90)

67. The first case management hearing would also fulfil the function of a Child Welfare Hearing. (Paragraph 91)

68. The sheriff or district judge should make the requirement for full and early disclosure clear at the first case management hearing. Active case management throughout the case should include firm action to deal with failure to comply with time limits and control of the use of expert evidence. (Paragraph 92)

69. The number of days allocated to a proof should reflect the number of days it is expected to last. (Paragraph 93)

70. In courts where the resident judicial officer is a district judge, it will be desirable to set aside in the court programme specific days or half days for the conduct of civil business, in particular family actions. Where practicable, criminal business in courts where there is only one court room should not be programmed for those days. Deferred sentences should not be fixed for days or parts of days programmed for civil business. (Paragraph 94)

71. A forum of family sheriffs and district judges should be established so that knowledge and experience can be shared and issues of common concern discussed. District judges should receive appropriate training when they are appointed. (Paragraph 95)

Children's referrals

72. In the first instance all children's hearing referrals should be allocated to a district judge. Cases identified as complex or lengthy may be allocated to a sheriff. There should be a procedure for remit of a case by the district judge to the sheriff should it prove more complex than it seemed at the outset. (Paragraph 97)

73. The rules for children's hearing referral cases be should be amended and supplemented by practice notes to permit active case management in those cases that require it. (Paragraph 99)

Curators, reporting officers, safeguarders and court reporters

74. For children, the following are required:

- An open, fair and transparent system of recruiting panels of people from whom curators, reporting officers, safeguarders and reporters can be appointed by the court.
- Clarity and consistency as to the qualifications and experience required for each type of appointment.
- Rates of remuneration which reflect the actual work required to fulfil the remit of the particular appointment.
- Access to appropriate induction and training for people appointed to panels, as well as opportunities for continuing professional development and the sharing of good practice.
- Clarity for appointees as to what is expected of them. For some appointments this may be laid down in rules of court, for others it may be appropriate to have non-statutory guidance. In any event, the sheriff or children's hearing making the appointment should always ensure that the person appointed is clear as to what is required of them, if necessary by specifying this in detail in the order.
- A system for monitoring the quality of the work done and reports provided by appointees and for dealing with situations where they fall below the standard expected. (Paragraph 111)

75. The courts, the Scottish Government, local authorities, SCRA, SLAB and the legal profession should collaborate to develop systems which will meet these objectives. (Paragraph 112)

76. For adults, the basic requirements of the systems of appointment, training and remuneration of safeguarders and curators *ad litem* are the same as set about above. The relevant organisations should work together in a similar way to develop appropriate systems. (Paragraph 113)

Information, family support and mediation services

77. Rule 33.22 of the Ordinary Cause Rules should be broadened to allow referral to mediation of any matter arising in a family action. (Paragraph 117)

78. The provision and funding of national mediation and family support bodies and local family mediation services, and in particular of family contact centres, should be treated as a priority by the Scottish Government and kept under review by the Scottish Parliament. (Paragraph 121)

Actions before the District Judge

79. There should be a single new set of rules for cases for £5,000 or less. (Paragraph 125)

80. The new rules for low value cases should be based on a problem solving or interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. (Paragraph 126)

81. The new rules should be written in plain English and be as clear and straightforward as possible. (Paragraph 127)

82. At the first hearing the district judge should decide what further information is required and what the next stage of procedure should be. He should be able to continue the case to a later date if he considers that to do so will enhance the prospects of achieving a settlement. There should be a permissive provision that will allow the district judge to assist the parties to reach a settlement at any point in the case, rather than a requirement that he should do so at the first hearing in every case. (Paragraph 128)

83. The simplified procedure should enable a party litigant, with the help of written explanatory guidance and/or support from an in-court or other advice agency, to initiate a claim or lodge a defence and conduct his case to a conclusion. Such a party should be entitled, with the permission of the court, to have his case presented for him by a suitable lay representative. (Paragraph 130)

84. The rules should be drafted for party litigants rather than practitioners. They should describe in outline how the case will proceed. They should also entitle the judge to permit lay representation and to hold any hearing in chambers. (Paragraph 131)

Actions which include a claim in respect of personal injury

85. The rules should provide that an action for damages for personal injury for up to £5,000 action can be transferred to the ordinary court or to the specialist personal injury court, if it raises complex or novel issues. (Paragraph 132)

Housing cases

86. The Scottish Government should develop and extend in-court advice services, including services offering specialist help in housing matters, as part of a broader strategy to improve and co-ordinate the provision of publicly-funded civil legal assistance and advice generally. (Paragraph 147)

87. Legal aid should continue to be available for housing cases, but there is also considerable scope for representation by specialist lay advisers. (Paragraph 148)

88. The new simplified procedure, with certain modifications, should apply to all cases involving housing matters. (Paragraph 153)

89. The procedural protections available to defenders in rented housing repossession cases should be of the same order as those available in mortgage repossession cases. In both types of case the judge should be given sufficient information by the pursuer and defender to apply the statutory tests. (Paragraph 154)

90. All housing cases should call in court. (Paragraph 159)

Expenses under the new simplified procedure

91. There should continue to be separate tables of expenses. One would be for claims up to £3,000. Another would be for claims between £3,001 and £5,000, to include all housing cases regardless of the amount of any arrears. Finally, there would be a separate table of expenses for any action which includes a claim for damages for personal injury. (Paragraph 159)

Specialisation by the district judge

92. Judicial specialisation in housing and family cases should be encouraged where possible. (Paragraphs 162-163)

93. District judges should receive special training relevant to the scope of their work. (Paragraph 164)

Chapter 6 Information technology

94. There should be no bar to conducting case management hearings by means of telephone or videoconferencing, if certain safeguards are in place. In deciding whether it would be compatible with article 6 for a case management hearing to take place in private, the court should have regard to the questions to be decided; whether the parties have consented or have by implication waived their rights to a hearing in open court; and whether the questions to be decided involve the public interest or are of such importance that the public would have an interest in having the hearing take place in open court. (Paragraph 63)

95. Generally, we would encourage the increased use of IT to support the work of the civil courts in Scotland. In particular we recommend that:

- The SCS should develop an up to date strategy for enhanced provision of IT based on research commissioned to identify the needs of all court users;
- The SCS Website should be a source of guidance and support particularly for parties in cases covered by the proposed simplified procedures falling

within the jurisdiction of the district judge. It should include information on other sources of advice and assistance; providers of mediation and other forms of ADR including links as appropriate; and self help materials;

- The use of email as a means of communicating with the courts and the judiciary should be encouraged;
- The proposed pilot of an online small claims and summary cause system should be actively pursued as soon as is practicable and consideration should be given to extending the system to other undefended actions;
- Video and telephone conferencing should be encouraged;
- Consideration should be given to means of encouraging court users to communicate electronically. This may involve entering into some sort of agreement with a provider to allow access to systems locally; managing the provision of such access directly, for example with local authorities; or by lower court fees; and
- All evidence in civil cases, apart from those under the simplified procedure, should be recorded digitally. (Paragraph 84)

Chapter 7 Mediation and other forms of dispute resolution

96. ADR is a valuable complement to the work of the courts, but the court should not have power to compel parties to enter into ADR. That is contrary to the constitutional right of the citizen to take a dispute to the courts of law. (Paragraph 24)

97. Advisers and agencies who provide first line advice should be aware of all the dispute resolution options that are available. That requires suitable training. (Paragraph 26)

98. The Scottish Court Service website should contain explanatory material on ADR and links to sources of further information about ADR. (Paragraph 28)

99. Our proposals in relation to pre-action protocols and active judicial case management provide the opportunity for the court to encourage parties to consider alternatives to litigation. (Paragraph 32)

100. We do not consider it necessary to make any specific provision in court rules for sanctions in expenses where a party has refused to engage in ADR. Parties should not have to justify to the court why they did not engage in ADR or, if they did, why it did not result in settlement. As a general rule parties should bear their own expenses in relation to mediation, unless they agree otherwise, and such expenses should not normally be part of an award of expenses by the court. (Paragraph 35)

101. The Scottish Government should consider establishing a free mediation service for claims which could be dealt with under the new simplified procedure and a mediation telephone helpline. (Paragraphs 37-39)

Chapter 8 Facilitating settlement

Pre-action protocols

102. Compliance with the current pre-action protocols in relation to personal injury and industrial disease claims should be compulsory. (Paragraph 33, 53)

103. In principle, the pre-action protocols should apply to all categories of personal injury claim. (Paragraph 34)

104. It should be possible to develop a protocol on clinical negligence actions similar to that in England and Wales. Pending the establishment of a Civil Justice Council for Scotland, the Law Society should take the lead in consulting interested parties on the merits of such a proposal. (Paragraph 35)

105. In family actions our preference would be for the court to make any necessary orders in relation to disclosure of financial information at the first case management hearing. (Paragraph 37)

106. The court should have the power to make orders in relation to expenses and interest for non-compliance with pre-action protocols. (Paragraph 53)

Offers in settlement

107. The common law system of judicial tenders should be replaced by a rule regulating the making of formal offers by any party. It should be open to any party to make a monetary or a non-monetary offer in full or partial settlement of the action. It should be open to any party to make such an offer before the commencement of proceedings. (Paragraph 86)

108. The usual rule should be that where the pursuer fails to achieve an outcome that is as favourable as the offer made, the defender should be entitled to expenses on a 'party and party' basis from the date on which the offer was made. (Paragraph 88)

109. In relation to pursuers' offers, if the pursuer obtains an outcome more favourable to him than his offer, the defender should be liable to pay an uplift of 50% on the fee element of expenses on a 'party and party' basis from the date of the offer. The court should have discretion to award a higher or lower percentage uplift. (Paragraph 89)

110. The application of these rules should be subject to the overall discretion of the court, to be exercised as laid down in *Carver v BAA plc*: success should be judged by looking at the conduct of the parties and the whole circumstances of the case. (Paragraph 90)

111. It should be open to a party making an offer to specify that it is open for acceptance only for a specified period. (Paragraph 92)

Chapter 9 Enhancing case management

Guiding principles

112. A preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court. (Paragraph 13)

Enhanced powers of case management

Disclosure of evidence

113. We do not recommend a move to the English system of disclosure. (Paragraph 36)

114. As part of the case management function a judge, sheriff or district judge should be entitled to order the disclosure of documents relating to the action together with authority to recover documents either generally or specifically; and order the lodging of documents constituting, evidencing or relating to the subject matter of the action within a specified period. The normal procedures for recovery of evidence should also be available to the parties. Recovery of documents should be competent at any stage in the proceedings. Any documents founded on in the pleadings should be lodged in advance of the first case management hearing. (Paragraph 38)

The use of witness statements

115. The provisions of RCS Rule 47.11, whereby the commercial judge may order the reports of skilled persons or witness statements to be lodged in process, and at the procedural hearing may determine in light of these that proof is unnecessary on any issue, should apply generally to all types of action that are subject to active judicial case management. (Paragraph 47)

Pleadings

116. For all actions in the Court of Session and sheriff court, with the exception of those subject to Chapter 43 procedure, pleadings should be in an abbreviated form.

A docketed judge or sheriff should determine whether adjustment of the pleadings is necessary to focus the issues in dispute and should have the power to determine what further specification is required and how that should be provided. (Paragraph 60)

Expert evidence

117. The provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals. (Paragraph 78)

118. In those cases subject to active judicial case management, parties should be required to consider whether it would be appropriate to instruct one or more joint experts in relation to either liability or quantum and should be in a position to address the court on this issue at case management hearings. Where the court thought it appropriate to do so, it could order the parties to instruct a joint expert. (Paragraph 81)

119. There should be a presumption in personal injury cases falling within the proposed simplified procedure that medical evidence should be restricted to the GP and the treating consultant, subject to the court's discretion. (Paragraph 83)

120. A rule should be introduced which clarifies that the overriding duty of an expert witness is to assist the court. A code of conduct and guidance on the format and information to be contained in expert reports should be adopted. Parties who wish to rely upon an expert report should be obliged, on request, to disclose all written and oral instructions to the expert and the basis upon which the expert is remunerated. (Paragraph 86)

121. In all cases to which the active case management model applies, the court should have power to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements. (Paragraphs 88-89)

122. A rule should be adopted to introduce a presumption that an expert's report would be treated as his evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence. (Paragraph 91)

Summary disposal

123. At any stage in proceedings either party should be able to seek summary disposal. The test should be whether the pursuer or the defender has no real prospect of success and where there is no other compelling reason why the case should proceed. The court should also have the power *ex proprio motu*, and as part of its active case management function, summarily to dispose of an action or defence by applying the same test. (Paragraphs 103)

Managing time efficiently

Time estimates

124. The assessment of time required for a hearing will be one of the case management functions of the docketed judge or sheriff in charge of the case. (Paragraph 113)

Time limited hearings

125. The court should expect parties to agree on a timetable for presentation of the evidence or submissions so that the most effective use is made of court time. A judge or sheriff should, as part of his case management functions, have the power to time limit hearings in particular types of case where he considers it appropriate. (Paragraph 117)

Use of outline arguments

126. We endorse Lord Penrose's recommendations that written notes of argument should be lodged following the exchange of the grounds of appeal and answers, but before the court ordered a substantive hearing, and that clear guidance on the scope and content of notes of argument should be published by way of practice notes. We believe that the approach he recommends for the Inner House can be applied generally. As part of his case management function a judge or sheriff should have the power to order that written arguments should be lodged and to prescribe the level of detail required. Parties should not be entitled to raise new issues without the permission of the court on cause shown. (Paragraph 119, 126)

Effective sanctions for non-compliance with rules or court orders

127. Where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the court to impose such sanctions as it considers appropriate. (Paragraph 146)

128. The rules of court should entitle the court to:

a) dismiss the action or counterclaim, in whole or in part;
b) grant decree in respect of all or any of the conclusions of the summons, or of the craves of the initial writ, or counterclaim;
c) refuse to extend any period for compliance with a provision in the rules or an order of the court;
d) make an award of expenses;
e) disallow a party from amending or updating part of its claim;
f) disallow a party from calling one or more witnesses, including expert witnesses;

g) deprive a claimant who is in default of all or some of the interest that would otherwise have been awarded;
h) order caution for expenses and
i) order immediate payment of expenses incurred in procedural matters and assess them summarily. Payment of the sum would be a condition precedent of further procedure.

We do not propose this as an exhaustive list. (Paragraph 148)

129. The court's power to make solicitors personally liable for expenses occasioned by their own fault, or where they are guilty of an abuse of process, ought to be incorporated in statute; and that it should be extended to cover all those with rights of audience. (Paragraph 149)

130. The courts should have the power to order that agents or counsel may not charge their clients or SLAB for any work that is occasioned by any improper, unreasonable or negligent act or omission on their part. (Paragraph 150)

Party litigants and vexatious litigants

Managing party litigants

131. The sheriff clerk should be given discretion to refer any ordinary action or summary application presented by a party litigant to a sheriff who may direct whether or not the action should be allowed to proceed. That decision should be based on whether or not, in the sheriff's opinion, the writ discloses a stateable case. The decision of the sheriff should be final and not subject to review. (Paragraph 166)

132. At any case management hearing the court should explain to a party litigant the requirements of any order made and the sanctions for non-compliance. (Paragraph 168)

Vexatious litigants

133. The civil courts should have powers similar to those in England and Wales in relation to civil restraint orders which would provide for a system of orders regulating the behaviour of parties who persist in conduct which amounts to an abuse of process. In considering whether or not to impose a civil restraint order, the court should be entitled to take into account proceedings in other jurisdictions. (Paragraph 190)

Rule making powers of the Court of Session and the sheriff court

134. The rule making powers of the Court of Session and the sheriff court should be reviewed to ensure that they are sufficiently wide to accommodate the range of case management powers that are necessary in a modern civil justice system. It would also be desirable to have a special procedure for adopting rules on an emergency

basis and a specific provision that would allow the court to set up pilot projects by way of Practice Notes. (Paragraph 191)

Chapter 10 Judgments

Form and content of judgments

135. It should be for the sheriff or district judge to decide whether to make *avizandum* or pronounce an *extempore* judgment. If he chooses the latter option, he should give reasons for the decision he has reached. Parties should have the right to request a written judgment in ordinary causes within seven days of delivery of the *extempore* judgment. (Paragraph 13)

136. In the Court of Session it should be for the judge or Division to decide whether to give its reasons orally, in short form, or by means of a full written judgment. In the simplest cases reasons may be expressed as bullet points within the interlocutor. In more complex cases, a brief narrative of the facts, circumstances and decision should suffice, with only the most complex requiring a full judgment. In cases that turn on their own facts the court may consider that a full written judgment is unnecessary. Where submissions are made on legal points which may have broader application the Court should be expected to deliver a fully reasoned judgment. (Paragraph 14)

137. It should be open to the Sheriff Appeal Court or the Inner House to give reasons in short form, for example, by referring to the reasoning of the inferior court. (Paragraph 15)

138. It should be open to parties to request a full written judgment in those cases in which an oral or abbreviated judgment is given, within seven days of delivery of the oral or abbreviated judgment. (Paragraph 16)

139. For simplified procedure cases we do not recommend any changes in practice from that currently applicable to small claims and summary cause actions. (Paragraph 17)

Delay in issuing judgments

140. A register of cases awaiting written judgments should be established on the Scottish Courts website for those cases in which judgment has been outstanding for more than three months. The judge, sheriff or district judge should be required to provide an explanation for the delay and to indicate when the judgment is likely to be issued. These cases should continue to be brought to the attention of the judge, sheriff or district judge at one monthly intervals until judgment is issued, and should be given the personal attention of the Lord President or sheriff principal. (Paragraph 35)

141. The need for an adequate amount of time to be assigned to write up a judgment should be recognised when drawing up the court programme. (Paragraph 36)

Chapter 11 Access to justice for party litigants

Public legal education

142. The promotion of public legal education should be an element of any strategy to improve access to justice in Scotland. (Paragraph 8)

Self help services

143. There should be a section of the SCS website which is much more obviously aimed at the public and contains all the information required to start or defend a case under the simplified procedure. There should also be information about the structure of the civil courts and other civil procedures. (Paragraph 22)

144. The SCS website should provide links to other bodies' websites which can be a source of advice and guidance e.g. Citizens' Advice, the Scottish Government, law centres, Consumer Focus Scotland etc. Information about mediation and other methods of dispute resolution should also be provided. (Paragraph 24)

145. The proposals which SCS have in hand to establish a new system for dealing with party litigants within the Court of Session should be extended to all courts. In particular, consideration should be given to the documentation of service standards which should be made available to party litigants in cases under the simplified procedure. (Paragraph 25)

In court advisers

146. In-court advice services should be developed and extended to be more widely available, if not in every sheriff court then within a reasonable distance. Such development should happen within the context of the Scottish Legal Aid Board's broader plans for the improvement and co-ordination of publicly-funded civil legal assistance and advice. In addition to the matters identified in the evaluation reports, SLAB should also consider the quality and consistency of advice and help being provided by the different services. (Paragraphs 36, 37)

147. Consideration should be given to whether in-court advice services are to be targeted at any particular group of potential users and therefore, by implication, to be unavailable to other groups. (Paragraph 38)

148. Where the in-court adviser is unable to assist an inquirer, there should be clear and consistent protocols for referrals to other sources of advice and help. (Paragraph 39)

McKenzie friends

149. A person without a right of audience should be entitled to address the court on behalf of a party litigant, but only where the court considers that such representation would be of assistance to it. The court should be entitled to refuse to allow any particular person to appear on specific grounds relating to character and conduct. The court's decision should be final and not subject to appeal. The rules of court should specify the role to be played by the individual and should provide that he or she is not entitled to remuneration. (Paragraph 53)

Chapter 12 Judicial review and public interest litigation

Title and interest to sue

150. The current law on standing 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. (Paragraph 25)

A time limit to bring proceedings for judicial review

151. The general rule should be that petitions for judicial review should be brought promptly and, in any event, within a period of three months, subject to the exercise of the court's discretion to permit a petition to be presented outwith that period. (Paragraph 38-39)

Introduction of a leave or permission stage

152. 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 should be made for an appeal to be made forthwith. (Paragraph 51)

153. 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. (Paragraph 52)

Case management

154. Where leave to proceed is granted on the papers the Lord Ordinary should issue standard orders to include, where appropriate, (a) the date by which answers shall be lodged; (b) the date up to which parties have a right to adjust their pleadings; (c) the date by which all relevant documents shall be lodged; (d) the date by which all authorities on whom parties intend to rely shall be lodged; and (e) the date by which notes of argument shall be lodged. It should be open to the parties to request, or the court to fix on its own initiative, a case management hearing to deal with procedural issues. A hearing on the merits should be fixed no later than 12 weeks from the lodging of answers. (Paragraph 58)

Expenses in public interest litigation

155. An express power should be conferred upon the court to make special orders in relation to expenses in cases raising significant issues of public interest. (Paragraph 73)

156. The model proposed by the Australian Law Reform Commission for making a public interest costs order could usefully be adapted for introduction in Scotland. (Paragraph 76-78)

Chapter 13 Multi-party actions

157. We endorse the Scottish Law Commission's recommendation that there should be a special multi-party procedure. (Paragraph 64)

Certification criteria

158. There should be a procedure for certifying an action as suitable for multi-party proceedings. In considering whether to certify an action, the court should be satisfied that the applicant is one of a group of persons whose claims give rise to common or similar issues of fact or law; that the adoption of the group procedure is preferable to any other available procedure for the fair, economic and expeditious determination of the similar or common issues; and that the applicant is an appropriate person to be appointed as a representative party, having regard in particular to his financial resources, and will fairly and adequately represent the interests of the group in relation to the common issues. (Paragraph 65)

159. Before granting certification the court should be satisfied, on the basis of the pleadings and documents presented in support of the application for certification, that the pursuers have demonstrated a *prima facie* cause of action. (Paragraph 66)

160. The 'any other available procedure' test should include the availability of ADR, administrative remedies and regulatory mechanisms. (Paragraph 68)

161. Should representative bodies be given standing to bring proceedings on behalf of consumers or other groups whom they represent, the multi-party procedure should be designed in such a way as to permit those bodies with standing to make use of it. (Paragraph 69)

162. At any time after a certification order has been granted, the court should be entitled to order that the case should be transferred out of the group procedure on grounds that the criteria for certification are no longer satisfied. (Paragraph 70)

An opt-in or opt-out model?

163. It should be for the court to decide whether in the particular circumstances of a case an opt-in or an opt-out model would be appropriate. (Paragraph 79)

164. It will be necessary to amend the legislation relating to prescription and limitation to take account of a group litigation procedure which permits opting out. (Paragraph 82)

165. It will also be necessary to confer powers on the court to make an aggregate or global award of damages and for the disposal of any undistributed residue of an aggregate award. (Paragraph 83)

166. We agree with the SLC's recommendation that the new procedure should initially be introduced only in the Court of Session. (Paragraph 84)

The case management of multi-party actions

167. The certification order should describe the class or group of claimants on whose behalf the action is brought, the question or questions of fact and law which are common to the class and the remedy sought. It should also appoint the representative party or parties. (Paragraph 85)

168. The Court should have at its disposal a wide range of case management powers similar to those conferred on the commercial judge in the Court of Session and a general power to regulate procedure as thought fit with regard both to certified questions and any other matters at issue. In addition, the judge should have the power to make such orders as may be appropriate to ensure that the group proceedings are conducted fairly and without avoidable delay. (Paragraph 86)

169. Where a number of pursuers have a common factual or legal basis to their claims but initiate proceedings on an individual basis, it should be open to defenders to apply to the Court, or for the Court on its own initiative, to transfer the cases to the multi-party procedure. (Paragraph 87)

170. There should be a case management mechanism that would enable multiple sheriff court actions bearing on the same subject matter to be transferred to the Court of Session and managed on a multi-party basis, either on the motion of one or more

of the parties or by the sheriff on his own initiative. In addition, the Lord President should have the power to direct that such litigation should be transferred to the Court of Session to be managed under the multi-party procedure. (Paragraph 88)

171. If an opt-out model is to be made available, it would be necessary to introduce a requirement for the court's approval of proposals to abandon or settle the action in order to safeguard the interests of those group members who are not parties to the action. (Paragraph 89)

Appeals

172. We agree with the recommendations made by the SLC regarding the circumstances in which it should be competent for the representative party to reclaim without leave an interlocutor disposing of an application for certification or decertification or identifying the common questions; and that where the representative party does not reclaim it should be competent for a group member to do so. (Paragraph 90)

How should multi-party actions be funded?

173. The general rule that expenses follow success should apply, in principle, to multi-party actions. The recommendations that we make in Chapter 12 on awarding expenses in public interest cases should apply to multi-party actions which satisfy the wider public interest criteria. (Paragraph 94, 109)

174. The additional responsibility involved in managing a group action should be a specific ground for awarding an additional fee. (Paragraph 97)

175. There needs to be a special funding regime for multi-party actions. On balance, we consider that it would be preferable to have special funding arrangements for multi-party actions to be administered by SLAB. (Paragraph 108)

176. There should be scope, in appropriate cases, for an award of expenses to be made against the multi-party action fund that we propose. (Paragraph 112)

177. Special criteria would need to be satisfied in order for financial assistance to be granted to a representative party. In particular, in applying the test of reasonableness, SLAB would have regard to the prospects of success, the number of members of the group, the value of their claims, the resources of the proposed defenders, and whether the proposed action raises issues of wider public interest that would justify the expenditure of public funds. It would be helpful for SLAB to be assisted by an advisory committee in dealing with such requests for funding. (Paragraph 113)

178. It should be possible for a grant of funding to be made on a conditional basis, for example, on a staged basis. The advisory committee should give advice to SLAB

in relation to an initial request for funding, at the review stage, and also in relation to any offers in settlement. (Paragraph 114)

179. If a person seeks public funding to bring a multi-party action then this would have to be by way of an application to the multi-party action fund. Class members who are not representative parties would be able to apply for legal advice and assistance. (Paragraph 116)

180. It should be open to the multi-party action fund to limit funding to litigation of the common issues. (Paragraph 117)

181. Where multiple applications for civil legal aid are made by individuals which raise the same or similar issues of fact or law, such that it would be desirable for these to be litigated under the multi-party action procedure, SLAB should have the power to refuse to grant legal aid on an individual basis, applying the reasonableness test, and to invite an application to the multi-party action fund for funding for a multi-party action. (Paragraph 118)

182. Funding could be made available on a different basis for actions by representative bodies. An application for funding by a representative body would have to meet a public interest merits test. In addition, the multi-party action fund would have a broad discretion to determine whether it would be reasonable to make public funds available, having regard to the resources of the organisation and the potential for the issues to be resolved by other means. (Paragraph 119)

Chapter 14 The cost and funding of litigation

Judicial Expenses

183. There should be a significant increase in the block fee for pre-litigation work to reflect work properly and reasonably carried out in connection with investigation and intimation of the claim, discussions on settlement and compliance with a pre-action protocol where applicable. (Paragraph 50)

184. The Lord President's Advisory Committee should review the adequacy of the block fee for proof preparation. (Paragraph 52)

185. We support the introduction of a judicial table of fees for counsel in the Court of Session, as well as in the sheriff court for those cases in which sanction for the employment of counsel is given. (Paragraph 55)

186. There should be a procedure for sanctioning the employment of a solicitor advocate in proceedings in the sheriff court. The fees of the solicitor advocate should be included in the judicial account as an outlay. The table of fees that we recommend for counsel should apply to solicitor advocates. (Paragraph 56)

187. We support the introduction of a power to award interest at the judicial rate on outlays from the date they are incurred. (Paragraph 57)

188. A tariff-based system for judicial expenses would be worthy of more detailed consideration. (Paragraph 65)

189. The cost of litigation should form part of the remit of the proposed Civil Justice Council for Scotland. Pending its establishment the Scottish Government should set up a Working Group on Judicial Expenses. In the meantime, the current judicial tables and their operation should be reviewed to address the concerns about recovery rates. (Paragraph 66)

190. The outcome of Lord Justice Jackson's review and whether, in the light of his recommendations, the rule that expenses follow success may require to be modified in this jurisdiction, are matters that should urgently be addressed by the Working Group on Judicial Expenses. (Paragraph 67)

Taxation

191. The offices of Auditor of the Court of Session and sheriff court auditors should be salaried posts, subject to the usual rules regarding public appointments. The status of the Auditor of the Court of Session as a member of the College of Justice should continue. Fees payable for extra-judicial taxations and assessments should be paid into public funds. (Paragraph 83)

192. For sheriff court auditors, commissions should be granted only to those holding qualifications as solicitors or law accountants and with relevant skills and experience. (Paragraph 84)

193. Greater use should be made of information technology so that taxations can take place by telephone or videoconference, with any necessary papers being filed with the auditor electronically. (Paragraph 85)

194. Small claims and summary cause assessments should be carried out by the sheriff court auditor, not by the sheriff clerk. (Paragraph 86)

195. The Auditor of the Court of Session should have a role as 'head of profession'. (Paragraph 87)

196. The Auditor of the Court of Session should have jurisdiction over taxations in actions raised in the all-Scotland personal injury court. (Paragraph 88)

197. Where a party wishes to recover counsel's fees, the account should be supported by detailed fee notes, disclosed to the paying party on request. If objection is taken to the reasonableness of counsel's fees, paying parties should specify what sum, in their view, would be appropriate. There should be a similar

obligation where objection is taken to the fees payable to expert and other witnesses. (Paragraph 90)

198. The procedure in the Court of Session whereby specific points of objection require to be intimated in advance of the diet of taxation should be extended to the sheriff court. The period of notice, which at present is three working days prior to the diet of taxation, should be lengthened. (Paragraph 91)

199. It should be open to parties to agree elements of an account and to restrict the taxation to only those items of the account that are in dispute. (Paragraph 92)

Speculative fee arrangements

200. In view of the in-depth reviews on costs and the operation of Conditional Fee Agreements currently underway in England and Wales, and the divergence of views as to whether introducing recoverability of success fees and After The Event premiums would improve access to justice, we consider it premature to recommend any changes to the current regime. This issue should be addressed as a matter of urgency by the Working Group on Judicial Expenses. (Paragraphs 125-127)

'Before the Event' legal expenses insurance

201. The Scottish Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance. (Paragraph 140)

Legal aid

202. The Scottish Government should review its policy on the provision of legal aid for welfare guardianship and intervention orders under the Adults with Incapacity (Scotland) Act 2000, the provision of ABWOR in relation to proceedings before the Mental Health Tribunals, and the means testing of legal aid for representation in an appeal against a decision of the Mental Health Tribunal. (Paragraph 158)

203. Legal aid should be available, subject to the usual tests, for all types and values of proceedings under the simplified procedure. (Paragraph 162)

204. Where personal attendance at a court other than the party's local court is essential for the proper conduct of a substantive hearing, a party who is otherwise in receipt of legal aid should be able to claim reasonable travelling expenses. (Paragraph 163)

Court fees

205. The relevant legislation should be amended to ensure that court fees and auditor's fees can be recovered from the losing party where the successful party is legally aided. (Paragraph 164)

Chapter 15 A Civil Justice Council for Scotland

206. A Civil Justice Council for Scotland should be established with a remit similar to that of the Civil Justice Council in England and Wales and responsibility for drafting the rules of court. (Paragraphs 51-59)

ANNEXES TO CHAPTERS 1 - 9

ANNEX TO CHAPTER 4 STRUCTURE OF THE CIVIL COURT SYSTEM

Annex A: Temporary and Part-time resources

The Legislative Framework

1. Section 22 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 introduced a provision enabling the Lord President to appoint a retired judge who had previously held office as a judge of the Court of Session or of the House of Lords, if he thought it expedient to do so as a temporary measure in order to facilitate the disposal of business. The use of retired judges introduced a measure of flexibility in planning how the complement of full time judges might best be used. In 1985 the Secretary of State appointed a review body under the chairmanship of Lord Maxwell to investigate how judicial time in the Court of Session and the High Court of Justiciary might be organised more effectively. The review body recommended that the power to appoint temporary judges should be extended to include judges of inferior courts and members of the Bar. This recommendation was given effect to by section 35(3) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

2. Section 11A of the Sheriff Courts (Scotland) Act 1971 empowers the Scottish Ministers to appoint part time sheriffs to supplement the complement of full time sheriffs which presently stands at 140.

3. Section 14A of the 1971 Act as amended by section 25 of the Judiciary and Courts (Scotland) Act 2008 confers a power on the sheriff principal, if it appears to him expedient as a temporary measure in order to facilitate the disposal of business in the sheriff courts of the sheriffdom, to appoint a retired sheriff principal or sheriff to act as a sheriff of that sheriffdom during such period or on such occasions as the sheriff principal thinks fits.

4. Section 11B(9) of the Sheriff Courts (Scotland) Act 1971 provides that a part time sheriff who is a solicitor in private practice shall not carry out any function as a part time sheriff in a sheriff court district in which his or her main place of business as such solicitor is situated. Members of the Bar who sit as temporary judges or part time sheriffs are not subject to similar restrictions.

5. Chapter 3 of the Judiciary and Courts Act 2008 puts the Judicial Appointments Board for Scotland on a statutory footing. When the relevant sections of the Act come into force the appointment of temporary judges[1] will fall within the remit of the Judicial Appointments Board.

[1] Except where the individual to be appointed holds or has held office as a judge of the European Court, a judge of the European Court of Human Rights, the Chairman of the Scottish Lands Tribunal, a sheriff principal or a sheriff.

2. Statistical data

Table 1: Business of the High Court of Justiciary - indictments registered, trials (evidence led)

	Indictments registered	Trials (evidence led)	Annual ratio of trials to indictments registered
2003-2004	1,362	359	26:100
2004-2005	1,234	259	21:100
2005-2006	1,104	303	27:100
2006-2007	1,171	414	35:100
2007-2008	1,005	446	44:100
2008-2009	920	380	41:100

Table 2: Supreme Court Sitting Days, 1995/6 - 2008/9

	All	Civil	Criminal	*% Civil*
1995-1996	4,518	1,984	2,534	*44*
1996-1997	4,566	1,855	2,711	*41*
1997-1998	4,624	1,912	2,712	*41*
1998-1999	4,988	2,082	2,906	*42*
1999-2000	5,079	2,016	3,063	*40*
2000-2001	5,597	2,082	3,515	*37*
2001-2002	5,407	1,997	3,410	*37*
2002-2003	5,325	1,808	3,517	*34*
2003-2004	5,232	1,842	3,390	*35*
2004-2005	4,877	1,662	3,215	*34*
2005-2006	5,332	1,910	3,422	*36*
2006-2007	5,422	2,076	3,346	*38*
2007-2008	5,472	1,881	3,591	*34*
2008-2009	5,804	1,978	3,826	*34*

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Table 3a: Temporary and Retired Judges in the Supreme Court: Days between 1 Jan 2006 to 31 Dec 2006

Category of Judge	Court of Session 1st instance	High Court of Justiciary 1st instance	Inner House	High Court of Justiciary Appeal	Total days per Category of Judge
Retired	12	56	71	90	229
Temporary (excluding serving sheriffs)	41	129	20	33	223
Serving sheriffs as temporary judges		74			74
Total days per allocated business	**53**	**259**	**91**	**123**	**526**

Table 3b: Temporary and Retired Judges in the Supreme Court: Days between 1 Jan 2007 to 31 Dec 2007

Category of Judge	Court of Session 1st instance	High Court of Justiciary 1st instance	Inner House	High Court of Justiciary Appeal	Total days per Category of Judge
Retired	31	28	64	74	197
Temporary (excluding serving sheriffs)	9	149	30	47	235
Serving sheriffs as temporary judges	1	276	1		278
Total days per allocated business	**41**	**453**	**95**	**121**	**710**

Table 3c: Temporary and Retired Judges in the Supreme Court: Days between 1 Jan 2008 to 31 Dec 2008

Category of Judge	Court of Session 1st instance	High Court of Justiciary 1st instance	Inner House	High Court of Justiciary Appeal	Total days per Category of Judge
Retired	25	36	73	74	208
Temporary (excluding serving sheriffs)	44	148	11	46	249
Serving sheriffs as temporary judges		466	8	9	483
Total days per allocated business	**69**	**650**	**92**	**129**	**940**

Annex B: The Sheriff Appeal Court

Table 1: Targets for criminal appeals and their disposal in the Supreme Courts

		2004/05	2005/06	2006/07	2007/08
Average waiting period for solemn sentence appeals (in weeks)	Target	9	9	9	9
	Outturn	**11**	**11**	**17**	**19**
Average waiting period for solemn conviction and sentence appeals (in term weeks)	Target	17	17	17	17
	Outturn	**29**	**30**	**27**	**37**
Average waiting period for summary sentence appeals (in weeks)	Target	9	9	9	9
	Outturn	**15**	**10**	**20**	**18**
Average waiting period for summary stated case appeals (in term weeks)	Target	6	6	6	6
	Outturn	**25**	**11**	**24**	**38**

Source: Scottish Court Service Annual Report 2007/08

Table 2: Average waiting period for appeals, by type of appeal 1997/8 to 2007/8 (in days)

Type of appeal	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08
Solemn sentence	86	80.3	104	121	102	127	150	173	216	162	158
Solemn conviction	165	239	246	279	333	329	255	372	423	372	382
Summary sentence	40	34.2	49	51	51	66	110	138	72	79	96
Summary conviction	70	128.0	158	115	296	376	309	324	158	129	220
All types	**53**	**65**	**81**	**83**	**99**	**140**	**155**	**187**	**152**	**132**	**151**

Criminal Appeal Statistics, Scotland, 2007/08; release by Scottish Government (Justice Analytical Services Division); 28 Oct.2008

Annex C: Raising the privative jurisdiction of the Sheriff Court

Table 1a Audit of all actions raised by summons in the General Department of the Court of Session in 2 weeks (18-23 June 2007 and 1-5 October 2007), by procedure

	2007	2007	June 18-23	October 1-5	Audit	*Audit*
Case Type	**Total**	**%**	**Audit Week 1**	**Audit Week 2**		**%**
Commercial (CA)	131	*4*	1	1	2	***2***
Ordinary (A)*	225	*7*	13	17	30	***23***
Family (F)	790	*23*	6	7	13	***10***
Personal Injury (PD)	2487	*72*	51	32	83	***65***
TOTAL	**3433**	***100***	**71**	**57**	**128**	***100***

To avoid double counting, actions transferred from PD to the Ordinary Roll were not counted if they had first registered in the Audit weeks. They were counted, however, if they had initially registered outwith the Audit weeks. 5 of the Ordinary actions were initially registered as PD (personal injury) actions in weeks outwith the Audit weeks

Table 1b Audit of actions raised by summons in the General Department of the Court of Session in 2 weeks (18-23 June 2007 and 1-5 October 2007), by case type

	June 18-23	October 1-5	All	*All*
Case Type				*%*
Personal Injury	54	34	88	***69***
Professional negligence	1	0	1	***1***
Adjudication	1	6	*7*	***6***
Reduction & Payment	0	2	2	***2***
Production & reduction of decree	0	1	1	***1***
Exchequer	1	0	1	***1***
Family	6	7	13	***10***
(Simplified Divorce	*(3)*	*(4)*		***(6)***
(Divorce (including children)	*(2)*	*(3)*		***(4)***
(Children contact only	*(1)*			***(1)***
Enforcement of payment	1	1	2	***2***
Count , reckoning & payment	0	1	1	***1***
Breach of copyright	0	1	1	***1***
Interdict	1	2	3	***2***
Proving the tenor	3	0	3	***2***
Implementation	1	0	1	***1***
Declarator	1	1	2	***2***
Declarator, or Payment and interdict	1	0	1	***1***
Execution & delivery	0	1	1	***1***
TOTAL	**71**	**57**	**128**	***103****

- *Percentages rounded off*

Table 1c: Audit of actions raised by summons in the General Department of the Court of Session in 2 weeks (18-23 June 2007 and 1-5 October 2007) by value of conclusion

Sum sued for in £	**Number**	*%*
Under 10,000	2	*2*
10,000 and under 20,000	9	*7*
20,000 and under 50, 000	28	*22*
50,000 and under 100,000	19	*15*
100,000 and under 150,000	12	*9*
150,00 and under 500,000	19	*15*
500,000 and over	10	*8*
Action for adjudication: all under £20,000	*7*	*5*
Non-monetary conclusion only	17	*13*
Information not available	5	*4*
ALL	**128**	***100***

Table 2a: Audit of all actions raised under commercial procedure in the Court of Session between 1 January and 30 June 2008 by value of conclusion

Sum sued for in £	Number	%
Under 50,000	7	11
50,000 and under 100,000	6	9
100,000 and under 150,000	2	3
150,00 and under 500,000	11	17
500,000 and over	21	32
Non-monetary conclusion only	16	25
Not known	1	2
ALL	**64**	**99**

Findings: Just 23% (15) of actions raised under commercial procedure were for a conclusion of under £150,000. Of these 15 actions, 5 (33%) had been remitted from the sheriff court.

Table 2b: Audit of all actions raised under commercial procedure in the Court of Session between 1 January and 30 June 2008

Case type	Type conclusion	Value	Notes
Declarator	Declarator		
Miscellaneous	Declarator		
Commercial lease	Declarator		
Heritable conveyancing	Declarator		
Commercial lease	Declarator		
Heritable conveyancing	Declarator		
Heritable conveyancing	Declarator		
Miscellaneous	Declarator		
Breach of contract	Declarator & Interdict		Transfer from ordinary proc
Miscellaneous	Declarator & Interdict		
Miscellaneous	Declarator & Interdict		
Interdict	Interdict		
Interdict	Interdict		
Miscellaneous	Declarator & Proving the tenor		
Commercial lease	Decree ad factum praes.		
Other breach of misc. contract	Missives		
Other breach of misc. contract	Not known		
Commercial lease	Declarator & Payment	**3,000**	
Construction of any contract	Payment	**30,000**	Remitted from Perth Sh. Ct.
Other breach of misc. contract	Payment	**30,500**	
DK	Payment	**35,000**	Remitted from Linlithgow Sh. Ct.
Miscellaneous	Payment	**35,000**	
Heritable conveyancing	Payment	**42,300**	Remit from Glasgow Sh. Ct.
Other breach of misc. contract	Payment	**45,000**	
Building engineering &construction contract	Payment	**50,000**	
Other breach of misc. contract	Payment	**52,058**	
Heritable conveyancing	Payment	**63,400**	Remit from Glasgow Sh. Ct.
Miscellaneous	Declarator & Payment	**65,000**	
Miscellaneous	Payment	**70,000**	
Miscellaneous	Payment	**70,000**	
Leasing of goods	Payment	**100,000**	
Contract	Payment	**130,000**	
Building engineering &construction contract	Payment	**150,000**	
Commercial lease	Payment	**150,000**	
Damages	Payment	**160,000**	Transfer from ordinary proc
Commercial lease	Payment	**195,000**	
Misc. contract	Payment	**200,000**	Remitted from Perth Sh. Ct.
Building engineering &construction contract	Payment	**220,000**	
Breach of contract	Payment	**256,000**	
Building engineering &construction contract	Payment	**270,000**	

Case type	Type conclusion	Value	Notes
Breach of Contract	Declarator & Payment	**280,000**	Transfer from ordinary proc
Building engineering &construction contract	Payment	**300,000**	
Commercial lease	Declarator & Payment	**350,000**	
Other breach of misc. contract	Payment	**500,000**	
Damages	Payment	**570,000**	Transfer from ordinary proc
Other breach of misc. contract	Payment	**575,000**	
Miscellaneous	Payment	**600,000**	Transfer from ordinary proc
Insurance	Payment	**611,000**	
Other breach of misc. contract	Payment	**704,000**	
Construction of any contract	Payment	**750,000**	
Building engineering &construction contract	Payment	**819,635**	
Damages	Payment	**944,000**	Transfer from ordinary proc
Damages	Payment	**1,000,000**	Transfer from ordinary proc
Miscellaneous	Payment	**1,000,000**	
Heritable conveyancing	Payment	**1,000,000**	
Breach of misc contract warrant	Payment	**2,000,000**	
Other breach of misc. contract	Payment	**2,200,000**	
Building engineering &construction contract	Payment	**2,700,000**	
Other breach of misc. contract	Declarator & Payment	**3,200,000**	
Other breach of misc. contract	Payment	**3,371,866**	
Building engineering &construction contract	Declarator & Payment	**3,500,000**	
Miscellaneous	Payment	**3,500,000**	
Damages	Payment	**7,970,000**	Transfer from ordinary proc
Other breach of misc. contract	Payment	**42,890,140**	

Table 3a: Relationship between sum sued for and value of settlement/judgment in Court of Session (93 personal injury actions disposed of between 2004 and 2007)

Sum sued for	Average sum sued for	Average value of settlement	*Ratio of average settlement value to sum sued for*
£150,000+ (33 cases)	£373,030	£178,090	***48:100***
£100,000 - £149,999 (13 cases)	£100,000	£21,457	***21:100***
£50,000 - £99,999 (13 cases)	£61,538	£14,961	***24:100***
£20,000 - £49,999 (29 cases)	£28,103	£7,624	***27:100***
Under £20,000 (6 cases)	£11,666	£3,275	***28:100***

Table 3b: Relationship between sum sued for and value of settlement/judgment in Sheriff Court (94 actions disposed of between 2004 and 2007)

Sum sued for	Average sum sued for	Average value of settlement	*Ratio of average settlement value to sum sued for*
£150,000+ (5 cases)	£263,708	£61,460	***23:100***
£100,000 - £149,999(6 cases)	£101,666	£34,625	***34:100***
£50,000 - £99,999(14 cases)	£61,071	£19,797	***32:100***
£20,000 - £49,999(25 cases)	£26,066	£7,356	***28:100***
Under £20,000 (44 cases)	£9,379	£3,017	***32:100***

Table 4a: Relationship between average total costs and sum sued for in 93 actions disposed of in the Court of Session between 2004 and 2007

Sum sued for	Average sum sued for	Average total costs (defenders' and recovered pursuers')	*Ratio of total costs to sum sued for*
£150,000+ (33 cases)	£373,030	£27,492	***7:100***
£100,000 - £149,999 (13 cases)	£100,000	£19,739	***20:100***
£50,000 - £99,999 (13 cases)	£61,538	£16,606	***27:100***

Sum sued for	Average sum sued for	Average total costs (defenders' and recovered pursuers')	*Ratio of total costs to sum sued for*
£20,000 - £49,999 (29 cases)	£28,103	£12,117	***43:100***
Under £20,000 (6 cases)	£11,666	£7,276	***62:100***

Table 4b: Relationship between average total costs and value of settlement in 93 actions disposed of in the Court of Session between 2004 and 2007

Sum sued for	Average value of settlement	Average total costs (defenders' and recovered pursuers')	*Ratio of total costs to value of settlement*
£150,000+ (33 cases)	£178,090	£27,492	***15:100***
£100,000 - £149,999 (12 cases)	£21,457	£19,739	***92:100***
£50,000 - £99,999 (13 cases)	£14,961	£16,606	***111:100***
£20,000 - £49,999 (29 cases)	£7,624	£12,117	***159:100***
Under £20,000 (6 cases)	£3,275	£7,276	***222:100***

Table 4c: Relationship between recovered pursuers' expenses and value of settlement in 93 actions in the Court of Session between 2004 and 2007

Sum sued for	Average value of settlement	Average recovered pursuers' expenses	*Ratio of recovered pursuers' expenses to value of settlement*
£150,000+ (33 cases)	£178,090	£15,353	***9:100***
£100,000 - £149,999 (12 cases)	£21,457	£9,961	***46:100***
£50,000 - £99,999 (13 cases)	£14,961	£9,911	***46:100***
£20,000 - £49,999 (29 cases)	£7,624	£6,612	***87:100***
Under £20,000 (6 cases)	£3,275	£4,546	***139:100***

Table 4d: Relationship between defender's expenses and value of settlement in 93 actions in the Court of Session between 2004 and 2007

Sum sued for	Average value of settlement	Average defender's expenses	*Ratio of defenders' expenses to value of settlement*
£150,000+ (33 cases)	£178,090	£12,156	***7:100***
£100,000 - £149,999 (12 cases)	£21,457	£9,870	***46:100***
£50,000 - £99,999 (13 cases)	£14,961	£6,695	***4:1005***
£20,000 - £49,999 (29 cases)	£7,624	£5,504	***72:100***
Under £20,000 (6 cases)	£3,275	£2,730	***83:100***

Table 4e: Pursuers' recovered expenses in 11 low value (sum sued for under 20k) cases in Court of Session

11 cases	Average sum sued for	Average value of settlement	Average recovered pursuers' expenses	*Ratio of defenders' expenses to value of settlement*
Under £20,000	£15,227	£6,326	£6,360	***101:100***

Table 4f: Pursuers' recovered expenses in low value (sum sued for under £10k) cases in Court of Session and Sheriff Court

	Actions where pursuers' recovered expenses exceeded damages
Court of Session 42 cases	***81%***
Sheriff Court 893 cases	***58%***

Table 4g: 8 cases raised in the Court of Session: Total expenses in the Court of Session and predicted expenses in the Sheriff Court

Case No	Value of settlement £	Court of Session: total expenses £	*Ratio of Court of Session expenses to damages*	Sheriff Court: Predicted total expenses £	*Predicted ratio of sheriff court expenses to damages*
1	7,000	13,094	***187***	7,073	***101:100***
2	22,000	9,856	***45***	5,654	***26:100***
3	66,000	12,752	***19***	6,496	***10:100***
4	22,500	17,514	***78***	12,234	***54:100***
5	11,000	7,241	***66***	4,588	***42:100***
6	75,000	17,700	***24***	11,882	***16:100***
7	4,000	12,871	***322***	9,049	***70:100***
8	13,000	9,238	***71***	5512	***42:100***

Findings: 1. In these 8 Court of Session cases of varied value, the ratio of total expenses to damages varied between 19% and 24% (for two cases that settled at £66k and £75k respectively) to 187% and 322% (for two cases that settled at £7k and £4k respectively).
2. On the basis of these 8 selected cases, total predicted expenses in the sheriff court was sometimes as low as 51% of the total expenses in the Court of Session, and never above 75%.

Table 5a: Relationship between average total costs and sum sued for in 94 actions disposed of in the Sheriff Court between 2004 and 2007

Sum sued for	Average sum sued for	Average total costs (defenders' and recovered pursuers')	*Ratio of total costs to sum sued for*
£150,000+ (5 cases)	£263,708	£14,967	***6:100***
£100,000 - £149,999 (6 cases)	£101,666	£16,676	***16:100***
£50,000 - £99,999 (14 cases)	£61,071	£12,821	***21:100***
£20,000 - £49,999 (25 cases)	£26,066	£7,421	***28:100***
Under £20,000 (44cases)	£9,379	£6,080	***65:100***

Table 5b: Relationship between average total costs and value of settlement in 94 actions disposed of in the Sheriff Court between 2004 and 2007

Sum sued for	Average value of settlement	Average total costs (defenders' and recovered pursuers')	*Ratio of total costs to value of settlement*
£150,000+ (5 cases)	£61,460	£14,967	***24:100***
£100,000 - £149,999 (6 cases)	£34,625	£16,676	***48:100***
£50,000 - £99,999 (14 cases)	£19,797	£12,821	***65:100***
£20,000 - £49,999 (25 cases)	£7,356	£7,421	***101:100***
Under £20,000 (44cases)	£3,017	£6,080	***202:100***

Table 5c: Relationship between average recovered pursuers' expenses and value of settlement in 94 actions disposed of in the Sheriff Court between 2004 and 2007

Sum sued for	Average value of settlement	Average recovered pursuers' expenses	*Ratio of pursuers' expenses to value of settlement*
£150,000+ (5 cases)	£61,460	£6,639	***11:100***
£100,000 - £149,999 (6 cases)	£34,625	£6,847	***20:100***
£50,000 - £99,999 (14 cases)	£19,797	£4,600	***23:100***
£20,000 - £49,999 (25 cases)	£7,356	£3,535	***48:100***
Under £20,000 (44 cases)	£3,017	£2,636	***87:100***

Table 5d: Relationship between average defender's expenses and value of settlement in 94 actions disposed of in the Sheriff Court between 2004 and 2007

Sum sued for	Average value of settlement	Average defender's expenses	Ratio of defenders' expenses to average value of settlement
£150,000+ (5 cases)	£61,460	£8,597	***14:100***
£100,000 - £149,999 (6 cases)	£34,625	£9,828	***28:100***
£50,000 - £99,999 (14 cases)	£19,797	£8,221	***42:100***
£20,000 - £49,999(25 cases)	£7,356	£3,895	***53:100***
Under £20,000 (44cases)	£3,017	£3,444	***114:100***

Table 5e: 79 low value (under 10k) cases in Sheriff Court

79 cases	Average value of settlement	Average recovered pursuers' expenses	*Ratio of pursuers' recovered expenses to value of settlement*
Under £10,000	£4,075	£3,005	***74:100***

Table 5f: 58 low value (under 10k) cases in Sheriff Court

58 cases	Average value of settlement	Average recovered pursuers' expenses	*Ratio of pursuers' recovered expenses to value of settlement*
Under £10,000	£2,610	£2,723	***104:100***

Table 5g: 90 low value (under 20k) cases in Sheriff Court

90 cases	Average value of settlement	Average recovered pursuers' expenses	*Ratio of pursuers' recovered expenses to value of settlement*
Under £20,000	£3,896	£2,823	***73:100***

Table 5h: 595 low value (under 20k) cases in Sheriff Court

595 cases	Average value of settlement	Average recovered pursuers' expenses	*Ratio of pursuers' recovered expenses to value of settlement*
Under £20,000	£3,188	£2,477	***78:100***

Annex D: A Specialist Personal Injury Court in the Sheriff Court

Table 1. Number of 'allocated' Chapter 43 and ordinary proofs in the Court of Session and sitting days allocated, September 2005 to July 2008

Month	No of Ordinary Proofs allocated	No of Days allocated to Ordinary Proofs	No of Chapter 43 Proofs allocated	No of Days allocated to Chapter 43 Proofs
September 05	1	6	0	0
October 05	12	70	3	12
November 05	7	34	10	23
December 05	2	2	3	12
January 06	12	93	2	8
February 06	4	15	7	26
March 06	1	6	5	20
April 06	5	30	1	4
May 06	7	28	8	36
June 06	7	23	4	11
July 06	5	21	5	17
September 06	2	12	3	8
October 06	17	82	3	16
November 06	10	59	5	15
December 06	2	2	3	12
January 07	13	50	3	20
February 07	7	34	3	12
March 07	10	36	4	20
April 07	2	5	3	18
May 07	8	64	2	8
June 07	9	33	6	28
July 07	1	2	1	4
September 07	1	8	0	0
October 07	10	28	0	0
November 07	4	14	5	24
December 07	3	8	1	4
January 08	1	1	2	12
February 08	3	17	5	50
March 08	5	15	2	8
April 08	1	10	0	0
May 08	2	9	5	26
June 08	7	32	1	4
July 08	9	30	2	8
Total	**190**	**879**	**107**	**466**
Average No		**4.63**		**4.36**

Table 2. Chapter 43 (personal injury) actions allocated to proof between September 2007 and July 2008: days allocated and used

Case ref	Amount sued for	Proof Days Allocated	Days Used	Days Unused	Days Overran
PD1502/06	£10,000,000	16	2	14	
PD1658/05	£750,000	18	4	14	
PD1313/07	£750,000	4	4		
PD1393/06	£400,000	4	4		
PD2102/05	£400,000	8	8		
PD1153/06	£350,000	8	4	4	
PD1809/07	£300,000	8	8		
PD1686/07	£200,000	4	4		
PD1878/06	£200,000	4	4		
PD556/06	£200,000	8	3	5	
PD1342/07	£150,000	6	4	2	

Case ref	Amount sued for	Proof Days Allocated	Days Used	Days Unused	Days Overran
PD1576/07	£150,000	4	1	3	
PD2076/06	n/a	6	8		2
PD348/07	£125,000	4	3	1	
PD1894/06	£100,000	4	4		
PD660/07	£110,000	4	3	1	
PD459/07	£100,000	4	1	3	
PD1181/07	£100,000	4	2	2	
PD2254/06	£75,000	4	4		
PD1102/07	£40,000	4	4		
PD769/07	£20,000	4	3	1	
Not known	*	?	?		
Not known	*	?	?		
Totals		**130 (136)**			

* Information on 2 cases missing

Table 3: Proofs under Ordinary Procedure between Sept 06 and Dec 08 (excluding Sept 08): Weekly averages

	Av number on final roll	Av number allocated to judiciary	Av number which run	Av number settled prior	Av number settle on the day
Sep–Dec 06	10	5	2	3	4
Jan–Mar 07	7	4	2	2	3
Apr–Jul 07	6	3	1	2	3
Sep–Dec 07	8	4	2	3	3
Jan–Mar 08	5	3	2	1	3
Apr–May 08	6	3	1	2	3
Sept-Dec 08	5	3	2	2	1

Table 4: Proofs under Chapter 43 Procedure between Sept 06 and Dec 08 ; Weekly averages

	Av. number on final roll	Av number allocated to judiciary	Av number which run	Av number settled prior	Av number settle on the day
Sep–Dec 06	12	4	1	7	4
Jan–Mar 07	11	3	1	6	4
Apr–Jul 07	14	3	0.8	8	5
Sep–Dec 07	11	3	0.5	7	4
Jan–Mar 08	12	3	1	7	4
Apr–July 08	10	2	0.5	6	3
Sep–Dec 08	8	3	1	5	2

Annex E: Sheriff Court Business

Table 1: Actions initiated in the sheriff court by procedure 1986 – 2008

	1986	1987	1988	1989	1990	1991	1992
Ordinary actions	46,604	48,863	50,544	46,107	52,003	58,383	59,207
Summary	128,726	123,125	109,473	49,919	44,929	45,650	41,801
Small claims				73,946	87,285	88,512	79,395
All actions initiated	**175,331**	**171,998**	**160,017**	**169,972**	**184,217**	**192,545**	**180,403**
	1993	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**
Ordinary actions	55,333	44,190	46,096	45,660	44,366	48,423	47,394
Summary	38,346	35,646	34,630	30,078	33,447	35,094	37,227
Small claims	72,714	64,002	59,710	59,009	56,551	52,527	51,096
All actions initiated	**166,393**	**143,838**	**140,436**	**134,747**	**134,364**	**136,044**	**135,715**
	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Ordinary actions	46,619	49,001	46,605	47,537	56,994	62,502	60,014
Summary	42,134	40,931	36,465	34,942	36,627	38,463	35,881
Small claims	45,786	39,193	32,256	32,974	33,496	34,529	29,022
All actions initiated	**134,539**	**129,125**	**115,326**	**115,453**	**127,117**	**135,494**	**124,917**
	2007	***2007 %***	**2008**	***2008 %***	***2007/ 2008 % change in cases initiated***		
Ordinary actions	59,459	*50*	46,806	*38*	***-21***		
Summary	34,472	*29*	32,491	*26*	***-6***		
Small claims	25,066	*21*	44,742	*36*	***+79***		
All actions initiated	**118,997**	***100***	**124,039**	***100***	***+4***		

Table 2: Business in the sheriff court 1997/8 to 2006/7

Sheriff court business	**1997/8 No.**	**1997/8 %**		**2001/2 No.**	**2001/2 %**		**2006/7 No.**	**2006/7 %**
Civil	9898	*34*		8970	*34*		9292	*31*
Summary Criminal	14533	*55*		14128	*53*		16020	*54*
Solemn Criminal	2862	*11*		3539	*13*		4486	*15*
All	**26,384**	***100***		**26,633**	***100***		**29,798**	***100***

ANNEX TO CHAPTER 5 A NEW CASE MANAGEMENT MODEL

A: THE USE OF PROCEDURAL JUDGES IN OTHER JURISDICTIONS

England and Wales

Interlocutory work in the High Court[1]

1. Most trials are handled by judges, but the pre trial ('interlocutory') work is conducted in London by Masters in the Queen's Bench and Chancery Divisions of the High Court and by district judges (formerly called registrars) in the Family Division. Outside London there are no Masters. High Court interlocutory business outside London is handled in District Registries by district judges who are normally also the district judges for the county court.

2. Masters and Registrars of the Supreme Court are the procedural judges for the majority of the civil business in the Chancery and Queen's Bench Divisions. Masters have a nationwide jurisdiction because the Supreme Court is not restricted in its jurisdiction. District Registries and judges in the Registries are limited to particular areas. A Master deals with all procedural aspects of an action, from its issue until it is ready for trial by a trial judge. After the trial the Master resumes responsibility for the case. In the High Court the complement of Masters comprises the Senior Master and nine Queen's Bench Masters; the Chief Master and five Chancery Masters; and the Chief Registrar and five Bankruptcy Registrars. One of the Queen's Bench Masters is the Admiralty Registrar.

Case Management[2]

3. Case management decisions are generally dealt with by Masters for cases proceeding in the Royal Court of Justice, and by the district judges in High Court district registry and county court cases. The governing rule (Civil Procedure Rules 2.4) gives the courts a great deal of flexibility allowing performance by any judicial officer, whether a district judge, Master or judge, subject to any specific contrary provision in any enactment, rule or practice direction. However, Practice Direction 29, para 3.10, provides, in relation to multi-track cases, that Masters will in general perform case management functions in the Royal Courts of Justice, district judges in district registry matters, and either district judges or circuit judges in county court cases. Practice Direction 2B enables Masters and district judges to deal with all types of application, but with express exceptions set out in the practice direction. Exceptions include most interim injunction applications, and applications affecting the liberty of the subject, which must be dealt with by a High Court or circuit judge. Cases in the Chancery and Queen's Bench Divisions are assigned to individual Masters although from time to time hearings may be dealt with by other Masters or

[1] Based on M. Zander (2007), *Cases and Materials on the English Legal System*, 10th ed.
[2] Based on W. Rose (2008), *Blackstone's Civil Practice*

deputies as the circumstances may require, and cases may be transferred from one Master to another.

4. Masters and Registrars of the Supreme Court are appointed by The Queen, after a fair and open competition administered by the Judicial Appointments Commission. The statutory qualification for the offices of Master of the Queen's Bench Division, Master of the Chancery Division, Admiralty Registrar and Registrar in Bankruptcy of the High Court is a seven-year right of audience in relation to all proceedings in any part of the Supreme Court, or all proceedings in County Courts or Magistrates' Courts.

Ireland[3]

5. Prior to the passing of the Courts and Court Officers Act 1995,[4] the Master of the High Court was largely confined to exercising powers conferred by rules of court. These functions include granting orders for discovery, interrogatories and extension of time for various matters; in civil claims initiated by special summons, ensuring that the legal documentation is correct before it is forwarded to a High Court judge; and giving judgment in non-contested cases, for example where a claim for a sum in default of a loan is made by a bank and there is no defence to the claim or no real defence.

6. The Master continues to exercise these functions, but the Courts and Court Officers Act 1995 added significantly to the scope of the powers of the office of Master. The Master is now empowered to exercise limited functions of a judicial nature within the scope of Article 37 of the Constitution.[5] All orders of the Master of the High Court are subject to appeal to the High Court.[6]

Australia

South Australia

7. In the Supreme Court of South Australia Practice Direction 5.1 of the 2006 Practice Directions[7] lays down a broad framework within which the interlocutory procedures involved in cases in the long and complex trial list are to be handled. Cases are assigned usually to this list if the estimated length of the hearing exceeds 15 days or if the case raises issues of particular complexity.

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[3] Based on R Byrne and J McCutcheon (2003), *The Irish Legal System*, 4th ed.
[4] The Courts and Court Officers Act 1995, No. 31/1995
[5] Article 37.1- "Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.
[6] Section 25(5) Courts and Court Officers Act 1995.
[7] Available at http://www.courts.sa.gov.au/lawyers/index3.html

8. The management of cases in this list is allocated to a pool of judges assisted by masters who between them are responsible for the conduct of the interlocutory proceedings. The panel of assigned judges have up to one week set aside every two months within which to deal with the lengthier directions hearings.

9. The Practice Direction states that except when there appears to be good reason to proceed otherwise, all interlocutory matters are to proceed by way of general directions hearings. Normally general directions hearings will be held as frequently as necessary, commonly at a time such as 8.30 or 9.00 am, ahead of the time at which civil and criminal trials are regularly listed. Those regular directions hearings will not be expected to occupy more than an hour. At the general directions hearings, the following matters are likely to be considered: pleadings, disclosure, experts' reports, ADR and pre-trial preparations.

Victoria[8]

10. In Victoria, before trial, most cases are subject to management by Masters in the Civil Management List. Masters set timetables for the necessary interlocutory steps and hear most interlocutory applications, including summary judgment and strike-out applications, discovery applications and applications arising out of noncompliance with previous orders.

11. It has recently been announced, following a review of the Office of Master, that Masters will be renamed "associate judges" and will play a larger role in mediating disputes. New legislation is to be introduced to facilitate this change.

United States

12. In the United States, rule 53 of the *Federal Rules of Civil Procedure*[9] authorises a court to appoint a master to:

- perform duties consented to by the parties;
- hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by: (i) some exceptional condition, or (ii) the need to perform an accounting or resolve a difficult computation of damages; or
- address pre-trial and post- trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

[8] Based on Victorian Law Reform Commission, Civil Justice Review Report 14, 2008.
[9] Available at http://www.uscourts.gov/rules/index.html

13. The order appointing the master must specify the master's duties, the issues to be investigated, the circumstances under which *ex parte* communication with the court or a party will be appropriate, the time limits for the master's activities and the fees payable to the master. Unless the order appointing the master provides otherwise, the master may regulate all proceedings and take all appropriate measures to his duties

New Zealand[10]

14. The Office of Master was established in 1986. The 1978 Royal Commission on the Courts recommended that Masters should be available at all levels of jurisdiction, but the office was eventually introduced into the High Court only.

15. Masters were appointed to assist with the growing workload of the High Court and to ensure the prompt handling of the planned summary judgment procedure. The Masters' jurisdiction has been extended a number of times by amendment to the Judicature Act. The increasing emphasis on case management and the introduction of a summary judgment jurisdiction to the District Court has meant that the nature of Masters' work has changed over the years. Their current workload is substantially dealing with insolvency and company liquidation, summary judgments, interlocutory applications, and case management.

16. There are, however, some concerns. Masters do not have tenure, which poses a potential threat to the independence of the office, and places Masters themselves in an unsatisfactory position.

17. The Law Commission has proposed that a small group of appropriately skilled, tenured Primary Court judges be warranted to exercise the office of a Master of the High Court, as well as being warranted to hear civil cases in the Primary Civil Court. It is anticipated that this group would number 8 to 10 people, all of whom would have the particular expertise, experience and aptitude to deal with all of this work. The Masters' jurisdiction would remain in the High Court. Existing Masters could have tenure as Primary Court judges and would be provided with the opportunity to hear civil cases in the Primary Civil Court if they were to make the transition to this new approach.

Canada

18. ***Ontario and British Columbia*** use Masters to deal with procedural and case management issues. In ***Quebec*** the function of a Master is carried out by a clerk who has the competence of a judge in chambers in cases where the law expressly so declares; when the judge is absent or unable to act and delay might result in the loss of a right or cause serious harm. In matters within his jurisdiction, the clerk has the same powers as the judge.[11] The decision of the clerk may be revised by the judge or

[10] Based on New Zealand Law Commission (2004), *Delivering Justice for All - A Vision for New Zealand Courts and Tribunals*, Report 85.
[11] Code of Civil Procedure R.S.Q. (Updated to 1 January 2009), Chapter C-25, Article 41

the court, upon a demand setting out the grounds relied on, served upon the opposite party and filed at the office of the court within 10 days from the date of the decision attacked. If the decision is quashed, matters are restored to the state where they were before it was rendered.[12]

B: COURT OF SESSION STATISTICS

Table 1: Business of Court of Session's commercial court, 1995-2008: Actions initiated or transferred.

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
No. of actions	**130**	**153**	**181**	**162**	**187**	**203**	**253**	**232**	**178**	**207**	**112**	**99**	**131**	**188**

Table 2: Business of Court of Session's commercial court, 2005-8

Year	Number of cases registered	Number of defences lodged	Number of cases in which defences lodged*
2005	112	27	24
2006	99	71	64
2007	131	86	81
2008	188	150	125

* Since defences lodged are not listed by case, there may be some overestimate here of the number of cases in which defences were lodged

Table 3: Family actions registered and defences lodged in the Court of Session in 2008

Case type	Number of cases registered	Number of defences lodged
Simplified divorce 1 yr	71	0
Simplified divorce 2 yr	97	0
Simplified divorce – gender recognition	1	0
Declarator of legitimacy	1	0
Declarator of marriage	1	0
Declarator of nullity of marriage	4	0
Divorce	39	29
S28 Family Law Scotland Act 2006	3	0
Section 11 Children Scotland Act 1997	5	0
Matrimonial & Property Act 1984	0	1
Family 125 and Sch. 11 Civil Partnership Act	0	3 (relating to one case)
TOTAL	**222**	**33**

[12] Code of Civil Procedure R.S.Q., Article 42.

Table 4: Ordinary actions registered and defences lodged in the Court of Session in 2008, by case type

Case type	Number of cases registered	Number of defences lodged	Number of cases in which defences lodged*	% of defended cases
Damages	274	182	163	42
Forthcoming	1	0	0	0
Harassment	1	0	0	0
Intellectual property	13	5	4	1
Interdict	44	23	18	5
Land or heritable estate	415	29	28	7
Maritime action	4	2	2	1
Other actions-miscellaneous	147	57	52	13.5
Other actions of status	2	1	1	0
Personal Debt	31	15	13	3.5
PI – at work	1	4	4	1
PI – asbestosis	0	1	1	0
PI- clin. neg.**	48	60	51	13
PI – other	13	27	25	6.5
PI – RTA	3	5	4	1
PI –clin. neg. transferred out**	38	23	21	5.5
PI –VWF	0	1	1	0
TOTAL	**1035**	**435**	**388**	**100%**

* Since defences lodged are not listed by case, there may be some overestimate as to the number of cases in which defences were lodged.

** With effect from 2 May 2007, new rules were made to accommodate clinical negligence cases being transferred out of chapter 43 at the stage of signeting. In 2008, 48 clinical negligence actions were registered as ordinary actions at that stage, and 38 were transferred out of chapter 43.

C: THE NEW SIMPLIFIED PROCEDURE IN THE SHERIFF COURT

The detail of the new procedure will be a matter for the Rules Council or Civil Justice Council for Scotland but we recommend that the rules should have the following features:

- The rules and any forms should be written in plain English and with the minimum of technical legal language. Consultation on the rules, on newly-designed forms and on written guidance should include an "intelligibility road-test" with members of the public.
- The rules should make clear that the court will control how the case progresses, and will take an active role in identifying the issues in dispute and deciding what information or legal argument it needs to have in order to determine the case.
- Forms for making and replying to a claim should explain clearly the difference between the time limit for responding in writing to the claim, and the day on which the case will be heard for the first time in court. The consequences of failing to respond to the claim should be made obvious.
- Forms for making and replying to a claim should provide information about sources of help and advice, including mediation and other forms of

dispute resolution and any relevant in-court advice or mediation services. They should also explain what will normally happen at the first hearing.

- Forms for making a claim should require the person making the claim to set out briefly the essential facts and law on which the claim is based along with details of any documents which are relevant. Written guidance should include examples of the kinds of information and statements that should be put on the form and the sort of documents and information that the court will want to have, for common types of claim.
- Similarly, the person replying to the claim should be required to set out briefly why he does not agree with what the claim form says and give details of any documents that he intends to use in support of his arguments. Again written guidance should include examples of possible defences and information about what the court will need to have in order to decide the case, for common types of claim.
- Other than in rented housing and mortgage re-possession cases, where no reply is received to a claim by the due date, it should not be called in court and the person making the claim should be able to ask for a court order in his favour by writing to the court.
- At the first hearing, the judge should decide what further information each party should provide and what the next stage of the procedure should be. In many defended cases, the first hearing would therefore in effect be a case management hearing.
- It should continue to be possible for the judge to dispose of the case finally at the first hearing if he considers it appropriate to do so.
- The judge should be able to try to assist the parties to reach a settlement at any point in the case, if it seems appropriate in the circumstances.
- The judge should be able to continue the case to a later date in order to allow parties to seek advice, to go to mediation or to negotiate a settlement.
- It should be open to the judge, at the request of one of the parties or if the judge considers it appropriate, to hold any hearing in private. This might help to settle some cases in which the parties may be willing to discuss a settlement but are reluctant to do so in front of other people in open court.
- Any party should be able to be represented by an authorised lay representative at any hearing, so long as the court is satisfied that the representative is a suitable person to fulfil that role.

D: HOUSING CASES IN THE SHERIFF COURT

Table 1: All Sheriff Courts 2007: Heritable Cases Registered

Action Type	Case type	Total by case type
A Ordinary	Land/Heritable	**2242**
A	Mortgage Lender	**1163**
A	Heritable securities	**51**

Action Type	Case type	Total by case type
A	Heritable Conveyancing	**463**
A	Sequestration for rent	**17**
A	Mortgage Rights (Scotland) Act 2001	**5310**
A	Recovery of possession of heritable property	**1014**
B Summary application	Recovery of possession of heritable property	**2**
SC Summary cause (Payment)	Recovery of Possession of Heritable Property	**22**
SD Summary Cause (Heritable Property)	Recovery of Possession of Heritable Property	**18710**
SD	Debt	**857**
SD	Land/heritable	**297**
SD	Heritable conveyancing	**118**
SD	Heritable securities	**13**
SE Summary Cause (Other)	Sequestration for rent	**1**
TOTAL CASES		**30280**

Note: All the figures were obtained from the Scottish Court Services case management system, taking figures for the case types that appear to relate to heritable property. Different courts appear to adopt different practices as to the categories under which cases are registered on the system. For example, in Glasgow, nearly all ordinary cases dealing with heritable property are registered under the heading "Land/heritable" with only a handful under "Mortgage Rights (Sc) Act 2001", while in Edinburgh the opposite is the case. It is not possible to tell from the CMS system whether the property which is the subject of the action is residential or commercial. However the categories of "Mortgage Lender" and "Mortgage Rights (Sc) Act 2001" together account for 6473 out of the total of 10260 ordinary causes dealing with heritable property and a significant proportion of the category "Land/heritable" will also involve residential property. Overall therefore it seems likely that the great majority of ordinary heritable cases involve residential property.

Table 2: All Sheriff Courts 2007: Defences Lodged

Action Type	Case type	Total by case type
A Ordinary	Land/Heritable	**63**
A	Mortgage Lender	**23**
A	Heritable securities	**3**
A	Heritable Conveyancing	**17**
A	Sequestration for rent	**3**
A	Mortgage Rights (Scotland) Act 2001	**71**
A	Recovery of possession of heritable prop	**49**
TOTAL		**229**

Table 3: All Sheriff Courts 2007: Intention to Appear

Procedure	Case type	Total by case type
SC Summary Cause (Payment)	Recovery of possession of heritable property	**1**
SD Summary Cause (Heritable Property)	Recovery of Possession of Heritable Property	**922**
SD	Debt	**29**
SD	Land/heritable	**11**
SD	Heritable conveyancing	**12**
SD	Heritable securities	**1**
SE Summary Cause (Other)	Recovery of possession of heritable property	**2**
SE	Sequestration for rent	
TOTAL		**978**

Table 4: All Sheriff Courts 2007: Numbers of defended cases per sheriff court

Court	Ordinary cause	Defences lodged	% defended	Summary cause	Intention to appear	% defended
Total	**10260**	**229**	**2.23%**	**20018**	**978**	**4.89%**
Glasgow	1921	39	2	3457	228	6.6
Edinburgh	1054	20	1.9	1647	324	19.6
Hamilton	954	15	1.6	1800	51	2.8
Paisley	615	14	2.3	1321	99	7.5
Airdrie	559	6	1.1	1064	2	0.2
Kilmarnock	478	4	0.8	1254	45	3.6
Linlithgow	390	3	1	1191	7	0.6
Aberdeen	345	9	2.6	1447	23	1.6
Dunfermline	338	8	2.3	502	5	1.0
Kirkcaldy	327	5	1.5	741	13	1.8
Dunbarton	316	6	1.9	292	19	6.5
Falkirk	284	11	3.9	640	20	3.1
Dundee	271	12	4.4	679		
Ayr	214	6	2.8	555	23	4.1
Haddington	193	1	0.5	361	11	3.0
Greenock	166	4	2.4	107	12	11.2
Perth	164	9	5.5	159	18	11.3
Inverness	147	2	1.4	263	3	1.1
Dumfries	131	6	4.6	401	8	2.0
Stirling	123	3	2.4	333	9	2.7
Lanark	118	7	5.9	145	4	2.8
Alloa	91	0	0	187	10	5.3
Arbroath	88	1	1.1	124	7	5.6
Cupar	85	5	5.9	133	3	2.6
Elgin	83	3	3.6	210	5	2.4
Peterhead	82	1	1.2	183		
Selkirk	75	3	4	66	2	3.0
Stonehaven	60	1	1.6	50	3	6.0
Dingwall	50	0	0	28	1	3.6
Stranraer	46	0	0	64	4	6.3
Jedburgh	43	1	2.3	52	5	9.6
Tain	39	1	2.6	45	0	0
Forfar	38	1	2.6	56	3	5.6
Banff	36	0	0	79		
Ft William	34	1	2.9	23	1	4.4
Kirkcudbright	34	3	8.8	75	1	1.3
Campbeltown	29	0	0	19	0	0
Oban	29	3	10.3	26	0	0
Dunoon	29	4	13.8	31	1	3.2
Stornoway	27	4	14.8	5	0	0
Wick	26	0	0	61	2	3.3
Peebles	22	1	4.5	20	0	0
Portree	21	0	0	15	0	0
Dornoch	17	1	5.9	9	0	0
Rothesay	17	1	5.9	18	2	11.1
Duns	16	0	0	37	4	10.8
Lerwick	16	2	12.5	6	0	0
Lochmaddy	10	0	0	2	0	0
Kirkwall	9	0	0	35	0	0

ANNEX TO CHAPTER 7 MEDIATION AND OTHER FORMS OF DISPUTE RESOLUTION

Annex A Current use of mediation in Scotland

1. Mediation is available and used to assist in resolving disputes in a wide variety of contexts in Scotland. The Scottish Mediation Network maintains a map of mediation services across the country.

Family disputes

2. Family disputes can be mediated through 16 local services affiliated to Relationships Scotland (the new organisation formed from the merger of Family Mediation Scotland and Relate Scotland) or by lawyers trained as mediators and accredited by the Law Society of Scotland, funded privately or by legal aid. Most family lawyer mediators are members of the association, CALM (Comprehensive Accredited Lawyer Mediators).

Commercial disputes

3. Commercial disputes are often mediated through commercial providers some of which also provide mediator training. Some mediations are undertaken by freelance mediators. Mediation is privately funded or funded by legal aid.

Consumer disputes

4. In small claims actions in the sheriff court the sheriff is permitted by the Rules of Court to assume an evaluative mediatory role.[1] An in-court mediation scheme is available to litigants in the small claims and summary cause procedures in Edinburgh and until June 2008 there was a similar service on a pilot basis in Glasgow and Aberdeen sheriff courts.

Community disputes

5. Community mediation services are available for disputes between neighbours or proximate groups of residents in all parts of Scotland. SACRO manages 15 community mediation services and the rest are run directly by local authorities. All are free to the user of the service. They are all members of the Scottish Community Mediation Network www.scmc.sacro.org.uk

Employment and workplace disputes

6. Employment disputes can be mediated through the ACAS (Advisory, Conciliation and Arbitration Service) if there is a collective dispute or a case already before the Employment Tribunal. Mediations may be privately arranged if, for

[1]Rule 9.2(2) of the Small Claim Rules 2002

instance, there is a workplace issue between individuals. As from April 2009, as a result of the Employment Act 2008 implementing the recommendations of the Gibbons Report,[2] the current mandatory "three-step" processes for disciplinary and dismissal procedures undertaken by an employer and for grievances raised by an employee were repealed. A revised statutory ACAS Code of Practice sets out the principles of what an employer and employee should do to achieve a reasonable standard of behaviour in the handling of disciplinary and grievance situations in the workplace. It does not require mediation to be undertaken, but where employers are not able to resolve the issue themselves they should consider using an independent third party to help to do so. This could be an internal mediator, so long as he is not involved in the situation, or an external mediator. ACAS has also recently issued a new Mediation Guide for Employers.[3] The use of mediation is also supported by the Employment Tribunal, where a Practice Direction issued in December 2006 provides that where parties to a claim agree that it should be sisted for mediation the Chairman of the Employment Tribunal must sist it for that purpose.[4]

Professional service complaints procedures

7. These procedures increasingly include mediation schemes. An example is the complaints process of the Scottish Legal Complaints Commission, which includes an offer of mediation as a standard part of the process.[5]

Education disputes

8. Sections 15 to 16 of the Education (Additional Support for Learning) (Scotland) Act 2004 require local authorities to make arrangements for appropriate independent mediation services free of charge for the purpose of avoiding or resolving disputes around additional support needs for children in education. Several independent mediation services, such as ASL:Resolve which is run by the charity Children in Scotland, have been set up to assist local authorities to meet their mediation requirements under this legislation. Mediation is free for parents/carers and children and young people and is paid for by the local authority.

Health sector disputes

9. A mediation pilot project began in April 2005 in relation to clinical negligence claims intimated to NHS Central Legal Office. Cases with a value higher than £10,000 where the NHS would be prepared to make a payment to settle the case out of court were eligible for the pilot. It is understood that the number of cases actually mediated has been very low.

[2] M Gibbons (2007), *A Review of Employment Dispute Resolution in Great Britain*, DTI
[3] Available at http://www.acas.org.uk/index.aspx?articleid=1364
[4] Practice Direction No 2 2006
[5] http://www.scottishlegalcomplaints.org.uk/makingacomplaint.aspx

Housing disputes

10. The Private Rented Housing Panel, created on 3 September 2007 from the former Rent Assessment Panel, is obliged to consider the use of mediation in appropriate cases to assist in resolving disputes between private landlords and their tenants in relation to repairs.[6] A number of Panel members have been trained as mediators and offer mediation when the dispute is about repair issues.

Homelessness or potential homelessness disputes

11. Some community and family mediation services offer mediation in situations where homeless people or potentially homeless people want to retain or re-establish contact with family or friends. Sometimes the services work in partnership with organisations that provide support for homeless people.

Discrimination disputes

12. The Disability Conciliation Service (DCS) is an independent scheme set up to provide an alternative to court for complaints of discrimination under the Disability Discrimination Act 1995 Part III (consumer disputes) and Part IV (education). As of 2009, it was expanded to cover discrimination disputes in employment and to cover discrimination on the grounds of race, gender, religion and belief, and sexual orientation. The service is funded by the Equality and Human Rights Commission, and run by 'Mediation Works'.

Planning

13. In 2009 the Scottish Government published a *Guide to the Use of Mediation in the Planning System*, which aims "to help those involved in the planning system in Scotland to understand how mediation can be used to enhance the planning process." It gives advice about how to go about using mediation, identifies areas where it might be appropriate and provides examples of situations in which it has successfully been used.

Peer mediation in schools

14. Peer mediation is when school children and young people are trained to help other young people sort out their disagreements. These disputes can range from unkind behaviour to disagreements in the playground. Pupils who are trained to use mediation skills are called Peer Mediators. There are over 120 such schemes in primary and secondary schools and in one university in Scotland.

[6] The Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007 SSI 2007/173.

Annex B Research on mediation and other forms of ADR

Scotland – attitudes and awareness

15. In 1999 The Scottish Office published a study[7] of the attitudes and opinions of those involved in the ADR field. The study, completed in 1996, aimed to identify the nature and extent of ADR in Scotland at that time, to identify and describe areas of research and policy interest and to identify future research required in ADR. It concluded that there was, at that time, little activity as regards ADR in the commercial/consumer sphere, but a steady rate of court referrals to family mediation. There was support for a scheme of court referred mediation in non-family matters, but resistance to the idea that mediation should in any way be compulsory. The study suggested that gradual acceptance of and increase in the use of ADR could follow on education of the judiciary, as "gate keepers" into ADR, and increased education and publicity about ADR within the legal profession and the public.

16. A 2004 review commissioned by the Scottish Executive[8] came to some similar conclusions. It found that the use of mediation for civil justice disputes was scattered and diverse and that access to services in Scotland varied both geographically and according to the type of dispute. It also identified a need to raise public and professional awareness in order to widen use.

17. A study carried out on behalf of the Scottish Consumer Council in 2005[9] however, found that a majority of respondents of those sampled were aware of mediation, were able to correctly identify what it means and would consider using it to sort out a dispute. Respondents from middle age groups and from higher socio-economic groups were more likely to be aware of mediation and to say they would consider using it. Disputes with an employer or with a neighbour were the most likely situations in which mediation would be considered.

18. A study carried out by mruk research on behalf of the Scottish Government in 2007[10] also aimed to gather information on awareness and perceptions of mediation as a means of resolving civil disputes. The study found that the majority of people had heard of mediation and most seemed to be aware of what the term meant. Only a small proportion of people were found to have used mediation previously (7% of the sample), but almost 3 out of 5 (59%) said they would consider using it. A high proportion (84%) of those who had used it before said they were likely to consider doing so in the future. A lack of understanding of how mediation works was identified by the research as the greatest perceived barrier to using it.

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[7] R Mays and B Clark (1999), *Alternative Dispute Resolution in Scotland*, Scottish Office Central Research Unit

[8] F MacDonald (2004), *The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence*, Scottish Executive Legal Studies Research Findings No. 50/2004

[9] Scottish Consumer Council (2005), *Report of omnibus survey on public awareness and perceptions of mediation in Scotland*

[10] mruk research (2007), *Public Awareness and Perceptions of Mediation in Scotland*, Scottish Government Civil & International Analytic Team

Scotland - neighbour disputes

19. A study of neighbour disputes carried out for the Scottish Office in 1998,[11] which aimed to offer advice and guidance about the strengths and weaknesses of mediation, reported that there had been a rapid expansion in activity in neighbour dispute mediation. There had been a proliferation of mediation services being established, frequently on the "in-house" mode, where the service is run within a host organisation, such as local authority or housing association. The report noted that neighbour disputes and anti-social behaviour were a major challenge for agencies which have to deal with them. The legal remedies available were expensive and had serious consequences which meant that they were only appropriate for use in the most serious disputes or instances of nuisance or anti-social behaviour. The great majority of disputes did not warrant the use of legal sanctions and the report suggested that mediation could offer a potentially valuable addition to the available range of responses.

20. In 2003, the Scottish Executive published a comparison of the costs and effectiveness of mediation and legal remedies for tackling neighbour disputes and anti-social behaviour.[12] The study found that in most cases the presenting issue was noise and that mediation produced a high proportion of positive outcomes. Participants in mediation generally had a positive view of the process, even where it did not provide their desired outcome. The cost of mediation in these types of disputes was found to be significantly less than the potential cost of legal action.

Scotland - evaluation of mediation services

Edinburgh Sheriff Court

21. The In-Court Mediation Service in Edinburgh Sheriff Court was the subject of a formal evaluation commissioned by the Scottish Executive[13] The service had started life in 1995 as the Mediation Project, operating out of Edinburgh Central CAB and was linked in 1998 to the Edinburgh Sheriff Court In-Court Advice Service, which had been established the year before. The study found that the mediation service provided unrepresented court users in small claims and summary cause cases with an alternative to litigation and that disputes were settled as often by "arms-length" negotiation facilitated by the mediation co-ordinator as by a face-to-face mediation meeting. There was also a high settlement rate for those cases which did go to a mediation meeting, with almost all being concluded with an agreement between the parties. All the agreements were thought to have been honoured.

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[11] J Dignan and A Sorsby (1999), *Resolving Neighbour Disputes Through Mediation in Scotland*, Scottish Office Central Research Unit

[12] A Brown et al (2003), *The Role of Mediation in Tackling Neighbour Disputes and Anti-social Behaviour*, Scottish Executive Social Research Findings 167/2003

[13] E Samuel (2002), *Supporting Court Users: The In-Court Advice and Mediation Projects in Edinburgh Sheriff Court*, Scottish Executive Central Research Unit 2002

22. The Edinburgh Sheriff Court Mediation Service continues in operation and its report for the year to August 2007 records a settlement rate of 78% among the cases which proceeded to mediation. It also reports on feedback about the service from users, sheriffs, sheriff clerks and solicitors. The great majority of comments are very positive.

Aberdeen and Glasgow Sheriff Courts

23. Two pilot court-linked mediation projects were established by the Scottish Executive in Glasgow and Aberdeen sheriff courts in 2006 and ran for two years, coming to an end in July 2008. The pilots were established on the basis that the mediation service, which was provided by an independent contractor, would be made available for defended small claims, summary causes and ordinary causes. The service was free of charge to users where the value of the claim was £750 or less (i.e. the upper limit of small claims as it stood when the pilots started). For claims involving sums above £750, there was a sliding scale of fees, i.e. £75 for cases between £750 and £1500, £125 for cases between £1500 and £5000, and so on. Mediations were time-limited to a maximum of 3.5 hours for cases up to £30,000. About half way through the Aberdeen pilot it was agreed that mediation in summary causes would also be offered free of charge.

24. An evaluation of these pilot projects is currently being undertaken by Margaret Ross of Aberdeen School of Law and the final report of the evaluation is expected to be published in 2009.

England and Wales – evaluation of mediation services

Central London County Court 1998

25. At around the time of publication of Lord Woolf's *Access to Justice* report in 1996, a pilot mediation scheme was established by the judges in the Central London County Court (CLCC) for non-family civil disputes with a value of over £3000. An evaluation of the service, commissioned by the DCA and conducted by Hazel Genn, concluded that mediation was capable of promoting settlement in a wide range of civil cases when parties had volunteered to accept it and that it offered a process that parties to civil disputes on the whole find satisfying.[14] It found that mediation can promote and speed up settlement, but it was not clear to what extent it can save costs, while unsuccessful mediation can increase costs. The study noted that the disadvantages of normal litigation procedures appeared to provide much of the incentive for parties to settle during mediation, raising questions about the extent to which mediation was valued in its own right. It also identified a number of issues which required attention, including the training, quality control and accountablity of mediators.

[14] H Genn (1998), *The Central London County Court Pilot Mediation Scheme – Evaluation Report*, DCA

Commercial Court and Court of Appeal 2002

26. Genn subsequently carried out an evaluation of the English Commercial Court's practice of issuing ADR Orders in some commercial disputes and of the Court of Appeal's mediation scheme[15], drawing together her findings with the results of her evaluation of the CLCC scheme. She concluded that it appeared that *successful* ADR saves the likely cost of proceeding to trial and may save expenditure by promoting earlier settlement that might otherwise have occurred, whereas *unsuccessful* ADR can increase the costs for parties. The legal profession was found to remain very cautious about the use of ADR. The study suggests that considering whether to refer to cases to ADR on a case-by-case basis was likely to be more effective than a general invitation to try ADR at an early stage in the litigation process. This would mean that clear selection principles would need to be drawn up. The timing of an invitation to consider or a referral to ADR was also very important. The early stages of proceedings might not be the best time, and should not be the only opportunity, to consider using ADR.

Small Claims Mediation Schemes 2006

27. In 2006 the Department of Constitutional Affairs (DCA) published evaluations of three different pilot schemes providing mediation in small claims cases, in Manchester, Exeter and Reading.

28. The Manchester small claims pilot was set up by DCA to be run from April 2005 to May 2006 and was the subject of an evaluation report published in December 2006.[16] It followed on from a previous pilot scheme offering information and advice on mediation, and referrals to mediators, for cases in the fast-track and multi-track at the court (i.e. generally cases above £5,000). That mediation advice pilot was evaluated in a separate study in 2004-05.[17] In the Manchester scheme, the in-court mediation officer was a full-time employee of the DCA and as well as giving advice on the use of mediation, he made referrals to external mediation providers for fast-track and multi-track cases, and provided free, on-site mediation for small claims. The choice of whether to use the service was voluntary. Defended claims were allocated to the small claims track and had a hearing date set before they were referred to the mediation service. The case was not adjourned or stayed for the parties to consider or use mediation. The pilot was established to provide face-to-face mediation and most cases were handled that way in the first four months of the pilot, but the use of telephone-based facilitation became the predominant method used by the end of the pilot, with the mediator working with the parties separately over the telephone, sometimes over several days or weeks, to broker a resolution. This was a reflection of parties' preferences; both face-to-face and telephone-based processes were offered throughout the pilot. The largest category of claims involved debt/breach of contract/goods and services and the rate of settlement was 86% for the

[15] H Genn (2002) *Court-based ADR Initiatives for Non-family Civil Disputes: The Commercial Court and the Court of Appeal*, DCA
[16] M Doyle (2006), *Evaluation of the Small Claims Mediation Service at Manchester County Court*
[17] M. Doyle (2005), *Mediation Advice Service Pilot at Manchester County Court: Evaluation Report*, DCA

duration of the pilot. People who used the service expressed a high degree of satisfaction with it and all settlements achieved through mediation or telephone-based facilitation during the evaluation period were complied with.

29. The Reading Scheme, known as the Reading Small Claims Support Service (SCSS), offered an information and advice service to largely unrepresented parties in a small claim, and also gave parties the opportunity to work with the Small Claims Support Officer (SCSO) to pursue a settlement of their case without the need to go to a hearing. It ran for a year from June 2005 and an evaluation report was published in September 2006.[18] The evaluation suggested that the lower value cases dealt with by the service were more likely to achieve a settlement than the higher value cases. It appeared that some judicial time was saved during the pilot as a result of cases settling without the need for a hearing and the judiciary and court staff thought that the scheme had the potential for time to be saved in other ways e.g. if hearings were shorter because litigants were better prepared or if fewer hearings had to be adjourned because further evidence was required. The scheme was seen to bring 'added value' in other ways, for example interviewees reported that members of the public often find being involved in a small claims case extremely daunting and that the whole process may be very stressful. The SCSS's contribution to allaying some of those fears was considered to be very positive. Overall the service appeared to have achieved an extremely high level of user satisfaction.

30. The Exeter scheme had been set up in 2002 by Exeter County Court and the Devon and Exeter Law Society and offered free, time-limited mediation (the aim was that each mediation would take no more than half an hour) in small claims cases. It was evaluated over the period from June 2005 to May 2006 by researchers from Exeter University.[19] Most of the cases which were mediated were general debt or contract claims. The evaluation found that more than 3 out of 4 respondents knew nothing or very little about mediation and parties still arrived at the mediation expecting an adversarial process and in many cases some form of determination by an external individual or body. There was concern that some litigants were not aware of the purpose of the process and so were not able to give 'informed consent' to mediate. The service did seem to save some judicial time and where the cases settled it also saved parties' time. There was some concern about the training of the mediators (who were all members or associates of Devon and Exeter Law Society) with a third of parties saying that they felt under pressure to settle and of those, nearly a third saying that the pressure came from the mediator. However, most parties who had attended mediation were not unhappy with the process and only 8% said they would not want to take part in mediation in future.

[18] Craigforth (2006), *Evaluation of the Small Claims Support Service Pilot at Reading County Court*, DCA

[19] S Prince and S Belcher (2006), *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court*, DCA

31. DCA also commissioned an evaluation of a scheme which had been established in 2001 at Birmingham Civil Justice Centre. It offered mediation at the court in all types of claim where the sum in dispute was over £5,000 and in all housing disrepair cases regardless of the amount claimed. The court provided accommodation for mediations between the hours of 4.30pm and 7.30pm and arranged the introduction of a trained independent mediator. Fees, which were paid to the mediator or mediation organisation, varied according to the sum in dispute. A retrospective analysis of a sample of cases dealt with under the scheme from its inception until October 2004 was undertaken by researchers from the University of Westminster and their report was published in September 2006.[20] The study examined over 300 cases which had been stated for mediation, about half of which were contract/ debt/ sale of goods cases. About a fifth were landlord and tenant/disrepair cases, and a few (7%) were personal injury. The vast majority of cases had legal representation on both sides. Around two-thirds of the cases that had been mediated and completed had settled at mediation and just under 10% were structured to deal with contingencies, and included a range of possible options, which could not be ordered by the court.

32. Solicitors interviewed for the study identified costs savings as a major benefit of mediation; this also applied to cases which did not conclude at mediation but which were perceived to settle, due to clarification of issues, at an earlier stage than would otherwise have been the case. Other, more holistic benefits included the lack of a 'winner or loser' in mediation, a greater control of the process for parties and the possibility of preserving business relationships notwithstanding the dispute. Solicitors made few negative comments on the process and whilst they did report advising clients to refuse mediation, this was usually linked to the timing of mediation (most often said to be ideal once the parties had exchanged information about their respective cases) rather than the concept. Both solicitors and mediators cited the attitude of the parties as an important factor in assessing the suitability of a case for mediation.

33. Even where cases did not conclude at mediation, solicitors considered that the process had been a catalyst to the eventual settlement of the dispute, having provided an opportunity to begin a process of communication between the parties or to narrow the issues. Clients were said to be satisfied with the process despite the unsuccessful outcome and at the very least had not expended significant sums in using the scheme.

34. The study concluded that parties were overwhelmingly positive about the individual mediators conducting their mediations and most made positive comments about the process. All the defendants and almost half of the claimant respondents whose claims had concluded at mediation were satisfied with the

[20] L Webley *et al* (2006), *Evaluation of the Birmingham Court-based (Non-family)Mediation Scheme*, DCA

outcome. Overall, parties were in favour of using mediation again, whether or not their dispute had concluded at mediation.

Central London County Court ARM and VOL schemes 2007

35. Most recently, Hazel Genn and colleagues have conducted an evaluation of two mediation programmes in the Central London County Court.[21] One was an experiment in quasi-compulsory mediation which ran from April 2004 to March 2005, (the ARM pilot) and the other was the voluntary mediation scheme (the VOL scheme) which was the subject of the earlier (1998) study. The study comes to conclusions on the effect that automatic referral and judicial pressure have on the uptake of mediation, on the experiences of users and whether mediation can offer savings to the justice system in administrative and judicial time.

36. The ARM scheme was inspired by the Ontario mandatory mediation scheme but its results were probably influenced by the decision in the *Halsey*[22] case, discussed below, in which Lord Justice Dyson expressed the view that although the court may strongly encourage parties to go to mediation, to require them to do so may be an infringement of their rights under Article 6 of the ECHR. In the ARM pilot, over 1,200 defended civil cases were randomly referred to mediation, slightly over four fifths of them personal injury cases. There was however a high objection rate (81%), especially among personal injury cases. By the end of the evaluation, less than a quarter of ARM cases had a mediation appointment booked and only 14% of those originally referred to mediation had been subject to a mediation.

37. Defendants in the ARM pilot were more likely than claimants to object to referral in both personal injury (PI) and non-PI cases. In non-PI cases objections to ARM were raised less often, with no objection to referral being raised in 45% of such cases. Overall there was a downward trend in the settlement rate of mediated ARM cases, from a rate of 69% among cases referred in May 2004, to 38% for cases referred in March 2005. The settlement rate over the course of the year was 55% where neither party objected to mediation, but only 48% where the parties were persuaded to attend having both originally objected to the referral.

38. The evaluation of the VOL scheme also revealed the reluctance of PI practitioners to engage in mediation, with only 40 of over 1000 cases mediated between 1999 and 2004 being personal injury cases. It also showed a decline in the rate of settlement at mediation, from 62% in 1998, to below 40% in 2000 and 2003. The rate did not rise above 50% after 1998.

39. In the ARM pilot, those whose mediations did not settle the dispute generally felt that it had resulted in an increase in legal costs (by around £1,000 to £2,000), but where there was settlement it was considered that costs had been saved, especially

[21] H Genn et al (2007), *Twisting Arms: court referred and court linked mediation under judicial pressure*
[22] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576

when a trial was avoided. Similar views were expressed by those taking part in the VOL scheme. Factors contributing to successful mediation in the ARM pilot were thought to be the willingness of the parties to negotiate and compromise, the contribution of legal representatives and the skill of the mediator.

40. In the VOL scheme, parties and lawyers were generally positive about their mediation experience. Parties valued the informality of the process, the skill of the mediator, and the opportunity to be fully involved in the settlement of the dispute. Factors which worked against settlement included inappropriate court direction, unwillingness to compromise, the intransigence of the opposing side, insufficient time, and failings on the part of the mediator.

41. Overall the study concludes that the following lessons can be taken from the evaluation of these two schemes:

- The motivation and willingness of parties to negotiate and compromise is critical to the success of mediation. Facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly more efficient than blanket coercion to mediate.

- Given the persistent rejection of mediation in personal injury cases, it is questionable whether it is worth investing resources in attempting to reverse this view.

- Despite increasing familiarity with mediation, the legal profession as a whole remains to be convinced that it is an obvious approach to dispute resolution. It may be difficult to change this unless incentives for legal advisers to recommend mediation to their clients can be identified.

- Efficient and dedicated administrative support and an environment conducive to settlement are important to the success of court-based mediation schemes.

- If the courts wish to increase consumer demand for mediation, they will need to find imaginative ways of communicating directly with disputing parties. Demand might be created by means of education, encouragement, facilitation, and pressure accompanied by sanctions, or incentives. An effective mediation-promotion policy might combine education and encouragement through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual cases by a judiciary trained to assess which cases are appropriate for referral.

Annex C Policy on mediation in England and Wales

General

42. Lord Woolf's *Access to Justice* final report, published in 1996, described what he referred to as "the new landscape" of civil litigation. Features of the landscape included that litigation would be avoided wherever possible and that when it did proceed it would be less adversarial and more co-operative.[23] He proposed that information on sources of ADR would be provided at all courts and that the court would encourage the use of ADR at case management conferences and pre-trial reviews. It would also take into account whether the parties had unreasonably refused to try ADR or behaved unreasonably in the course of ADR. Lord Woolf's review of the English civil justice system and his report have formed the background to the establishment and evaluation of court-linked mediation services in various courts in England and Wales over the last 10 years.

Court-linked schemes

43. The Ministry of Justice have taken the view that the in-house mediation service at Manchester County Court, described above, had been shown to be the most effective for lower value claims, demonstrating the highest levels of both settlement and customer satisfaction. Following the success of the Manchester pilot, throughout 2007/08, the service was rolled out across England and Wales - so that now the whole of England and Wales is served by the small claims mediation service. The mediators are civil servants employed by the Ministry of Justice and have mostly been recruited from the ranks of HMCS staff, usually at court manager level. They receive training and are provided with administrative support. They deal with small claims cases (which have an upper limit of £5000), such as disputes involving goods and services and private disputes between individuals. They do not deal with housing or undefended debt negotiations.

44. In its report for 2007/08 on the effectiveness of its commitment to use alternative dispute resolution,[24] the Ministry of Justice reported that during the first year (April 2007 to March 2008) of its small claims mediation service, 3,745 mediations were conducted, of which 2527 settled, a settlement rate of 67.5%. By far the largest proportion of small claims mediations (87%) took place over the phone. The average length of time from date of allocation to date of settlement was 5.2 weeks, as compared with the 14 weeks that it normally takes from allocation to a small claims hearing. 98% of users said they were satisfied or very satisfied with the professionalism and helpfulness of the mediators, with 94% saying that they would use the service again.

45. For higher value claims, above £5000, a low-priced time-limited mediation service via the National Mediation Helpline is available. The August 2008 edition of

[23] Lord Woolf (1996), *Access to Justice – Final Report*, Section 1, para 9
[24] The Annual Pledge Report 2007/08, available on the Ministry of Justice website.

the Ministry of Justice's *Out of Court* newsletter reported that of the cases referred to the Helpline in the calendar year 2007, 787 mediations were conducted and there was a success rate of 66%. The helpline is broken down into geographical areas and works with panels of mediation providers who have obtained accreditation on a system developed by the Civil Mediation Council. They agree to go on a rota and provide a service on a fixed-fee basis. It is essentially a "cab-rank" system, so people who use it are not offered a choice of possible providers.

46. The Ministry of Justice's policy is to mainstream mediation into the work of the courts, so that small claims mediation becomes an integral part of the court process, and the larger courts in particular are encouraged to refer higher value cases to the National Mediation Helpline. The case allocation questionnaires for both small claims and fast track and multi-track cases have recently been updated to reflect this policy. Both questionnaires, which have to be completed by both the claimant and the defendant, have an initial section entitled "Settlement". The small claims form asks whether the person completing the form would like to use the free small claims mediation service provided by HMCS and requires a tick in either "Yes" or "No". The fast and multi-track form starts with a reminder that under the Civil Procedure Rules parties should make every effort to settle their case before the hearing and that the court will want to know what steps have been taken. Legal representatives have to confirm that they have explained to the client the need to try to settle, the options available and the possibility of costs sanctions if they refuse to try and settle. There is a box on the form which can be ticked and the court will arrange a mediation appointment.

47. In January 2008 the Judicial Studies Board published a Civil Court Mediation Service Manual,[25] for which the Master of Rolls, Sir Anthony Clarke, provided the Foreword. The aim of the Manual is to provide "a valuable reference tool to help guide staff and judiciary through the 'nuts and bolts' issues of supporting a mediation service for small claims as well as part and multi-track disputes."

The attitude of the judiciary in England and Wales towards ADR

48. The judiciary in England and Wales have in recent years generally demonstrated a very positive attitude towards ADR. Lord Woolf stopped short of recommending compulsory mediation in his *Access to Justice* Report, on the grounds that it was wrong in principle to deny citizens their entitlement to seek a remedy from the civil courts. However, in his judgment in the case of *Cowl and Others v Plymouth County Council* [2001] EWCA Civ 1935, in which he refused permission for an application for judicial review to go ahead, he suggested that rather than commit themselves to the costs involved in litigation, both parties should have considered the possibility of mediation. He commented that applicants who were complaining about the council's decision had not paid enough attention to what he called the "paramount importance of avoiding litigation wherever possible." He suggested that in similar cases, courts might need to hold hearings "at which the parties can

[25] Available on the Judicial Studies Board website: http://www.jsboard.co.uk/publications.htm

explain what steps they have taken to resolve the dispute without the involvement of the court." He went on to say: "Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and the public, and saved time, expense and stress . . . . Today, sufficient should be known about Alternative Dispute Resolution to make the failure to adopt it, in particular when public money was involved, indefensible."

49. The case of *Dunnet v Railtrack* [2002] EWCA Civ 302 made it clear that, in the light of the requirements of the the Civil Procedure Rules,[26] parties and their legal advisers have to recognise that they need to consider ADR, especially where this has been suggested by the court itself. Flatly refusing to consider ADR, as Railtrack did in this case, means that costs may not be given to the winning party.

50. The *Halsey* judgement[27] however seemed to draw back slightly from continuing the drive towards very strong encouragement to use ADR that seemed to be emerging from these two cases. In the *Halsey* case, two important principles concerning the voluntary nature of mediation were established. Firstly, compulsion to engage in mediation would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6 of the European Convention on Human Rights. Secondly, the court can decide to deprive successful parties of some or all of their costs on the grounds that they have refused to agree to ADR, but that it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. The burden of justifying a departure from the general rule is on the unsuccessful party to show that the successful party acted unreasonably in refusing to agree to ADR.

51. There has been some criticism of *Halsey* judgement with, for example, Lightman J stating in a speech delivered in 2007 that both of the principles established in *Halsey* are "unfortunate and mistaken."[28] Firstly, according to Lightman J, the Court of Appeal "…appears to have been unfamiliar with the mediation process and confused an order for mediation with an order for arbitration or some other order that places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most, it merely imposes a short delay to allow an opportunity for settlement."[29] Secondly, he stated that the Court appeared to have been unaware that ordering parties to proceed to mediation regardless of their wishes happens elsewhere in the Commonwealth and the United States and, indeed, in Britain in matrimonial property disputes in the Family Division.

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[26] Rule 1.4 of the CPR requires the court to further the overriding objective "by actively managing cases"; active case management includes (1.4.2 (e)) "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure". Parties are required by Rule 1.3 to help the court to further the overriding objective.
[27] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576
[28] G Lightman (2007), 'Breaking down the barriers' *The Times* July 31 2007. Available at http://business.timesonline.co.uk/tol/business/law/article2166092.ece.
[29] *Ibid.*

52. The Lord Chief Justice of England and Wales, Lord Phillips, gave a speech in India on 29 March 2008 in which he also commented on what he referred to as Lord Justice Dyson's "weakening" of the costs sanction by saying that the burden was on the party seeking costs to show that the other party had unreasonably refused to resort to mediation. In Lord Phillips' view "it is a pity that [Lord Justice Dyson] said what he did about burden of proof. There is much to be said for the robust attitude that a party who refuses to attempt mediation should have to justify his refusal".

53. Lord Phillips' speech was followed by a speech by the Master of the Rolls, Sir Anthony Clarke, at the Civil Mediation Council Conference on 8 May 2008, in which he suggested that the decision in *Halsey* was "overly cautious" on the question of whether compulsion to engage in mediation would be an infringement of Article 6 of the ECHR. Sir Anthony noted out that a number of European States who are signatories to the Convention have introduced compulsory ADR schemes without any successful Article 6 challenges, and that the EU Directive on Mediation envisages the possibility of "national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede the right of access to the judicial system." In his view the European approach "appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of Article 6".

Annex D Mediation and other forms of dispute resolution in other jurisdictions

Europe

54. The European Judicial Network[30] gives summaries of the use of mediation and other forms of dispute resolution in states which are members of the European Union. Many states list conciliation, mediation and arbitration as possible options for resolving disputes within their jurisdictions, and in some the rules of court procedure allow the judge to attempt to get the parties to settle the dispute or to refer it to a conciliation or mediation process. The following descriptions of the position in some European countries have largely been compiled from the information provided on the EJN.

Germany

55. In Germany, there are many "conciliation boards" in particular sectors, such as the motor or building trades, and for professions such as lawyers, accountants and architects, which deal with the amicable resolution of consumer-related conflicts before they reach the courts. Conciliation is also used in employment disputes and mediation in family disputes. Mediation procedures are also used in Germany in cases relating to public law or administrative actions, especially in environmental law. In addition, under provisions in the Code of Civil Procedure, a federal state can require by law that an action shall only be brought before a court once an attempt to achieve consensus has been made at a recognised conciliation office. This applies to disputes relating to proprietary rights where the value in dispute does not exceed 750 euros as well as to certain defamation disputes and disputes relating to the law concerning neighbours and the interests of adjoining owners. An action brought without an attempt to reach a consensus would be dismissed as being inadmissible. Not all the federal states have adopted this option.

Spain

56. In the civil courts in Spain, for proceedings involving amounts exceeding €3 000, there is a compulsory conciliation procedure subsequent to submitting the application and the response by the defence. This conciliation procedure is led by the judge, who is obliged to promote efforts to obtain an agreement. The court proceedings go ahead only if this does not succeed.

France

57. In France, mediation may take place either out of court or in the course of legal proceedings. In the latter case, it is regulated by the code of civil procedure and proceeds under the control of the judge. Any judge to whom a dispute is referred may, with the consent of the parties, have recourse to mediation. The mediation

[30] http://ec.europa.eu/civiljustice/adr/adr_net_en.htm#1.

process must not exceed three months and its confidentiality is guaranteed. The mediator's remuneration is set by the judge and is the responsibility of the parties, who must make a provisional payment at the start of the procedure, with the exception of impecunious parties who are eligible for legal aid. The court of first instance and the local court may also, with the consent of the parties, appoint a conciliator. Conciliation is a free service. There are two mechanisms:

- A preliminary attempt at conciliation before the court of first instance and the local court: the applicant applies orally or in writing to the court clerk, who calls the parties together by means of an ordinary letter. If the conciliation is successful, the report, signed by the parties, the judge and the clerk of the court, is legally binding. In the absence of conciliation, the case may either be heard immediately if the parties agree, or may go through an ordinary court process. In practice conciliation hearings are held before a judge in most courts of first instance.

- Conciliation ordered during the legal proceeding with the consent of the parties: the court may, with the consent of the parties, appoint a conciliator. The conciliator sets the duration of the attempt at conciliation, which may not exceed one month but which may be renewed once only. The conciliation process is completely confidential. In the event of a memorandum of agreement being produced, it must be submitted for the judge's approval. In the event of failure, the proceedings resume their normal course once.

58. In France the law regulating legal proceedings also allows the court to order the parties to meet a conciliator to inform them about the aims and procedures of the conciliation process, but the parties' engagement in the actual process is always optional.

The Netherlands

59. The Ministry of Justice of the Netherlands has a general policy of supporting mediation as a dispute resolution option and has taken action to provide incentives in order to promote awareness of and confidence in mediation.

60. The general policy of the Ministry of Justice in the Netherlands in recent years has been to provide incentives in order to promote awareness of and confidence in mediation. In a speech to a meeting of mediation experts in June 2006, the Minister of Justice said that "in the coming years, the focus will be on providing more information and case-by-case referral to mediation," with referral facilities being introduced at the courts and the legal service counters (which are the successors in the Netherlands to legal aid offices).

61. A mediation referral system is in place in all the courts in the Netherlands. Referral can take place at any time during the course of the cases and can be on the initiative of the judge or the parties. Each court has one or more mediation officers

who act as advisers and liaison officers for the judges and others involved in mediation and also play an important role in monitoring the quality of the mediation. The first two and a half hours with the mediator are free of charge to the parties (the mediator is paid 200 Euros for this period by the Ministry of Justice) and thereafter the parties pay the mediator's fees jointly. The mediators have to meet quality criteria which were adopted in consultation with the Netherlands Mediation Institute and the Council for the Judiciary. A project[31] to monitor the court-linked mediation facilities in the Netherlands reported in December 2006 that a written invitation to mediate at an early stage of the case had a higher success rate than a referral later at a hearing, because the parties opted for it of their own volition. A specific case-related invitation to consider mediation, accompanied by a self-assessment test, which asks the party to think about their personal motives for or against mediation, was found to have the highest chance of success. The average success rate of the cases referred to mediation (approximately 3,000) was over 60% at the end of the project period (March 2000 – April 2005).

62. The Legal Counters in the Netherlands also have a mediation referral facility. The Counters began to be established in 2005 as the principal method of delivering legal aid, replacing a system where there had been a number of separate regional legal aid boards. The Legal Counters offer a first-stop legal advice service, where the aim is for staff to help clients to work out what the legal nature of their problem or dispute is and what the options are for tackling it. A report on referrals by the Legal Counters to mediation in 2006 found that at least partial agreement was the outcome of 79% of all referred mediations.

Jersey

63. Mediation is firmly established as a part of the procedure for small claims before the Jersey courts. At the first hearing of the proceedings and at any subsequent hearing, in relation to any disputed proceedings where the value of the matter in dispute does not exceed £5,000, the Court may direct that the proceedings be adjourned to a mediation and directions hearing.[32] The date, place and time for the mediation will be fixed immediately by the Court and will usually take place within ten days (on a Friday morning). The mediation will be conducted by a Relief Magistrate (Mediator) who, in the event of the dispute not being resolved, will not thereafter take any further part in the proceedings. If no agreed settlement is reached or, in the view of the Mediator, will be reached between the parties within a reasonable time, the Mediator may then immediately proceed to a directions hearing, at which he will give such procedural directions as will be necessary in order to prepare the case for trial.

[31] http://www.gemme.eu/spip.php?rubrique262
[32] Information obtained from website of Jersey Citizens Advice Bureau, http://www.cab.org.je/

Ireland

64. The District Court in Ireland operates a small claims procedure which is applicable in cases with a value of up to €2,000.[33] The process allows parties to a dispute to resolve the issues between them by mediation through a District Court clerk, who for this purpose is called the Small Claims Registrar. These court officials settle many cases through mediation without having to list the case for court. Where possible, the registrar will negotiate a settlement without the need for a court hearing. If the matter cannot be settled the registrar will bring the claim before the District Court. The small claims procedure operates an online dispute resolution procedure where claims can be filed online. The statistics in the Court Service annual report show a fairly high settlement rate. Applications under the Small Claims procedure increased by almost 25% in 2007 to 3,734. Over 50% of all the claims finalised were settled by the Small Claims Registrar with only 33% referred to court.

65. Part of the current programme of work of the Law Reform Commission in Ireland is to examine, and explore reform options for, the main processes of alternative dispute resolution and associated key principles. It issued a consultation paper in August 2008[34] which reached a number of preliminary conclusions, including the recommendation that "in civil claims generally, courts should be permitted, either on their own motion or at the request of a party to such claims, to make an order requiring the parties to consider resolving their difference by mediation or conciliation."[35] It also recommended that a pilot court-annexed mediation scheme should be established in the District Court, based on the voluntary participation of the litigants.[36] The Commission's consultation paper also discusses the possible use of mediation in medical negligence cases[37] and notes that although it will not be suitable in every medical case, it may be especially suitable where parties seek redress that is not available through the courts, for example, an apology and that mediation can offer an opportunity to express the emotional aspects of the dispute.

66. Outwith the court system in Ireland, the PRTB Dispute Resolution Service, which replaces the jurisdiction of the Circuit Court in relation to the adjudication of residential landlord and tenant disputes, operates a two-stage dispute resolution system. Stage 1 consists of either mediation or adjudication. Stage 2 is a hearing by a Tenancy Tribunal. However, uptake of mediation has been disappointing, at only 8%.

[33] The Irish Law Reform Commission has provisionally recommended that this be raised to €3000 – see paragraph 8.61 of its consultation paper on ADR, referred to below.
[34] Available at http://www.lawreform.ie
[35] Paragraph 3.92 of the Law Reform Commission's consultation paper on ADR
[36] Paragraph 3.98
[37] Chapter 6

European Union

67. In May 2008, the European Union adopted a Directive on certain aspects of mediation in civil and commercial matters. The Directive seeks to further the use of mediation by making certain legal rules available within the legal systems of the Member States. These rules cover the areas of confidentiality of the mediation process and of mediators as witnesses, enforcement of agreements for settling disputes as a result of mediation, and the suspension of the running of periods of prescription and limitation of actions while mediation is in progress. The Directive also encourages the training of mediators and the adoption of codes of conduct to ensure the quality of mediation throughout the European Union. The Directive applies only in cross-border disputes, but the preamble states that "nothing should prevent Member States from applying such provisions also to internal mediation processes."

Australia

68. In Victoria, Australia, relatively few civil disputes are resolved by judicial decision. Improving ADR by facilitating greater and earlier use of ADR in the civil justice system is part of government policy at both state and federal levels.[38]

69. The Victorian courts refer cases to mediation, pre-hearing conferences, conciliation and arbitration although mediation is the main form of ADR used. The Supreme, County and Magistrates' Courts have the power to order a proceeding or any part of a proceeding to mediation with or without the consent of the parties.

70. Court officers in Victorian courts play an important role in facilitating the resolution of pre-trial issues and the early settlement of cases, including through court-conducted mediation and conferences. This presently occurs at both the trial and appellate levels. The Magistrates' Court offers two forms of alternative dispute resolution: pre-hearing conferences and mediation. The former are conducted almost exclusively by registrars and deputy registrars. They are offered without additional cost to the parties at the court's premises.[39]

71. In its Civil Justice Review Reprt, the Victorian Law Reform Commission has indicated that courts should have express power to compulsorily refer parties to a wide range of ADR options, including processes such as arbitration, which may have a binding outcome. However, in view of possible legal constraints, the preferable course is for the court to (a) retain jurisdiction over any matter referred to any ADR process, including arbitration and (b) retain responsibility for the final adjudication of the matter if it is not resolved in a manner consented to by the parties.

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[38] Victorian Law Reform Commission (2008), *Civil Justice Review Report*

[39] According to the Magistrates' Court submission, a pre-hearing conference will usually be listed within 2 months of a defence being filed: Submission CP 55.

72. Australia has a long tradition of promoting ADR for family disputes. The Federal government issued a Justice statement in May 1995 in which it committed itself to making dispute resolution services more widely available. Funding was allocated to 24 family mediation services throughout Australia over a four-year programme. Funding was also allocated to expand community based family mediation services. A National Alternative Dispute Resolution Advisory Council (NADRAC) was established in November 1995 to develop a comprehensive policy framework for the expansion of alternative dispute resolution.[40] It published an Issues Paper on Alternative Dispute Resolution in the Civil Justice System in March 2009, following a request from the Attorney-General that NADRAC enquire into incentives that would encourage greater use of alternative dispute resolution (ADR), and what barriers need to be removed.

73. Most jurisdictions in Australia have provision for the mandatory referral of parties in legal proceedings to ADR processes. However, there is still considerable controversy over whether matters should be referred, in the absence of the consent of the parties, to processes such as arbitration and other forms of ADR where the outcome may be binding without a settlement agreement between the parties.

New Zealand

74. In New Zealand the Disputes Tribunal is reported to provide a quick, inexpensive, informal and private way to help resolve a wide range of civil disputes. It deals with disputes up to $7,500, or $12,000 if everyone involved agrees, in cases such as provision of goods and services, loss or damage to property or disputes about HP agreements. Cases are decided by a "referee" and no lawyers are allowed at the hearing. The referee's ruling is binding and can, if necessary, be enforced through the courts.

75. In March 2004 the New Zealand Law Commission published a report[41] which made 160 recommendations aimed at improving the way the New Zealand court system works. The Commission had "no doubt that mediation has much to offer people who have general civil disputes of low value. A low cost service would offer satisfactory, speedy and cheap resolution of disputes, many of which may be of a 'community' or neighbourhood nature, and would assist to keep disputes out of the court system. Such a broadly available service could also educate users on the benefits of mediation, and lead to the development of skills that may help litigants resolve their own disputes in the future."[42] In relation to higher value cases, the Commission thought that it would be possible to design and manage a court-mandated mediation rule in which "party autonomy can be accommodated." It concluded that "the benefits offered in terms of the speedier resolution of disputes, greater choice and satisfaction for many litigants, and savings to the court system

[40] See www.nadrac.gov.au
[41] New Zealand Law Commission (2004), Report 85, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*,
[42] *Ibid*, Part 2, paragraph 123,

warrant the introduction of a court-mandated mediation rule."[43] The Commission made the following specific recommendations:

- One organisation should take responsibility for coordinating all state-managed mediation services to ensure they remain accessible and meet high standards. (Recommendation 36)

- Mediation should be available through the coordinated service for a small fee, to parties with general civil disputes under $50,000 (i.e. within the limit of the jurisdiction of the Community Court). It should not be necessary to file a claim in court in order to access the service, and the Community Court would not be able to order parties to attempt mediation. (Recommendation 37)

- There should be a presumption that cases filed on the standard case management track in the proposed Primary Civil Court and the High Court will go to mediation before the 13th week after filing. The judge should have discretion to excuse parties from mediation, or to allow the parties to delay mediation. (Recommendations 38 and 39) [44]

Canada

76. A mandatory mediation programme was established in Ontario in the courts of Ottawa and Toronto in 1999, and has now been extended to Windsor. The programme applies to all civil cases that are defended and subject to cases management under the Ontario Rules of Civil Procedure. Family cases, class actions and small claims are among the types of case excluded from the programme. A mediation session has to take place within 90 days after the first defence has been filed, unless the court orders otherwise. At least 7 days before the mediation session, every party has to prepare a statement identifying the factual and legal issues in dispute, briefly setting out the position and interests of the party making the statement and attaching any documents that the party considers of central importance in the action. If a party fails to comply with these requirements, or fails to attend the mediation, the mediator has to cancel the session and immediately file with the mediation co-ordinator a certificate of non-compliance. The parties, and their lawyers if the parties are represented, are required to attend the mediation session unless the court orders otherwise.

77. An evaluation[45] of the mandatory mediation programme, concluded that it could be generally regarded as a successful addition to the case management and

[43] *Ibid*, paragraph 133

[44] In its response to the Law Commission's Report, the New Zealand Government said that it had decided not to progress recommendations 36 and 37 specifically, although it did agree that there was merit in exploring ways to improve co-ordination of state-managed mediation services. In relation to Recommendation 38, the Government thought that there were preferable options for promoting the use of mediation than the recommendations proposed by the Law Commission and directed the Ministry of Justice to further explore and report back with options on how to do so (including appropriate incentives and increased awareness of the availability and benefits of mediation).

[45] R Hann and C Baar (2001), *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1)*, Ontario Ministry of the Attorney General.

dispute resolution mechanisms available through the Ontario Superior Court of Justice in both Toronto and Ottawa. The evaluation considered that there was strong evidence that:

- Mandatory mediation under the Rule had resulted in significant reductions in the time taken to dispose of cases.
- Mandatory mediation had resulted in decreased costs to the litigants.
- Mandatory mediation had resulted in a high proportion of cases (roughly 40% overall) being completely settled earlier in the litigation process –with other benefits being noted in many of the other cases that do not completely settle.
- In general, litigants and lawyers expressed considerable satisfaction with the mediation process.
- Although there were at times variations from one type of case to another, these positive findings applied generally to all case types – and to cases in both Ottawa and Toronto.

USA

78. In 1998 the US Congress passed the Alternative Dispute Resolution Act, under which each federal district court is to: devise and implement its own alternative dispute resolution program; encourage and promote the use of alternative dispute resolution in its district; require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation; and provide litigants in all civil cases with at least one alternative dispute resolution process. The Act allows federal district courts to use a broad range of ADR processes, defined as "any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration." Successive US Presidents have encouraged the use of ADR in federal government and there is an Office of Dispute Resolution to co-ordinate the use of ADR in the Department of Justice.

79. One study comparing litigation and ADR in US Federal Government litigation indicates that ADR can save both time and costs and result in outcomes that are not significantly different from what litigation would have produced. The study found that 65% of cases settled when ADR was used. There was a greater settlement rate when ADR was used voluntarily than when it was mandatory (71% as compared with 50%). The cases examined were handled by Assistant US Attorneys, who were asked to estimate savings in time and fees. The study concludes that ADR has the potential to improve dispute processing without sacrificing the quality of justice. [46]

[46] L Blomgren Bingham et al (2009), 'Dispute Resolution and the Vanishing trial: Comparing Federal; Government Litigation and ADR outcomes', *Ohio State Journal of Dispute Resolution*

Annex E Code of Practice for Mediation in Scotland

Adopted by the Board of the Scottish Mediation Network on 19.11.08

Preamble

This Code is intended to form a baseline for the conduct of all forms of mediation in Scotland. It is expected that the different strands of mediation will, if they have not already done so, develop complementary and more detailed guidance.

Definition of mediation

Mediation is a process in which disputing parties seek to build agreement and/or improve understanding with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves.

Voluntary participation and self determination

A mediator shall recognise that mediation is based on the principle of voluntary participation and that it is the parties, rather than the mediator, who determine the outcome.

Impartiality and independence

A mediator shall remain impartial and independent. If a mediator becomes aware of any reason which may diminish their impartiality or independence, they shall disclose this to the parties at the earliest opportunity and withdraw from the mediation unless the parties do not wish them to do so.

Conflicts of Interest

A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator whether before or during a mediation and shall withdraw from the mediation unless the parties do not wish him/her to do so.

Competence

A mediator shall be responsible for undertaking sufficient training, supervision and continuing professional development to maintain necessary mediation skills. A mediator shall mediate only when she/he believes that he/she has the necessary skills to carry out the mediation.

Confidentiality

Confidentiality in mediation is important to encourage all participants to speak truthfully and candidly, and to enable a full exploration of issues in dispute. Unless compelled by law, or with the consent of all the parties, a mediator shall not disclose any of the information given during the mediation process.

Understanding of mediation

A mediator shall ensure that the parties understand:

- the purpose and procedure of the mediation;
- the role of the parties and the mediator;
- any fee arrangement;
- the obligation of confidentiality.

Advertising and solicitation

In advertising or offering services, mediators shall not guarantee settlement or promise specific results. All information provided by mediators about their education, background, mediation training and experience shall be accurate.

Gifts and favours

A mediator must not accept from or exchange any gift or favour with any party in any mediation. A mediator must use judgement that reflects the high ethical standards which mediation requires.

Discrimination

People should always be treated with respect and without discrimination.

Complaints and Professional Indemnity Insurance

A mediator shall provide information about the process for handling any complaint made about their conduct or service, and about any professional indemnity insurance cover they may have.

ANNEX TO CHAPTER 8 FACILITATING SETTLEMENT

Annex A: Comparative Analysis of the Use of Pre-Action Protocols in Other Jurisdictions

England and Wales

1. There are now ten pre-actions protocols in force in England and Wales covering personal injury, clinical negligence, construction and engineering disputes, defamation, professional negligence, judicial review, disease and illness, housing disrepair, rent arrears and mortgage arrears.

2. The Civil Justice Council, in a Consultation Paper published in 2008,[1] invited comments on proposals to introduce a general pre-action protocol that would be used in those cases to which subject-specific pre-action protocols did not apply. It also put forward proposals to amend the Practice Direction on Protocols, which sets out detailed steps which each of the parties to a dispute is expected to take in cases not covered by a protocol. In its Report summarising the responses to the consultation,[2] the Civil Justice Council confirmed that there was a general acknowledgement that streamlining and simplifying the pre-action process is desirable. However, the majority of respondents (75%) were opposed to the idea of a General Pre-Action Protocol. The clear consensus was that the proposals sought to impose an overly prescriptive and rigid framework that would be inappropriate if it were to apply to a vast range of disputes. The prevailing view expressed was that creating a 'one size fits all' protocol for situations where there is no specific protocol might give rise to more problems than solutions.

3. In April 2009 a new Practice Direction on Pre-Action Conduct[3] was added to the CPR, describing the conduct the court will normally expect of the prospective parties prior to the start of proceedings. The court will expect the parties to have complied with the Practice Direction or any relevant pre-action protocol. When considering compliance the court will –

1) be concerned about whether the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with minor or technical shortcomings;
2) consider the proportionality of the steps taken compared to the size and importance of the matter;
3) take account of the urgency of the matter. Where a matter is urgent (for example, an application for an injunction) the court will expect the parties to comply only to the extent that it is reasonable to do so.

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[1] Civil Justice Council (February 2008), *General Pre-Action Protocol and Practice Direction on Pre-Action Protocols: Consultation Paper*
[2] Civil Justice Council (October 2008), *General Pre-Action Protocol and Practice Direction on Protocols: Response to Consultation*
[3] Available at http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm

The court will look at the overall effect of non-compliance on the other party when deciding whether to impose sanctions.

4. The Ministry of Justice published a consultation paper "Case track limits and the claims process for personal injury claims" on 20 April 2007.[4] The second part of that paper invited comments on proposals aimed at speeding up the claims process, and reducing unnecessary costs and delays. The proposed new claims process provides early notification of a claim to defendants/insurers; promotes early admissions of liability and settlements and removes duplication of work from the process. The Response to the Consultation was published on 21 July 2008.[5] Suggestions were made as to how the proposed new claims process could be improved. The Civil Procedure Rule Committee has been asked to consider draft rulers, practice directions and pre-action protocols as appropriate, to implement the new claims process.

Northern Ireland

5. The Civil Justice Reform Group, formed in 1998, was tasked with reviewing procedures in Northern Ireland for the administration of civil justice and making recommendations as to how the system could be developed so as to make it as accessible, economical and efficient as possible. The Group attempted to provide for a new legal landscape with identical features to that proposed by Lord Woolf but moulded to complement and encompass the existing strengths of the Northern Ireland civil justice system. Of all of Lord Woolf's recommendations, the Group considered the introduction of pre-action protocols to have the greatest potential for revolutionising the civil justice system. It its final report, published in June 2000, the Group therefore recommended that pre-action protocols should be prescribed for use in certain categories of proceedings in both the County Courts and the High Court.[6]

6. A pre-action protocol for the resolution of claims under the Inheritance (Provision for Family and Dependants)(Northern Ireland) Order 1979 came into force on 12 September 2005. More recently a pre-action protocol for personal injury litigation commenced in the High Court of Justice in Northern Ireland's Queen's Bench Division was introduced on 1 April 2008. The Lord Chief Justice's Office has announced that a pre-action protocol on mortgage repossession cases will take effect from 5 October 2009. It considers that 'a relatively flexible approach' should be taken at present in relation to compliance.

[4] Ministry of Justice (2007), *Case track limits and the claims process for personal injury claims: Consultation Paper*

[5] Ministry of Justice (2008), *Case track limits and the claims process for personal injury claims: Response to Consultation*

[6] The Civil Justice Reform Group (2000), *Review of the Civil Justice System in Northern Ireland - Final Report*

Ireland

7. There is no pre-action protocol in force for personal injury litigation in Ireland since all personal injury cases have to be submitted to the Personal Injuries Assessment Board (PIAB) for assessment before legal proceedings may be commenced.

New Zealand

8. The New Zealand Law Commission has observed that pre-action protocols are used in the United Kingdom to outline the steps parties should take to obtain and provide information about a prospective legal claim.[7] Although it recognised that there is evidence that the protocols have worked well in the United Kingdom to promote a culture of openness and cooperation and to encourage settlement, it noted that there are also indications that they have to a degree increased costs by causing a 'front loading' of expenses. It considered that early exchange of information should happen in New Zealand as a matter of good practice, and therefore did not recommend the introduction of pre-action protocols in New Zealand until there is clear evidence that the additional costs involved are not an impediment in themselves.

Canada

9. Pre-action protocols do not appear to be a standard feature of the litigation landscape in North American jurisdictions. However, protocols and other pre-action requirements have been considered in the course of several recent reform projects in Canada. In Canada, as in many other jurisdictions including the United States, there are many specific legal contexts where certain steps must be taken, or leave sought, before legal proceedings may be commenced. For example, where a landlord wishes to take action against a tenant for breach of a covenant or condition of a lease, the tenant must first be given notice of such intention with a view to resolving the issue before taking legal action.

British Columbia Justice Review

10. In November 2006 the British Columbia Civil Justice Reform Working Group produced its report.[8] The report includes a number of recommendations designed to improve the pre-litigation process of resolving disputes. This includes the provision of information and assistance to those with disputes and the establishment of a 'central hub' to provide information, advice, guidance and other services required to assist people in solving their own legal problems.[9] The report further recommended a requirement that parties personally attend a case planning conference before they actively engage the civil justice system beyond initiating or responding to a claim.[10] The case planning conference would seek to address settlement possibilities and

[7] New Zealand Law Commission (2004), *op.cit.*
[8] British Columbia Civil Justice Reform Working Group (2006), *Effective and Affordable Civil Justice*
[9] *Ibid*, Recommendation 1
[10] *Ibid*, Recommendation 2

processes, and also seek to narrow the issues and determine procedural steps and deadlines for the conduct of litigation in the event that settlement is not possible.

Ontario Civil Justice Reform Project

11. In 2006, the Government of Ontario established the Civil Justice Reform Project, and a Consultation Paper was issued.[11] The aim of the project is to develop reform options to render the civil justice regime in that province 'more accessible and affordable'.[12] One option canvassed in the Consultation Paper is the introduction of pre-action protocols *'for specific case types on a pilot basis (i.e. case types determined to involve the greatest amount of delay)'*.[13] It was noted that '[c]ertain pre-action protocols may work to weed out cases early, or at least unnecessary parties, at the front end of the litigation process'.[14] Comments and suggestions were sought as to the possible use of pre-action protocols in Ontario. The final report, issued in November 2007, does not contain any recommendations in relation to pre-action protocols.[15]

Nova Scotia Rules Revision Project

12. The Supreme Court of Nova Scotia recently undertook a review of the civil procedure rules in the province. It identified seven major topics where reform might be indicated: (1) discovery and disclosure, not including experts, (2) early dispute resolution, (3) evidence, including experts, (4) determinations before trial, (5) management of litigation, (6) appeals and judicial review and (7) smaller claims. Pre-action protocols do not appear to have been among the issues examined and the new rules which came into effect in January 2009 do not have any provisions about them.

Hong Kong

13. The use of pre-action protocols was considered in Hong Kong in 2004, as part of the final report of the Chief Justice's Working Party on Civil Justice Reform. The report noted there was substantial evidence that pre-action protocols in England and Wales had led to significant front-loading of costs. It considered that protocols should therefore only be adopted where such front-loading is considered justifiable in that the benefits of early settlement resulting from the protocol are likely to outweigh the disadvantages of such front-loading.[16] This militated against an attempt to devise a protocol applicable 'across the board'.

14. The report also noted that there had been difficulties in securing the meaningful enforcement of protocols in England and Wales, stressing that if a protocol was to remain credible, conscientious parties must be able to ensure compliance on the part of their opponents in an efficient and economic fashion. Accordingly, the report concluded that pre-action protocols of a global nature ought

[11] C Osborne (2006), *Ontario Civil Justice Reform Project: Consultation Paper*
[12] *Ibid*, 1
[13] *Ibid*, 7
[14] *Ibid*, 6
[15] C Osborne (2007), *Ontario Civil Justice Reform Project: Summary of Findings and Recommendations*
[16] Working Party on Civil Justice Reform Hong Kong (2004), *Reform of the Civil Justice System in Hong Kong*, *Final Report*

not to be introduced, but recommended that courts operating specialist lists be permitted to create protocols of more limited scope, subject to the approval of the Chief Judge of the High Court and after due consultation with all relevant persons. The report recommended that rules should be introduced to enable the court to take into account non-compliance with an applicable protocol in exercising any relevant discretionary power,[17] although it specified that 'special allowances may have to be made in relation to unrepresented litigants'[18]

15. The Hong Kong report also considered the issue of costs where a dispute is settled pursuant to a pre-action protocol. It noted that it was 'important that [allocating] the front-loaded costs generated by pre-action protocols should not be allowed to undermine settlements achievable on the substantive dispute'.[19] The report recommended there should be available a procedure analogous to that developed in England and Wales, whereby separate 'costs-only' proceedings can be brought in relation to the taxation of costs where a dispute has been settled at a pre-commencement stage.[20]

Australia[21]

16. In some Australian jurisdictions, pre-action disclosure and other obligations have been introduced pursuant to statutory provisions (e.g. in Queensland for certain types of personal injury litigation), rules of court (e.g. in South Australia and in the Family Court) or by agreement between stakeholder groups (e.g. in Victoria for transport accident claims).

Queensland

17. In recent years a number of reforms implemented in Queensland either impose specific pre-action obligations on persons in certain types of dispute or facilitate the making of various types of court orders before litigation begins. The Personal Injuries Proceedings Act 2002 introduced major procedural reforms, which are said to have been designed to ensure the affordability of insurance. In particular, the legislation seeks to:

- provide 'a procedure for the speedy resolution of claims for damages for personal injury to which the Act applies'
- promote 'settlement of claims at an early stage wherever possible'
- ensure 'that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial'
- impose reasonable limits on awards of damages
- minimise the costs of claims
- regulate inappropriate advertising and touting.

[17] *Ibid*, Recommendation 7.
[18] *Ibid*, Recommendation 8.
[19] *Ibid*, para 134.
[20] *Ibid*, Recommendation 9.
[21] This section is based on the Victorian Law Reform Commission (2008), *Civil Justice Review Report*, Chapter 2

18. The Act applies to all personal injuries arising out of an incident occurring before, on or after 18 June 2002, with the exception of various categories of personal injury, such as those attributable to motor accidents and accidents at work. Some of these other categories of personal injury are governed by separate legislation. Provision is made for notice of a claim to be given in an approved form. The legislation sets out certain steps which a claimant and a person against whom a claim is made are required to take before legal proceedings are commenced.

19. In late 2003 the Queensland Attorney-General appointed a stakeholder reference group to consider a common pre-proceedings process for personal injury claims. In June 2004 the reference group prepared a report which proposed a revised pre-proceedings process for personal injury claims. It recommended that this process replace the existing regimes and would apply to all cases of personal injury other than dust-related diseases, medical negligence and claims by minors. It was proposed that, as far as practicable, uniform procedures and processes would be introduced in the following five areas:

- early notification of claims
- compulsory disclosure of information and documents
- a compulsory conference
- compulsory final offers
- costs.

20. The group recommended that the proposed common pre-proceedings process should be 'substantive' rather than 'procedural' in nature. All personal injuries claims (other than the excluded claims referred to above) would be handled in accordance with the proposed common procedures. The filing of a notice of claim would give rise to a stay of the limitation period, either by order of the court or by agreement of the defendant.

21. The Family Court in Queensland has extensive pre-action procedures. Before starting a case, each prospective party is required to comply with the pre-action procedures. These include a requirement that they must attempt to resolve the dispute using dispute resolution methods. The court may take into account a party's failure to comply with a pre-action procedure when making an order, including in relation to costs. Similarly, where a party applies for relief from certain rules or orders, the court may consider the extent to which a party has complied with pre-action procedures.

New South Wales

22. There are no statutory provisions or rules of court which impose general pre-action obligations on persons in dispute in New South Wales. There are, however, provisions for pre-action orders of the court to be obtained in various circumstances, including to identify a potential defendant, to ascertain the merits of a proposed cause of action and to prevent the removal or dissipation of assets. Also, in some circumstances there are obligations to obtain experts' reports or other documents prior to the commencement of litigation and to disclose such documents to parties when proceedings are commenced or pleadings are served.

South Australia

23. Since 1992 South Australia has continued to expand pre-action procedures in all courts. Provisions requiring the exchange of a formulated claim and expert reports prior to commencing proceedings were initially limited to personal injury cases, but have been extended to all claims for liquidated and unliquidated damages since September 2000.

Victoria

24. The Victorian Law Reform Commission, in its Civil Justice Review Report of May 2008, recommended[22] that pre-action protocols should be introduced for the purpose of setting out codes of 'sensible conduct' which persons in dispute are expected to follow when there is the prospect of litigation. The objectives of the protocols would be to:

- specify the nature of the information required to be disclosed to enable the persons in dispute to consider an appropriate settlement
- provide model precedent letters and forms
- provide a time frame for the exchange of information and settlement proposals
- require parties in dispute to endeavour to resolve the dispute without proceeding to litigation
- limit the issues in dispute if litigation is unavoidable so as to reduce costs and delay.

25. The Commission recommended that specific pre-action protocols applicable to particular types of dispute should be developed by the proposed Civil Justice Council in conjunction with representatives of stakeholder groups in each relevant area (e.g. commercial disputes, building disputes, medical negligence, general personal injury, etc.). Except in (defined) exceptional circumstances, compliance would be an expected condition precedent to the commencement of proceedings. A person seeking to formally commence a legal proceeding should be required to certify whether the pre-action protocol requirements have been complied with, and, where they have not, to set out the reasons for such non compliance.

26. The Victorian Law Commission further recommended that unreasonable failure to comply with an applicable protocol or the general standards of pre-action conduct should be taken into account by the court in determining costs, in making orders about the procedural obligations of parties to litigation, and in awarding interest on damages. Unless the court orders otherwise, a person in dispute who unreasonably fails to comply with the pre-action requirements:

- would not be entitled to recover any costs at the conclusion of litigation, even if the person is successful
- would be ordered to pay the costs of the other party on an indemnity basis if unsuccessful.

[22] See Victorian Law Reform Commission (2008), *op.cit.* p 142-5

Annex B Defenders' and Pursuers' Offers in a Selection of Jurisdictions

Jurisdiction	Monetary and Non-monetary offers	All or part of claim	Stage of legal proceedings at which offers permitted	Provisions for offers near to or at proof/trial	Provisions for acceptance of offers during proof/trial	Time allowed for consideration of offers	Permission to withdraw offer within period for consideration	Type of penalty: Pursuers' or claimants' offers 1	Type of penalty: Pursuers' or claimants' offers 2	Type of penalty: Defenders' or defendants' offers
Scotland 1996: Pursuers' offers in the Court of Session	No. Only where there is a pecuniary conclusion	DK	At any time before court makes avizandum, gives judgment or jury retires to consider verdict	None	None	Specified by pursuer- though not required to specify period	YES- as long as not accepted- by lodging a minute of withdrawal	100% uplift: sum equal to the expenses of process as taxed, including any additional fee under rule 42.14		
CPR pre-6 April 2007	Both	All or part	Before/during/on appeal	Special provisions where offer made less than 21 days before trial: costs consequences do not apply unless court abridged relevant period	Court's permission needed to accept offer after start of trial	21 days	YES- but only under exceptional circumstances	Costs on indemnity basis (agent-client) from expiry of period for consideration of offer (21 days)	Up to 10% above base rate on principal sum and costs from expiry of offer may be awarded	Costs on party-party basis from expiry of period for consideration of offer (21 days)
CPR from 6 April 2007	As above	As above	As above	As above	As above	As above	As above	Costs on indemnity basis (agent-client) from expiry of period for consideration of offer (21 days) **plus interest on costs not exceeding 10% above base rate**	Up to 10% above base rate on principal sum and costs from expiry of offer **unless court considers it unjust to do so**	Costs on party-party basis from expiry of period for consideration of offer (21 days) **plus interest on these costs**

Jurisdiction	Late acceptance of offers	Court discretion	Information and documentation to support offers and their acceptance	Beating the offer	
Scotland: 1996		No	No	No	
CPR	Parties may reach agreement of costs. Failing this, court makes order: usually offeree liable for claimant's costs from expiry of offer	Subject to overriding discretion of court in relation to cost and overriding objective to reach just result: Account taken of terms of Part 36 offer; stage in proceedings when offer made; information available to parties when offer made; conduct of parties enabling exchange of information (See Carver v BAA plc (2008)	See court discretion	Where Part 36 offer includes interest, court must calculate interest to the date of the offer to determine whether more or less favourable than judgment obtained by claimant	
CPR from 6 April 2007	As above	As above	See court discretion	As above	

Jurisdiction	Stage of legal proceedings at which offers permitted	Provisions for offers near to or at proof/trial	Provisions for acceptance of offers during proof/trial	Time allowed for consideration of offers	Permission to withdraw within period for consideration	Type of penalty: Pursuers' or claimants' offers 1	Type of penalty:Defenders' or defendants' offers
Queensland	Any time until 'final relief' or verdict			Specified by party, though not less than 14 days	Only with leave of court	Defendants to pay plaintiffs' costs on an **indemnity** basis	D. to pay plaintiff's costs on standard basis until date of offer- and plaintiff to pay defendants' costs on standard basis calculated from day after service of offer to settle (but on **indemnity** basis from date of d's offer, if made on 1st or subsequent day of trial)
South Australia	Up to 21 days before date fixed for trial, but only 4 days if offer relates to costs only.			Usually 14 days after service of offer. Acceptance must be made 7 days before trial date, or 2 days before in case of proceedings for costs only.		Defendant not allowed costs referable to the period falling 14 days after service of offer- and pursuer entitled to those of the party's costs on an indemnity-solicitors/client basis. If pursuer's offer is in relation to costs alone, then costs borne by defendant on indemnity (party/client) basis.	Pursuer not allowed costs referable to the period falling 14 days after service of offer- and defender entitled to costs referable to this period. If defendant's offer is in relation to costs alone, then costs borne by pursuer on indemnity (party/client) basis.

Jurisdiction	Monetary and Non-monetary offers	All or part of claim	Stage of legal proceedings at which offers permitted	Provisions for offers near to or at proof/trial	Provisions for acceptance of offers during proof/trial	Time allowed for consideration of offers	Permission to withdraw offer within period for consideration	Type of penalty: Pursuers' or claimants' offers 1	Type of penalty: Pursuers' or claimants' offers 2	Type of penalty: Defenders' or defendants' offers
New South Wales			Until final summing up (jury) or delivery of decision (all other)	Special provisions for penalties where offer made on or after first day of trial		May be time limited but at least 28 days, unless offer made less than 2 months before trial.	Only with permission of the court	Entitled to costs on ordinary basis up to date on which offer made, and indemnity costs from day following date of offer		D. entitled to costs on ordinary basis up to date on which offer made, and indemnity costs from day following date of offer
Victoria			Any time before verdict or judgment			May be time limited, but open to consideration for at least 14 days, or sooner where verdict or judgment is sooner.		Where death or bodily injury, costs to pursuer on indemnity basis from initiation. All other actions: standard costs up to date of offer, and on indemnity basis thereafter,		Plaintiff entitled to costs on party/party basis up to date on which offer made, and defender entitled to costs on party/party basis thereafter.

Jurisdiction	Late acceptance of offers	Court discretion	Information and documentation to support offers and their acceptance	Beating the offer
New South Wales			Plaintiff may not make offer unless full particulars of claim and documents necessary to enable defendant to fully consider offer given. If d. considers these insufficient, must inform plaintiff within 14 days of receiving offer.	In applying the rules on costs consequences, the court must disregard the interest referable to the period after which the offer was made
Victoria				In applying the rules on costs consequences, the court must disregard the interest referable to the period after which the offer was made

Jurisdiction	Stage of legal proceedings at which offers permitted	Time allowed for consideration of offers	Permission to withdraw offer within period for consideration	Type of penalty: Pursuers' offers	Type of penalty: Defenders' offers
Manitoba	Any time, but costs consequences do **not** apply if less than 3 days before a motion or 7 days before trial/hearing	May be specified- and if so, then offers deemed withdrawn on expiry of specified time		Plaintiff entitled to party/party costs up to date of offer- and double party/party costs from that date-unless court orders otherwise.	Plaintiff entitled to party/party costs up to date of offer- and defendant to party/party costs from that date, unless courts orders otherwise.
Alberta	P: after issuing the claims. P and D: Any time before commencement of trial	45 days	Not without permission of court before 45 days	Unless court finds special reasons, P. entitled to double the costs (excluding disbursements) from date of offer.	Unless court finds special reasons, D. awarded costs for all steps in relation to the claim from date of offer. Double costs (excluding disbursements) where claim dismissed entirely
Ontario	Any time, but costs consequences do **not** apply if less than 7 days before trial/hearing	May be specified- and if so, then offers deemed withdrawn on expiry of specified time		Partial indemnity costs to date of offer and **substantial** indemnity costs thereafter	P. entitled to partial indemnity costs to date of offer and d. entitled to **partial** indemnity costs thereafter
British Columbia				Award double the costs on all or some steps following offer, while depriving other party of some or all entitlement in relation to steps taken following offer.	Award double the costs on all or some steps following offer, while depriving other party of some or all entitlement in relation to steps taken following offer.
New Brunswick	Any time, but costs consequences do **not** apply if less than 10 days before trial/hearing	If time specified, offer deemed withdrawn on expiry of period	Yes- any time before offer accepted	P. entitled to 1.5 times the usual costs	P entitled to party/party to date of service of offer- and defendant to party/party from date of service

Jurisdiction	Stage of legal proceedings at which offers permitted	Time allowed for consideration of offers	Permission to withdraw offer within period for consideration	Type of penalty: Pursuers' offers	Type of penalty: Defenders' offers
Nunavut		If time specified, offer deemed withdrawn on expiry of period	Yes- any time before offer accepted	P entitled to party/party to date of offer, and solicitor/client from date of offer	P entitled to party/party to date of service of offer- and defendant to solicitor/client from date of offer

Jurisdiction	Court discretion	Information and documentation to support offers and their acceptance	Beating the offer	Additional notes
Manitoba				Offer to settle made without admission of liability and on a 'without prejudice' basis
Alberta				
Ontario			Burden of proof on the party who claims the benefit of the rules relating to costs consequences.	
British Columbia	Court may consider: Whether the offer to settle ought reasonably to have been accepted at that date or later date; relationship between terms of offer and final judgment; relative financial circumstances of the parties; any other factor the court considers appropriate			
New Brunswick				
Nunavut				

ANNEX TO CHAPTER 9 ENHANCING CASE MANAGEMENT

A PLEADINGS[1]

The Court of Session

Ordinary procedure

1. The Rules of the Court of Session provide that the standard method of commencing an action is by means of a summons.[2] The basic form of summons is specified and comprises the instance, address and charge, warrants, conclusions, condescendence and pleas-in-law.[3] The conclusions of the summons must be in the appropriate style contained in Form 13.2(2). The grounds of the action may be pled cumulatively,[4] (i.e. multiple grounds) alternatively[5] or eventually.[6] Even alternative inconsistent or mutually incompatible grounds may be averred.[7]

2. The condescendence within the summons must meet certain criteria. Shortly, the condescendence contains the allegations in fact forming the grounds of action which must include title and interest to sue,[8] and those essential[9] facts which in the particular case give a right of action. There should be no disconformity between the condescendence and conclusions.[10] The importance of the condescendence lies in the fact that the averments give notice to an opponent of the case which the pursuer will try to prove.[11] A pursuer stands or falls on his establishing the averments he makes on record and is not entitled, in the course of inquiry into the facts, to make a new case for which he has no record.[12] It is an inherent part of procedure that the defender has to meet the case made against him/her on record and nothing more.[13] A pursuer cannot prove more than he avers[14] and cannot succeed, as a matter of fair

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[1] Section A of this Annex is based on materials prepared by members of the Faculty of Advocates
[2] Rule 13.1 of the Rules of the Court of Session (RCS)
[3] Form 13.2-A (RCS). There is always an exception to the rule. Note that in ship collision actions there is no need for a condescendence or plea-in-law. RCS 46.6(3)
[4] Mackay, *Manual of Practice of the Court of Session* p. 185
[5] Thomson & Middleton, *Manual*, p. 64, Maxwell, *Practice of the Court of Session* p. 172, *M'Kellar v Dallas's Ltd.* 1928 SC 503, *Mackay v Campbell* 1967 SLT 337
[6] e.g. Action for declarator with eventual conclusions for interdict and damages.
[7] *Norwich Union Life Insurance Society v Tanap Investments VK. Ltd (in Liquidation) (No.1)* 1998 SLT 623 per L. Penrose at 628
[8] See e.g. *Bentley v Macfarlane* 1964 SC 76 per L. Guthrie at 83, *Microwave Systems (Scotland) Ltd. v Electro-Physiological Instruments Ltd*. 1971 SC 140 per L. Thomson at 143.
[9] *Brown v Redpath Brown & Co*. 1963 SLT 219
[10] *Ewing's Trs. v Farquharson* (1829) 7 S. 464, *Muir v Braidwood* (1831) 10 S. 83, *Wilson v Walker* (1856) 18 D. 673, Maxwell, *Practice* p. 173
[11] *Ward v Coltness Ironworks* 1944 SLT 409
[12] Lord Reid in *McGrath v NCB* (4 May 1954, unreported) applied in *Hamilton v John Brown & Co. (Clydebank) Ltd*. 1969 SLT (N) 18 and *Carroll v Scott's Shipbuilding Co*. 1969 SLT 46, *Morrison's Associated Companies v Rome* 1964 SC 160 at 182; *McIntosh v Walker Steam Trawl Fishing Co*. 1971 SLT (N) 75, Maxwell, *Practice* p. 173
[13] *McGrath v National Coal Board* (4th May 1954, unreported) per Lord Reid
[14] *Campbell v M'Nee* 1903 SLT 278

notice, against a defender on a ground which is not averred on record,[15] although he may succeed in circumstances in which evidence is led by the pursuer at proof in support of that ground which is not objected to timeously.[16]

3. Conventional guidance as to drafting the condescendence requires that it should be brief,[17] and pointed insofar as consistent with clearness[18] but should not be vague[19] such that the pursuer should give the defender inadequate notice of the case to be made against him.[20] Alternative inconsistent statements of facts may be averred but in the testing of the relevancy of the cause so pled, as a whole, if one branch is relevant and the other branch is irrelevant, the whole case may be held to be irrelevant[21] as the weaker alternative is always the test of the case.[22]

4. If a document is relied upon in the condescendence it must be averred long hand or incorporated by using the pleading phrase "[the document] is adopted and held to be herein repeated *brevitatis causa*."[23] Increasingly reference is made in pleadings to a document which 'is referred to for its terms' when it is clear that the document was intended to be incorporated and is indeed relied upon. It is not an averment of fact upon which a plea-in-law can be based[24] and a phrase along the lines of "[the document] is referred to for its terms and adopted *brevitatis causa*" is strictly, incorrect. It may be noted, however, that the point is very rarely taken nowadays in procedure roll discussion.

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[15] *Black v John Williams & Co. (Wishaw*) 1924 SC (HL) 22, *"Vitruvia" S.S. Company Ltd. v Ropner Shipping Co. Ltd*. 1923 SC (HL) 31, *Morrison's Associated Companies. Ltd. v James Rome & Sons Ltd*. 1946 SC 160 per L. Guthrie at 190. See also *Cleisham v The British Transport Commission* 1964 SC (HL) 8 per L. Reid at 13 and per L. Guest at 22

[16] *Albacora SRL v Westcott & Laurence Line Limited* 1966 SC (HL) 19 per L. Reid at 23 and L. Guest at 26, *McGlone v British Railways Board* 1966 SC (HL) 1 per L. Reid at 12, *Brown's Executor v N.B. Steel Foundry* 1968 SLT 121, *Hamilton v John Brown & Co. (Clydebank) Ltd*. 1969 SLT (N) 18, *O'Donnell v Murdoch McKenzie & Co. Ltd* 1966 SC 58, 1967 SC (HL) 63, *Hislop v Lynx Express Parcels* 2003 SLT 785

[17] As the annotators to Green's Annotated Rules of the Court of Session point out, 'an unfortunate modern practice has developed of making articles long and cumbersome.' para. 13.2.4. See also Green's Litigation Styles at A3-005

[18] *Wardrope supra.*

[19] *Jackson v Earl of Cassillis* (1833) 11 S. 908; *Henderson v Minto* (1860) 22D 1126. Maclaren, *Practice* p. 311, Maxwell, *Practice* p. 173

[20] *Carruthers v Caledonian Rly Co.* (1854) 16D 425 at 429, *Beattie v Beattie* (1883) 11 R. 85, *Gunn v M'Adam & Son* 1949 SC 31 at 38, *Hope v Hope's Trs*. (1898) 1 F. (HL) per L. Watson at 3, *Eadie Cairns v Programmed Maintenance Painting Ltd*. 1987 SLT 777

[21] *Finnie v Logie* (1859) 21 D. 825 per LP M'Neill at 829

[22] *Hope v Hope's Trustees* (1898) 1 F (HL) 1 per L. Watson p. 3 and L. Shand at 5.

[23] *Gordon v Davidson* (1864) 2 M. 758 per LJ-C Inglis at 758, *Redpath Dorman Long Ltd. v Tarmac Construction Ltd.* 1982 SC 14 per L. Ross at 18, *Grampian Hydraulics (Buckie) Ltd. v Dauntless Marine Engineering and Supply Co*. 1992 SLT (Sh Ct) 45, *Halliday v Rolland Decorators* Ltd. 1994 SCLR 305. Sometimes the phrase '[The document] is produced herewith, adopted and held to be herein incorporated *brevitatis causa'* is used - see *Grampian Hydraulics (Buckie) Ltd. v Dauntless Marine Engineering and Supply Co. cit. sup*.

[24] Macphail, *Practice*, para. 9.67

5. Lastly, the summons should contain pleas-in-law. These should be specific, distinct and separate propositions in law without argument[25] "stating in as few words, as is consistent with clearness, the rule of law founded upon".[26] The pleas will mirror the substantial parts of the conclusions and, taken with the condescendence, they should give the defender sufficient notice of the case made against him.[27] Each legal proposition will be represented by a plea-in-law.[28]

6. The defender must answer concisely, accurately and candidly the pursuer's articles of condescendence, meeting every fact in the averments. The Rules of the Court of Session provide that defences to an action shall consist of (a) numbered answers corresponding to the articles of the condescendence annexed to the summons; and (b) appropriate pleas-in-law.[29] The defender answers by "admitting", "not knowing and not admitting", "expressing a belief as to whether true" (which is a deemed admission) or by denying the facts averred by the pursuer. Thereafter a positive case in defence can be advanced by way of express averments, as the defender cannot succeed in a substantive defence not stated on record.[30] The defender concludes with his own pleas-in-law, which are either (i) preliminary pleas; or (ii) pleas on the merits. The former are the basis for preliminary or dilatory defences[31] and the latter for peremptory defences.[32] If the former is sustained, the case against a defender is dismissed. This does not render the cause *res judicata* and the pursuer may bring a new action on the same grounds,[33] subject to the law of prescription and limitation. The latter type of plea will result in the defender being assoilzied from the conclusions of the summons[34] and does form *res judicata* preventing any subsequent action on the same grounds. If a defender is lacking in candour in his defence, he runs the risk of facing a pursuer's motion for summary decree.

7. Thereafter both parties are allowed a period of adjustment and a Closed Record is made up. Any alterations thereafter have to proceed by amendment which is within the discretionary power of the Lord Ordinary.

8. The Rules of the Court of Session contain specific provision in Chapters 43 to 90 in respect of a large number of different types of proceedings. Many of the principles and rules of pleading under the ordinary procedure set out above will apply to the specific types of action but many will borrow here and there from ordinary procedure or will apply the ordinary procedure under deletion of certain

[25] Maxwell, *Practice*, p. 174. See also *Fraser v M'Kenzie* (1826) 4 S. 699 (note) (NE 706, note). and Mackay, *Manual* p. 194 fn (e)
[26] Mackay, *Manual*, p. 195
[27] *Gunn & Ors. v M'Adam & Sons Limited & Ors* 1949 SC 31 at 39
[28] A.G. Walker, Written Pleadings, *cit. sup.* p. 166
[29] Rule 18.1
[30] *Robb v Logiealmond School Board* (1875) 2 R. 417
[31] *Ross v Young* (1831) 9 S. 275
[32] *Geils v Geils* (1851) 1 Macq. 36 per Lord Chancellor Truro at 39-40
[33] *Menzies v Menzies* (1893) 20 R. (HL) 108 per L. Watson at 110, *Govan v Old Victualling Society Ltd. v Wagstaff* (1907) 44 SLR 295
[34] *Shirreff v Brodie* (1836) 14 S. 825

components. Two specific types of proceedings which adopt a different approach to pleadings are discussed below.

Commercial Actions

9. The rules for commercial actions in the Court of Session (Chapter 47), made in 1994, introduced to Court of Session practice simple abbreviated pleadings and a pro-active judge. The rules introduced the concepts of case management and judicial pro-activity to the Court of Session. Put simply, cases of a business or commercial nature are managed through three principal types of hearing: preliminary hearing, procedural hearing and then a final disposal hearing.[35] Generally speaking, cases appear before the same judge throughout. The judge acts pro-actively.[36] The formal requirements of written pleadings as practised in ordinary Court of Session actions are usually dispensed with. A summons need contain only the orders sought, detail of the parties to the action, the transaction or dispute from which the action arises, and a summary of the circumstances out of which the action arises and the grounds on which the action proceeds. Appended to the summons is a schedule listing the documents founded upon or adopted as incorporated in the summons.[37] In practice, the pleadings will vary according to the nature of the case although the Practice Note gives guidance that the pleadings should be "in an abbreviated form."[38] Where the parties seek a judicial construction of a term in a contract, the pursuer may serve a summons simply containing details of the contract and averments of the preferred construction.[39] There is no necessity to make up a summons containing headings "condescendence" and "pleas-in-law." Lengthy narrative in averment is discouraged. Lengthy quotations from documents are not necessary. Detailed written pleadings are not expected nor required.[40] There is still a requirement of fair notice[41] and parties are expected to make full and frank disclosure and may be pressed to do so by the commercial judge.

10. Although there are the three types of hearing, Rule 47.5 provides that "the procedure in a commercial action shall be such as the commercial judge shall order or direct."[42]

11. Defences are in the form of answers with any additional statement of facts or legal grounds. If documents are founded upon or adopted as incorporated in the defences they must be lodged and listed in a Schedule attached to the defences.

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[35] For analysis of the operation of the Court see Clancy et al., *op. cit*., N. Morrison, 'Scotland's New Commercial Court' (1994) 39 *J.L.S.S. 354*, C. Macleod, 'The Commercial Court' (UPDATE course: 'Court of Session Practice and Procedure', Clyde Hall, Glasgow, 3rd March 1997.), and the Annotations to Chapter 47 in Annotated Rules of the Court of Session 2003.

[36] See PN No.12 of 1994, para. 5. See Clancy *et al*. *op. cit.* for what this has meant in practice.

[37] RCS 47.3. Note that there is no need to employ the pleading phrase 'adopted etc. *brevitatis causa'*.

[38] PN No 12 of 1994, para. 3(1)

[39] *Ibid*.

[40] N Morrison (1994), *op. cit*., p. 355

[41] and detailed notice is required where a party makes allegations of fraud. *Kaur v Singh* 1998 SC 233.

[42] In practice, the Court will deal with and dispose of most actions at Preliminary Hearings and continuations thereof. Clancy *et al. op. cit*. conducted research into the disposal rate, finding that 75% of cases settled at or before the preliminary hearing stage.

12. The commercial judge has a very wide discretion at the preliminary hearing[43] and the procedural hearing.[44] The hearings will take place on a set day at a set time. The preliminary hearing is used to identify and focus the real issues in the case. It is not automatic that the court will allow further adjustment of the pleadings. If further pleadings are necessary, these will be controlled and superintended by the court. Adjustment 'at large' is unusual. It is more common that the Court orders a party to amplify an aspect of his case and a specific period will be permitted to do so. The emphasis is on candour and disclosure and technical pleading conventions such as "not known and not admitted" or partial admissions coupled with "*quoad ultra* denied" are discouraged. The judge has the power to determine whether further specification is required, if so, the extent of the specification and how that specification should be presented.[45] It need not proceed by way of written pleadings. The court will desire to have relevant documents produced at the earliest opportunity and the traditional rules for recovery of evidence will not apply. In practice, if a party knows or even suspects that their opponent has a document and that he has not produced it, then mention of it to the judge with submissions on the import of the document will often result in the court ordering the party to produce it.

13. Prior to the procedural hearing, parties must produce written proposals for further procedure, written notes of argument (if debate is sought) lists of witnesses and expert reports. From this information the court will determine how the case should progress. Debates will be granted only if the commercial judge considers that a debate will assist the resolution of the case. Insisting on preliminary pleas will not guarantee debate. Methods other than conventional proof may be considered in determination of the case. Proof is not restricted to the pleadings but may include matters set out in written statements lodged in advance of the procedural hearing.[46] The fact that proof is led beyond the four corners of a record will not found an appeal. Commercial cause proofs are still susceptible to late settlement[47] although, in practice, a By Order hearing will be fixed shortly before the proof for parties to advise on the likelihood of settlement.

Personal Injury Actions

14. The new rules for the disposal of personal injury actions, as set out in Chapter 43 of the Rules of the Court of Session, came into force on 1 April 2003[48] together with Practice Notes Nos. 2 and 3 of 2003. The summons now has no condescendence and is termed the Statement of Claim. Pleas-in-law are not attached. Pleadings are restricted in so far as averments should relate only to those facts necessary to establish or defend the claim. An automatic right to a legal debate on the procedure roll has been withdrawn. Consequently abbreviated pleadings are

[43] RCS 47.11
[44] RCS 47.12
[45] RCS 47.11(1)
[46] *Highland and Universal Properties Ltd. Safeway Properties Ltd*. 1996 SC 424
[47] Clancy *et al.*, *op. cit*
[48] SSI 2002, No. 570

now part of reparation practice in the Court of Session which comprises the largest proportion of the business of the Court of Session.

The Sheriff Court

Ordinary causes

15. The Ordinary Cause Rules in the Sheriff Court prescribe the form of initial writ.[49] It has to contain a condescendence, which must "state in numbered paragraphs the facts which form the ground of action" and pleas in law "in numbered sentences." In terms of Rule 9.12 the sheriff, at the Options Hearing, is under a duty to 'seek to secure the expeditious progress of the cause by ascertaining from the parties the matters in dispute'[50] as well as any other matters relating to further procedure. The Options Hearing takes place after defences have been lodged and there has been a period of adjustment of pleadings and the basic principles in relation to pleadings in the ordinary cause in the sheriff court are the same as for ordinary actions in the Court of Session.

Commercial actions

16. Following the successful introduction of the new rules for commercial procedure in the Court of Session in 1994, new rules for commercial actions were introduced into the sheriff court in 2001. These were first made available in Glasgow Sheriff Court in March 2001[51] by direction of the Sheriff Principal of Glasgow and Strathkelvin. The rules were subsequently commenced in Jedburgh, Selkirk, Inverness and Duns Sheriff Courts and in Aberdeen Sheriff Court in August 2004.

17. The rules expedite early identification of issues by requiring pursuers and defenders to lodge with the writ or defences a list of documents founded on.[52] Defences should be in the form of answers that allow the extent of the dispute to be identified thereby dispensing with the traditional form where the defender repeats each of the pursuer's averments.[53]

[49] Rule 3.1(1)(a) and Form G1
[50] OCR 1993, r. 9.12(1)
[51] Act of Sederunt (Ordinary Cause Rules) Amendment (Commercial Actions) 2001 (SSI 2001/8)
[52] Chapter 40 of the Ordinary Cause Rules of the Sheriff Court
[53] Rule 40.9(3)

B EXPERT EVIDENCE Examples of provisions and recommendations by reviews in other jurisdictions[54]

Australia

New South Wales

18. The Law Reform Commission of New South Wales carried out a comprehensive review of rules relating to expert evidence. In their report of 2005, it noted that many Australian jurisdictions had adopted, as part of their general case management powers, rules similar to those in England & Wales. The Commission recommended that a rule should be introduced in New South Wales requiring the court's permission to adduce expert evidence. It also recommended that the court should have the power to require expert witnesses to consult before the hearing or trial and to prepare a report setting out the matters upon which they agree and disagree. The Commission did not, however, favour a rule making such consultation mandatory.

19. The issue of joint experts was more controversial with many respondents to the Commission's consultation being opposed in principle to the court having the power to 'impose' a joint expert upon the parties. On balance, however, the Commission thought that the use of joint experts could reduce the partisanship of expert witnesses and encourage the use of experts with balanced, representative views. The Commission also thought that the use of joint experts had the potential to reduce costs. Accordingly, it concluded that the court should have the power, in appropriate cases, to direct that a joint expert be instructed.

20. The Attorney General set up a Working Party to consider the Law Commission's report. The Working Party was not convinced that the introduction of a 'permission rule' was necessary in New South Wales but recommended that the court should have extended powers in relation to expert evidence. New rules were introduced in 2006 as part of the Uniform Civil Procedure Rules 2005.[55] These do not go so far as to introduce a 'permission rule' along the lines of CPR 35 but provide that if parties propose to adduce expert evidence they must seek directions from the court.

21. The rules also include a 'purpose clause' which states that the main purposes of the expert evidence rules are: to ensure that the court has control over the giving of expert evidence; to restrict expert evidence to that which is reasonably required; to avoid unnecessary costs associated with experts; to enable a single expert to be

[54] Section B of this Annex is based on information contained in Chapter 7 'Changing the Role of Experts' of the Victorian Law Reform Commission's *Civil Justice Review Report* (May 2008) http://www.lawreform.vic.govau/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Civil+Justice/

[55] Part 31 of the Uniform Civil Procedure Rules of New South Wales. Available at http://www.legislation.nsw.govau/viewtop/inforce/subordleg+418+2005+FIRST+0+N/

engaged by the parties or appointed by the court; and to declare the duty of an expert in relation to the court.

22. The court has a general discretion to give directions in relation to the use of expert evidence, and may direct that expert evidence may be adduced on specified issues only, limit the number of expert witnesses who may be called to give evidence on a specified issue, direct the engagement and instruction of a parties' single expert in relation to a specified issue and require experts to confer. Unless the court otherwise orders, an expert witness's evidence in chief must be given by the tender of one or more expert's reports.

23. Experts who are providing their services on a contingency or deferred payment basis must declare this in their reports. The code of conduct for experts which is annexed to the Uniform Civil Procedure Rules makes clear that an expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise and that the expert witness's paramount duty is to the court and not to any party to the proceedings. An expert must comply with directions made by the court and has a duty to work cooperatively with other expert witnesses.

South Australia

24. Expert reports in the Supreme and District Courts in South Australia must comply with the relevant Practice Direction which states that the expert's overriding duty is to assist the court and that they are not advocates for a party. The form and content of expert reports are set out in a Practice Direction. The court may also give directions in relation to expert evidence including a direction that the expert witnesses should confer and report on matters on which they agree and disagree.

25. Parties who wish to rely on expert evidence must disclose details of any fee or benefit the expert has received for preparation of the report or giving evidence and must disclose communications with the expert relevant to the preparation of the report.

Queensland

26. The main purpose of the provisions about expert evidence in the Uniform Civil Procedure Rules 1999 of Queensland[56] include ensuring that, where practicable and consistent with the interests of justice, evidence is given on an issue by a single expert agreed by the parties, and avoiding unnecessary costs associated with the parties retaining different experts. The expert's duty to assist the court overrides any obligation to a party to the proceedings or to anyone who is liable for the witness's fees or expenses. The court has power to direct experts to meet.

[56] Available at http://www.legislation.qld.govau

Western Australia

27. The Western Australia Rules provide that no expert evidence may be adduced at trial without leave of the court. The court may give directions in respect of the expert evidence sought to be adduced, and the general form of order made by the court requires the experts to confer for the purpose of narrowing or removing any differences between them. The court may limit the number of experts able to be called to give evidence at trial.

28. The Practice Direction for cases in the Commercial and Managed Cases List of the Supreme Court of Western Australia encourages more flexibility in relation to expert evidence:

> "Innovative approaches to expert evidence will be encouraged, including the parties conferring with a view to agreeing some or all of the facts upon which the expert opinions are to be based and the questions to be addressed to the experts. Conferral of experts prior to trial will normally be ordered. The taking of expert evidence concurrently at trial will be considered."[57]

29. A code of conduct applies to any experts engaged to give evidence in a proceeding in the District Court of Western Australia. The code states that expert witnesses have an overriding duty to assist the court, and are not advocates for the parties retaining their services. It also sets out requirements for the form and content of experts' reports and for conferences between experts. Expert witnesses must certify that they have read and complied with the code of conduct.

Victoria

30. In its Civil Justice Review Report published in May 2008, the Victorian Law Reform Commission recommended that Victoria should adopt the recently introduced expert witness provisions in NSW (summarised above), modified to reflect some of the provisions regarding control of expert evidence already in place in that jurisdiction. They recommended that there should be a "purposes clause, to ensure the court has control over the giving of expert evidence, to restrict expert evidence to that which is reasonably required, to avoid unnecessary costs associated with retaining experts, to enable a single expert to be engaged by the parties or appointed by the court and to declare the duty of an expert witness."

Canada

Alberta

31. In 2003 the Alberta Law Reform Institute considered the issue of expert evidence as part of its long term Rules of Court Project. The Institute's Discovery and Evidence Committee did not consider it necessary to impose restrictions on the number of expert witnesses that could be called in relation to any issue owing to

[57] Supreme Court of Western Australia, Practice Direction No 4 of 2006

other safeguards within the rules. It considered that the appointment of joint experts might cause more problems than it would solve but concluded that the rules should permit the use of a joint expert by consent or with leave of the court.

32. The Committee was concerned that pre trial conferences of experts might lead to additional expense and delay and considered that this should be an option only for very long or complex trials, and then only with the consent of the parties or leave of the court. It did not favour a panel or 'hot tub' approach to presenting expert evidence as it was ultimately for the parties to decide how best to present their cases. However, it was of the view that the rules should provide for this as a possible option, with the consent of the parties or with leave of the court.

British Columbia

33. The Report of the British Columbia Justice Review Task Force (November 2006) recommended reform of the rules to 'reduce expert adversarialism and limit the use of experts in accordance with proportionality principles'. Its recommendations included the incorporation of a statement of duties of an expert witness into the rules of court; greater use of court appointed experts; close judicial management of expert evidence including control over the number of experts, use of court appointed/joint experts and meetings between experts.

Ontario

34. The Ontario Civil Justice Reform Project (2007) recommended that parties should be encouraged to discuss the retention of a single expert early in the litigation process so as to reduce costs and avoid unnecessary competing reports, but the use of joint experts should not be mandatory. The court should have case management powers enabling it to give directions in relation to the issues upon which expert evidence may be adduced and limiting the number of experts that may be called. It recommended the introduction of an overriding duty on the expert to give assistance to the court; and a power to direct pre trial conferences of experts to identify, clarify and resolve issues and to prepare a joint statement on areas of agreement or reasons for disagreement.

C SANCTIONS FOR NON-COMPLIANCE: Examples of provisions and recommendations by reviews in other jurisdictions

England and Wales

The Woolf Report

35. Lord Woolf, in his final report on Access to Justice, stated that if the new regime recommended for England and Wales, and especially case management by the court, was to work, it was essential for there to be an effective system of sanctions for non-compliance with rules, directions and orders. He thought that sanctions were also needed because a party may not be guilty of any breach of a particular rule or order but may nevertheless frustrate the overriding objective of the rules by pursuing his or her litigation in an oppressive manner. It was therefore necessary to have power to control behaviour which does not infringe a specific rule or direction.

36. Lord Woolf therefore recommended that:

> (1) As part of a case-managed system, sanctions should be designed to prevent, rather than punish, non-compliance with rules and timetables.
>
> (2) The rules themselves should specify what will happen where there has been a breach. All directions orders should include an automatic sanction for non-compliance.
>
> (3) The court should intervene and impose sanctions on parties who conduct litigation in an unreasonable or oppressive manner even if they have not breached specific rules, orders or directions.
>
> (4) The courts should make more use of their power to tax or assess the costs of an application and order them to be paid immediately.
>
> (5) The onus should be on the party in default to seek relief from a sanction, not on the other party to apply to enforce the sanction.
>
> (6) The power to make wasted costs orders should continue, but they should be reserved for clear cases and not allowed to develop into satellite litigation.
>
> (7) The client should personally be sent any costs order made against him and be made aware of his right to apply for a wasted costs order against his solicitor. He should also be sent a copy of any order, breach of which will lead to striking out, so that he knows the directions of the court and the effect of non-compliance. [58]

[58] Lord Woolf (1996), *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Chapter 6

Sanctions available in England and Wales

General

37. The court's general powers of case management are set out in Part 3 of the Civil Procedure Rules. According to *Blackstone's Civil Practice*, the sanctions available to the court under the rules and by the case law include: [59]

(a) striking out the entire claim or defence;
(b) striking out part of the defaulting party's statement of case;
(c) debarring a party from amending or updating part of its statement of case or a schedule of future loss and expense;
(d) debarring a party from calling one or more witnesses, including expert witnesses;
(e) depriving a claimant who is in default of all or some of the interest that would otherwise have been awarded;
(f) increasing the rate of interest otherwise payable (if the default comprises non-compliance with a pre-action protocol);
(g) requiring a defaulting party to pay all or some of the other party's costs of the proceedings;
(h) requiring the defaulting party to pay the costs of and occasioned by the application in which the default is considered;
(i) ordering adverse costs orders to be paid on the indemnity basis;
(j) requiring adverse costs orders to be paid forthwith;
(k) requiring the defaulting party to provide security as a condition for being allowed to continue with the proceedings;
(l) ordering security for costs.

38. The court is entitled under the rules to extend or shorten the time for compliance with any rule, practice direction or court order, even if the application for extension is made after the time for compliance has expired.[60] The court has complete discretion in exercising this power, subject to the general requirement to further the overriding objective.

Unless orders

39. The court, when making an order, can make it subject to conditions, including a requirement to pay a sum of money into court, and it may also specify the consequences of failure to comply with an order of condition.[61] Such an order is known as an "unless order". Adrian Zuckerman has recently noted that unless orders are normally used where a party has been dragging its feet and has failed to comply with process requirements, and where the court has determined that no further default will be tolerated.[62] Examples of the types of situation in which an unless order might be made, given by Zuckerman, are the court ordering that unless

[59] W Rose (2008), *Blackstone's Civil Practice*, para 46.11: This is a non-exhaustive list of possible sanctions that may be imposed.
[60] Civil Procedure Rules (CPR) 3.1(2)
[61] CPR 3.1(3)
[62] A Zuckerman (2008), 'How seriously should unless orders be taken?' *Civil Justice Quarterly*, *27* (1)

a party files an expert report by a certain time, the party will not be allowed to rely on expert evidence; or the court directing that unless the party gives disclosure by a certain time, the party's statement of case would be struck out.[63] He notes that an unless order stipulating a striking out consequence is made only where the party in default has already failed to comply with rules or bare orders and only where the court is satisfied that the time already allowed has been sufficient and the failure of the party to comply with an earlier order is inexcusable.[64]

40. Zuckerman also comments that, until recently, notwithstanding the provision in Rule 3.8(1) of the CPR that a sanction imposed has effect unless the party has applied for and obtained relief from it, unless orders have not in practice always been rigidly enforced, with the court often giving additional time for compliance unless the party's failure has actually prejudiced their opponent or undermined the possibility of a fair trial proceeding. The result was that the effectiveness of unless orders was eroded and the possibility of satellite litigation arising from such an order itself was increased. However a recent Court of Appeal decision,[65] if it is followed in other cases, may mean that the court has now decided that it must take a different approach and enforce unless orders except where something has happened after the order was made which means that enforcing it has become unfair. As Zuckerman puts it, "if a peremptory order was fair, reasonable and proportionate in the first place, its consequences will be equally fair, reasonable and proportionate once a default has occurred, except where the party in question could not be blamed for the default."

Relief from sanctions

41. Rule 3.8(1) of the CPR allows a party in breach of a rule, practice direction or order imposing a sanction for non-compliance to apply for relief from the sanction. The application must be supported by evidence.[66] The court will consider all the circumstances of such an application and will take into account the following factors:

(a) the interests of the administration of justice;
(b) whether the application for relief has been made promptly;
(c) whether the failure to comply was intentional;
(d) whether there is a good explanation for the failure;
(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
(f) whether the failure to comply was caused by the party or his legal representative;
(g) whether the trial date or the likely trial date can still be met if relief is granted;

[63] In *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 W.L.R. 1666 at 1676, CA, Auld LJ stated that an unless order "is by its nature intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court."
[64] *Star News Shops v Stafford Refrigeration Ltd* [1998] 4 All E.R. 408, p. 415
[65] *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463
[66] CPR 3.9(2)

(h) the effect which the failure to comply had on each party; and
(i) the effect which the granting of relief would have on each party.[67]

Wasted costs orders

42. The courts in England and Wales have the power to make a legal representative liable for any wasted costs.[68] It can do this either by disallowing the costs or ordering the legal or other representative to pay them. "Wasted costs" are defined as any costs incurred by a party

> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.[69]

'Legal or other representative' means any person exercising a right of audience or right to conduct litigation on behalf of a party, so includes solicitors and counsel.[70]

43. When the court is considering whether to make a wasted costs order, it must give the legal representative a reasonable opportunity to attend a hearing to give reasons why the order should not be made.[71] The Practice Direction about wasted costs order states that such orders can be made at any stage in the proceedings, including proceedings relating to assessment of costs. A party can apply for a wasted costs order in writing or by making an application orally in the course of a hearing. The court can also make a wasted costs order of its own initiative. The Practice Direction states that it is only appropriate to make a wasted costs order against a legal representative if the representative has acted improperly, unreasonably or negligently; his conduct has caused a party to incur unnecessary costs; and it is just in all the circumstance to order the representative to compensate that party for some or all of those costs.

44. Research carried out on behalf of the Department for Constitutional Affairs into the effect of the Woolf reforms found that "wasted costs orders are hedged about with such complexities that judges tend to shy away from them. In any event if the fault lies with the lawyer then it was thought by some judges that in most cases a costs order against an innocent party will end up being settled by the lawyer and indeed firms sometimes acknowledge their fault and undertake to pay any costs order made against their client." [72]

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[67] CPR 3.9(1)
[68] Supreme Court Act 1981 (c. 54), s. 51, as substituted by the Courts and Legal Services Act 1990 (c41), s.4
[69] *Ibid*, s. 51(7)
[70] *Ibid*, s. 51(13)
[71] Civil Procedure Rules, 48.7(2)
[72] J Peysner and M Seneviratne (2005), *op. cit*, para 3.3

Ireland

45. The Rules of the Superior Courts in Ireland provide that where it appears to the court that a trial or other proceedings cannot conveniently proceed due to the neglect of a solicitor for a party to attend personally or be represented, to the solicitor's failure to be properly prepared for the matter, or to an omission to deliver any document needed by the court, the court may direct the solicitor personally to pay costs to the other party. [73]

46. The court may also disallow, or even direct repayment, of costs incurred as between a solicitor and his client if it considers that they have been incurred improperly or without reasonable cause, or have proved fruitless to the client due to delay in proceeding under any judgment or order, or to misconduct or default by the solicitor.[74]

47. The Rules of the Superior Courts also provide that non-compliance with the Rules may result in the proceedings being set aside, either wholly or in part, or otherwise dealt with in such manner and upon such terms as the Court thinks fit. [75]

Northern Ireland

48. The Civil Justice Reform Group Review of Northern Ireland, in 2000, recommended:[76]

- Procedural breaches should not necessarily be perceived as an inconsequential norm of litigation. The breach of rules, practice directions and protocols should be met with effective, automatic and relevant sanctions, although mechanisms should exist to provide relief. The court should also have a more general discretion to examine how the parties have conducted themselves during the litigation.

- The court should possess a discretion to strike out all or any part of the proceedings as a sanction where a party has seriously or repeatedly breached any rule, practice direction or protocol. When proceedings are issued unnecessarily as a result of non compliance with a protocol, the court should have power to sanction through costs or through the denial, reduction or increase of interest on damages. There should also be a power for a court to order immediate payment of interlocutory costs where there has been serious or repeated default. The amount of such an order, if not provided for in a scale, should be measured by the presiding judge. As to final cost orders, in both the Supreme Court and County Court Rules there should be a re-emphasising of the present judicial discretion. While the general principle that costs follow the event should remain, this should be tempered by reference to the overriding objective and the

[73] Rules of the Superior Courts (updated as of 2nd April 2009), Order 99, rule 6
[74] ibid, Order 99, rule 7
[75] ibid, Order 124
[76] The Civil Justice Reform Group (2000), *Review of the Civil Justice System in Northern Ireland Final Report*, Final Recommendations: paras 66-68

accompanying judicial discretion to vary the usual order. The use of automatic evidential sanctions when a party has failed to comply with evidential requirements should be continued, with the onus on the defaulting party to apply for relief. Courts should have the power to order lawyers to present their clients with a reasoned written explanation of why a sanction has been imposed. The power to make such an order should be expressly incorporated into the rules as should the power to require a litigant to be invited to a hearing during which a sanction is potentially to be imposed or reviewed.

- Where interlocutory sanctions are imposed, whether automatically or not, the defaulting party should have an opportunity to seek relief. In every such application the court should consider all the circumstances, including:
  (a) the interests of the administration of justice;
  (b) whether the application for relief has been made promptly;
  (c) whether the failure to comply was intentional;
  (d) whether there is a good explanation for the failure;
  (e) the extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocol;
  (f) whether the failure to comply was caused by the party or his legal representative;
  (g) whether the trial date or the likely date can still be met if relief is granted;
  (h) the effect which the failure to comply had on each party; and
  (i) the effect which the granting of relief would have on each party.

Victoria, Australia

49. In the Report of the Civil Justice Review in 2008 the Victorian Law Commission reviewed the existing rules of the Supreme, County and Magistrates' Courts of Victoria which allow the court to apply sanctions or procedural consequences, including setting aside proceedings or parts of proceedings, where there has been a failure to comply with the rules. The Commission recognised the threat of sanctions as being important for encouraging compliance with court directions and orders. It considered that there should be more clearly delineated express powers to order sanctions, including costs sanctions, for non-compliance with court directions and orders, unless there is a valid reason for non-compliance. It thought that a range of disciplinary and case management orders that included, but are not limited to, costs sanctions would be useful since sometimes costs might not be the most appropriate sanction, particularly where a party had substantial resources. The Commission provided a set of draft case management provisions[77] which include the following:

> If a party to whom such a direction [i.e. a case management] has been given or against whom an order is made…fails to comply with the direction or order, the court may, by order, do any one or more of the following:
> (a) dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim;

[77] Victorian Law Reform Commission (2008), *op.cit*, Chapter 5, paragraphs 5.3.1 and 6.7

(b) strike out or limit any claim made by a plaintiff;
(c) strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly;
(d) strike out or amend any document filed by the party, either in whole or in part;
(e) strike out, disallow or reject any evidence that the party has adduced or seeks to adduce;
(f) direct the party to pay the whole or part of the costs of another party;
(g) make such other order or give such other direction as it considers appropriate.

New South Wales, Australia

50. Section 61 (3) of the Civil Procedure Act 2005 provides that if a party to whom a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:

(a) dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim;
(b) strike out or limit any claim made by a plaintiff;
(c) strike out any defence filed by a defendant, and give judgement accordingly,
(d) strike out or amend any document filed by the party, either in whole or in part,
(e) strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
(f) direct the party to pay the whole or part of the costs of another party,
(g) make such other order or give such other direction as it considers appropriate.

51. Rule 42.10 of the Uniform Civil Procedure Rules 2005 provides that if a party fails to comply with a requirement of the rules, or of any judgment or order of the court, the court may order the party to pay such of the other parties' costs as are occasioned by the failure.

52. The New South Wales costs' system also allows lawyers to be made liable for the costs of an action that has no reasonable prospect of success.[78] The Legal Profession Act 2004 provides that a law practice[79] must not provide legal services on a claim or a defence of a claim for damages unless they reasonably believe "on the basis of provable facts and a reasonably arguable view of the law" that the claim or defence has a reasonable prospect of success. When filing court documentation[80] a law practice must certify that there are such reasonable grounds for believing that the claim or defence has a reasonable prospect of success. The provision of legal services without reasonable prospects of success can amount to professional misconduct or unsatisfactory professional conduct. If a court finds that the facts established by the evidence do not form a basis for a reasonable belief that a claim or defence has reasonable prospects of success, a rebuttable presumption arises that any

[78] Legal Profession Act 2004, sections 344 to 349
[79] Where legal services are provided by both a solicitor and a barrister, the responsibilities imposed by the Act apply to both.
[80] "Court documentation" is defined by the 2004 Act as: (a) an originating process (including for example, a statement of claim, summons or cross-claim), defence or further pleading, or (b) an amended originating process, defence or further pleading, or (c) a document amending an originating process, defence or further pleading, or (d) any other document of a kind prescribed by the regulations.

legal services that were provided were provided without reasonable prospects of success. Where it appears to a court that a law practice has provided legal services without a reasonable prospect of success, the court can of its own motion or on the application of a party to the proceedings, make either or both of the following orders in respect of the practice or one of the legal practitioners of the practice:

> (a) an order directing the practice or associate to repay to the party to whom the services were provided the whole or any part of the costs that the party has been ordered to pay to any other party,
>
> (b) an order directing the practice or associate to indemnify any party other than the party to whom the services were provided against the whole or any part of the costs payable by the party indemnified.

53. A costs assessor in New South Wales, if he considers that the legal costs charged by a law practice are grossly excessive, or that a costs assessment raises any other matter that may amount to unsatisfactory professional conduct or professional misconduct, must refer the matter to the Legal Services Commissioner to consider whether disciplinary action should be taken against the practitioner.[81]

Canada - Federal Courts Rules

54. Rule 56 of the rules of the Federal Courts of Canada provides that non-compliance with any of the rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60.[82] Those rules allow a party to challenge any step taken by another party for non-compliance with the rules. A challenge has to be brought as soon as practicable after the party bringing the challenge becomes aware of the irregularity. Where the court finds that a party has not complied with the rules, it may –

> (a) dismiss the motion, where the motion was not brought within a sufficient time after the moving party became aware of the irregularity to avoid prejudice to the respondent in the motion;
> (b) grant any amendments required to address the irregularity; or
> (c) set aside the proceeding, in whole or in part.

[81] Legal Profession Act 2004, section 393
[82] Federal Courts Rules (SOR/98-106) Current to May 27 2009

Ontario, Canada

55. As of January 1, 2010, Rule 3 of the Ontario Rules of Civil Procedure are to be amended by adding a rule about timetables, allowing parties to amend a timetable established by order of a judge or case management master, unless the order expressly prohibits amendment by the parties. Parties will not be able to amend the date before which the action is to be set down for trial or restored to a trial list, as the case may be. The new rule also contains the following provision about non-compliance:

> If a party fails to comply with a timetable, a judge or case management master may, on any other party's motion, (a) stay the party's proceeding; (b) dismiss the party's proceeding or strike out the party's defence; or (c) make such other order as is just.[83]

[83] Rules of Civil Procedure (R.R.O. 1990, Regulation 194), Rules 3.04(4)

D VEXATIOUS LITIGANTS

Comparative Analysis of Provisions in Other Jurisdictions

Ireland

56. In Ireland a party may apply to the court for an "Isaac Wunder" order.[84] Such an order obliges a litigant who is found to have instituted proceedings which are an abuse of process against another party to apply to court for its prior consent before that litigant can issue fresh proceedings against that same party. Usually, such a litigant will either have persistently brought proceedings which are an abuse of process against a particular defendant or defendants or have intimated that he intends to do so. In effect, it is an 'anti-harassment' filtering device whose aim is to ensure insofar as is possible that only proceedings with a legitimate place before the courts find their way there.[85]

57. While "Isaac Wunder" orders do provide an effective remedy to restrict plaintiffs in respect of particular defendants, they do not, however, provide a remedy in cases where a plaintiff issues multiple sets of proceedings which are repeatedly an abuse of process in respect of different defendants. It is possible for a person to bring proceedings before the Irish courts in any number of matters against any number of defendants. In an extreme case, where such proceedings are judicially determined to be an abuse of process, "Isaac Wunder" orders will be of limited value only.[86]

Northern Ireland

58. In Northern Ireland the Attorney General can apply to the High Court for a restriction order in a case where a litigant has "habitually and persistently and without any reasonable ground instituted vexatious legal proceedings".[87] These legal proceedings may have been instituted in the High Court or in any inferior court or tribunal, against the same person or against different persons. The effect of this order is that the litigant, after being heard or given the opportunity of being heard, cannot start or continue any proceedings in not only the High Court but also in any court or tribunal without the High Court's permission. The Court also has the discretion to assign a solicitor or counsel to any person against whom an order is sought and the expenses of any such solicitor or counsel shall be taxed and paid out of the legal aid fund. A notice of making a restriction order is published in the Belfast Gazette.[88]

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[84] *Wunder v Hospitals Trust (1940) Ltd* (unreported, Supreme Court, 24 January 1967 and 22 February 1972)
[85] D. Shiels (2001) 'Wunder Wall', *Law Society Gazette*, *95*, number 9
[86] *Ibid*
[87] Section 32 of the Judicature (Northern Ireland) Act 1978 (c. 23)
[88] *Ibid*

New Zealand

59. In New Zealand the Attorney General can apply to the High Court for a litigant to be restricted on his right to institute legal proceedings if he "has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons."[89] In this case the Court may order, after hearing that person or giving him an opportunity of being heard, "that no civil proceeding or no civil proceeding against any particular person or persons shall without the leave of the High Court or a Judge thereof be instituted by him in any Court." The vexatious litigant has no right to appeal an order granting or refusing him such leave.

60. Special provision is made for family law matters. Under section 32 of the Harassment Act 1997[90] the Court may dismiss any proceedings before it if it is satisfied that proceedings are frivolous or vexatious or are an abuse of the procedure of the Court. In addition, if the Court is satisfied that a person has persistently instituted vexatious proceedings under the Act, it may make an order prohibiting that person from commencing any proceedings under the Act, or proceedings of any special kind or against any specified person, without leave of the Court. Such an order cannot be made without giving that person an opportunity to be heard.

Canada

61. In Ontario a judge of the Superior Court of Justice where satisfied, on application, that a person "has persistently and without reasonable grounds" either instituted vexatious proceedings in any court or conducted a proceeding in any court in a vexatious manner, may order that no further proceedings be instituted by that person in any court.[91] The judge may also order that a proceeding previously instituted by that person in any court, not be continued. The litigant against whom such an order has been made may apply to the Superior Court of Justice for leave to institute or continue a proceeding. Leave is granted only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding. The Attorney General is entitled to be heard on the application. No appeal lies from a refusal to grant relief to the applicant.

62. In Alberta an application requires the written consent of the Minister of Justice and the Attorney General of Alberta who also have the right to appear and be heard in person or by counsel on an application made to the Court.[92] If the Court is satisfied that a person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in the Court or in any other court

[89] Section 88B of the Judicature Act 1908
[90] Harassment Act 1997, s.32
[91] Chapter 43 of the Courts of Justice Act 1990
[92] Section 23 of the Judicature Act 2000, (c. J-2)

against the same person or against different persons, the Court may order that no legal proceedings shall, without leave of the Court, be instituted in any court by the person taking those vexatious legal proceedings.

63. In British Columbia the Supreme Court requires that one of the litigants apply for such an order.[93] It has no power to make an order on its own motion. If the court is satisfied that "a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons" it may order that a legal proceeding must not, without leave of the court, be instituted by that person in any court. The application is made in the Supreme Court and takes into account vexatious proceedings started in either the Provincial Court or the Supreme Court. The person concerned has the right to be heard.

Hong Kong

64. Following a Working Party led by the Chief Justice on Civil Justice Reform Hong Kong enacted legislation in 2008[94] allowing a vexatious litigant order to be made not only upon application by the Secretary of State for Justice but also upon the application of any person directly affected by the vexatious conduct. An "affected person" is defined as a person who is or has been a party to any of the vexatious legal proceedings or who has directly suffered adverse consequences resulting from such proceedings. The person against whom the order is to be made has the right to be heard. A vexatious litigant order may be made for a specified period but will otherwise remain in force indefinitely. Leave to institute or continue proceedings by a person who is the subject of an order will only be granted where the Court of First Instance is satisfied that the proceedings are not an abuse of process and that there are reasonable grounds for the proceedings.

[93] Section 18 of the Supreme Court Act
[94] Civil Justice (Miscellaneous Amendments) Ordinance 2008