



# Scottish Civil Courts Review

A CONSULTATION PAPER





# **Scottish Civil Courts Review**

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## CIVIL COURTS REVIEW – CONSULTATION PAPER

### Foreword by the Lord Justice Clerk

The work of the Civil Courts Review began on 4 April 2007. Since then we have received many representations from a wide range of individuals and interest groups. We are grateful to them all for their contributions to our work.

We have decided to publish this Consultation Paper at this stage in order to inform interested parties of the principal issues that have been raised with us, to report on our researches to date and to set out what appear to us to be the practicable options for reform. In Annex D we provide certain statistical data that may stimulate further discussion.

This Paper does not set out a closed agenda. We will welcome suggestions as to other questions and options that we may not have considered.

From the representations that we have received so far, it is apparent to us that there is a widespread desire for reform; but we have reached no conclusions on any of the questions that we have posed.

I wish to make it clear at this stage 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. Unless that problem is dealt with effectively, it is probable that any proposals for civil justice reform will have only the most limited practical significance.

On behalf of the Board, I thank the members of our Review Team and our Policy Group for their expertise and commitment, which has enabled us to reach this stage of the Review in so short a time.

We invite responses to this Consultation Paper by 31 March 2008. After that, we may conduct more specific consultations on individual topics before proceeding to our conclusions.

Rt Hon Lord Gill  
November 2007



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## CHAPTER 1: INTRODUCTION

1.1 This chapter explains the background to the Review and the context in which it began its work.

### Remit of the Review

1.2 On 12 February 2007 the then Minister for Justice, Cathy Jamieson, announced a wide ranging review of the civil courts system in Scotland with the following remit:

*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.*

### Background to the Review

1.3 The Scottish Executive's report '*Modern Laws for a Modern Scotland*',<sup>1</sup> published on 12 February 2007, explained the background to the decision to embark upon the review and set out the key issues which the Review was expected to address and the principles which the Executive considered should underpin its work.

1.4 The Executive had supported the Scottish Consumer Council's initiative, funded by the Nuffield Foundation, to examine the case for and against a review of civil justice in Scotland and to make suggestions for change. The Scottish Consumer Council appointed a Civil Justice Advisory Group (CJAG) chaired by the Rt Hon Lord Coulsfield, which held a series of six seminars between September 2004 and April 2005. The CJAG published a report in November 2005,<sup>2</sup> which called on the Executive to establish a review of several important aspects of the civil justice system in Scotland and identified key issues that such a review should address.

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<sup>1</sup> Scottish Executive (2007), *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*.

<sup>2</sup> Scottish Consumer Council (2005), *The Civil Justice System in Scotland: a case for review? The final report from the Civil Justice Advisory Group*.

1.5 In early 2006, the Executive held a number of meetings with a broad range of stakeholder interests to discuss the conclusions of the CJAG report. A debate on civil justice reform took place in the Scottish Parliament on 20 April 2006, in which there was a clear consensus that disproportionate costs and unacceptable delays should be addressed. At that debate the Executive announced its intention to establish a judicially-led “root and branch” review of the civil courts.<sup>3</sup> The Lord Justice Clerk, the Rt Hon Lord Gill, was invited to lead the Review, with the above remit.

### The Review Board, the Policy Group and the Review Team

1.6 The Review began its work in April 2007, when Lord Gill was joined by the Hon Lord McEwan, Sheriff Principal James Taylor and Sheriff Mhairi Stephen on the Project Board. The Board is assisted by a Policy Group comprising individuals with particular knowledge and expertise in various aspects of civil justice, and is provided with administrative and research support by a Review Team.<sup>4</sup>

1.7 In recognition of the importance of the Review being as well informed as possible about what and where the problems are, a general call was issued in May 2007, via a press release and on the Review’s website, <http://www.scotcourts.gov.uk/civilcourtsreview/index.asp>, for views about the topics covered by the remit and any other matters within its scope that people considered the Review should take into account. Views from anyone with an interest were welcomed and a number of submissions were received via the website and its associated email address, [CivilCourtsReview@scotcourts.gov.uk](mailto:CivilCourtsReview@scotcourts.gov.uk). In addition a number of people and organisations were contacted by letter and asked about issues relating to the civil courts which are of concern to them. Around 40 submissions have been received to date, from a range of people and organisations, including judges, legal practitioners, voluntary organisations, and individual court users. Many of these contributions are extremely detailed and thoughtful and the Review is grateful for the time and effort that contributors have given. All the contributions have been useful in informing consideration of the matters which will require to be addressed. While this paper does not discuss in detail all the points that have been drawn to the Review’s attention, it reflects the main themes and topics of concern that have been raised so far.

### Key issues

1.8 The remit sets out the areas the Review is expected to examine and the outcomes its recommendations should be designed to achieve. The remit is related to the four key issues identified in the Scottish Executive’s report *‘Modern Laws for a Modern Scotland’* as being most urgently in need of attention. These four issues, which were highlighted by the CJAG report, are:

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<sup>3</sup> Scottish Parliament, Official Report, 20 April 2006, col 24856.  
<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-06/sor0420-02.htm#Col24853>.

<sup>4</sup> Further information about the membership of the Policy Group and the Review Team is provided in Annex A.

- (a) the disproportionate cost of litigation, particularly in relation to cases of low monetary value;
- (b) balancing the demands of civil and criminal business;
- (c) specialisation; and
- (d) case management.

The remit also refers to the role of mediation and other forms of alternative dispute resolution and to the development of modern methods of communication.

1.9 The Review's primary purpose is to improve access to justice for the people of Scotland. An effective and efficient civil justice system is a vital component of a civilised and prosperous society. A good civil justice system must provide citizens with high quality advice, information and assistance, at a price they can afford, to help them avoid civil legal problems arising, to provide means to help to resolve problems satisfactorily when they do arise, and to ensure that citizens' civil rights and responsibilities are protected and enforced when necessary. The system will be failing if the civil courts are seen as remote and inaccessible, if people are inhibited from pursuing or defending valid claims because they cannot afford the assistance they need to enable them to do so, or if the procedures and language the courts use create confusion in the minds of the general public. These are all issues which the Review will address.

### **The role of the courts within the civil justice system**

1.10 A key issue for the Review will be whether, as a matter of public policy, the court should be regarded as the last resort for the resolution of disputes after all other suitable methods of dispute resolution have been proved ineffective; or whether it is simply one of a "menu" of dispute resolution options from which parties may choose. Both models raise a question about the role that the court should play in determining which disputes it deals with and at what stage of a dispute its services should be engaged. These are key questions for the Review because, as the Executive's report noted,<sup>5</sup> there are choices to be made about priorities for investing in the civil justice system, and about where the balance should lie as between on the one hand, investing in formal structures such as the courts, and on the other, supporting the provision of advice and other methods of dispute resolution which aim to prevent disputes ending up in court. The Review would welcome views and comments about where the balance should lie and how it can best be achieved.

### **Principles underpinning the Review**

1.11 The Executive's report also highlighted two principles that it considered should underpin any proposals for reform, namely, proportionality and value for money, both of which are reflected in the terms of the Review's remit. The Report defined proportionality in terms of resolving disputes within a reasonable time and

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<sup>5</sup> Scottish Executive (2007), *op. cit.*, p15.

at a reasonable cost both to the parties involved and to the public purse. It proposed that the level of legal, and where appropriate, judicial resources applied to an issue should be proportionate to the importance and value of the issue to the parties and to society in general. Thus where the monetary value of a dispute was small and there were no complex legal issues, the application of the proportionality principle should ensure that a fair determination is reached quickly and at reasonable cost. Value for money was defined on the premise that civil justice is a public service, which must therefore, like other public services, both meet reasonable public expectations and make the most efficient use of the public resources invested in it.

1.12 The Civil Justice Council in their first report on access to justice and funding,<sup>6</sup> enumerated a number of overriding principles upon which they considered delivery of access to justice was dependent:

- (i) a meritorious case;
- (ii) the participants having at the outset access to means of funding their case;
- (iii) the lawyers on each side having at the outcome access to reasonable remuneration;
- (iv) the cost of (ii) and (iii) being proportionate to what is at stake; and
- (v) the availability of an efficient and properly resourced court system.

1.13 The Review considers that the principles of proportionality and value for money, together with the principles identified by the Civil Justice Council, form a sound basis for its examination of the options and development of recommendations for reform. The idea of proportionality in the use of resources to resolve civil disputes is integral to the concept of justice. It is vital both that the civil justice system provides access to justice at a reasonable cost, and that the resources of the system are allocated fairly. That is not to say that the monetary value (if there is one) of the matters at stake should be the sole determining factor as to how much resource should be expended on a case. A number of different factors may be relevant. The need for a judicial precedent to clarify the law and/or enable the resolution of a number of other cases, especially in areas such as delict and contract where there is still significant scope for judge-made law, may justify the investment of significant resources in a case of low monetary value. Other factors, such as the value society places on protecting the interests of children or vulnerable adults, or on enforcing high standards of health and safety in the workplace, will also be relevant considerations in the decision as to what is a proportionate amount of legal and judicial resource to devote to a case.

1.14 As the principles adopted by the Civil Justice Council make clear, proportionality does not mean justice on the cheap. A good civil justice system must be adequately resourced and the recommendations that the Review will make will be predicated upon that. The recommendations will also be predicated on the

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<sup>6</sup> Civil Justice Council (2005), *Improved Access to Justice – Funding Options and Proportionate Costs*. The Civil Justice Council is a non departmental public body the remit of which includes the provision of advice to the Ministry of Justice on the operation of the civil justice system in England and Wales.

assumption that the aim is to improve the system for the benefit of those whom it is intended to serve, rather than those who work within it.

1.15 The Review would welcome views and comments on the principles which underpin its work.

### Related areas

1.16 It will be necessary for the Review to look beyond the courts themselves and to consider what alternatives or precursors to court proceedings exist or ought to exist, what they each offer and whether and in what circumstances people should use them or be encouraged to do so. The extent to which advice, information and alternative dispute resolution systems are available, affordable and of sufficiently high quality to inspire confidence in those who use them, will have a significant effect on whether and when people consider it appropriate, or are forced, to engage the court system in the resolution of a dispute. Although the Review's primary focus must remain on the courts themselves, its recommendations are likely to need to have regard to a number of other matters. There are areas that are outside its remit, but which are relevant to recommendations which it may wish to make. Developments in some of these areas may have an impact on whether recommendations which the Review may wish to make, on matters which are within its remit, can actually be given effect to. The following are the areas where the Review considers that it will be most important for it to take account of current policy and any proposed changes that may have an impact on the work of the civil courts in the following areas:

- the provision of publicly-funded legal information, advice and assistance;
- the role of mediation and other methods of dispute resolution (including industry specific arbitration schemes);
- the field of administrative justice, including the roles of complaints procedures, ombudsmen, and administrative tribunals, and their respective relationships with the civil court system;
- the recruitment, training and deployment of judges; and
- the structure and regulation of the legal profession.

### The aim of the paper

1.17 This paper sets out what the Review considers to be the most important issues that should be discussed and identifies the areas that it will examine in order to identify and assess possible options for change. It aims to build on the work already done by the Scottish Consumer Council and the Scottish Executive in identifying the main areas of concern and it takes account of available information about the workings of the civil justice system; from published research; from submissions to the Review; and from investigations undertaken so far. The paper also aims to identify where there are significant gaps in knowledge about how well – or how badly – the system is working at present. It is hoped that responses will reveal potential sources of information to enable the Review to supplement its

knowledge, as well as further ideas for possible options for change that it should consider.

1.18 The paper deals with four groups of questions: about access to justice; about the cost and funding of litigation; about the structure of the civil courts; and about how the courts operate. All these issues are, of course, inter-related. Decisions on one issue will inevitably affect the others.

1.19 Each of the following chapters identifies key questions for discussion and deals with a number of specific issues. Some identify areas where further information and investigation are needed. Some refer to options for change that have already been identified, either because they have already been introduced in one or more areas of Scotland, or because they have been adopted in other jurisdictions, or because they have emerged from work already done by the Review. This paper does not aim to draw conclusions about such options. Its purpose is to identify what they are and what issues they raise, and whether they are worthy of further examination.

1.20 The issues discussed in this paper are of concern to everyone who wishes to improve access to civil justice in Scotland. Long term improvement in civil justice can be fully achieved only if there is a reasonable measure of consensus about where the problems are, what the key aims and priorities of the system should be and how they can best be pursued. Opening up the discussion will enable crucial concerns to be aired and addressed. The next stage of the Review's work will be to examine in more depth the various issues identified in this paper, looking at the causes of problems and the reasons for successes, and assessing options for change and their potential impact. The engagement of all interested parties in that process will be essential if the Review is to be successful in fulfilling its remit. All contributions are welcome and will be taken into consideration.

### How to respond

1.21 Each chapter of this paper asks a number of specific questions. Please respond to as many or as few of the questions as you wish, indicating in your response which questions your comments relate to. Please give reasons for your views and information from your own experience where appropriate. If there are issues within the Review's remit which are not mentioned in the paper but which are of concern to you, please feel free to draw them to our attention.

1.22 It is intended that all responses to this consultation will be made publicly available via the Review's website, unless respondents request otherwise. Please therefore indicate whether or not you are content for your response to the paper to be published, by completing and returning the respondent information form enclosed with the covering letter (and available from the website) with your response.

### Questions for discussion

1. Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?
2. Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?
3. Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?



## CHAPTER 2: ACCESS TO JUSTICE

2.1 The first of the matters to which the Review's remit requires it to have regard is the cost of litigation to the parties and to the public purse. But not all disputes require litigation to resolve them justly; and litigation need not necessarily involve parties being legally represented. The remit requires the Review to make recommendations "with a view to improving access to justice" and "promoting early resolution of disputes". It is therefore important, as already noted in Chapter 1, to look beyond the courts themselves and to consider how legal disputes can be avoided in the first place or resolved without resort to the courts, as well as how to keep court procedures to the minimum necessary.

### Public legal education

2.2 Increasing general public knowledge about the law and the civil justice system is one way to assist people to avoid becoming involved in legal problems. Well informed citizens may also be able to engage in discussion and negotiation with a view to reaching a resolution without resort to the courts when disputes do arise. The development of the "enabled citizen" is the aim of the Public Legal Education and Support Task Force established in July 2006 by the Department for Constitutional Affairs (now the Ministry of Justice), which published its first report in July 2007.<sup>7</sup> The report sets out a strategy for the development of public legal education as "a powerful tool that enables all citizens to make the best use of the legal system in dealing with daily problems". Canada has a long tradition of public legal education, much of it funded by the federal Department of Justice.<sup>8</sup> In Scotland the Scottish Legal Action Group (SCOLAG) recently called for the Scottish Executive to provide support for increased public legal education, including the development of teaching about the Scottish legal system and legal rights and responsibilities in schools.<sup>9</sup> The Review will consider the value of such initiatives in improving access to justice and avoiding unnecessary litigation.

### Advice and assistance

2.3 Knowledge on its own will not, however, be enough to enable the citizen to avoid or resolve disputes in every case. Advice will frequently be necessary but, as one submission to the Review has commented, effective intervention by an adviser at an early stage will in many cases be sufficient to resolve a dispute, before it escalates into a more serious and intractable problem. Such advice can come from a large number of different sources, including the voluntary sector, local and public authorities and lawyers in private practice. Much advice provision is publicly

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<sup>7</sup> Public Legal Education and Support Task Force (2007), *Developing capable citizens: the role of public legal education*, and Alexy Buck, Pascoe Pleasance and Nigel Balmer (2007), *Education Implications of the English and Welsh Civil and Social Justice Survey*, LSRC.

<sup>8</sup> More information on these initiatives can be found at:

<http://www.justice.gc.ca/en/ps/pb/prog/legaled.html>.

<sup>9</sup> SCOLAG Urges 3 Steps to Increase Access to Justice, March 2006, see <http://www.SCOLAG.org/group/3steps.htm>.

funded, either through grant aid provided by local or central government or via the legal aid system.

2.4 One of the key findings of the Strategic Review on the Delivery of Legal Aid, Advice and Information<sup>10</sup> carried out for the Scottish Executive in 2004 was that “there needs to be a more strategic and co-ordinated approach to planning and delivery of overall provision of publicly funded legal assistance”, in order to ensure that the people in Scotland who need it are provided with good quality legal information, advice and assistance efficiently. This finding was echoed by a submission to the Review which identified the need for an integrated network of planned advice provision, including both solicitors and non-solicitor advisers.

2.5 Following the Strategic Review the Executive published a consultation paper, *Advice for All*,<sup>11</sup> which proposed the development of a national strategy for publicly funded legal assistance (PFLA) in civil matters<sup>12</sup> and, in the longer term, the establishment of a national body with responsibility to plan, co-ordinate, support and develop civil PFLA. Some reforms to the civil legal aid system have been made by the Legal Profession and Legal Aid (Scotland) Act 2007,<sup>13</sup> which amends the legal aid legislation to allow the provision of advice and assistance by approved non-solicitor advisers and extends the Scottish Legal Aid Board’s powers to employ solicitors directly for the purpose of providing civil legal assistance and grant funding. These powers may in the future be used to deal with any gaps in coverage, particularly in rural areas or some areas of the law, where members of the public may experience difficulty in obtaining advice or finding a solicitor to do legal aid work. Any developments in relation to civil PFLA could have a significant effect on the extent to which people need to use the courts to resolve disputes and the Review will have regard to developments in this area. As another of the Strategic Review’s key findings says, “the development of publicly funded legal assistance needs to be taken forward in conjunction with planned changes in the justice system, rather than in isolation, given the influence and impact of each upon the other”.

### Mediation and other methods of dispute resolution

2.6 The Review will also look at the role of mediation and other methods of dispute resolution in assisting people to resolve disputes without resort to the courts. The spectrum of dispute resolution processes is set out in the CJAG Report.<sup>14</sup> Processes which can be instigated by one party include complaints procedures,

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<sup>10</sup> Scottish Executive (2004), *Strategic Review on the Delivery of Legal Aid Advice and Information: Report to Ministers and the Scottish Legal Aid Board*.

<http://www.scotland.gov.uk/Publications/2004/11/20170/45845>.

<sup>11</sup> Scottish Executive (2005), *Advice for All: Publicly Funded Legal Assistance in Scotland? The Way Forward – a Consultation*, <http://www.scotland.gov.uk/Publications/2005/06/16153135/31366>.

<sup>12</sup> Civil PFLA is described in *Advice for All* as covering the full range of assistance that people may need to resolve their justiciable problems, including information, advice on options, practical assistance, mediation and representation, and advice which is not always described as legal advice, such as advice on welfare rights, debt, housing and consumer matters.

<sup>13</sup> asp.5.

<sup>14</sup> CJAG Report page 50, *op. cit.*

ombudsmen, regulation and litigation (courts and tribunals). Processes which require participation by both parties include negotiation, mediation, conciliation, neutral evaluation, expert determination and arbitration/adjudication. Chapter 5 discusses the role of mediation and other dispute resolution in relation to the court process in more detail and identifies the main issues that the Review will examine.

### Self-representation

2.7 A significant number of litigants either choose to represent themselves in court or are unable to obtain legal representation. As is noted in paragraph 3.25 around half of households are not eligible for legal aid, and of those eligible, 60% would have to make a contribution to the costs of the case. Many people may therefore be put off seeking legal representation because of fears about the cost, and may not be able to obtain access to other means of funding such as *pro bono* schemes or speculative fee arrangements. Certain current procedures are also specifically intended to be able to be used by unrepresented parties, for example the small claims procedure in the sheriff court, and consequently legal aid is not available for representation in small claims cases.

2.8 Concerns about litigants appearing in court without legal representation have been raised by a considerable number of the submissions which the Review has so far received. Many of these highlight the difficulties for the court which are caused by party litigants, especially those who pursue cases which have little or no merit. Some behave in ways that absorb a disproportionate amount of the court's resources and cause significant unjustifiable expense to their opponents. Paragraphs 6.74 to 6.88 of Chapter 6 discuss such litigants in more detail and consider how the problems they cause could be addressed.

2.9 Several submissions however also highlighted the other side of the issue, namely, how unrepresented litigants can be assisted to present their cases effectively. One submission noted that court procedures are complex and often very difficult for non-lawyers - even well-educated and articulate individuals - to follow, and that even the small claims procedure has in practice operated much more formally than was originally envisaged. It was suggested that a party litigant may be put off by the prospect of facing a solicitor representing the other side, against the backdrop of a formal setting dominated by lawyers in court dress and using legal language. Even people who have a reasonable case to put forward may find it difficult to do so coherently in such circumstances.

### *Simplified procedures*

2.10 It will be appropriate for the Review to examine how far it is desirable and feasible to design court procedures in order to enable people to conduct their own cases, for example by simplifying forms and using more accessible language. There are some situations where, in order to do justice, it may be essential for a party to have legal representation. However, it should also be possible in some instances for individuals to conduct their own cases, particularly where relatively low amounts of money are involved and where the legal issues are straightforward.

### *Self-help guidance*

2.11 The Review will also look at what can be done to assist unrepresented litigants to prepare their cases for court and to present them effectively. One way of improving people's ability to present their own cases is by providing guidance on what kinds of information and evidence should be provided to the court in particular types of case, what actions are required by particular court procedures and how court forms should be completed. Some guidance is already available to assist people to use the small claims procedure, and it may be that more could be done for other procedures. Such guidance might be given in written form, via a website, or face to face. A number of jurisdictions in the USA have developed fairly substantial "self-help" services for unrepresented litigants<sup>15</sup> and the Review may consider whether a similar approach could improve access to justice here in Scotland. This is discussed in more detail in paragraph 6.33 below.

### *In-court advice*

2.12 Another way in which to provide assistance to unrepresented litigants is to provide advice within the court complex itself. The in-court advice project established in Edinburgh sheriff court in April 1997 was the first such service to be established in a Scottish court. The project was intended to help those raising or defending small claims and summary cause (including heritage) actions, as well as unassisted litigants involved in ordinary cause actions where the Debtors (Scotland) Act 1987<sup>16</sup> may be applied. The aim was to provide clients with the necessary tools to construct a defence or argument in pursuing or defending a claim. If necessary the in-court adviser made referrals to appropriate agencies for further help including representation. Court representation was offered by the in-court adviser only in an emergency.

2.13 Research which was undertaken to assess the implementation, operation and impact of the Project<sup>17</sup> over the first nine months of its operation found that there was a large demand for the services provided and that these helped to optimise the use of court resources and court time. Sheriffs welcomed the Project for facilitating efficiency and justice in the court room and clients also gave it a powerful endorsement.

2.14 A well established mediation service and Mediation Co-ordinator were formally linked to the Project in 1998. The number of clients using the mediation services increased substantially. A second phase of research undertaken to examine the new mediation component of the Project, as well as to assess the Project's continued impact on court users, the sheriff court and the civil justice system,<sup>18</sup> found

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<sup>15</sup> Examples include Washington Law Help, <http://www.washingtonlawhelp.org/WA/index.cfm>; the California Courts Self-Help Centre, <http://www.courtinfo.ca.gov/selfhelp/>; and the Indiana Supreme Court Self Service Legal Center, <http://www.in.gov/judiciary/selfservice>.

<sup>16</sup> c.18.

<sup>17</sup> Elaine Samuel (1999 and 2002), *Supporting Court Users: The In-court Advice Project in Edinburgh Sheriff Court Parts I and II*, Scottish Executive.

<sup>18</sup> *ibid.*

that demand for services provided by the In-court Advice Project increased steadily from the time it was first introduced. The mediation component provided unrepresented disputants in small claims and summary causes with an alternative to litigation. The Mediation Co-ordinator helped as many clients settle their disputes by arms-length negotiation as by fixing a mediation hearing, and where there was a mediation hearing almost all were concluded with an agreement. Sheriffs welcomed the Project for helping unrepresented litigants to achieve higher levels of participation, control and understanding of court procedure, and for promoting a level playing field in court. It also appeared to optimise court resources by smoothing the passage of unrepresented litigants through the sheriff court, by helping them to get quickly and accurately to disputed issues, and by diverting some cases from the court.

2.15 Following on from the success of the Edinburgh Sheriff Court In-court Advice Project further in-court advice services were established in Aberdeen, Airdrie, Dundee, Hamilton and Kilmarnock in 2002/3. An evaluation published in January 2006<sup>19</sup> indicated that these services are a valuable resource which was particularly able to meet otherwise unmet legal need for people involved in court proceedings.

2.16 It would appear from the research that initiatives such as the in-court advice services have an important role to play in improving access to justice by assisting people to resolve disputes in advance of court hearings and ensuring court time is used more effectively when hearings do go ahead. The Review will consider whether there is a case for greater availability of such services, and if so, how that might be achieved.

### **An alternative method of dealing with low value cases**

2.17 The preceding paragraphs of this chapter have discussed ways in which people can be assisted to avoid involvement in court proceedings, or when they do have to be involved, how they can be helped to navigate through the process by themselves. Several of the submissions to the Review, however, have questioned whether the present court structure is the best place in which to deal with certain types of cases, especially those of low monetary value. It has been suggested that certain types of claim should be dealt with in a different forum. This could be either at a new lower level or “third tier” within the sheriff court, or in a new court or tribunal outside the sheriff court but with a right of appeal to that court. Examples of the kinds of case that have been suggested as being potentially suitable for an alternative forum are debt, consumer and housing cases.

2.18 One suggestion made to the Review is that consumer and debt cases might be dealt with by a tribunal presided over by a legally qualified decision-maker akin to a tribunal chair, or perhaps even by non-legally-qualified justices with a legally qualified clerk, along similar lines to the district court. Another suggestion is for a

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<sup>19</sup> Sue Morris *et al* (2006), *Uniquely Placed: Evaluation of the In-court Advice Pilots, Phase 1*, Scottish Executive.

civil tribunal which would operate in an inquisitorial fashion in order to ensure equality of arms without the need for legal representation. As regards housing cases, one submission notes that a large proportion of such cases involve negotiation with landlords and continuation of the case for payment and/or processing of housing benefit claims rather than complex legal arguments, and that it may be appropriate to have a specialist housing forum to deal with these, as well as mortgage repossession cases.

2.19 Other jurisdictions have made more radical changes to how they deal with certain kinds of claims of lower value by taking them outside the formal court structure, for example, the Republic of Ireland has established the Personal Injuries Assessment Board (PIAB) and the Private Residential Tenancies Board. The PIAB came into being for compensation in cases involving employers' liability on 1st June 2004 and for claims arising from motor accidents on 22nd July 2004. All claims for personal injury (excluding medical negligence) must now be submitted to the PIAB for assessment. It is said that the new process delivers compensation without the legal costs and experts' fees that add, on average, more than 46% to the cost of a claim. It also reduces the time taken from approximately three years under the court system to nine months.<sup>20</sup>

2.20 The Private Residential Tenancies Board was established by the Residential Tenancies Act 2004. The Act, which arose out of recommendations of the Commission on the Private Rented Residential Sector, brought about comprehensive reform of the legislation through a modernised code that strengthens tenants' rights and also supports a more professional approach by landlords. The dispute resolution service replaces the courts in relation to the majority of landlord and tenant disputes.

2.21 Hence, there are several possible options for new ways of dealing with cases such as those mentioned above, as well as other low value, straightforward cases. All these options raise complex questions for the Review to consider, concerning jurisdiction, procedure, judiciary and staffing, as well as issues about accommodation and other physical resources such as information technology. The cost implications of the creation of any new forum to deal with low value cases, whether within or outside the sheriff court, would be likely to be significant. The structural issues require to be considered alongside questions about case management procedures in order to identify an appropriate model for dealing with the kinds of case being discussed, especially where one or more of the parties is not legally represented. Chapter 4 has further discussion on specialisation within the courts and on jurisdiction and allocation of business, which are relevant to the matters discussed here.

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<sup>20</sup> Personal Injuries Assessment Board: <http://www.PIAB.ie>.

## Questions for discussion

1. What contribution can public legal education make to improving access to justice?
2. Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?
3. To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?
4. What contribution, if any, can (a) “self-help” services for party litigants and (b) court based advice services make to improving access to justice?
5. Are there any other issues which impact on access to justice in Scotland which the Review should consider?
6. Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?



## CHAPTER 3: THE COST AND FUNDING OF LITIGATION

3.1 This chapter considers the cost of litigation and the ways in which it is funded.

### The cost of litigation

3.2 It is frequently stated that people are deterred from litigating by worries about the cost.<sup>21</sup> Information about the actual cost of litigation in Scotland is not readily accessible, but some information is available from the Scottish Legal Aid Board. It is, however, important to bear in mind that this information does not necessarily reflect the cost of privately funded cases.

3.3 In its annual reports the Scottish Legal Aid Board (SLAB) publishes statistics on the average cost per case in the sheriff court and the Court of Session, by reference to case type. The average cost per case to the Legal Aid Fund in the sheriff court for the years between 2000/01 and 2005/06 ranged between £1,726 and £1,939, and in the Court of Session, between £7,075 and £11,227. For personal injury cases the average cost per case to the Fund in the sheriff court in those years ranged between £3,552 and £4,223, and in the Court of Session between £12,770 and £21,394.<sup>22</sup> The statistics do not, however, record the value of the property recovered or preserved so no comparison can be made between the amount of expenses paid by the Fund and the value of the action.<sup>23</sup>

3.4 In his interim report, *Access to Justice*,<sup>24</sup> Lord Woolf identified the cost of litigation as one of the fundamental problems confronting the civil justice system in England and Wales. He concluded that excessive cost deterred people from making or defending claims and that the unaffordable cost of litigation constituted a denial of access to justice. In the course of his review he commissioned a survey of bills of costs taxed in the Supreme Court Taxing Office, comparing the costs as taxed with the value of the claim. The survey findings indicated that the average combined costs amongst the lowest value claims consistently represented more than 100% of the claim and in cases between £12,500 and £25,000 the range was between 40% and 95%. Only where the value was greater than £50,000 were the combined costs of both parties likely to be less than the value of the claim.<sup>25</sup>

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<sup>21</sup> Hazel Genn and Alan Paterson (2001), *Paths to Justice Scotland: What people in Scotland do and think about going to law*, OUP.

<sup>22</sup> Scottish Legal Aid Board *Annual Report 2005-2006*. Note, however, that SLAB will normally only grant legal aid for personal injury actions in the Court of Session where the sum sued for is £50 000 or more.

<sup>23</sup> In many cases, such as family cases or judicial review, there may be no monetary claim or any such claim may be ancillary to the main purpose of the proceedings.

<sup>24</sup> Lord Woolf (1995), *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, DCA.

<sup>25</sup> Lord Woolf (1996), *Access to Justice: Final Report*, DCA, Chapter 1, paragraph 11. These figures should be treated with caution. In his interim report, Lord Woolf noted that the cost of litigation in England and Wales was higher than in other jurisdictions, including Scotland.

3.5 There is little in the way of hard evidence as to the cost of litigation in Scotland, other than in some limited categories of case. There is insufficient information available at present to allow definite conclusions to be drawn about how litigation costs in Scotland compare with awards made by the court or the sums for which cases settle and whether, or in what kinds of case, they are disproportionate. While it might be argued that some inferences can be drawn from information available from England and Wales, differences in the ways fees are charged, what costs are recoverable and extent of the availability of legal aid mean that these cannot provide a sound basis for decisions as to what should happen about costs in Scotland. The Review will seek out more information about actual levels of legal expenses, and how they compare with sums awarded by the court or settlement figures.

### **The elements of litigation expenses and how they are calculated**

3.6 In considering whether and to what extent the expense of litigation can be reduced, it is essential to understand what the various elements of litigation expenses are and how they are calculated.

3.7 The charges due by a party to a litigation comprise three main elements:

- court fees;
- fees due to solicitors and counsel; and
- other liabilities incurred in the prosecution or defence of the action, such as expert reports.

#### *Court fees*

3.8 It has been the policy of the Scottish Executive to set court fees at a level that makes a significant contribution to the cost of running the court system,<sup>26</sup> with exemptions or discounts for parties who would have difficulty in paying the full fee. The policy in other jurisdictions is to move towards 'full recovery'. In England and Wales the fees are set at levels that produce a recovery rate of 89%. In Northern Ireland the recovery rate is 68%. In Scotland it is 57%.

3.9 It has been argued that a policy of full cost recovery is inconsistent with the aim of ensuring access to justice.<sup>27</sup> It is said that such a policy results in significant underfunding of the courts and may limit access to the courts. Similar concerns have been expressed in the Scottish Parliament when increases have been made to the civil court fees.<sup>28</sup>

3.10 Some submissions to the Review have suggested that there may be an argument that court fees should be set at a level that is high enough to discourage parties from raising actions that are capable of resolution extra-judicially or are vexatious or frivolous.

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<sup>26</sup> It has been estimated that the average cost per sitting day is approximately £2000 in the sheriff court and approximately £3,500 in the Court of Session.

<sup>27</sup> Civil Justice Council (2004), *Response to Consultation on Court Fees*.

<sup>28</sup> For example, see Justice 2 Committee, Official Report, 4 September 2002.

### *Solicitors' fees*

3.11 Litigation which is self-funded is subject to the same rules and arrangements that apply to the funding of other legal services. In the event of a dispute between a solicitor and client about the amount of fees charged, the client is entitled to have the solicitor's account taxed.<sup>29</sup> Rules of court and case law provide the auditor of court with principles to be applied in the taxation of an account related to litigation work.<sup>30</sup>

### *Advocates' fees*

3.12 There is no statutory basis on which advocates' fees are regulated.<sup>31</sup> Detailed arrangements relating to counsel's fees are, however, embodied in a formal Scheme issued by the Faculty of Advocates and the Law Society of Scotland in 2002.<sup>32</sup> In the absence of express prior arrangement to the contrary, the instructing solicitor impliedly undertakes a professional commitment to pay a reasonable fee. The fee will normally be agreed between the solicitor and counsel's clerk. If the matter cannot be agreed, either party is entitled to require that the matter be determined by the Auditor of the Court of Session or the Auditor of the appropriate sheriff court. Advocates are not entitled to pursue either the instructing solicitor or client for their fees unless the solicitor has been put in funds for the payment of counsel's fees.<sup>33</sup> In practice, however, the Scheme for Accounting for and Recovery of Counsel's Fees sets out steps that can be taken to recover counsel's fees which involves reference to a Joint Committee of the Faculty of Advocates and the Law Society of Scotland and, ultimately, to the Dean of Faculty.

### *Other Liabilities*

3.13 The other liabilities which comprise the third element of litigation expenses may often be significant in the overall expense of conducting or defending a litigation. These include expert reports, such as medical reports. The extent to which the court should have control over the amount and nature of the expert evidence to be led is addressed in Chapter 6.

## **Recovery of expenses**

3.14 At the conclusion of a litigation the court will normally make an award of expenses in favour of the successful party, applying the general principle that expenses follow success.<sup>34</sup> The amount of expenses which an unsuccessful party may

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<sup>29</sup> Solicitors (Scotland) Act 1980 (c.46) s 61A.

<sup>30</sup> Act of Sederunt (Solicitor and Client Accounts in the Sheriff Court)1992 (SI 1992/1434); RCS r.42.7; eg *Tods Murray WS v McNamara*, 2007 SLT 687.

<sup>31</sup> Part VII of Chapter III of the Court of Session Table of Fees provides that the auditor shall allow a solicitor advocate the same fee for each item of work done by the solicitor in that capacity as he would allow an advocate for an equivalent item of work.

<sup>32</sup> 2002 Scheme for Accounting and Recovery of Counsel's Fees.

<http://www.advocates.org.uk/2002scheme.html>.

<sup>33</sup> *Batchelor v Pattison and Mackersy* (1876) 3 R. 914.

<sup>34</sup> Awards of expenses are uncommon in family cases. An award of expenses can, however, be made in family cases where the court considers a party's conduct justifies that course – *Sweeney* [2007] CSIH 11.

have to pay his opponent is regulated by tables of fees in statutory instruments made by the Scottish Parliament. In practice the Lord President puts forward proposals on the recommendation of an Advisory Committee and these are adopted by the Parliament. In straightforward and uncomplicated cases the successful party is usually entitled to his full expenses as taxed.<sup>35</sup> There may be a shortfall between the amount that a successful party recovers from his opponent (“party and party expenses”) and the amount that the party is liable to pay to his own legal advisers for the work done and outlays incurred (“agent and client expenses”).

3.15 The difference between the amount recovered on a party and party basis and the amount payable on an agent and client basis can be significant. Until 1992 the recovery of expenses on a party and party basis in Scotland was, in general terms, considered to be extremely poor when compared to the equivalent rates in England and Wales. A major re-structuring of the Table of Fees took place in 1998 with the introduction of certain new judicial fees and a substantial increase in the existing rates. The level has been increased on several occasions since then, most recently on 1 April 2007. As a result, the judicial Table of Fees and the recoverable amounts have been substantially increased. This has led to a rise in recovery rates in party and party matters. Despite this increase, for example, the amount normally recovered by a successful party in a commercial action is usually between one half to two thirds of the actual fees paid.

3.16 Several submissions to the Review suggest that the recovery rate in commercial causes compares unfavourably with other jurisdictions and that this deters parties from litigating in Scotland. They propose that successful parties should be able to recover a more realistic percentage of the costs actually incurred as a way of discouraging frivolous claims or defences, as well as bringing Scotland’s courts into line with those in other jurisdictions.

### Taxation of accounts

3.17 One of the issues examined in the *Report of the Working Group on the Legal Services Market in Scotland*<sup>36</sup> was the function of the auditor of court in relation to the taxation of fees. The Scottish Consumer Council had submitted that the taxation process could be a useful consumer protection mechanism but had concerns that clients might not be aware of the process or might be deterred from using it because of the cost. The Council was of the view that the research undertaken in relation to auditors of court showed that the process was complex, lacked transparency and had considerable potential for inconsistency.<sup>37</sup>

3.18 The Working Group considered the role of the auditor in relation to judicial taxations, extra judicial taxations and assessments. It found that there was clear evidence of confusion and disagreement amongst respondents as to the nature of

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<sup>35</sup> *Bond v British Railways Board* 1972 SLT (Notes) 47.

<sup>36</sup> <http://www.scottishexecutive.gov.uk/Publications/2006/04/12093822/0>.

<sup>37</sup> *ibid.*, paragraph 10.28.

taxation and the role and office of the auditor. So far as the issue of consistency is concerned, two areas of concern emerged from the research: (1) the taxing of counsel's fees in judicial and legal aid cases and (2) determining liability for the auditor's fee for taxation.<sup>38</sup>

3.19 The Working Group made a recommendation to the Scottish Ministers that the arrangements for the taxation of solicitors' and counsel's fees should be reformed and modernised in the light of the weaknesses which the research had identified in the present system.<sup>39</sup> It is understood that the Justice Directorate of the Scottish Government is considering this recommendation.

3.20 The broader issues examined by the Working Group concerning the system for appointing and training auditors and their role and functions in relation to extra judicial taxations and assessments are outside the remit of this Review. However, if the current arrangements in relation to the taxation of judicial accounts of expenses are presenting problems in relation to access to justice then this would be a matter to which the Review would give consideration.<sup>40</sup>

### Sources of funding for litigation

3.21 In considering whether and to what extent the cost of litigation can be reduced it is also necessary to take account of the sources which are available to fund litigation. Other than simply meeting the expenses from their own pocket, there are a number of different ways in which parties may be able to gain access to funding for litigation, including legal aid, legal expenses insurance and the use of speculative or conditional fee arrangements including trade union backing which, it is understood, is funded on a speculative basis.

#### *Legal aid*

3.22 It is not within the remit of the Review to conduct a full-scale review of the system of funding for civil advice and assistance and legal aid, but it is appropriate for the Review to consider how the availability of advice and assistance and legal aid affects access to justice. The eligibility limits and the criteria for granting legal aid are factors which affect the workload of the courts and the extent to which there is equality of arms between parties. The availability of legal aid for the funding of alternative dispute resolution also affects decisions by advisers as to how a dispute is handled. The whole question of publicly funded legal assistance is of considerable relevance to the work of the Review and it will be necessary to take account of current proposals and possible future developments in this area.

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<sup>38</sup> *ibid.*, paragraph 10.203.

<sup>39</sup> *ibid.*, paragraph 10.205.

<sup>40</sup> For example, it has been suggested in submissions to the Review that consideration should be given to introducing a procedure for submitting a tender or formal offer of settlement prior to taxation. If the account was subsequently taxed at a sum below that offered the receiving party would bear the cost of the taxation.

3.23 Legal aid policy is determined by Scottish Ministers. The legal aid system in Scotland is administered by the Scottish Legal Aid Board (SLAB), which provides advice to Ministers on its operation. There are two main types of publicly funded civil legal assistance: *advice and assistance* which funds (partially or wholly) the obtaining of advice from a solicitor (whether or not in contemplation of litigation) and, in some situations, covers representation including at some tribunals; and *civil legal aid* which funds representation by a solicitor in court.

3.24 A brief description of the advice and assistance scheme, the civil legal aid scheme and the financial eligibility criteria is given in Annex B.

3.25 In 1998/9 the financial eligibility limits were such that 55% of the population of Scotland was eligible for legal aid. More than half of those eligible fell within the contributory band.<sup>41</sup> More recent estimates suggest that only 50% of households are eligible for legal aid and just over 60% of all eligible households would have to make a contribution to the costs of the case. Some respondents have expressed concerns that many people on moderate incomes are dissuaded from pursuing cases through their perceived inability to meet potential expenses, creating a 'middle income trap'. Greater take-up of legal expenses insurance has been suggested as a means of addressing this problem.

3.26 Concern about the impact of financial eligibility criteria on the take-up of legal aid has been expressed by the Justice 1 Committee, the Scottish Executive and the Scottish Legal Aid Board.<sup>42</sup> The following year, the Scottish Executive indicated<sup>43</sup> that it would discuss with SLAB the implications of introducing a system of extended and tapered financial eligibility criteria, with higher proportionate contributions at higher income levels. Such a scheme might involve a contribution equivalent to the full actual cost of the case. In developing the models for such a scheme the Scottish Executive undertook to review the rules on clawback.<sup>44</sup> Proposals for the introduction of tapering were welcomed in some submissions to the Review.

3.27 In its annual accounts for the year 2005/06, the Scottish Legal Aid Board noted that applications and grants for civil legal aid had fallen by over 40% over the previous 10 years, although the rate of reduction had slowed over the last 5 years. The reduction was thought to be attributable to the reduction in fault-based divorces and the willingness of practitioners to undertake personal injury work on a speculative basis. Grants of legal advice and assistance had also fallen by 27 % in the previous 5 years.

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<sup>41</sup> SLAB (2001), *Legal Aid in a Changing World*.

<sup>42</sup> See, for example, Justice 1 Committee (2001), *Report on Legal Aid Inquiry: SP Paper 437* <http://www.scottish.parliament.uk/business/committees/historic/justice1/reports-01/jlr01-08-01.htm> and Scottish Executive (2004), *op.cit.*

<sup>43</sup> Scottish Executive (2005), *op.cit.*

<sup>44</sup> These provide for the deduction of fees and outlays from property recovered or preserved as a result of the grant of civil legal assistance: see Annex B.

3.28 The cost of civil legal assistance is offset in part by the contributions payable by recipients and by expenses recovered from their opponents. In 2005/06 the net cost of civil legal assistance was £39.5 million, SLAB having recovered £10.8 million by way of contributions and expenses and property recovered or preserved – a recovery rate of 36%. In reparation cases 84% of the amount spent was recovered, compared to 13% of the amount spent on family and matrimonial cases.<sup>45</sup>

3.29 Although the number of grants of civil legal assistance has fallen in recent years, the total expenditure on civil legal assistance has remained relatively static. This is attributable to the fact that the average cost per case has increased steadily. This may be due to a number of factors: a relatively small number of very high cost cases, greater use of counsel, a greater use of experts and reporters in family cases and a tendency for proofs in certain types of cases (such as referrals from a children’s hearing) to last for longer periods than before. It is also likely that solicitors will undertake cases which are low risk or more straightforward, and therefore less costly, on a speculative or private paying basis.

3.30 The fees payable to solicitors undertaking legal aid work are fixed by legal aid regulations. The rates payable are significantly below the rates which may be chargeable by a solicitor undertaking cases on a private basis (although where a solicitor who has legal aid funding is successful in their case, they can accept judicial expenses as an alternative to being paid under legal aid rates). This disparity has resulted in some solicitors no longer undertaking civil legal aid work. Firms prepared to do legal aid work can generally be found in the larger cities but there may be gaps in cover – or “legal aid deserts” – in smaller towns and rural areas, or for some types of cases. A review of fees for solicitors in civil legal aid cases was commissioned by the previous administration and is due to report to Ministers in the autumn of 2007.

3.31 Problems in finding solicitors willing to provide professional services funded by legal aid were reported by at least one representative organisation in its submission to the Review. The amendments to the civil legal aid system made by the Legal Profession and Legal Aid (Scotland) Act 2007, referred to in paragraph 2.5 above, are aimed at ameliorating such problems. However, many of the larger firms in Scotland undertake little or no legal aid work.

3.32 Some submissions to the Review put forward the view that the protection against liability in expenses which a legally aided person enjoys through being able to apply to the court for modification of that liability can create inequality of arms and unfairness, particularly where the non-legally aided opponent is an individual of modest means.

#### *Speculative or conditional fee arrangements*

3.33 It has been suggested that one of the barriers to litigation for parties of modest means is the unpredictable nature of their liability in expenses should their

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<sup>45</sup> These figures relate to recoveries in respect of grants of civil legal aid and do not include recoveries.

action be unsuccessful. In recent years there has been a considerable growth in the number of speculative fee agreements, particularly in relation to reparation actions. Under the arrangements which apply in Scotland,<sup>46</sup> solicitors may enter into a speculative fee agreement with clients which provides that no fee will be payable by the client should the action be unsuccessful. If the action is successful, however, the solicitor is entitled to an uplift of his fee of up to 100%. This enhanced fee is not recoverable from the unsuccessful party.

3.34 Although a speculative fee arrangement means that parties will not have to pay their own solicitor anything if they lose the case, they still run the risk of having to meet the other side's expenses. This risk is underwritten by insurers offering 'after the event' (ATE) insurance. It is understood that the premiums payable for ATE insurance can form a significant proportion of the value of modest claims. In Scotland, unlike in England and Wales, these premiums are not recoverable from the unsuccessful party. Depending on the agreement which a party has reached with his solicitor, the premium may be deducted from the damages payable to the pursuer or the solicitor may absorb the cost.

3.35 It has been suggested by some respondents that the issue of recoverability of ATE premiums should be considered by the Review. This is a contentious area. Speculative fee arrangements, known as Conditional Fee Arrangements (CFAs) in England and Wales, have been widely used following the withdrawal of the availability of legal aid for most types of personal injury action in England and Wales. Insurers have been concerned about the increased costs resulting from success fees and ATE premiums. This has resulted in complex and costly litigations between insurers and solicitors in England and Wales.

3.36 The role which legal expenses insurance has to play more generally in the funding of litigation in general is also a matter for consideration by the Review. "Before the event" or BTE insurance can be taken out by individuals or businesses to cover the policy holder against a future risk of having to incur legal expenses in making or defending a civil claim. It is commonly offered as an "add-on" to a household insurance policy and would typically cover areas such as employment disputes, personal injury claims and disputes with suppliers of goods and services. Usually matrimonial disputes are excluded and cover will be available up to a limit of £50,000 in legal expenses. It is thought that take-up of this kind of insurance is low and that only a small proportion of cases are currently funded by such insurance. This is in contrast to the situations in other countries such as Germany, and Sweden, where a much larger proportion of the population has legal expenses insurance and accordingly it is much more used as a method of funding litigation.

3.37 The Review will give careful consideration to the advantages or disadvantages which might flow from greater use of BTE legal expenses insurance as

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<sup>46</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) section 36 inserting new section 61A into the Solicitors (Scotland) Act 1980 (c.46).

well as the implications of any possible amendment to the rules relating to recovery of ATE premiums.

### Questions for discussion

1. What, if any, information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures?
2. To what extent does the cost of litigating deter people from pursuing or defending cases in court?
3. Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?
4. Are the current rules for recovery of judicial expenses satisfactory?
5. Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?
6. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?
7. Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?
8. What impact have speculative fee arrangements had on access to justice?
9. Should legal expenses insurance, including “before the event” and “after the event” insurance, have a greater role to play in the funding of litigation in Scotland?
10. What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?



## CHAPTER 4: THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

4.1 Part of the remit of the Review is to examine the structure, jurisdiction, procedures and working methods of the civil courts of Scotland. This chapter looks at their structure and jurisdiction, the following chapter examines their problems, while the final chapter reviews their operation and management.

4.2 The two main structural issues which are reflected in the Review's remit are:

- The relationship between the civil and criminal courts; and
- The issue of specialisation within the civil courts.

4.3 The Review will also wish to consider:

- Whether the respective jurisdictions of the Court of Session and the sheriff court should remain unchanged;
- Whether the jurisdiction of the Court of Session and the sheriff court should be unified to create a single civil court;
- Whether the existing territorial organisation of the sheriff courts is still appropriate;
- How rights of appeal are structured; and
- Any problems associated with the use of temporary judges and part-time sheriffs.

A description of the jurisdiction and allocation of business as between the Court of Session and the sheriff courts is in Annex C.<sup>47</sup>

### The relationship between the civil and criminal courts

4.4 The civil and criminal courts of Scotland are not separate institutions. They deal with separate bodies of law and use different procedures, but the same judges hear the cases and, by and large, especially at sheriff court level, they use the same buildings. The Review is aware of concerns that the pressure of criminal business and the priority given to criminal cases has a detrimental effect on the management of civil business. There is a view that insufficient resources are allocated to the civil side of the courts. Several of the submissions have identified a real concern about the effect this can have on the progress of civil business.

4.5 At the Supreme Court<sup>48</sup> level, it has been suggested that the volume of High Court business is causing a serious problem in the timetabling of Court of Session business, with the problem being mainly felt in the Outer House. The opinion has been expressed that many of the cases now being indicted at High Court level could be dealt with by the sheriff court. Examples have been given of occasions when the pressure of criminal business has meant that there have been no judges available to deal with civil cases which have been set down to be heard on a particular day.

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<sup>47</sup> This is not a description of the entire civil court system in Scotland as it does not include specialist courts such as the Land Court.

<sup>48</sup> In Scotland, the term "Supreme Court" refers to the Court of Session, the High Court of Justiciary and the Accountant of Court's Office.

4.6 Similar problems arise in the sheriff court: in submissions made to the Review practitioners have complained about delays or interruptions to civil business, especially in the smaller sheriff courts, due to the need for criminal business to take priority. This has led to unnecessary expense and inconvenience to parties and their representatives.

4.7 Trends in relation to volume and the number of sitting days devoted to criminal business are discussed below. Annex D contains a detailed analysis of the civil business of the Court of Session and the sheriff courts.

4.8 It has been suggested that the existing problems caused by the diversion of judicial resources from the Court of Session to the High Court could be solved if the court rather than the Crown were to decide whether an indicted case should be tried in the High Court or the sheriff court. There are serious difficulties in that suggestion. It is a constitutional principle that the Lord Advocate is the master of the instance. If that principle were to be abolished it would require primary legislation.

4.9 Such a reform could create its own problems. The Crown decides at what level a case is to be indicted on the basis of the precognitions, from which the gravity of the facts and circumstances can be assessed; the accused's previous convictions; and whatever ministerial policies the Lord Advocate may have from time to time relating to the prosecution of certain crimes. It is difficult to see how the court could ever be as well informed as the Crown in making such a decision. Moreover, it is arguable that on principle it should be no function of the court to apply policy as to the level at which specific types of prosecution should be taken.

4.10 The Crown Office is currently reviewing its marking policy with particular reference to the five years sentencing power that sheriffs now have. It is reasonable to assume that under any revised marking policy, certain cases will still be indicted in the High Court, for reasons considered good by the Crown, which on conviction are unlikely to result in the imposition of a sentence of five years or more.

4.11 Even among serious cases that are appropriate for prosecution in the High Court, there are many cases which raise no particular problems of fact or law. Temporary judges recruited from the ranks of the sheriffs and from the senior bar have dealt with the work of the High Court competently and on the whole satisfactorily. Instead of continually increasing the number of High Court judges to meet the increasing workload of that court, a preferable solution might be to create a mid-level of judges, corresponding to those Circuit Judges in England and Wales who routinely try serious crimes. Such judges could deal with the bulk of High Court crime. High Court judges could then deal only with trials of special importance, whether by reason of their facts or the complexity of the legal questions that they raised, and in this way be available for a greater amount of civil work and for some of the work of the Appeal Court. This solution would not, it is thought, lower the quality of the judicial work in the High Court. It might create an attractive career option for members of the senior bar who were experienced in criminal work.

### *The Supreme Court*

4.12 In recent years the number of sitting days devoted to civil business in the Court of Session has remained static; in contrast, there has been a 45% increase in the number of sitting days allocated to criminal business over the past 11 years. Civil business now accounts for just over a third of the sitting days in the Supreme Court.

4.13 The Scottish Court Service's annual report for 2005/06 observed that: "The flat trend in sitting days is unlikely to change in the near future because of the continuing need to divert judicial resources to the High Court. That, coupled with the recent rise in caseload and increased demand for multiple day hearings, limits the Court's capacity to make inroads into delays which, particularly in the case of appeals and civil jury trials, merit early attention."

4.14 The 2005/06 report also noted that the number of indictments in the High Court had fallen over the period 2001/02 to 2005/06 as a result of the increased sentencing powers granted to sheriffs in 2004. "However, this is not mirrored in the demand for judicial time which remains high. The average jury trial now takes longer to complete. In addition, there is a greater incidence of lengthy cases, driven in part by wider prosecution of white collar and organised crime, a trend which seems set to increase." The number of trials in the High Court rose from 259 in 2004/05 to 455 in 2006/07.

4.15 As documented further in Annex D, there are targets for waiting periods for the hearing of civil appeals and ordinary proofs in the Court of Session. Up until 2005/06, the waiting periods for both civil appeals and ordinary proofs far exceeded the targets set. In its annual reports for the years 2004/05 and 2005/06, the Scottish Court Service attributed this failure to the need to give priority to the business of the High Court.

4.16 In its annual report for 2004/5, the Scottish Court Service notes: "Waiting periods, both for appeal and first instance work, are not meeting agreed targets principally because of the need to give priority to the business of the High Court. That is unlikely to change in the short term. It is anticipated that Lord Bonomy's reforms, when fully bedded down, will permit more judicial resources to be allocated to civil business. That, coupled with the introduction of more streamlined procedures for personal injury cases, should contribute to a gradual reduction in waiting periods."

4.17 In the 2005/06 report the prognosis in relation to waiting periods was less positive: "Waiting periods in the Court of Session show signs of improvement although they remain above target because of the continuing need to give priority to the criminal business of the High Court. This is unlikely to alter significantly in the short term." By 2006/07, however, the waiting period for ordinary proofs dropped significantly (see Annex D, Section 5 Court of Session: Waiting periods). Waiting periods relating to appeals and jury trials, however, remained high.

### *The sheriff court*

4.18 So far as sitting days devoted to civil business are concerned, the pattern in the sheriff court is broadly similar. The number of sitting days allocated to civil business has remained static, whereas the number of sitting days devoted to criminal business has increased by around 17% in the last ten years. The proportion of sitting days allocated to civil business in the sheriff court is just over 30%.

4.19 The number of sitting days in relation to solemn (sheriff and jury) criminal business increased substantially, by about a third between 2000/1 and 2006/7. There was a 42% increase in the number of indictments registered over the same seven year period 2000/1 to 2006/7. The upward trend in solemn business is thought to be due in part to the increase in shrieval sentencing powers.

4.20 The number of summary criminal cases registered grew by 15% over the seven year period 2000/1 to 2006/7 and the number of sitting days increased similarly (by 17%). Although the percentage increase is not as great as that for solemn business, the impact of summary business on the workload of the sheriff court arises through the sheer volume of cases: 109,824 summary complaints were registered in 2006/7. This impact is reflected in the programming of business: for example, in a typical week, only one sheriff out of eighteen is scheduled to hear civil proofs in Edinburgh sheriff court.

4.21 Although waiting period targets for the allocation of proofs in ordinary civil business are being met, it is understood that the pressure of criminal business in the sheriff court is more likely to be felt in terms of delays in starting, or interruptions to the hearing of, civil business in order to deal with criminal cases. As a result, hearings may be continued or adjourned.

4.22 In smaller sheriff courts, business is programmed so that only one day diets or hearings may be available for civil cases, even though they are expected to last for a longer period. This means that hearings are adjourned or may have to take place over two or more single day slots, resulting in delay, inconvenience and greater expense. If criminal business overruns then there may not be a sheriff available to hear civil cases.

4.23 The lack of a clear separation between the civil and criminal courts can also be a barrier to access to civil justice in other ways. Research has shown that there is a large degree of public misunderstanding as to the difference between civil and criminal matters, and a general tendency to associate the courts with criminal matters.<sup>49</sup> This may well create or exacerbate a sense of reluctance to become involved in any litigation, as well as being an additional source of stress and anxiety to those who find themselves having to be so.

4.24 The Review has also been made aware of concerns about whether it is reasonable or sensible to expect a sheriff whose previous experience has been mostly

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<sup>49</sup> Genn and Paterson (2001), *op.cit.*

in criminal practice to deal with the whole variety of civil business that can arise, more or less immediately on appointment. It has been suggested that the prospect of an inexperienced sheriff with a purely criminal background dealing with a civil case has in some instances been a key factor in the decision to commence a case in the Court of Session.

4.25 At sheriff court level, one solution might be to separate the civil and criminal courts completely by creating separate criminal and civil divisions, by designating certain sheriffs to hear primarily civil business, and by providing separate court accommodation for civil business. It may be impractical to provide separate accommodation for civil business in some of the smaller, more outlying sheriff courts, and an alternative might be to provide civil justice centres on a regional basis, with one centre covering more than one of the current sheriff court districts. The Court of Session and the High Court of Justiciary are of course already separate courts, but the same judges sit in both. Separation here would involve some judges being designated to deal primarily with civil business.

4.26 It should be borne in mind that separation of the civil and criminal courts could reduce the overall flexibility of the system, and involve some waste of resources. There are also circumstances where it may be helpful for the judge to have experience of both civil and criminal process, for example in relation to anti-social behaviour orders, or proceeds of crime legislation, where there is an overlap between civil and criminal process. And in certain areas, such domestic abuse, there have been calls for the civil and criminal processes to be dealt with together rather than separately. There may therefore be a continuing need for judges at all levels who are able to handle both civil and criminal business.

4.27 A clearer separation of the courts into civil and criminal divisions might also raise questions about the recruitment and deployment of judges, and the effect on the legal profession. It is likely that many judges consider the variety of work that is currently available to them as one of the main attractions of the job so that splitting the judiciary into two divisions would reduce the pool of applicants for judicial office. On the other hand, some of the current complement of judges might well prefer, if the opportunity were there, to concentrate on either civil or criminal business. The legal profession has itself become increasingly specialised, with the majority of solicitors and advocates being either in civil or criminal practice. It may be that the necessity of doing both is currently deterring some excellent candidates from applying for judicial office.

### **Specialisation within the civil courts**

4.28 There is at present a limited degree of specialisation within the civil courts in Scotland. In the sheriff court, for example, there are designated commercial judges. There are also designated family sheriffs in Glasgow sheriff court. In the Court of Session, some judges are designated to deal with particular types of case, for example, there are designated commercial judges, and a designated judicial chairman of the Employment Appeal Tribunal. Some judges are allocated particular

responsibilities as circumstances arise, for example, The Rt. Hon. Lord Gill was the judge responsible for overseeing all Court of Session litigation between 1996 and 2001 arising out of the Braer disaster. Generally, however, judges deal with the whole range of civil business.

4.29 An issue for the Review to consider is whether the existing specialist courts within the court system should be retained. Long term statistics in respect of the volume of business coming before the commercial court of the Court of Session are inconclusive when considered in the context of resources devoted to it. There is, however, an argument that a successful commercial court with a high degree of expertise could be beneficial to the Scottish economy. It would support specialist commercial law firms and enable the continued development of commercial law in Scotland. It would attract business outside of Scotland seeking quick and reliable resolution of disputes and, for Scottish business, would develop and support confidence in litigating in Scotland.

4.30 The question of whether further specialisation would bring benefits has been raised in a number of submissions to the Review, with those raising it generally indicating support for a degree of further specialisation. The arguments in favour of specialisation within the civil court are based on a number of considerations. The first is the increasing complexity of the law itself. As has already been noted, the legal profession in Scotland, as in most other legal systems, has become increasingly specialised, as the volume and complexity of the law continues to increase. The general legal practitioner is probably now the exception rather than the rule, in both the solicitor and advocate branches of the profession.

4.31 It may be questioned to what extent the increasing complexity of the law and the increasing specialisation of the legal profession demands increasing specialisation in the courts. There may also be considerable advantages, such as the efficient use of the courts' resources, in having a body of judges who are able to deal with any kind of case.

4.32 Whether it is reasonable to expect all judges to be able to familiarise themselves with new and complex areas of law and practice, however, is also open to debate. From the parties' point of view, and assuming that both sides wish a swift resolution to the dispute, it may be more beneficial to have access to a judge with the necessary specialist knowledge and experience so that key issues are quickly identified and understood, thereby saving time and expense.

4.33 The early identification of issues is an aspect of case management that seems to be particularly associated with specialist courts. In those instances where specialisation has been introduced into the civil courts and has been judged to be a success, it has usually involved both the use of specialist judges and the use of specialist case management procedures. The commercial court in Glasgow and Aberdeen sheriff courts, for example, involves both the designation of specific sheriffs and the use of special procedures. Likewise, in Glasgow, family cases are dealt with by a small number of judges with particular experience, using the special

procedures for family cases contained in the sheriff court rules. Other case management advantages which such a court may offer, depending on the procedures adopted, are the ability of the judge to build up effective working relationships with practitioners working in the field, and the continuity of judicial input. This may not only have implications for court efficiency by nurturing judicial case “ownership”, but also for the quality of justice. The Review will look at the interaction between these two particular aspects of specialisation, i.e. personnel and procedure, and consider the extent to which they are dependent on one another.

4.34 In terms of the workload of the courts, more specialisation at sheriff court level may attract more business to the sheriff court. It is also likely that a decision of a judge with specialist knowledge of an area of law will be more robust and less likely to be appealed. A specialist court with a good reputation may attract high-quality business into the jurisdiction, particularly in commercial causes where parties are able to choose where to litigate.<sup>50</sup>

4.35 Family cases have been singled out in a number of submissions to the Review as being particularly appropriate for specialist treatment within the court system.<sup>51</sup> Judicial continuity, allowing for the repetition of sensitive information to be kept to a minimum and enabling the judge to expedite matters by managing the case actively, is seen as a particular advantage of a specialist family court. Understanding the full background to a case and dealing with it as quickly as possible are especially important considerations where children are involved.<sup>52</sup> Particular concerns have been voiced regarding delays in the completion of proof hearings in the sheriff court to determine whether the grounds of referral to a children’s hearing have been established,<sup>53</sup> although the Review has also been made aware of areas of good practice.<sup>54</sup> Other reasons cited for separating family cases from other civil business include the desirability of a more informal atmosphere, and the benefit of separation from any association with the criminal courts which may exist as a result of the same court buildings being used. It would be possible to envisage the creation of a separate court, or at least a specialist family division at sheriff court and possibly at Court of Session level, dealing with divorce, civil partnerships, residence, contact, adoption, child protection, and other family matters.

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<sup>50</sup> It may also generate economic benefits for Scotland: see letter from Dr David Moreland, calling for the establishment of an intellectual property sheriff court, *Journal of the Law Society of Scotland*, August 2007, p10.

<sup>51</sup> The question of how best to deal with residence and contact cases has been recently discussed in the *Journal of the Law Society of Scotland* (July 2007, p20 and August 2007, p16).

<sup>52</sup> The family court in Glasgow sheriff court is suggested as a model for other courts to follow: see for example, Jenny Nobbs (2006), “Keep it in the Family”, *Journal of Law Society of Scotland*, October 2006.

<sup>53</sup> The Review has been told of one case where referral proceedings had still not been completed more than two years after the child involved was placed into foster care on an emergency basis.

<sup>54</sup> For example, Practice Note No 2 of 2004 *Adoption of Children etc: Guidance for Sheriffs and Practitioners*, issued by the Sheriff Principal of Lothian and Borders, aims to secure the efficient management of contested adoption and related proceedings. Similar Practice Notes have been issued in other sheriffdoms.

4.36 If greater specialisation of the civil courts was, in principle, considered to be desirable, questions arise as to whether there is at present a sufficient degree of expertise in specialist areas such as family or commercial work for judges and sheriffs with expertise in those areas to be recruited or deployed and whether there would be a need for the judicial training programme to be expanded. The volume of particular areas of specialist work in most courts is relatively low so that specialisation in one area to the exclusion of more general business would not be practicable. It might, however, be possible for designated specialists to have a 'ticket' in one or more specialist areas with cases falling into those categories being assigned to them as well as general business. This would provide a degree of flexibility as well as enabling judges to develop expertise in different fields.

4.37 A move towards a greater degree of judicial specialisation might have implications for the appellate courts which necessarily deal with the whole range of civil business.

4.38 Consideration would also have to be given to the locations where specialist judges, particularly sheriffs, would sit. It would not be practicable for a range of specialist sheriffs to sit permanently at each sheriff court. Many of the smaller sheriff courts have only one sheriff who hears the full range of civil business in that court. One option might be for specialist sheriffs to sit in smaller courts on an ad hoc basis as and when required. Specialist sheriffs might sit at any court within the sheriffdom, or some other geographical area, or might have an all Scotland jurisdiction. There might be greater scope for certain types of hearing to be conducted remotely by telephone or video link. Another option would be the creation of a limited number of specialist centres at locations where there is the greatest volume of specialist business.

### **Jurisdiction and allocation of business**

4.39 The current structure of the civil courts in Scotland is largely a product of historical events, with different parts of the system being developed at different times in a largely pragmatic way. It has evolved in response to what have been seen as particular concerns and issues that have arisen from time to time rather than having been thought out and created as a coherent whole. One particularly notable feature of the current system is that while the sheriff court and the Court of Session exist in a hierarchy in relation to one another, they have a very considerable degree of overlap in their first instance jurisdictions. As a result business is allocated between the two courts largely on the basis of choices made by litigants and their advisers, rather than under the control of the courts themselves.

4.40 A key question for the Review is therefore whether the current allocation of business between the two courts best serves the public in terms of providing access to justice at a level appropriate to the dispute in question, and at a reasonable cost both to the litigant and to the public purse.

4.41 A number of the submissions received by the Review have suggested that the Court of Session should no longer deal with first instance business,<sup>55</sup> and should become solely a court of appeal, or at least that its first instance jurisdiction should be severely restricted. The degree of choice currently offered, whereby, with the exception of cases where the sum sued for is less than £1,500,<sup>56</sup> a pursuer can choose to raise most actions in either the Court of Session or the sheriff court, has, on one view, resulted in too many routine, low value cases being raised in the Court of Session. This is said to lead to the inefficient use of that court's resources as well as the unnecessary and artificial inflation of legal fees. It may also be inappropriate for cases other than those of general importance, or of exceptional value, to be dealt with at first instance in the Court of Session.

4.42 A number of other submissions, however, have said that unrestricted access to the Court of Session at first instance, especially for personal injury cases, is one of the great advantages of the current system and essential to ensure continued access to justice. There are some firms of solicitors who have developed systems for raising personal injury actions in the Court of Session, and who would argue that these systems offer considerable advantages to their clients, both in terms of cost and efficiency, which would be lost if they had to disperse their cases to a number of different sheriff courts.

4.43 It could be argued that in many ways the Court of Session operates as a specialist personal injury court, following the introduction of the new procedure for personal injury actions under Chapter 43 of the Rules of the Court of Session. About two thirds of actions initiated in the Outer House are personal injury cases, and a very large proportion (more than 92%) of them now proceed under Chapter 43 procedure. A recent evaluation of the new Rules found that they had resulted in a marked reduction in delays and earlier settlement, as compared with actions initiated prior to their introduction and as compared with actions initiated but not proceeding under Chapter 43.<sup>57</sup>

4.44 Although a significant number of relatively low value cases are initiated in the Court of Session, very few of these proceed to proof. There are, of course, implications for staff time in dealing with the administration of low value cases, but it does not appear that a significant amount of judicial time is devoted to hearing low value cases, particularly following the introduction of Chapter 43. Although these cases may not take up a significant amount of judicial time, however, the large volume of personal injury cases has a significant effect on the court programme.

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<sup>55</sup> It should be noted that "the continued existence of the Court of Session as a civil court of first instance and of appeal" is a reserved matter: paragraph 1 of Schedule 5 to the Scotland Act 1998.

<sup>56</sup> On 13 September 2007 the Scottish Government laid an order before the Scottish Parliament which, if affirmed, will increase the privative jurisdiction of the sheriff court to £5,000 with effect from 14 January 2008: The Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2007. On the same day an order was laid increasing the limit for small claims actions from £750 to £3,000: The Small Claims (Scotland) Amendment Order 2007.

<sup>57</sup> Elaine Samuel (2007), *Managing Procedure: Evaluation of the New Rules for actions for damages for, or arising from, personal injuries in the Court of Session [Chapter 43]*, Scottish Executive, <http://www.scotland.gov.uk/Publications/2007/03/30091751/0>.

There is also an important question of principle as to whether the resources of a country's supreme civil court should be devoted to the resolution of small value claims of any kind.

4.45 It may be possible to replicate the benefits accruing from the Chapter 43 Rules of the Court of Session within the sheriff court, perhaps by creating a specialist personal injury court at sheriff court level, either at one location in Scotland or at a limited number of locations. Another option, (see paragraph 2.19 above), would be to take low value personal injury claims out of the court altogether, as has been done in the Republic of Ireland. These are matters which the Review will consider.

4.46 Personal injury actions are only part of the picture. Consideration should be given to whether there are other types of business currently being dealt with by the Court of Session that could be dealt with at sheriff court level and vice versa. For example, many judicial reviews are not concerned with important points of public or administrative law but deal with what are essentially private law disputes.<sup>58</sup> The Review will consider whether such cases should be dealt with at sheriff court level.

4.47 A whole range of factors are relevant in deciding which forum is best suited for different types of dispute, including the value of the money or property at issue, the complexity of the legal issues and whether the law requires to be clarified in order to determine the case, the remedy or outcome sought, the status of the parties involved, the availability of relevant legal or judicial expertise (including knowledge of the local community), and the convenience of the parties and their advisers. It is also relevant to consider the cost to the public purse of providing the administrative procedures, court accommodation and judicial input that the case may require.

4.48 This wide range of factors would tend to support the idea that a more sophisticated system of allocating cases to different levels of the court system is needed than at present exists. One approach might be to bring together the Court of Session and the civil jurisdiction of the sheriff court to create, in effect, a single civil court with a number of tiers within it. Such a proposal has recently been considered in England and Wales where a consultation paper, issued by the Department for Constitutional Affairs in 2005,<sup>59</sup> proposed unification of the High Court and county courts. The proposed new Civil Court in England and Wales would operate as one court with a number of tiers of different judges performing different roles but broadly corresponding to the roles currently performed by High Court Judges and Masters, Circuit Judges and District Judges. A unified civil court in Scotland might involve a system whereby all cases would be initiated at the same level, and subsequently allocated to the appropriate part of the court hierarchy, after an indication of intention to defend has been lodged. It would, of course, be necessary to define the criteria which would apply to the allocation decision and who should make the decision.

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<sup>58</sup> For example, *Lindsay Smith for JR of a decision by the Committee of the Nairn Golf Club* 2007 SLT 909.

<sup>59</sup> DCA (2005), *A Single Court?* [http://www.dca.gov.uk/consult/civilcourt/civilcourt\\_cp0605.htm](http://www.dca.gov.uk/consult/civilcourt/civilcourt_cp0605.htm).

4.49 A less radical option would be to retain the Court of Session and sheriff court as separate institutions but to develop a set of legal criteria, in more detail than currently exist, to automatically route different types of case to different levels of the court hierarchy. Another option which might address any mismatches between the workload and the resources of the different levels of court would be to create stronger and more wide-ranging powers of remit to enable cases to be transferred between the different levels of court in accordance with set criteria, and/or in pursuit of the efficient administration of business.

4.50 As discussed above, (see paragraphs 2.17-2.21) another issue which has been raised in submissions is whether the existing two-tier structure is adequate, or whether there is a case for another level of court or tribunal below the sheriff court to deal with cases such as debt, consumer and housing disputes. There are, of course, different levels of procedure within the sheriff courts, and small claims and summary cause procedures currently cover a large proportion of the volume of business of the sheriff court. It may be argued that it is not necessary for all such business to be dealt with by a sheriff, and that some of it could be delegated to a lower level of court or tribunal or to a more junior level of judicial officer operating within the sheriff court creating a “third tier” for the disposal of civil business. A third tier might have the advantage of providing a more accessible, less formal and less complex means of resolving these types of cases, particularly where parties may not be represented. The case for the creation of a “third tier” could be reinforced in the event of the first instance jurisdiction of the Court of Session being restricted, since that would inevitably increase the volume of business in the sheriff court.

### **Territorial organisation of the sheriff courts**

4.51 In looking at how the allocation of the business of the courts affects access to justice, it will also be relevant for the Review to consider whether the current division of the sheriff court into a number of distinct territorial jurisdictions best serves the public. This is particularly pertinent given the possibility of greater specialisation within the sheriff court. Strict adherence to distinct territorial jurisdictions may inhibit the allocation of cases to specialist sheriffs whose jurisdiction is not based on territorial considerations.

4.52 A number of the submissions received also questioned whether the existence of formal boundaries between sheriffdoms encourages the most efficient allocation of business. One submission suggested that there are too many small sheriff courts in close proximity to each other, which are unnecessary and operate inefficiently. However, another said that shrieval boundaries work very well at present.

4.53 Many cases dealt with in the sheriff court are uncontested, for example undefended debt recovery actions and simplified divorces. While not involving significant judicial resources, they nonetheless take up staff time. A further significant number of cases relate to administrative functions, such as commissary business, which may not need to be dealt with by a court at all. A third category of

business includes cases arising from the sheriff court's extensive jurisdiction in relation to statutory appeals and applications, for example, in relation to licensing. These different categories of business may not all need to be carried out within each sheriff court or indeed within the court system at all. For example there could be a case for centralising high volume, uncontested actions and referring to the relevant sheriff court only that minority of claims which are defended. There may be an argument for a new administrative body charged with carrying out commissary business, which may provide local access to the public in accommodation outwith the SCS estate. Another possibility could be the creation of specialist centres which could deal with public/administrative law. The role which modern systems of information and communications technology have to play in facilitating access to the courts and in managing its business will be particularly relevant here.

4.54 The efficient conduct of business may also be restricted by the limited powers of a sheriff to transfer business between different sheriff courts. A sheriff may transfer a case to another sheriff court, whether in the same sheriffdom or another, only in three specified situations. These are detailed in Annex C, paragraph 17. There is no power available to a sheriff principal to direct that a case be transferred either within his own sheriffdom, or to another, to assist in the allocation of business. The Review will consider whether such a power is necessary and, if so, whether it should be limited to the transfer of cases within a sheriffdom or between different sheriffdoms and under what circumstances that power should be used.

4.55 The interests of civil justice might be served by a degree of rationalisation of the civil business of the sheriff courts. Section 11 of Annex D shows that each of the sheriffdoms contributes to all civil business in the sheriff court a proportion that more or less reflects the distribution of the population across the sheriffdoms. However, it is appropriate to consider whether the current organisational structure allows for the best possible match between demands made of the sheriff courts in their conduct of civil business and the resources available to them.

4.56 We invite consultees to consider the option of there being a single all-Scotland sheriff court. The present pattern of sheriffdoms creates haphazard boundaries between sheriff courts that are close to one another, for example, Falkirk and Linlithgow. It is at least questionable whether the present pattern of sheriffdoms has any relevance to the transport and communications network in modern Scotland; nor whether the separate administrative areas that sheriffdoms create necessarily result in optimum administrative efficiency. We invite consultees to consider whether or not a more efficient structure could be created by having a sheriff court without the existing sheriffdoms and their boundaries. In such a court, the principle of local justice could be protected by maintaining the tradition of appointing permanent sheriffs to specific courts on a permanent basis, with the usual flexibility that is given by the use of floating sheriffs and part-time sheriffs. Within an all-Scotland sheriff court it would be possible to create a central administration with which all new actions would be registered and, upon registration, allocated to specific sheriff courts in accordance with certain defined criteria. What those criteria would be would require further consultation. Possible criteria might be the

allocation of each case to the court to which it was most closely related or the allocation of cases to individual courts on the basis of the greatest convenience to the greatest number of persons involved.

4.57 In such a system, although cases would be processed in specified sheriff courts, it would be possible to allocate proofs, debates and other hearings with a greater degree of flexibility, again on the basis of defined criteria. The power to allocate hearings to a court other than the court in which the action has proceeded might increase the flexibility of the system and enable cases to be transferred from courts where a list was overloaded to a court where space had come free. This could be of particular benefit in courts in the central belt where the M8, for example, would enable litigants and witnesses to travel to other courts in the conurbation without undue inconvenience and perhaps even with greater convenience overall.

4.58 In such a system the position of the sheriff principal would have to be reconsidered. We invite consultees to consider whether the office of sheriff principal could be retained for administrative purposes only; or for appellate judicial purposes only; or for both. We also invite views on whether if the office and the judicial jurisdiction of the sheriff principal were retained, it would be desirable for the sheriff principal to operate as an administrative judge for certain courts or groups of courts within the overall system and if so whether such groupings of court would reflect the existing pattern of sheriffdoms.

### **Appellate business**

4.59 In looking at the structure of the courts, it will also be relevant to look at appeal routes and consider whether a degree of rationalisation is called for. As identified above, the current system offers a measure of choice as to forum. This also applies to appellate business. Unsuccessful litigants in the sheriff court generally have the choice of an appeal to the sheriff principal or to the Court of Session. Those who choose to appeal to the sheriff principal normally have a further right of appeal to the Court of Session. Within the Court of Session itself, there is a right of appeal from a single judge of the Outer House to one of the Divisions of the Inner House.

4.60 A further right of appeal lies from a final judgment of the Inner House to the House of Lords, unless restricted or excluded by statute. There is no requirement to seek the leave of the Inner House or permission from the House of Lords. This was described by their Lordships, in a recent case<sup>60</sup> which had been appealed from the sheriff court to the Inner House of the Court of Session and then to the House of Lords, as a privilege not enjoyed by litigants in other parts of the United Kingdom. Their Lordships expressed concern, in the circumstances of that case, about that

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<sup>60</sup> *Wilson v Jaymarke Estates Ltd* (2007) UKHL 29.

arrangement. Views are invited as to whether a provision requiring leave to appeal to the House of Lords<sup>61</sup> is desirable.

4.61 One issue commented upon in the submissions is whether there is currently an appropriate balance between affording sufficient rights of appeal and ensuring that the appellate courts are not burdened by unmeritorious appeals. It has been suggested that there should be a wider requirement for leave to appeal, particularly in respect of further appeals to the Court of Session where an appeal has already been taken from the sheriff to the sheriff principal.

4.62 If a requirement for leave to appeal were to be introduced, the question would arise as to whether a more onerous threshold should be applied to the second level appeal, for example, a requirement that there is a real prospect of success or that there is some compelling reason for leave to be granted. Another option might be to route all appeals from the sheriff to the sheriff principal, any further appeal being subject to leave of the sheriff principal. A 'leapfrog' provision allowing an appeal direct from the sheriff to the Court of Session could apply to cases raising an important point of principle of wider application.

4.63 In some jurisdictions the concept of proportionality has been applied so as to limit the number of stages of appeal which may be pursued, for example, to allow only two appeals up the court hierarchy unless the case raises an important point of principle or practice of wider application which would justify the appeal being taken to a higher level. The Review will consider whether there should be a limit to the number of appeals through which an action can progress; the number of stages that would be appropriate in most cases; what provision should be made for exceptional cases; and how these should be defined.

4.64 The Court of Session's appellate jurisdiction under various statutes is extensive (see Annex C). Since statutory appeals to the Court of Session are traditionally dealt with in the Inner House, the Review will consider whether the Inner House is indeed the appropriate forum for the hearing of such appeals or whether some statutory appeals could be dealt with by a single judge at either Inner House, Outer House or sheriff principal level.

4.65 The Review will also consider whether there may be advantages in the designation of specialist judges within the Inner House to deal with such matters as immigration and, perhaps due to the enlargement of the jurisdiction of the Lands Valuation Appeal Court, to take in appeals from the Scottish Land Court, the Lands Tribunal for Scotland and appeals under the Planning Acts.

4.66 At present all decisions of the sheriff are subject to appeal to the sheriff principal and, with the exception of small claims actions, to the Court of Session. It

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<sup>61</sup> The privilege will continue when the jurisdiction of the House of Lords is transferred to the new United Kingdom Supreme Court under The Constitutional Reform Act 2005 c.4.

might be argued that there should be no right of appeal for certain categories and the Review will consider this.

4.67 If a third tier civil court were created, as discussed in paragraph 4.50 above, consideration would have to be given to what provision for appeal, if any, should be made from decisions made at that tier.

### Judicial resources

4.68 The structural questions discussed in this chapter should be considered in the context of current judicial resources. The use of temporary sheriffs had been well established for many years before the decision in *Starrs v Ruxton* (2000 JC 208). The use of temporary judges in the High Court and Court of Session is of more recent origin. It appears that temporary judges and part-time sheriffs have come to be an essential element in the normal judicial complement, rather than a resource available for emergencies. While the availability of part-time judicial resources gives a useful degree of flexibility in the planning of court timetables, the Review is aware of concerns that the present extensive use of such resources may give rise to questions of public confidence in the judiciary. There are many reasons why it may be undesirable for an individual to be seen to appear as both judge and practitioner at the same level of the court structure. Amongst others, there are presentational problems where it ceases to be clear whether that individual is a practitioner who does some judicial work or is a judge or sheriff who does some legal practice. Views are invited on this and related questions.

### Questions for discussion

1. Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?
2. Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?
3. Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?
4. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?
5. What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where jurisdiction is concurrent?
6. In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?

7. Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?
8. Should the Court of Session become a court of appeal only or should it retain a first instance jurisdiction? If so, for what types of action and why?
9. If the current structure of the courts is retained, at what level should the privative jurisdiction of the sheriff court be set?
10. Are the current powers to transfer cases between sheriff courts and between the Court of Session and the sheriff court satisfactory?
11. Given the range in value and complexity of civil business in the sheriff court, should there be a tier of civil court below the level of the sheriff court?
12. Alternatively, should there be another level of judiciary within the sheriff court to deal with “third tier business”?
13. Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?
14. Are the current arrangements for dealing with undefended actions satisfactory?
15. Are the current arrangements for the disposal of cases raising issues of public or administrative law satisfactory?
16. Are there types of business in the sheriff court which could more efficiently or appropriately be dealt with by administrative rather than judicial process? For example, are the current arrangements for the disposal of commissary business satisfactory?
17. Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?
18. Is there a case for all sheriffs to have an all-Scotland jurisdiction?
19. If the sheriff court becomes the primary court of first instance, should there be a power of transfer from the Court of Session to the sheriff court and a power for the sheriff to seek the leave of the Court of Session to transfer a case there? If so, what factors should be taken into account?
20. Are the existing appeal arrangements satisfactory?
21. Should the office of sheriff principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?

22. Should the majority of statutory appeals continue to be dealt with by the Inner House of the Court of Session?
23. Should there be a limit to the number of levels of appeal through which an action can progress? If so, how many levels would be appropriate? What provision, if any, should be made for exceptional cases and how should these be defined?
24. What are the advantages and disadvantages of reliance on temporary judges and part-time sheriffs?



## CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

5.1 This chapter considers the guiding principles for reform to civil procedure, including the possible role that an “overriding objective” might play. It also identifies a number of specific topics that the Review intends to examine.

### Guiding principles for the reform of civil procedure

5.2 The Remit of the Review requires it to make recommendations which aim to ensure that “cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised.” The pursuit of proportionality in civil procedure is declared in the Scottish Executive’s report on civil justice in Scotland to be one of the key principles which should inform all proposals for change in civil justice.<sup>62</sup> The test of proportionality is said to be “whether the level of legal, and where appropriate, judicial resource applied to an issue is proportionate to the importance and value of the issue to the parties and to society in general”.

5.3 The adoption of such a guiding principle for civil procedure would bring Scotland into line with countries with similar legal systems which have recently carried out major reviews and reforms of their civil justice systems. Often this has taken the form of an “overriding objective” or statement of philosophy which is incorporated as part of a code of civil procedure.

5.4 The Civil Procedure Rules which now govern all civil litigation in England and Wales, following the reforms instigated by Lord Woolf’s review, incorporate an overriding objective which requires the court to deal with a case “justly”.<sup>63</sup> This is defined as including: 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; and ensuring that it is dealt with expeditiously and fairly. In addition it involves allotting to a case only such share of the court’s resources as is proportional to the magnitude of the case, while taking account of the need to allot resources to other cases. The court must give effect to this overriding objective when exercising its powers or interpreting the Rules and parties are required to assist the court in furthering it.

5.5 In Northern Ireland, the Civil Justice Reform Group that was set up in 1998 to review civil procedure considered that there was an “unarguable case” for including a statement incorporating the overriding objective described above into the Rules

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<sup>62</sup> Scottish Executive (2007), *op. cit.*, p.13.

<sup>63</sup> UK Ministry of Justice, *Civil Procedure Rules*, Rule 1.1

[http://www.justice.gov.uk/civil/procrules\\_fin/contents/parts/part01.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm).

guiding civil procedure in the High Court and county courts in Northern Ireland.<sup>64</sup> This view was reached while acknowledging that the pattern and scale of civil litigation in Northern Ireland was significantly different from that in England and Wales and that the problems of expense and delay did not exist to the same extent. The Group regarded the objective as providing “a touchstone by which the parties and the court can base and judge good practice.”

5.6 In Ontario, Canada, a civil justice reform project was set up in June 2006 with the aim of finding “options to reform the civil justice system to make it more accessible and affordable for Ontarians”.<sup>65</sup> One of the principles that the Project is required to take account of in its work is proportionality, described in the Project’s mandate as “the principle that the time and expense devoted to civil proceedings should be proportionate to the amount in dispute and the importance of the issues at stake”.

5.7 Similarly in British Columbia, the Report of the Civil Justice Working Group to the Justice Review Taskforce recommends rewriting the Supreme Court Rules with an explicit overriding objective that all proceedings are dealt with “justly and pursuant to the principles of proportionality.”<sup>66</sup>

5.8 Likewise in Queensland, Australia, the uniform Civil Procedure Rules incorporate a statement of “philosophy” which sets out the overriding obligations of parties and the court. The purpose of the Rules is said to be “to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense”.<sup>67</sup> The Rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating that purpose, and a party to proceedings impliedly undertakes to the court and to the other parties to conduct the action in an expeditious way.

5.9 It might be argued that it is unnecessary to incorporate an overriding objective into the rules governing civil procedure in Scotland as the courts have an inherent power to regulate the conduct of proceedings and to ensure that the business of the court is conducted efficiently. A recent example of the Court of Session exercising that power is in a recent Inner House decision<sup>68</sup> where the court exercised its inherent power to put an end to an action for want of prosecution despite the fact that no such power was provided by the Rules of Court. In dismissing the action, their Lordships said:

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<sup>64</sup> Northern Ireland Court Service (2000) *Review of the Civil Justice System, in Northern Ireland – Final Report*, paragraph. 12, [http://www.courtsni.gov.uk/en-GB/Publications/Targets\\_and\\_Performance/p\\_tp\\_reviewofciviljusticesystemni.htm](http://www.courtsni.gov.uk/en-GB/Publications/Targets_and_Performance/p_tp_reviewofciviljusticesystemni.htm).

<sup>65</sup> Ontario, Canada, Ministry of the Attorney General (2006), *Mandate of the Civil Justice Reform Project*, <http://www.civiljusticereform.jus.gov.on.ca/english/default.asp>.

<sup>66</sup> British Columbia Review Task Force (2006), *Effective and Affordable Justice – Report of the Civil Justice Reform Working Group*, Recommendation 3.1 [http://www.bcjusticereview.org/working\\_groups/civil\\_justice/civil\\_justice.asp](http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp).

<sup>67</sup> Office of the Queensland Parliamentary Counsel (1999), *Uniform Civil Procedure Rules 1999*, Rule 5 <http://www.courts.qld.gov.au/practice/legislation/acts.htm>.

<sup>68</sup> *Barrie Tonner and Anr v Reiach and Hall*, 12 June 2007.

*“We do not think it can be the law that, in the absence of express authority, the Court is powerless to bring an action to an end if it is satisfied that a point has been reached at which justice cannot possibly be done. That would, in our opinion, be to deny the very reason for the existence of the ‘inherent power’.”*

5.10 The case also illustrates that the Rules of the Court of Session are not co-extensive with the practice of the Court. The fact that a particular power is not mentioned in the Rules does not necessarily mean that the power is not available to be used in appropriate circumstances. As their Lordships observed:

*“We cannot accept, however, as a general proposition, that the Court cannot take any course for which there is no precedent in the absence of a Rule of Court expressly empowering it to do so.”*

5.11 In the sheriff court the powers of the sheriff are not limited to those laid down by statute. A sheriff’s statutory powers only limit the exercise of the inherent jurisdiction to the extent that it cannot be exercised in a way that is inconsistent with statute law or statutory rules of court.<sup>69</sup>

5.12 Reforms and proposed reforms to the civil justice systems referred to above have all adopted the approach that the application of the principle of proportionality to the conduct of a case should primarily be the responsibility of the court,<sup>70</sup> with parties having a duty to assist the court in achieving proportionality. The application of the principle requires the court to take a more controlling and at times interventionist approach than traditionally taken. The idea of the judge as a referee between two opposing sides, rather than managing the case, is deeply rooted in the Scottish legal tradition.<sup>71</sup> There have been a number of initiatives aimed at giving the court a more interventionist or management role, ranging from the introduction of the Options Hearing in ordinary civil procedure in the sheriff court in 1993, the establishment of the commercial court in the Court of Session in 1994, the introduction of the rules for commercial cases in the sheriff court in 2001, and most recently, the new procedure for personal injury cases in the Court of Session. These initiatives have had varying degrees of success, and the Review will want to examine in detail the factors which have contributed to the achievement of any improvements and to identify the reasons for any lack of success.

5.13 It may be that a more effective and efficient system of civil procedure can only be achieved if the court has greater control over the way in which cases are instigated and over how they progress once they are in court. The Review is enjoined by its remit to consider modern methods of case management and will wish to examine a variety of ways of achieving greater control over the progress of cases. The key point, however, is that it should be the court, rather than the parties, which

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<sup>69</sup> *Newman Shopfitters Ltd. v MJ Gleeson Group Plc* 2003 SLT 83.

<sup>70</sup> Such an approach has also been supported by the Scottish Executive. See *Modern Laws for a Modern Scotland, op cit.*, (paragraph 3.8, p14).

<sup>71</sup> *Thomson v Glasgow Corporation* 1961 SLT 237.

decides what is a reasonable level of time and expense to devote to an action once it has been brought before the court, and that it should be the court which drives the timetable towards resolution of the action - whether this is achieved by way of settlement or by judicial determination.

5.14 Whether such control is best achieved by adopting the kind of overriding objective that other countries have embraced is a matter for careful consideration. Some may argue that it is unnecessary and that all that is needed is for the court to have stronger and more explicit powers to control the progress of cases; others may argue that an explicit statement of principle, and a requirement for all parties to abide by it, is required in order to achieve the cultural change that is necessary to bring about a real improvement in the way litigation is conducted.

### **Procedural Issues for Consideration by the Review**

- 5.15 The Review is required by its remit to have particular regard to -
- 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.<sup>72</sup>

### **The role of mediation and other methods of dispute resolution**

5.16 A growth of interest in methods of dispute resolution other than formal adjudication by the court has been one of the most notable developments in civil justice over the past decade or so.

5.17 Studies of what people wish when they encounter a significant justiciable problem show that they generally wish it to be resolved as quickly and as painlessly as possible so that they can “get on with their lives”.<sup>73</sup> This demand could link to parties’ feelings of fairness and justice as well as “proportionality”. However, where a case is brought to court and defended, it is possible for one or more parties to introduce delay and cause expense to the other side – often to their tactical advantage. Those who regard litigation as the keystone of civil justice might argue that the solution is to make court procedures so streamlined and efficient that contested issues can be determined swiftly and at proportionate cost.

5.18 However, litigation can cause undesirable consequences. It may increase conflict and encourage the entrenchment of positions. It may favour those who are articulate and skilled in argument, while disempowering those who lack the ability or confidence to set out their case, or who are unable to afford to employ someone to do so on their behalf. The formality of the process may encourage a party to become detached from any responsibility for taking steps to resolve the dispute. Litigation offers a limited range of outcomes, which may be unable to provide what a party to a

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<sup>72</sup> The remit of the Review groups these last two bullet points together, but it is more convenient for the purposes of discussion to separate them.

<sup>73</sup> Genn and Paterson (2001), *op.cit.*

dispute may truly want, such as an apology or an undertaking to behave differently in future. This is often cited as one of the factors in the growth of interest in mediation<sup>74</sup> and alternative dispute resolution (ADR).<sup>75</sup>

5.19 While people wish a resolution to a dispute, it is said they also desire fairness and a transparent process in the handling of their case. The Review therefore needs to consider the extent to which the various forms of dispute resolution can meet these various needs, both as a supplement to traditional settlement processes and on their own. Mediation, for example, ideally involves the willing participation of parties acting in good faith. In practice, sometimes, the mediation process may feel less than completely consensual and the playing field on which the parties are operating may be uneven. It may then fail to satisfy fully the sense of justice of participating parties.

5.20 A broader question that arises in relation to ADR is the nature of the resolution itself. One of the fundamental features of justice systems within the Western democratic tradition is that they operate in public. The rapid rise in the use of alternative methods of dispute resolution in many sectors of law in the United States of America has been accompanied by the emergence of concerns about the growth in “private justice.” Indeed, some sectors embrace ADR particularly when they wish to protect their disputes and their interests from the public view. How far down that road the civil justice system in Scotland should travel can only be determined by careful scrutiny of the available evidence on ADR in Scotland and elsewhere.

### **Current use of mediation and other methods of dispute resolution in Scotland**

5.21 Scotland has not to date followed the trend evident in some other jurisdictions, where mediation and other methods of dispute resolution are now widely used. Mediation in Scotland seems to be most commonly used in the resolution of family cases and neighbour disputes. There is provision in the rules of court for the court to refer the parties to mediation, which is available free of charge through Family Mediation Scotland (FMS) services if children are involved.<sup>76</sup>

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<sup>74</sup> Mediation is commonly described as “ a process in which disputing parties seek to resolve their differences 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.” Scottish Mediation Network, Guidelines on the Practice of Mediation, <http://www.scottishmediation.org.uk>.

<sup>75</sup> The term ADR is often used generically to refer to dispute resolution methods other than formal court adjudication. While originally an acronym for alternative dispute resolution, some ADR practitioners now prefer the term to be understood to mean appropriate dispute resolution. However, confusion can arise when discussing adjudicative methods like arbitration at the same time as consensus building methods like mediation under the common banner of ADR. Those making submissions to the review are invited to specify which means of dispute resolution are the subject of those submissions.

<sup>76</sup> In appeals from the sheriff court in which an order in relation to parental responsibilities or parental rights under section 11 of the Children (Scotland) Act 1995 (c.36) is in issue, the court has discretion to refer the issue to a mediator accredited to a specified family mediation organisation (Rule 40.20). There are corresponding rules in the sheriff court in relation to family and civil partnership actions which enable the sheriff to refer issues relating to parental responsibilities or rights to an accredited mediator (Rules 33.22 and 33A.22).

However FMS is a charity and, if greater use is to be made of mediation, there may be an issue as to whether it is viable for this to be delivered by voluntary organisations. The Scottish Legal Aid Board also provides funding for the cost of mediation in both family and non-family actions. It may also be worth considering whether sheriffs and judges who deal with family law should be trained in mediation skills so that they may better understand how mediation might be useful in the court setting.

5.22 It is open to the sheriff to refer actions raised under the commercial procedure to alternative dispute resolution (though it is worth noting that this power has not been exercised in practice in the commercial court).<sup>77</sup> In small claims and summary cause actions the sheriff is under a duty to seek to negotiate and secure settlement of the claim before proceeding to dispose of the action.<sup>78</sup>

5.23 Recently, however, there has been some formal recognition of the broader role that mediation and other methods of dispute resolution can play in relation to civil court procedure. The Sheriff Court Rules Council conducted consultation exercises on mediation in 2006. The Ordinary Cause Committee of the Sheriff Court Rules Council has subsequently approved the instruction of a draft Act of Sederunt for mediation rules and preparation of these is currently under way. The report of the Sheriff Court Rules Council's working group on mediation was subject to discussion at the meeting of the Court of Session Rules Council in October 2006 and March 2007 when it was agreed that draft rules would be considered by the Lord President in light of the views expressed.

5.24 The Scottish Executive has declared<sup>79</sup> its broad support for greater use of mediation and other methods of dispute resolution and has established, or supported, three pilot projects providing mediation services to litigants in the small claims and summary cause procedures in the sheriff court. An evaluation of the first pilot Edinburgh service, which is linked to the sheriff court in-court advice service, reported that the service was successful in extending access to negotiation to party litigants and providing them with alternative methods of resolving disputes once litigation had been commenced. It also gave unassisted litigants an opportunity to avoid litigation by helping them to negotiate a settlement before litigation started, often by 'shuttle' diplomacy or 'at a distance' negotiation handled by a Mediation Co-ordinator.<sup>80</sup> All mediations in the Edinburgh pilot, of which there were 82 between 2005 and 2006, were conducted by volunteer mediators free of charge. More recently it has been noted in other sheriff court mediation schemes that there has been a low take-up of the service where there is a charge, albeit a nominal one of £75, in summary cause actions.

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<sup>77</sup> Rule 40.12 of the Sheriff Court Rules.

<sup>78</sup> Rule 9.2(2) and Rule 8.3(2).

<sup>79</sup> Scottish Executive News Release 11/09/03:  
<http://www.scotland.gov.uk/News/Releases/2003/09/4109>.

<sup>80</sup> Elaine Samuel (2002), *Supporting Court Users, Part II: The In-court Advice and Mediation Project in Edinburgh Sheriff Court*, Scottish Executive.

5.25 Many of the submissions received by the Review have suggested that the Review should consider whether greater use of mediation and other methods of dispute resolution generally would be beneficial. Several submissions expressed some caution, with one taking the view that the benefits of mediation may have been “oversold.” Advocates for mediation say that mediation is not a panacea and that it is “underused” rather than oversold. They say that it needs to be embedded in our system so that it is available as one of the range of options open to people who are considering how to resolve their differences.

5.26 Concern has been expressed about any possibility of mediation becoming compulsory. This is particularly so in cases involving domestic abuse, or in cases where there has been a history of intimidation or there is a significant power imbalance between the parties.<sup>81</sup> There has also been some judicial consideration as to whether it would be compatible with Article 6 of the European Convention on Human Rights for a court to compel parties to submit their dispute to mediation.<sup>82</sup>

5.27 Other countries have, however, taken steps in the direction of making an attempt at mediation a compulsory part of the court process for some kinds of case, with some apparent benefits for litigants. An example is the mandatory mediation programme for some categories of case in Ontario, Canada. An evaluation of the programme found that it resulted in significant reductions in the time taken to dispose of cases, decreased costs for litigants and a significant proportion of cases settling at or within seven days of the mediation. There was, however, still some scepticism as to whether mediation always resulted in a fair outcome, with a third of the lawyers in the Toronto sample of the evaluation disagreeing with the statement that “justice was served by this process”.<sup>83</sup>

5.28 The Review will wish to consider evidence about the use of mediation and other methods of dispute resolution to assess whether, and in what circumstances, it can offer an effective complement, supplement or even alternative to litigation; if so, it will wish to consider:

- the stage (i.e. before or after the commencement of litigation) at which consideration should be given to mediation or other methods of dispute resolution;

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<sup>81</sup> The Scottish Mediation Network suggests that it is generally considered inappropriate to mediate where there is: a requirement for an interim interdict or summary judgment; a vexatious litigant; a need for a legal precedent to clarify the law or inform policy; a view that a settlement would not be in the public interest; or an alleged abuse of power.

<sup>82</sup> For example in the case of *Halsey v Milton Keynes NHS Trust* [2004] EWCA (Civ) 576, Lord Justice Dyson expressed the view of the court that “it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6.”

<sup>83</sup> Robert Hann and Carl Baar (2001), *Evaluation of the Ontario Mediation Programme (Rule 24.1)*, Ontario Ministry of the Attorney General. The Programme applies to all civil cases which are defended and subject to case 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.

- the appropriateness of particular kinds of disputes for the use of mediation or other methods of dispute resolution;
- how far the court should go in trying to encourage parties to settle a case by means of negotiation or the use of mediation or other methods of dispute resolution;
- whether the court should have the power to penalise parties for not opting for mediation or other methods of dispute resolution in suitable cases;
- whether, and to what extent, the court can have a legitimate role in trying to mediate or “broker” a settlement itself;
- how mediation and other methods of dispute resolution should be funded;
- how suitable practitioners should be identified and how assurances about the quality of the mediator may be obtained;
- the forms which mediation or other methods of dispute resolution should take;
- whether mediation delivers justice;
- whether mediation might become a barrier to justice, for example, by creating additional costs; and
- what is the potential impact on the development of the law and legal precedents of increased use of mediation and other methods of dispute resolution (so called ‘loss of law’).

### **The development of modern methods of communication**

5.29 Many of the submissions received by the Review have commented that modern information technology has a major contribution to make to increasing the efficiency of civil litigation in Scotland. There have already been some significantly useful innovations. One feature of the Commercial Court in Glasgow that has been most favourably commented on by those who use it is the extensive use of telephone conferencing and e-mail in procedural matters.<sup>84</sup> The Sheriff Principal of Glasgow and Strathkelvin has built on the success of this approach by issuing a Practice Note allowing parties to communicate with the court by e-mail in relation to certain procedural matters in other types of action.<sup>85</sup>

5.30 There are also a number of initiatives by the Rules Councils to consider better and further use of IT. The IT Committees of the Court of Session Rules Council and the Sheriff Court Rules Council hold joint meetings under the joint chairmanship of Lord Macphail and Sheriff Iain Peebles QC. IT provides opportunities for substantial improvements in the services that Scottish civil courts provide for litigants, with significant reduction in delay and expense. Specific topics which have been considered include signature or other authentication on parts of process; steps in procedure that should be undertaken by electronic means; and the giving of evidence

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<sup>84</sup> Elaine Samuel (2005), *Commercial Procedure in Glasgow Sheriff Court*, Scottish Executive.

<sup>85</sup> Practice Note No 1, 2006 (3 July 2006), issued by the Sheriff Principal of Glasgow and Strathkelvin, [http://www.scotcourts.gov.uk/sheriff/practiceNotes/glasgow/pn01\\_2006.pdf](http://www.scotcourts.gov.uk/sheriff/practiceNotes/glasgow/pn01_2006.pdf).

by video link, which was provided for in 2006 in both the Court of Session and the sheriff court.<sup>86</sup>

5.31 The Scottish Court Service (SCS) has also acknowledged a clear need for progress towards handling its business electronically and set up the Electronic Service Delivery Unit (ESDU) in 2001, with a view to developing a strategy that will help it meet the Scottish Ministers' target to deliver all essential services to customers by electronic means.

5.32 A number of courts have audiovisual systems to display evidence and there are video link facilities in all High Court venues and major sheriff courts for vulnerable witnesses and those who have difficulty in physically attending court.

5.33 In addition, SCS has indicated its intention to commence piloting the electronic transmission of civil documents pending the outcome of the Civil Courts Review, with a view to testing systems which could be adapted to accommodate reforms arising from the Review. Initially the pilot should involve only small claim and summary cause actions for payment. It will provide facilities for on-line web-based applications for individual litigants and 'bulk processing' facilities for bulk users. The pilot will be conducted from a 'virtual court' and a case would be transmitted to a real court only where it was defended or where an offer to pay had been rejected. The project team is now seeking advice on the procurement of a system and have invited the Joint IT Committee to nominate a member who would be willing to work with them on developing the specification and on selecting a contractor. The Joint IT Committee have advised that no further rules on the subject of electronic transmission of documents should be instructed pending the development of the SCS project.

5.34 It is clear that the use of IT offers a range of opportunities for improving the efficiency and accessibility of court proceedings, as well as improving the depth and quality of information available to assist in the evaluation of any future changes. The Review will wish to consider all of these carefully.

### **Case management in Scotland: themes and initiatives**

5.35 The desire for more active case management has, in various forms, been a recurring theme in many previous reviews of civil court procedure, in both the Court of Session and the sheriff court. There have been a number of initiatives and proposals aimed at giving the courts a more interventionist or management role in the progress of cases. Two models of case management may be identified, judicial case management and 'case-flow' management. Judicial case management seeks to expedite the progress of cases by making provisions for the active intervention of the judiciary at case management conferences. These are usually held at early stages of procedure to identify the issues in dispute and to allow the judiciary to determine

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<sup>86</sup> See, for example, Chapter 93 of the Rules of the Court of Session and Rule 32A.1 of the Ordinary Cause Rules.

what orders are required for the expeditious resolution of the dispute. Case 'ownership' and judicial continuity is not a necessary feature of judicial case management, but is often thought to be desirable. 'Case-flow' management is more limited in its aims and application. It seeks to take the pace of proceedings out of the control of parties, usually by generating a procedural timetable and providing the court with powers to oversee compliance. The judiciary is involved in 'case-flow' management only so far as overseeing compliance with the timetable is concerned. A large responsibility for the operation of 'case-flow' management lies with court staff. Examples are identified below.

### *Court of Session*

#### *Inner House*

5.36 The Rt. Hon Lord Penrose conducted a review of the business of the Inner House in 2006, based on statistical data obtained from surveys of cases initiated in the Inner House in 2002 and 2003. Its main findings were: a significant amount of judicial time was being taken up with incidental business, often as a result of parties' failure to comply with procedural requirements; there was delay on the part of appellants in approaching the court to fix a date for the hearing of appeals; cases were abandoned or settled at a late stage with the result that judicial resources could not be reallocated effectively; 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 cases were often sisted for lengthy periods.

5.37 On the basis of these findings, Lord Penrose recommended that a single Inner House judge should deal with procedural business and, crucially, that there should be a degree of judicial continuity in managing appeals – particularly those involving party litigants. Control over the progress of an appeal should be vested in the court rather than the parties, and the court should fix a timetable, to which parties would be required to adhere. Late amendments and late lodging of documents should be penalised to encourage frontloading preparation, and cases should not be allocated a hearing until they are ready for hearing. Written notes of argument should be exchanged at a relatively early stage of the appeal to enable parties to assess the relative strengths and weaknesses of their case and to enable the court to make informed decisions on procedural issues. Parties should be expected to make accurate estimates of the length of hearing required and to pay the relevant court fees in advance of the hearing. Court fees would be liable to forfeiture if the hearing did not proceed and enhanced fees would be payable in cases which overran the time estimates.

5.38 In its consideration of the civil appeals system, the Review will take note of Lord Penrose's recommendations which combine 'case-flow' and judicial case management techniques to address the problems identified in the Inner House.

#### *Outer House: Commercial actions*

5.39 New rules for commercial actions in the Court of Session (Chapter 47) were introduced in September 1994 in response to recommendations made by Lord

Coultsfield's Working Party on Commercial Causes.<sup>87</sup> These new optional rules for commercial actions were designed to provide a speedy and efficient procedure, primarily through the introduction of judicial case management at two hearings – at a preliminary hearing to focus the issues in dispute and at a procedural hearing to determine how the disputed issues are to be dealt with. This was the first time that judicial case management had been built into the structure of civil procedure in Scotland, albeit restricted to commercial causes.

5.40 Evaluation of the procedure has been positive in terms of reducing delay, though cases proceeding under it have frequently involved extensive judicial resources in the form of three or more preliminary hearings.<sup>88</sup> A compulsory pre-action protocol was therefore introduced into the Commercial Court in January 2005 with a view to reducing the number of continued hearings by focusing issues prior to the initial preliminary hearing. It is understood that the introduction of the pre-action protocol might have contributed to a recent decrease in the number of cases raised under commercial procedure, either because more actions now settle prior to litigation or because the cost of the pre-actions protocol has driven litigation back to ordinary procedure or to other jurisdictions. It is therefore possible – but by no means certain – that initiatives to reduce the resource-intensive nature of judicial case management might have been counter-productive in terms of encouraging more commercial business to the Court of Session, and concern as to its potential impact on the development of Scots law has been expressed. Most recently, however, the Commercial Court appears to have been successful in encouraging new business to the court and in reducing the ratio of hearings to new actions (see Annex D).

#### Outer House: Personal injury actions

5.41 Following introduction of the new rules for commercial actions in the Court of Session, attention turned to the expedition of other actions raised in the Outer House, the most numerous of which are personal injury actions. A review of business in the Outer House recommended early case management hearings in all actions.<sup>89</sup> There was considerable opposition to this recommendation. On the grounds that judicial case management was neither cost-effective nor necessary in routine reparation actions, a Working Party on Court of Session Procedure was established in 1997 under the chairmanship of Lord Coultsfield to consider new methods for expediting such actions.

5.42 A new procedure for personal injury actions, Chapter 43 of the Rules of the Court of Session, was introduced in April 2003 and implements the recommendations of the Working Party.<sup>90</sup> Crucially, Chapter 43 manages the throughput of personal injury actions in the Court of Session by introducing 'case-flow management'. As soon as defences are lodged, the court generates a procedural timetable with which parties must comply and Chapter 43 provides the court with

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<sup>87</sup> Lord Coultsfield (1993), *Report of the Working Party on Commercial Causes*.

<sup>88</sup> Andrew Clancy, Ronald Murray and Rachel Wadia (1997), 'The New Commercial Cause Rules', *SLT (News)* 45, 5.

<sup>89</sup> Lord Cullen (1995), *Review of Business of the Outer House*.

<sup>90</sup> Lord Coultsfield (1998), *Report on the Working Party on Court of Session Procedure*.

new powers to oversee their compliance. This is a very different model of case management than that which operates in the Court of Session under Chapter 47 (for commercial actions).

5.43 Research conducted to evaluate Chapter 43<sup>91</sup> found that it was highly successful in reducing delay in personal injury actions and bringing settlement forward from the day of proof. Practitioners acting for both pursuers and defenders were satisfied, and frequently impressed, by the changes that Chapter 43 had brought to the culture and practices of personal injury litigation in the Court of Session. The impact of Chapter 43 on court business was found to be mixed, however, with appointments to the Procedure Roll significantly reduced but appointments to the 'By Order' Roll and 'starred' motions (motions appointed to be heard in court) somewhat increased. This was not unexpected, however, in a system designed to control the pace of proceedings by overseeing the compliance of parties to a court-generated timetable.

5.44 The research found that 'case-flow' management techniques introduced by Chapter 43 were effective for most personal injury actions proceeding under it. In a few cases, however, the need for active judicial case management, which is currently not provided for under Chapter 43, was apparent. For personal injury actions that had successfully applied to be transferred out of Chapter 43 (about 7% of all personal injury actions raised under Chapter 43) there was no case management at all – neither 'case-flow' nor judicial case management. These actions, which were likely to be of considerable complexity and involve injuries of considerable significance, were found to be subject to long delays and last minute settlement. While Chapter 43 has therefore proved successful in expediting routine reparation actions, more complex actions have been left without any provisions for their expedition. This issue has been drawn to the Review's attention on a number of occasions and is clearly a matter of concern.

### *The Sheriff Court*

#### *Ordinary Cause Rules*

5.45 The new Ordinary Cause rules, which came into force in 1994, are probably the most significant reform undertaken in the sheriff court over the last 20 years. The new rules were targeted at reducing delay and the number of callings in court, particularly during the period in which pleadings are being adjusted. They introduced a fixed timetable within which adjustments were to be completed and created a new procedural hearing known as the Options Hearing, at which the sheriff "shall seek the expeditious progress of the cause." One of the principal policy objectives underpinning the rules was to vest control and management of cases in the court, rather than leaving parties free to litigate at their own pace.

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<sup>91</sup> Elaine Samuel (2007), *op. cit.*

5.46 Research conducted into the operation of the new rules concluded that they had been effective in reducing delay and the number of callings in court during the adjustment period, but that Options Hearings had not been as effective as anticipated.<sup>92</sup> The research also identified a built-in tension between two objectives of the new rules, namely, vesting control over the pace of proceedings in the court and keeping the number of callings to a minimum, in so far as the exercise of control frequently demanded summoning parties to court. As we have seen above, this was also noted in the evaluation of Chapter 43 in the Court of Session. The evaluation recommended that the effectiveness of Options Hearings should be considered further, particularly with regard to the participation of principal solicitors, the role of sheriffs and the control of the court over the progress of cases.

#### Commercial actions

5.47 The new rules for commercial procedure in the sheriff court, which were introduced as Chapter 40 of the Ordinary Cause Rules in 2001, were designed to address some of these problems with respect to commercial cases. They aim to expedite the progress of commercial actions by allocating particular cases to a named sheriff, by procedures that encourage early identification of the issues and by providing the sheriff with wide-ranging case management powers. A study<sup>93</sup> carried out on behalf of the Scottish Executive into the operation of the new procedure at Glasgow sheriff court found that it had proved popular with commercial practitioners, who reported that cases settled or were resolved earlier in the commercial court and at a lower cost (than in the ordinary court). The procedure was reported to have changed many aspects of the litigation culture of the court, with robust shrieval case management, shrieval continuity and the use of IT identified as key factors in its success. This procedure for commercial actions is currently available only in Glasgow, Aberdeen, Jedburgh, Selkirk, Duns, Inverness, Dingwall and Portree sheriff courts.

#### Family actions

5.48 The success of the commercial court in Glasgow sheriff court has been matched by the enthusiasm of many family law practitioners for the family court that was established in Glasgow sheriff court some years earlier. Though it has not been formally evaluated, there have been strong calls from practitioners for establishing family courts in other sheriff courts on the grounds that shrieval continuity, judicial case management and specialisation is crucial for the interests of justice to be served in family cases.<sup>94</sup>

#### Personal injury actions

5.49 Following consultation, the Sheriff Court Rules Council has decided that a modified form of the Court of Session's Chapter 43 should be "rolled out" to personal injury actions in the sheriff court. The modifications involved have not yet been announced. In the meantime, a new procedure for litigating personal injury

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<sup>92</sup> Elaine Samuel and Robert Bell (1997), *Implementing OCR (93): Defended Actions in the Sheriff's Ordinary Court*, Scottish Office Central Research Unit.

<sup>93</sup> Elaine Samuel (2005), *op. cit.*

<sup>94</sup> Jenny Nobbs (2006), *op. cit.*

actions was introduced in Glasgow sheriff court in January 2006. It follows the judicial case management approach adopted in the commercial court in Glasgow sheriff court and Aberdeen as Chapter 40 rather than the 'case-flow' management approach adopted for personal injury actions by Chapter 43 in the Court of Session. In the view of the sheriff principal and sheriffs concerned, many of the factors contributing to the success of Chapter 43 in the Court of Session, such as the presence of a specialist personal injury bar, were felt to be absent in the context of the sheriff court.<sup>95</sup> More generally, the point may be made that what is successful in one context cannot be assumed to be successful in another.<sup>96</sup> Not least, 'rolling out' requires careful consideration of practices, practitioners and legal culture in their different settings.

### Case management: current issues

5.50 The history of attempts to introduce case management into various areas of civil procedure in Scotland is useful in two main ways: first, it demonstrates very clearly the piecemeal approach taken in Scotland to civil justice reform and the need now for consolidation; and second, it shows that different types of case management system not only have different, and often competing, advantages, but that a "one size fits all" model is unlikely to be appropriate. The Review will therefore examine and compare different types of case management, such as judicial case management and 'case-flow' management, to consider their respective benefits as well as the types of cases and contexts to which they are most suited.

### Questions for discussion

1. Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?
2. Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?
3. If so, how should this be done and at what point or points in the progress of a dispute?
4. Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.
5. What form should mediation or other methods of dispute resolution take and how should this be funded?
6. In what respects can modern communications and information technology be harnessed to improve access to the civil courts?

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<sup>95</sup> For further discussion, see Elaine Samuel (2007), *op.cit.*, pp.182-3.

<sup>96</sup> Elaine Samuel (2005), *op. cit.*, pp. 77-83.

7. To what extent should the court control the conduct and pace of litigation?
8. What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?



## CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

6.1 A number of specific topics relating to the working methods of the civil courts including the initiation, management, and timetabling of litigation have also been raised by respondents which the Review will wish to explore in detail. These include:

- Pre-action procedures
- Gatekeeping
- How court rules are made
- Initiating documents
- Written pleadings
- Summary disposal
- Procedural business
- Substantive hearings
- Disclosure
- Expert evidence
- Pursuers' offers
- Civil juries
- Form of judgment
- Sanctions for non-compliance
- Party litigants
- Rights of audience
- Multiparty actions
- Judicial review

### Pre-action procedures

6.2 One of the methods that can be used to promote efficient use of court resources is the pre-action protocol. These are now a key feature of litigation in England and Wales and enable the court to take into account compliance or non-compliance with an applicable protocol when giving directions for the management

of proceedings and when making orders for costs.<sup>97</sup> Parties are expected to comply with the terms of the protocol applying to the type of case in which they are involved.

6.3 The intention of the pre-action protocol system operating in England and Wales is to ensure that before proceedings are commenced, reasonable steps are taken to avoid the necessity for litigation. The aim is to encourage the exchange of early and full information about the prospective legal claim; to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and to support the efficient management of proceedings where litigation cannot be avoided. Pre-action protocols are not suitable for certain types of action e.g. debt actions.

6.4 As of January 2007, there were nine pre-action protocols in force in England and Wales under Civil Procedure Rules (1999), covering personal injury, clinical negligence, construction and engineering disputes, defamation, professional negligence, judicial review, disease and illness, housing disrepair and rent arrears.

6.5 In Scotland, the use of pre-action protocols is more limited. After discussions between a working party of the Law Society of Scotland and the Forum of Scottish Claims Managers, a pre-action protocol was introduced in January 2006 for claims for personal injuries.<sup>98</sup>

6.6 Industrial disease cases are excluded; it is designed primarily for claims with a value of up to £10,000, although there is nothing to prevent parties dealing with higher value claims under the protocol by mutual agreement; and there are fixed fees for cases settled under the protocol.

6.7 In the Court of Session, a pre-action protocol was introduced into the commercial court as of January 2005 by means of a Practice Note and, unlike the personal injury protocol, is mandatory.<sup>99</sup> It requires that, save in exceptional cases where speed is of the utmost necessity, matters in dispute must be discussed and focused in pre-litigation communications between prospective parties' legal advisers. This is so that commercial procedure is reserved for only those actions that need to be resolved by judicial decision, which itself functions best if "issues have been fully investigated and ventilated prior to the raising of the action."

6.8 The Law Society of Scotland and the Forum of Scottish Claims Managers have agreed a further Voluntary Protocol to resolve claims of professional negligence against solicitors and other professional persons (other than medical negligence cases). It applies to claims intimated after 1 July 2007 where the value of the claim is

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<sup>97</sup> Civil Procedure Rules (1999) 3.1(4) and (5), 3.9(e) and 44.3(5)(a) and Practice Direction, Protocols.

<sup>98</sup> Graeme Garrett (2005), "New deal for PI claims: Commentary on, and text of, the Voluntary Pre-action Protocol agreed between the Society and the FSCM," *JLSS*, December 2005.

<sup>99</sup> Court of Session Commercial Court Practice Note 6: paragraph 11.

up to £20,000 although parties may by mutual consent agree to use the protocol for claims of higher value.

6.9 There has been no formal evaluation of the protocols currently in use in Scotland. A number of submissions to the Review noted their existence and suggested that the Review should examine whether greater use of them would be beneficial. Comments in relation to the voluntary pre-action protocol for personal injury actions were generally supportive of its introduction. One respondent, however, considered that the protocol had failed to address what he considered to be a fundamental problem, namely, unrealistic pre-litigation offers.

6.10 There has been a marked decrease in actions raised in the commercial court of the Court of Session over the past few years and Lord Reed has invited feedback.<sup>100</sup> He reports that the general view was that pre-action correspondence was sensible, that the protocol had resulted in some disputes being settled without proceedings, and that issues were narrowed in some disputes that were litigated. So, at first glance, it may appear that the protocol has been responsible for reducing the number of commercial actions raised – and it may have done so.

6.11 However, concerns were also raised as to the cost of compliance with the protocol, which was on average estimated at £10,000 per party. It was thought that the requirements of the protocol encouraged a tendency to indulge in prolonged correspondence. The requirement to obtain and disclose expert evidence in advance of raising the action was also thought to result in unnecessary expense and delay. In addition, there was disquiet about experts committing themselves at too early a stage.

6.12 It has been suggested “the protocol is being applied more rigorously than necessary. There is a need to consider whether it ought to be clarified or refined”.<sup>101</sup>

6.13 In England and Wales, an early evaluation of the Woolf reforms was undertaken in 2002,<sup>102</sup> which looked at the impact of the reforms on pre-action behaviour in personal injury, clinical negligence and housing disrepair cases. Amongst the Woolf reforms that were examined were Part 36 offers (see paragraph 6.58), pre-action protocols and the single agreed expert.

6.14 Most practitioners regarded the Woolf reforms as successful in expediting pre-litigation negotiation and settlement and, in particular, Part 36 offers were singled out for praise. By establishing clear ground rules on how claims should be formulated and responded to, pre-action protocols were thought to focus minds on the key issues at an early stage and to encourage greater openness. However, there was some criticism of the courts for failure to sanction non-compliance.

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<sup>100</sup> Lord Reed (2007), “Clean sheet at the Commercial Court”, *Journal of the Law Society of Scotland*, Feb. 2007.

<sup>101</sup> *ibid.*

<sup>102</sup> Tamara Goriely, Richard Moorhead, R and Pamela Abrams (2002), *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour*, *The Law Society and Civil Justice Council*.

6.15 The Master of the Rolls has now asked the Civil Justice Council to advise on the future development of the pre-action protocol regime in England and Wales in relation to five issues: the format, content and consistency of the protocols; costs associated with complying with the pre-action protocols; changes that are necessary to simplify them; new areas that would benefit from protocols; the content of each protocol and change that may be needed.

6.16 The Civil Justice Council has recently consulted on the first of these issues. It is proposing to recommend the introduction of a Consolidated Pre-Action Protocol that will reduce the present nine protocols to one protocol by incorporating the core steps and guidance common to all of the protocols but with subject specific appendices.<sup>103</sup>

6.17 As it stands at present, therefore, there would be appear to be mixed views as to the benefits to be achieved by the use of pre-action protocols and, if used, as to the best form for them to take. The Review will wish to examine all of the available evidence before coming to any view.

### Gate-keeping

6.18 Another method identified by a number of submissions to the Review for promoting efficient use of court resources is the introduction of a gate-keeping mechanism, such as a requirement for permission of the court to be obtained before all proceedings or certain types of proceedings are brought – either before a particular procedural step is taken or before an appeal is made to a higher level of court.

6.19 As discussed below, in paragraphs 6.80 to 6.82, rules of procedure already exist to restrict the right of a potential litigant to commence proceedings, albeit in limited circumstances. In the Court of Session, for example, a party litigant must seek the leave of the court to commence an action.

6.20 The leave of the court may also be required during the currency of an action, for example, if a party wishes pleadings to be received late or amended. Although such a requirement can be a useful means of enabling the court to maintain some control over the progress of an action, in practice, the court is unlikely to refuse leave if the other party does not object.

6.21 There are also some provisions that require leave to appeal to be obtained. The general policy under the Sheriff Courts (Scotland) Act 1907 would appear to restrict appeals without leave unless the appeal is against a final judgment or against a specified class of interlocutor which, in practice, are usually of material importance or affect the status quo of parties such as an interlocutor sisting an action or refusing

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<sup>103</sup> Civil Justice Council (2007), *Consultation on consolidated pre-action protocol*, [www.civiljusticecouncil.gov.uk/publications/1074.htm](http://www.civiljusticecouncil.gov.uk/publications/1074.htm).

a reopening note.<sup>104</sup> In summary causes, an appeal lies from the sheriff to the sheriff principal in respect of the final judgment only,<sup>105</sup> with a further appeal from the sheriff principal to the Court of Session in summary causes only if the sheriff principal certifies the cause as suitable for such an appeal. In small claims the right of appeal is to the sheriff principal and no further.<sup>106</sup>

6.22 In the Court of Session any interlocutor of an Outer House judge which deals with all or part of the merits of a case may be reclaimed (i.e. appealed against) without leave, other than in commercial or judicial review cases.

6.23 It can be seen from the above that there is no general requirement to obtain the permission of the court to proceed with an action, or to appeal against a judgment, in either the Court of Session or the sheriff court. The Review will wish to consider whether it would be appropriate to have a more general requirement for leave to bring, or to take steps in, proceedings. Such a requirement could be related to the question of where a case should commence within the court system, that is, to which level it should be allocated and which type of procedure it should follow, as well as whether a case should be allowed to start or proceed to a further stage. It would be important to ensure that if a more general requirement for leave were to be introduced, it did not simply result in consequential litigation and opportunity for delay and expense, with decisions about the granting of leave becoming themselves the subject of appeal or application for judicial review. It would also be necessary to consider whether it is appropriate to set out explicitly the considerations that the court should take into account in deciding whether to grant leave, or to let the matter rest on case law, as is the current position.

### How court rules are made

6.24 All civil rules of court are made by Act of Sederunt of the Court of Session, for both the Court of Session and the sheriff court,<sup>107</sup> under powers contained in the Court of Session Act 1988 and the Sheriff Courts (Scotland) Acts 1971.<sup>108</sup> Changes to the rules are made on the advice of the courts' respective Rules Councils.

6.25 The Court of Session Rules Council is constituted under section 8 of the Court of Session Act 1988 and consists of the Lord President, two other judges of the Court of Session appointed by the Lord President, five members of the Faculty of Advocates, and five solicitors appointed by the Council of the Law Society of Scotland. The Sheriff Court Rules Council is constituted under section 33 of the

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<sup>104</sup> Sheriff Courts (Scotland) Act 1907 (c.51) sections 27 and 28.

<sup>105</sup> Sheriff Courts (Scotland) Act 1971 (c.58) section 38(a) (as amended by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 (c.73), section 18(4)).

<sup>106</sup> Sheriff Courts (Scotland) Act 1971 (c.58) section 38(b) (as amended by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 (c.73), section 18(4)).

<sup>107</sup> With the exception of the rules for inquiries under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14), which are made by Scottish Ministers (see section 7 of the 1976 Act, as modified by S.I. 1999/678, arts. 2(1), 7(4), Sch.).

<sup>108</sup> See the Court of Session Act 1988 (c.36), section 5, and the Sheriff Courts (Scotland) Act 1971 (c.58), section 32.

Sheriff Courts (Scotland) Act 1971. Members of the Council are appointed by the Lord President and membership comprises two sheriffs principal, three sheriffs, one advocate, five solicitors, two sheriff clerks and two lay members who have a knowledge of the working procedures and practices of the civil courts, a knowledge of consumer affairs and an awareness of the interests of litigants in the sheriff courts. Each council has a secretariat to manage its administrative business.

6.26 A question which the Review will wish to consider is whether the current system of making rules of court, including responsibility for advising on and drafting required changes, is the most effective that could be achieved. There are significant differences in the make-up of the respective Rules Councils. The fact that there are two separate Rules Councils is itself worthy of comment. There have been instances of the two Councils undertaking joint projects, for example, the joint meetings of the IT Committees (see paragraph 5.33 above). There are also instances where the two Councils have approached the same issue separately, for example, in relation to mediation and other forms of alternative dispute resolution (see paragraph 5.23 above).

6.27 The recent Review of the Scottish Court Service recommended that the secretariat function for all the Rules Councils, including the Criminal Rules Council, should be provided by a single branch within the Scottish Court Service.<sup>109</sup> Legal advice would continue to be provided by the Lord President's Private Office. The SCS and the Scottish Executive are currently considering this proposal. It also recommended a change in primary legislation to enable the appointment of lay members to the Court of Session Rules Council.

6.28 The recommended changes, while directed primarily at increasing the efficiency of the system of making rules, may also be helpful in promoting a more consistent approach to civil procedure generally. A number of submissions have suggested that there should be a single body of civil procedure rules applicable at all levels of the civil courts. Four major sets of rules at sheriff court level, together with a separate set of rules for the Court of Session which contain a plethora of specialised procedures for different categories of case, can make accessibility to the civil court system difficult. The often archaic and abstruse language used in the courts has also been adversely commented on in a number of submissions. It is not just lay people who struggle to understand the terminology used in the courts: one experienced Scots lawyer commented in his submission that even he has difficulty in understanding the language employed in court documents. Consolidation of the rules across the whole civil court system could address that problem at the same time as creating a new procedural code.

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<sup>109</sup> Douglas Osler (2006), *Agency Report of the Scottish Court Service*, Scottish Executive, <http://www.scotcourts.gov.uk/library/Agency-Review.pdf>.

## Initiating documents

6.29 Within Scottish civil procedure there is currently a wide range of different forms for initiating actions of different types, with different requirements as to the amount, nature and format of information which must be supplied in the initiating document. Several of the submissions to the Review have suggested that there is considerable scope for rationalising the forms of initiating documents. The possibility of a “single initiating document” has emerged in recent years,<sup>110</sup> the idea being that it should be possible to state whatever claim is being made in a standard form.

6.30 One submission has suggested that it should be possible to raise all proceedings in the sheriff court in the same brief statement to the court, containing a narration of what the person raising the action wishes the court to do, a brief summary of the circumstance that justify the request and a request for the claim to be intimated to such parties as may be necessary. This proposal is linked to other suggestions that all actions should be initiated at the same level, and possibly even at a central entry point, if this were done electronically. A case would then be allocated to the appropriate court only if defended.

6.31 The use of IT for electronic filing has increased in varying degrees in other jurisdictions. In Western Australia, for example, e-lodgement facilities in Magistrates and District Courts enable members of the legal profession and approved litigants to lodge documents and pay court fees online and in Washington the Civil Division of the Superior Court has electronic filing for more complex civil cases, such as medical malpractice, toxic tort and asbestos-related cases. As mentioned in Chapter 5, there is considerable scope for extending the use of electronic filing in Scottish courts.

6.32 Another point made in a number of submissions concerns the language used in initiating documents and the information supplied to potential litigants. The view has been expressed that there is a need for a complete overhaul of court forms if current procedures are to be retained. Attempts have been made in recent years to make some forms, such as the small claims summons, more user-friendly, but it is clear they are still not easy for many people to understand. For example, it is very common for defenders in small claims and summary cause cases to turn up at the court on the calling date, having failed to return the summons by the return date. One submission comments that the use of obscure language in court documents raises a serious issue about access to justice, with the present system seeming elitist and exclusive such that only a member of the club can understand what is going on.

6.33 Others suggest that much more could be done to assist members of the public to access court procedures themselves, by greater provision of information and guidance on relevant legal provisions and explanation of what the rules

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<sup>110</sup> See Lord Woolf (1996), *op. cit.*, Recommendation 114.

require.<sup>111</sup> For example, in many courts in California a growing number of self-help centres provide integrated support services to those who do not have lawyers. One self-help centre web site was found to have been visited more than 100,000 times a month by those seeking information about their legal rights.<sup>112</sup> In Australia, most courts provide some form of pre-trial assistance to party litigants. A series of software modules intended to guide lawyers and others through the necessary steps for conducting particular legal matters was developed in New South Wales and legal information is increasingly available on the Internet from sources such as the Australasian Legal Information Institute.<sup>113</sup>

6.34 These are certainly important matters which the Review will wish to examine.

### Written pleadings

6.35 Written pleadings can be defined as “the formulation in writing of litigants’ positions in law and fact for determination by a court”.<sup>114</sup> The current system of written pleadings leaves the parties to determine the content of their pleadings and to decide what evidence ought to be led. The court’s role is restricted to making interlocutory decisions as the case proceeds and thereafter determining the case on the evidence led as restricted by these pleadings.

6.36 The reform of civil procedure and written pleadings has been considered since as long ago as 1906<sup>115</sup> and continues today. In 1993, for example, the Lord Advocate, Lord Rodger of Earlsferry, commented that:

*“there must be room for further consideration of our system of written pleadings. They can, of course, serve a most useful purpose in certain cases. But they absorb an enormous amount of the time of counsel and solicitors and it is not always clear that so much effort and resulting expense are justified”.*<sup>116</sup>

6.37 One submission to the Review has suggested that a total review of the system of pleadings is required and comments that although the intention of pleading is to focus arguments, the present system often only results in arcane arguments and consequent delay, especially in the sheriff court. Others echo these sentiments and subject the standard of pleadings in the sheriff court to particular criticism. They point to the irony that full formal pleadings are still being required in personal injury

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<sup>111</sup> See, for example, Robin Bennett (2007), “DIY in the Sheriff Court F.A.Q.”, *SCOLAG Journal*, September 2007.

<sup>112</sup> Richard Zorza (2002), *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers*, National Centre for State Courts, Williamsburg, VA.

<sup>113</sup> The Australian Law Reform Commission Adversarial Background Paper (1998), *The Unrepresented Party*.

<sup>114</sup> David Parratt (2006), *The Development and Use of Written Pleadings in Scots Civil Procedure*, The Stair Society. Also see comments by The Rt. Hon. Lord Gill, “The Case for a Civil Justice Review – A Contemporary Relic in Need of Overhaul”, *JLSS*, 1995, 129.

<sup>115</sup> J A Clyde, “Practice and Procedure in the Court of Session” (1906/7) 18 JR 319.

<sup>116</sup> Lord Rodger of Earlsferry, “A Civil Justice System in Motion”, in HL MacQueen (ed), *The Costs of Justice. Proceedings of a Conference Sponsored by the Faculty of Advocates*, 3 November 1993 (DHI, Occasional Paper, No. 43, 1993) 13-14.

cases in the sheriff court whereas there is a simplified system of pleadings for these cases in the Court of Session. Another submission comments on the impact of the requirement for written pleadings on access, since unassisted parties cannot be expected to draft written pleadings as lawyers. It should be recognised however that pleadings perform an important function in identifying the facts and legal issues in dispute. If they are to perform that function properly and to give fair notice of each party's case a degree of technicality may be required. Concerns have been expressed that the introduction of a system of abbreviated pleading might lead to less care being taken to identify the issues at an early stage. This may unduly lengthen court hearings if time is spent clarifying issues which should have been focused in the pleadings.

6.38 The Review of the Business of the Outer House of the Court of Session<sup>117</sup> recommended the adoption of a system of abbreviated pleadings for all actions apart from those where the court was satisfied that the difficulty or complexity of the action made it unsuitable. The recommendation was not implemented. Concern was expressed that the use of abbreviated pleadings would herald the demise of the Scottish doctrine of relevancy. It was contended that it would also mean the removal of the advantages of encapsulating the parties' positions in one document and would result in increased paperwork and costs, and take up judges' time unnecessarily.<sup>118</sup>

6.39 The Rules under Chapter 43 for personal injury actions in the Court of Session do, however, mean that abbreviated pleadings are now part of reparation practice in the Outer House of the Court of Session, which comprises the largest proportion of the business of that court.

6.40 A recently published evaluation of Chapter 43<sup>119</sup> found that almost all defenders' agents expressed strong reservations over the introduction of simplified pleadings, particularly over the absence of pleas-in-law. Solicitors for pursuers mostly endorsed the new system but were concerned that the reforms had not been successful in eliminating skeleton defences or blanket denials. Some advocates expressed mixed feelings and were concerned that simplified pleadings were sometimes responsible for lack of clarity. This did not contribute to the smooth running of the court or the progress of actions through the court, and was detrimental to the interests of both parties. At the same time, many practitioners commended the new procedure for introducing abbreviated pleadings and urged that they be introduced for personal injury actions in the sheriff court, as the Sheriff Court Rules Council has now recommended.

6.41 Provision is also made for the use of abbreviated pleadings in commercial actions in the Court of Session. Guidance on the form which these should take is given in the relevant Practice Note.<sup>120</sup> It is understood, however, that there is a

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<sup>117</sup> The Hon Lord Cullen (1996), *op. cit.*

<sup>118</sup> See, for example, *The Cullen Report*, Nigel Morrison QC 1996 SLT 93.

<sup>119</sup> Elaine Samuel (2007), *op. cit.*

<sup>120</sup> Practice Note No 6 of 2004, paragraph 3(1).

tendency in such actions for the pleadings, given their nature, to be rather more elaborate than the short form adopted for cases under Chapter 43.

6.42 Similarly, new rules for commercial actions were introduced in the sheriff court in 2001. 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.<sup>121</sup> Defences should be in the form of answers that allow the extent of the dispute to be identified, thereby dispensing with the traditional form whereby the defender repeats each of the pursuer's averments.<sup>122</sup> Despite this, the practice of using fairly elaborate pleadings appears to remain.

6.43 It can be seen that incremental reforms to parts of the civil justice system have resulted in a number of specialised procedures which do not require, or actively discourage, the use of full written pleadings. This trend is evident in other jurisdictions, such as England and Wales.<sup>123</sup> We are now at a point where a number of procedures in the Court of Session and the sheriff court operate different aspects of case management involving judicial proactivity and abbreviated pleadings to a greater or lesser extent.<sup>124</sup> The question for the Review is which way we go now.

### Summary disposal

6.44 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 any part of it to which the motion relates.<sup>125</sup> The court may only grant summary decree where it is satisfied that there is no stateable defence to the action. If a stateable defence is advanced the court is not required to assess the likelihood of that defence being successful.

6.45 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 in support of or opposition to the motion for summary decree.

6.46 With certain limited exceptions, the summary decree procedure applies only to a pursuer.<sup>126</sup> 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. The reason for this lack of reciprocity is that the rules on summary decree were introduced to prevent defenders from lodging skeleton

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<sup>121</sup> Chapter 40 of the Ordinary Cause Rules of the Sheriff Court.

<sup>122</sup> Rule 40.9(3).

<sup>123</sup> Woolf (1996), *op. cit.*, Chapter 12.

<sup>124</sup> David Parratt (2006), *op.cit.*, p.187.

<sup>125</sup> 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, multiplepinding, actions for proving the tenor and actions under the Presumption of Death (Scotland) Act 1977 (c.27).

<sup>126</sup> 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.

defences as a delaying tactic whereas the strength of a pursuer's case, it is said, can only be tested once the period for adjusting the pleadings has expired and the relevancy of the pursuer's case examined at debate.

6.47 In some jurisdictions or tribunals it is open to either party to apply for summary disposal of a case and the test is a lower one than there being no stateable case. For example, an employment tribunal may strike out a claim or response on the grounds that it has no reasonable prospect of success.<sup>127</sup>

6.48 Under the Civil Procedure Rules in England and Wales the court may give summary judgment against a claimant or defendant, in whole or in part, if the claimant has no real prospect of success or the defendant has no real prospect of successfully defending the action. The court may raise this issue of its own volition as well as on the application of either party.<sup>128</sup>

6.49 It has been suggested that the Review should consider the desirability of introducing a procedure for either party to apply for summary disposal of an action or defence which has no reasonable prospect of success. Views are invited as to whether the current arrangements for summary disposal are satisfactory.

### **Procedural business**

6.50 In both the sheriff court and the Court of Session, routine procedural business is dealt with by sheriffs and judges of the Outer and Inner Houses. In many other jurisdictions, procedural matters are dealt with by junior judges, usually with a power to refer more complex or contentious issues to a senior judge. It has been suggested that consideration should be given to whether there might be merit in creating a judicial office, equivalent to that of the Master in the High Court in England or Wales in relation to Court of Session business, or equivalent to a district judge in the county court in relation to sheriff court business.

6.51 Consideration might also be given to the arrangements for hearing routine procedural business. At present, such business is generally listed for hearing on an unallocated basis. When the motion roll is lengthy this can result in significant and costly waiting time for a matter which may take only a few minutes to be heard. One option might be to assign dedicated time slots to particular cases including procedural business conducted by telephone or video conferencing. This may encourage the use of such methods as a means of dealing with procedural business. The success of such a scheme would, however, depend on parties giving accurate time estimates for the disposal of such business.

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<sup>127</sup> Rule 18(7)(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004, No. 1861.

<sup>128</sup> CPR 24 and relevant Practice Direction.

## Substantive hearings

6.52 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. Research in relation to the business of the Inner House has shown that the estimates given by the parties are frequently inaccurate with the result that cases require to be adjourned and reconvened to a later date. It is understood that this is also a problem at first instance in the Court of Session, particularly in relation to judicial review; in the sheriff court difficulties arise in that civil proofs or hearings may only be allocated 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.

6.53 It has been suggested that the court should play a greater role in deciding how much time should be allocated to a hearing; that once a hearing is fixed for a particular length of time the court should ensure that a timetable is fixed for the hearing of evidence and/or submissions; and that the parties should be required to adhere to that timetable unless there are exceptional circumstances which would justify departure from it. It has also been suggested that more efficient use could be made of the time allocated to hearings through greater use of written submissions or outline arguments. Such a system would 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. On the other hand, it would result in a degree of frontloading of costs if written submissions or outline arguments were exchanged in advance of a hearing which was later discharged on settlement or withdrawal of the case. Time would have to be allocated for judges and sheriffs to read the written submissions or outline arguments in advance of the hearing. Time limited hearings might restrict the ability to advance arguments fully and might inhibit debate between 'bench and bar' which can test the strengths and weaknesses of a case. The Review will consider the relative advantages and disadvantages of time limited hearings and the use of written submissions or outline arguments.

6.54 Cases often settle shortly before the hearing, or at a very early stage in it, so that court time which has previously been allocated is not utilised. This makes the programming of cases difficult and unpredictable. The Review will consider ways in which greater certainty and predictability could be introduced into oral hearings, with adjournments or continuations being permitted only in exceptional circumstances. The Review will examine the advantages and disadvantages of these or similar arrangements.

## Disclosure

6.55 Another factor which affects both the speed at which cases progress and the expense which they incur is how, when and to what extent parties disclose to each other relevant documents and other information. At present this is achieved by a combination of the basic requirements of the rules and the specific procedures by

which the court may require the parties to disclose information.<sup>129</sup> One submission suggests that greater use could be made of pre-proof disclosure, including more use of affidavits. The burden of disclosure can, however, be considerable. In some instances it can be used as a weapon with which to attack the other side, either by excessively burdensome demands for information or by the provision of excessively burdensome amounts of unsorted information. Some respondents have commented that there may be a case for reviewing at what stage of an action a specification of documents may be granted and have suggested that settlements could be facilitated, or disputed issues narrowed, by the earlier exchange of information between the parties. The Review will wish to look at possible options for ensuring appropriate early exchange of information, including the new disclosure regime under the Civil Procedure Rules in England and Wales, which recent research suggests is regarded as working well.<sup>130</sup>

### Expert evidence

6.56 A related issue is the use of expert evidence, which is involved nowadays in many litigations. In Scotland there are no procedural limitations upon the number of expert witnesses who may be led by a party. The only practical limitations that exist are cost, as well as the powers of the court to refuse to certify a witness who, in its opinion, has been employed unnecessarily.<sup>131</sup>

6.57 Concerns have been voiced about the excessive use and cost of expert witnesses in civil cases. One option would be to require parties to agree on the use of a single joint expert in place of the court having to choose between conflicting evidence of experts employed by each party. The Civil Procedure Rules in England and Wales give the court power to direct that evidence on a particular issue is given by one expert only, and power to decide who the expert will be if the parties cannot agree.<sup>132</sup> It is understood that the use of a single joint expert is now the norm in England and Wales. Another option would be to refer the matter to an assessor<sup>133</sup> or a person of skill.<sup>134</sup> The Review will consider these and any other options that may be identified. The Review will also examine the role of the expert in relation to litigation and, in particular, the question whether an expert's main duty should be to the instructing party or to the court. The Review invites views on the extent to which the court should have control over the amount and nature of the expert evidence that is led. The Review will consider the experience in other jurisdictions including England and Wales where, following recommendations made in the Woolf Report, the Civil Procedure Rules were amended in order to emphasise experts' duty to the court and to encourage a more focused use of experts.

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<sup>129</sup> See for example, Rules of the Court of Session Chapter 27 (Documents founded on or adopted in pleadings), 35 (Recovery of evidence) and 43.4 (Inspection and recovery of documents in personal injury cases); and Sheriff Court Ordinary Cause Rules, Rule 9.13 and Summary Cause Rules, Rule 8.5.

<sup>130</sup> John Peysner and Mary Seneviratne (2005), *The Management of Civil Cases: The courts and the post-Woolf landscape*, paragraph. 3.5, DCA Research Series 9/05, Ministry of Justice.

<sup>131</sup> *Ayton v National Coal Board* 1965 S.L.T (Notes) 24.

<sup>132</sup> CPR 35.7.

<sup>133</sup> RCS, r 12.1.

<sup>134</sup> OCR, r 29.2.

## Pursuers' offers

6.58 Several submissions have referred to the use of tenders to promote settlement and to reduce the cost of litigation. Respondents have suggested that Scotland should introduce a procedure similar to that of the Part 36 orders under the Civil Procedure Rules in England and Wales. Part 36 provides for offers to settle to be made by any of the parties to an action. The rules are designed to encourage early settlement by providing for consequences in respect of costs to follow, depending on whether the offer is accepted or refused and the point in the proceedings at which that happens. The rules are complicated, but the basic principle is that where an offer is made by either the claimant or the defendant, but not accepted by the other side, and the ultimate judgment is no more favourable to the party refusing the offer than would have been the case had the original offer been accepted, the party refusing the offer will be liable for the additional costs which have been incurred by the offer or since the offer was made.

6.59 In Scotland, if the pursuer is awarded less than the sum tendered, the defender will normally be entitled to the expenses of the action from the date of the tender. There is no equivalent rule in relation to a pursuer's formal offer. A Rule of Court was made in 1996 to provide for pursuers' offers, but was revoked after only seven weeks. The Inner House of the Court of Session subsequently held that the Rule was *ultra vires*.<sup>135</sup> The Review will examine the possible benefits of a system in which tenders are open to both pursuers and defenders.

## Civil juries

6.60 It is clear from the submissions received by the Review that there are diametrically opposed views as to the merits of civil jury trials.

6.61 Trial by jury is available in Scotland only in the Court of Session, and only in a limited range of cases, the principal ones being actions of damages for personal injuries, including those resulting in death, and actions of defamation.

6.62 Since 2000, never more than five jury trials per year have gone to a verdict. It can be argued, however, that although they are few, their significance is greater than their number would suggest. In support of their continued existence it has been suggested to the Review that they reflect public values and public involvement in the administration of justice; that jury awards are generally higher than judicial awards; and that jury awards are an important benchmark against which both judicial awards can be assessed and against which extra-judicial settlements are made.

6.63 On the other hand, there have been some principled objections to the jury trial; for example, that they offend against the right to a fair trial under article 6 of the ECHR, because a jury gives no reasons for its award, and that a jury may give a verdict based on irrelevant considerations. There are also pragmatic objections; for

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<sup>135</sup> *Taylor v Marshalls Food Group* 1998 SC 841.

example, that the fixing of jury trials, most of which do not go ahead, is wasteful of resources.

6.64 This topic will be an important element in the Review.

### Form of judgment

6.65 One matter which the Review may wish to give consideration to is the scope for judges to deliver judgments *ex tempore*.

6.66 It is an important rule of law that a litigant has a right to know why he has won or lost his case. A written judgment provides a permanent and official record of the decision for the litigant. Written judgments also provide for open and transparent justice in that they are available via the internet or are published in law reports and therefore are fairly readily accessible to members of the public. An *ex tempore* judgment is only accessible to anyone present when the judgment is delivered.

6.67 Where a judge is called upon to deliver a final judgment in a civil case, in the Court of Session not writing an opinion is rarely an option.

6.68 In a case (other than an undefended family action) where evidence has been led in the sheriff court, findings in fact and law should be included in the interlocutor and a note setting out the reasons for the decision should be appended to the interlocutor.<sup>136</sup> The findings in fact should be stated in sufficient detail to explain and justify the decerniture. Sheriffs should always express a conclusion on all issues regarding the facts which have been argued before them and which are capable of being raised on appeal. Findings in fact are then followed by findings in law, supported by the applicable rules of law pertinent to the case.

6.69 The function of the note is to explain the findings. The need for sheriffs to state the reasons for their decision is an important part of the sheriff's duty in every case where judgment is given after a proof. The parties are entitled to know their reasons, as are any appellate courts in the event of an appeal.<sup>137</sup>

6.70 Case law has evolved to set out that what is required in the note is substantive.<sup>138</sup> It has been questioned whether, in the interests of efficiency, it is necessary to follow this format and, indeed, whether written judgments are required in all cases. These are matters which the Review may wish to consider.

### Sanctions for non-compliance

6.71 Some respondents have suggested that the courts should have greater powers to impose sanctions in cases in which parties to proceedings, or their representatives,

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<sup>136</sup> OCR, r 12.2(3).

<sup>137</sup> *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] A.C. 729.

<sup>138</sup> T. Welsh (2006), *Macphail's Sheriff Court Practice*, 3<sup>rd</sup> edition, see paragraph 17.27-28, W.Green.

have behaved unreasonably or where there has been a significant failure to comply with the court rules.

6.72 Statistics are not kept in relation to the amount of judicial and staff time taken up by motions to relieve parties of the consequences of failure to comply with time limits or other requirements specified in the rules. However, such applications are common and are not confined to exceptional or unforeseen circumstances. The Review will consider whether there is a case for introducing extended powers to penalise non-compliance with court rules and, if so, what powers might be appropriate. Options might include a power to dismiss or otherwise dispose of proceedings in the event of unreasonable conduct or a serious breach of court rules; an order making parties or their legal representatives personally liable for the expenses of a case or a particular step in procedure; an order disallowing the expenses of a particular step of procedure from being charged to the client and/or to the Scottish Legal Aid Board; or an order requiring immediate payment of the expenses of a particular stage of procedure to a party to the action, the amount of the expenses being determined by the court.

6.73 Some of these powers are already available by virtue of the inherent power of the court to regulate questions of expenses. However, there may be merit in making these explicit and setting out the criteria which the court should apply in exercising its discretion. Another option might be for the rules themselves to contain automatic sanctions for failure to comply, with the onus being on the party in breach to apply to the court at their own expense for relief from the consequences of the breach.

### Party litigants

6.74 Numerous submissions have raised concerns relating to party litigants. Two contrasting themes have emerged: firstly, the problems created by the growth in the number of party litigants, particularly in the higher courts; and secondly, the extent to which party litigation should be competent and the means by which it should be made easier. This section examines the first theme, while the second has been considered in Chapter 2.

6.75 There may be several reasons why parties choose to represent themselves. Lack of funding may be the primary reason. A close relationship can be expected between the number of party litigants and the extent to which their access to legal aid, to legal assistance through *pro bono* schemes, to speculative fee arrangements or to other forms of assistance is limited. However litigants may consider that lawyers are not always necessary or best placed to advance their interests, or may also wish to 'have their say' in court against legal advice. Some litigants may be content to rely on the supportive measures available in the courts without feeling the need for additional assistance.

### *Incidence of party litigants*

6.76 There are no comprehensive statistics on the number of party litigants in Scotland's courts. Research conducted in 2001 found that one quarter of those attending a court or tribunal said they attended by themselves.<sup>139</sup> Figures collated from five sheriffdoms indicate that party litigants are involved in 21-31% of appeals to the sheriff principal.

6.77 Evidence has also been collated by Dr. Rachel Wadia in her research and analysis of appeals and reclaiming motions lodged in the Inner House in 2002 and 2003, which informed the Review of Inner House Business by Lord Penrose.<sup>140</sup> (For further details, see Annex E). Lord Penrose concluded that a significant proportion of appeals in the Inner House involved party litigants and these were absorbing a disproportionate amount of court and judicial time on procedural business. The failure of party litigants to comply with procedural requirements was frequently rewarded by allowing extended and often misguided oral presentation, frequently at the expense of opponents. Lord Penrose identified a hardened core of party litigants who were abusive towards staff and disrupted the administration of business. Some of them continued that pattern of conduct in court.

### *Unmeritorious proceedings*

6.78 Some of the submissions to the Review raised concerns about the time taken by the courts to dispose of unmeritorious cases brought by party litigants and the costs incurred both in terms of court time and by the other parties to the litigation. A number of factors may contribute to opportunities for party litigants to behave unreasonably. These include rules which enable excessive procedural activity and apparent court leniency towards party litigants.

6.79 It is also recognised that additional burdens are likely to be placed upon the court where individuals represent themselves. For example, as Lord Glennie commented in the recent case of *Kenneil v Kenneil*:<sup>141</sup>

*“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.”*

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<sup>139</sup> Genn and Paterson (2001), *op.cit.*

<sup>140</sup> Lord Penrose (2006), *Review of the Inner House*.

<sup>141</sup> 2006 SLT 449.

### *Procedural limitations*

6.80 Various rules have been developed in Scotland which attempt to ensure that a case can only proceed where it has real legal merit. For example, Rule of Court 4.2 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 cases (81%), granted in 8 (15%) and no order was 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.

6.81 With regard to Court of Session appeals, there is a mechanism whereby incompetent appeals (those which do not comply with procedural requirements) may be referred to a Lord Ordinary who may dispose of them summarily.<sup>142</sup> 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. The efficacy of this as a filtering mechanism is limited, however, in that it only applies to incompetent appeals. A judge has no power to refuse an appeal at this stage on the merits alone.

6.82 In the sheriff court, there are no equivalent rules that act as a filter to identify unmeritorious or incompetent causes or appeals.

6.83 The Review will consider what measures should be available to the courts to identify and manage unmeritorious causes or appeals brought by party litigants. This could include a requirement for a party litigant to obtain leave to institute proceedings, or to proceed with an appeal, in all cases. The court could be granted greater powers to regulate the conduct of proceedings, and the conduct of the party litigant, in those cases where a party litigant is involved. Consideration may also be given to making representation in all cases compulsory.

### *Vexatious Litigants*

6.84 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.

6.85 Where any person habitually and persistently commences legal proceedings without any reasonable grounds, the Lord Advocate, acting in the public interest, may apply to the Inner House of the Court of Session for an order under section 1 of the Vexatious Actions (Scotland) Act 1898.<sup>143</sup> The effect of such an order is to prevent legal proceedings being brought by that person in the Court of Session or any other court unless leave is granted by a Lord Ordinary, who must be satisfied that they are

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<sup>142</sup> Rules of Court 38.14(4) (reclaiming motions), 40.12 (appeals from inferior courts) and 41.3A (other appeals).

<sup>143</sup>c. 35. It has been suggested in submissions to the Review that persons other than the Lord Advocate should be able to apply to the court for an order under the Act.

not vexatious and that there is a *prima facie* ground for such proceedings. There is no right of appeal against the decision of the Lord Ordinary to refuse leave.

6.86 In Scotland notification of an order having been made against an individual is advertised in the Edinburgh Gazette. A list of vexatious litigants is not, however, publicly available. This can be contrasted with other jurisdictions which operate a similar process by which a person is added to the list. For example, litigants who have been found to be vexatious in England and Wales are listed on the website of HM Courts Service.

6.87 It is questionable whether the legislation as it is currently framed is adequate to deal effectively in modern circumstances with the mischief against which the Act is directed. Under the Vexatious Actions (Scotland) Act 1898 the Court can only make an order if: (a) the litigant in question has "instituted proceedings"; (b) it can be established that those proceedings were "without reasonable ground"; (c) it can also be established that those proceedings were "vexatious"; and (d) this has been done "habitually and persistently". The last requirement involves some degree of repetition of the behaviour, although a relatively small number of actions may suffice.<sup>144</sup> Institution of proceedings includes the bringing of a counterclaim. It does not include: (a) the vexatious continuation of existing proceedings where the tests set out above cannot be satisfied in relation to the institution of the proceedings; or (b) the making of vexatious applications in the course of proceedings, whether instituted by the litigant in question or by some other party.

6.88 Many respondents have submitted that the Review should look carefully at the methods by which party litigants who have a probable cause of action can be assisted in the preparation and presentation of their cases so that valuable court resources are not wasted and their opponents are not put to unnecessary expense. It has also been suggested that there is an urgent need for stricter controls in relation to those litigants whose cases are wholly without merit.

### Rights of audience

6.89 As a general rule parties to a litigation are entitled represent themselves in court or be represented in the sheriff court by a solicitor or a member of the Faculty of Advocates, and in the Court of Session by a member of the Faculty of Advocates or by a solicitor with extended rights of audience, known as a solicitor advocate.<sup>145</sup> Under the procedures for small claims and summary causes, a party may be represented by an authorised lay representative, provided the sheriff considers the representative to be a suitable person.<sup>146</sup> Companies, partnerships and other artificial persons cannot appear other than through counsel or other persons having a right of

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<sup>144</sup> *Lord Advocate v Cooney* 1984 SLT 434 (four actions).

<sup>145</sup> *Asmat Mushtaq v Secretary of State for the Home Department* unreported 3 March 2006. Rights of audience were extended in 2000 to include a solicitor from a member state of the European Union and in March 2007 to include someone granted a right of audience under section 25 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c.40).

<sup>146</sup> Small Claims Rules 2002, rule 2.1; Summary Cause Rules 2002, rule 2.1.

audience. A party can generally only represent himself and not, for example, a group of which he purports to be a spokesman.

6.90 The courts in England and Wales have for over 30 years allowed party litigants to be assisted in court by what have become to be known as “McKenzie friends”.<sup>147</sup> They do not take on the role of a lawyer, but provide support in court such as making notes, prompting or giving advice on the conduct of the case. There have been occasions where the Court has gone further and, in particular circumstances, allowed the McKenzie friend to address the Court.<sup>148</sup> In such cases the court has to exercise its statutory powers and grant a right of audience to the McKenzie friend.

6.91 In Scotland differing views have been expressed by Outer House judges as to the competency of permitting a person assisting a party litigant to address the Court on the party litigant’s behalf. Many party litigants are assisted in conducting their litigation before the Court of Session by friends and acquaintances, who sit behind them in court.<sup>149</sup> In *Kinneil v Kinneil*<sup>150</sup> the Lord Ordinary, in granting an application for a wife to represent her husband who was otherwise unrepresented at the hearing, found that the Court of Session has a discretion to allow a lay person to speak for a party litigant. He emphasised, however, that this discretion should only be exercised in favour of allowing such representation in exceptional cases. Each case will depend on its own facts. In another case the Lord Ordinary, in the absence of any authority supporting that approach, found it to be incompetent, although he did acknowledge that such an arrangement might in certain circumstances prove to be of practical assistance.<sup>151</sup>

6.92 One submission to the Review stated that it would be particularly helpful in child contact cases for there to be a formal recognition of the right of a parent to rely on, and be represented in court, by someone other than a solicitor or advocate. It is understood that this is permitted from time to time in some sheriff courts. The desirability of permitting a party litigant to be represented in court by a person without a right of audience is a matter that the Review will consider.

### Multi-party actions

6.93 The Review will also look at the question of multi-party actions and group litigation. The terms are used to refer to situations where a number of people have the same or similar rights and in which the court deals with the claims on a collective rather than an individual basis. There are growing demands from consumer interests, and from Europe, for procedures for representative and class actions. In addition, situations arise where a large number of related actions are initiated at the

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<sup>147</sup> *McKenzie v McKenzie* [1971] P 33.

<sup>148</sup> *Izzo v Philip Ross & Co (a firm)* Times Law Reports 9 August 2001.

<sup>149</sup> *Martin Frost and John Parkes v Cintec International Limited* unreported 9 September 2005.

<sup>150</sup> *op. cit.*

<sup>151</sup> *Patricia Anderson v Shetland Islands Council* unreported 26 June 2007.

same time, whether in the Court of Session or in the sheriff courts, giving rise to questions as to how these cases could be managed most efficiently.

6.94 Although there are no formal procedures for class actions in Scotland, there have been instances of litigation involving multiple claimants arising from the same cause of action, which was managed on an informal basis with claims being grouped and dealt with together (for example, the litigation relating to Chinook, Piper Alpha and Lockerbie).

6.95 The Scottish Law Commission has examined the introduction of a form of class action for the handling of multiple private law claims and identified three situations where a number of persons might have the same or similar claims:<sup>152</sup>

- Those arising out of a single event (“sudden mass disaster”);
- Those attributable to a single cause but occurring at different times and in different circumstances (“Creeping disaster” or product liability);
- Those arising from transactions as consumers.

6.96 The perceived advantages of class actions were that they make available to members of a group or class an effective remedy which those persons could not easily obtain on an individual basis – either because the cost or risk of litigating individually would not be cost effective or because the case requires considerable expert evidence which it would be difficult for an individual to access. It was also noted by the Scottish Law Commission that the availability of class actions might encourage “the use of safer working practices, better quality control or increased research before the introduction of new products.”

6.97 Perceived disadvantages identified by the Scottish Law Commission included the possibility of abuse of process whereby a large number of unmeritorious claims are raised resulting in significant cost to the defender (“blackmail litigation”). It was noted that class actions may be unmanageable, particularly in cases where the claimants seek damages assessed on their own personal circumstances. Where damages are not “personalised” or allocated to specific individuals difficult issues arise as to how the court should distribute the fund of money recovered by the litigation. Class actions may also have adverse effects upon the courts and the legal profession if “lawyer entrepreneurs” are allowed to take charge of the litigation.

6.98 The Scottish Law Commission concluded that the existing informal arrangements for handling class actions were not always satisfactory, in particular, there might be difficulty in applying a decision in an informal test case to actions or claims made by other individuals in similar circumstances. It considered that a more effective remedy was required. The majority of its respondents, including the judiciary and the two main professional bodies, were in favour of the introduction of a special procedure for multi-party actions. The Commission recommended that a

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<sup>152</sup> Scottish Law Commission (1996), *Multi-Party Actions*, No.154.

procedure for multi-party actions should be introduced, and drafted a set of court rules that might apply to such actions.

6.99 In 2003 the Scottish Consumer Council repeated its call for the introduction of class actions.<sup>153</sup>

6.100 One of the main issues concerning the introduction of a multi-party procedure is how such actions should be funded. The Scottish Law Commission concluded that the general rule that expenses follow success should apply to multi-party actions and that contingency fees should not be permitted for such actions. The Commission examined various options for third party funding: the establishment of a Contingency Legal Aid Fund (CLAF); a Class Action Fund (established by Government; another public body or a private body); and legal aid. The Commission concluded that the only financially viable option would be to amend the rules relating to legal aid to include multi-party actions.

6.101 In their submissions to the Review, several individuals called for the introduction of multi-party procedure and the Review will consider whether there is a need for this.

### **Judicial review**

6.102 An application for judicial review is an application to the Court of Session to exercise its supervisory jurisdiction. Such applications are generally brought against public bodies in circumstances in which it is alleged that they have acted unlawfully or have exceeded their powers. However, an application for judicial review may also be used to appeal against a decision of an inferior court or tribunal where no formal route of appeal to the Court of Session exists.

6.103 The procedure for applying for judicial review is set out in Chapter 58 of the Court of Session Rules. The Rule clearly envisages that the first hearing will take place shortly after the service of the petition and that it may be possible for the court to decide the issue without further procedure in simpler cases. Where it is thought that further procedure is necessary the court has a range of case management powers to clarify the issues and determine what evidence is necessary. However, in practice, the first hearing is frequently fixed for a date many months after service of the petition, with the result that the first hearing is treated as the substantive hearing rather than a procedural hearing. As the court's powers of case management only come into play at the first or second hearing, this means that there are no procedural rules governing the lodging of answers or documents, clarification of pleadings, or regulation of evidence, which apply in the interval between the service of the petition and the first hearing. Consequently, issues may not be focused properly, while pleadings and documents may be served at the last minute. There is no procedure for lodging Notes of Argument setting out the legal issues or for lodging authorities in advance of the first hearing. These matters are left for the parties to regulate by

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<sup>153</sup> Scottish Consumer Council (2003), *A Class of Their Own: Why Scotland needs a class actions procedure*.

agreement. A number of respondents have expressed dissatisfaction with the way in which the Rule operates.

6.104 Applications for judicial review form a significant part of the business of the Court of Session. There is no filter mechanism in place by which unmeritorious applications for judicial review can be sifted out. Nor are there any time limits within which an application for judicial review must be brought. This causes uncertainty for those bodies whose decisions, acts or omissions may be challenged and to third parties whose rights or interests may be affected. Some respondents have suggested that time limits and a requirement to seek leave should be introduced. Others consider this unnecessary, however, and to the likely advantage of respondents.

### Questions for discussion

1. What are the advantages and disadvantages of pre-action protocols?
2. Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?
3. Should compliance with pre-action protocols be voluntary or compulsory?
4. Should there be a greater requirement for leave to bring or to take steps in proceedings? If so, at what points in proceedings and what criteria should the court apply in deciding whether leave should be granted?
5. Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.
6. Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?
7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?
8. To what extent should a system of abbreviated pleadings be introduced?
9. Are the current arrangements for summary disposal satisfactory?
10. Should routine procedural matters in both the Court of Session and the sheriff court be dealt with by judges (perhaps at a more junior level) designated for that purpose?
11. Are the current arrangements for dealing with routine procedural business satisfactory?

12. Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing? Should hearings be time limited or conducted by reference to a timetable determined by the court?
13. In the conduct of substantive hearings should there be greater use of written rather than oral arguments?
14. To what extent should there be an earlier and/or wider disclosure of evidence?
15. To what extent should the court have control over the use of expert and other evidence?
16. Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?
17. Should civil jury trials be retained?
18. Should written judgments be required in all cases?
19. Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?
20. What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?
21. Is the current legislation on vexatious litigants in need of reform and, if so, how should that be done?
22. Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?
23. Would it be desirable to introduce separate procedures for multi-party litigation?
24. Is the rule governing the procedure to be followed for judicial review satisfactory?

## Members of Policy Group and Review Team

### Policy Group

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## Civil Legal Assistance and Financial Eligibility Criteria

### *Advice and assistance*

1. Advice and assistance does not normally include the cost of representation in court or before a tribunal although there is limited scope for this in cases covered by the assistance by way of representation (ABWOR) scheme. A grant of advice and assistance may be used to resolve issues without going to court, or to fund preliminary work to determine whether a potential litigant may have grounds to bring or defend a case, or may relate to a free standing legal problem upon which the claimant seeks advice.

2. A grant of advice and assistance is made by a solicitor, subject to whether there is a matter of Scots law involved and to financial eligibility criteria in relation to disposable income and capital. Depending on the amount of disposable income the applicant may have to pay a contribution. If property is recovered or preserved as a result of a grant of advice and assistance the amount of solicitors' fees and outlays may be deducted from that property subject to certain exemptions.

### *Civil legal aid*

3. Applications for civil legal aid are made to the Board which decides whether or not to grant it. In addition to financial eligibility criteria there are two "merits" tests: the claimant must establish a probable cause of action and the Board must be satisfied that it would be reasonable, in the circumstances, to grant legal aid. In assessing whether it is reasonable to grant legal aid in any particular case the Board will take into account a number of factors including whether funding is available from another source (for example, a trade union or legal expenses insurance); whether the potential benefit to the applicant is equalled or exceeded by the likely cost of prosecuting the action; whether the prospects of success are poor or are such that a privately paying client would not be advised to incur the risk of litigating; and whether the prospects of recovery do not justify the use of public funds. Civil legal aid is not available in small claims proceedings.

### *Financial eligibility criteria*

4. At present the lower disposable income limit, below which a contribution from income is not payable, is £3,085 and the upper limit above which a person is ineligible on grounds of income is £10,074. Between those figures a contribution equal to one third of available income above the lower disposable limit is payable. There is a sliding scale for payments of contributions from income ranging from 20 months for contributions up to £500 to 48 months for contributions over £2,000. In exceptional cases up to 60 months can be allowed for payment of the contribution.

5. So far as disposable capital is concerned, the lower limit is £6,879 and the upper limit is £11,402. Between those figures a contribution equal to the difference between total capital and the lower limit is payable. In contrast to disposable income

legal aid may still be made available if capital exceeds the upper limit as the Board has discretion to allow legal aid in such cases if it is satisfied that the whole circumstances of the case and the interests of justice warrant the granting of legal aid.

## Jurisdiction and Allocation of Business between the Court of Session and Sheriff Courts

### *Administration*

1. The Court of Session, the supreme civil court in Scotland, sits only in Edinburgh. It has a total complement of 34 judges who also sit as members of the High Court of Justiciary. The Lord President, the most senior judge, has responsibility for supervising the administration of the business of the court. The Court of Session is divided into Outer and Inner Houses. The Outer House consists of 23 Lords Ordinary sitting alone or, in certain cases, with a civil jury, and deals primarily with first instance business. There is provision for retired<sup>1</sup> and temporary judges<sup>2</sup> to be utilised when pressure of business requires it. The Inner House is in essence the appeal court, although it also has a small range of first instance business. It is divided into the First and Second Divisions, which are of equal authority, and are presided over by the Lord President and the Lord Justice Clerk respectively. An Extra Division of three judges can be constituted when required.

2. The sheriff court is essentially the local court. There are 49 sheriff courts in Scotland, organised into six sheriffdoms with a sheriff court situated in all the major centres of population and towns of significant size. Each of the six sheriffs principal has a duty to secure the speedy and efficient disposal of business in his or her sheriffdom, with power to give administrative directions. The courts vary in size from Glasgow sheriff court, which has 28 full time sheriffs, to Wick sheriff court, where there is a single sheriff who sits for one or two days per week. All sheriff courts deal with both civil and criminal business.

3. There are currently 143 full-time sheriffs. Their commission designates the sheriff court district or districts in which they are to perform their duties. A sheriff principal may, however, instruct a sheriff to act temporarily in a different district of the sheriffdom in certain circumstances including where it is expedient to do so in order to avoid delay in the administration of justice in the sheriffdom.<sup>3</sup> Of these 29 are all-Scotland floating sheriffs whose commission allows them to sit in any of the sheriffdoms, although they will normally be based in a particular sheriff court. There is also provision for part-time sheriffs to be appointed by Scottish Ministers.<sup>4</sup> As from 10 May 2006 the maximum number who may be appointed is 80.<sup>5</sup> Part-time sheriffs may sit in any sheriffdom in Scotland and when sitting have the same powers and jurisdiction as a sheriff of the sheriffdom in which they are sitting.

<sup>1</sup> Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 (c.73 ) section 22.

<sup>2</sup> Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c.40 ) section 35(3).

<sup>3</sup> The Sheriff Courts (Scotland) 1971 Act (c. 58), section 16(1)(b).

<sup>4</sup> *ibid* section 11A, as inserted by the Bail, Judicial Appointments etc. (Scotland) Act 2000 asp.9, section 7.

<sup>5</sup> Maximum Number of Part-Time Sheriffs (Scotland) Order 2006 SSI 2006/257.

### *First instance jurisdiction*

4. The Court of Session has jurisdiction to sit and decide upon all civil actions,<sup>6</sup> but its ability to determine a cause at first instance can be limited either by agreement or by statute. Likewise, the sheriff court has first instance jurisdiction in all cases except those reserved to the Court of Session or to other courts or tribunals.

5. The main matters which are reserved to the Court of Session are: actions of reduction of all kinds; actions of proving the tenor of lost or destroyed documents; most proceedings in relation to trusts, including charitable trusts; proceedings involving the exercise of the court's supervisory powers over administrative bodies; proceedings to compel statutory bodies to perform their duties;<sup>7</sup> proceedings for the winding-up of companies with a paid up capital exceeding £120,000;<sup>8</sup> proceedings relating to patents;<sup>9</sup> Exchequer causes, which include revenue appeals and inheritance tax appeals; special cases;<sup>10</sup> proceedings to compel an arbiter to proceed; proceedings for recall of awards of sequestration;<sup>11</sup> actions under the Hague Convention on the Civil Aspects of International Child Abduction;<sup>12</sup> applications involving the *nobile officium*; actions of adjudication;<sup>13</sup> inhibitions;<sup>14</sup> and devolution issues under Schedule 6 of the Scotland Act.<sup>15</sup>

6. The sheriff court has privative jurisdiction in cases not exceeding £1,500<sup>16</sup> in value exclusive of interest and expenses which are competent in the sheriff court.

7. The Court of Session and the sheriff court have concurrent jurisdiction in the majority of actions exceeding £1,500 in value, including actions such as those relating to breach of contract or damages for personal injury, and in relation to most types of action involving personal status or family matters.

8. As regards the territorial jurisdictions of the courts, the Court of Session has jurisdiction throughout the whole of Scotland, while sheriffs only have jurisdiction within the sheriffdom for which they have a commission. In order to raise a civil

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<sup>6</sup> College of Justice Act 1532 (c.2).

<sup>7</sup> Court of Session Act 1988 (c.36), section 45(b).

<sup>8</sup> Insolvency Act 1986 (c.45), section 120(3).

<sup>9</sup> Patents Act 1977(c.37), sections 97(4),(5),98; Civil Jurisdiction and Judgments Act 1882 (c.27), schedule 8, r 14.

<sup>10</sup> Court of Session Act 1988 (c.36), section 27.

<sup>11</sup> Bankruptcy (Scotland) Act 1985 (c.66), sections 16,17. The Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp.3) section 16 provides for the removal of the jurisdiction of the Court of Session in respect of petitions for sequestration or for recall of sequestrations, which are to be heard by the sheriff alone. That section is not yet in force.

<sup>12</sup> Child Abduction and Custody Act 1985 (c.60), sections 4, 8 and 27.

<sup>13</sup> Actions of adjudication for debt and adjudication in security are to be abolished by sections 79 and 172 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp.3). These sections are not yet in force.

<sup>14</sup> Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp.3) section 146(6) provides that it is no longer competent for the Court of Session to grant letters of inhibition. That section is not yet in force.

<sup>15</sup> Scotland Act 1998 (c.46).

<sup>16</sup> On 13 September 2007 the Scottish Government laid an order before the Scottish Parliament which, if affirmed, will increase the privative jurisdiction of the sheriff court to £5,000 with effect from 14 January 2008.

action in the sheriff court, the pursuer must therefore first establish jurisdiction within a particular sheriffdom. Civil jurisdiction is largely regulated by the Civil Jurisdiction and Judgments Act 1982,<sup>17</sup> and in general terms follows the domicile, habitual residence or place of business of the defender or the location of the subject matter of the action.

### *Appellate jurisdiction*

9. Both the Court of Session and the sheriff court exercise an appellate jurisdiction in addition to their first instance jurisdiction.

10. The appellate jurisdiction of the Court of Session is exercised primarily by the Inner House. The Court can set aside, suspend or review the judgments of inferior courts in civil causes except where, under certain statutes, the power has been excluded. There are three main sources of appeal: from decisions in the Outer House (including motions for a new trial following the verdict of a civil jury), from sheriffs and sheriffs principal and from certain statutory authorities and tribunals. In addition the court hears appeals in the exercise of its *nobile officium* jurisdiction from certain quasi-criminal decisions of sheriffs and Lords Ordinary, such as findings of contempt of court in civil proceedings.

11. The Court of Session's appellate jurisdiction under various statutes is extensive. Most statutory appeals are stated simply as "to the Court of Session" and, following a long tradition, this is interpreted to mean that they are to be dealt with in the Inner House. An enactment may, however, specify that an appeal is to be dealt with by a single judge or the Lord Ordinary.<sup>18</sup> The Inner House may also remit certain appeals to the Outer House for a Lord Ordinary to determine in the first instance.<sup>19</sup>

12. In the sheriff court, the main responsibility of the sheriff principal, other than in relation to the effective administration of the business of the sheriffdom, is to sit as an appellate court. Under the ordinary procedure in the sheriff court a party wishing to appeal against a sheriff's decision has, in most cases, a choice of appeal route to either the sheriff principal or to the Court of Session. Where the choice is made to appeal to the sheriff principal, there is a further right of appeal to the Court of Session. The majority of appeals are taken from the sheriff to the sheriff principal, with only a few thereafter to the Court of Session.

13. In summary causes (i.e. currently cases not exceeding £1,500 in value) there is a right of appeal from the sheriff to the sheriff principal in respect of the final judgment only.<sup>20</sup> A further right of appeal lies from the sheriff principal to the Court of Session only if the sheriff principal certifies the cause as suitable for such an

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<sup>17</sup> c.27.

<sup>18</sup> For example, applications under section 103A of the Nationality, Immigration and Asylum Act 2002 (c.33).

<sup>19</sup> RCS 41.44 (effective as of 23 September 1996).

<sup>20</sup> Sheriff Courts (Scotland) Act 1971 (c.58) section 38(a) (as amended by the Law Reform Miscellaneous Provisions)(Scotland) Act 1985 (c.73), section 18(4).

appeal. There is no appeal from small claims actions (i.e. currently cases not exceeding £750 in value) beyond that to the sheriff principal.<sup>21</sup>

#### *Powers of remit*

14. Both the Court of Session and the sheriff court have powers available to them to transfer cases between them. In addition a sheriff has power to transfer a case to another sheriff court.

15. The Court of Session has power<sup>22</sup> to order a case to be transferred to it from the sheriff court where the decision in that case and another case in the Court of Session would decide the other in whole or in part. The Court also 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.<sup>23</sup> The Court has, however, placed a restrictive interpretation on this power to remit by reinforcing the view 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 where to raise an action.<sup>24</sup>

16. A sheriff may, on the motion of a party, remit a case to the Court of Session if he or she considers that its importance or difficulty make it appropriate to do so,<sup>25</sup> provided that the value of the case exceeds the privative jurisdiction of the sheriff court. A sheriff may only remit a case on his or her own accord in actions for divorce or those in relation to parental responsibilities or parental rights or the guardianship or adoption of a child,<sup>26</sup> and actions of declarator of death.<sup>27</sup> A sheriff's ability to remit a case from one Roll to another on his or her own accord is limited to directing that a small claim be treated as a summary cause where a difficult question of law or a question of fact of exceptional complexity is involved.<sup>28</sup>

17. With regard to the transfer of business between different sheriff courts, a sheriff may transfer a case to another sheriff court, whether in the same sheriffdom or another, in three situations.<sup>29</sup> Firstly, in a case with one or more defenders, a sheriff may transfer a case to any other sheriff court which has jurisdiction over any of the defenders. Secondly, where a sheriff finds that there is no jurisdiction he may transfer a case to the sheriff court where it should have been brought. In both instances transfers must be at the request of one or more of the parties and the sheriff

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<sup>21</sup> *ibid*, section 38(b) (as amended by the Law Reform Miscellaneous Provisions)(Scotland) Act 1985 (c.73), section 18(4)).

<sup>22</sup> Court of Session Act 1988, section 33.

<sup>23</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, section 14.

<sup>24</sup> *McIntosh v British Railway Board* 1990 SC 338; *Paterson v The Advocate General for Scotland* 2007 SLT 846.

<sup>25</sup> 1971 Act, section 37(1)(b), as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.73) section 16.

<sup>26</sup> 1971 Act, section 37(2A).

<sup>27</sup> Presumption of Death (Scotland) Act 1977(c.27), section 1(6).

<sup>28</sup> 1971 Act section 37(2B).

<sup>29</sup> OCR 26.1 (2) to (4).

must consider it expedient having regard to the convenience of the parties and their witnesses. Thirdly, a sheriff has a general power on his or her own accord to remit a case to another sheriff court but only on “cause shown”.<sup>30</sup> 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. In particular there is no general power available to sheriff principals to transfer cases between different sheriffdoms to help cope with peaks and troughs of business.

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<sup>30</sup> OCR 26.1(1).



## Business of the Civil Courts

### FOREWORD

The data provided in this Annex are management information statistics which have not been subjected to the same quality assurance as statistics produced by the Government Statistical Service. In particular, the following points must be made:

- There are general concerns surrounding the accuracy of some of the data contained in this Annex. As a result, the data should be used with caution and it should be appreciated that firm conclusions cannot be drawn from the data provided. Where there is particular cause for concern, this has been highlighted in the text. .
- Data have been provided from a number of sources – the *Civil Judicial Statistics (CJS)* publication, the case management system (CMS) of the Court of Session and the information services of the Court of Session and the sheriff courts. In general, information pertaining to cases in the Court of Session (sections 1-3) have been provided by *CJS* and CMS, to cases in the sheriff courts (sections 6-8 and 11) by *CJS*, and to waiting periods and sitting days (sections 4-5 and 9-10) by the information services of the Court of Session and sheriff courts.
- It is believed that some of the data in *CJS* contain significant inaccuracies, and as a result the publication has been suspended whilst these inaccuracies are investigated. The latest publication contains data for 2002 but data continue to be collected and have been used in some sections to supply information on sheriff court business for all years. Data derived from *CJS* for any year must be treated with caution.
- Using different sources to provide information on cases in the Court of Session in sections 1-3 will affect the reliability of the trend information contained in these sections. Data provided for the years up to and including 2002 have been provided by *CJS*, whereas data for 2003 onwards are derived from CMS. Information prior to 2003 is not directly comparable with information from 2003 onwards and therefore caution should be exercised when analysing these trends.
- A mixture of calendar and financial years are used to report the business of the civil courts. Whilst every effort was made to ensure consistency and to provide information by calendar years, it was frequently not possible to break down information given by financial years into monthly data. It was therefore not always possible to reconstitute the information into calendar years.
- The available information frequently referred to different sets of years, such as the past five years or the past seven years. Frequently, information was available over the past 7 years in one context but only available for the past 5 years in another context. It was not possible to ensure that all information was available over a similar number of years, though this

would have been desirable. Graphs and tables may therefore sometimes refer to trends over the past 5 years, the past 7 years, the past 10 year and even the past 25 years. These were dictated by the information available rather than any other reason.

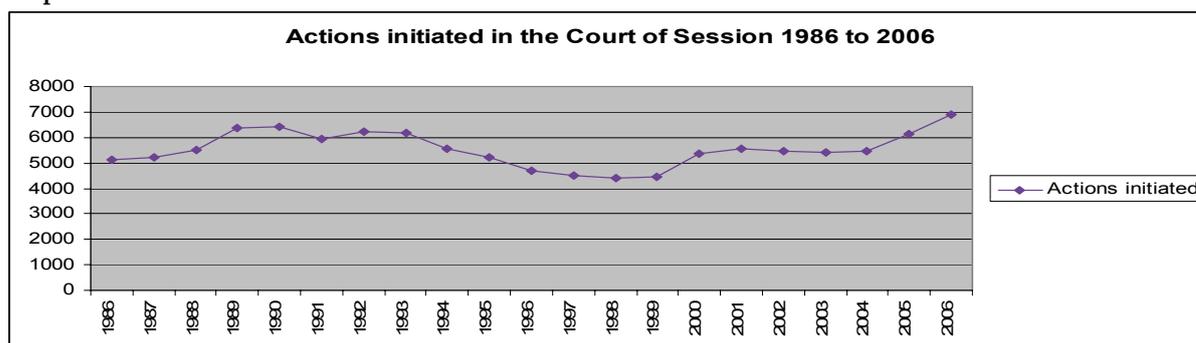
## 1. COURT OF SESSION BUSINESS

The total number of actions initiated in the Inner and Outer House of the Court of Session by petition and by summons over the past 21 years was examined. Up until 2002, these figures are based on returns to the Scottish Court Service from the Court of Session, as published in *CJS*. From 2003 onwards, they are taken directly from the case management system of the Court of Session (CMS) and may not be directly comparable with pre-2003 figures. In particular, actions that are transferred out of one procedure into another (such as personal injury actions raised under Chapter 43 but transferred to ordinary cause procedure) may be double counted by CMS. It should also be noted that appeals from the Outer to the Inner House are not registered as new causes.

**Table 1: New business in the Court of Session 1986 to 2006**

	1986	1987	1988	1989	1990	1991	1992
<b>All causes initiated</b>	5,123	5,205	5,486	6,390	6,427	5,937	6,212
	1993	1994	1995	1996	1997	1998	1999
<b>All causes initiated</b>	6,182	5,535	5,207	4,683	4,513	4,401	4,471
	2000	2001	2002	2003	2004	2005	2006
<b>All causes initiated</b>	5,120	5,535	5,059	5,388	5,445	6,145	6,922

**Graph 1: New business in the Court of Session 1986 to 2006**



There has been a 35% increase in the business of the Court of Session compared with 21 years previous, with marked fluctuations over the period. Compared with the years between 1989 and 1993 when figures were previously at their highest, the level of new business initiated in the Court of Session in 2006 is now only slightly higher (between 8% and 17%). Compared with the years between 1996 and 1999, however, when figures were at their lowest, it is significantly higher (between 48% and 57%).

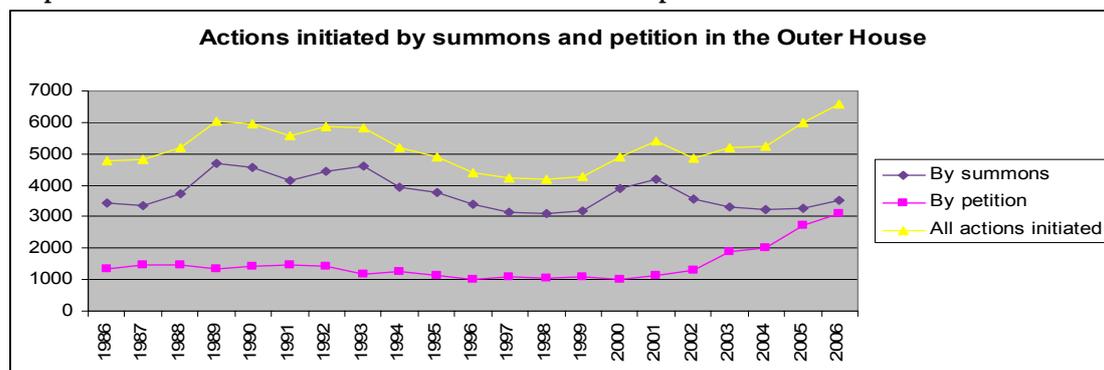
## 2. OUTER HOUSE BUSINESS

### 2.1 All Outer House business and its composition

**Table 2: Summons and petitions in the Outer House 1986 to 2006**

	1986	1987	1988	1989	1990	1991	1992
<b>By summons</b>	3,434	3,372	3,720	4,700	4,553	4,135	4,449
<b>By petition</b>	1,352	1,466	1,474	1,332	1,420	1,459	1,411
<b>All actions initiated</b>	<b>4,786</b>	<b>4,838</b>	<b>5,194</b>	<b>6,032</b>	<b>5,973</b>	<b>5,594</b>	<b>5,860</b>
	1993	1994	1995	1996	1997	1998	1999
<b>By summons</b>	4,629	3,960	3,763	3,392	3,156	3,108	3,200
<b>By petition</b>	1,189	1,239	1,133	998	1,074	1,065	1,086
<b>All actions initiated</b>	<b>5,818</b>	<b>5,199</b>	<b>4,896</b>	<b>4,390</b>	<b>4,230</b>	<b>4,173</b>	<b>4,286</b>
	2000	2001	2002	2003	2004	2005	2006
<b>By summons</b>	3,912	4,187	3,563	3,310	3,212	3,272	3,516
<b>By petition</b>	1,006	1,119	1,292	1,805	1,933	2,600	3,133
<b>All actions initiated</b>	<b>4,918</b>	<b>5,406</b>	<b>4,855</b>	<b>5,115</b>	<b>5,145</b>	<b>5,872</b>	<b>6,649</b>

**Graph 2: New business in the Outer House: Summons and petitions 1986-2006**



There has been a similar increase in the business of the Outer House over the past 21 years (39%), also marked by fluctuations over time. Compared with the years between 1989 and 1990, when figures were previously at their highest, the level of new business initiated in the Outer House in 2006 was only slightly higher (between 10% and 11% higher). Compared with the years between 1996 and 1999 when figures were at their lowest, however, it was significantly higher (between 51% and 59% higher).

The relative contribution of actions initiated by petition and summons to the business of the Outer House has changed significantly over the past 21 years and is illustrated in the graph above. Up until 2002, the number of actions initiated by petition was never usually more than one third of actions initiated by summons. Since 2002, however, there has been a significant increase in the number of actions initiated by petition so that almost as many actions were initiated by petition as by summons in 2006. Between 2000 and 2006, the number of all actions initiated in the Outer House rose from 4,918 to 6,649, an increase of 35%. Petitions account for most of this increase. While the number of actions initiated by petition has increased threefold since 2000, the number of actions initiated by summons has dropped by 10% in the same period (even with possible double counting of actions raised by summons in the data collected from 2003 onwards).

## 2.2 Actions initiated by summons

Over the past 21 years, the number of new actions initiated every year by summons has ranged between 3,108 and 4,700. Over the past 5 years, however, the number of actions initiated by summons has shown greater consistency: never more than 3,563 new actions every year (in 2002) and never less than 3,212 (in 2004). Indeed, the number of actions initiated by summons in the Outer House in 2006 (3,516) was little different from 21 years previous (3,434).

### *Personal injury actions*

The composition of actions initiated by summons in the Outer House was examined in greater detail for the years 1996-2006. The number of actions for personal injury increased steadily from 1996 until it reached a high-point of 2,969 actions initiated in 2001. Over the past five years, it has hovered between 2,419 and 2,013. Since 1997, personal injury actions have accounted for the majority of actions initiated by summons in the Outer House – approximately two-thirds in 2006 and 2006 (67%).

**Table 3: Actions initiated by summons: Personal injury and other cases 1996-2006**

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Debt	712	392	248	185	200	244	248	296	241	119	143
Land or heritable estate	45	59	79	27	26	41	35	30	39	15	23
Damages	240	230	171	171	172	263	308	277	220	333	232
Other	759	737	691	625	696	670	553	528	699	631	775
<b>Personal injury</b>	<b>1,656</b>	<b>1,738</b>	<b>1,919</b>	<b>2,192</b>	<b>2,818</b>	<b>2,969</b>	<b>2,419</b>	<b>2,179</b>	<b>2,013</b>	<b>2,174</b>	<b>2,343</b>
<b>TOTAL</b>	<b>3,412</b>	<b>3,156</b>	<b>3,108</b>	<b>3,200</b>	<b>3,912</b>	<b>4,187</b>	<b>3,563</b>	<b>3,310</b>	<b>3,212</b>	<b>3,272</b>	<b>3,516</b>
<i>% Personal injury</i>	<i>49</i>	<i>55</i>	<i>62</i>	<i>69</i>	<i>72</i>	<i>71</i>	<i>68</i>	<i>66</i>	<i>63</i>	<i>67</i>	<i>67</i>

However, because approximately 6-7% of actions initiated under Chapter 43 are transferred to ordinary procedure, between approximately 140 and 160 personal injury actions recorded every year from 2003 onwards could have been double counted. This reduces both the total number of all actions and personal injury actions initiated, as well as the proportion of personal injury actions initiated by approximately 2% for each of the years from 2003 onwards.

The impact of the introduction of a new procedure for personal injury actions in April 2003 (Chapter 43 of the Rules of the Court of Session) on the number of cases raised under ordinary procedure is demonstrated below. While actions raised under ordinary procedure once constituted the bulk of actions initiated by summons in the Outer House, they comprised only approximately a quarter (24%) in 2006. The number of actions initiated, however, may not reflect the impact of the new procedure on the business of the court. Actions proceeding under Chapter 43 may be more likely to settle without ever calling for a hearing in court than ordinary cause actions.<sup>1</sup>

<sup>1</sup> Elaine Samuel (2007), *Managing Procedure*, Scottish Executive, Ch.5 & 6.

**Table 4: Actions initiated by summons in the Outer House 2002-2006\***

	2002	2003	2004	2005	2006	2006
	No.	No.	No.	No.	No.	%
'Ordinary' excl. 'Family'*	3284	1,847	859	857	866	24
Commercial*	227	172	209	110	98	3
PI (Ch.43)**	0	1,218	2,013	2,174	2,343	67
Family	78	73	131	131	209	6
<b>TOTAL</b>	<b>3,589***</b>	<b>3,310</b>	<b>3,212</b>	<b>3,272</b>	<b>3,516</b>	<b>100</b>

All data derived directly from CMS (including 2002)

\*Actions transferred into commercial and ordinary procedure are included in these figures and may therefore be double counted

\*\*Chapter 43 was introduced in April 2003

\*\*\* Differs from Table 3, which refers to Civil Judicial Statistics for 2002 figures

### Commercial procedure

Following the introduction of a new procedure for commercial actions (Chapter 47 of the Rules of the Court of Session) in September 1994, there is an option for commercial cases to be raised under a separate procedure. Actions initiated under commercial procedure or transferred to it have always accounted for only a small number of actions initiated by summons in the Outer House.

**Table 5: Actions initiated under or transferred to commercial procedure (Chapter 47) 1995-2006**

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
<b>Actions initiated &amp; transferred</b>	130	153	181	162	187	203	253	232	178	207	104	99

From Civil Judicial Statistics up until 1999 and from the records of the commercial court from 2000 onwards

In the first eight years since its introduction, commercial procedure showed a steady increase in the number of new actions initiated or transferred to it each year, with a levelling off between 2002 and 2004. Between 2004 and 2006, there was a sharp fall in the number of new actions initiated or transferred into commercial procedure (from 207 to 99). In 2007, however, 93 new commercial actions had been initiated as of 16 October, (though 11 actions were related to one dispute). The number of new actions initiated under commercial procedure in 2007 will therefore surpass the previous year, though it is difficult to predict by how much.

Like Chapter 43, the number of actions dealt with under Chapter 47 may not reflect the impact of the procedure on the business of the court. In 2000, 2001 and 2002, for example, there was a ratio of 4 court hearings (excluding proof and debate diets, and motion roll hearings) to every one new commercial action initiated. This increased to 7 court hearings for every new commercial action initiated in 2005. During the first 7 months of 2007, however, only 3.5 hearings were being conducted for every new commercial action initiated. Greater efficiency has therefore been introduced into the management of commercial procedure in the most recent past.

### Family actions

While the number of family actions raised under ordinary procedure has doubled in the past five years (mainly actions for 'simplified divorce'), family actions account for only a small proportion of actions initiated by summons in the Outer House. In 2006, for example, 209 new family actions were initiated and comprised just 6% of all new actions raised by summons in the Outer House.

### 2.3 Actions initiated by petition in the Outer House

Compared with actions initiated by summons, actions initiated by petition in the Outer House show a quite different pattern over the past 21 years.

There was relative stability in the number of petitions raised in the Outer House between 1986 and 2001, with approximately 1,400 petitions initiated every year between 1986 and 1992, and approximately 1,100 new petitions registered every year between 1993 and 2001. Over the past seven years, however, there has been a strong and steady increase in the number of actions initiated by petition. Though caution must be exercised with regard to the comparability of data sources up to and following 2002 (see Foreword), the increase is significant whatever data sources are used. If CMS data are comparable with information published in *Civil Judicial Statistics*, an increase of 300% is recorded between 2000 and 2006, as recorded in Table 6 below. If information is derived from CMS alone, the number of actions initiated by petition in the Outer House has increased from 1,276 in 2000 to 3,133 in 2006, an increase of 245%.

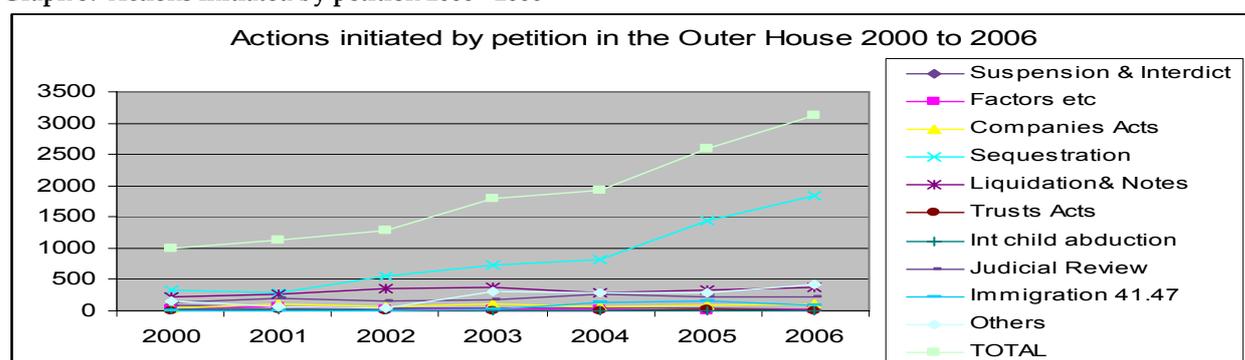
The impact of sequestrations on the petition business of the Outer House has been dramatic and accounts for most of the increase in actions initiated by petition since 2000.

**Table 6: Actions initiated by petition in the Outer House 2000 - 2006**

	2000	2001	2002	2003	2004	2005	2006
Suspension & Interdict	78	72	41	47	34	41	25
Factors etc	16	69	31	21	14	10	22
Companies Acts	43	114	63	105	76	92	115
Sequestration	342	291	561	738	815	1443	1,841
Liquidation& Notes	218	269	359	385	298	333	366
Trusts Acts	5	20	8	7	8	12	11
Int child abduction	13	13	15	11	6	5	9
Judicial Review	142	208	160	174	261	229	231
Immigration 41.47	0	0	0	17	125	146	83
Others	149	63	54	300	296	289	430
<b>TOTAL</b>	<b>1,006</b>	<b>1,119</b>	<b>1,292</b>	<b>1,805</b>	<b>1,933</b>	<b>2,600</b>	<b>3133</b>

*Civil Judicial Statistics until 2002 and CMS from 2003 onwards*

**Graph 3: Actions initiated by petition 2000 - 2006**



In 2000, there were 342 petitions for sequestration, comprising approximately 25% of all petitions. Six years later, there were 1,841 petitions for sequestration, an increase of more than 1,500. By 2006, sequestrations accounted for 58% of all actions initiated by petition in the Outer House and for more than 25% of all actions initiated by either summons or petition in the Outer House. The Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) section 16, which provides for the

removal of the jurisdiction of the Court of Session in respect of petitions for sequestration or for recall of sequestrations, is likely to make a major impact on the volume of business initiated in the Court of Session when it comes into force (expected in 2008).

### *Opposed petitions*

The impact of petitions on the business of the Court of Session largely depends on whether they are opposed. Although unopposed petitions may sometimes call in court, opposed petitions are likely to make a greater impact on the business of the court. A large proportion of petitions for judicial review are opposed. In 2006, for example, 84% of disposed petitions for judicial review were opposed.

**Table 7: Opposed petitions: Petitions for judicial review disposed of in the Court of Session 1995-2002**

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
	%	%	%	%	%	%	%	%	%	%	%	%
<b>Judicial review</b>	90	87	87	77	67	53	41	60	75	66	86	84

\* Petitions are identified as opposed if 'answers' are lodged. Petitions may be opposed without lodging answers, though it is rare

Though petitions for judicial review comprise only a small proportion of all actions initiated by petition in the Court of Session, (just 7% of all petitions in 2006 and 8% of all petitions in 2005), they comprise a far greater proportion of all opposed petitions. In 2006, there were 171 answers to petitions in the Court of Session, 40% of which related to petitions for judicial review. In 2005, there were 205 answers to petitions, 50% of which related to judicial review.

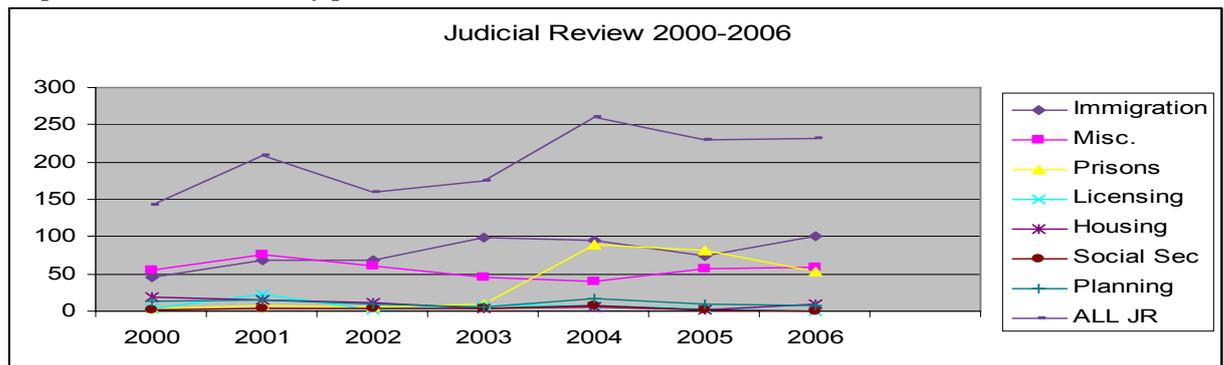
### *Judicial review*

Petitions for judicial review have never comprised more than 19% of all actions initiated by petition over the past six years and comprised just 7% of petitions in 2006. Because petitions for judicial review are more likely to be opposed, their contribution to the workload of the Court of Session is more significant than would otherwise be expected (*ceteris paribus*). Petitions for judicial reviews were therefore examined for any changes over time.

**Table 8: Actions initiated by petition for Judicial Review 2000 to 2006**

	2000	2001	2002	2003	2004	2005	2006
<b>Immigration</b>	45	68	68	99	95	74	101
<b>Misc.</b>	55	76	61	45	39	57	59
<b>Prisons</b>	4	7	5	9	90	82	54
<b>Licensing</b>	3	22	2	8	7	3	0
<b>Housing</b>	19	15	11	4	5	2	9
<b>Social Sec</b>	2	4	3	4	8	1	0
<b>Planning</b>	14	16	10	5	17	10	8
<b>TOTAL JR</b>	<b>142</b>	<b>208</b>	<b>160</b>	<b>174</b>	<b>261</b>	<b>229</b>	<b>231</b>
<i>% of all Petitions</i>	14	19	12	9	14	9	7
<b>All Petitions</b>	<b>1,006</b>	<b>1,119</b>	<b>1,312</b>	<b>1,805</b>	<b>1,933</b>	<b>2,600</b>	<b>3,133</b>

Graph 4: Actions initiated by petition for Judicial Review, 2000 to 2006



Petitions with regard to immigration more than doubled since 2000 and constituted almost half of all judicial reviews in 2006. From 2004 onwards, prison-related petitions also made a substantial contribution to the number of judicial reviews initiated.

### 3. INNER HOUSE: BUSINESS INITIATED

#### 3.1 Appellate business and its derivation

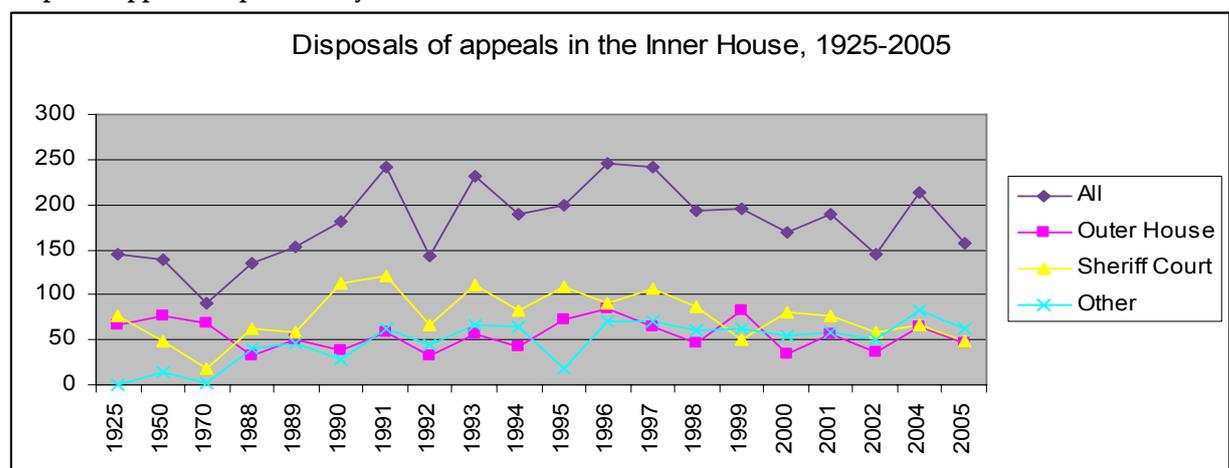
Over the past 80 years, the appellate business of the Inner House has been subject to considerable fluctuations. In 1970 (the lowest years), there were only 91 disposals of appeals in the Inner House. In 1996 (its highest year), there were 246 final disposals. (Information was not available for 2003 and was incomplete for 2006). Since 1989, the number of disposals of appeals has varied between 150 and 250 per year.

**Table 9: Appeals disposed of by the Inner House and their derivation 1925 - 2005**

	ALL	Outer	House		Sheriff	Court		Appeals under	statute
	No	No	%		No	%		No	%
1925	144	67	47		76	53		1	0
1950	139	77	55		48	35		14	10
1970	91	69	76		19	21		3	3
1988	134	32	24		62	46		40	30
1989	154	50	32		58	38		46	30
1990	181	39	22		113	62		29	16
1991	242	58	24		121	50		63	26
1992	143	32	22		66	46		45	32
1993	232	56	24		110	47		66	29
1994	189	42	22		83	44		64	34
1995	200	73	37		109	55		18	8
1996	246	85	34		90	37		71	29
1997	241	64	27		106	44		71	29
1998	193	46	24		86	45		61	32
1999	196	82	42		51	26		63	32
2000	169	34*	20		80	47		55	33
2001	190	56	29		76	40		58	31
2002	145	36	25		59	41		50	34
2003	Data not available								
2004	213	64	30		67	31		82	39
2005	158	47	30		48	30		63	40

\* Data missing with regard to 3 months

**Graph 5: Appeals disposed of by the Inner House and their derivation 1925 - 2005**



Between 1988 and 2002 (and except for 1999), the Inner House disposed of more appeals from the sheriff court than from the Outer House or under statute. Only in 1999 did the Inner House dispose of more appeals from the Outer House than from the sheriff court or under

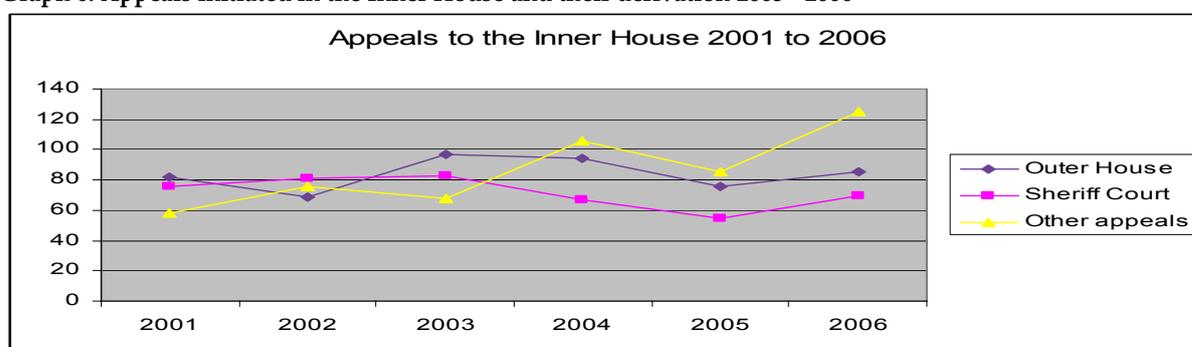
statute. Most recently, (in 2004 and 2005), it disposed of more appeals under statute than from the sheriff court or Outer House. In 2005, appeals under statute (mainly from tribunals) comprised 40% of all appeals disposed of in the Inner House.

Information is also available for the number of appeals initiated in the Inner House over the past 4 years.

**Table 10: Appeals initiated in the Inner House and their derivation 2003 - 2006**

	ALL	Outer House		Sheriff Court		Appeals under statute	
		No	%	No	%	No	%
2001	216	82	38	76	35	58	27
2002	226	69	31	80	36	76	34
2003	248	97	39	83	33	68	27
2004	267	94	35	67	25	106	40
2005	216	76	35	55	25	85	39
2006	280	85	30	70	25	125	45

**Graph 6: Appeals initiated in the Inner House and their derivation 2003 - 2006**



Over the past 6 years, the number of appeals initiated in the Inner House has increased by 30%, (from 216 to 280), though there were no more new appeals initiated in 2005 than in 2001. It is too early to say whether the figures for 2006 are indicative of an upward trend. The number of reclaiming motions from the Outer House and appeals from the sheriff court has remained fairly stable over the period, while the number of other appeals (under statute) has increased considerably. As of 2006, appeals under statute comprised 45% of all appeals initiated in the Inner House.

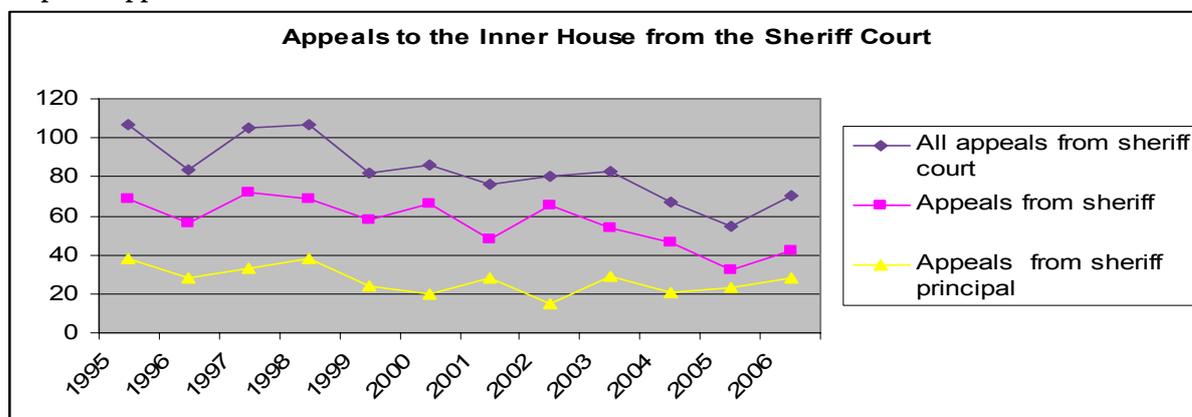
### 3.2 The Sheriff Court

Appellants from the sheriff court have the choice of appealing to the sheriff principal or to the Court of Session directly under ordinary procedure. Over the past 12 years, there were always more appeals to the Inner House that came directly from sheriffs than from sheriffs principal. Over the past 5 years, an average of 48 appeals per year came directly from sheriffs, compared with 23 from sheriffs principal. In the previous 5 years (1997 to 2001), an average of 63 appeals per year came directly from sheriffs, compared with 29 from sheriffs principal.

**Table 11: Appeals initiated in the Inner House from the Sheriff Court 1995 - 2006**

	All appeals from sheriff court	Appeal from sheriff	Appeal from sheriff principal	% appeal from sheriff
1995	107	69	38	64
1996	84	56	28	66
1997	105	72	33	68
1998	107	69	38	64
1999	82	58	24	70
2000	86	66	20	77
2001	76	48	28	63
2002	80	65	15	81
2003	83	54	29	72
2004	67	46	21	69
2005	55	32	23	58
2006	70	42	28	60

**Graph 7: Appeals initiated in the Inner House from the Sheriff Court 1996 - 2006**



As Graph 6 above illustrates, both appeals direct from sheriffs and from sheriffs principal have decreased over the past 12 years. The falling number of appeals direct from sheriffs, however, has made a more significant contribution to the decrease of all appeals from the sheriff court to the Inner House than appeals from sheriffs principal, which appear somewhat more stable.

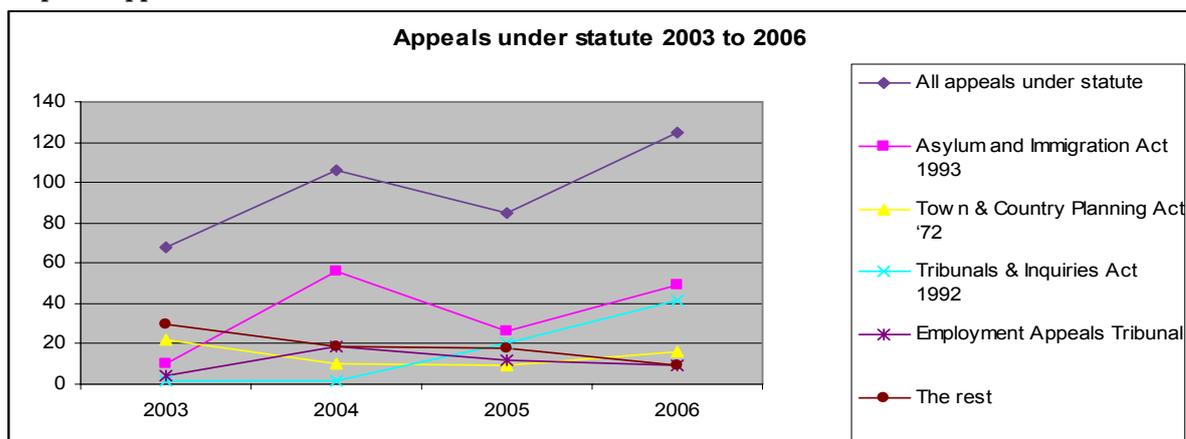
### 3.3 Appeals under statute

Until 2002, appeals under statute never contributed more than a third of all appellate business initiated in the Inner House. From 2001, however, the number of appeals under statute has doubled and has made a marked contribution to the appellate business of the Inner House. This is mainly accounted for by growth in appeals under the Asylum and Immigration Act 1993 and the Tribunals and Inquiries Act 1992.

**Table 12: Appeals initiated under statute 2003-2006**

	All appeals under statute	Asylum and Immigration Act 1993	Town & Country Planning Act '72	Tribunals & Inquiries Act 1992	Employment Appeals Tribunal	The rest
2003	68	10	22	2	4	30
2004	106	56	10	2	19	19
2005	85	26	9	20	12	18
2006	125	49	16	42	9	9

Graph 8: Appeals under statute 2003-2006



### 3.4 Petitions

Actions to the Inner House may also be raised by petition. There was a significant growth in the number of petitions to the Inner House from 2000 to 2005, particularly with regard to 'miscellaneous petitions', though the number nearly halved in 2006. Future trends are therefore uncertain.

Table 13: Actions initiated by petition to the Inner House 1995-2006

	1995	1996	1997	1998	1999	2000
Nobile officium	2	1	5	4	2	0
Trusts	9	11	7	2	9	7
Companies	20	6	9	4	0	0
Misc	19	29	21	28	36	28
<b>All</b>	<b>50</b>	<b>47</b>	<b>42</b>	<b>38</b>	<b>47</b>	<b>35</b>
	2001	2002	2003	2004	2005	2006
Nobile officium	0	0	0	0	0	0
Trusts	11	29	9	9	8	12
Companies	0	4	13	2	0	1
Misc	28	26	63	81	98	43
<b>All</b>	<b>39</b>	<b>59</b>	<b>85</b>	<b>92</b>	<b>106</b>	<b>56</b>

## 4. COURT OF SESSION: SITTING DAYS AND HEARINGS

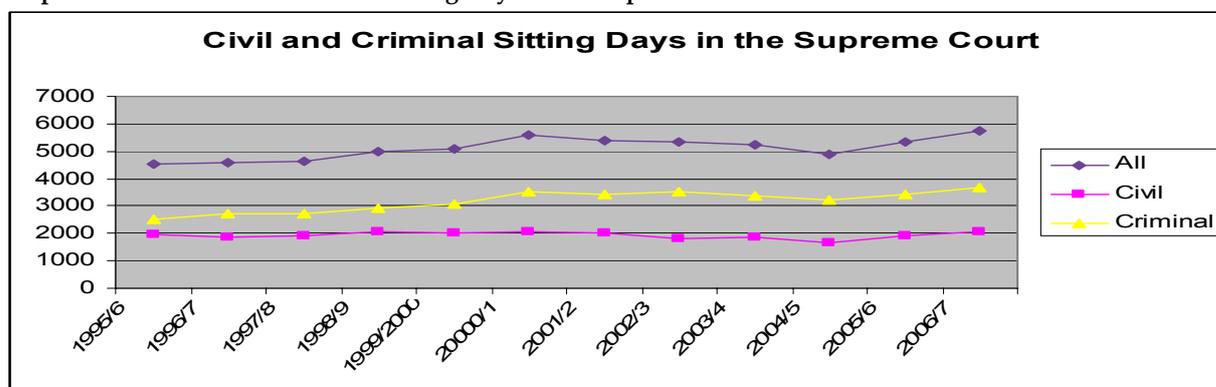
### 4.1 Sitting days in the Supreme Court

The total number of sitting days in the Supreme Court increased from 4,518 to 5,755 days per year, between 1995/6 and 2006/7, an increase of 27%. Most of these additional days were allocated to criminal business. Criminal sitting days increased by 1,141 while civil sitting days increased by only 96 days. In the past year, civil sitting days constituted 36% of all Supreme Court sitting days, compared with 44% in 1995-6.

**Table 14: Supreme Court Sitting Days: 1995/6 - 2006/7**

	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	5,755	2,080	3,675	36

**Graph 9: Civil and Criminal Court Sitting Days in the Supreme Court 1995/6 - 2006/7**



Over the past 11 years, the number of sitting days allocated to civil business has increased by just 5% while the number of sitting days allocated to criminal business has increased by 45%, (from just over 2,500 to 3,675 days). This has implications for the conduct of civil justice in the Supreme Court, especially in relation to the reduction of delays, as the Scottish Court Service Annual Report 2005/6 notes: *“The flat trend in sitting days is unlikely to change in the near future because of the continuing need to divert judicial resources to the High Court. That, coupled with the recent rise in caseload and increased demand for multiple day hearings, limits the Court’s capacity to make inroads into delays which, particularly in the case of appeals and civil jury trials, merit early attention.”*

## 4.2 Sitting days and criminal business in the High Court of Justiciary

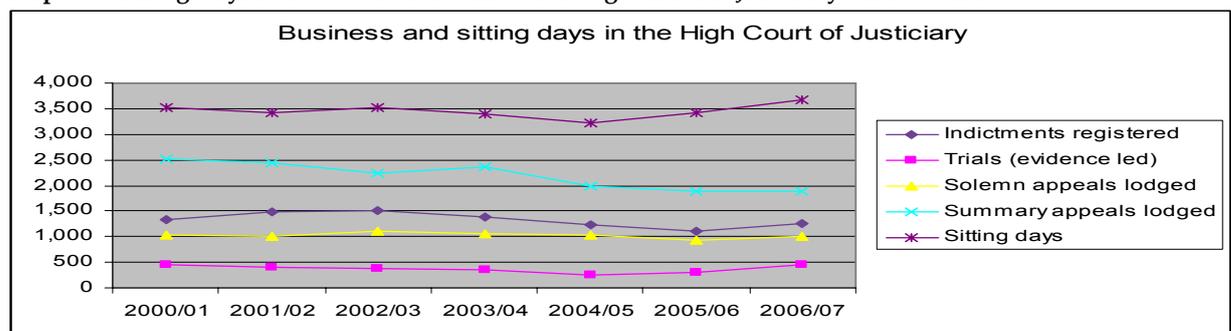
Over the past 7 years, there has been a 5% increase in sitting days in the High Court of Justiciary. At the same time, there has been a 5% decrease in the number of indictments registered, no change in the number of trials with evidence led, a very small decrease (-2%) in the number of solemn appeals lodged and a large decrease (-25%) in the number of summary appeals lodged. This 7-year trend, however, obscures quite marked changes in both the number of indictments registered and trials conducted over the past 3 to 4 years.

**Table 15: Sitting Days and criminal business in the High Court of Justiciary 2000/1 - 2006/7**

	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	% change
Indictments registered	1,343	1,489	1,513	1,387	1,234	1,104	1,270	-5%
Trials (evidence led)	462	397	368	358	259	303	455	0%
Solemn appeals lodged	1,038	998	1,117	1,063	1,019	925	1,014	-2%
Summary appeals lodged	2,514	2,439	2,236	2,371	2,000	1,876	1,887	-25%
Sitting days	3,515	3,410	3,517	3,390	3,215	3,422	3,675	+5%

Sources: 2001/2- 2005/6 Scottish Court Service Annual Reports and 2006/7 Justiciary Office Statistics

**Graph 10: Sitting Days and criminal business in the High Court of Justiciary 2000/1 - 2006/7**



The number of indictments registered declined from 1,513 in 2002/3 to 1,104 in 2005/6, a fall of 27%, most likely as a consequence of increased sentencing powers granted to Sheriffs in 2004. In the past year, however, indictments registered in the High Court of Justiciary have increased by 15%. The number of trials with evidence led decreased by 44% between 2000/1 and 2004/5. Since then, however, there has been a substantial increase from 259 in 2004/5 to 455 in 2006/7, a rise of 76%. Not only have more trials proceeded in the most recent past, but the Scottish Court Service Annual Report 2005/6 notes that demand for judicial time remains high because of "a greater incidence of lengthy trials, driven in part by wider prosecution of white collar and organised crime".

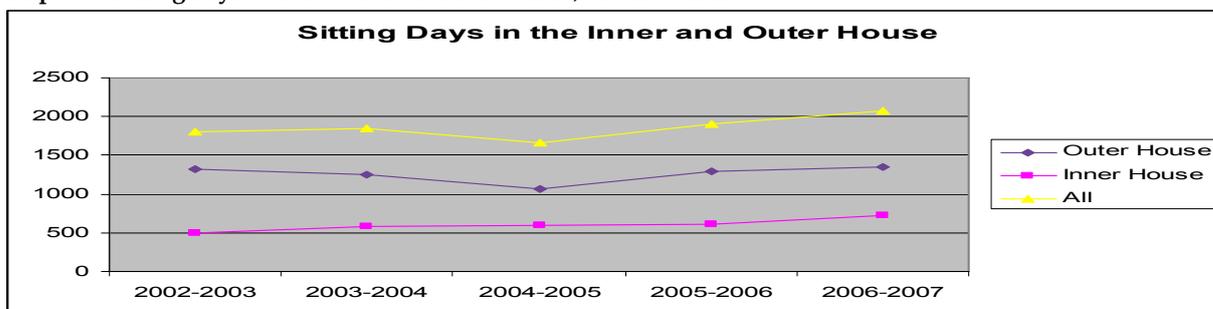
## 4.3 Court of Session (Inner and Outer House) sitting days

The overall number of days allocated to the Court of Session grew by 15% between 2002/3 and 2006/7 (from 1,808 to 2,080). The number of days allocated to the Outer House in 2006/7 was only a little higher than in 2002/3. At the same time, the number of sitting days allocated to the Inner House increased by 48% (from 494 to 731). The number of sitting days allocated to the Inner House now comprises 35% of all Court of Session sitting days, compared with 27% just four years previous.

**Table 16: Sitting days in the Inner and Outer House, 2002/3 - 2006/7**

	Outer House	Inner House	All	% Inner House
2002-2003	1,314	494	1,808	27
2003-2004	1,256	586	1,842	32
2004-2005	1,071	591	1,662	36
2005-2006	1,296	614	1,910	32
2006-2007	1,349	731	2,080	35

**Graph 11: Sitting days in the Inner and Outer House, 2002/3 - 2006/7**



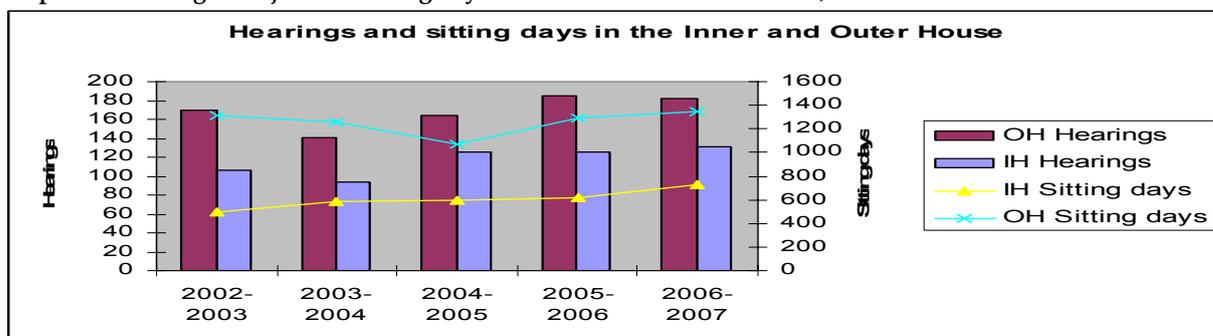
#### 4.4 Court of Session (Inner and Outer House) judicial sitting days and hearings

Between 2002/3 and 2006/7, 272 additional sitting days were allocated to the Court of Session, 237 days of which were to the Inner House. The number of hearings in the Inner House increased by 23% over the 5-year period, while the number of judicial sittings days increased by 48%. This is because three judges (and hence three judicial sittings days) are allocated to any single day of hearings in the Inner House. In the same period, the number of sitting days allocated to the Outer House rose by just 3%, while the number of hearings dealt with by the Outer House increased by 7%.

**Table 17: Hearings and judicial sitting days in the Inner and Outer House 2001/2 to 2006/7**

	OH Hearings	OH Sitting days		IH Hearings	IH Sitting days
2002-2003	170	1,314		106	494
2003-2004	141	1,256		94	586
2004-2005	164	1,071		126	591
2005-2006	185	1,296		126	614
2006-2007	182	1,349		131	731

**Graph 12: Hearings and judicial sitting days in the Inner and Outer House, 2002/3 to 2006/7**



In 2002/3, 4.7 judicial sitting days were allocated on average to every hearing in the Inner House compared with 7.7 in the Outer House. In 2006/7, however, 5.6 judicial sitting days were

allocated on average to every hearing in the Inner House, compared with 7.4 in the Outer House. Over the 5-year period, fewer judicial sitting days were spent on average at each hearing in the Inner House than in the Outer House, even with 3 judicial sitting days for every day of hearings. However, the average number of judicial sitting days per hearing in the Inner House increased over the period (from 4.7 to 5.6), while the average number of judicial sitting days per hearing in the Outer House fell slightly (from 7.7 to 7.4).

## 5. COURT OF SESSION: WAITING PERIODS

Ministers have set Scottish Court Service targets in relation to both the average waiting period in civil appeals (other than early disposals) and the average waiting period for ordinary proofs in the Court of Session.

### 5.1 Appeals

The waiting period for appeals is calculated from the date of the interlocutor appointing the cause to the Summar Roll to the earliest date on which a diet is available, and counted by reference to **term weeks** rather than calendar weeks. However, diets are not allocated automatically by the court: it is for the parties to approach the Keeper to fix a diet after the interlocutor appointing the cause to the Summar Roll is pronounced. There is often a significant delay between the date of the interlocutor appointing the cause to the Summar Roll and the parties approaching the Keeper for a date. Research undertaken in support of Lord Penrose's review of Inner House business disclosed that in 2003 the interval between these two events ranged from 1 week to 63 weeks, with 7 weeks being the average.

It is frequently the case that parties do not accept the first available diet if they, their legal representatives or their witnesses are unavailable. It is also understood that in calculating the waiting period for the purpose of compiling the statistics for Ministerial targets, court staff discount any delay by the parties in approaching the Keeper for a diet and count the first available diet as the end point for the waiting period even though parties may elect a later date. This is understandable in terms of measuring the efficiency of the court in allocating diets, though it may be less successful in documenting delay. The statistics also do not take account of the delays caused by hearings being discharged. As noted in Lord Penrose's review, this happens in a substantial proportion of cases (43% of Summar Roll diets were discharged in the period covered by the first phase of the research and 47% in the second). Waiting periods are therefore intended as a measure of court efficiency. They should not be treated as a measure of delay since they do not refer to the actual time elapsing between the interlocutor appointing the cause to the Summar Roll and actual date of the hearing.

**Table 18: Appeal hearings: target waiting periods and potential appointments (in term weeks) 2001/2 to 2006/7**

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

Over the past 6 years, the target for appeal hearings was set at 18 weeks. Civil appeals have failed to achieve their court-designated targets by between 9 and 15 term weeks. In the last fiscal year, waiting periods for appeal hearings failed to meet their target by 12 terms weeks. Additional sitting days are being allocated to the Inner House in an attempt to reduce waiting periods. However, the Inner House has capacity for only two courts to be allocated to hearings on appeal over a four day week. In any single term week, a maximum of only eight opportunities are available.

## 5.2 Ordinary actions

The statistics relating to waiting periods for ordinary proofs are also calculated by reference to **term weeks** rather than calendar weeks. They do not apply to actions proceeding under commercial procedure (Chapter 47 of the Rules of the Court of Session) or actions initiated and proceeding under personal injury procedure (Chapter 43), and therefore do not apply to the bulk of actions raised in the General Department. While the court allocates proof diets in personal injury and commercial actions that proceed under these specialist procedures, parties have control over the timing of proof diets under ordinary procedure.

It is understood that in calculating the period between the interlocutor allowing a proof/PBA or jury trial and the first available diet of hearing, any period attributable to delay by the parties in fixing the diet is discounted; similarly the waiting period is calculated by reference to the first available diet and not the diet actually fixed for the convenience of parties should this be later. The statistics relate to the earliest possible date for proof which the Keeper can give parties and not the actual waiting period to proof:

**Table 19: Waiting period for proof hearings in ordinary actions: targets and potential appointments (in term weeks) 2001/2 - 2006/7**

	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07
Target	19	19	19	19	19	19
Outturn	26	35	41	34	30	11

Over the past 6 years, the waiting period for proof hearings of actions raised and proceeding under ordinary procedure was targeted at 19 weeks. Between 2001/2 and 2005/6, appointments to diets of proof failed to achieve their court designated targets by between 7 and 22 term weeks. In the past fiscal year, however, waiting periods were not only improved upon but targets were achieved and surpassed by eight weeks. In 2006/7, actions proceeding to proof under ordinary cause procedure could be appointed to a proof diet to take place, on average, within 11 weeks of the interlocutor allowing further procedure.

## 5.3 Personal injury actions proceeding under Chapter 43

Personal injury actions are now raised under Chapter 43 of the Rules of the Court of Session and accounted for 67% of actions initiated by summons in the General Department in 2006. Target waiting periods to proof do not apply to them unless they are remitted out of Chapter 43 and into ordinary cause procedure. Instead, the court generates a procedural timetable as soon as defences are lodged, and actions are appointed to a proof diet by the court on a date set by the court. When Chapter 43 was first introduced into the Court of Session in April 2003, the court was setting personal injury actions to a proof diet 59 **calendar** weeks, on average, following the lodging of defences.<sup>2</sup> As of October 2007, personal injury actions proceeding under Chapter 43 are being appointed to a proof diet some 10 months or 42 **calendar** weeks following the lodging of defences.

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<sup>2</sup> Samuel (2007), *op.cit.* p. 71.

## 5.4 Jury trials

Actions appointed to a jury trial may be raised under Chapter 43 or ordinary procedure. They may also be raised under Chapter 43 and proceed to a jury trial under ordinary procedure if application for remittal is granted. Almost all actions currently appointed to a jury trial are proceeding under Chapter 43, however, so that appointment to a trial diet is made without recourse to counsels' diaries. There has been a steady increase in the number of civil actions for which application for trial by jury has been made and allowed. However, the number of actions for which precepts have been issued, that is, in which citations for jury service have been issued, has remained stable, as Table 20 shows. This is because actions proceeding under Chapter 43 are now settling earlier and before citations for jury service are issued.

**Table 20: Jury trials fixed and precepts issued 2004-7**

	2004		2005		2006		To 30 June 2007	
	Fixed	Precepts	Fixed	Precepts	Fixed	Precepts	Fixed	Precepts
Ordinary (A)	35	31	50	25	14	9	8	3
Personal Injury (PD)	20	10	56	23	87	40	54	15
<b>TOTAL</b>	<b>55</b>	<b>41</b>	<b>106</b>	<b>48</b>	<b>101</b>	<b>49</b>	<b>62</b>	<b>18</b>
Ratio of precepts to jury trials		75:100		45:100		49:100		29:100

Actions proceeding under Chapter 43 and appointed to a jury trial are currently waiting for 15 months, or 40-45 **term** weeks, from the interlocutor approving a jury trial to the trial diet. While a high proportion of jury trials settle early, and citations were not even issued in 71% of actions set for jury trial between 1 January and 30 June 2007, many more actions are now being appointed to a jury trial. Up until the beginning of 2007, three civil jury trials were being appointed per week. As of February 2007, this had increased to four jury trials per week. However, this has been insufficient to reduce the backlog and reduce the waiting period to a trial diet, which is targeted at 19 **term** weeks.

## 5.5 Prognosis

In its Annual Report for 2004/5, the Scottish Court Service notes: *“Waiting periods, both for appeal and first instance work, are not meeting agreed targets principally because of the need to give priority to the business of the High Court. That is unlikely to change in the short term. It is anticipated that Lord Bonomy’s reforms, when fully bedded down, will permit more judicial resources to be allocated to civil business. That, coupled with the introduction of more streamlined procedures for personal injury cases, should contribute to a gradual reduction in waiting periods.”*

In the 2005/6 report the prognosis in relation to waiting periods was less positive: *“Waiting periods in the Court of Session show signs of improvement although they remain above target because of the continuing need to give priority to the criminal business of the High Court. This is unlikely to alter significantly in the short term.”*

By 2006/7, however, the waiting time for ordinary proofs had been reduced quite dramatically to 11 **term** weeks. The waiting period for personal injury actions raised and proceeding under Chapter 43 also dropped (to ten months from defences to a court appointed proof diet) in the

same period. From April 2003, when Chapter 43 was first introduced, the court appointed to a proof diet all those actions raised under Chapter 43 within 12 to 15 months of defences being lodged. It was also required to appoint to a proof diet all those actions allowed a proof diet but raised under ordinary procedure in the years and months preceding April 2003. By 2006, however, most of the actions initiated prior to April 2003 under ordinary procedure had worked themselves through the system and only 30% of new actions were being raised under ordinary procedure (see Table 4). Hence, Chapter 43 was responsible for longer waiting periods to diet of proof for actions raised under ordinary procedure in the first years following its introduction. Once the backlog was removed, however, waiting periods to diets of proof for actions raised under ordinary procedure were greatly reduced.

The 2006/7 report has not yet been published and court based assessment is awaited, particularly with regard to the impact of criminal business on waiting periods. However, an examination of the available information indicates that waiting periods with regard to proof diets under ordinary and Chapter 43 procedure have improved and are above target, while waiting times for appointment to hearings on appeal and appointment to a jury trial remain far below target.

## 6. SHERIFF COURT CIVIL BUSINESS

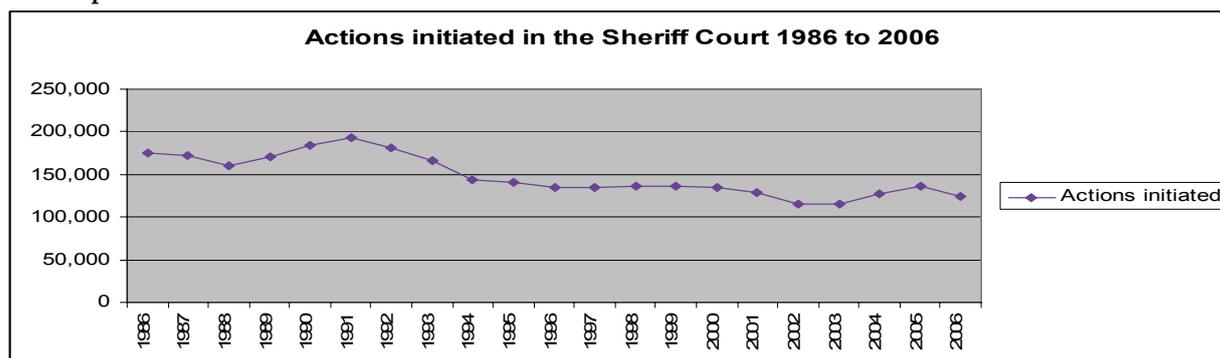
### 6.1 Actions initiated

Over the past 21 years, the total number of ordinary, summary cause and small claims actions raised in the sheriff court peaked at just under 200,000 in 1991. It has since fallen away gradually by more than one third to approximately 115,000 actions initiated in 2002 and 2003. Business picked up in 2004 and 2005, only to fall away in 2006 – though not to the levels of 2002 and 2003.

**Table 21: All actions initiated in the sheriff court 1986 - 2006**

	<b>1986</b>	<b>1987</b>	<b>1988</b>	<b>1989</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>
<b>Actions initiated</b>	175,331	171,998	160,017	169,972	184,217	192,545	180,403
	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>
<b>Actions initiated</b>	166,393	143,838	140,436	134,747	134,364	136,044	135,715
	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Actions initiated</b>	134,539	129,125	115,326	115,453	127,117	135,494	124,914

**Graph 13: All actions initiated in the sheriff court 1986 - 2006**

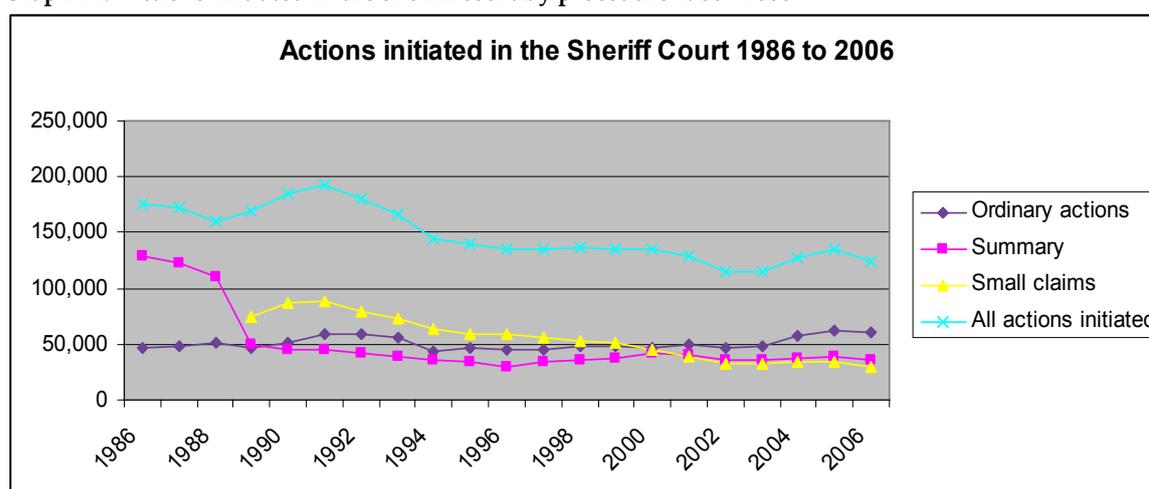


Over the past 21 years, there have been considerable changes in the proportion of ordinary, summary and small claims actions raised. In 1986, the number of ordinary actions raised in the sheriff court comprised just over one quarter (27%) of all actions. By 2006, however, they comprised almost half (48%) of all actions raised. In 1989, the year in which small claims procedure was introduced, small claims actions comprised 44% of all actions raised. By 2006, however, they comprised only 23%. Summary cause actions comprised 29% of all actions raised in both 1989 and 2006.

**Table 22: Actions initiated in the sheriff court by procedure 1986 - 2006**

	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

**Graph 14: Actions initiated in the sheriff court by procedure 1986 - 2006**



## 6.2 Ordinary Cause

Although the proportion of ordinary cause actions has increased over the past 21 years, the actual number of actions raised under ordinary procedure in 2005 and 2006 was not substantially higher than in 1991 and 1992, when it was previously at its peak. From around 59,000 in 1992, the number of ordinary actions initiated in the sheriff court fell to around 44,000-49,000 between 1994 and 2002. Between 2002 and 2006, however, the number of ordinary actions initiated in the Sheriff court rose from 46,605 to 60,014, an increase of 27%.

Overall figures relating to case type of sheriff court ordinary causes are available only for disposals, and not for actions initiated.

**Table 23: Ordinary cause actions disposed of in the sheriff court 2006**

Case type	No.	%
Aliment (child, family, top-up)	41	*
Custody (contact)	332	1
Damages	1,270	3
Personal injury	2,673	6
Debt	21,297	49
Delivery/payment	464	1
Divorce	6,831	16
Furthcoming	118	*
Interdict	489	1
Land/heritable	2,640	6
Mortgage lender	4,028	9
Other	3,336	8
<b>Total</b>	<b>43,519</b>	<b>100</b>

- *less than .5%*

Of the 43,519 ordinary actions disposed of in the sheriff court in 2006, 50% were classified as actions for debt or delivery/payment. Personal injury actions comprised 6% of all disposals with actions for damages accounting for another 3% of disposals. Land/heritable actions and actions related to mortgage lenders accounted for another 15% of actions disposed of in the sheriff court.<sup>3</sup> Divorce actions accounted for 16% of all ordinary cause disposals in the sheriff court in 2006, with child contact cases accounting for less than 1%.

Information is available on actions that are undefended in relation to disposals, though the information is likely to underestimate the proportion of undefended actions. Decree was granted in favour of the pursuer on an undefended basis in at least 79% of all ordinary cause disposals, with some cases more likely to be defended than others. In 2006, for example, decree was granted in favour of the pursuer on an undefended basis in at least 90% of land/heritable actions and actions raised by mortgage lenders, but in only 25% of damages and 14% of personal injury actions. Thus, an increase in the number of personal injury actions initiated in the sheriff court is likely to make a far greater impact on the business of the sheriff court than a similar increase in land/heritable actions.

### 6.3 Summary Cause

Compared with 1989 (when small claims procedure was introduced), the number of actions raised under summary procedure in 2006 has fallen by 27% (from 49,191 to 35,881). Actions raised under summary cause procedure comprise mainly actions for payment and for the recovery of heritable property, and only a very small proportion of all actions initiated are believed to be defended.

### 6.4 Small claims

There has been a significant decline in the number of small claims actions raised since the procedure was first introduced in 1989. At its highpoint in 1991, for example, 88,512 small claims actions were raised compared with 29,002 in 2006, (representing a fall of 60%). Small

<sup>3</sup> There are thought to be considerable inaccuracies around the recording of personal injury and damages actions, as well as around land/heritable actions and actions in relation to mortgage lenders.

claims actions mainly comprise actions for payment and only a very small proportion of them are defended.

## 6.5 Proofs, debates and full hearings

Over the past five years, the number of ordinary cause proofs and debates has decreased slightly (by 2%) while the number of summary and small claims full hearings has decreased substantially (by 43%).

**Table 24: Proofs, debates and full hearings 2002/3 - 2006/7**

	2002/03	2003/04	2004/05	2005/06	2006/7	% change
Ordinary proofs and debates	1,370	1,339	1,256	1,219	1,343	-2%
Summary/ small claims full hearings	767	510	416	513	434	-43%

The likelihood of going to a hearing on proof or debate, or the likelihood of going to a full hearing, has also decreased. While the number of ordinary actions raised in the 5 year period between 2002/3 and 2006/7 increased by 25%, (from 47,045 to 58,868), the number of proofs, debates and full hearings that proceeded fell by 2%. In 2002/3, one ordinary cause proof or debate was heard for every 34 ordinary cause actions raised that year. In 2006/7, however, one ordinary cause proof or debate was heard for every 44 ordinary civil actions raised that year.

While the number of summary and small claims actions registered in the 5 year period between 2002/3 and 2006/7 fell by 10% (from 71,260 to 64,126), the number of summary cause and small claims hearings (where evidence was led) has fallen even more dramatically, by 43%. In 2002/3, there was one full hearing (with evidence led) for every 93 summary or small claims civil actions raised that year. In 2006/7, however, there was one full hearing for every 147 summary and small claims actions initiated that year.

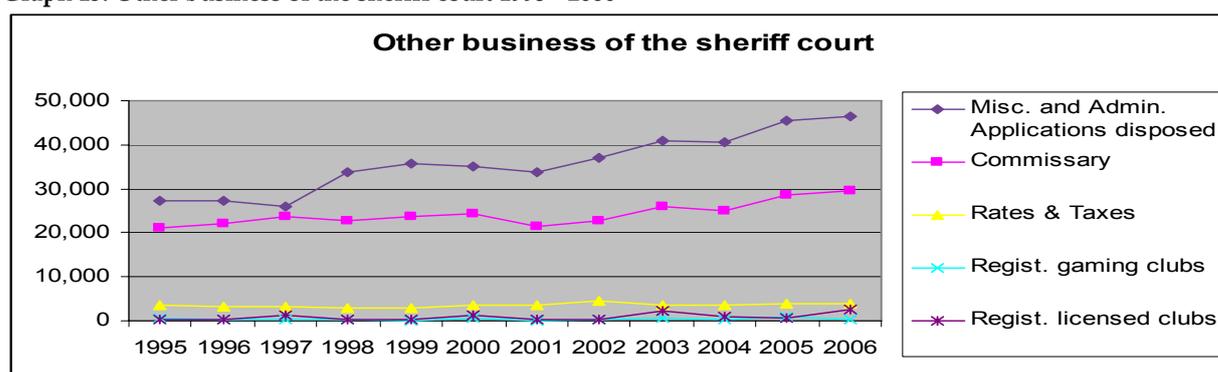
## 7. SHERIFF COURT MISCELLANEOUS AND ADMINISTRATIVE BUSINESS

Other business dealt with in the sheriff court, including miscellaneous and administrative applications, commissary business, warrants for the collection of rates and taxes, and the registration of clubs, forms a significant part of the work of the sheriff court.

**Table 25: Other business of the sheriff court 1995 - 2006**

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Misc. and Admin. Applications: No. of disposals	27,434	27,251	26,099	33,686	35,583	35,120	33,799	36,937	41,005	40,459	45,532	46,491
Commissary: No. of inventories recorded	21,266	21,921	23,742	22,636	23,782	24,341	21,590	22,820	25,997	24,999	28,619	29,696
Collection of Rates & Taxes: No. of warrants issued	3,694	3,104	3,192	3,081	2,845	3,679	3,606	4,543	3,419	3,448	3,892	3,973
Gaming clubs: No. of applications for registration or renewal granted	726	233	194	202	156	596	161	179	589	341	1,058	419
Licensed clubs: No. of applications for registration or renewal granted	337	311	1442	388	350	1,404	439	326	2,298	816	747	2,599

**Graph 15: Other business of the sheriff court 1995 - 2006**



The number of disposals with regard to miscellaneous and administrative applications in the sheriff court increased from 27,434 in 1995 to 46,491 in 2006, an increase of almost 70% over the 12 year period. Likewise, commissary business shows a consistent, albeit, slower rise (40%).

The increase in disposals of miscellaneous and administrative applications between 1995 and 2006 can be located in several sources. The number of bankruptcy related actions has increased steadily from around 6,500 in 1996 to 13,256 in 2006, an increase of 100%. There has also been a marked increase in liquidations: from 1,400 in 1995 to over 2,000 in 2006, an increase of 43%. A significant area of work is concerned with applications under the Social Work (Scotland) Act 1968. There has been an almost eightfold increase in disposal of applications under section 16: from 38 in 1995 to 283 in 2006. In contrast, disposals of applications under section 42 have more than halved: from 2,838 in 1995 to 1,227 in 2006. The yearly number of applications disposed under sections 49 and 50 has fluctuated, but recently settled at around 283.<sup>4</sup>

<sup>4</sup> Sections under the Social Work (Scotland) Act have now been superseded and orders are now made under the Children (Scotland) Act 1995.

Disposals relating to applications for adoption fell from 530 in 1995 to 367 in 2006, a decrease of approximately 25%. However, there has been a more than threefold increase in the number of disposals relating to applications for freeing orders, (from 52 in 1995 to 137 in 2006).

The impact of recent legislation must also be considered. For example, 1,173 applications under the Mental Health (Scotland) Act (1984) Part V were disposed of in 2005. Only 20 applications were disposed of in 2006, however, since applications are now made to Mental Health Tribunals under the Mental Health (Care and Treatment) (Scotland) Act 2003. On the other hand, the Adults with Incapacity (Scotland) Act 2000 is reported to have been responsible for a large and growing number of applications, though precise numbers were not readily identifiable from the court data available.

## 8. APPEALS IN THE SHERIFF COURT

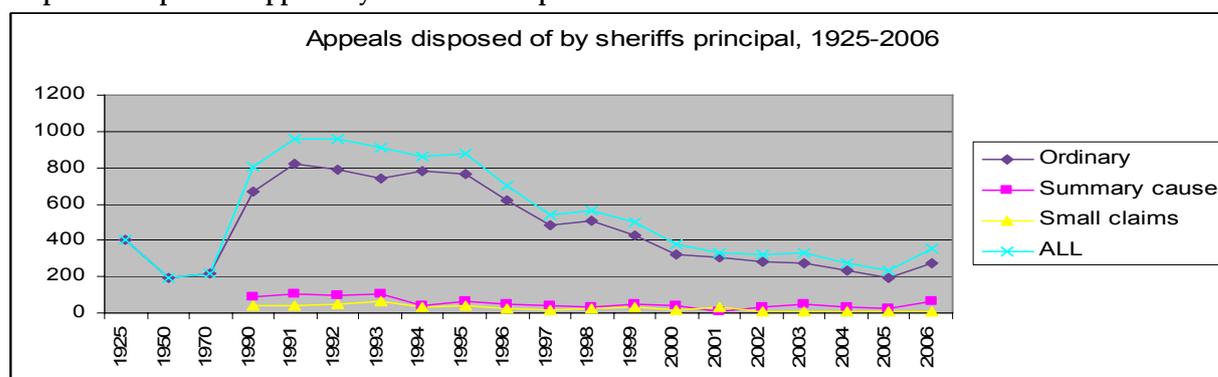
### 8.1 Disposals in the Sheriff Court

The number of appeals disposed of by sheriffs principal was its high-point in the early 1990s, with an almost fivefold increase between 1970 and 1991. It has fallen since then: from 959 in 1991 to 230 in 2005, a fall of 76% in the 14 year period. In 2006, however, the number of appeals disposed of by sheriffs principal rose from 230 in 2005 to 354 in 2006, an increase of 54%. It will be important to track sheriff court appeals in the future, so as to ascertain if this marks the beginning of a new upward trend.

**Table 26: Disposal of appeals by Sheriffs Principal 1925 - 2006**

	1925	1950	1970	1990	1991	1992	1993	1994	1995	1996
Ordinary	403	197	215	670	818	793	744	785	766	622
Summary cause	n/a	n/a	n/a	91	101	98	102	37	68	52
Small claims	n/a	n/a	n/a	43	40	45	65	36	42	23
<b>ALL</b>	<b>403</b>	<b>197</b>	<b>215</b>	<b>804</b>	<b>959</b>	<b>956</b>	<b>911</b>	<b>858</b>	<b>876</b>	<b>697</b>
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Ordinary	484	506	423	326	307	281	275	230	196	275
Summary cause	37	33	45	38	11	29	50	36	25	67
Small claims	20	23	33	16	32	12	9	9	9	12
<b>ALL</b>	<b>541</b>	<b>562</b>	<b>501</b>	<b>380</b>	<b>350</b>	<b>322</b>	<b>334</b>	<b>275</b>	<b>230</b>	<b>354</b>

**Graph 16: Disposal of appeals by Sheriffs Principal 1925-2006**



Before the introduction of summary cause (1976) and small claims procedure (in 1988), all appeals dealt with by sheriffs principal related to actions raised under ordinary cause procedure. Following the introduction of summary cause and small claims procedure, ordinary cause actions still dominated appeals dealt with in the sheriff court. In 1996, for example, 89% of the appellate business of the sheriff court related to ordinary cause actions. Ten years later, 78% of the appellate business of the sheriff court related to ordinary cause actions.

**Table 27: Appeals disposed of by Sheriffs Principal by procedure 1996 and 2006**

	1996		2006	
	No.	%	No.	%
Ordinary cause	622	89	275	78
Summary cause	52	8	67	19
Small claims	23	3	12	3
All	697	100	354	100

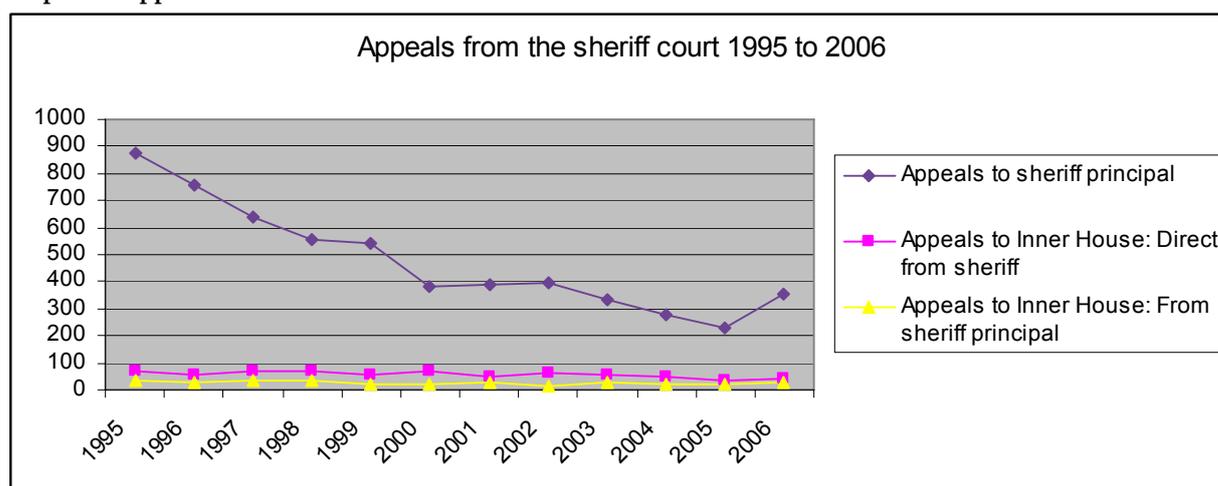
## 8.2 Appeals from the Sheriff Court

Between 1995 and 2006, the number of appeals from the sheriff court that were initiated in the sheriff court fell by 60% (from 876 to 354). This was not accompanied by an increase in appeals to the Inner House direct from sheriffs, which fell by 39% (from 69 to 42). Patterns of appeals to the Inner House direct from sheriffs do not indicate a trend to circumvent sheriffs principal. Indeed, an increase in the number of appeals initiated to the sheriff principal between 2005 and 2006, which bucked the downward trend, was accompanied by an increase in appeals direct to the Inner House from sheriffs.

**Table 28: Appeals from the sheriff court initiated 1995-2006**

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Appeals to sheriff principal	876	760	636	557	544	380	387	399	334	275	230	354
All appeals to the Inner House from the sheriff court	107	84	105	107	82	86	76	80	83	67	55	70
Appeals to Inner House: Direct from sheriff	69	56	72	69	58	66	48	65	54	46	32	42
Appeals to Inner House: From sheriff principal	38	28	33	38	24	20	28	15	29	21	23	28

**Graph 17: Appeals from the sheriff court initiated 1995-2006**



Between 1995 and 2006, the number of appeals to sheriffs principal fell by 60% (from 876 to 354) while the number of appeals to the Inner House from sheriffs principal fell by 26% (from 38 to 28). In 1995, there was one appeal to the Inner House from sheriffs principal for every 23 appeals to sheriffs principal, while in 2006 there was one appeal to the Inner House from sheriffs principal for every 13 appeals to sheriffs principal. Over the twelve year period, therefore, the likelihood of appeals to the sheriff principal being appealed to the Inner House

has almost doubled. Since the overall number of appeals to sheriffs principal decreased substantially over this time, however, the actual number of appeals from sheriffs principal to the Inner House also decreased.

In sum, fewer appeals were initiated in 2006 than in 1995: whether to the sheriff principal; to the Inner House direct from the sheriff; or to the Inner House from the sheriff principal. When appeals were made to the sheriff principal in 2006, however, they were more likely to be appealed to the Inner House than in 1995. At least one straightforward explanation has been offered to interpret these trends, namely, that the new dispensing powers of sheriffs have eliminated those appeals to the sheriff principal that were never likely to be appealed to the Inner House.

## 9. SHERIFF COURT WAITING PERIODS

A key performance indicator in the sheriff court is the average waiting period for ordinary civil proofs. It is important to note that this key indicator does not reflect some of the ongoing problems currently reported in the sheriff court, for example, proofs that are allocated but cannot be disposed of in the available time. Waiting periods are calculated by calendar weeks and run from the date when the interlocutor granting a proof/PBA is pronounced to the earliest date on which a diet is available. This may not be the date which is assigned to the case as the earliest date may not suit the parties, their legal representatives or witnesses.

Target waiting periods for the allocation of proofs in ordinary civil cases are set in agreement with sheriffs principal. The target waiting period is presently 12 weeks. Targets and outturns over the past 8 fiscal years are as follows:

**Table 29: Waiting period for allocation of ordinary cause proofs**

	1999/00	2000/1	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7
Target	12 weeks							
Outturn	11 weeks	12 weeks	11 weeks	10weeks				

The sheriff court system not only reached its targets over the 8 years under consideration, but achieved and improved upon its target by two weeks in 2006/7. In 2006, only 5 sheriff courts did not reach their target, though they were not far off:

**Table 30: Waiting period for allocation of ordinary cause proofs in 5 sheriff courts 2006**

	Airdrie	Ayr	Perth	Dunfermline	Linlithgow
Target	12 weeks	12 weeks	12 weeks	12 weeks	12 weeks
Outturn	15 weeks	13 weeks	14 weeks	13 weeks	13 weeks

Further analysis of sheriff court data points to a range of factors that may be responsible for unmet targets in these sheriff courts. It is instructive to review the business of each of these courts to assess the contribution made by the pressure of criminal business on ordinary cause proof waiting times.

**Airdrie (15 weeks):** Over the past 4 years, there was a slight decrease in summary trials called and heard. However, there has been an average yearly increase of 7% in solemn indictments called and an average yearly increase of 11% in solemn cases where evidence has been led, (from 41 in 2002 to 61 in 2006). While there has been an average yearly increase of 17% in the number of ordinary actions registered, there has been a 9% average yearly reduction in the number of debates and proofs proceeding and an 11% average yearly reduction in the number of summary/small claims proofs with evidence led. Hence, in Airdrie, an increase in solemn criminal trials could be responsible for increased waiting times for ordinary cause proofs.

**Ayr (13 weeks):** Over the past 4 years, there has been an average yearly increase of 5% in summary trials called, 2% in summary trials heard, 29% in solemn indictments, 20% in solemn trials called and 20% in solemn trials with evidence led. So, for example, the number of solemn trials with evidence led rose from 21 in 2002 to 38 in 2006. At the same time, there was an average yearly decrease of 6% in ordinary proofs and debates proceeding and a decrease of 6% in summary/small claims proofs with evidence led. Like Airdrie, there has been a substantial

increase in solemn business and a decrease in civil cases proceeding to proof/debate. Like Airdrie, an increase in solemn criminal trials could be responsible for increased waiting times for ordinary cause proofs.

**Perth (14 weeks):** Over the past 4 years there has been an average yearly increase of 3% in summary complaints and 6% in solemn indictments. At the same time, there has been an average yearly **decrease** of 2% in summary trials called, of 6% in summary trials heard, of 11% in solemn trials called and of 7% in solemn trials with evidence led. This represents a substantial fall in criminal business over 4 year period, for example, a 27% decrease in solemn trials with evidence led. Over the same period, there was an average yearly decrease of 6% in both the number of debates and proofs that proceeded and summary/small claims proofs with evidence led. In Perth, the impact of criminal business on waiting periods for ordinary cause proofs is not immediately apparent.

**Dunfermline (13 weeks):** Over the past 4 years, there has been an average yearly increase of 2% in summary trials called, of 4% in summary trials heard and of 23% in solemn indictments. However, there has been an average yearly decrease of 8% in solemn trials called and of 13% in solemn trials with evidence led. So, for example, the number of solemn trials with evidence led decreased from 18 in 2002 to 9 in 2006. Like Perth, the impact of criminal business on waiting periods for ordinary cause proofs is not immediately apparent.

**Linlithgow (13 weeks):** While there has been an increase in the number of summary complaints and solemn indictments over the past four years, there has been an average yearly decrease of 7% in summary trials called, of 2% in summary trials heard, of 13% in solemn trials called and of 2% in solemn trials with evidence led. In 2002, the number of summary trials called was 2,084, but fell to 1,484 in 2006. The number of solemn trials called in 2002 was 53, but fell to 25 in 2006 while the number of solemn trials with evidence led fell from 13 in 2002 to 6 in 2005, but was up to 12 in 2006. Though there has been a yearly average increase of 10% in ordinary cause actions raised and 8% in summary/small claims registered over the past four years, there has been an average yearly decrease of 12% in debates and proofs proceeding under ordinary cause and an average yearly decrease of 2% in summary cause/small claims full hearings. Criminal business has not been identified by sheriff court staff as making an impact on ordinary cause proof waiting times. Responsibility for not reaching targets has been attributed to: i) more requests for multiple day hearings in ordinary cause proofs and ii) a need for more pre-proof hearings, which are presently at the discretion of sheriffs. These factors in combination are responsible for more multiple day proofs being cancelled at the last moment, with no opportunity for the sheriff court to appoint other civil actions to a proof diet in their place.

## 10. SHERIFF COURT SITTING DAYS: CRIMINAL AND CIVIL BUSINESS

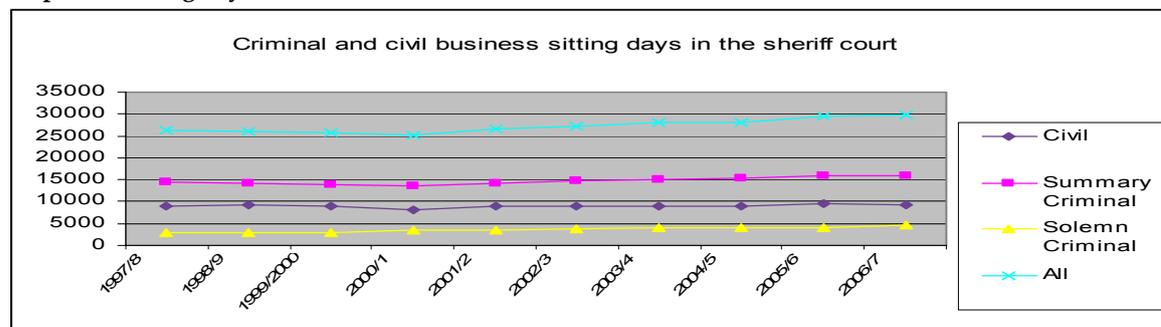
### 10.1 Sitting days: main trends

Annual reports and management information of the Scottish Courts Service provide detailed information on sitting days in the sheriff court. Over the past 10 years, there has been an 11% increase in the number of sitting days in the sheriff court. These additional sitting days were distributed across the business areas of the sheriff court, as follows.

**Table 31: Sitting days allocated to civil and criminal business in the sheriff court**

	97/98	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07	% change
Civil	8,989	9,123	8,952	8,206	8,970	8,934	8,946	8,840	9,417	9,292	+3
Summary Criminal	14,533	14,058	13,748	13,653	14,128	14,615	15,019	15,399	15,953	16,020	+10
Solemn Criminal	2,862	2,772	2,900	3,410	3,539	3,676	3,987	3,942	3,995	4,486	+57
All	26,384	25,953	25,600	25,269	26,633	27,225	27,952	28,181	29,365	29,798	+11%

**Graph 18: Sitting days allocated to civil and criminal business in the sheriff court**



While sitting days allocated to civil business increased by just 3% over the past 10 years, they increased by 10% and 57% for summary criminal and solemn criminal business respectively. Closer inspection reveals where the main changes took place.

**Table 32: Sitting days in the sheriff court 1997/98 – 2006/07**

	97/98	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07	% change
Appeals	495	441	450	328	337	385	373	331	301	327	-34
Summary trials	8,508	8,032	7,591	7,844	7,767	8,115	8,096	7,912	7,806	7,912	-7
Summary Non Trial	5,376	5,423	5,601	5,380	5,773	6,021	6,302	6,701	6,861	7,306	+36
Sheriff and Jury	2,654	2,620	2,775	3,313	3,322	3,403	3,726	3,639	3,671	3,757	+42
Solemn Non Trial	208	152	125	97	217	273	261	303	324	729	+250
Criminal Other	649	603	556	429	588	479	621	786	1,286	802	+24
Ordinary Proof	3,154	3,176	3,038	2,994	3,076	3,165	3,301	3,054	3,154	3,238	+3
Ordinary Debate	424	392	295	302	328	254	236	231	206	214	-50
Ordinary Other	2,644	2,761	2,820	2,450	2,815	2,790	2,802	2,897	2,921	2,788	+5
SC/SCI aim Hearing	647	686	684	509	534	387	382	346	377	396	-39
SC/Sclaim Other*	511	491	447	419	556	612	564	597	591	636	+24
Other	1,114	1,176	1,218	1,204	1,324	1,341	1,288	1,384	1,867	1,693	+52
All	26,384	25,953	25,600	25,269	26,633	27,225	27,952	28,181	29,365	29,798	+11%

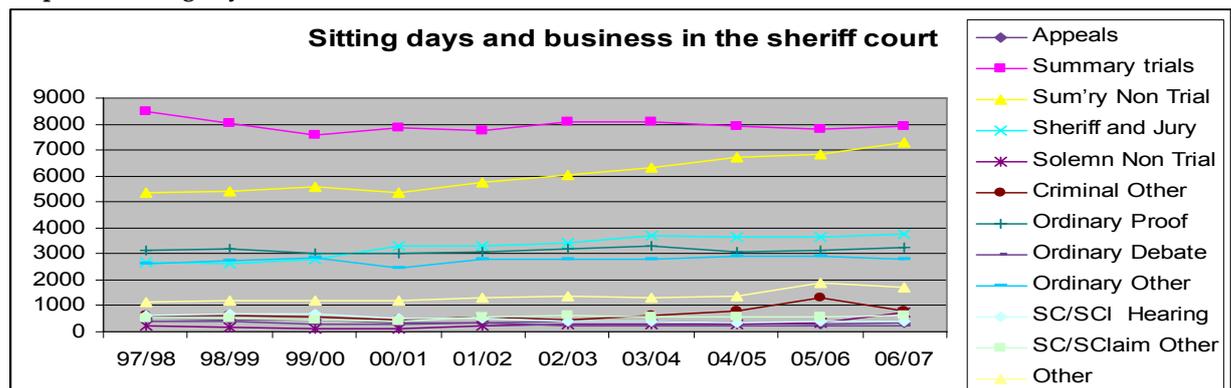
\*Preliminary and First Hearings

In civil business, sitting days allocated to ordinary cause proofs have increased by 3%, while sitting days allocated to debates have fallen by 50% (a trend most likely to be welcomed by many). Sitting days allocated to full hearings under small claims and summary cause

procedure have decreased by 39%, while there has been a 24% increase in the number of sitting days allocated to other business under these procedures.

In criminal business, sitting days allocated to summary trials has remained flat over the past few years, and has even fallen by 7% since 1997/8. Sitting days allocated to summary criminal business other than trials, however, has increased by 36%. Sitting days allocated to solemn procedure has risen considerably over the past 10 years, with a 42% increase in sitting days allocated to sheriff and jury trials and a 250% increase in sitting days allocated to solemn procedure business other than trials (such as intermediate diets).

Graph 19: Sitting days and business in the Sheriff Court



## 10.2 Distribution of sitting days and the business of the sheriff court

Sheriff court business was also examined for the distribution of sitting days between civil business, summary criminal and solemn criminal business. Three years were compared: 1997/8, 2001/2 and 2006/7. Just over one third of all sitting days were allocated to civil business in 1997/8 and 2001/2, though this had fallen to just under one third in 2006/7. For all of the years under examination, over half of all sitting days were allocated summary criminal business. The number of sitting days allocated to solemn criminal business was small, but was rising (from 11% in 1997/8 to 15% in 2006/7).

Table 33: Distribution of sittings days between civil and criminal (summary and solemn) business in the sheriff court

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
<b>All</b>	<b>26,384</b>	<b>100</b>	<b>26,633</b>	<b>100</b>	<b>29,798</b>	<b>100</b>

## 10.3 Solemn business and sitting days

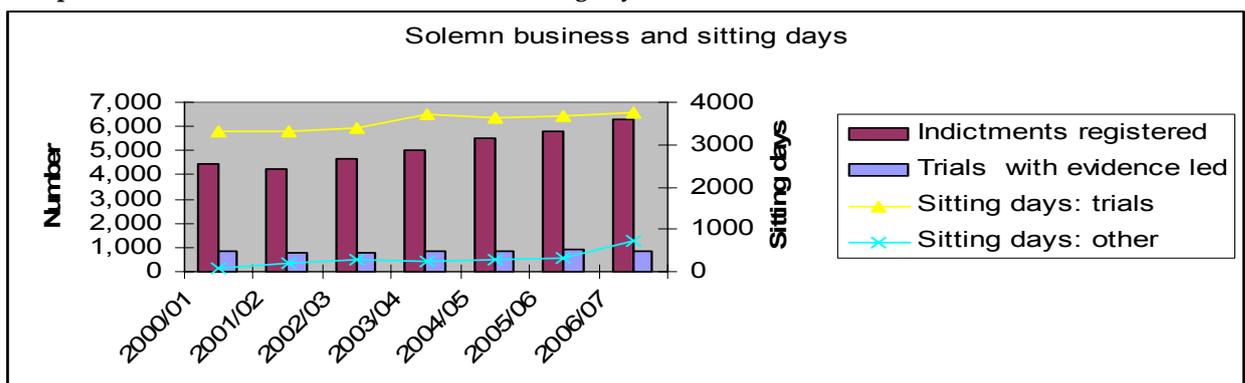
The number of sitting days allocated to solemn criminal business in the sheriff court increased substantially between 2000/1 and 2006/7, from 3,410 days per year to 4,486 days, an increase of 32% over the 7 year period. There was also an increase in indictments registered (42%) over the

same period, but a small decrease in trials (4%). In 2000/1, one sitting was allocated on average to every 1.3 indictments registered. In 2006/7, however, one sitting day was allocated on average to every 1.4 indictments registered. If anything, therefore, solemn criminal cases were dealt with more expeditiously in 2006/7 than 2000/1. This is mainly because indictments were less likely to go to trial in 2006/7 than 2000/1. In 2000/1, there was one trial with evidence led for every 5 indictments. In 2006/7, however, there was one trial with evidence led for every 7.4 indictments. Nevertheless, the number of sitting days allocated to sheriff and jury trials in 2006/7 was more than 5 times greater than the number of sitting days allocated to other solemn business.

**Table 34: Solemn business and sheriff court sitting days 2000/1 to 2006/7**

	2000/1	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	% change
<b>Solemn criminal</b>	<b>No.</b>							
Indictments registered	4,445	4,248	4,636	5,050	5,512	5,798	6,304	+42%
Trials with evidence led	882	802	754	852	815	889	848	-4%
Sitting days: trials	3,313	3,322	3,403	3,726	3,639	3,671	3,757	+13%
Sitting days: non-trial	97	217	273	261	303	324	729	+750%
<b>Sitting days: ALL</b>	<b>3,410</b>	<b>3,539</b>	<b>3,676</b>	<b>3,987</b>	<b>3,942</b>	<b>3,995</b>	<b>4,486</b>	<b>+32%</b>

**Graph 20: Solemn business and sheriff court sitting days 2000/1 to 2006/7**



Between 2000/1 and 2006/7, there was a 13% increase in the sitting days allocated to trials while there was a small decrease (-4%) in the number of trials (with evidence led) over the period. There was an exceptionally large increase (750%) in the sitting days allocated to other solemn business.

In 2000/1, 3.75 trial sitting days were allocated for every trial with evidence led. In 2006/7, however, 4.4 trial sitting days were allocated for every trial with evidence led. Though the number of sheriff and jury trials decreased in the 7 year period, the number of sitting days allocated on average to every trial increased from 3.75 days to 4.4 sitting days.

In 2000/1, one non-trial sitting day was allocated for every 46 indictments registered. In 2006/7, however, one non-trial sitting day was allocated for every 9 indictments registered. Not only did the number of indictments increase (by 42%) in the 7 year period, the number of sitting days allocated to solemn non-trial business increased from one sitting day for every 46 indictments registered in 2000/1 to one sitting day for every 9 indictments registered in 2006/7.

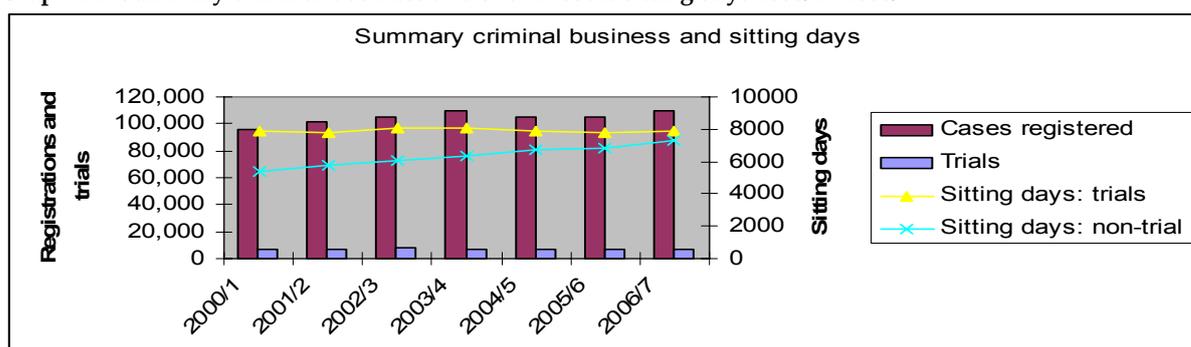
## 10.4 Summary criminal business and sitting days

The number of sitting days in relation to summary criminal business increased substantially between 2000/1 and 2006/7, from 13,653 days per year to 16,020 days, an increase of 17% over the 7 year period. There was also an increase of 15% in the number of summary cases registered. In 2000/1, one sitting day was allocated on average to every 7 summary cases registered. In 2006/7, one sitting day was allocated to just under every 7 summary cases registered. There was therefore very little change in the average amount of time allocated to each summary case over the period. Summary criminal cases were allocated more sitting days in 2006/7 than 2000/1 (an increase of 17%) because the number of summary cases registered had increased (by 15%).

**Table 35: Summary criminal business and sheriff court sitting days 2000/1 - 2006/7**

Summary Criminal	2000/1	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	% change
Cases registered	95,615	101,441	104,960	109,177	104,605	105,273	109,824	+15%
Trials	7,427	7,420	7,523	7,091	7,272	7,224	6,619	-11%
Sitting days: trials	7,844	7,767	8,115	8,096	7,912	7,806	7,912	+1%
Sitting days: non-trial	5,380	5,773	6,021	6,302	6,701	6,861	7,306	+36%
Sitting days: other	429	588	479	621	786	1,286	802	+87%
<b>Sitting days: ALL</b>	<b>13,653</b>	<b>14,128</b>	<b>14,615</b>	<b>15,019</b>	<b>15,399</b>	<b>15,953</b>	<b>16,020</b>	<b>+17%</b>

**Graph 21: Summary criminal business and sheriff court sitting days 2000/1 - 2006/7**



There was only a 1% increase in sitting days allocated to summary trials. However, the number of summary criminal trials that proceeded decreased by 11% over the period. There was a 36% and 87% increase in non-trial and 'other' summary criminal sitting days respectively. In summary criminal cases, the number of non-trial and other sitting days allocated to summary criminal cases is rising and, unlike solemn business, almost equals the number of sitting days allocated to trials.

In 2006/7, 1.19 sitting days were allocated for every trial with evidence led, compared with 1.05 sitting days in 2000/1. Though the number of summary trials that proceeded decreased in the 7 year period (by 11%), the number of sitting days allocated to every trial increased very slightly on average from 1.15 to 1.19 days.

In 2000/1, one non-trial sitting day was allocated for every 18 summary cases registered. In 2006/7, however, one non-trial sitting day was allocated for every 15 summary cases registered. Not only did the number of cases increase (by 15%) in the 7 year period, the average time per case allocated to non-trial summary business also increased.

## 10.5 Civil business and sitting days

The number of sitting days allocated to civil business has remained fairly constant over the past 10 years (see 10.1 above). In 2006/7, 9,292 sitting days were allocated to civil business in the sheriff court, compared with 8,989 (an increase of 3%) some ten years earlier. Over a similar period, the number of civil actions initiated in the sheriff court fell by 7%, with a 49% decrease in small claims actions but a 7% and 36% increase in summary and ordinary cause actions, respectively.

**Table 36: Sitting days, registrations and procedure 1997 to 2006**

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	% change
Ordinary actions	44,366	48,423	47,394	46,619	49,001	46,605	47,537	56,994	62,502	60,014	+36
Summary	33,447	35,094	37,227	42,134	40,931	36,465	34,942	36,627	38,463	35,881	+7
Small claims	56,551	52,527	51,096	45,786	39,193	32,256	32,974	33,496	34,529	29,022	-49
<b>All civil actions initiated</b>	<b>134,364</b>	<b>136,044</b>	<b>135,715</b>	<b>134,539</b>	<b>129,125</b>	<b>115,326</b>	<b>115,453</b>	<b>127,117</b>	<b>135,494</b>	<b>124,917</b>	<b>-7</b>
Civil sitting days by fiscal year 1997/8 to 2006/7	8,989	9,123	8,952	8,206	8,970	8,934	8,946	8,840	9,417	9,292	+3

## 10.6 Ordinary cause actions and sitting days

The number of ordinary cause actions initiated between 2002/3 and 2006/7 rose by 25%. However, there was also 2% drop in the number of full hearings with evidence led over this period. The number of sitting days in relation to ordinary cause business decreased very slightly (by 2%) over the five year period, from 6,327 sitting days in 2002/3 to 6,207 sitting days in 2006/7.

**Table 37: Sitting days, registrations and hearings under ordinary cause procedure 2002/3 - 2006/7**

	2002/3	2003/4	2004/5	2005/6	2006/7	% change
Actions registered	47,045	50,144	59,255	62,930	58,868	+25
No. of hearings on proof and debate	1,370	1,339	1,256	1,219	1,343	-2
Sitting days: Proof	3,301	3,054	3,154	3,238	3,165	-4
Sitting days Debate	236	231	206	214	254	+8
<b>Sitting days Proof and debate</b>	<b>3,537</b>	<b>3,285</b>	<b>3,360</b>	<b>3,452</b>	<b>3,419</b>	<b>-3</b>
Sitting days: Other	2,790	2,802	2,897	2,921	2,788	0
<b>All sitting days: Ordinary cause</b>	<b>6,327</b>	<b>6,087</b>	<b>6,257</b>	<b>6,373</b>	<b>6,207</b>	<b>-2</b>

While the number of ordinary cause actions registered in the sheriff court increased by 25%, the number of debates and proofs that proceeded fell by 2%. Though more ordinary cause actions were raised in the sheriff court over the period, they were far less likely to be heard at proof or debate. The ratio of registered ordinary actions to ordinary cause proofs or debates fell from 1 hearing for every 34 ordinary cause actions registered in 2002/3 to one hearing for every 44 ordinary cause actions registered in 2006/7.

Though there was a 25% increase in the number of actions registered in 2006/7, they took up less sitting days in 2006/7 than in 2002/3 (albeit only 2% less). This was because less sitting time was spent per case in 2006/7 than five years previous. In 2002/3, one sitting day was allocated on average to every 7 ordinary cause actions registered. In 2006/7, one sitting day was allocated to more than every 9 ordinary cause actions registered.

The number of hearings on proof and debate fell (by 2%) in the 5-year period, while the number of sitting days allocated to hearings on proof and debate also fell (by 3%). There was little difference in the time allocated to hearings. In 2002/3, one sitting day was allocated to every 2.6 hearings on proof and debate. In 2006/7, one sitting day was allocated to every 2.5 hearings on proof and debate.

Though the number of ordinary cause actions increased by 25%, there was no change in the number of sitting days allocated to ordinary cause non-hearing business. In 2002/3, one 'other' sitting day was allocated to every 17 ordinary cause actions registered. In 2006/7, however, one 'other' sitting day was allocated to every 21 ordinary cause actions registered.

### 10.7 Summary cause/small claims actions and sitting days

The number of summary cause and small claims actions initiated over the five year period fell by 10%. There was also a 43% drop in the number of full hearings with evidence led. The number of sitting days in relation to summary cause and small claims business increased slightly (by 3%) over the five year period, from 999 sitting days in 2002/3 to 1,032 sitting days in 2006/7.

**Table 38: Sitting days, registrations and hearings under summary case/small claims procedure 2002/3 to 2006/7**

	2002/3	2003/4	2004/5	2005/6	2006/7	% change
Actions registered	71,260	67,710	70,058	69,634	64,126	-10
No. of full hearings	767	510	416	513	434	-43
Sitting days: Full hearings	387	382	346	377	396	+2
Sitting days: Other	612	564	597	591	636	+4
<b>All sitting days</b>	<b>999</b>	<b>946</b>	<b>943</b>	<b>968</b>	<b>1,032</b>	<b>+3</b>

Not only was there a fall in the number of small claims and summary cause actions registered in the 5 year period, but those small claims and summary cause actions that were raised were far less likely to go to a full hearing. The ratio of summary cause and small claims actions registered to full hearings in the five year period fell from 1 full hearing for every 93 actions registered in 2002/3 to one full hearing for every 148 actions registered in 2006/7.

Though there was a 10% fall in the number of summary and small claims actions registered in 2006/7, they took up more sitting days in 2006/7 than in 2002/3 (albeit only 3% more). This was because more time was spent per case in 2006/7. In 2002/3, one sitting day was allocated on average to every 77 summary and small claims actions registered. In 2006/7, one sitting day was allocated to just under every 61 summary and small claims actions registered.

Though the number of hearings decreased substantially (by 43%) in the 5-year period, the number of sitting days allocated to summary cause and small claims full hearings increased by 2%. This was because twice as much time was spent on every full hearing in 2006/7 than in 2005/6. In 2002/3, one sitting day was allocated to every two summary cause/small claims hearings. In 2006/7, however, one sitting day was allocated for every one summary cause and small claims hearing.

Though the number of summary cause and small claims actions registered fell by 10%, there was a 4% increase in sitting days allocated to other summary cause/small claims business. In 2002/3, one 'other' sitting day was allocated to every 116 summary cause/small claims action registered. In 2006/7, however, one 'other' sitting day was allocated for every 101 cause/small claims action registered.

## 11. SHERIFF COURT CIVIL BUSINESS AND POPULATION OF SCOTLAND: ANALYSIS BY SHERIFFDOM

The distribution of civil business across the sheriffdoms, (as measured by the number of ordinary, summary and small claims actions initiated), is relatively even and has been fairly consistent over time. Over the past 12 years, no sheriffdom has contributed more than 21% of the civil business of the sheriff court in any year and no sheriffdom has contributed less than 13%. Over the past 12 years, no court has moved more than 2 percentage points in either direction.

**Table 39: Distribution of sheriff court civil business (ordinary, summary and small claims actions initiated) across sheriffdoms 1995-2001**

	All actions initiated	Glasgow	Grampian, Highlands & Islands	Lothian	North Strathclyde	South Strathclyde	Tayside
1995	140,436	17%	15%	19%	14%	16%	19%
1996	134,747	18%	14%	18%	14%	16%	20%
1997	134,364	17%	15%	18%	14%	16%	19%
1998	136,044	18%	15%	18%	13%	16%	19%
1999	135,715	17%	14%	17%	14%	17%	21%
2000	134,539	18%	14%	18%	13%	18%	19%
2001	129,125	17%	13%	18%	13%	18%	21%
2002	115,326	18%	13%	17%	13%	18%	21%
2003	115,453	19%	14%	17%	13%	16%	20%
2004	127,117	18%	14%	18%	14%	17%	20%
2005	135,494	18%	13%	18%	15%	18%	19%
2006	124,917	18%	13%	18%	15%	18%	19%

Percentages rounded to the nearest whole number

The distribution of civil business between sheriffdoms was also compared with the distribution of the population of Scotland's sheriffdoms, as recorded by the 2001 Census.

**Table 40: Distribution of Sheriff Court civil business (ordinary, summary and small claims actions initiated) and population of Scotland across sheriffdoms in 2001**

2001	Glasgow & Strathkelvin	Grampian, Highlands & Islands	Lothian & Borders	North Strathclyde	South Strathclyde	Tayside	TOTAL
All actions initiated	17%	13%	18%	13%	18%	21%	100%
Population	699,681	802,585	885,131	787,965	868,728	1,017,921	5,062,011
% population	14%	16%	17%	16%	17%	20%	100%

At the last Census, the proportion of civil actions contributed by each of the sheriffdoms to the civil business of the sheriff court more or less reflects the distribution of the population across the sheriffdoms. Glasgow contributed slightly more to the overall business of the sheriff court (17%) than might have been expected given its population (14%), while Grampian and North Strathclyde contributed slightly less (13%) than might have been expected (16% each). The proportion of civil actions raised in the sheriffdoms of Tayside, South Strathclyde and Lothian & Borders in 2001 reflects the proportion of the population of Scotland living in these sheriffdoms in 2001.

### Research relating to Party Litigants in the Inner House

1. With regard to the cases initiated in 2002, paragraph 4.3 of Lord Penrose's Report records that a high 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 in the 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. The Report goes on to say that "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."

2. With regard to procedural business Dr Wadia found that 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 effectively to manage this business, and if necessary to discipline its conduct, emerged as a major factor contributing to the total time absorbed.<sup>1</sup>

3. Dr Wadia then analysed data relating to cases commencing in 2003. As in the previous exercise, the involvement of party litigants emerged as a significant factor. Party litigants were involved in 18% of Inner House business. However, this group were involved in 40% of procedural hearings. Factors contributing to this situation included inept grounds of appeal that attracted opposition; non-appearance at hearings that required to be re-assigned; and the court's anxiety to extend latitude to unrepresented litigants.<sup>2</sup>

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<sup>1</sup> Lord Penrose (2006), *Review of the Inner House*, paragraph 4.6.

<sup>2</sup> *ibid.*, paragraph 5.5.

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