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RR Donnelley B60185 9/09

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CHAPTER 10 JUDGMENTS

Form and content of judgments

1. It is a fundamental rule of law that a litigant has a right to know why he has won or lost his case. Written judgments provide for open and transparent justice. They are available on the internet or are published in law reports. They are readily accessible to lawyers, scholars, students and members of the public here and abroad. In contrast, an *extempore*[1] judgment is accessible only to those present when it is delivered.

2. Article 6 of the European Convention on Human Rights makes no specific reference to a requirement to provide a reasoned judgment. However, the European Court of Human Rights has interpreted the general right to a fair trial to include, by implication, a final decision that is supported by adequate reasons.[2] Reasons are said to (i) inform the parties why they have lost or won; (ii) enable the losing party to exercise a right of appeal; (iii) act as a check against arbitrariness in judicial decisions; and (iv) inform members of a democratic society of the basis for such decisions. The case law does, however, make it clear that there is a margin of discretion as to the form that reasoned judgments may take. As well as allowing for different national traditions, the Strasbourg Court has stressed that the general duty to give reasons "cannot be understood as requiring a detailed answer to every argument," provided that the reasons indicate with sufficient clarity the grounds on which the decision is based.[3] Article 6 also provides that judgment should be pronounced publicly. This has been interpreted to permit the publication of judgments in writing.[4]

Current position

3. In the Court of Session there are no formal rules governing the form in which judgments must be delivered. Guidance on form and content has evolved by case law. Where a judge is called upon to deliver a final judgment in a civil case in the Court of Session, he can seldom do so without writing an opinion. A judge should ensure that the opinion gives a sufficient explanation of his reasons for reaching his

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[1] Literally "at the time" i.e. a judgment delivered orally immediately after the conclusion of a hearing or after only a short adjournment.

[2] see *Van de Hurk v. Netherlands* (1994) 18 EHRR. 481 (paragraph 61); *Hiro Balani v. Spain* (1995) 90 EHRR 566 (para 27); *Hadjianastassiou v Greece* (1992) 16 EHRR 219 (para 33); *Ruiz Torija v. Spain* (1994) 619 EHRR 553; *Hiro Balani v. Spain*, (1994) 19 EHRR 566; *Georgiadis v. Greece* (1997) 24 EHRR 606 (para 42); *Helle v. Finland* (1998) 26 EHRR 159*; Higgins v. France* (1999) 27 EHRR 703; *Garcia Ruiz v. Spain*, January 21, 1999; *Quadrelli v. Italy*, January 11, 2000.

[3] *Van de Hurk v. the Netherlands*, *supra; Georgiadis v. Greece*, *supra*; *Helle v. Finland*, *supra*; *Garcia Ruiz v. Spain*, *supra*; *Higgins v France* 1998- I, para 42

[4] *Pretto and Others v Italy* (1983) 6 EHRR 183, para 26; *Axen v Germany* (1983) 6 EHRR 195, paras 29-32 (Court of Appeal proceedings); *Helmers v Sweden* 61 DR 138 (1989) (criminal). *CF Werner v Austria (1997)* 26 EHRR 310, paras 56-59- violation where judgment merely served on parties and not available to public at large.

decision. These reasons will be necessary for the appellate court. In *Morrow v Enterprise Sheet Metal Works (Aberdeen) Ltd*[5] the Inner House said:

> "a Lord Ordinary should always express a conclusion on all issues regarding the facts which have been argued before him and which are capable of being raised in a reclaiming motion. Unless he does that, an appeal court may find itself in the position of having to arrive at conclusions upon the facts without the benefit of the views of the Lord Ordinary who heard the evidence."

4. In the sheriff court, the form and content of a judgment in an ordinary cause action is prescribed by the Ordinary Cause Rules (OCR). 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 it.[6] The findings in fact should be stated in sufficient detail to explain and justify the decision. The sheriff should always express a conclusion on all factual issues that have been argued before him and are capable of being raised on appeal. Findings in fact are followed by findings in law, supported by the applicable rules of law pertinent to the case. The function of the note is to explain the findings. The need for a sheriff to state the reasons for his decision is an important part of the sheriff's duty in every case.[7]

5. In small claims and summary cause actions it is the usual practice for the sheriff to deliver judgment orally at the conclusion of the hearing, although the rules provide for delivery of a written judgment in appropriate cases.

Responses to the Consultation

6. We asked respondents whether there should be greater scope for judges to deliver judgments *extempore*. Our respondents were equally divided on this issue.

7. Those in favour of written judgments emphasised their importance in:

- enabling the parties to understand the reasons for the judgment;
- enabling parties to assess whether there are grounds for appeal;
- assisting the appellate court in determining whether the court below has erred;
- allowing justice to be seen to be done;
- supporting the rule of law in affording protection against arbitrary decision making; and
- promoting consistency of approach and developing a coherent body of case law.

[5] 1986 SC 96.
[6] Ordinary Cause Rules 12.2(3).
[7] *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] AC 729

8. Some who favoured written judgments thought that there might be scope for them to be in abbreviated form, and that it was not necessary for judgments to rehearse all of the evidence and submissions.

9. Those who favoured a more flexible approach thought that there were categories of case in which justice would be served by the delivery of an *extempore* judgment. It was said that in a case involving a simple dispute on the facts, the parties themselves may prefer an *extempore* judgment delivered shortly after the conclusion of the proof rather than a wait of several weeks, if not months, for a written judgment. Others considered that there are many cases in which the point at issue is of importance to the parties, but of little wider relevance: for example, a road traffic case where the decision turns largely on the credibility and reliability of witnesses. In such a situation, greater encouragement can be given to the issuing of an *extempore* judgment in appropriate cases. Parties will be spared the delay inherent in the writing of an opinion before learning the outcome of their litigation. A lengthy written opinion may not be of interest to a wider audience. Another respondent agrees that where the issue is the credibility and reliability of the witnesses' testimony, a written decision is unnecessary unless an appeal is marked.

10. A note of the use of written judgments in other jurisdictions and in employment tribunals can be found in the Annex to this chapter.

Discussion and recommendations

11. There is a balance to be struck between the important public function that a system of written judgments offers and the interest of the parties in obtaining an early resolution of their dispute. A presumption in favour of delivery of *extempore* judgments or written judgments in short form, subject to a request by the parties for a full written judgment, would not serve the wider public interest in having access to judicial precedent.

12. As the Law Council of Australia stated in its response to the Federal Civil Justice System Strategy Paper issued by the Attorney General's Department in December 2003:[8]

> "it needs to be borne in mind that a large number of the cases to which legal practitioners have access and consider when advising clients are those which are unreported. There would certainly be an advantage in judges providing *ex tempore* judgments to the parties. However, to place the onus on those parties to determine whether or not an elaboration is required may not be in the interests of the legal profession, litigants as a whole and the development of the law."

13. We are accordingly of the view that in the sheriff court it should be for the sheriff or district judge to choose whether to make *avizandum*[9] at the conclusion of a

[8] http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C72EF1A-1C23-CACD-220E-D9552E36F873&siteName=lca

[9] i.e. reserve judgment until a later date

case or to pronounce judgment *extempore*. If he chooses the latter option, he should give reasons for the decision he has reached. Parties should have the right to request a written judgment in ordinary causes within seven days of delivery of the *extempore* judgment. In that event, the sheriff should follow the form and content of judgments set out in the OCR.

14. We consider that in the Court of Session it should be for the judge or Division to decide whether or not to give reasons orally, or in short form, or by means of a full written judgment. In the simplest cases reasons may be expressed as bullet points within the interlocutor. In more complex cases a brief narrative of the facts, circumstances and decision should suffice, with only the most complex requiring a full judgment. In cases that turn on their own facts the Court may consider that a full written judgment is unnecessary. In cases in which submissions are made on legal points which may have broader application, the Court should be expected to deliver a fully reasoned judgment.

15. In giving reasons for decisions on appeal it should be open to the Sheriff Appeal Court or the Inner House to give reasons in short form; for example, by referring to the reasoning of the inferior court.

16. As it is important that parties are able fully to understand the reasons for a decision and to assess whether there are grounds for appeal, it should be open to parties to request a full written judgment in those cases in which an oral or abbreviated judgment is given. Such a request should be made within seven days of delivery of the oral or abbreviated judgment.

17. For cases subject to the simplified procedure, we do not recommend any change in practice from that currently applicable to small claims and summary cause actions.

Delay in issuing judgments

18. Although the Consultation Paper did not ask a specific question on this topic we received strong representations on it.

19. The Rules of Court do not prescribe a time by which written judgments must to be issued. Some are issued many months and even more than a year after a hearing. The Lord President, as the senior judge of the Court of Session, has responsibility for the administration of that Court and the judges who sit there. Sheriffs principal have a similar responsibility. They have the power to reallocate judicial resources to provide additional writing time where it is required; but their ability to do this depends on the pressure of business and particularly criminal business.

20. We were impressed by the extent of the indignation in the profession on the subject of delays in judgments. One respondent considered that this open ended approach has the effect of denying access to justice. Another considered that the

length of time taken to issue written judgments is one of the biggest frustrations in our current system. We have been told that litigants find it impossible to understand why it takes some judges as long as it does to issue written judgments. Other respondents refer to the distress and hardship that this inflicts on litigants.

21. Another respondent considered that where a written judgment is required, the parties should be entitled to receive it within a reasonable period of time. It referred to recent examples where decisions in the Outer House have taken over a year to be produced and to one where the judgment was outstanding for almost three years. The respondent suggested that this is unacceptable. It questioned the ability of the judge to be able to remember in full the evidence and submissions after such a period of time.

22. The same respondent pointed out that there is no realistic means by which a litigant may complain when a decision is delayed. Any desire to raise a complaint is often tempered by concern that such a complaint may displease the judge. It therefore suggests that all decisions ought to be issued within a set period of, say, three months and that after the expiry of that period the case should be put out By Order so that the judge may inform litigants as to the reasons for the delay.

23. One respondent emphasised that judges are public servants. It is not helpful for an expensive and important litigation to remain unresolved indefinitely. Other respondents suggested that a judgment should be issued within a specified time limit prescribed by Rules of Court. Another suggested that By Order hearings should be fixed where a judgment is not available within the timescale so that the position can be explained to litigants.

24. Members of the Project Board have received countless informal representations from members of the legal profession that the time taken to issue written judgments is unacceptable. An audit of opinions delivered in the Court of Session during the period 1 January to 1 July 2008 shows that, in general, opinions are delivered within a reasonable period of time although one opinion was outstanding for 96 weeks and others for 94 and 93 weeks. Other cases have been drawn to our attention: in 2007 there was a case that took 91 weeks for an opinion to be issued and another case that took 123 weeks. There is a more recent example of a case at *avizandum* for 112 weeks.

25. Our audit showed that most judges deliver their judgments within a reasonable time, although a small minority do not.

26. The length of time taken to issue a judgment in the Court of Session has resulted in a case being brought before the European Court of Human Rights alleging a breach of article 6.[10] In that case final submissions had been heard on 15 May 2003 and the judgment of the Court had been issued on 18 May 2005. During the intervening two years repeated representations were made on behalf of the applicant who was informed that the judge was working on his opinion. At one

[10] *Berry v United Kingdom* Application no. 41512/05

stage the applicant received an assurance that it would be typed up by the end of 16 February 2004. Her solicitors contacted the Deputy Principal Clerk of Session who replied that the judge was on leave and that he would consult with him on his return. They also wrote to the Lord President asking him to expedite the issuing of a judgment. No reply was received. A friendly settlement was reached.

27. There are unacceptable delays in the sheriff court also. We are aware of an application for an order to free a child for adoption in which proceedings were commenced in 2002, evidence was heard in August 2003, submissions were made in November 2003, and the sheriff's judgment was not issued until June 2005.

28. If the problem of delay is not dealt with, it is likely that further applications will be made to the European Court of Human Rights.

Other jurisdictions

29. In Ireland, section 46(1) of the Courts and Court Officers Act 2002 places a statutory duty on the Courts Service to establish and maintain in the prescribed form and manner a register of every judgment reserved by the Supreme Court, the High Court, the Circuit Court and the District Court in any civil proceedings. Section 46 is reproduced in the Annex to this chapter. The register of reserved judgments came into operation on 31 March 2005. It attempts to give litigants greater predictability about the timing of judgments without unduly pressurising judges. Proceedings are re-listed before the trial judge following the expiry of two months from the hearing if judgment has not been delivered within that period. The judge should then specify when he proposes to deliver judgment, and the proceedings will continue to be re-listed on a two monthly cycle until judgment is delivered.

30. The register has its foundations in the incorporation into Irish law of the European Convention on Human Rights and in two cases in which complaints were brought against Ireland under article 6(1) in relation to delay in the issue of reserved judgments.[11] Section 46 is intended as a monitoring provision that will help to secure the legitimate expectation of litigants that judgment in their cases will be delivered within a reasonable time.

31. One commentator has pointed out that

> "judges have sizeable caseloads and, in many cases, they must consider and reflect on substantial volumes of oral and documentary evidence, often highly technical, in reaching determinations. Justice rushed may mean an outing in an appellate court. The embarrassment of repeat listings may expedite judgments in a minority of cases. However, the register's principal benefit may be in increasing the focus on scheduling judgments as a necessary part of the case management process, thus reducing the frustration and uncertainty in the waiting period." [12]

[11] Application Nos 28995/95, *Flattery v Ireland*, 8 July 1998 and 50389/99, *Doran v Ireland*, 28 February 2002

[12] Sean Barton; McCann FitzGerald e-brief February 2005

32. In Australia both the Federal Court and the Federal Magistrates Court have a goal of delivering each judgment within three months from the date on which the judgment was reserved. If a practitioner is concerned about a delay in delivering a reserved judgment he should raise the matter with the President of the Bar Association or Law Society of the State or Territory in which the case was heard. Without disclosing the identity of the practitioner, the President will refer the inquiry to the Chief Justice, in the case of the Federal Court, or the Chief Federal Magistrate in the case of the Federal Magistrates Court, who will then take up the matter with the judge or magistrate whose decision is reserved. Similar provisions exist to enable enquiries to be made about a delay in the delivery of reserved judgments in Victoria and New South Wales.

Discussion and recommendations

33. Delay in the issuing of written judgments is an impediment to an efficient and effective system of civil justice. It can be frustrating for litigants and their representatives. It may mean that a judge may not recall all material aspects of the case when finally writing the judgment.

34. There would be some merit in a system under which, after a particular period had elapsed, a hearing would automatically be fixed for the judge or sheriff to give an indication of the date when his judgment would be available. It would enable litigants and their representatives to be kept informed and provide those writing the judgments with an incentive to complete their task. But in our view this would be a costly exercise in terms of both parties' time and judicial time and it would seem unreasonable to expect parties to bear this additional burden.

35. For this reason our preference is to recommend the establishment of a register on the Scottish Courts website for those cases in which judgment has been outstanding for a period of more than three months. The rules of court should provide that if a judgment is not issued within that period the judge, sheriff or district judge should be required to provide an explanation for the delay and to indicate when the judgment is likely to be issued. This explanation should be conveyed to the parties and put on the website. Cases like this should continue to be brought to the attention of the judge, sheriff or district judge at one monthly intervals until judgment is issued. Such cases should be given the personal attention of the Lord President or appropriate sheriff principal. No appearance before the judge or sheriff would be necessary. Although cases would be entered on the register once a judgment had been outstanding for a period of more than three months, we do not mean to imply that three months is a reasonable period to wait for a judgment to be delivered. In most cases we would expect a judgment to be delivered much more quickly than that. We accept, however, that in more complex cases a period of three months might be acceptable.

36. We should not leave this topic without mentioning writing time. Judges and sheriffs cannot be expected to deliver their opinions promptly unless they are allocated sufficient writing time, particularly in heavier cases. The need for an adequate amount of time to be assigned to write up a judgment should be recognised when the court programme is drawn up. Late settlements or withdrawals can offer the opportunity to catch up with written work, but there is a need for a more systematic approach than the current practice of allocating writing time on an *ad hoc* basis. Such a practice can have the effect of encouraging inefficiency. It is not satisfactory for the administration of justice, or conducive to judicial morale, if those who are slowest in producing judgments are given the most writing time.

CHAPTER 11 ACCESS TO JUSTICE FOR PARTY LITIGANTS

1. In the Consultation Paper we recognised that there has been a significant growth in the number of party litigants appearing in the courts. Comments reflected the particular perspective of the respondent, with most demonstrating one or other of two opposing attitudes: either that litigants who represent themselves were more often than not a source of trouble to the court and created additional burdens on judges and other litigants and that measures should be put in place to reduce their numbers; or that the courts were unwelcoming and inaccessible and that significant changes were needed to simplify court procedures and to support and empower people to act for themselves.

2. In our view both of these attitudes reflect part of the truth. There are certainly party litigants whose lack of understanding of the law and court procedures causes the court and other litigants considerable trouble, delays and unnecessary expense; there are some who misguidedly raise actions with no stateable legal basis; and there are a few who actively abuse the court process. These are matters that require case management. We discuss how this should be done in Chapter 9. But we also agree that there is a need for changes to court practices and procedures so that people who do not have legal representation are able to enter and navigate their way through the court process effectively. This is particularly relevant for cases of low monetary value where the cost of legal representation would be disproportionate. In Chapter 5 we propose a new simplified procedure for low value and housing cases. Public legal education, self-help services, in-court advice services and lay representatives and McKenzie friends also have a role to play in supporting the litigant who does not have a lawyer. We discuss these matters in this chapter.

Public Legal Education

3. The Consultation Paper suggested that increasing general public knowledge about the law and the civil justice system may help people to avoid becoming involved in legal problems and that well informed citizens may be able to engage in discussion and negotiation with a view to reaching a resolution without resort to the courts.

4. Overall, public legal education (PLE) was seen in a positive light by our respondents, with over three-quarters seeing potential benefits. Most commonly respondents thought that raising public awareness and knowledge about the law and the legal system, and about rights and remedies, would help people to avoid legal problems, understand the options for dealing with legal problems when they arise and know where to go for advice to obtain redress. Some thought it could help to save the time of the courts. One respondent thought that it might enable some people to undertake some legal work for themselves. Among judges and lawyers it was seen primarily as helping people to identify when they needed advice and find their way to sources of professional help, rather than as a way of enabling people to

be more self-reliant in dealing with legal problems. Family lawyers were all supportive of greater PLE, and put the emphasis on its value in dispelling preconceptions about the law and the legal system, and making people aware of the available support services and alternatives to litigation.

5. Many respondents suggested ways by which PLE could be improved. By far the commonest suggestion was that education about the law and the legal system should be part of the school curriculum. The Public Legal Education and Support (PLEAS) Task Force project mentioned in the Consultation Paper was noted with approval by several respondents. Several also described educational initiatives in which they had themselves been involved.

6. General support for PLE was tempered with caveats about its limitations. The most commonly recurring theme was that PLE needs to be part of a larger strategy incorporating improved access to good quality advice and representation, and be adequately resourced and co-ordinated. There was also some concern that people should not be over-loaded with information they could not reasonably be expected to understand or deal with. Some respondents noted that there would always be sectors of the public who would not be able to benefit from PLE because of their poor level of literacy or other factors such as social or health problems.

7. In March 2009, the Scottish Government and Consumer Focus Scotland jointly organised a seminar on PLE at which a range of topics was discussed, including the challenges for developing PLE in Scotland and the target groups for any PLE initiatives. The seminar delegates overwhelmingly thought that the Scottish Government had a key role to play in taking PLE forward in Scotland on a strategic level.[1]

8. Raising awareness amongst the public of ways of dealing with legal problems and disputes and of sources of advice and help is likely to assist those who, when faced with a justiciable problem, either try to solve it themselves or simply "lump it."[2] It may also mean that those who do seek help find the right help more quickly. We recommend that the promotion of PLE should be an element of any strategy to improve access to justice in Scotland.

Self-Help Services

9. The Scottish Court Service (SCS) currently has available on its website a guide for party litigants, small claims and summary cause information and procedural guides, and a guide to simplified divorce/dissolution of civil partnerships. A section called 'Your Questions' gives answers to some common questions about court procedure. The website also has links to other sites, such as Edinburgh Citizens Advice Bureau (CAB), Shelter, Scottish Law Online and the Scottish Government,

[1] Consumer Focus Scotland (May 2009),*Public Legal Education*, *Report of Seminar*
[2] H Genn and A Paterson (2001), *op. cit*, Chapter 3

although these are not on the front page. The SCS also have proposals in hand to establish a new system for dealing with party litigants within the Court of Session, involving a dedicated clerk and an appointment system and a document which sets out the respective rights and responsibilities of party litigants and SCS staff.

Responses to the Consultation

10. In the Consultation Paper we asked what contribution, if any, 'self-help' services for party litigants can make to improving access to justice. The majority of respondents thought that they had some contribution to make, although proportionately fewer responses from the legal profession and judiciary took this view. It was generally thought that there is considerable potential for greater use of information technology within the courts.

11. Suggested ways to assist individuals to prepare and present their own cases included court forms/styles; information on what to expect in a specific court; guides to the law in specific areas and to party litigants' rights in court; and information packs on how to go about pursuing or defending small claims. Materials could be provided in a litigants' library which could be available either on-line, in hard copy or on DVD. Suggestions as to who could prepare such guidance included universities working with advice agencies and the SCS.

12. Many respondents, while considering that self-help services can make a contribution to improving access to justice, thought that they were appropriate mainly in straightforward, low value cases. There were concerns about whether such services could help in cases of any complexity. Family cases were singled out by several practitioners as examples of the kinds of case where self-help services would not have a significant role to play. On the other hand one respondent saw advantages in parties representing themselves, possibly with the assistance of a McKenzie friend,[3] and wished to see websites being developed which included a step-by-step approach to court procedures, with examples of documentation, information on how to conduct a case and simple explanations for the various procedures required.

13. Overall the attitude of respondents towards self-help services was that these had their place within the civil justice system and could make a contribution to improving access to justice, but that there are limitations in relation to the types of case in which they could be useful and the people who can benefit from them. There was a consistent view that in complex cases, in particular family or matrimonial cases, it would always be in a litigant's best interests to have expert legal advice and representation. However, self-help services should be available as a safety net for those who do not qualify for legal aid and cannot afford to instruct a solicitor.

[3] See paras 41-53 of this chapter for a discussion about McKenzie friends.

Research on the views and experiences of civil sheriff court users

14. The recently published report[4] of a small scale research project carried out by Ipsos MORI on behalf of the Scottish Legal Aid Board (SLAB) and Consumer Focus Scotland provides some interesting information about the experiences of some sheriff court users. The research project was an exploratory qualitative study based on telephone interviews with a sample of 35 civil litigants in the sheriff court. It found that people who try to move through the civil court system without representation can experience considerable anxiety because of their lack of awareness or understanding of the process. This can create preconceptions that are worse than the reality turns out to be. Lack of information about the reasons for postponement of hearings and lengthy waiting times in court were also sources of irritation for litigants. Overall, the report concludes that

> "The clear message emerging from the research is the need for greater provision of practical and comprehensive information for litigants on what to expect during legal proceedings and how litigants can best seek advice and progress their case effectively."

Other Jurisdictions

15. The issue of self-help services has been addressed in reviews of other civil justice systems including New Zealand,[5] Ontario[6] and British Columbia.[7] Overall these conclude that self-help services are necessary if party litigants are to be assisted either to deal with their dispute without having to go to court or to obtain access to the courts successfully, not only from their own perspective but also from that of the court and other court users. Information generally agreed to be necessary includes basic legal information and resources, referrals to other agencies (for further information and with a view to accessing alternative methods of dispute resolution), assistance with completion of forms and information on court procedures.

16. There is also an accepted view that hard copies of documents as well as on-line access is important and that the presentation of materials should be considered carefully. Sometimes more personalised sources are required. Written information should be provided in plain language, with the use of headings, large print, pictures or diagrams. It should be provided in a variety of languages, and in braille. Flow charts are often more accessible than pages of text, although the most user-friendly form of information provision can often be face-to-face or at least accessible by phone or email. There should always be a contact person/organisation listed for provision of further information.

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[4] Ipsos MORI (July 2009), *The Views and Experiences of Civil Sheriff Court Users: Findings Report.*
[5] New Zealand Law Commission (2004), Report 85, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, *Part 1*
[6] Justice CA Osborne (2007), *Civil Justice Reform Project*, *Summary of Findings and Recommendations*, Ontario Justice Reform Project
[7] Civil Justice Reform Working Group in British Columbia (2006), *op. cit.*

17. The New Zealand report takes the view that some kind of central agency should take the lead role in overseeing the delivery of legal information. The Civil Justice Reform Project in Ontario goes further and proposes a model for a self-help centre, a number of which have already been established in British Columbia, Quebec and Alberta. The components of a self-help centre may vary. It may provide services in a physical location at or near a courthouse, from a mobile unit or through a virtual location on the internet, or a mixture of these models.

18. The report of the British Columbia Justice Review Task Force proposes what it refers to as a "hub," a single place where people can get the information and services they require to solve legal problems on their own. The hub would:

- co-ordinate and promote existing legal-related services;
- provide legal information;
- establish a multidisciplinary assessment/triage service to diagnose the legal problem and provide referrals to appropriate services;
- provide access to legal advice and representation if needed through a clinic model;
- support dispute prevention and planning through plain language, legal education, preventive law and systems design;
- facilitate access to mediation or other dispute resolution processes.

19. A number of jurisdictions in the USA have developed fairly substantial self-help services, for example in Washington and Indiana.[8] In Indiana the Supreme Court has laid the groundwork for a state-wide network providing basic resources to party litigants. An Advisory Committee was set up in response to "the growing national phenomenon of people choosing to represent themselves without lawyers". Its role is to make recommendations to the Supreme Court; develop a comprehensive strategy plan; and help trial courts respond to the growing numbers of party litigants. The Committee also provides basic resources to party litigants including uniform, state-wide forms. It encourages local courts to develop their own assistance programs. The Advisory Committee is comprised of judicial officers, county clerks, Bar representatives, legal services providers, librarians, and other community members. The Division of State Court Administration houses and administers the project with the help of Counsel to the Chief Justice.

20. It may be argued that other jurisdictions have a well developed system of self-help services because there is lesser or indeed no provision of civil legal aid. The Washington State Supreme Court's 2003 *Civil Legal Needs Study*,[9] which found that nearly 90 per cent of low-income families in Washington receive no help whatsoever when facing serious civil legal problems, resulted in increased funding for the

[8] See Washington LawHelp, http://www.washingtonlawhelp.org/WA/index.cfm; and the Indiana Supreme Court Self Service Legal Center, http://www.in.gov./judiciary/selfservice.
[9] Washington State Supreme Court Task Force on Civil Equal Justice Funding (2003), *The Washington State Civil Legal Needs Study*

Northwest Justice Project which supports Washington Lawhelp.[10] In Indiana the alternative to self-help provision is *pro bono* services. As the report of the Law Commission for New Zealand states:

> "...improving access to legal information and advice is becoming even more pressing in the face of the contemporary reality of increased self-representation and of uneven representation."[11]

Recommendations

21. In Scotland we are fortunate to have a legal aid system that is not capped and in which the upper disposable income threshold for financial assistance for civil legal aid has recently been increased from £10,306 to £25,000. The traditional model of legal aid provided by lawyers is only part of the picture. In our view a mixed economy, with a range of sources of information, advice and help to deal with legal disputes, which also encourages the development of good, informative on-line facilities, is the best way to ensure that most people have the support they need to obtain access to justice.

22. Respondents to the Consultation Paper and the conclusions of the research project commissioned by SLAB and Consumer Focus Scotland (see paragraph 14) support the view that there is a need to provide clear and easy to access self-help facilities for parties involved in disputes which will fall within the new simplified procedure. Some material is already available on the SCS website, but the documentation can appear lengthy and confusing to a litigant who has no previous experience of the legal system. Access is not as easy as it could be. Litigants need to know what they are looking for before they start, for example guidance on small claims procedure. We recommend that there should be a section of the SCS website that is much more obviously aimed at the public and contains all the information required to start or defend a case under the simplified procedure. There should also be information about the structure of the civil courts and other civil procedures.

23. Material should be regularly reviewed and updated to ensure that it is accurate. It would be useful to test material on focus groups as it is being developed and, in due course, to monitor its effectiveness.

24. The SCS website should provide links to other bodies' websites which can be a source of advice and guidance; for example, CAB, the Scottish Government, law centres, Consumer Focus Scotland and the like. Information about mediation and

[10] Washington LawHelp is an internet guide to free civil legal services for people on low incomes in Washington. It provides legal education materials and tools giving basic information on a number of legal problems, detailed instructions and forms to help parties represent themselves in court, and information on free legal aid programs in Washington. It is maintained by staff at the Northwest Justice Project (NJP). The NJP is a not-for-profit statewide organisation that provides free civil legal services to those on low incomes from offices throughout the state of Washington. Information obtained from http://www.washingtonlawhelp.org..

[11] New Zealand Law Commission (2004), *op. cit.*

other methods of dispute resolution[12] should also be provided to allow potential litigants to explore other options before commencing a case or once the process has started.

25. We also recommend that the proposals which SCS have in hand to establish a new system for dealing with party litigants within the Court of Session should be extended to all courts. In particular, consideration should be given to the documentation of service standards which should be made available to party litigants in cases under the simplified procedure.

In-Court Advisers

Current projects

26. The first in-court advice project was introduced in Edinburgh Sheriff Court in April 1997 to provide court users with legal and other advice.[13] Subsequently five in-court advice pilots funded by the Scottish Government were located in Kilmarnock, Aberdeen, Dundee, Hamilton and Airdrie. The Scottish Government also funds the Homelessness Advice Desk in Paisley Sheriff Court, which is run by Paisley Law Centre.

27. The main aims of the pilots are

- Increasing the number of clients seeking advice and assistance;
- Increasing client confidence in court proceedings;
- Increasing the effectiveness of court hearings;
- Increasing general efficiency of the court system; and
- Decreasing the number of decrees granted in absence of the defender.

28. All the in-court advisers have the same remit - to provide a range of services to people without legal representation involved in certain civil court proceedings, including small claims and debt and heritable summary cause actions. The range of services available includes advice, information, negotiation, advocacy, onward referral and representations. Clients are largely local authority or housing association tenants, although there is a difference in the balance between sheriff courts. For example, housing accounts for the vast majority of cases in Kilmarnock but for only around half of cases in Airdrie. Some cases subject to ordinary cause procedure are undertaken but the policy and practice on this differs. The attitude of the sheriff is an important factor in whether the adviser becomes involved in such cases.

29. The Edinburgh project is managed by the local CAB. The other five services have different management structures, with Aberdeen, Hamilton and Airdrie having

[12] We discuss these in more detail and make recommendations in Chapter 7.
[13] E Samuel (1999), *Supporting Court Users: The In-court Advice Project in Edinburgh Sheriff Court*

a local CAB manager, Dundee jointly managed by CAB and Shelter, and Kilmarnock managed by East Ayrshire Council. The management structure has implications for how the adviser carries out the remit and who is able to make use of the service. For example, it is considered inappropriate for the adviser in Kilmarnock to appear on behalf of anyone who is being taken to court by East Ayrshire Council, although representation may be an element of the role for another adviser. Nearly all of the Kilmarnock in-court adviser's work is to do with housing cases and her role is restricted to giving advice and dealing direct with the housing and legal sections of the Council on the tenant's behalf. Another example of the influence of the management arrangements on the delivery of the service is in Dundee where the in-court adviser, whose part-time post is managed by Shelter, deals predominantly with summary cause heritable cases, but will not act for landlords against tenants because this would be contrary to Shelter's policy.

30. The independent evaluations of the service in Edinburgh[14], Aberdeen, Hamilton, Airdrie, Dundee and Kilmarnock[15] were positive in their conclusions. Demand was found to be high, as were levels of satisfaction amongst clients, court staff, sheriffs and local agencies. The services were found largely to meet their aims and objectives while advisers were generally fitting well into courts and with local agencies. There were a number of problems. These included the adequacy of accommodation for the advisers and the related health and safety issues; administrative support staff for the advisers; adviser qualifications and training; early intervention in cases; further expansion of the services; and models of service provision. Recommendations were made to continue the pilots on a longer term basis and to extend the services nationally so that as many people as possible would have access to an in-court adviser. It was also recommended that, following consultation, a decision should be taken on whether to include cases subject to ordinary cause procedure as part of the services.

31. The Ipsos MORI report referred to at paragraph 13 above also provided some information about public perceptions of the in-court advice services. The litigants interviewed were "almost universally positive about the in-court advice services and the advisers who work there." There were however some concerns about whether the services had sufficient staff and resources to meet demand, and about whether they were properly publicised. The report suggests that increased staffing and better publicity, together with better liaison between the services and court staff, could have benefits both for litigants and for the effective management of cases in the court.

32. The Scottish Government has continued to provide funding for the pilots up to the current financial year. Responsibility for them has now transferred to SLAB.

[14] E Samuel (1999), *ibid* and E Samuel (2002), *Supporting Court Users: The In-court Advice and Mediation Projects in Edinburgh Sheriff Court: Phase 2*
[15] S Morris et al (2005), *Uniquely Placed: Evaluation of the In-court Pilots, Phase 1.*

Responses to the Consultation

33. Chapter 2 of the Consultation Paper asked what contribution court-based advice services could make to improving access to justice. Two thirds of respondents thought that they could make a positive contribution and there was strong support for the extension of the existing in-court service. This supported the findings of the evaluation project. Respondents tended to view the services as being of most relevance in housing, debt and consumer claims and other types of "social welfare" cases, especially where solicitors in private practice would not consider the work to be sufficiently remunerative. There were some concerns that an in-court adviser could not provide as good a service as a lawyer in private practice and about whether the provision of an in-court advice service might compromise the independence of the courts. In-court advisers were not generally thought to have a significant role to play in relation to personal injury and family cases.

34. Some respondents thought that one of the benefits of in-court advice services would be in putting pressure on party litigants to take advice when it was available and the court thereby being able to take a more robust approach to those party litigants who failed to do so. One respondent thought that sheriffs should have the power to compel a party litigant to meet the representative of the in-court advice service for advice on rules of procedure and that failure to use the service following such referral should be taken into account by the court when awarding expenses. Another thought that the cost of providing an in-court service would be offset by cost savings in terms of court time where the service assisted party litigants with procedural aspects of their litigation. There was also a view that party litigants who unreasonably refused such services should not be excused by the court for failing to comply with the court rules, as is currently the approach in many cases.

35. In addition to seeking responses in the Consultation Paper, we had meetings with the in-court advisers. It was apparent from these meetings that the services all operate in different ways, partly as result of the different management structures. It is also likely to be a reflection of the different backgrounds and training of the individual advisers and a response to the local culture within the relevant sheriff courts and to the attitude of individual sheriffs. In some instances the in-court advisers saw themselves as the final stage after other agencies such as CAB had been consulted. In others, the adviser was much more proactive in trying to offer assistance at an early stage in a dispute.

Recommendations

36. We consider that the in-court advice services make a useful contribution to improving access to justice for those who are able to make use of their services. We recommend that such services should be developed and extended. Such development should happen within the context of SLAB's broader plans for the improvement and co-ordination of publicly-funded civil legal assistance and advice.

37. In addition to the matters identified in the evaluation reports, we recommend that SLAB should consider the quality and consistency of advice and help being provided by the different services.

38. It is for SLAB to conduct an in-depth evaluation of the current provision for in-court advice and to develop a policy of what an in-court advice service should look like. One particular issue which we think requires to be carefully considered is whether in-court advice services are to be targeted at any particular group of potential users and therefore, by implication, to be unavailable to other groups. In the Kilmarnock and Dundee services this already happens, in effect, because of the management structures of the project. This has resulted in what might appear to be an arbitrary limitation on the ability of some potential users to obtain help from the services. The structure of each of these services may be the result of a pragmatic approach to establishing and evaluating a pilot project, but consideration should be given to whether such arrangements are appropriate in the longer term. Local requirements may differ but it can be argued that where in-court services are publicly funded they should have similar policies and practices. It is difficult to justify a private landlord in one area being able to get advice from an in-court adviser about a problem tenant, but not in another area, simply because of the management structure in place at the relevant advice service. We have no difficulty with in-court advice services being targeted at particular user groups where an analysis of local needs supports this; but the rationale should be clear and explicit, so as not to raise the expectations of other potential user groups or cause difficulties for the advisers themselves.

39. Where the in-court adviser is unable to assist an inquirer, there should be clear and consistent protocols for referrals to other sources of advice and help. These should apply where the inquirer does not fall within the service's target group, if it has one, and where the service is already assisting the other party in the dispute and there would accordingly be a conflict of interest.

40. We have considered the suggestion that a link should be made between the availability of in-court services and their use by party litigants, and that failure to use the service should be taken into account by the court when awarding expenses or in relation to the leeway party litigants are allowed in conducting cases. It is always open to the court in awarding expenses to take account of a party's behaviour. In recommending a new simplified procedure our intention is that the court should take an interventionist approach, which should include such action as is necessary to ensure that party litigants comply with the court's directions. We therefore do not consider that it is necessary to make a recommendation on this particular issue.

McKenzie Friends

Current position

41. As a general rule parties in Scotland are entitled to 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 advocate.[16] Under the procedures for small claims and summary causes, a party may be represented by an authorised lay representative, if the sheriff considers the representative to be a suitable person.[17] A party can generally represent only himself and not, for example, a group of which he purports to be a spokesman.

42. In Chapter 6 of the Consultation Paper we asked whether a person without a right of audience should be entitled to address the court on behalf of a party litigant and, if so, in what circumstances. This relates to a trend in the courts in England and Wales where, for over 30 years, party litigants have been allowed assistance in court from what have become known as "McKenzie friends".[18] McKenzie friends do not take on the role of a lawyer, but may give assistance by making notes, helping with case papers or quietly giving advice on the conduct of the case, as well as providing moral support in court. Sections 27 and 28 of the Courts and Legal Services Act 1990 provide the court with a discretionary power to grant rights of audience to a lay individual. A court may therefore grant a McKenzie friend a right of audience in exceptional circumstances, provided an application is made at the start of a hearing. This has happened on occasion.[19]

43. Many party litigants are assisted in conducting their litigation before the Court of Session by friends and acquaintances, who sit behind them in court.[20] The practice of the Scottish Land Court permits McKenzie friends. 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. In *Kenneil v Kenneil*[21] Lord Glennie, granting an application for a wife to represent her husband who was otherwise unrepresented at the hearing, found that the Court of Session has discretion to allow a lay person to speak for a party litigant. He emphasised, however, that such representation should be allowed only in

[16] *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 persons granted a right of audience under section 25 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990. Act of Sederunt (Sheriff Court Rules Amendment) (Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) 2009 (SSI. 2009/163) enables members of the Association of Commercial Attorneys who are properly qualified and trained to exercise certain rights to conduct litigation and certain rights of audience in the sheriff court.
[17] Small Claims Rules 2002, rule 2.1; Summary Cause Rules 2002, rule 2.1.
[18] *McKenzie v McKenzie* [1971] P 33.
[19] *Izzo v Philip Ross & Co* (a firm) Times Law Reports 9 August 2001.
[20] *Martin Frost and John Parkes v Cintec International Limited* [2005] CSOH 119, 9 September 2005.
[21] [2006] CSOH 95, 16 June 2006

exceptional cases. Each case will depend on its own facts. In *Anderson, petitioner*[22], in the absence of any Scottish authority supporting that approach, Lord Mackay of Drumadoon found it to be incompetent, although he did acknowledge that such an arrangement might in certain circumstances prove to be of practical assistance.[23]

Responses to the Consultation

44. Respondents to the Consultation Paper were fairly evenly divided as to whether or not a person without a right of audience should be permitted to address the court on behalf of a party litigant.

Arguments in support

45. Some respondents considered that such representation was appropriate where, for example, English is not a party litigant's first language, or where the party litigant is subject to a disability which restricts his full participation in the action. Another thought that a party litigant could be substantially assisted by a more articulate, less nervous or more experienced representative. This might also benefit the court and the opposing party and his solicitor. A common theme was that a person without a right of audience should be permitted to address the court only in exceptional circumstances and that the court should retain an ability to make the decision on a case by case basis and have the power to revoke its decision if it sees fit. Various tests were proposed in relation to the exercise of that discretion.

46. Respondents submitted that the circumstances in which such a representative is permitted to address the court should be carefully controlled and their role clearly defined. It was suggested that the representative should not be entitled to remuneration of a financial nature, other than reasonable travel expenses. The assistance he could give would include providing moral support, giving non-legal advice, suggesting questions to ask witnesses, consulting with the party litigant during the proceedings, making notes and helping source legal forms.

Arguments against

47. A number of respondents were against change on the basis that the existing rules strike the correct balance. They emphasised the maintenance of high standards and the obligations of professionalism which enable matters to be dealt with efficiently. One respondent pointed out that the professional regulation associated with legal representation underpins the way in which the court system functions. Professional obligations would not be incumbent upon non-legally qualified representatives, who could not be relied upon to provide the same quality of assistance to the court. Another respondent considered that it is important to bear in

[22] [2007] CSOH 110, 26 June 2007.
[23] A public petition was presented to the Scottish Parliament (PE1247) in April 2009 calling for the introduction of a McKenzie friend facility in the Scottish courts.

mind the legal representative's dual roles as adviser and officer of the court, and that courts benefit from advisers who are not intimately involved in the litigation.

48. One respondent highlighted the particular difficulties it saw in a McKenzie friend acting in a family law case. It thought there would be considerable difficulties in introducing such a scheme, which would have to address issues such as what, if any, qualification and/or experience in the law, practice and procedure the person would require to have; whether the person had a vested interest in the case on behalf of a special interest group; and at what stage in the litigation the person would first appear. Another respondent warned that one consequence of individuals being able to act on behalf of party litigants could be an increase in the number of "recreational" party litigants who offer their experience or "expertise" to other party litigants. Quite often these people are described to the court as being a friend or acquaintance, but in reality are charging a fee of some sort for their services. If the current restrictions were to be relaxed, this trend would, in its view, almost certainly develop.

49. A comparative analysis of rights of audience in some other jurisdictions is given in the Annex to this chapter.

Recommendations

50. We agree that the legislation regulating those who have rights of audience in the courts is aimed at providing appropriate safeguards and protections to members of the public and seeks to ensure a high quality of representation before the courts. With the exception of our proposals in relation to lay representation in simplified procedure cases, discussed in Chapter 5, we do not favour rights of audience being extended generally to those without suitable qualifications.

51. However, we recognise that there may be exceptional circumstances in which it would be appropriate to permit a McKenzie friend to assist a party litigant and, with the court's permission, to address the court. The law at present is unclear and it would be desirable to clarify this for the small number of cases where such representation would help to the court.

52. This is not to say that parties would have the right to be represented by a McKenzie friend. Assistance and representation would be subject to the control and discretion of the court and permission would be given only if the court was satisfied that this would help. The court would have to be satisfied as to the character and conduct of the proposed representative and would be at liberty to withdraw permission for that person to act for the party. In particular, the court would wish to be satisfied that the McKenzie friend was not offering his services for financial reward.

53. We therefore recommend that a person without a right of audience should be entitled to address the court on behalf of a party litigant, but only in circumstances where the court considers that such representation would help it. Whether such a

person would be of assistance would be at the discretion of the court. Without prejudice to its general discretion, the court should be entitled to refuse to allow any particular person to appear on specific grounds relating to character and conduct. The court should be entitled to withdraw its approval at any time. The court's decision should be final and not subject to appeal. The rules of court should specify the role to be played by the individual and should provide that he is not entitled to remuneration.

CHAPTER 12 JUDICIAL REVIEW AND PUBLIC INTEREST LITIGATION

1. In Chapter 6 of the Consultation Paper we asked whether the rules governing the procedure in petitions for judicial review are satisfactory.

2. A number of key themes emerged from the consultation. These were that the procedure is in need of reform; it should provide for a greater degree of case management; and the rules on title and interest to sue in judicial review applications should be clarified.

3. Views were divided on whether there should be a time limit in which to raise proceedings and whether there should be a requirement to seek leave to proceed.

Current position

4. 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.[1] However, as they are more likely to be opposed, their contribution to the workload of the Court of Session is more significant than would otherwise be expected. More recent figures indicate that petitions for judicial review took up 11.7% of sitting days for all first instance business between September 2005 and July 2008. The number of such petitions registered in 2006 comprised only 3.5% of all first instance business. This indicates the disproportionate amount of time, about three times more than might be expected, taken up with the hearing of such petitions. The average length of each hearing is 1.66 sitting days.

5. With regard to the types of issues raised by petitions for judicial review, there has been a significant increase in the number of applications in immigration and asylum cases, with the number of such petitions more than doubling since 2000 and constituting almost half of all applications for judicial review in 2006. In 2008 this had risen to 79%. From 2004 onwards, petitions by prisoners also made a substantial contribution to the volume of applications initiated.[2]

Recent developments

6. The Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") creates a two-tier tribunal system from 3 November 2008. The First-tier Tribunal is the tribunal of first instance, and will eventually replace most existing tribunals (other than employment tribunals). The Upper Tribunal hears appeals from the First-tier Tribunal, and also has power to deal with judicial review applications transferred to it from the High Courts of England and Wales and Northern Ireland and from the

[1] See Annex D to the Consultation Paper
[2] *Ibid*

Court of Session. A stated policy intention is that this will allow parties to have the benefit of the Upper Tribunal's specialist expertise in cases similar to those with which it routinely deals in the exercise of its statutory appellate jurisdiction.

7. Section 20 of the 2007 Act, enables the Court of Session to transfer judicial review applications to the Upper Tribunal. An application can be transferred only if it does not seek anything other than an exercise of the Court of Session's supervisory jurisdiction. Applications cannot be transferred if they relate to specific issues such as devolved matters. Subject to these exceptions, transfer is mandatory for those classes of application specified by act of sederunt. To date one class has been specified: applications which challenge a procedural decision or procedural ruling of the First-Tier Tribunal[3]. If the application does not fall within such a class the Court has a discretion to transfer it.

8. Applications for judicial review in immigration and asylum cases were originally excluded from transfer. In August 2008 the United Kingdom Government consulted on this. The consultation paper[4] proposed that section 20 be amended to leave it open to the judiciary to decide what types of judicial review case should be transferred, whether as a class or on an individual basis. It considered that some, but not all, immigration judicial review cases would be suitable for transfer. Respondents were evenly split over this issue. The Government decided to legislate to extend the power of transfer to immigration and asylum cases.

9. Accordingly section 53 of the Borders, Citizenship and Immigration Act 2009, which received royal assent on 21 July 2009, enables the Court of Session to transfer certain judicial review applications in immigration and asylum cases to the Upper Tribunal. This includes applications that call into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered.

10. Consideration is currently being given to the types of applications for judicial review that it would be appropriate to transfer to the Upper Tribunal.

Responses to the Consultation

11. Of those who responded to this question only ten (23%) considered that the current procedure for petitions for judicial review is satisfactory. Twenty five respondents (57%) considered that it is not. A further seven respondents, whilst they considered the procedure to be satisfactory, still recommended reforms. Accordingly 32 (73%) of respondents considered that some reforms should be made.

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[3] Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (SSI 2008/357).

[4] Home Office UK Border Agency (2008), *Fair decisions; Faster Justice. Consultation on Immigration Appeals*

12. The principal areas of reform proposed by respondents were: the rules on title and interest to sue; the introduction of time limits for bringing applications for judicial review; whether a requirement to obtain leave to proceed should be introduced; and whether the procedure under Chapter 58 of the Rules of the Court of Session (which deals with applications for judicial review) should be amended.

Title and interest to sue

13. In order to bring a petition for judicial review in Scotland, a petitioner must have both title and interest to sue. Title and interest is not required for a public interest intervention in terms of Rule 58.8A of the Rules of the Court of Session. This allows a person who is not a party to a judicial review petition to seek leave to intervene on the basis that the proceedings raise a matter of public interest, the propositions to be advanced by the applicant are relevant and likely to assist the court, and the intervention will not prejudice the rights of the parties. These are two separate issues, although in some cases there may be a significant degree of overlap. For a person to have title to sue:

> "he must be a party (using the word in its widest sense) to some legal relationship which gives him some right which the person against whom he raises the action either infringes or denies."[5]

In more recent cases it has been said that this phrase must be given content and meaning keeping it abreast of developments in administrative law and judicial review. An individual or body seeking to challenge an act or decision of a public body must go further than demonstrating that the issue is one of public interest, and

> "must show that, having regard to the scope and purpose of the legislation, or measures, under which the act is performed, or the decision is made, he or they have had such a right conferred upon them by law, either expressly or impliedly."[6]

Whether or not a petitioner has title to sue will, therefore, depend upon the legislative context in which the application is brought. For example, in *Scottish Old People's Welfare Council, Petitioners,*[7] Age Concern Scotland, whose object was to promote the welfare of old people in Scotland, sought judicial review of an official circular giving guidance on legislation on hardship payments for severe weather. The Court took the view that the legislation in question conferred rights on members of the public generally and, accordingly, as the organisation's membership included individuals upon whom rights had been conferred, the organisation itself had title to sue. By contrast, in *PTOA Ltd v Renfrew District Council*[8] an association of taxi drivers sought judicial review of the licensing authority's policy on allocating licences following local government reorganisation. It was held that the association had no title to sue, as although they had a right to object to individual licence applications,

[5] Lord Dunedin in *Nicol (D&J) v Trustees of the Harbour of Dundee* 1915 SC (HL) 7
[6] Lord Clarke in *Rape Crisis Centre v Secretary of State for the Home Department* 2000 SC 527
[7] 1987 SLT 179
[8] 1997 SLT 1112

they had no legal relationship qualifying them to challenge a policy decision. The petitioner in *Rape Crisis Centre v the Secretary of State for the Home Department*[9] provided support, advice and assistance for victims of rape and received funding for this purpose from local authorities and charitable donations. The petitioner sought to challenge the Home Secretary's decision to grant leave to Mike Tyson, a convicted rapist, to enter the United Kingdom to take part in a boxing match in Glasgow. The Lord Ordinary held that the petitioner did not have title to sue as the immigration rules are addressed to officials who require, in the exercise of their statutory functions, to make decisions under primary legislation; and that these rules confer no express or implied rights on any other parties.

14. So far as interest to sue is concerned, although older cases refer to "pecuniary right and status"[10], more recent cases have adopted a broader approach. In *Scottish Old People's Welfare Council,* Lord Clyde described the position as follows:

> "The interest must be such as to be seen to be material or sufficient. The pursuit of an academic issue would not suffice, nor would an attempt to seek a general pronouncement of law on facts which were hypothetical. There must be a real issue. But the existence of a sufficient interest is essentially a matter depending upon the particular circumstances of the case."[11]

He concluded that Age Concern Scotland did not have interest:

> "The petitioners are not suing as a body of potential claimants but as a body working to protect and advance the interests of the aged. Their purpose in the present context is not to claim benefit themselves or for their members but to secure that benefit is available in all cases in which they believe it is deserved."[12]

Thus, although they had title to sue, the petition was dismissed as they did not have a sufficient interest to bring proceedings. In contrast, although the petitioners did not have title to sue in the *PTOA* case,[13] the court accepted that they did have interest. The petitioners in the *Rape Crisis* case were also held to have sufficient interest but no title. In England and Wales where a similar challenge to the Home Secretary's decision was refused on the merits no issue was raised in relation to entitlement to bring proceedings.[14]

15. In Scotland, therefore, if a body such as Age Concern Scotland wishes to seek judicial review of an official decision or policy, it must identify an affected person who is:

[9] 2000 SC 527
[10] Per Lord Ardwall in *Swanson v Manson* (1907) 14 SLT at 738
[11] 1987 SLT 179 at 186
[12] Ibid. at 187
[13] 1997 SLT 1112
[14] *R v Secretary of State for the Home Department*, *ex parte Bindel*, January 17, 2000, unreported

> "willing to lend their names to the action - a forensic stratagem which one might have expected reform of the law to make unnecessary."[15]

In England and Wales, a body such as the Child Poverty Action Group had been held to have sufficient interest to seek judicial review in relation to the interpretation of social security legislation.[16]

16. It is said that these restrictive Scottish rules on standing mean that work is lost to England. The authors of *Judicial Review 20 Years On - Where Are We Now?*[17] cite the example of Greenpeace's decision to bring proceedings in England challenging Ministerial approval of the disposal of the Brent Spar oil platform in Scottish waters, on the basis of an opinion from a Scottish QC on problems that they would have in showing that they had standing in Scotland. The authors referred to situations where, given the choice, well funded campaigning groups will raise proceedings for judicial review in London. This was also the experience of some respondents in our consultation.

17. It has been argued that there is nothing worth keeping in what are currently distinctive Scottish aspects of the law of standing:

> "The truth is that the most distinctive aspect - the separation of title and interest - serves no useful function. First, the requirement to show title is not necessary for the purpose of distinguishing between the frivolous litigant and those with a serious interest in the outcome of litigation: the requirement of interest is perfectly capable of performing that function on its own. Second, the requirement to show title may exclude those who have a substantial personal interest in challenging illegal acts, such as trade competitors. Third, it adds confusion because litigants are not able to predict when lack of title will be successfully argued against them. And finally, the separation of title from interest causes particular confusion in the context of public interest standing because public interest petitioners are told in some cases that they have title but lack interest, but in others they have interest but lack title, with the reasons for the difference not being clear."[18]

18. Lord Hope of Craighead has observed that:

> "...an approach to standing which applies a private law test to issues of public law is at risk of being out of touch with the public interest in having matters of that kind, about which a section of the public has a genuine grievance, litigated in the courts."[19]

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[15] A Bradley (1987) 'Applications for Judicial Review-The Scottish Model' *Public Law*, 313. The Dunpark Committee, which made recommendations relating to the introduction of a specific procedure for judicial review, was of the view that there was a strong case for extension of the common law rules of title and interest to sue to enable every person who is directly or indirectly affected by an alleged unlawful act or decision to challenge it.

[16] *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1990] 2 QB 540

[17] S Blair and S Martin, 2005 SLT (News),31, 173

[18] T Mullen (2006) 'Standing to Seek Judicial Review', in A McHarg and T Mullen (eds) *Public Law in Scotland*, 241-261

[19] Lord Hope of Craighead (2001),'Mike Tyson Comes to Glasgow-A Question of Standing' *Public Law* 294

19. Some respondents argued that the current approach to standing is inconsistent with obligations under European law. For example, the UK has ratified the Aarhus Convention, the third pillar of which is concerned with access to environmental justice. It gives rights to members of the public, including environmental organisations, to challenge the legality of decisions by public authorities in relation to the environment. Article 9(2) provides that members of the public having sufficient interest must have access to a court of law or other independent and impartial body to challenge the legality of certain classes of decision. The European Community has also ratified the Convention, and it is accordingly open to the European Commission to take action against Members States to comply with Aarhus obligations in areas within Community competence, using the enforcement mechanisms under Article 226 of the Treaty.[20]

20. The restrictive rules on standing may also give rise to the question whether Scotland, by failing to provide a mechanism for interest groups to challenge the compatibility of primary legislation with Community law by means of judicial review, is in breach of its obligations to provide an effective remedy under Community law. This can be contrasted with the position in England and Wales where the House of Lords, in the case of *R. v Secretary of State for Employment, ex parte Equal Opportunities Commission and Another*[21], recognised that the Equal Opportunities Commission had standing in such a case.

21. There are, however, a number of objections to the proposition that individuals and pressure groups should be permitted to litigate to advance the general public interest. It can be argued that strict rules of standing are necessary to conserve scarce judicial resources; their relaxation will result in a flood of unnecessary litigation and there is a risk that cases will be inadequately presented by parties with no real interest in the outcome. However, the evidence from England, where a more liberal approach to standing is taken, is that the vast majority of cases are brought by individuals or bodies with a personal stake in the outcome.[22]

22. If the rules on title and interest to bring a petition for judicial review were to be relaxed then consideration requires to be given to what test of standing should apply. Section 31(1) of the Supreme Court Act 1981 provides that a court in England and Wales may not grant permission to apply for judicial review unless the claimant has demonstrated a "sufficient interest" in the matter to which the claim relates. Whether a claimant has established a sufficient interest is a question of both fact and law, having regard to all the circumstances of the case.[23] In *R v (1) Somerset County Council, (2) ARC Southern Ltd ex p. Richard Dixon*[24] it was said that the English courts have always been alive to the fact that a person or an organisation with no particular

[20] Working Group on Access to Environmental Justice (2008), *Ensuring access to environmental justice in England and Wales*, para 10.
[21] [1994] 2 WLR 409
[22] See T Mullen (1997), *op. cit*, p 258
[23] *R v Inland Revenue Commission ex p. National Federation of Self-Employed and Small Businesses* [1982] AC 617
[24] (1998) 75 P & CR 175

legal interest in the outcome of a case might wish, and be well placed, to draw the court's attention to an apparent misuse of public power. Thus, if an arguable case of misuse of public power could be made out at the application for leave stage, the court's only concern should be that it is not being made for an ill motive.[25] The test of sufficient interest has also been adopted for the purposes of judicial review proceedings arising under the law of England and Wales, and Northern Ireland, before the new Upper Tribunal.[26]

23. The sufficient interest test is said to be a relatively low hurdle for potential claimants to overcome.[27] The Court of Appeal reviewed the law on standing in 2003 in the *Feakins*[28] case where Dyson LJ held that if a claimant is able to demonstrate that a genuine public interest will be furthered if he is granted standing, he will be regarded as having a sufficient interest to proceed. It is said that the case of *Edwards*[29] suggests that in what are regarded by the courts as deserving cases, the sufficient interest test is wide enough to allow pressure groups, nominal claimants and third parties to bring proceedings.[30]

24. The adoption of a sufficient interest test would not necessarily involve a departure from the Scottish approach of treating standing as a preliminary issue to be considered separately from the merits of the action.[31]

Recommendations

25. On balance, we are persuaded that the current law on standing is too restrictive and that the separate tests of title and interest should be replaced by a single test: whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings. In assessing whether a petitioner has a sufficient interest the court would have regard to the factors identified by Lord Clyde in the *Scottish Old People's Welfare* case: that is, the petitioner must demonstrate an interest which is material; the pursuit of an academic point would not be permitted nor would the court give a general pronouncement of the law on facts which are hypothetical; there must be a real issue between the parties. We do not think that it would be possible or desirable to elaborate on the test, the application of which would depend on the facts and circumstances of each case.

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[25] E Legere (2005), 'Locus *Standi* and the Public Interest: A Hotchpotch of Legal Principles', *Judicial Review*, *10 (2)*
[26] Tribunals, Courts and Enforcement Act 2007 section 16
[27] E Legere (2005), *op. cit.*
[28] *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546
[29] *R (David Edwards) v (1) The Environmental Agency, (2) Secretary of State (Defendants) & Rugby Ltd (Interested Party)* [2004] EWHC 736 (Admin)
[30] E Legere (2005), *op. cit.*
[31] *Matchett v Dunfermline District Council* 1993 SLT 537; *Scottish Old People's Welfare Council*, *op. cit*, *PTOA Ltd v Renfrew District Council*, *op. cit.*

A time limit to bring proceedings for judicial review

26. At present there are no time limits within which an application for judicial review must be brought. Just over 20% of the respondents on this issue considered that a time limit should be introduced. Some respondents said this caused uncertainty for those bodies whose decisions, acts or omissions may be challenged and for third parties whose rights or interests may be affected. Indeed, it was argued that the interests of good administration, and the right of third parties to rely on administrative decisions once they have been made, require that an affected person wishing to challenge an administrative decision should do so at the earliest possible opportunity.

27. One respondent, a government agency, argued that the absence of a time limit can cause practical problems. It pointed out that it is still being served with challenges against refusals by the Immigration Appeal Tribunal (IAT) to grant permission to appeal to the IAT against a decision of an adjudicator. A new means of challenging such refusal was introduced by the Nationality, Asylum and Immigration Act 2002, yet due to the absence of a time limit in Scotland, petitions relating to the old procedure are still being brought. Similarly, an application for judicial review of a decision to refuse a fresh human rights or asylum claim under paragraph 353 of the Immigration Rules can presently be brought at any time. The respondent considered that a fixed period within which such challenges could be brought would mean that petitioners would need to take action to challenge an allegedly unlawful decision within a reasonable period of time of the decision being made, rather than challenge the decision only when removal action is initiated.

28. Although Chapter 58 of the Court of Session Rules does not impose a time limit, a petitioner who delays in bringing an application may be met with a plea of *mora*, taciturnity and acquiescence. Such a plea may be upheld where a petitioner has been guilty of excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances, to the detriment of the other party.[32] The passage of time before a challenge is made may be such as to yield the inference of acquiescence, and the concept of detriment to good administration has been recognised where further administrative action has been taken in the belief that the decision in question has been acquiesced in.[33]

29. In *Somerville v the Scottish Ministers*[34] the Inner House emphasised that there were three distinct elements to the plea, all of which require to be present for the plea to be sustained. *Mora*, or delay, is a general term applicable to all undue delay. Taciturnity connotes a failure to speak out in assertion of one's right or claim. Acquiescence is silence or passive assent to what has taken place. In civil proceedings delay alone is not enough. Prejudice or reliance are not necessary elements of the plea. At most, they are circumstances from which acquiescence may be inferred.

[32] Per Lord President Kinross in *Assets Co Ltd v Bain's Trustees* (1904) 6 F 692 at 705
[33] Per Lord Nimmo-Smith in *Singh v Secretary of State for the Home Department* 2000 SLT 533 at 537
[34] 2007 SLT 96

30. What is regarded as excessive or unreasonable delay will depend on the facts and circumstances of the case.

31. Some respondents submitted that the doctrine of *mora* works reasonably well. Others thought that it was undesirably vague. Despite the guidance given by the Inner House in *Somerville*, there continues to be doubt as to whether prejudice or reliance are necessary elements of the plea.[35]

32. The case for the imposition of a time limit within which to bring an application for judicial review is based on the principle of legal certainty. This was expressed by Lord Diplock in *O'Reilly v Mackman*[36] in the following terms:

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

33. In other jurisdictions the time limits specified in legislation governing judicial review vary, as do the dates from which time begins to run. The Annex to this chapter sets out the position in some other jurisdictions. In England and Wales, rule 54.5(1) of the Civil Procedure Rules provides that in such actions the claim form must be filed (a) promptly and (b) in any event not later than three months after the grounds to make the claim first arose. A similar rule applies in Queensland. Rule 98.06 of the Rules of the Supreme Court of South Australia specifies a limitation period of 6 months. There are no specific time limits for the commencement of proceedings for judicial review in New Zealand, nor in some of the Canadian provinces.

34. A claimant seeking judicial review in England and Wales must file the claim form promptly and is not necessarily entitled to wait up to 3 months before commencing proceedings. This is particularly so where third parties may be adversely affected by the overturning of a decision.[37] Where the court considers that there has been undue delay in making a claim for judicial review, it may refuse to grant leave for the making of the application, or any relief sought, if it considers that granting the relief sought would be "likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".[38] The court may, however, extend the time limit if it is satisfied that there are good reasons for doing so.

35. It has been suggested that the imposition of a short period for bringing applications may "stimulate weak or premature applications for leave" to apply for

[35] e.g. *CWS v Highland Council* [2008] CSOH 28, para 58 in which it was noted that there is an apparent discrepancy between *Pickering v Kyle and Carrick District Council* and *R(Burkett) v Hammersmith LBC* on the one hand, and *Somerville v the Scottish Ministers* on the other.
[36] [1983] 2AC 237
[37] *R v Independent Television Commission ex parte* TVNi [1996] JR 60
[38] Supreme Court Act 1981, section 31(6)

judicial review and "lead to some forms of governmental illegality going unchallenged."[39]

36. The Public Law Project, a legal charity in England and Wales which aims to improve access to public law remedies, considers that the strict time limit of three months in that jurisdiction creates difficulties, especially, though not exclusively, for vulnerable potential applicants. It maintains that 3 months is a very short time within which to find a solicitor, organise funding and prepare a case. It can be difficult to find a solicitor to take on a judicial review case, and those solicitors who do this work may not be able to take on a case once it is up against the deadline.

37. In contrast, a number of our respondents expressed the view that the time limit in England and Wales does not seem to unduly inhibit well-founded claims.

Recommendations

38. We consider that the common law plea of *mora*, taciturnity and acquiescence is not particularly well suited to a procedure designed to provide a speedy and effective remedy to challenge the decisions of public bodies. In such cases there is a public interest in challenges being made promptly and resolved quickly. Accordingly, we are of the view that a time limit should be introduced within which petitions for judicial review must be presented. If there is good reason for delay in making an application, or where the court is satisfied that injustice would result if a petition presented outwith the time limit was not allowed to proceed, the court should have discretion to allow a late petition to proceed.

39. We note the time limits applicable in other jurisdictions and take the view that a period of three months should be sufficient in the vast majority of cases. We also consider that there are some cases in which a delay of three months in bringing an application would be excessive and that the general rule should be that petitions for judicial review should be brought promptly and, in any event, within a period of three months, subject to the exercise of the court's discretion to permit a petition to be presented outwith that period.

Introduction of a leave or permission stage

40. Under the current procedure governing judicial review there is no mechanism by which unmeritorious applications can be sifted out. Several respondents considered that such a procedure should be put in place in order to give the court an opportunity to filter out those claims that have no prospect of success.

41. The main reason put forward by respondents opposed to such a mechanism is that it is unnecessary as the procedure for granting first orders is sufficient. There is also concern that the introduction of a leave mechanism could result in potentially successful cases being refused permission to proceed.

[39] L Bridges et al (1995), *Judicial Review in Perspective*

42. One model suggested by respondents is the introduction of a procedure similar to that in England and Wales, where the court's permission is required before a claim for judicial review can proceed.[40] The claimant is required to serve upon the defendant a claim form accompanied by a detailed statement of his grounds, the evidence on which he relies, a time estimate for the hearing, any written evidence in support of the claim, copies of any document on which he proposes to rely and a list of essential documents for advance reading by the court. The defendant has 21 days to answer the claim by providing a summary of his grounds for doing so. The papers are then considered by an Administrative Judge, who will generally consider the question of permission without holding an oral hearing.[41] If permission is refused the claimant is entitled to request, within 7 days, that the matter be reconsidered at an oral hearing.[42] A right of appeal lies to the Court of Appeal against a refusal to grant permission.[43] There is also a special procedure for urgent cases and those where interim orders are sought.

43. In deciding whether or not to grant permission to proceed the court will assess whether or not the claimant has an arguable case. The Privy Council has held that the case must be not merely potentially arguable, but must have a realistic prospect of success, subject to the important qualification that arguability cannot be judged without reference to the nature and gravity of the issue to be argued.[44]

44. The reference to a realistic prospect of success is similar to the wording of the Civil Procedure Rules on both the setting aside of a default judgment and summary judgment (i.e. summary decree), where the test is whether the defendant has no real prospect of successfully defending the claim or issue.

45. Lord Woolf said in *Swain v Hillman:*[45] "The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success and they direct the court to the need to see whether there is a "realistic" as opposed to "fanciful" prospect of success."

46. In *ED & F Man Liquid Products Ltd v Patel & Anr,*[46] which concerned the setting aside of a default judgment, the Court of Appeal explained the distinction between realistic and fanciful prospects of success as appropriately reflecting the observation in earlier case law that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better

[40] Civil Procedure Rules, Rule 54(4)
[41] Practice Direction 54A, Rule 8(4)
[42] Rule 54(12). In 2002 the rate of renewed applications after refusal was around 50%
[43] In the legal year 2002/2003, there were 280 applications for permission to appeal a decision refusing permission to claim for judicial review filed with the Court of Appeal. That figure had decreased rapidly to 101 in 2004/5 and was standing at 70 by 2006/2007
[44] *Sharma v Brown-Antoine* [2006] UKPC 57
[45] [2001] 1 All ER 91 at 92j
[46] [2003] EWCA Civ 472

than merely arguable. In this context the court regarded the use of the words "real" and "realistic" as interchangeable.

47. A total of 6,690 applications for permission to apply for judicial review were received in the Administrative Court in 2007.[47] In the same year, 4,116 applications proceeded to the permission stage, approximately two out of every three applications received. Around a third were withdrawn, in many cases because the parties reached agreement that the respondent would reconsider or review the decision complained of. Of those applications that proceeded to the permission stage, 847 (21%) were granted permission to proceed and 3,269 (79%) were refused permission. Immigration/asylum applications made up 65% of the total number of applications received in 2007 and 64% of applications proceeding to the permission stage in 2007. Of the 2,616 immigration/asylum applications that proceeded to the permission stage, only 310 (12%) were granted permission to proceed.

48. Research carried out by the Public Law Project[48] and the University of Essex into the permission stage in judicial review in England and Wales found that of a sample of 1,449 issued claims, 496 (34%) were concluded before reaching the permission stage. The researchers suggest[49] that the increased rate of early settlements occurs because the pre-action protocol for judicial review and the opportunity given to the respondent to oppose the granting of permission encourage respondents to look more closely at claims before they reach the permission stage. This leads respondents to concede or settle where they accept the essence of the claim or for other, pragmatic reasons. This, in turn, may mean that those claims that do proceed to the permission stage are less meritorious, or more contentious, which may explain why judges are insufficiently convinced of the merit of a relatively high proportion of them. The researchers suggest that if this is correct, it should not be assumed that just because lower proportions of claimants are obtaining permission than under the previous procedure where permission was sought on an *ex parte* basis, claimants are becoming less successful in their claims for judicial review. They suggest that it may be more accurate to argue that because greater numbers of cases are being resolved earlier, access to the court is becoming less necessary.[50]

49. In contrast, the procedure for granting first orders in Scotland rarely allows a respondent the opportunity to oppose the granting of such an order. A recent amendment to the Rules of the Court of Session[51] provides that a first order can be granted (though may not be refused) without hearing counsel for the petitioner. Unless interim orders are sought, which trigger a caveat lodged by the respondent, the respondent will be unaware that the petition has been lodged and will have no opportunity to oppose the granting of a first order. One respondent, whose core litigation work is in the field of public law and one of whose principal clients is the

[47] Figures are based on Ministry of Justice (2008), *Judicial and Court Statistics 2007*, Table 1.12
[48] See the website at http://www.publiclawproject.org.uk/PermissJudicRev.html
[49] The findings of the research are referred to in V Bondy and M Sunkin (2008), 'Accessing Judicial Review', *Public Law* , Sweet and Maxwell
[50] V Bondy and M Sunkin (2008), *op. cit*, p 657
[51] Act of Sederunt (Rules of the Court of Session Amendment No. 10)(Miscellaneous) 2007; No.548, in force 7 January 2008

Home Secretary, considers this change to have been a detrimental step. As regards immigration and asylum petitions, it is its experience that where a caveat has been triggered a significant proportion of petitions are successfully opposed at first order stage. Petitioners in such cases are now less likely to seek interim orders, with the result that caveats are not triggered, first orders are granted automatically and petitioners are able to stay longer in the United Kingdom. A requirement to obtain leave to bring proceedings would assist in weeding out unmeritorious claims at an early stage.

Recommendations

50. There has been a steady increase in numbers of petitions for judicial review. They occupy a disproportionate amount of sitting days. We also note the impact of the recent change in the rule relating to the granting of first orders. In England and Wales the introduction of a pre-action protocol for judicial review and a procedure, by which a respondent may oppose the granting of permission, has resulted in around a third of all applications for judicial review being resolved before the permission stage is reached. Of those cases which proceed to the permission stage, permission is refused in a relatively high percentage; in only a small minority of cases is there an appeal against refusal of permission. Research[52] suggests that these procedures work well in filtering out unmeritorious applications and in prompting early concessions where claims are well founded.

51. We recommend the introduction of a requirement to obtain leave to proceed with an application for judicial review in Scotland, following the model of Part 54 of the Civil Procedure Rules in England and Wales. We consider that such a procedure will assist, at an early stage, in encouraging early concessions by respondents in cases which are well founded and in preventing unmeritorious claims from proceeding. This will create additional capacity in the court programme, enabling those cases in which leave is granted to be dealt with expeditiously. We consider that the petitioner should be required to serve upon the respondent and any interested party, within seven days of lodging the petition, the petition itself, a time estimate for the leave hearing, any written evidence in support of the petition, copies of any document on which the petitioner proposes to rely and a list of essential documents for advance reading by the court. The respondent should have 21 days to answer the petition. The respondent should be entitled to oppose the granting of leave. The papers should then be considered by a Lord Ordinary, who will not normally require an oral hearing. The Lord Ordinary will decide whether the petitioner has an arguable case. If leave is refused, or granted on certain grounds or subject to conditions, the petitioner should be entitled to request, within 7 days, that the matter be reconsidered at an oral hearing before another Lord Ordinary. If leave is refused, there should be a right of appeal, within 7 days, to the Inner House which would look at the petition anew. For urgent cases, for example, in relation to directions for removal in immigration and asylum cases, provision should be made for an appeal to be made forthwith and in writing and to be accompanied by a Note

[52] V Bondy and M Sunkin (2008), *op. cit.*

by the Lord Ordinary setting out the reasons for refusing leave. The appeal would be heard by the Inner House on an expedited basis.

52. In our view, the test that should be applied in deciding whether or not to grant leave to proceed should be whether the petition has a real prospect of success, in the sense that it is not fanciful. If, on consideration of the papers, or on hearing the parties, the Lord Ordinary is not satisfied that the petition has a real prospect of success then leave should be refused. We agree that arguability cannot be assessed without reference to the nature and gravity of the issue to be considered.

53. This approach requires the petitioner to demonstrate more than that his case is merely stateable, the test we propose in Chapter 9 for refusing to warrant an initial writ. Under our proposals the petition will be served on the respondent, who may oppose the application for leave. In deciding whether or not to grant leave the Court will be able to take into account whether the application is opposed and the grounds for that opposition. The Court will have a much fuller picture of the strengths and weaknesses of the parties' cases and will be in a position to assess whether the petition can be said to have a real prospect of success. It would be open to the Court to direct that a hearing on leave should take place if the Court did not think that it could make a decision on the papers.

54. This will mark a departure from the current position where a petition for judicial review may be presented if, in the opinion of these representing the petitioner, there is a stateable case. In giving that advice those representing the petitioner are reliant upon the instructions given to them and may not be aware of relevant information held by the respondent. In our view, it should be for the Court rather than one of the parties to make an assessment, having heard from both parties, of whether a case has sufficient merit to be permitted to proceed to a full hearing. We should emphasise that a 'real' prospect of success is not the same as a 'reasonable' prospect of success and that the Court does not have to be satisfied that, on a balance of probabilities, the petition will be successful.

Case management

55. The greatest concern of those respondents who consider the procedure for judicial review to be unsatisfactory is the lack of case management, which they consider can lead to a delay in the determination of the issues. The Court's powers of case management come into play only at the first or second Hearing. Of particular concern is the fact that answers may not be lodged as a matter of course and that if they are, they can be lodged just before the first hearing. This can lead to a waste of time in preparing to meet lines of argument that may not be advanced. It also makes it difficult to assess what length of hearing is likely to be needed. Further, there are no procedural rules governing the lodging of documents or affidavits in the interval between the service of the petition and the first hearing.

56. Another concern voiced by respondents is the length of time it takes to obtain a first hearing. The Rule[53] envisages that the first hearing will take place shortly after the service of the petition but, according to some respondents, in practice it is frequently fixed for a date many months later with the result that the first hearing is treated as the substantive hearing rather than a procedural hearing.

57. Having made enquiries of the Keeper's Office of the Court of Session we understand that as at April 2009, the average period between the date of first order being granted and the date fixed for the first hearing was 10 term weeks.

Recommendations

58. We consider that the introduction of a requirement to seek leave will provide an opportunity to hold an early case management hearing, to ensure that the issues are properly focused at the subsequent hearing on the merits of the application and that a diet of an appropriate length is fixed for that hearing. We recommend that, where leave to proceed is granted on the papers, the Lord Ordinary should, at the same time, issue standard orders, as prescribed by Rules of Court, to include, where appropriate, (a) the date by which answers shall be lodged; (b) the date prior to the hearing on the merits up to which parties have a right to adjust their pleadings; (c) the date by which all relevant documents, marked up to indicate which parts parties intend to rely on, shall be lodged; (d) the date by which all authorities on which parties intend to rely shall be lodged; and (e) the date by which notes of argument shall be lodged. It should be open to the parties to request, or the court to fix on its own initiative, a case management hearing to deal with procedural issues, such as the need to modify the standard orders. A hearing on the merits of the petition should be fixed to take place no later than 12 weeks from the lodging of answers.

Expenses in Public Interest Litigation

59. Although in the Consultation Paper we did not ask a specific question about the Court's exercise of its discretion to award expenses in cases raising significant issues of public interest, a number of respondents raised this issue and submitted that the use of what are known in England and Wales as Protective Costs Orders (PCOs) should be formalised in Scotland.

60. PCOs have been developed by the English courts in the exercise of their discretionary powers in relation to expenses, and represent a departure from the normal rule that the 'loser' pays. It is always open to the court in the particular circumstances of a case to decide that both sides should bear their own expenses. This is not uncommon in cases raising questions of public importance or interest brought by parties - generally against a public authority - who might not have the

[53] Rules of the Court of Session, Rule 58.7: "On being lodged, the petition shall, without appearing in the Motion Roll, be presented forthwith to the Lord Ordinary in court or in chambers for-
(a) an order specifying- … (iii) a date for the first hearing, being a date not earlier than 7 days after the expiry of the period specified for intimation and service…"

financial standing to meet an adverse finding in expenses. Because a potential liability in expenses may act as a disincentive to bringing such proceedings, liability for expenses generally being determined only at the end, the English courts have developed a range of orders which may be made at the commencement or in the course of proceedings. These may limit a claimant's liability in expenses to a specified sum or declare that, regardless of the outcome of the case, the claimant will not be required to pay the expenses of the defendant or any third party. Where the court makes a PCO in favour of a claimant it may also impose a 'costs capping' order limiting the amount of expenses that the claimant may recover in the event of success. This is intended to address the potential for a PCO to operate as a blank cheque enabling the claimant to litigate in an unreasonable or disproportionate fashion in the knowledge that it will not incur any liability in expenses.

61. The development of PCOs and similar types of orders in other common law jurisdictions is discussed in the Annex to this chapter. One of the drivers of this development has been the obligations incumbent upon signatories to the Aarhus Convention. The Aarhus Convention stipulates that signatory states shall ensure access to justice for the public and establish procedures for doing so which shall 'provide adequate and effective remedies…and be fair, equitable, timely and *not prohibitively expensive*'.[54] Furthermore, signatory states must 'consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'[55]

62. The leading English case is *R (Corner House Research) v The Secretary of State for Trade and Industry*[56] in which the Court of Appeal laid down guidelines which should be taken into account by the court in deciding whether to make a PCO. These are:

(1) A PCO may be made at any stage of the proceedings, on such conditions as the Court thinks fit, provided that the court is satisfied that: (i) the issues raised are of genuine public importance; (ii) the public interest requires that those issues be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.

(2) If those acting for the applicant are doing so *pro bono*, this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, at its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above.[57]

[54] *Ibid*, Article 9, para 4 (emphasis added)
[55] *Ibid*, Article 9, para 5
[56] [2005] EWCA Civ 192
[57] [2005] EWCA Civ 192 at para 74

63. In *McArthur v Lord Advocate,*[58] Lord Glennie confirmed that, in his view, it was competent for the Scottish courts to make a PCO, although he was not persuaded on the facts of the case that it was appropriate to do so.

> "The real question is whether, as a matter of discretion, it is appropriate to make such an order; indeed, whether it would ever be appropriate to make such an order at this early stage of the proceedings. The ordinary rule is that expenses follow success: *Ramm v Lothian & Borders Fire Board (supra)*. While there are many grounds for departing from that general rule, they are normally grounds rooted in the conduct of the parties in relation to the litigation and, more generally, the dispute. The objection to a protective order for expenses granted at the beginning of the litigation is that it fetters the discretion of the court which hears and resolves the dispute. In other words, it deprives the court hearing the dispute of the opportunity of taking into account, in its award of expenses, the conduct of the parties in and in connection with the litigation. Such considerations are a considerable impediment to the making of a protective order of the type sought. However, I see no intrinsic problem with making such an order in a case where the court is able, in advance, to form a sufficient view of the importance of the case being brought and of its merits; and to be satisfied that the future conduct of the case would not cause it, at the end of the litigation to form a different view."

64. He endorsed the guidelines laid down by the Court of Appeal in the *Corner House* case subject to the qualifications that the guidance might require development or adaptation in the light of the circumstances, and there may be factors peculiar to litigation in Scotland which are not adequately taken into account in the *Corner House* guidelines.

65. It is understood that a second application for a PCO was made in Scotland by four named individuals in the context of an appeal by Friends of the Earth Scotland in relation to the M74 extension. It is said that the Inner House was not convinced that a PCO would be competent in Scotland and indicated that this issue should be considered by the Rules Council.[59]

66. English practice has moved on since the *Corner House* case was decided and since the decision in *McArthur*. Judges have a wide discretion in deciding whether a case raises questions of general importance or public interest; the requirement that the claimant should have no private interest in the outcome of the litigation has been doubted although not formally overruled; the practice of making a costs capping order restricting representation for the claimant to junior counsel has been departed from in appropriate cases; and PCOs have been granted in a number of cases where the claimant's lawyers were not acting on a *pro bono* basis.[60]

67. Furthermore, there has been some discussion about whether the guidelines laid down in *Corner House* are sufficient to satisfy the requirements of the Aarhus

[58] 2006 SLT 170
[59] F McCartney (2007) 'Access to environmental justice', *Paths to Justice? Essays prompted by the Gill Review*, SCOLAG
[60] B Jaffey (2006), 'Protective Costs Orders in England and Wales', *Judicial Review*, *11(2)*

Convention. The Report of the Working Group on Access to Environmental Justice chaired by Mr Justice Sullivan considered that the criteria might require to be reformulated in environmental cases in order to comply with the Convention. There were two concerns: the 'general public importance' test might be too high a hurdle unless the upholding of environmental law in an individual context could be regarded as a matter of general public importance, and the 'no private interest' test would not be apt in the context of an environmental judicial review brought by an individual seeking to protect a private interest. The Report recommended that the principles of the Convention should be taken into account in applications for a PCO in environmental cases and expressed the hope that the Court of Appeal would find an early opportunity to revisit the *Corner House* guidelines in this context.[61]

68. In 2006 a Working Group on Facilitating Public Interest Litigation, chaired by Lord Justice Maurice Kay and comprising a group of senior government lawyers, lawyers acting for claimants and representatives of other interested bodies, reported on whether and when it was appropriate for the courts to make PCOs. The project was funded by the Nuffield Foundation and organised by Liberty. The Group's conclusions were:

1. The courts should be prepared to grant PCOs in public interest cases.
2. A public interest case for this purpose is one where:
   (i) the issues raised are ones of general public importance, and
   (ii) the public interest requires that those issues should be resolved.
3. It should not be a condition for obtaining a PCO that the person or body applying for it have no private interest in the outcome of the case.
4. Nonetheless, the nature and extent of an applicant's private interest was a factor relevant to the decision whether to grant a PCO.
5. Three types of PCO could be identified:
   (i) an arrangement where the party benefiting from the PCO will not be liable for their opponent's costs if they lose but will be entitled to recover their costs if successful (a Type 1 PCO);
   (ii) an arrangement where neither side will be liable for the other's costs (a Type 2 PCO); and
   (iii) an arrangement where the benefiting party's liability for their opponent's costs if they lose is capped in advance (a Type 3 PCO).
6. All three types of order were orders that the circumstances of a particular case might justify and should therefore be options available to the courts.
7. Agreement could not be reached on whether a cap should be placed on the costs incurred by the party benefiting from a Type 1 or Type 3 PCO.

[61] This issue was considered by the Court of Appeal in *Morgan v Hinton Organics (Wessex) Ltd.* [2008] EWCA CIV 107 where the Court favoured the modification of the criteria for making PCOs in environmental cases

8. In deciding whether to grant a PCO the courts should place little emphasis on the fact that the lawyers for the applicant are acting or are prepared to act *pro bono*.
9. It should not be a condition for obtaining a PCO that unless the order was granted the person or body applying for it would not proceed with the substantive proceedings – this was, however, an issue that a court could properly take into account.
10. The public interest in a case and the disparity of resources between the parties might justify granting a PCO even though the person or body seeking the order might still be able to pursue the case without one.
11. There was no reason in principle why a PCO should not be granted for an appeal.
12. (With some dissent) There should be a presumption in relation to that application on an application for a PCO that there should be no order as to costs, this rule only to be departed from where a party acts unreasonably.[62]

69. In his Review of Civil Litigation Costs, Lord Justice Jackson has invited comments on the *Corner House* criteria and whether they strike the right balance.[63]

Discussion & Recommendations

The desirability of an express power to make a PCO

70. There is no express power in the Civil Procedure Rules for courts in England and Wales to make a PCO, although there is an express rule permitting costs capping. The case law concerning PCOs has developed by way of guidelines laid down by the courts in the exercise of their general discretion in relation to expenses. In *Corner House* the Court of Appeal expressed the hope that the Civil Procedure Rules Committee would give further detailed consideration to this issue. It was noted by the Court of Appeal in *R (Buglife — The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* that so far the Committee had not done so in any detail. [64]

71. One advantage of having an express power is that draft rules in an area which is controversial and which involves a careful balancing of the interests of claimants and public bodies could be put out for consultation so that a range of views from interested parties, not just the arguments advanced in any particular litigation, could inform the formulation of the principles to be applied. Another advantage is that prospective litigants are aware that it is open to them to apply for such an order and of the criteria that will have to be satisfied if an order is to be made in their favour. The status quo leaves room for doubt and may not be sufficient to fulfil the United Kingdom's obligations under the Aarhus Convention.

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[62] Working Group on Facilitating Public Interest Litigation (2006), *Litigating the Public Interest*, Liberty
[63] Lord Justice Jackson (May 2009), *op. cit*, Part 7: Chapter 35
[64] 2008 EWCA Civ 1209 at para 29 per Sir Anthony Clarke MR

72. On the other hand, it is evident from the experience of other jurisdictions that trying to formulate a public interest test has proved difficult and that the tendency has been to leave the courts to develop principles on a case by case basis.

73. If there were clear authority that it was competent for the Scottish courts to make PCOs then leaving the courts to develop guidelines appropriate for this jurisdiction might be an attractive option. However, as doubts have been raised at Inner House level about the competency of such an order it may be open to question whether the current arrangements satisfy the requirements of the Convention. Furthermore, an important element in striking a fair balance is the ability of the court in England and Wales to make a costs capping order, either limiting the amount which a successful defender can recover from a public interest litigant (a form of limited immunity from liability in expenses) or limiting the amount which a successful public interest litigant, who enjoys the protection of a PCO, may recover from the defender (to avoid the PCO operating as a blank cheque). For these reasons we consider that an express power should be conferred upon the courts in this jurisdiction to make special orders in relation to expenses in cases raising significant issues of public interest.

Factors to be taken into account in exercising the court's discretion

74. The principles enunciated in the *Corner House* case have been developed in subsequent jurisprudence and have been the subject of scrutiny by various commentators, the Report of the Working Group on Environmental Justice, and the Working Group on Facilitating Public Interest Litigation. The fundamental issue is whether it would be fair and just in any given case to make an order. The observation in *Corner House* that such orders will only be made in exceptional circumstances is in recognition of the stringency of the criteria rather than an additional hurdle for the applicant to overcome.[65] The Court of Appeal has been reluctant to give additional guidance on the principles that the issues raised must be of general public importance or that the public interest requires their resolution, suggesting that the judge should have a wide discretion to apply these principles to the facts of the particular case. There is widespread support for the view that the 'no private interest' criterion is unduly restrictive and is at odds with the rules on standing to bring applications for judicial review, although the existence of a private

[65] See *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, per Waller LJ at para 24, Smith LJ at para 80-83, Buxton LJ (dissenting) at para 64-66. See also Appendix 3 to the Report from a Working Group on Access to Environmental Justice, referred to by Waller LJ in *Compton*: "In *Corner House*, the Court of Appeal accepted that PCOs should only be granted in "exceptional" cases. But it now seems this 'exceptionality' test is being applied so as to set too high a threshold for deciding (for example) 'general public importance', thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case, *Bullmore*, the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with Aarhus."

interest should be a factor which the court takes into account. It has been suggested that the *Corner House* principles attach too much weight to whether the claimant's lawyers are acting on a *pro bono* basis. The probability of the claimant discontinuing proceedings in the absence of a PCO is thought to be too high a test, although the risk of this happening might be a relevant consideration.

75. A reformulated *Corner House* test might, accordingly, look something like this:

> The court may make a protective costs order at any stage of the proceedings and on such conditions as it thinks fit if it is satisfied that:
>
> - the issues raised are of general public importance;
> - the public interest requires that those issues be resolved; and
> - having regard to the financial resources of the applicant and the respondent and to the amount of expenses that are likely to be involved, it is fair and just to make the order.
>
> In exercising its discretion the court may have regard to:
>
> - whether the applicant is likely to abandon the proceedings and will be acting reasonably in so doing if an order is not made; and
> - whether the applicant's legal representatives are acting on a pro bono basis.
>
> It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

76. Another model would be that proposed by the Australian Law Reform Commission (ALRC), which recommended that the following criteria should govern the award of a public interest costs order:

> "A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that
>
> - the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
> - the proceedings will affect the development of the law generally and may reduce the need for further litigation
> - the proceedings otherwise have the character of public interest or test case proceedings.
>
> A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter."[66]

[66] Australian Law Reform Commission (1995), *Costs Shifting – who pays for litigation*, *Report 75* Recommendation 45

77. The ALRC recommended that the court should have the power to make an order in the following terms:

> "If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to
>
> - the resources of the parties
> - the likely cost of the proceedings to each party
> - the ability of each party to present his or her case properly or to negotiate a fair settlement
> - the extent of any private or commercial interest each party may have in the litigation.
>
> The orders the court or tribunal may make include an order that
>
> - costs follow the event [i.e. expenses follow success]
> - each party shall bear his or her own costs
> - the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
>   - not be liable for the other party's costs
>   - only be liable to pay a specified proportion of the other party's costs
>   - be able to recover all or part of his or her own costs from the other party
> - another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.
>
> An order under this provision will be subject to the power of the court or tribunal to make disciplinary and case management costs orders."[67]

78. We consider that the model proposed by the ALRC could usefully be adapted for introduction in Scotland.

[67] *Ibid*, Recommendation 47

CHAPTER 13 MULTI-PARTY ACTIONS

1. In Chapter 3 of the Consultation Paper we asked whether it would be desirable to introduce a separate procedure for multi-party litigation. The term 'multi-party' litigation was used by the Scottish Law Commission (SLC) in its discussion paper[1] and reports[2] discussed below to describe litigation where a number of persons have the same or similar rights. The SLC identified three different categories of multi-party actions:

- *public interest* actions which are brought by public officials who seek redress for the public at large, or for a section of it;
- *organisation* actions which are brought by an organisation, such as a consumer protection or environmental organisation, on behalf of its members or the public at large. These are sometimes known as 'external pursuer actions' since a group or association is granted standing to sue on behalf of consumers for damages suffered by them;
- *class actions* which are brought by a named plaintiff or pursuer who is typically the self-appointed representative of a class (or group) of persons, and who seeks redress both for himself and for the other class members.3

2. In England and Wales and some other Commonwealth jurisdictions there is a type of action known as a representative action which is, in effect, a form of class action brought by a group whose members share the same legal interest. However, the term 'representative action' is also used, particularly in relation to claims brought under competition or consumer law, to refer to the type of public interest or organisation actions described by the SLC. In addition, some jurisdictions have introduced procedures for the collective management of multiple court actions.[4] More recently, 'collective action' has been used as a generic term to apply to all of these types of proceedings, for example, by the Civil Justice Council (CJC).[5] For the sake of consistency with the SLC, however, we will continue to refer to this broad range of actions as multi-party actions.

[1] Scottish Law Commission (1994a), *Multi-Party Actions: Court Proceedings and Funding*, *Discussion Paper No 98*
[2] Scottish Law Commission (1994b), *Multi-Party Actions: Report by Working Party set up by Scottish Law Commission*, and Scottish Law Commission (1996), *Multi-Party Actions: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*
[3] Scottish Law Commission (1996), *op. cit*, p 5
[4] For example, Group Litigation Orders in England and Wales and collective settlement procedure in the Netherlands.
[5] Civil Justice Council (2008), *Improving Access to Justice through Collective Actions*

Background

3. The introduction of formal procedures for multi-party actions in Scotland has been under serious consideration for some time. Two initiatives are notable in this respect. In 1979, the Scottish Consumer Council (SCC) set up a Working Party[6] which recommended the introduction of formal procedures for class actions and canvassed proposals to introduce representative actions by bodies such as consumer groups.[7]

4. The introduction of formal procedures was later examined in depth by the SLC, in response to a reference from the Lord Advocate in 1988, which invited it to:

(a) consider the desirability and feasibility of introducing in Scottish civil court proceedings arrangements to provide a more effective remedy in situations where a number of persons have the same or similar rights;

(b) consider how such recommendations might be funded; and

(c) make recommendations.

5. The SLC reported in 1996[8] having considered the deliberations and findings of an appointed Working Party,[9] a research report[10] and a further discussion paper.[11] The SLC considered the need for reform in the Scottish context and the experience of other jurisdictions. The SLC's report focussed only on its third category of multi-party actions, that is, class actions. It concluded that informal mechanisms were inadequate and that a procedure for multi-party actions would be a useful addition to the range of available procedures in Scotland. As we go on to discuss, we agree with the SLC.

6. The SLC recommended the introduction of a procedure for multi-party actions in situations where a number of persons have the same or similar rights. Procedure would, so far as possible, follow that of an ordinary action, with familiar features such as preliminary pleas, an open and closed record, commission and diligence, procedure roll debate, amendment of pleadings and hearing of evidence (proof).

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[6] Under the chairmanship of Sheriff Iain Macphail from 1979 to 1980 and James Clyde QC from 1980 to 1982.
[7] Scottish Consumer Council (1982), *Class Actions in the Scottish Courts: A new way for consumers to obtain redress?*
[8] SLC (1996), *op. cit.*
[9] SLC (1994b), *op. cit.* The Working Party included advocates, solicitors and senior officials in the Scottish Office, Scottish Courts Administration and the Scottish Legal Aid Board.
[10] C Barker *et al* (1994), *Multi-Party Actions in Scotland*, Scottish Office Central Research Unit
[11] SLC (1994a), *op. cit.*

7. Special features would include a provision, common to almost all jurisdictions which have adopted a multi-party action procedure, for court approval or 'certification' that the proceedings meet certain criteria. The SLC recommended the following certification criteria:

(a) that the applicant is one of a group of persons whose claims give rise to common or similar issues of fact or law;
(b) that the adoption of the multi-party procedure is preferable to any other available procedure for the fair, economic and expeditious determination of the similar or common issues;
(c) that the applicant is an appropriate person to be appointed as representative party, having regard to his financial resources, the court being satisfied that he will fairly and adequately represent the interests of the group in relation to the common issues; and
(d) that the members of the group are so numerous that it would be impracticable for them to sue together in a single conventional action.

8. The SLC also considered the mechanism by which parties should be joined to the action. Multi-party action procedure in other jurisdictions typically provides for an 'opt-in' or an 'opt-out' procedure, though some jurisdictions have hybrid schemes which permit either model depending on the nature of the claim.

9. Under an opt-in regime, the potential class of claimants is identified and class members must opt in to the claim either before or during the course of proceedings, usually by a specified cut off date. Class members who have opted into the claim are bound by the judgment or, as the case may be, a settlement, which may require court approval.

10. In an opt-out regime, the potential class members may not have been identified or be identifiable at the start of proceedings. A detailed description of the class is agreed between the parties and/or approved by the court. Steps are then taken to publicise the proceedings so that potential claimants are made aware of them and of their right to opt out of the action and pursue their own remedy. In cases where there are a large number of potential claimants who cannot all be identified, the court award or settlement may take the form of an award of aggregate or global damages based on an estimate of the number of potential claimants. Awards may be distributed amongst class members on an average or pro rata basis. Any unclaimed funds may, depending on agreement between the parties or the relevant legal framework, be returned to the defendant; paid to the state, a specified body or charitable organisation; or paid into a fund administered by the court or another agency for distribution according to agreed principles.

11. The SLC favoured an opt-in procedure for multi-party actions in Scotland. Its recommendation should be seen in the context of its focus on actions initiated by individuals, that is, on class actions. It concluded that this procedure could be introduced by way of rules of court and that primary legislation was not necessary.

12. The SLC's recommendations were considered by the Court of Session Rules Council in 2000. We understand that the Council decided not to take the recommendations forward on the grounds that informal mechanisms for handling multi-party actions appeared to be working satisfactorily in Scotland and that the introduction of a formal procedure would give rise to 'serious and complex' questions.

13. In 2003 the SCC renewed its call for the introduction of a multi-party procedure.[12] It argued that such a procedure was essential in the interests of upholding the rule of law, in that it is unacceptable that consumers and others are given rights that they cannot effectively enjoy. It identified situations where many individuals suffer small losses as the result of unlawful action by traders but few individuals find it worthwhile to take action, with the result that the wrongdoer makes a windfall profit. In cases where larger sums are at stake, such as product liability cases, the evidence required is likely to be of a specialised nature and costly expert evidence may be required to assess the viability of a claim. It may be beyond the means of a single party to initiate this work, but feasible if claimants were to band together to explore common issues and spread costs over the whole group.

14. The SCC also argued that dealing with similar disputes against the same defender in a number of individual actions promotes inconsistency. There is the possibility that different judges will arrive at different conclusions. Defenders, too, may benefit by fighting one rather than a series of actions. The availability of a group procedure may also benefit the courts, by avoiding the duplication and cost involved in litigating many similar claims individually.

15. In March 2009, a petition (PE 1234) was presented to the Scottish Parliament on behalf of Leith Links Residents' Association, calling on the Parliament to urge the Scottish Government to introduce a class action procedure. The petition observed that in recent years, class action mechanisms had been available in England and Wales and argued that similar mechanisms should be available to the people of Scotland. The petition was considered by the Public Petitions Committee on 3 March 2009, when it agreed to bring the petition to our attention and to write to the Scottish Government seeking a response following the conclusion of our Review.[13]

[12] Scottish Consumer Council: C Ervine (2003), *A Class of their Own: Why Scotland needs a class actions procedure*

[13] For minutes of meeting, see http://www.scottish.parliament.uk/s3/committees/petitions/or-09/pu09-0402.htm. The minutes record that members of the Public Petition Committee were of the view that the Court of Session Rules Council did not take forward the recommendations of the Scottish Law Commission because it was "too much of a hassle for the legal establishment."

Responses to the Consultation

16. A large majority (75%) of respondents were in favour of the introduction of a multi-party procedure. Strong feelings were evident. As one respondent observed, class actions are lionised in some quarters as the champion of the individual against big business, but demonised elsewhere as 'legalised blackmail' benefiting few but the lawyers involved.

17. One respondent submitted that the introduction of such a procedure raised a major constitutional issue with significant consequences for Scottish commerce and the court system. It considered that the introduction of multi-party procedure should be subject to a fully researched and costed set of policy proposals with the potential to be integrated with what may emerge out of the European Union's recent consultation on effective mechanisms for collective redress. Another respondent, representing the interests of defenders, observed that while the advantages of introducing a new procedure probably outweigh the disadvantages, the issues involved were so significant and wide-ranging that dedicated research was now required to address them.

18. Many respondents found the current informal procedures available for multiple claims to be unsatisfactory, partly because of the need for individual actions to be brought. This made the available procedures particularly unsuitable in consumer cases, where relatively small amounts of money may be involved. Respondents reported that current procedures were responsible for inconsistencies in practice and decisions. For example, the court has no well-established practice for conjoining actions. They also observed that informal procedures were responsible for chaotic funding arrangements and could not cater for cost sharing between privately and publicly funded litigants or claw-back arrangements under the legal aid scheme. There was a need for special rules on expenses, and powers of case management.

19. Several respondents referred to the SLC's discussion paper on multi-party actions[14] and endorsed many of its conclusions: existing Scottish civil court procedures for handling multi-party actions are unsatisfactory; reform is needed; the principal aim of a formal procedure should be to minimise complexity, delay and expense; and these procedures should be as even-handed as possible between pursuers and defenders. They urged us to review the SLC's conclusions and to build on its work.

20. Most respondents who favoured the introduction of formal procedures for multi-party actions thought it would broaden access to justice, particularly where large numbers of claimants might be entitled to compensation but were deterred from making individual claims for relatively small amounts of money. Some saw its potential for 'levelling the playing field' in Scotland's courts and making it easier for 'ordinary' people to pursue claims against well-resourced defenders. Others saw its

[14] SLC (1994a), *op. cit*, 4.52-4.54

potential for restricting the time, expense and opportunity costs that defenders might otherwise incur when dealing with a series of individual actions.

21. Still other respondents identified potential benefits to the courts by reducing duplication, improving efficiency, and promoting consistency of practice and decision making.

22. A number of UK-wide organisations referred to the unavailability of formal procedures for dealing with multi-party actions in Scotland and urged that Scotland should not be left behind. Group Litigation Orders (GLOs) had provided a mechanism for dealing with some multi-party litigation in England and Wales since 2000, and a generic procedure for multi-party actions was under review by the Civil Justice Council. Respondents warned that the Scottish legal system now needed to position itself as a litigation forum of choice. There was an increasing need for collective redress mechanisms to be made available and the Review provided Scotland with an ideal opportunity to be forward-looking and competitive in the context of pressures for change arising from Westminster and Europe.

23. Several respondents looked to collective redress mechanisms for their capacity to deter unlawful and unfair behaviour on the part of business and to encourage safer working practices.

24. A minority of respondents, however, did not favour the introduction of new procedures. Some thought that robust case management could address some, if not all, of the problems arising out of the currently available provisions. Others suggested that difficulties associated with finding a workable solution to the problems of funding class actions were insurmountable. Still others feared that the introduction of new provisions for collective redress risked inviting 'popular justice' and warned that any such step needed to be balanced by safeguards against 'blackmail litigation'.

25. Several respondents observed that there was no single solution and that different kinds of multi-party actions were best dealt with by different kinds of mechanisms. This, perhaps, explains the variety of suggestions made. Some respondents looked forward to a separate provision for test cases. Some recommended that there should be new procedures that broadly follow GLOs in England and Wales, while others thought it would be unwise to adopt procedures, such as GLOs, that require each claimant to raise an individual action. Still others observed that there may be administrative advantages in evidence being heard together where it may be common to all actions arising out of a unique incident. However, matters which may vary in each case, such as the quantum of each claimant's loss, would need to be handled separately. A number of organisations called for the introduction of a procedure to enable a representative body to bring consumer actions on behalf of claimants on an 'opt-out' basis.

26. Several responses identified mechanisms to avoid the perceived excesses of US class actions should new procedures for multi-party actions be introduced in

Scotland. Suggestions included compulsory pre-action protocols, mechanisms to ensure the early removal of unmeritorious claims, adoption of an 'opt-in' system, or a system where judges have discretion to decide how a particular 'class' of litigants should be determined or treated. A number of respondents spoke of the need for enhanced judicial case management powers in such cases and recommended that the Court of Session should have exclusive jurisdiction.

27. Many respondents thought that whatever approach was adopted, new provisions were unlikely to achieve their objectives unless there were appropriate rules on expenses. Several respondents explicitly rejected the introduction of contingency fees. Some suggested that settlements could be subject to judicial scrutiny. A number of responses agreed that legal aid should be available to support multi-party actions.

Other jurisdictions

28. Annex A of this chapter contains a short summary of the development of class actions in the USA, Canada and Australia. Class actions were formally introduced in the United States in 1938 and are now a well established feature of the legal system. Rule 23 of the Federal Rules of Procedure, which also forms the basis of the procedure adopted in many states, was amended in 1966 to provide for an opt-out procedure. An underlying policy objective was the facilitation of what have been described as institutional class actions, in which the relief sought is generally of an injunctive or declaratory nature, for example, actions regarding alleged discrimination in college admissions policy. It was not envisaged that opt-out procedure would be available in 'mass tort' actions such as claims for personal injury through exposure to asbestos. However, claims of this type began to receive certification from the early 1980s. Some commentators have suggested that their certification has already reached a high-water mark and that the courts are now less likely to certify actions in which there are a large number of potential claimants who have suffered varying degrees of loss or injury. On the other hand, class actions continue to be used frequently in relation to litigation concerning securities and shareholders.

29. Some jurisdictions in Canada and Australia have a form of proceedings similar to proceedings brought in England and Wales under the 'representative rule' (now CPR 19.II). This enables an action to be brought by one or more claimants representing a larger group or class where all the members of the class share the same interest. This can be a useful form of procedure but has its limitations owing to the need for the claimants to share the 'same' interest. So, for example, it would not be possible for a group of claimants to pursue a representative action arising out of a single event, such as the sinking of a cargo ship, where some claims are based in tort and others in contract. Some jurisdictions permit representative actions only where all the claimants are suing the same defendants.

30. Owing to the limitations of the 'representative rule', the majority of jurisdictions in Canada have adopted a multi-party procedure which is wider in scope, enabling claims to be brought that are similar or arise out of the same set of circumstances, even though their legal basis may be different. With one limited exception, Canadian jurisdictions have adopted an opt-out model. There are no restrictions regarding the types of action or the remedies that may be claimed. The relevant legislation and/or rules of court provide for the assessment of aggregate awards of damages and their distribution amongst the class members on an average or proportional basis; or the participation of individual class members for the determination of issues particular to them; or the distribution of damages on a *cy près* basis, that is, the unclaimed portion of the fund is put to its "next best" compensation use, usually by giving it to a third party or agency to use for court-designated purposes.[15]

31. A multi-party procedure has been introduced in Australia in the Federal Courts and Victoria. Again, an opt-out model was adopted. Unusually, there is no procedure for certifying multi-party actions as suitable, but an application can be made to decertify them. Claims may be brought by representative bodies. For example, the Australian Competition and Consumer Association (ACCA) has standing to bring proceedings on behalf of affected consumers in which the court awards damages to members of the class other than the ACCA.

32. Annex B of this Chapter describes the multi-party procedures that have been adopted in member states of the European Union and initiatives by the European Commission in relation to the introduction of mechanisms for collective redress, including representative actions, particularly in the fields of competition law and consumer protection. With certain exceptions, the model adopted or proposed has been an opt-in mechanism owing to concerns about introducing what is perceived to be a US style litigation culture. Some jurisdictions have adopted a hybrid procedure allowing either opt-in or opt-out mechanisms and some have restricted opt-out actions to small value consumer claims where large numbers of consumers are affected and where it would not be viable or cost effective for the claims to be litigated individually. In a number of European jurisdictions public bodies or consumer interest groups have concurrent or even exclusive jurisdiction to bring representative claims on behalf of consumers or affected persons. Most multi-party procedures are limited in scope in terms of the types of claims that may be brought, with complaints in relation to consumer protection legislation being the most common.

33. Annex C of this chapter describes the background to the current position in England and Wales, with reference to the findings of various bodies who have looked at the issue in recent years.

[15] K Forde (1996), 'What Can a Court Do with Leftover Class Action Funds? Almost Anything!' *The Judges' Journal*, *35*, no. 3

34. A Group Litigation Order (GLO) provides for the case management of claims which give rise to common or related issues of fact or law. The court may make a GLO where there are a number of claims giving rise to such common or related issues. The order establishes a register of claims, specifies the issues which identify them and specifies a management court. It may direct that from a specified date claims are to be started in the management court or that existing claims are to be transferred there, order that claims are stayed (sisted), or direct their entry on the group register. There may be directions for publicising the GLO. A judgment made in relation to one or more of the GLO issues is binding on the parties to all other claims on the group register at the time the judgment is given. One of the distinctive features of the GLO is that it may be made on the application of any party or on the initiative of the court.

35. Although the GLO procedure has been a welcome development in the handling of multi-party actions in England and Wales, some commentators have argued that it has significant drawbacks and that a full class action procedure, with an opt-out regime, would be preferable. In particular, the requirement for each claimant to issue proceedings before the claim can be entered in the group register is said to erect an expensive and unnecessary barrier to access to justice.[16] This may explain the low rate of participation under the GLO regime, with estimates that less than 30% of potential claimants register a claim.[17]

36. More recent policy initiatives in England and Wales, and at UK level in relation to competition and consumer protection legislation, have been concerned with representative actions, those brought by third parties on behalf of consumer groups or groups of individuals that they represent.

37. In 2001 the Lord Chancellor's Department (LCD) consulted on an extension of the rules relating to representative actions in England and Wales that would enable interested bodies without a direct legal interest to bring proceedings on behalf of persons whom they represent. The proposals were not limited to claims in the sphere of consumer or competition law. The LCD's consultation paper noted that in keeping with the aims of the civil justice reforms, court proceedings to resolve disputes should be seen as a last resort and used after other more appropriate means had been employed, for example, action by a statutory body, industrial codes of practice and ombudsman schemes.[18] Responsible representatives should have a good understanding of non-court remedies and should aim to assist individuals towards satisfactory settlements without recourse to litigation. Nevertheless, it acknowledged that there will be some situations where a representative could usefully pursue court action on behalf of those directly affected. The paper noted a number of European Union initiatives which provided for the principle of representative claims for the vindication of consumers' and other individuals' rights.

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[16] A Zuckerman (2006), *Civil Procedure-Principles of Practice*, p 519
[17] R Mulheron (2008), *Reform of Collective Redress in England & Wales: A Perspective of Need*
[18] Lord Chancellor's Department (2001), *Representative Claims: Proposed New Procedures–a Consultation Paper*

38. In the context of competition law, a form of representative action was introduced by section 47B of the Competition Act 1998. This enables a body representing those harmed by an unlawful practice to bring an action in the Competition Appeal Tribunal on behalf of consumers who have suffered loss. Representative actions can only be brought on a 'follow-on', not a 'stand-alone', basis. Thus, a representative action may be brought in the Competition Appeal Tribunal only where the Office of Fair Trading (OFT), a concurrent regulator or the European Commission, has made an infringement decision. The representative action is then brought on behalf of named consumers, that is, following an 'opt-in' model. A body seeking to bring a representative action before the Competition Appeal Tribunal must apply for authorisation to do so. To date only one body has been authorised to bring proceedings under section 47B, namely, the Consumers Association[19], which accounts for the only representative action brought in the Competition Appeal Tribunal so far.[20]

39. In November 2007 the OFT made recommendations to the Government on steps that should be taken to strengthen the enforcement regime by improving the effectiveness of redress for those harmed by breaches of competition law. It recommended that the Government should consult on modifying existing procedures, or introducing new ones, to allow representative bodies to bring stand-alone and follow-on representative actions for damages and injunctions on behalf of consumers and businesses on an opt-out or opt-in basis.

40. In its consumer strategy, *A Fair Deal for All* (2005), the Department for Trade and Industry (DTI) endorsed the principle of permitting representative actions for breach of consumer protection legislation.[21]

41. The DTI launched a further consultation in 2006 in which it invited views on what form such a representative procedure should take and which bodies should be entitled to bring proceedings.[22]

42. A number of respondents questioned the need for a new procedure and it was noted that there had been a number of policy developments since the publication of the DTI's consumer strategy, including an emphasis on restorative justice and mechanisms other than court procedures for resolving consumer complaints. The DTI had indicated that, in its view, further research was required before any decisions were taken.

43. The Civil Justice Council (CJC) held a series of meetings with the judiciary, academics, lawyers acting for claimants and defendants, Government officials, and consumer and advice representatives in 2006, 2007 and 2008. It also commissioned research into whether the existing mechanisms in England and Wales for the

[19] The Consumers Association is now known as *Which?*
[20] *Consumer Association and JJB Sports Plc:* Case No 1078/7/7/07
[21] DTI (2005), *A Fair Deal for All*
[22] DTI (2006), *Representative Actions in Consumer Protection Legislation: Consultation*

resolution of multiple claims were adequate.[23] The CJC reported to the Lord Chancellor in December 2008.[24] It concluded that the existing procedures do not provide for sufficient or effective access to justice, that there is evidence that well founded claims are not being pursued, and that the existing procedures could be improved whilst protecting defendants from unmeritorious litigation. It recommended:

- the introduction of a generic collective action in respect of any type of civil law claim in which multiple parties have an interest;
- collective claims should be capable of being brought by a wide range of representative parties (individual representative claimants or defendants, designated bodies and ad hoc bodies);
- collective claims may be brought on an opt-in or opt-out basis, subject to court certification;
- where the case is brought out on an opt-out basis, the court should have the power to aggregate damages in appropriate cases;
- unallocated damages from an aggregate award should be distributed by a trustee according to general trust law principles;
- any settlement reached between the representative claimant and defendant should be approved by the court so as to protect the interests of the represented class of claimants;
- collective claims should only be permitted to proceed where certified by the court, and should be subject to an enhanced form of case management by specialist judges.

44. The Ministry of Justice (MoJ) responded in July 2009 by rejecting CJC's call for a generic right of collective action.[25] It took the view that additional rights of collective action should be considered and introduced, where appropriate, on a sector specific basis. They should be introduced only where there was clear evidence of need and following an assessment of economic and other impacts, as well as consideration of alternative approaches. In particular, regulatory options should be considered before introducing court based options. Nonetheless, the MoJ pledged to "work with the CJC and Civil Procedure Rule Committee to develop flexible generic procedural rules within which any collective action scheme can operate."

45. The MoJ also observed that the distinction between opt-in and opt-out models is not clear cut in practice. Much depended on the stage of proceedings at which the class is closed. The MoJ was of the view that which model is adopted should be considered sector by sector. However, it expected that in most cases, a hybrid opt-in model will be preferable to a full opt-out model. The CJC's recommendations for provisions to aggregate damages where cases were brought on an opt-out basis and the distribution of unallocated damages from an aggregate award were for consideration by sector. Recommendations for provisions to protect the interests of

[23] R Mulheron (2008), *op. cit.*
[24] Civil Justice Council (2008), *op. cit.*
[25] Ministry of Justice (2009), *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'*

the represented class of claimants where settlement was agreed were accepted in principle, with possible exceptions for consideration on a sector by sector basis.

46. The CJC's recommendations as to the certification of collective actions by the court and their case management by specialist judges were accepted by the MoJ without reservation.

47. Annex D of this chapter describes recent discussions and debates within the United Kingdom concerning the funding of multi-party litigation. Issues in relation to funding in other jurisdictions are described in Annexes A to C.

Discussion and Recommendations

48. In this section we consider the case for introducing a special procedure for multi-party actions in Scotland, what features that procedure might have, and how such actions might be funded.

Should a special procedure for multi-party actions be introduced?

49. In their reports the SCC and the SLC considered whether the existing informal mechanisms for multi-party litigation were adequate. They noted several ways in which multiple claims could be litigated under existing procedures, but identified significant limitations. An action raised by an individual may benefits others, particularly where the remedy sought is interdict. If the remedy sought is damages, however, the defender may not accept any liability to affected persons who have not joined in the action. Multiple actions on the same subject matter may be conjoined, which could provide certain economies of scale. However, this may be cumbersome if there are a large number of pursuers, especially if the remedies sought are particular to each. The court has no power to compel parties to conjoin actions if pursuers choose not to do so. If a pursuer's action is not conjoined, the pursuer cannot call on other interested parties to contribute to the cost of the litigation. It may then not be cost effective for an individual to pursue an action if the value of the claim is small.

50. Where multiple actions on the same subject matter are raised, the parties may agree to identify one or more test or lead cases to determine the issues of fact or law in dispute. However, parties not directly involved in the test case are not bound by the result unless they consent. There are several potential disadvantages for both the lead pursuer and the other parties. The lead pursuer is liable for the expenses of the action. A conflict of interest may arise between the lead pursuer and the other claimants: the lead pursuer may choose to settle the action where the other claimants would opt to continue. The lead pursuer's claim may turn out to be atypical, with the result that the common issues remain unresolved. A decision in the test case does not bind potential claimants who were not party to the action: they are free to litigate the issues anew. Similarly, a defender who has been unsuccessful or who has chosen to settle the action is not bound to settle with other claimants who were not

parties to the action. For these reasons, the SLC concluded in its Discussion Paper that there are a number of significant disadvantages in the test case mechanism that outweigh the advantages.[26]

51. The majority of respondents to the SLC's Discussion Paper, including the two main professional bodies - the Faculty of Advocates and the Law Society of Scotland - favoured the introduction of a special procedure for multi-party actions. The SLC concluded that there was clearly a significant gap in existing Scottish court procedures and that it would be helpful for there to be an appropriate procedure designed to deal with multiple claims where the claimants have the same or similar rights. They noted developments in other jurisdictions, notably Canada and Australia.

52. Events have moved on considerably since the SLC made its final report in 1996, as the materials gathered in Annexes A to C of this chapter indicate. Multi-party procedures are well established in Canada, Australia, England and Wales, and a number of European countries. Initiatives at EU level, particularly in the fields of competition law and consumer protection, are likely to feature collective redress mechanisms as a means of achieving policy objectives. The UK government has consulted on the development of mechanisms for collective redress that may include representative actions in these particular fields.

53. In Scotland, it is said that a pragmatic approach to handling multi-party actions has generally worked well. Examples frequently cited in support of the adequacy of available procedures include the Ibrox stadium disaster, Piper Alpha and the Braer litigations. These are 'single event' disasters with a readily identifiable group of potential claimants and may not be particularly useful examples of true multiple litigation scenarios. For example, the Piper Alpha litigation was largely concerned with the apportionment of liability between defenders. The pursuers' claims were settled extra judicially or by reference to arbitration where quantum could not be agreed.

54. Recent mass litigation in the Scottish courts has highlighted problems arising from the lack of a formal multi-party procedure. The availability of such a procedure to manage prisoners' 'slopping out' claims might have reduced the burden on the public purse and the pressure on the courts.[27] The recent dispute concerning the lawfulness of bank charges has resulted in more than 400 actions being litigated in sheriff courts throughout Scotland. Despite the common issues these actions raise, there are no mechanisms whereby they can be transferred to a single court and managed as a group. In consequence, each pursuer individually has been required

[26] Scottish Law Commission (1994a), *op. cit.*

[27] In an address to the Scottish Parliament on 11 March 2009, Justice Minister Kenny MacAskill noted that 3,737 claims had been settled and a further 1,223 were being dealt with. A substantial proportion of the pursuers were granted legal aid, incurring legal fees of between £2,000 and £2,500 each, most of which was recovered by SLAB from the Scottish Government. As of 28 June 2008, the Scottish Prison Service/Scottish Government has paid out £2.6million in legal fees. These individual actions and petitions for judicial review also incurred legal costs for the defender (SPS/SG) and the Scottish Courts, which have not been identified or accounted for in any publicly available document).

to pursue a claim raising complex questions of contract law and interpretation of the Unfair Contract Terms legislation, and the banks have had to defend every action individually, resulting in unnecessary expense for both parties. On occasion this has led to inconsistent decisions on the sisting of actions pending the determination of test case proceedings in England.[28] After a number of opposed motions in different sheriff courts, actions were sisted pending an action brought by the OFT in the courts in England and Wales. In England and Wales, individual actions in the county courts were stayed by order of the court, pending the resolution of those proceedings.

55. The bank charges cases also demonstrate the difficulty of applying the available procedural rules to multiple claims. Most proceeded as small claims or summary causes with informal pleadings. In such a situation it was difficult for the court to assess whether there was a commonality of issues with the concurrent proceedings in England and Wales, a factor taken into account in deciding whether or not cases should be sisted. Had the cases proceeded as ordinary actions, the court might have been reluctant to consider an application to sist until the adjustment period had ended. In a situation where there are a large number of claims, such reluctance could result in considerable expense to many parties.

56. The personal cost of individually pursuing what may be a complex claim in which many other individuals may also have an interest was highlighted recently by Ian Hamilton QC, who raised a small claims action against the Royal Bank of Scotland in February 2009 on the grounds that it was negligent in representing itself as solvent when it sold him shares in its rights issue of June 2008. The sheriff directed that the action was to be treated as an ordinary cause, on the defender's submission that there were complex issues of fact that could not be dealt with adequately under small claims procedure. The pursuer then abandoned the action on the grounds that the sum at stake was not sufficient to justify the risk of an adverse finding in expenses on the ordinary cause scale. Given the number of people in Scotland who may wish to make similar claims there have been calls for a class action procedure to be introduced in Scotland as a matter of urgency.[29]

57. Some of those who are opposed to the introduction of a multi-party procedure have warned against what are described as the excesses of the American class action procedure. There are strongly held views on both sides of the debate as to whether it has been a blessing or a curse. US class actions have been criticised for being cumbersome, expensive and ruinous for many defendants. There have been significant battles over the certification of a class, ('satellite litigation'), while the costs and risks of defending a claim are sometimes alleged to be so high that it may be cheaper to settle ('blackmail litigation'). At the same time, class actions have been praised as a means of asserting the rights of the individual, leading to major

[28] See, for example the judgment of Sheriff Nigel Morrison QC in *Morton v Bank of Scotland plc* (A1017/08) 26 August 2008 and those of Sheriff Derek Pyle in *Coleman v Clydesdale Bank*, 7 September 2007 and *Clydesdale Bank v Wright*, 22 February 2008.
[29] See, for example, www.thefirmmagazine.com 20 Feb 2009, and Richard Keen QC (Dean of Faculty of Advocates) http://thescotsman.scotsman.com/latestnews/QC-Allow---class.4911469.jp

advances in civil rights and deterring unacceptable business practices. It is said that they make litigation possible for many who would not have otherwise had the resources to bring (or defend) individual claims.

58. Regardless of the rights and wrongs of those views, it has been suggested by a number of commentators that there are special features of the American class action regime that differentiate it from the multi-party procedure adopted in jurisdictions such as Canada and Australia.[30] American class actions are funded by contingency fees. A no-costs shifting rule applies (see below). The procedure provides for extensive discovery of documents and for pre-trial depositions. Class suits are heard by juries. Exemplary and punitive damages are available. In recommending the introduction of representative actions in competition cases, the OFT considered that features of the US civil justice system often associated with 'litigation culture' are not present in England and Wales, such as the no-costs regime, the fact that treble damages are available and the right to a jury trial. The UK courts also have wide case management powers and can strike out cases that are without merit (see Annex C of this chapter, para 68).[31]

59. Those jurisdictions which have relatively recently introduced procedures for multi-party actions, such as the Federal Courts in Australia, Victoria and England and Wales, have not been deluged by such actions. For example, by 2008 only 62 GLOs had been made in England and Wales since the procedure was introduced in 2000.[32] We are, however, acutely conscious of the potential for 'blackmail litigation' should there be insufficient safeguards and we deal with this issue below.

60. Others have argued that mechanisms for collective redress should be provided through regulatory means rather than the promotion of private law litigation. In the US the emphasis is on private rather than public enforcement. Some 95% of antitrust enforcement occurs through private lawsuits.[33] In Europe, enforcement of policy, particularly in the fields of competition and consumer protection, is achieved through a mixture of public and private law mechanisms. In many jurisdictions public authorities, such as ombudsmen or consumer associations, have been given extensive enforcement powers including the power to bring representative actions on behalf of consumers. Examples of the regimes introduced in Sweden, Norway and Denmark are given in Annex B of this chapter. According to one commentator there are some preliminary indications that these extended powers have enabled ombudsmen to negotiate with companies to make refunds to consumers, thereby avoiding the need for court action.[34]

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[30] Scottish Consumer Council (2006), *Representative Actions: Response to the DTI consultation*, R Mulheron (2008), *op. cit*, and C Hodges (2009) 'From class actions to collective redress: a revolution in approach to compensation', *Civil Justice Quarterly, Vol. 28(1)*

[31] Office of Fair Trading (November, 2007), *Private Actions in Competition Law: Effective Redress for Consumers and Business*

[32] R Mulheron (2008), *op. cit.*

[33] C Hodges (2009), *op. cit.*

[34] C Hodges (2009), *op. cit.*

61. This has led some to question whether there is a need to extend available multi-party action procedure or whether a better model might be to focus on developing redress through regulatory regimes.[35] This is illustrated by the Ministry of Justice's recent response to the CJC's *Improving Access to Justice through Collective Actions*, see para 44 above.[36] Under the Regulatory Enforcement and Sanctions Act 2008 regulators have a discretion to require an offender to take steps to secure that the offence does not recur and that the position is restored to what it would have been had no offence been committed. It has been suggested that a regulator might use its discretionary power to require the offender to pay compensation to affected consumers. It is argued that this may be more cost effective than encouraging private enforcement through collective actions for damages.

62. Others, such as the CJC, argue that ombudsmen or regulatory systems are not primarily suited to resolve the very wide range of situations that can give rise to the need for large-scale remedial action.[37] The OFT has argued that representative actions are needed to enhance the enforcement regime, as public authorities must concentrate their resources on high profile or high impact investigations and cannot pursue or investigate every instance of an alleged breach of competition rules that may have adversely affected consumers (see Annex C of this chapter, para 66).[38] The Department for Business, Enterprise and Regulatory Reform commissioned further research on the need for collective actions for the enforcement of consumer protection legislation. This research is now available.[39]

63. We agree that some types of claim might be resolved more appropriately by agencies other than the courts and, as discussed in Chapter 7, we consider that potential litigants should be given information about alternative means of resolving disputes. Nevertheless, however well the regulatory regimes may operate, there may still be cases that require to be litigated and a multi-party procedure is, in our view, an essential element of the range of options available for the resolution of disputes involving a number of parties with the same or similar legal or factual interests.

64. In conclusion, we adopt the SLC's recommendation that there should be a special multi-party procedure.

What features should such a procedure have?

Certification criteria

65. The SLC recommended there should be a procedure for certifying an action as suitable for multi-party proceedings. Having regard to the experience of other

[35] C Hodges (2009), *op. cit*
[36] Ministry of Justice (2009), *op. cit.*
[37] Civil Justice Council (2008), *op. cit.*
[38] Office of Fair Trading (2007), *op. cit.*
[39] J Peysner and A Nurse (2008), *Representative Actions and Restorative Justice: A Report for the Department for Business Enterprise and Regulatory Reform (BERR) – December 2008*

jurisdictions, we agree that this would be desirable. In considering whether to grant a certification order, the court should be satisfied (a) that the applicant is one of a group of persons whose claims give rise to common or similar issues of fact or law; (b) that the adoption of the group proceedings procedure is preferable to any other available procedure for the fair, economic and expeditious determination of similar or common issues; and (c) that the applicant is an appropriate person to be appointed as a representative party, having regard in particular to his financial resources, and will fairly and adequately represent the interests of the group in relation to the common issues.

66. In addition to the above criteria, some jurisdictions impose a 'merits test' which requires the court to be satisfied that the proposed multi-party action has a reasonable basis upon which to proceed. This does not generally require the claimants to establish that it is more likely than not that they will succeed. Rather, the application for certification and supporting documents should disclose a real issue to be tried. In Portugal, for example, the court conducts a preliminary hearing at which it considers, *inter alia*, whether the action is manifestly ill-founded. In its recent proposals in relation to collective actions in England and Wales, the CJC recommended that the court should conduct a preliminary merits test.[40] Although a merits test was not recommended by the SLC, we think it would be an important safeguard against potential abuse. We therefore recommend that before granting certification the court should be satisfied, on the basis of the pleadings and documents presented in support of the application for certification, that the pursuers have demonstrated a *prima facie* cause of action.

67. The SLC recommended that one of the certification criteria should be that the group procedure is preferable to 'any other available procedure' (see above). In some jurisdictions this involves an examination not just of alternative court procedures such as test cases, judicial review or interdict, but of other dispute resolution procedures as well as the availability of administrative remedies and regulatory mechanisms.[41] The CJC has recommended that the representative party should satisfy the court that a collective claim is the most appropriate legal vehicle to resolve the issues compared, for example, to pursuing the claim on a traditional unitary basis through the civil courts or specialist tribunal or seeking a compensatory remedy via regulatory action where available and where able to deliver effective access to justice.

68. We agree that the 'any other available procedure' test should include the availability of ADR, administrative remedies and regulatory mechanisms.

69. We endorse the SLC's recommendation that the court should be satisfied that the representative pursuer is an appropriate person. In some jurisdictions the pursuer need not be a natural person but can be an 'ideological' pursuer, generally a

[40] CJC (2008), *op. cit.*

[41] R Mulheron (2004), *The Class Action in Common Law Legal Systems: A Comparative Perspective*, pp 238-242. See for examples of situations in which the courts in the USA and Canada have refused to certify class actions on the grounds that alternative remedies were available.

representative body. For example, as mentioned above, the Australian Competition and Consumer Association has power to bring representative actions in certain circumstances. We do not think that it would be appropriate for the legislation that will be necessary to implement our recommendations to seek to specify the type of bodies that might be permitted to bring proceedings on a representative basis. That issue is under consideration at present, and there may be further developments at European level. However, should representative bodies, either generally or those specifically authorised, be given standing to bring proceedings on behalf of consumers or other groups whom they represent, we think that the multi-party procedure should be designed in such a way as to permit those bodies with standing to make use of it.

70. We recommend that at any time after a certification order has been granted, the court should be entitled to order that the case should be transferred out of the multi-party procedure on the grounds that the criteria for certification are no longer satisfied.

An opt-in or opt-out model?

71. Multi-party procedures in the USA, Canada and Australia have generally adopted an opt-out model. In his report *Access to Justice,* Lord Woolf recommended that it should be for the court to determine which procedure was appropriate in any given case. The GLO procedure that was subsequently introduced, however, is an opt-in model. The CJC has argued that this is unduly restrictive, that there should be no presumption in favour of either model and that the court should decide which option is preferable. With the exception of Portugal, most European countries have adopted an opt-in model, although some jurisdictions operate a hybrid system or permit opting out in consumer claims where the value of each claim is modest but the number of potential claimants large.

72. The advantages of an opt-in system are that the claimants are identified and the defender can more easily quantify the potential extent of his liability, particularly where the quantum of damages or other remedy is the same for each member of the group or may be easily ascertained. Only those claimants who actively exercise a choice to opt in to the action are bound by the outcome. The disadvantages are that it may be costly and time-consuming, or impossible, to identify all the potential members of the group and seek their agreement to opt in. Claimants may be reluctant to come forward if they need to take active steps to join proceedings or incur a cost in so doing, particularly if there is a requirement to raise an action before being permitted entry to the group register. Research has shown that participation rates are much lower in opt-in schemes than in opt-out schemes.[42]

73. The advantage of an opt-out scheme is that it is not necessary to identify all the potential claimants before proceedings are initiated. This is particularly useful in actions relating to injury that manifests itself over a period of time, such as exposure

[42] R Mulheron (2008), *op. cit.*

to asbestos or cases involving pharmaceuticals. An opt-out regime generally leads to a much higher participation rate by potential claimants. The disadvantages include the cost, which may be considerable, of publicising the fact that proceedings are pending and that those who fall within the definition of the class will be bound by the outcome of the action unless they elect to opt out. Potential claimants who have no knowledge of the action may become bound by the outcome. It may be necessary for damages to be awarded or distributed on an aggregate basis where it is not practicable to make an individual assessment for each class member. This may involve a degree of averaging out and may be to the detriment of those who have the most valuable claims. There may be additional costs in distributing unclaimed funds.

74. In the context of competition law, as noted above, the OFT has argued that there may be cases where an opt-out model is the most effective way of obtaining redress.

75. Although a form of representative action was introduced by section 47B of the Competition Act 1998, only one representative action has been brought in the Competition Appeal Tribunal to date. The claim was brought by the Consumers Association (trading as *Which?*) against JJB Sports plc in relation to findings by the OFT and the Competition Appeal Tribunal, upheld by the Court of Appeal, in respect of price fixing arrangements for the sale of replica football shirts in 2000 and 2001. The claim was initially brought on behalf of some 130 individual consumers who had opted in. The Consumers Association had estimated that many hundreds of thousands of consumers were affected and had run an advertising campaign in the media to encourage claimants to come forward. The Association sought compensatory damages in respect of the named consumers and exemplary or restitution damages of 25% of the relevant turnover. The claim was settled by agreement under which those consumers who had opted into the action received a payment of £20. It is understood that around 500 consumers qualified for such a payment. Consumers who had not opted in but who had proof of purchase, or the shirt itself, were entitled to claim £10 at a JJB store by a specified cut-off date. The settlement payout amounted to around £18,000 plus the Association's reasonable costs which, according to the legal press, ran into several hundred thousand pounds. Shortly after the Association announced that it intended to bring proceedings, JJB offered to give a free England shirt and mug to customers who had proof of purchase, on condition they did not opt in to the action. It is reported that over 12,000 customers took up this offer.

76. Speaking at an antitrust conference in November 2008 the Head of Legal Services of *Which?* said that it was unlikely that it would bring any further actions under section 47B. It had devoted a considerable proportion of its resources to bringing the claim and had doubts about whether this was cost effective given the relatively small number of consumers who benefited from it, either directly or indirectly.

77. For this reason, *Which?* is strongly in favour of an opt-out regime. Its Head of Legal Services has expressed the opinion that as most potential representative bodies will be charities, there will always be concerns about proportionality in terms of cost and time as long as an opt-in system prevails.

78. We consider that the JJB Sports case is a useful example of why an opt-out procedure may be more appropriate in certain types of case, particularly consumer cases where the value of each individual claim is modest but the pool of potential claimants is large.

79. We are attracted to the option of leaving it to the court to decide whether in the particular circumstances of a case an opt-in or opt-out model would be appropriate. In any case, as the recent response of the Ministry of Justice to the CJC points out, the distinction between these models may not be so clear cut. Where the remedy sought is an interdict or the action is to enforce statutory duties, for example in relation to nuisance or environmental matters, the court might sanction an opt-out procedure in situations where it is not possible to identify all the potential claimants who might benefit from a decree.

80. Opting out might also be appropriate where a large number of claimants are affected but the facts and legal issues are common to all. For example, in the US case of *American Trading & Production Corporation v Fischbach & Moore Inc*[43], a fire at an exhibition destroyed the property of some 12,000 exhibitors. In spite of the large number of potential claimants, the court certified the claim as a class action on the ground that identical evidence would be required to establish the fire's origin, the parties' responsibility, and the proximate causation for each claimant. The only issue distinguishing class members was the amount of loss sustained. The certification was therefore limited to the issue of liability.

81. An opt-out procedure might be appropriate in a consumer case, such as that brought against JJB Sports, where a large number of consumers are affected, the nature and quantum of each claim is the same, and the value of the claims is such that it is not economically viable to pursue them on an individual basis. In contrast, where potential class membership is small and easily identifiable, for example, the passengers injured in a bus or coach accident, the court may consider an opt-in procedure preferable so that only those who make a positive choice to opt in are bound by the outcome.

82. It will be necessary to amend the legislation relating to prescription and limitation to take account of a group litigation procedure which permits opting out.

83. It will also be necessary to confer powers on the court to make an aggregate or global award of damages and for the disposal of any undistributed residue of an aggregate award.

[43] 47 FRD 155 (D111)(1969)

84. We agree with the SLC's recommendation that the new procedure should initially be introduced only in the Court of Session.

The case management of multi-party actions

85. The certification order should describe the class or group of claimants on whose behalf the action is brought, the question or questions of fact and law which are common to the class and the remedy sought. It should also appoint the representative party or parties.

86. The Court should have at its disposal a wide range of case management powers similar to those conferred on the commercial judge in the Court of Session and a general power to regulate procedure as thought fit with regard both to certified questions and any other matters at issue. In addition, the judge should have the power, at his own instance or on the motion of the representative party or the defenders to make such orders as may be appropriate to ensure that the proceedings are conducted fairly and without avoidable delay. This may include the drawing up of a timetable specifying periods within which steps must be taken.

87. The SLC was not in favour of permitting defenders to apply for certification of a group action, as it took the view that it was for pursuers to decide whether to make use of the new procedure. We can foresee situations, however, where a number of pursuers have a common factual or legal basis to their claims but initiate proceedings on an individual basis where for tactical reasons they do not wish to avail themselves of the multi-party action procedure. In such circumstances, we consider that it should be open to defenders to apply to the Court, or for the Court on its own initiative, to transfer the cases to the group procedure. Such an order may presently be made under the GLO procedure in England and Wales.

88. Although we recommend that the new procedure should be introduced only in the Court of Session, we are conscious that situations may arise where multiple actions bearing on the same subject matter are initiated in different sheriff courts, such as the recent litigation on bank charges. We consider that there should be a case management mechanism that would enable such litigation to be transferred to the Court of Session and managed on a group basis, either on the motion of one or more of the parties or by the sheriff on his own initiative. In addition, the Lord President should have the power to direct that such litigation should be transferred to the Court of Session to be managed under the multi-party action procedure.

89. We note that the SLC did not recommend that the court should be required to approve the abandonment or settlement of a class action or make abandonment or settlement competent only with the court's prior approval. This was understandable in the context of its recommendation that an opt-in regime be adopted. However, if an opt-out model is to be made available, then we consider that it would be necessary to introduce a requirement for the court's approval of proposals to abandon or settle the action in order to safeguard the interests of those group members who are not parties to the action.

Appeals

90. We agree with the SLC's recommendations on the circumstances in which it should be competent for the representative party to reclaim without leave an interlocutor disposing of an application for certification or decertification or identifying the common questions; and that where the representative party does not reclaim it should be competent for a group member to do so.

How should multi-party actions be funded?

Liability in Expenses

91. The general rule in litigation in Scotland is that expenses follow success, although the court in its discretion may make a different award. In other jurisdictions a rule to this effect is called costs shifting. In some jurisdictions where costs shifting is the normal rule, this is modified for multi-party actions. Options considered by the SLC included a 'no expenses' rule under which the representative party and the defender bear their own expenses regardless of the outcome. The SLC rejected this as it thought it would encourage weak claims. A second option was a discretionary 'no expenses' rule under which the court would decide at each stage of procedure whether the general rule should apply. The SLC rejected this on the ground that it would lead to unpredictability. A third option was a 'one-way' expenses rule under which expenses may be awarded against a defender but not a representative party. The SLC rejected this as unfair. The SLC recommended that the court should retain its discretion to apply the general rule that expenses follow success in multi-party action proceedings.

92. Annexes A, B and C of this chapter describe the position in other jurisdictions. Owing to the risk to representative parties of an award of adverse costs, a number of Canadian jurisdictions have adopted a 'no costs' rule for class actions. However, this rule also deprives successful plaintiffs of their costs and has led to a degree of controversy. In those jurisdictions which retain a 'two way' costs regime for class actions, the court may modify the usual rule that costs follow success for those unsuccessful plaintiffs who have raised a novel point of law that was a matter of broad public interest.

93. In Australia, the normal costs shifting rule applies to multi-party litigation. In England and Wales, the general rule that costs follow the event also applies to actions under the GLO procedure. However, the court may exercise its discretion to make a protective costs order or a costs capping order (see Chapter 12). In its proposed collective action procedure, the CJC recommended that there should be full costs shifting on the ground that it is a deterrent against speculative or so-called blackmail litigation. It noted that full costs shifting may afford a limited protection to defenders where the claimants are impecunious, but considered that the court could use its powers to order security for costs in appropriate cases.

94. We agree that the general rule that expenses follow success should apply, in principle, to multi-party actions. We also consider that the recommendations that we make in Chapter 12 on awarding expenses in public interest cases should apply to multi-party actions which satisfy the wider public interest criteria.

Contingency Fees and Speculative or Conditional Fees

95. In the USA, class actions, like other civil litigations, are funded by way of contingency fees where the lawyer undertakes the case on a no win/no fee basis and is entitled to charge a percentage of the amount recovered by the client. The advantage of this system is that lawyers can spread the risk of losing one case over a large number of cases and can represent those who would otherwise be unable to afford to litigate. Several disadvantages have been identified: it may foster a 'litigation culture'; it may create a conflict of interest between lawyer and client; and the percentage recovery may be unreasonable. Following a consultation on the legal profession in Scotland in 1989, the Secretary of State rejected the introduction of contingency fees on the ground that it would not be in the public interest.[44]

96. There has been an ongoing debate on this issue in England and Wales. The CJC has recommended that contingency fees should be available in multi-party actions as a last resort where alternative funding is not available. As discussed more fully in Chapter 14, there are a number of ongoing reviews in England and Wales on the funding and cost of litigation and we think that it would be premature to make any recommendations regarding the introduction of contingency fees in this jurisdiction.

97. In jurisdictions where contingency fees are not permitted it may be possible to enter into a no win/no fee agreement which allows the plaintiff's legal representatives an uplift in their fees. A detailed discussion of conditional fee agreements can be found in Chapter 14. In Scotland, multi-party litigation could be undertaken on a speculative basis. It would be open to a representative party to apply to the court for, or to negotiate, an additional fee to recognise the additional responsibility involved in managing a group action. We recommend that this should be a specific ground for awarding an additional fee.

Third Party Funding

98. The SLC considered a number of options for funding multi-party actions including a contingency legal aid fund (CLAF), a class action fund and legal aid.

99. A CLAF is one which takes a proportion of the money received by a successful pursuer to meet claims on the fund by unsuccessful pursuers. Initial funding may be provided by the government. Claimants would have to satisfy a merits test. In theory, the fund becomes self financing over time. Respondents to the SLC

[44] SHHD (1989), *Consultation on the Legal Profession in Scotland*. Also, SHHD (1989), *The Scottish Legal Profession: The Way Forward*.

consultation thought this was an interesting option but doubted whether the volume of litigation would be such as to make the fund viable.

100. A second option considered by the SLC was a class action fund, financed either by public or private bodies. Again, it was considered that such a fund could only be established with public funds in the first instance.

101. In view of the absence of any indication that public funding would be available to establish a contingency or class action fund, the SLC concluded that legal aid was the most suitable means of providing financial assistance for multi-party actions.

102. As part of its proposals in relation to multi-party proceedings in the Federal Court, the Australian Law Reform Commission recommended the introduction of a special fund for such proceedings, as had the South Australian Law Reform Committee. Those recommendations were not implemented. In its recent review of the civil justice system the Victorian Law Reform Commission recommended the establishment of a 'justice fund' which could be used to finance group actions. Although an initial seeding grant would be required to establish the fund, it would seek to become self funding out of revenue derived from class action cases that were financially supported. It would operate on a contingency basis and would be able to recover monies not only from the representative party but also from class members, from judgments or settlements. The fund would accordingly seek to make a profit out of providing assistance rather than merely seeking recovery of its outlays. It would be used to provide funding for commercially viable meritorious litigation, important test cases or public interest cases, to finance research on civil justice issues and to fund initiatives of the civil justice council.[45]

103. As the SLC noted, special funds for group actions have been established in Quebec and Ontario and illustrate how provision may be made for a class action fund.[46] The Ontario Class Proceedings Fund provides assistance, limited to disbursements, in class actions and charges a 10% levy on awards and settlements in successful cases. It is administered by a committee of the Law Foundation, which considers the merits and public interest aspects of a potential class action to decide whether funding should be made available. The Fund is responsible for opponents' costs in unsuccessful cases.

104. The Fonds D'Aide aux Recours Collectifs was introduced in Quebec in 1978. It supports a wide range of collective actions including product liability, environmental claims and consumer claims. It pays for legal representation (at a fixed hourly rate) as well as disbursements. It has a right of subrogation either to a share of the damages awarded to the individual claimant (up to 10%) or a higher rate in relation to unclaimed damages.

[45] Victorian Law Reform Commission (2008), *op. cit*, Chapter 10

[46] SLC (1994a), *op. cit*, pp 270-274. See also Civil Justice Council (2007), *The Future Funding of Litigation-Alternative Funding Structures*

105. Both funds are viable[47] although the take-up rate in the Ontario scheme is low.

106. In its Review of Alternative Funding Structures (2007), the Civil Justice Council (CJC) examined a number of options for the funding of civil litigation, including a Contingency Legal Aid Fund (CLAF) and a Supplementary Legal Aid Scheme (SLAS) for class actions.[48] The models considered were for the funding of civil litigation generally and not just the funding of multi-party actions. The CJC's assessment was based on the assumption that the government would provide neither additional public money to increase legal aid coverage in civil proceedings nor initial funding to establish a contingency legal aid fund. The CJC concluded that a CLAF should not be established under the current costs regime in England and Wales. It thought it unlikely that a CLAF would be successful in a system where conditional fee agreements are operating successfully. In other words, stronger claims would continue to be funded through CFAs, leaving weaker claims, and hence a higher degree of risk, with the CLAF. The CJC was of the opinion that any attempt to introduce a CLAF scheme that recovered its payback by a success fee recoverable from opponents would be certain to generate a further 'costs war' involving satellite litigation.

107. As the CJC noted, study of CLAF and SLAS schemes in other countries shows that success or failure depends on the legal environment in which the fund operates, such as the extent of competition from other methods of funding. In this jurisdiction, success fees charged under speculative agreements are not recoverable from the defender and must be met by the pursuer from the sums recovered. The availability of funding on a contingency basis might therefore be an attractive option for potential group litigants.

108. In our view there needs to be a special funding regime for multi-party actions. While we are attracted by the Quebec model for a CLAF, we note that doubts have been expressed about the viability of such a fund in Scotland if its scope were limited to the funding of multi-party actions. We also note that in other jurisdictions there have been savings in administrative costs where funding arrangements for such actions are administered by the legal aid authorities. There are also links between the operation and availability of legal aid and the funding of multi-party actions. Accordingly, on balance, we consider that it would be preferable to have special funding arrangements for multi-party actions to be administered by SLAB.

109. As discussed above, we take the view that the general rule that expenses follow success should apply to multi-party actions, subject always to the court's discretion. Issues arise, therefore, as to the liability in expenses of class members as a whole, and of the representative parties in particular.

[47] The Fonds is not fully self-financing and receives a 50% subsidy from the Government of Quebec.
[48] CJC (2007), *op. cit.*

110. In its report the SLC recommended that under its proposed multi-party action procedure, members of the class should be liable to contribute to the expenses of the representative party and for a share of the defender's taxed expenses in the event of the action being unsuccessful. It is difficult to see how those arrangements could work in a regime which permits opting out, as the members of the class may not be identifiable and may not be aware of the proceedings until a relatively late stage. In those jurisdictions that have adopted an opt-out system, the representative parties bear the cost of proceedings although they may have first call over the damages awarded for any shortfall between 'party and party' and 'agent and client' expenses to reflect the additional cost of being a representative party. In addition, in regimes that apply cost shifting in multi-party actions, the representative parties are liable for the expenses of the defenders. These provisions can operate as a significant disincentive.

111. It is for this reason that the class action funds operating in Ontario and Quebec offer not only support with the cost of pursuing the action but also an indemnity in relation to expenses in the event of the action being unsuccessful.

112. In England and Wales, the normal cost protection rules apply to legally aided representative parties in group actions which are funded by legal aid, that is, the court may modify their liability in expenses to nil. The CJC envisaged that this protection would apply also to actions funded by their proposed SLAS. This would have the consequence of creating a *de facto* one way costs shifting regime for those actions funded by SLAS. In other words, the representative parties would be able to recover their expenses from the defenders in the event that the action was successful, but might have their liability in expenses modified to nil in the event that it was not. We are not persuaded that a one way costs shifting rule would be appropriate for multi-party actions. This would be unfair to defenders, particularly when expenses in a multi-party action are likely to be considerably greater than in a unitary one. In our view, there should be scope, in appropriate cases, for an award of expenses to be made against the multi-party action fund that we propose.[49] We do not consider that it would be appropriate for such an order to be made in all cases where a multi-party action was unsuccessful. The court may consider that the case was one which should have been brought in the public interest and that, having regard to the importance of the issues raised and the resources of the defenders, it would be appropriate for there to be a finding of no expenses due to or by either party, or some other modification of the general rule.

113. Because of the risk of a finding in expenses being made against the multi-party action fund we think that special criteria would need to be satisfied in order for financial assistance to be granted to a representative party. In particular, in applying the test of reasonableness, we propose that SLAB would have regard to the prospects of success, the number of members in the group, the value of their claims, the resources of the proposed defenders, and whether the proposed action raises issues of wider public interest that would justify the expenditure of public funds. As these

[49] We use the term 'fund' for ease of reference. This might be a notional rather than an actual fund.

issues may be difficult to assess, we consider that it would be helpful for SLAB to be assisted by an advisory committee in dealing with such requests for funding. We note SLAB already has a Committee comprising legal and non-legal members and other co-opted members which considers complex, sensitive, novel or other contentious legal aid applications. We recommend that SLAB apply a similar approach to its handling of multi-party actions. Clearly SLAB would wish to consider whether it requires to expand the range of experience and background available to it in dealing with multi-party actions.

114. Owing to the potential cost to the public purse, we consider that it should be possible for a grant of funding to be made on a conditional basis, for example, on a staged basis, such as for all work done up to the application for certification of the action, with regular reviews thereafter of whether the funding continues to meet the reasonableness criteria. We think that the advisory committee should give advice to SLAB in relation to an initial request for funding, at the review stage, and also in relation to any offers in settlement.

115. The funding arrangements that apply to multi-party actions may be required to differ in other respects from those applying to civil legal aid. For example, it would be necessary to consider further whether eligibility for funding should be subject to a means test and whether the multi-party action fund should be supported by a levy on damages in successful actions (i.e. on a contingency basis), or by financial contributions by claimants, or a combination of these.

116. So far as the relationship between the availability of civil legal aid and support from the multi-party action fund is concerned, the principle of costs shifting would be undermined if a pursuer who was eligible for legal aid on an individual basis was able to bring proceedings as a representative pursuer. We therefore consider that a person who seeks public funding to bring a multi-party action would have to do so by way of an application to the multi-party action fund. Class members who are not representative parties would be able to apply for legal advice and assistance, if eligible, to help them decide whether or not to opt in or opt out, depending on the nature of the action.

117. As with actions funded by the Legal Services Commission, we think that it should be open to the multi-party action fund to limit funding to litigation of the common issues. If those issues were resolved in favour of the class members and further advice or litigation was required in order to resolve the issue of quantum, or another issue personal to a class member, then this might be funded privately or by ordinary civil legal aid.

118. We have recommended that where there are multiple unitary claims raising common issues of fact or law, it should be open to the defenders to apply to the court, or for the court on its own initiative, to transfer the cases to the multi-party action procedure. We consider that where multiple applications for civil legal aid are made by individuals which raise the same or similar issues of fact or law, such that it would be desirable for these to be litigated under the multi-party action procedure,

SLAB should have the power to refuse to grant legal aid on an individual basis by applying the reasonableness test and inviting an application to the multi-party action fund for funding for a multi-party action.

119. It was suggested by some respondents that, in contrast to the position for civil legal aid, representative bodies should be eligible for funding if the proposed multi-party action satisfies a public interest test. This would cater for the situation where, for example, a charitable organisation representing consumer interests does not have sufficient resources to pursue a multi-party action or where to do so would take up a disproportionate amount of its resources. We consider that funding could be made available on a different basis for such actions. For example, the organisation might have to pay a contribution to, or share the costs of, bringing the action (even if this option is not adopted for individuals who apply for such funding) or might have to agree to bear a share of the expenses if the action is unsuccessful. An application for funding by a representative body would have to meet a public interest merits test. In addition, the multi-party action fund would have a broad discretion to determine whether it would be reasonable to make public funds available, having regard to the resources of the organisation and the potential for the issues to be resolved by other means.

CHAPTER 14 THE COST AND FUNDING OF LITIGATION

1. Our remit identified the cost of litigation as one of the particular matters to which we should have regard. In this chapter we discuss the cost of litigation, judicial expenses, the taxation of accounts and whether the shortfall between 'party and party' and 'agent and client' expenses should be reduced. We also consider speculative fee arrangements, legal expenses insurance, some aspects of legal aid, and court fees.

2. In November 2008, responding to concerns about the costs of civil litigation, the Master of the Rolls, Sir Anthony Clarke, appointed Lord Justice Rupert Jackson to conduct a year-long review of legal costs in litigation in England and Wales. A preliminary report was published on 8 May 2009, in which Lord Justice Jackson identified the fundamental issues emerging from his investigation.[1] In this chapter we make extensive reference to his preliminary report ("the Jackson Report"). The review's findings are due to be presented in December 2009.

Information and views from the consultation

3. We set out to gather information about the levels of legal expenses, how these compare with sums awarded by the court or settlement figures, and the extent to which experience in Scotland differs from that in England and Wales. We obtained some information of the type we were looking for. Some of the information we received was commercially sensitive and provided to us on a confidential basis. Information was mostly provided by defenders in personal injury actions or their agents, in the form of information about sums sued for, sums settled for and expenses paid to pursuers' agents, based on a sample of cases. It was not always clear to us on what basis the samples were chosen. Some respondents did not differentiate between cases raised in the sheriff court and Court of Session. Information was presented in different formats, so that collation of the information or direct comparison was not always possible. The information that was collected is summarised in Annex C to Chapter 4, Tables 3a to 5h.

[1] The Rt. Hon Lord Justice Jackson (2009), *Review of Civil Litigation Costs: Preliminary Report.* See especially Volume 1 pp 11-17, for emerging questions. See also M Zander (2009) 'A Titanic challenge?' *New Law Journal*, 22 May 2009, in which Lord Justice Jackson's preliminary findings are summarised.

4. We also wanted evidence about the extent to which concerns about cost act as a deterrent to going to court. Almost all respondents agreed that cost is a significant factor in deciding whether or not to pursue or defend a case. It was suggested that this might not be such an issue in personal injury cases because of the availability of specialist solicitors and speculative fee arrangements. There were concerns that those arrangements might no longer be economically viable if personal injury cases (which under current arrangements might be heard in the Court of Session) were dispersed to sheriff courts throughout Scotland, resulting in a denial of justice to those not eligible for legal aid. We have recognised this in our recommendations in Chapter 4 regarding the creation of a specialist personal injury court in the sheriff court.

5. Many respondents related their views on the cost of litigation to the availability of legal aid. The consultation pre-dated recent changes to the financial eligibility criteria for legal aid and the introduction of a tapering system for contributions by the assisted party. Some respondents described the previous arrangements as producing a situation where only the very poor (who qualify for legal aid) or the very rich can afford to litigate. The recent changes should mitigate that situation. It is also mitigated by legal expenses insurance or speculative fee arrangements (discussed later in this chapter), although these are not available for all types of actions. Particular mention was made of cases raising issues of public or administrative law, which are not generally undertaken on a speculative basis. In Chapter 12 we make recommendations about orders in relation to expenses in public interest cases.

6. Family practitioners told us that pressure to avoid incurring further expense was a factor leading many family actions to settle. In such cases a great deal of expense can be incurred due to the level of hostility between the parties or to lack of early disclosure and focusing of the issues. It was suggested that the courts could take a more robust line to curb unreasonable behaviour and that more proactive case management would produce greater efficiency and assist in resolving cases at an earlier stage. We deal with case management in Chapters 5 and 9.

7. Some respondents mentioned particular problems in obtaining funding for professional/clinical negligence cases or those relating to industrial diseases. Most personal injury litigation is now funded by speculative fee arrangements. These were generally considered by respondents to work well in relatively straightforward cases where there is a reasonable prospect of success. Complex cases such as clinical negligence claims were more problematic. A considerable amount of work may have to be done, and expenditure on expert opinion incurred, before the prospects of success can be assessed. It was suggested that the legal aid rates payable for complex cases did not adequately reward the work done, with the result that many solicitors were unwilling to take on such cases.

8. Respondents proposed a variety of methods in which funding for litigation could be provided and barriers to access to the courts could be overcome. These

included greater awareness of and reliance on legal expenses insurance and wider financial eligibility for legal aid, with a tapering system of contributions. Allowing recovery of success fees and "After The Event" (ATE) insurance premiums was also proposed, as was the introduction of procedures for multi party actions and/or group litigation. These topics are discussed later in this chapter and in Chapter 13.

Proportionality

9. We have not been able to obtain sufficient information to allow us to come to a definitive view on whether the cost of litigation in Scotland is generally disproportionate. Anecdotally there have been some cases where expenses have gone beyond what would appear to a detached observer to be reasonable, having regard to the sums and the issues involved. We have not, however, gained any impression that the experience of England and Wales has been, or is in danger of being, replicated here. Our research suggests that, for lower value personal injuries claims, average expenses are high relative to the monetary value of the claim. If proportionality is viewed simplistically as a calculation of monetary value against expense, such expense may appear disproportionate. This tended to be the view of insurers and those advising them. They argued that expenses were often incurred unnecessarily, with both sides investigating claims and keeping their findings secret for tactical reasons. However, those acting for pursuers argued that a certain amount of work always has to be done and some outlays incurred if any personal injury case, of whatever value, is to be prepared properly. They argued that there is a minimum level of expense involved in any claim and that care should be taken in applying the principle of proportionality. We understand that SLAB undertakes a cost/benefit analysis in assessing whether it is reasonable to grant civil legal aid and that an application is unlikely to be approved if the cost is disproportionate to any likely benefit to the applicant.

10. We consider that assessing proportionality is more sophisticated than simply comparing the monetary value of the claim with the legal fees and outlays. Other factors must also be taken into account, such as the relative importance of the claim to the individual and the public interest in holding to account those responsible for the injury in personal injury cases. Whether the expenses are proportionate to the issues involved will therefore always be to some extent a subjective matter and can really only be answered on a case by case basis. We do not favour a system of fixed fees which sets the level of expenses recoverable solely by reference to the monetary value of the claim. The responses revealed differences of view on whether all cases are pursued efficiently and economically, but information about the levels of expenses paid in settled cases indicates general acceptance, by both pursuers and defenders, that there is an irreducible level of expense involved in personal injury cases. This is borne out by the agreed tables of fees for claims settled under the voluntary pre-action protocols.[2] We accept that there will be an unavoidable

[2] The minimum fee payable for a case settled under the voluntary pre-action protocol in personal injury cases works out at £695 for a case which settles at £1,500. This rises to £1,325 for a case settling at

minimum level of expense if a personal injury case is to be investigated and prepared properly, regardless of its monetary value. It is for this reason that later in this chapter we make a recommendation about the block fees payable for pre-litigation work.

Recommendations – general

11. In the rest of this chapter we make specific recommendations about the judicial expenses regime, the system for taxing accounts, legal expenses insurance, and legal aid. We consider that our recommendations will improve access to justice. Before going on to discuss these matters in more detail there are two general issues we wish to highlight.

Efficiency

12. While we accept that there will be a subjective element to deciding how much is too much as regards the expense of a case, we also consider that the courts have a very important role to play in ensuring that expense is not incurred unnecessarily and that opportunities for parties to manipulate court procedures for tactical gain are minimised. Any system which aims to keep the cost of litigation under reasonable control must, in our view, start by ensuring that cases are dealt with at the appropriate level and with a suitable degree of case management. Our specific recommendations on those matters are designed to provide structures and procedures dealing with litigation in as efficient a manner as possible, consistent with justice. They should in our view make a significant contribution to controlling the cost of litigation generally.

Recoverability

13. For many respondents the question of what proportion of expenses incurred by a party can be recovered by that party if successful was more of a live issue than the actual amount incurred. We obtained some information about the rate of recovery of expenses and the extent of the shortfall between the amount that a successful party recovers from his opponent ("party and party expenses") and the amount he is liable to pay his own legal advisers for the work done and outlays incurred ("agent and client expenses"). The Consultation Paper suggested (at paragraph 3.15) that the amount normally recovered by a party in a commercial action is between one half to two thirds of the actual fees incurred by that party. The majority of respondents who dealt with this issue confirmed their experience was in line with that. A 50% – 60% recovery rate was commonly mentioned, with some

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£2,500, £1,700 for one settling at £5,000 and £2,075 for one settling at £10,000. Under the voluntary pre-action protocol for professional negligence claims, where the claim is settled without litigation, the minimum fee payable to the pursuer's agent is £1,525, for a claim settling at up to £2,500, rising to £1,900 for a claim settling at £5,000 and £2,275 for one settling at £10,000. Law Society of Scotland http://www.lawscot.org.uk/Members_Information/rules_and_guidance/guides/Rules/preaction_protocol_fees/Preprotocolfees.aspx

estimating that it could be less than 50% in complex cases where significant legal research and investigation might be required, the cost of which could not be fully recovered. The recovery rate was generally considered to be lower in commercial cases than in other cases. All respondents who referred to awards of costs in England agreed that the recovery rate there is higher.[3]

14. We are sympathetic to the view that, in terms of ensuring access to justice, the level of recovery of legal expenses is usually of great significance. A substantial shortfall in what can be recovered by a successful party clearly creates a disincentive to litigate even where there are good prospects of success. For commercial cases, there is a risk that if the shortfall in Scotland is significantly greater than in England and Wales, those businesses that have a choice as to whether to raise actions here or in England will choose the latter. This must be avoided if Scotland is to have any chance of achieving the aspiration of becoming a centre of excellence for dispute resolution, as proposed by the Scottish Government's Business Experts and Law Forum.[4] For personal injury and other claims by individuals, any shortfall will be borne by the party concerned, resulting in a reduction of the sums received by them, unless the shortfall is absorbed by the solicitor or a body providing funding such as a trade union. It is a feature of personal injury litigation in particular that actions are often supported by specialist solicitors and/or trade unions on a no win/no fee basis. The cumulative effect of absorbing such losses may cause them to take on only those cases that they consider to be low risk. This could result in cases with a reasonable prospect of success not being pursued, potentially restricting access to justice. In legally aided cases a solicitor may chose to accept judicial expenses rather than make a claim on the Fund, in which case no deductions are made from the sums recovered by the assisted person. However, where a claim is made on the Fund the relevant expenditure may be recovered from the assisted person by way of clawback. It is for these reasons that we recommend later that the concerns about recovery rates should be addressed.

Judicial Expenses

Introduction

15. Different legal systems apply different policies in relation to the recovery of the expenses or costs of litigation. Many systems have adopted a 'loser pays' approach while others provide that each party should bear their own expenses. In those jurisdictions in which the loser pays the expenses of the successful opponent, one of two policies may operate: (i) the losing party pays the full expenses incurred by the successful party on an agent and client basis ('full indemnity') or (ii) he pays only a proportion of those expenses ('partial indemnity'), which may either be fixed

[3] This would appear to be borne out for commercial cases by the information contained in Appendix 9 to the Jackson Report (2009), *op. cit.*
[4] Business Experts and Law Forum (BELF) (2008), *Report of the Business Experts and Law Forum*

by reference to a specified percentage of agent and client expenses or subject to a more general test of reasonableness.

Other jurisdictions

16. The two extremes are the USA, which has a 'no costs shifting' rule, that is, each side bears its own expenses, and some European jurisdictions which offer a full indemnity, although this may be linked to a fixed statutory scale for agent and client fees for litigation, as in Germany.

17. Most jurisdictions adopt a system of partial indemnity under which judicial ('party and party') expenses are fixed by reference to a table or tariff of fees. As a matter of policy, most jurisdictions set the table/tariff at a percentage of agent and client fees, for example, 60%. The objectives are to discourage frivolous litigation and to limit a losing party's liability in expenses. Many jurisdictions also limit recovery to expenses which are determined to be reasonable. Hence, recovery will be a certain percentage of 'reasonable' expenses rather than actual expenses.

18. The disadvantage of such systems is that the tables/tariffs may not be up-rated sufficiently frequently to keep in line with inflation, leading to an ever-widening gap between 'party and party' and 'agent and client' expenses. Some jurisdictions deal with this problem by providing a mechanism for annual up-rating.

19. In England and Wales the tariff-based system was abandoned and replaced by a rule allowing successful parties to recover their 'reasonable' costs. This produces a relatively high recovery rate compared to other jurisdictions but increases costs, with a disproportionate effect in low value cases, and makes it difficult for parties to predict the extent of their liability in the event of an adverse finding in costs.

20. One of the objectives of the Woolf reforms was to address this issue by providing that only reasonable and proportionate costs are recoverable.

21. The Woolf reforms coincided with other changes: the withdrawal of civil legal aid from all non-medical negligence personal injury actions and many other categories of civil actions that involve monetary claims; the introduction of Conditional Fee Arrangements (CFAs); and the ability to recover from an unsuccessful party both the success fee chargeable under the CFA and any ATE insurance premium. The new Civil Procedure Rules also introduced 'costs only' proceedings which may be brought where the principal sum or other subject matter of a dispute is agreed but parties cannot reach agreement on costs. The significant increase in costs arising from the recoverability of success fees and ATE premiums led to a proliferation of satellite costs litigation and adverse comment by the courts.[5]

22. In order to address the problems of proportionality and predictability in relation to costs, particularly in lower value claims, a number of special rules have

[5] See paragraph 103 *et seq*.

been adopted in England and Wales. For 'costs only' claims in road traffic cases with a value between £1,000 and £10,000 there are fixed recoverable costs depending on the value of the claim plus a fixed success fee of 12.5% where the claimant has entered into a CFA. For other road traffic cases, and certain types of employers' liability claims, there are fixed success fees depending on the type of action and the stage at which it settles or is concluded. In May 2007 a number of major insurance companies and medical reporting agencies signed an agreement regarding capped costs for obtaining medical reports for most personal injury cases under £15,000 in value.

23. In its Report *Improved Access to Justice - Funding Options and Proportionate Costs* (2005), the Civil Justice Council (CJC) made a number of recommendations for reform, including an extension of the predictable costs regime for road traffic claims and fixed success fees for certain categories of personal injury claims. It also recommended that a Costs Council should be established with responsibility for setting fixed and predictable costs. Further details of the recommendations are given in the Annex to this chapter. The Ministry of Justice did not accept the recommendation regarding the establishment of a Costs Council, although a Civil Costs Advisory Committee has been established. The Jackson Report, discussed more fully below**,** proposed that a fixed cost regime should be introduced for all fast track cases. Lord Justice Jackson has invited views on whether such a regime should be introduced for higher value cases or whether there should be benchmark costs for such cases.

24. In 2005 the Irish Legal Costs Working Group also recommended the establishment of a legal costs regulatory body which would take over the existing functions performed by the court rules committees and other bodies, and which would have power to set guidelines and limits in respect of costs.[6]

25. There are two bases of assessment in England and Wales: standard (similar to 'party and party') and indemnity (similar to 'agent and client'). The standard basis of assessment produces a recovery rate of around 80%. By contrast, respondents told us that in Scotland judicial expenses are approximately 60% of fees chargeable on an agent and client basis. In New Zealand the tariff is calculated at two thirds of the agent and client rate, based on a specified daily rate which fixes the amount of time that it would be reasonable to spend on any stage of process. The recovery rate varies in Australia: the Manitoba Law Reform Commission estimated Australian recovery rates at between 60 - 70%. When various tariffs were introduced in Canada, the policy was to fix them at around 60% of agent and client fees. However, the tariffs have not kept pace with inflation and recovery rates may now be 50% or even less, with estimates of no more than 25% – and on occasion less than 10% – being given to the Commission by practitioners. A description of the tariffs adopted in other jurisdictions is in the Annex to this chapter.

[6] Legal Cost Working Group Ireland (2005), *Report of the Legal Cost Working Group*

26. Schemes based primarily on the value of a claim may not reflect the time reasonably spent in conducting a case or the complexity of the issues, and may over compensate high value cases. Some schemes provide for a large number of variables and a high degree of discretion on the part of the court, which can lead to unpredictability. Some jurisdictions address this by adopting a 'default' tariff or a system whereby the court assigns a case to the appropriate tariff at an early stage of proceedings, absent the agreement of the parties.

Scotland

27. The general rule is that only such expenses as are reasonable for conducting the cause in a proper manner are recoverable. There is an inevitable tension between predictability and reward based on the work done in any particular case. Scotland has a hybrid system which provides for block fees similar to the systems used in many other jurisdictions under which fees are fixed by reference to different steps or stages of procedure. However, it has additional flexibility in permitting parties to charge on a time and line basis. Where the block fees, based on an estimate of the time reasonably spent on a stage of procedure, would not provide adequate recompense, the account can be charged on a time and line basis. It is not, however, possible to elect to charge part of an account on a block fee basis and part on a time and line basis. The auditor has the power under both bases to "tax off" work if he considers it unreasonable.

28. In addition, there is provision for a party to seek an 'additional fee' to reflect the complexity of a case. The criteria are as follows:

a) the complexity of the cause and the number, difficulty or novelty of the questions raised;

b) the skill, time and labour, and specialised knowledge required, of the solicitor or the exceptional urgency of the steps taken by him;

c) the number or importance of any documents prepared or perused;

d) the place and circumstances of the cause or in which the work of the solicitor in preparation for, and conduct of, the cause has been carried out;

e) the importance of the cause or the subject-matter of it to the client;

f) the amount or value of money or property involved in the cause;

g) the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.[7]

[7] Rule 42.14 of the Rules of the Court of Session. Similar provision is made for the sheriff court.

29. In the Court of Session, the Court itself may determine an application for an additional fee or may remit it to the Auditor of Court to determine whether an additional fee should be allowed.[8] In either case it is the Auditor who assesses the amount of the additional fee; there is no cap on the percentage uplift. There are no guidelines on the factors to be taken into account in determining the percentage uplift to be awarded. In the sheriff court, it is the sheriff who decides whether an additional fee should be allowed and the percentage increase to be applied.

30. The element of solicitors' fees in 'party and party' expenses is regulated by act of sederunt. In practice, the Lord President puts forward proposals on the basis of recommendations made to him by his Advisory Committee. The Lord President's Advisory Committee on Solicitors' Fees (LPAC) was set up by Lord President Emslie to advise on the Court of Session's exercise of its powers to regulate solicitors' fees in civil causes in the Court of Session and the sheriff courts.

31. LPAC is chaired by a Court of Session judge, currently Lord Carloway, and comprises the Auditor of the Court of Session, a representative nominated by the Faculty of Advocates and four solicitors nominated by the Law Society, two of whom practice predominantly in the Court of Session and two in the sheriff courts.

32. The Law Society makes an annual submission to LPAC, usually in December, regarding increases to the hourly rate and the other fees in the tables of fees. The submission usually includes requests on a variety of matters concerning the court rules and the tables of fees. LPAC meets as necessary to consider the submission and then reports to the Lord President making recommendations on the matters raised. The Lord President then instructs the preparation of appropriate amending acts of sederunt.

33. In addition, submissions on changes to the rules on solicitors' fees may be made to the Lord President at any time by any interested party. Ordinarily he would refer any such submission to LPAC for advice.

Consultation Responses

34. A significant majority of respondents were of the view that the present arrangements for recovery of judicial expenses are unsatisfactory.

35. A number of respondents submitted that the gap between 'party and party' and 'agent and client' expenses is too great. This was a particular concern for commercial practitioners, who reported that the recovery rate in commercial cases can be as low as 50% or less. Although charge-out rates for solicitors' fees in Scotland are competitive in comparison with those in London, the shortfall may act as a deterrent to litigating in Scotland where there is a choice of forum. Those acting for pursuers in personal injury cases submitted that the shortfall meant that clients do not receive their full damages unless the solicitor waives part of his fee or meets

[8] Rule 42.14(2)

the cost of unrecoverable outlays. It was suggested that this may be contrary to article 1 of the First Protocol of the European Convention on Human Rights.[9] It was also said that the shortfall forces pursuers into accepting unfavourable settlements for fear of incurring unrecoverable expenses.

36. Many respondents were in favour of narrowing the gap between 'party and party' and 'agent and client' expenses or raising the recovery rate to 100%. However, increasing judicial expenses would expose the unsuccessful litigant to a higher liability in expenses and could, in some instances, deter claimants from litigating. For example, a law centre drew our attention to the fact that some clients do not take up its offers to work on a *pro bono* basis as they are worried about being found liable for their opponents' expenses. Other respondents thought the balance was about right, in that the current average recovery rate of around 60% represents a reasonable risk factor to be taken into account when considering either bringing or defending cases in court, without being an insurmountable barrier to access to justice.

37. Some respondents suggested replacing the present regime with a system of fixed recoverable expenses based on the value of a case, or that consideration should be given to a system whereby each party bears its own expenses. It was suggested that this was a topic deserving of separate study in its own right.

38. Some concerns were expressed about the lack of transparency of the procedure by which fees are reviewed and set, and the fact that there is no consumer or wider representation on LPAC. It was, however, noted that there are regular annual reviews of the judicial tables. One respondent considered that any increasing differential between 'agent and client' and 'party and party' expenses was mainly attributable to the increased fees charged by large to middle sized firms.

39. A number of respondents drew attention to a perceived anomaly in the treatment of solicitor advocates' fees in sheriff court proceedings. Where counsel is instructed the sheriff can be asked to sanction the employment of counsel. If the motion is granted counsel's fees will, in the event of success, be recoverable from the opposing party as an outlay, subject to taxation. However, there is no provision for sanctioning the employment of a solicitor advocate. The work undertaken by the solicitor advocate is treated as work undertaken by the instructing solicitor and is chargeable under the table of fees for solicitors. This means that in the event of success the solicitor advocate's fee is not fully recoverable from the opponent.

[9] Article 1 Protocol 1 provides that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Submission by the Professional Remuneration Committee of the Law Society of Scotland

40. In its submission to us, the Professional Remuneration Committee of the Law Society of Scotland ('the Committee') drew attention to what they perceived as a number of problems with the current arrangements:[10] the rate of recovery in commercial cases; the amount payable for pre-litigation preparation and negotiation; the block fee for proof preparation; the lack of any regulation of counsel's fees and fees paid to expert witnesses; and the fact that interest is not payable on outlays.

Rate of recovery in commercial cases

41. Like other respondents, the Committee expressed concern about the shortfall between 'party and party' and 'agent and client' expenses in commercial cases. It had been hoped that an amendment made in April 2008 to Rule 42.9 of the Court of Session Rules might help to address this issue. The previous rule only permitted the time of one solicitor to be charged on a 'party and party' basis. This did not reflect the fact that most commercial firms work in teams and that several lawyers of varying degrees of seniority and different areas of expertise may be involved in the conduct of a case. The amendment deleted the reference to taxing the account as if the whole work in the cause had been carried out by one solicitor.[11] However, the amended rule only applies to accounts which are drawn up on a time and line basis. There is a view that the amendment has not (as yet) had a significant impact. This may be because a high proportion of accounts are still being drawn up on a block fees basis, although views on this issue differed.

42. We understand that the Law Society has submitted to LPAC that there should be a separate table of fees for commercial actions. That proposal was not, however, accepted by LPAC.

43. As a result of concerns about the rate of recovery in commercial litigation the report of the Business Experts and Law Forum commissioned by the Scottish Government recommended that the Lord President and the Rules Councils should undertake a full review of costs recovery rules, including comparative analysis with other jurisdictions.[12]

The amount payable for pre- litigation preparation and negotiation

44. It is the Committee's position that the fees provided for in the judicial tables of expenses in the Court of Session and sheriff court for pre-litigation preparation and negotiation are inadequate. There are also inconsistencies between auditors as to the criteria that must be fulfilled before the pre-litigation fee is allowed.

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[10] The submission is included among the consultation responses published on the Review's pages of the Scottish Court Service website: http://www.scotcourts.gov.uk/civilcourtsreview/publications.asp

[11] Act of Sederunt (Rules of the Court of Session Amendment) (Fees of Solicitors) 2008 (SSI 2008/39)

[12] Business Experts and Law Forum (2008), *op.cit*, Recommendation 1.4.4.

45. The Committee noted that the pre-litigation fee in the sheriff court is £138.90 for actions up to £5,000 and £383.80 for ordinary cause actions, and that in the Court of Session the pre-litigation fee is £416.50.[13] It observed that these sums are significantly less than the fees payable under the voluntary pre-action protocol for personal injury actions (the 'protocol fee').[14] The Committee's position is that insurers who settle claims under the protocol have implicitly accepted that the protocol fees represent a reasonable rate of remuneration for the work done in investigating a claim, intimating it to the insurer, and carrying on settlement negotiations. The fact that the judicial pre-litigation fee is so small in comparison may act as a disincentive to insurers to settle early. Insurers' liability in expenses may be less if they wait until proceedings are commenced and lodge a tender with the defences. If the tender is accepted and the insurer pays the judicial expenses of the action, the pre-litigation block fee may, depending on the value of the claim, be considerably smaller than the protocol fee that would have been payable had the claim been settled prior to the action being raised.

The block fee for proof preparation

46. The Committee further noted that the block fee for proof preparation in the Court of Session is £940.40 in a personal injury action (under Chapter 43) and £942.35 in an ordinary action.[15] The Committee estimated that the work involved in arranging and preparing a consultation on the sufficiency of evidence (excluding attendance at the consultation itself) amounts to around £150; the work involved in preparing and lodging the list of witnesses and citing witnesses is estimated at £375. These basic steps account for more than half the block fee which, in their submission, does not adequately reward the remaining work that has to be done in preparing for the proof.

Counsel's fees

47. Although the amount of solicitors' fees which may be recovered from an opponent is regulated by the court, there is no corresponding table of fees for counsel. Counsel's fees are charged on an 'agent and client' basis and are included in the judicial account as an outlay. In its submission, the Committee calculated that on average approximately 88% of counsel's fees are recovered, compared to 63% of solicitor's fees. In the Committee's experience the principal area of dispute between parties in most accounts which proceed to taxation related to the amount of counsel's fees and the extent to which these are recoverable from the opposing party. It was also argued that increases in counsel's fees, rather than solicitors' fees, were

[13] These fees have now been increased: see Act of Sederunt (Rules of the Court of Session Amendment No 2)(Fees of Solicitors) 2009 (SSI 2009/82). The figure quoted by the Committee in relation to actions up to £5,000 is the one applicable to defended summary cause actions. However, there is a separate table for personal injury claims only. Under that table the figure applicable at the date of the Committee's submission for pre-litigation work was £395.15.
[14] See footnote 2
[15] These fees have now been increased: see footnote 13

responsible for the rising cost of litigation. In their submission, the Committee proposed that there should be a separate table of judicial fees for counsel, to be determined by LPAC. This proposal was supported by other respondents.

Other outlays

48. At present a party must bear the cost of any outlays necessarily incurred in the preparation of the case until the judicial expenses are settled by the unsuccessful party.[16] The Committee drew attention to the recent significant increase in court dues[17] and the cost of medical and other expert reports, arguing that the court should have power to award interest on outlays from the date they were incurred.

Discussion and Recommendations

The shortfall between 'party and party' and 'agent and client' expenses

49. Most respondents did not favour full recovery on an 'agent and client' basis. This would lead to uncertainty and unpredictability as there is no longer a table of fees regulating the amount a solicitor may charge a client. Although it was suggested by one respondent that the European Convention on Human Rights requires full recovery of expenses incurred, this does not appear to be borne out by the Court's case law. In *Dello Preite v Italy*,[18] for example, the European Commission of Human Rights held that the article 6(1) right of access to a court does not imply that the successful party will necessarily be reimbursed the costs of those proceedings, unless there is evidence that these costs would constitute an impediment to access to a court. We are not aware of any case law supporting a contention that a party's inability to recover expenses on a full indemnity basis would be a breach of article 1 of the First Protocol. If awards were made on a full indemnity basis, this would result in a significant increase in the cost of litigation and might lead to additional expense in that it is likely that more accounts would proceed to taxation.

50. How, then, can the problem of shortfall be addressed? Some improvements could be made without radically altering the existing system. For example, we are of the view that the points made by the Professional Remuneration Committee of the Law Society of Scotland on the disparity between protocol fees and fees payable under the judicial tables for pre-litigation work are well founded and may serve to discourage defenders from settling prior to litigation. Accordingly, we consider that there should be a significant increase in the block fee for pre-litigation work to reflect work properly and reasonably carried out in connection with investigation and intimation of the claim, pre-litigation discussions on settlement, and compliance with a pre-action protocol where applicable. This would have the effect of narrowing the gap between block pre-litigation fees and protocol fees. For the avoidance of doubt,

[16] If the pursuer is legally aided, then outlays of £150 or more can be reimbursed before the end of the court action.
[17] These are discussed later in this chapter
[18] Application No.15488/89

this increase would apply to all actions and not just those to which the protocol applies. While this could result in over-compensation for pre-litigation work undertaken in other types of cases, it is open to the auditor to abate or restrict the block fee to an amount which is reasonable in the circumstances of the case.

51. Although it is open to the auditor to increase the block fee for pre-litigation work if he finds it inadequate in a particular case, the exercise of that discretion is likely to be limited to exceptional cases. It would, therefore, be preferable for the block fee to be increased if it generally does not adequately reward the amount of work properly undertaken. In our opinion an increase in the block fee would promote careful and reasonable case preparation and would enhance the prospects of early settlement.

52. There is some force in the Professional Remuneration Committee's views on the adequacy of the block fee for proof preparation, which may be insufficient remuneration for the amount of work required in preparing for a proof. We recommend that this issue should be reviewed by LPAC.

Counsel's fees

53. The Professional Remuneration Committee's concerns about the level and impact on the cost of litigation of counsel's fees were echoed by other respondents. They are also reflected in SLAB's annual reports for the period 1996/7 to 2006/7. During this period, total civil legal aid for proceedings in all courts decreased by 10%, from £35,064,000 to £31,428,000. Total payments to solicitors decreased by 28%, from £23,150,000 to £16,704,000. Total payments to counsel, however, increased by 106% in the same period, from £2,398,000 to £4,936,000. For proceedings in the Court of Session, total civil legal aid paid to solicitors in 1996/7 was more than double that paid to counsel (£3,581,000 compared with £1,689.000). By 2006/7, however, the total payment to counsel was 13% higher than that to solicitors (£3,011,000 to counsel compared with £2,662,000 to solicitors). During the same period average civil legal aid payment per case in the Court of Session rose by 60%, from £5,716 to £9,128. However, the average payment to solicitors for Court of Session cases decreased by 12%, from £3,209 to £2,823 per case, while the average payment to counsel increased by 111%, from £1,513 to £3,193 per case. As the amount of counsel's fees chargeable to the Legal Aid Fund is prescribed by the legal aid regulations, the figures published by SLAB may not fully reflect counsel's rates in the legal market generally, and are likely to underestimate them.

54. A law accountant submitted that over the last 15 years, total expenditure in relation to legal expenses (both gross and recoverable) has risen disproportionately when compared to the increase in sums awarded and that this is largely, though not wholly, attributable to an increase in fees charged by counsel at a rate in excess of either price or wage inflation.

55. We accordingly support the introduction of a judicial table of fees for counsel in the Court of Session, as well as in the sheriff court for those cases in which

sanction for the employment of counsel is given. The table could be based on historical data regarding the amount allowed for counsel's fees at taxation. We propose that there should be a band or range of fees for different categories of work (for example, drafting pleadings, proposing or opposing motions, advising in consultation or conducting a hearing), reflecting the complexity of the case and the seniority or degree of expertise of counsel. The table would be regulated by LPAC.

56. We have mentioned the anomaly in relation to the treatment of the fees of solicitor advocates in the Sheriff Court. We consider that there should be a procedure for sanctioning the employment of a solicitor advocate in proceedings in the sheriff court and that the fees of the solicitor advocate should be included in the judicial account as an outlay. We also consider that the table of fees that we recommend for counsel should apply to solicitor advocates.

Outlays

57. We have some sympathy with the points made by the Professional Remuneration Committee about outlays and would support the introduction of a power to award interest at the judicial rate on outlays from the date they are incurred.

Amending the judicial tables

58. One respondent, an experienced law accountant, suggested that the judicial tables could be restructured to produce quicker, cheaper and more efficient outcomes by promoting early settlement and penalising prolixity. Changes identified as meriting consideration include: front-loading fees; tapering fees to encourage brevity; earlier disclosure of the instruction of experts and other witnesses as a condition of the right to recover their fees; and 'soft-capping' of the fees of expert and other witnesses in lower value proceedings. We believe that these are worthy of further consideration by the proposed Working Group on Judicial Expenses that we discuss later.

A new tariff based system

59. Reform of block fees for pre-litigation activity and proof preparation, the introduction of a judicial table of fees for counsel and a power to award interest on outlays, should go some way to meet concerns expressed by practitioners, particularly those specialising in personal injury cases. These proposals would not, however, fully address the concerns of commercial practitioners about recovery rates.

60. Some jurisdictions make an express link between 'party and party' and 'agent and client' rates, for example New Zealand, where the judicial rate is two thirds of a notional 'agent and client' rate. Following the withdrawal of the Table of Fees for General Business in 2005, there is no 'agent and client' benchmark in Scotland. It might, however, be possible to devise a notional 'agent and client' rate based on the

Law Society's Cost of Time Survey. We understand that the Survey is taken into account by LPAC at present in setting the judicial rates. There is, however, no express connection or relationship between the hourly rates underpinning the judicial table and those in the Survey. The hourly rates in the judicial tables are presently set at approximately 60% of 'agent and client' rates, possibly less than 60% in commercial litigation, as measured across Scotland's law firms by the Survey, but it is not clear that this is as a result of a deliberate policy choice.

61. An alternative would be a system that provided for separate tables or tariffs of judicial expenses designed to produce different recovery rates according to the value and/or complexity of an action. So, for example, fees in Tariff A might be set at a level to provide for a recovery rate of 60% of notional 'agent and client' fees as measured by the Survey; Tariff B at, say, 75% of 'agent and client' fees; and Tariff C at, say, 90%. In practice, this would mean a 25% uplift in Tariff B, and a 50% uplift in Tariff C. There would be a presumption that the applicable tariff would be determined by the value of the action: for example, Tariff A would apply to actions with a value of less than £50,000; Tariff B to those between £50,000 and £300,000; and Tariff C to those with a value of more than £300,000.

62. The value of the action would not be decisive and it would be open to the parties to agree that a different tariff should apply or, in the absence of agreement, to ask the court to fix the appropriate tariff. The appropriate tariff would be agreed by the parties or fixed by the court at the commencement of proceedings but could be reviewed at a later stage if the action became more or less complex than had been envisaged at the outset. The court would have discretion to decide that part or all of the proceedings should be subject to taxation by reference to one or more of the tariffs.

63. The facility to apply a higher tariff in recognition of the importance or complexity of an action would take the place of the current additional fee procedure.

64. Fixing the recovery rate for Tariff A at 60% would reflect the policy choice made in other jurisdictions that this represents a reasonable balance in facilitating access to justice for well-founded claims while not exposing a claimant to a level of risk as regards an adverse finding in expenses that would operate as a disincentive to pursuing such a claim.

65. These suggestions are put forward as a basis for further discussion and consultation. It has not been possible in the context of this Review, standing the breadth of the remit and the timescale for its completion, to consult in sufficient depth to make a firm recommendation. We are however of the view that a tariff-based system along these lines would be worthy of more detailed consideration.

66. In Chapter 15 we recommend that a Civil Justice Council for Scotland (CJCS) should be established. We consider that the cost of litigation should form part of that body's remit. Pending the establishment of the CJCS we consider that the Scottish Government should set up a Working Group on Judicial Expenses to consider *inter*

alia: whether such a system would confer any benefits to litigants over and above the present system; the implications of adopting tariffs with varying rates of recovery; the appropriate number of tariffs; the percentage rates of recovery; the value of the hourly rates underpinning each of the tariffs; the default values of the actions to which each tariff should apply; and the arrangements for those actions with no pecuniary crave. In the meantime, we consider that the current judicial tables, and their operation, should be reviewed to address the concerns about recovery rates, the extent to which these may act as a barrier to access to justice, and their impact on whether parties choose to litigate in Scotland.

67. The review of costs in civil litigation in England and Wales currently being undertaken by Lord Justice Jackson raises more fundamental issues. The Jackson Report considers whether the rule that expenses follow success should be modified, for example, by the introduction of a one way costs shifting rule under which both sides would bear their own costs in the event of the claimant being unsuccessful, and the defendant would pay the successful claimant's costs. This would obviate the need for claimants to take out ATE insurance and could result in an overall saving for defendants who would no longer have to reimburse ATE premiums. These proposals are discussed in more detail below where we note that adopting a one way costs shifting rule in England and Wales could have a significant impact on choice of forum. The outcome of Lord Justice Jackson's review and whether, in the light of his recommendations, the rule that expenses follow success may require to be modified in this jurisdiction are matters that should urgently be addressed by the Working Group on Judicial Expenses.

Taxation

The Office of Auditor of Court

68. The Auditor of the Court of Session is, by virtue of his appointment, a member of the College of Justice. The appointment is made by the Scottish Ministers on the nomination of the Lord Advocate. The appointment process is governed by regulations made by the Scottish Ministers after consultation with the Lord President. The Auditor must be a fit and proper person who has practised for not less than three years as a Writer to the Signet or a member of the Society of Solicitors to the Supreme Court. He may not practise either directly or indirectly in the Court of Session. He taxes judicial accounts of expenses incurred in civil litigation; agent and client accounts where the account relates to litigation or the solicitor is suing for recovery of fees; accounts referred to him by SLAB where SLAB is in dispute with a solicitor or counsel acting for a legally aided client; and accounts in relation to judicial factors, trustees in bankruptcies and liquidators of companies. He may also conduct extra-judicial taxations, whereby a solicitor and client agree to remit the solicitor's account to the Auditor for taxation.

69. The Auditor receives a stipend in relation to his appointment and is entitled to retain the fee fund dues, that is, the fees payable in respect of taxations carried out by him, from which he defrays the cost of running his office. [19]

70. Auditors in the sheriff court hold a commission and are appointed by the sheriff principal. In most courts a sheriff clerk is appointed as the auditor, although in Edinburgh and Glasgow the commissions are held by independent practitioners. In the case of sheriff court auditors who are serving sheriff clerks, the fee fund dues payable in respect of judicial taxations are paid into public funds. However, the auditors are entitled to retain fees payable in respect of extra-judicial taxations or assessments, including accounts referred by SLAB. Those auditors who are independent practitioners are entitled to retain the audit fees for all taxations or assessments undertaken by them.

71. The fees payable for judicial taxations are set by act of sederunt and are based on a percentage of the gross account as submitted, not on the value of the account as taxed. The auditor accordingly has no financial interest in upholding or rejecting any points of dispute in relation to the account. However, in the Court of Session, where the Court may remit a motion for an additional fee to the Auditor and where the Auditor fixes the amount of the percentage increase, it could be said that he does have a financial interest in deciding whether an additional fee should be awarded and in its amount, as an increase in the gross account will result in a higher audit fee.

72. The paying party is normally responsible for payment of the auditor's fees but, in his discretion, the auditor may apportion these between the parties where significant sums have been taxed off the account.

The Research Working Group on the Legal Services Market

73. The position of auditors was examined by the Research Working Group on the Legal Services Market in Scotland in 2006.[20] The Research Group had concerns about the appointment process in both the Court of Session and sheriff court, which did not conform to standard public appointment procedures. While sheriff clerks are recruited and appointed under civil service procedures on fair and open competition, there is no formal assessment of their skills and competencies to carry out the role of auditor, since they are appointed as auditor not by the Scottish Court Service but by the sheriffs principal. There is no uniformity in the procedure whereby commissions cease to have effect: in some cases these lapse automatically when the sheriff clerk moves post and in others the commission continues even after the incumbent has left the service until withdrawn by the sheriff principal.[21]

[19] A fee of £35 is charged on lodging an account for taxation. A fee of 20% of the account as submitted is charged on the first £400 of the account and a fee of 5% on every additional £100 or part thereof.
[20] Scottish Executive (2006), *Report by the Research Working Group on the Legal Services Market in Scotland*
[21] Scottish Executive (2006), *op. cit*, paragraph 10.194

74. In interviews conducted by the Research Group, informants expressed some concerns about whether sheriff clerk auditors had the necessary skills and training to conduct taxations and assessments, especially in relation to extra-judicial work where they might have little or no experience of the area of practice to which the account related. The abolition of the Table of Fees for General Business meant that there was no longer a benchmark for what might be regarded as a reasonable rate of remuneration. It was said that this had resulted in a lack of consistency amongst auditors and a variable quality of decision making. The Research Group also drew attention to the lack of formal training for auditors.

75. It was clear that there was considerable confusion about the role and status of auditors and the differences between judicial taxations, extra-judicial taxations and assessments. Concerns were expressed about the potential conflict of interest which might arise in cases where a sheriff clerk was conducting a judicial taxation in which one of his 'private' clients was involved. Criticisms were made of auditors' role in taxing legal aid accounts, which involves interpreting legislation and where there is said to be a high element of inconsistency throughout the country.

76. The Research Group also drew attention to the lack of consistency in approach between the Auditor of the Court of Session and sheriff court auditors, and between individual sheriff court auditors, in relation to the apportionment between the parties of the fees payable for the taxation in cases where significant sums are taxed off the account. There are no specific rules or guidelines on this and practice varies between courts and auditors.

Responses to the Consultation

77. It is apparent that there are considerable concerns about the arrangements for taxing accounts of expenses.[22] The majority of respondents expressed dissatisfaction with the current arrangements, submitting that they were complex, lacking in transparency and inconsistent. The issue of delay was raised in relation to taxations in both the Court of Session and sheriff court. It was suggested that the time limits for submitting accounts of expenses should be more strictly enforced.[23]

78. There was significant support for the post of auditor to be a professional, salaried appointment. It was suggested that auditors should publish statistics on their workload, and annual reports. One respondent thought that the somewhat archaic statutory criteria for appointment as Auditor of the Court of Session should be reviewed.

79. A number of respondents favoured the introduction of a system of tenders in relation to accounts of expenses.

[22] The concerns expressed by some respondents in relation to taxation in the Court of Session predate the appointment of the present Auditor and changes in working practices and procedures that he has instituted.
[23] This is a matter for the court rather than the auditor.

80. Other concerns raised include:

- problems arising in relation to the treatment of fees of solicitor advocates;
- counsel's fee notes do not have to be disclosed to the paying party and need not contain a detailed description of the work done;
- objections to counsel's fees often consist of bare assertions that they are excessive, and there is no obligation on the paying party to specify the sum which in his view would be reasonable;
- there is no consistency in approach in allocating liability for payment of the fee fund dues when sums are taxed off the account;
- it is not possible to restrict the taxation to only those parts of the account that are in dispute;
- sheriff clerks do not receive in-depth training in the taxation of accounts, leading to inconsistency;
- there is no overall guidance on the interpretation of the rules, again leading to inconsistency; and
- the volume of cases that go to taxation in the smaller sheriff courts is insufficient to enable sheriff clerks to build up expertise in this area.

81. As noted by the Research Group, the procedure by which auditors are appointed does not conform to the usual procedures for appointment to a public office, which require appointments to be made through fair and open competition. In so far as the Auditor of the Court of Session and those sheriff court auditors who are independent practitioners are concerned, their appointments effectively authorise them to carry on a private business, as they are entitled to retain the fees charged for carrying out judicial and extra-judicial taxations and private assessments. The position of those auditors who are sheriff clerks is even more anomalous, as they are making a private gain from their position as public servants. We understand that this latter issue is under review at present.

82. We think that it is undesirable in public policy terms that the holder of a public office should, by virtue of that office, be able to make a profit from undertaking what should be a public service: the taxation of accounts under judicial scrutiny. We consider that the taxation of judicial accounts should be part of the service provided to the public by the civil court system and that the fees payable for taxing such accounts should be based on the cost of providing the service rather than on the value of the account as submitted. This would be a fairer system as the cost of taxation would depend on the time spent in taxing the account. It would also facilitate the introduction of a system, which we recommend later, limiting the scope of taxation to the items in dispute.

83. We accordingly recommend that the offices of Auditor of the Court of Session and of sheriff court auditors should be salaried posts, subject to the usual rules regarding public appointments. The status of the Auditor of the Court of Session as a member of the College of Justice should continue. The Auditor of the Court of Session and sheriff court auditors would continue to carry out extra-judicial

taxations and assessments, but the fees payable for that work would be paid into public funds to support the cost of providing the service.

84. We are convinced of the need for sheriff court auditors to hold suitable professional qualifications as solicitors or law accountants and recommend that in future commissions should be granted only to those holding such qualifications and with relevant skills and experience. Having regard to the volume of cases that proceed to taxation, it would probably be sufficient to appoint one auditor per sheriffdom.

85. Greater use should be made of information technology so that taxations could take place by telephone or videoconference, with any necessary papers being filed with the auditor electronically.

86. At present expenses in small claims and summary cause actions are assessed by the sheriff clerk. We recommend that assessments should instead be carried out by the sheriff court auditor.

87. The Auditor of the Court of Session should have a role as 'head of profession', and should be able to issue guidance to sheriff court auditors on the interpretation of the rules of court and tables of fees as well as other aspects of practice and procedure, to ensure that a consistent approach is taken in the taxation of accounts. This would also help to avoid the anomalies said to arise in relation to the percentage uplift applied by the auditor where the court has awarded an additional fee.

88. The Auditor of the Court of Session should have jurisdiction over taxations in personal injury actions raised in the all-Scotland personal injury court that we recommend. This will provide the new specialist court with the expertise, consistency and continuity in the taxation of accounts in personal injury cases that has been built up over a period of time.

89. If in due course a tariff-based system of judicial expenses were to be introduced, the current additional fee procedure would be replaced by the exercise of the court's discretion to award all or part of the expenses at a higher tariff than would otherwise apply. The Auditor's role would be restricted to assessing whether the items in the account were reasonable and recoverable from the paying party

90. We take the view that, where a party in whose favour an award of expenses has been made wishes to recover counsel's fees, the account should be supported by detailed fee notes specifying the work done, which should be disclosed to the paying party on request. If objection is taken to the reasonableness of counsel's fees, paying parties should specify what sum, in their view, would be appropriate. There should be a similar obligation on the paying party where objection is taken to the fees payable to expert and other witnesses.

91. At present there is no requirement in the sheriff court to give written notice in advance of the taxation of any items in the account to which objection is taken. The

procedure in the Court of Session, where specific points of objection require to be intimated to the Auditor and the opposing party in advance of the diet of taxation, should in our view be extended to the sheriff court to facilitate discussion and the possibility of negotiating an agreement. The period of notice, which at present is three working days prior to the diet of taxation, should be lengthened.

92. It should be open to parties to agree elements of an account and to restrict the taxation to only those items of the account that are in dispute.

93. A number of respondents suggested that a system for lodging a tender in the taxation procedure should be introduced. The paying party could make an offer in settlement of an account of expenses lodged for taxation. If the offer was rejected and the account was subsequently taxed at an amount less than that offered, the party in whose favour the award was made would be liable for the expenses of the taxation. Such a procedure is not available in Scotland[24] at present, although the auditor may apportion the fee fund dues between the parties if a significant amount is taxed off the account. We understand that this issue was considered by the Court of Session Rules Council but that no decision was taken given that this issue fell within the remit of this Review.*

94. An account of expenses is made up of a number of elements: solicitors' fees and outlays such as court dues, other out of pocket expenses, fees and expenses paid to witnesses and fees paid to counsel. A tendering system that permitted a global offer to be made in settlement of the account might operate unfairly as the contested items might relate not to the fee element of the account, which is regulated by the judicial tables, but to those items such as fees payable to expert witnesses and counsel that are not regulated and which, we are informed, are more likely to be contentious. The risk of incurring liability for the cost of preparing for and attending the taxation as well as the fee fund dues could, in many lower value cases, be prohibitive.

[24] See *McFarlane v Scottish Borders Council* 2006 CSOH 96. The pursuer in this personal injury action, having been unsuccessful at first instance, had been found entitled to damages following a reclaiming motion. The Court had pronounced two interlocutors, one *inter alia* finding the defenders liable for the whole expenses of the cause, the other decerning against the defenders for payment to the pursuer of the expenses as taxed. The Court could not, by subsequent order, alter the substance of such an interlocutor. The expenses were greatly in excess of the principal sum awarded. The pursuer having refused an offer in settlement of expenses, the defenders lodged a tender. The pursuer refused to accept it and insisted on going to taxation. His account was taxed at a figure that, including the fee fund dues and his agents' fee for attending the taxation, was less than the sum tendered. The defenders enrolled a motion seeking to have the pursuer found liable for the expenses incurred by the defenders in connection with attendance at the taxation. Despite what she described as the defenders' persuasive submission that such expenses could be seen as separate from those covered by the interlocutors, Lady Smith held that she could not competently grant the motion. One of the interlocutors was a decerniture, and it was plain that they covered not only expenses incurred up to that date but also any expenses incurred in remitting the account for taxation and having it taxed; that must be inferred from the wording used, and it accorded with the interpretation of such interlocutors in practice. Lady Smith considered that parties and the court must be seen as having intended that expenses were disposed of finally and exhaustively at that time, leaving no room for a future award in respect of part of the expenses of taxation. That could have been allowed for by way of reservation, but that had not been done and in those circumstances she did not consider that it was open to her to make the award now.

*Minutes of Meeting of the Court of Session Rules Council, 10 March 2008

Consequently, pursuers might be advised to accept low offers in relation to judicial expenses, resulting in a further diminution of the award or settlement in their favour. We are also concerned that the introduction of a procedure for tendering would lead to a greater number of disputed accounts and further expense in adjusting accounts. It might also operate in such a way as to undermine the court's award of expenses in favour of the successful party, and would call into question the finality of proceedings.

95. If a pursuer insists on proceeding to taxation in the face of a reasonable offer, then the auditor has discretion in relation to the allocation of the fee fund dues. Our proposals for reform should assist in narrowing the areas of dispute and facilitating the settlement of accounts. For these reasons, we do not favour the introduction of a system for tenders in relation to expenses.

Speculative fee arrangements

The position in Scotland

96. In Scotland there is no rule of law prohibiting a solicitor or advocate from entering into an agreement that no fee will be charged in the event of the litigation being unsuccessful and that an enhanced fee will be payable in the event of success. There are, however, statutory restrictions on the percentage uplift that may be charged. Rules of court defining the basis upon which a speculative fee may be charged apply to actions in the Court of Session and sheriff court.[25] The relevant acts of sederunt prescribe a maximum uplift of 100% on the fees element of an account prepared on a 'party and party' basis. This means that only a limited fee can be charged for work undertaken prior to the commencement of litigation. It also means that any fees which the auditor may disallow at taxation as being not strictly recoverable from the other party are excluded from the uplift. Success fees and ATE premiums are not recoverable from the unsuccessful party in Scotland but must be absorbed either by clients or by agents.

97. Just over ten years ago, research on the funding of personal injury litigation in Scotland found that speculative fee agreements were relatively rare.[26] Today, however, many report that a majority of reparation actions in Scotland are funded on this basis, despite the fact that success fees and ATE premiums are not recoverable. It is understood that some trade unions have special arrangements that do not fit the normal model for speculative fee agreements, in that success fees are not charged where the claim is successful and neither the defender's nor the pursuer's legal costs are charged to the pursuer if he is unsuccessful, these being met either by the union itself or its solicitors.

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[25] Solicitors (Scotland) Act 1980, section 61A (solicitors); Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, section 36 (advocates); RCS, Rule 42.17 (solicitors); Act of Sederunt (Fees of Advocates in Speculative Actions) 1992 (SI 1992/1897) (advocates); the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992 (SI 1992/1599)

[26] J Blackie et al (1998), *Funding Issues in Personal Injury Litigation*, Scottish Office

Experience in England and Wales

98. Under the Courts and Legal Services Act 1990, lawyers may enter into Conditional Fee Agreements (CFAs) with their clients. As in Scotland, these provide that no fee is chargeable if the litigation is unsuccessful; an uplift of up to 100% of the base fee may be charged if it is successful. While these provisions were initially restricted to personal injury, insolvency and cases brought under the European Convention on Human Rights, they were extended by the Access to Justice Act 1999 to cover all civil cases except those involving issues relating to the welfare of children. The 1999 Act also provided that success fees charged under CFAs and premiums paid for ATE insurance were recoverable by a successful party from his opponent. These changes were made in the context of the withdrawal of legal aid, including advice and assistance, from all non-medical negligence personal injury actions and many other categories of civil actions that involved monetary claims. In effect, CFAs replaced legal aid funding except for cases which meet certain public interest criteria, such as housing claims and judicial review. [27]

99. Since then, CFAs have become the standard method of funding litigation in England and Wales. Michael Zander has observed that the recoverability of ATE insurance premiums and success fees has had dramatic effects by making CFAs far more attractive to claimants. They were now relatively free from financial risk and put claimants on a better footing than legally aided litigants on a nil contribution.[28] So, for example, ATE premiums may be self insured so that nothing is payable if the case is lost. Research undertaken in 2003 in England and Wales found in relation to personal injury actions that 99% of trade union cases, 91% of cases funded by Before the Event (BTE) or legal expenses insurance, 93% of Accident Management Company cases and 86% of all other cases were funded by CFAs.[29]

100. Permitting recovery of ATE insurance premiums and success fees also encouraged the initial growth of 'claims management' companies. So, for example, Claims Direct announced a pre-tax profit of £10.1 million on a turnover of £39.6 million in 2000, while two years later, The Accident Group (known as TAG) announced a turnover of £243 million. Yet by 2002 and 2003 respectively, both firms were insolvent. This was partly the result of poor press based on the experience of dissatisfied clients and partly because of court decisions holding that the premiums charged to clients and the fees charged to panel solicitors were wholly or partly irrecoverable.

101. CFAs were developed in England and Wales to reduce the number of personal injury actions funded by the Legal Aid Board.[30] There may have been some saving to

[27] Lord Chancellor's Department (1998), *Access to Justice with Conditional Fees: Consultation Paper*
[28] M Zander (2007), p. 635
[29] P Fenn et al (2006) *The Funding of Personal Injury Litigation: Comparisons over time and across jurisdictions*, DCA Research Series 2/06
[30] For a synopsis of the relationship between CFAs and government policy on legal aid, see M Zander (2003).'Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?' *DePaul Law Review*, Spring 2003

the public purse in personal injury litigation by adopting CFAs in place of legal aid, though much of the cost of such cases would have been recovered by the Legal Aid Board. In Zander's view the relatively modest benefit to the public purse will ultimately be paid for by the public in increased insurance premiums.[31]

102. It has been estimated that by the date of trial, recoverable fees in England and Wales may be twice what they would be in Scotland,[32] due partly to the recoverability of ATEs and success fees. The insurance industry has strongly resisted these reforms. There has been a wave of what is commonly referred to as 'satellite litigation', that is, litigation where there is no dispute between parties as to liability or damages, the case being fought only on costs under Part 8 of the Civil Procedure Rules.[33]

103. Many of the battles over CFAs between defendants' insurers and claimants have focused on technicalities relating to the validity of CFA agreements as, broadly speaking, success fees and ATE premiums are only recoverable from a defendant if the claimant has entered into a valid CFA with his solicitor. A detailed history of the "Costs War" can be found in Chapter 3 of the Jackson Report. The Court of Appeal has tried to discourage satellite litigation, for example, in its judgment in *Hollins v Russell*.[34] In *Hollins* the Court heard a number of defendants' appeals raising the issue of failure by claimants' solicitors to comply with conditions prescribed by the 1999 Act and associated regulations. These placed obligations on the solicitor to provide the client with certain information, such as specification of the amounts payable in all the circumstances or the methods to be used to calculate them.[35] The Act provided that "A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but…any other conditional fee agreement shall be unenforceable."[36] The thrust of the defendants' argument was that CFAs were unenforceable and that therefore the defendants were not liable to pay the claimants' costs, on an application of the indemnity principle. Giving the judgment of the Court, Lord Justice Brooke said that Parliament would not have meant to render unenforceable a CFA which adequately met the requirements designed to safeguard the administration of justice, protect the client, and acknowledge the legitimate interests of the other party to the litigation. A CFA would only be unenforceable if the particular departure from a regulation or statutory requirement gave rise to a materially adverse effect on the protection afforded to the client or upon the proper administration of justice.

> "The court should be watchful when it considers allegations that there have been breaches of the regulations. The parliamentary purpose is to enhance access to justice, not to impede it, and to create better ways of delivering litigation services, not

[31] *Ibid*
[32] A Paterson and B Ritchie (2006) *Law*, *Practice and Conduct for Solicitors*, W. Green & Son
[33] See, for example, *Callery v Gray* [2002] UKHL 28 and *Halloran v Delaney* [2002] EWHC 9029
[34] [2003] EWCA Civ 718
[35] Conditional Fee Agreements Regulations 2000 (SI 2000 No 692), regulation 2(1)(d)
[36] 1999 Act, section 27(1), amending section 58 of the Courts and Legal Services Act 1990

> worse ones. These purposes will be thwarted if those who render good service to their clients under CFAs are at risk of going unremunerated at the culmination of the bitter trench warfare which has been such an unhappy feature of the recent litigation scene."[37]

104. Efforts to curb satellite litigation on the technicalities of CFAs were also made on another front. One of the key themes raised by the literature had been the impenetrability of CFAs for claimants, who simply did not understand the options that their solicitors placed before them.[38] Hence rules were simplified in 2003, and two consultation papers were published by the Department for Constitutional Affairs (DCA) in 2003, *Simplifying Conditional Fee Agreements*, and 2004, *Making Simple CFAs a Reality*. In its summary of responses to the 2004 consultation in 2005, the DCA concluded that there was no need for any regulations, and that all client care, contractual and guidance matters, as well as a proposed new model CFA, should now be the responsibility of the Law Society.[39] This led to the implementation of a new regime on 1 November 2005, under a new CFA developed by the Law Society, whereby solicitors came under a professional duty to make clear to clients the terms of CFA agreements.

105. In 2009, however, Lord Justice Jackson reports that the Costs War is still being fought with some vigour:

> "Taken collectively, the law reports of the last decade present the unseemly spectacle of endless and expensive squabbles about how much money would be paid to lawyers. Sometime claimant lawyers secure windfalls. Sometimes defendants succeed on technical points so as to deny claimant lawyers any remuneration for work properly done. The question must be asked whether the Costs War either serves the public interest or benefits the profession as a whole. If the answer to this question is no, then consideration must be given to what further measures (beyond those already adopted) should be taken in order to stamp out such litigation."[40]

Responses to the consultation

106. The Consultation Paper asked what impact speculative fee arrangements have had on access to justice. Most respondents reported a positive experience of these arrangements in Scotland. They were said to provide a means of funding litigation when other sources of funding had reduced, whether through diminishing trade union membership or the relatively low threshold for financial eligibility for civil legal aid.

107. As far as access to justice is concerned, speculative fee arrangements were said to have been responsible for a reduction in the number of firms taking on personal

[37] [2003] EWCA Civ 718
[38] D Brennan and M Day, 'A dangerous side-effect of withdrawing public funding', *The Times*, 11 April 2006, referred to by C Hodges (2009) , *op .cit.* Also referred to as problematic by M Zander (2007), *op. cit.*
[39] DCA (2005), *op. cit.*
[40] Lord Justice Jackson (May 2009), *op.cit*

injury litigation, resulting in less choice for consumers but a concentration of expertise in those firms dealing with such cases. The fact that success fees are not recoverable was said to disadvantage clients with a good case since they were, in effect, cross-subsiding weaker cases. One respondent noted that there was little regulation of success fees and the maximum uplift of 100% tended to be the default position. Another respondent was of the view that speculative fee arrangements were being entered into where there was little risk.

108. Some respondents wished to see success fees become recoverable, as they are in England and Wales. Attention was drawn to the disadvantages of funding on a speculative basis: counsel was uncertain as to whether they would be paid; it was sometimes difficult to charge the uplift since successful parties were already paying the shortfall between judicial expenses and agent/client expenses; fees were recovered only at the end of the case; and the risks and delays in payment are a deterrent to acting on this basis, as is the significant amount of fees written off so that the client is not 'out of pocket'.

109. We also asked whether legal expenses insurance, including BTE and ATE insurance, has a greater role to play in the funding of litigation in Scotland, and what impact the ability to recover ATE insurance premiums from unsuccessful parties would have on litigation. BTE insurance is discussed later. Some respondents noted that it was difficult and sometimes impossible for solicitors to obtain ATE cover for their clients in Scotland. Some reported that it was available, but more expensive than in England and Wales. This was partly because the market was too small and partly because premiums were not recoverable, which in turn impacts on the size of the market. Because of its cost, ATE insurance was unlikely to provide a solution to the problem of funding low value actions. There was broad agreement that the ATE market was unlikely to develop in Scotland unless premiums were recoverable.

110. Many respondents noted that the recovery of premiums had been a 'mixed blessing' in England and Wales. On the one hand, claimants did not have to dig into their damages; recoverable success fees and ATE premiums constituted a significant cost for defendants that could act as a deterrent to running speculative defences and could encourage earlier resolution of claims. On the other hand, it was responsible both for satellite litigation and for 'claims farming'.[41]

111. Trade unions, some firms acting on behalf of pursuers, UK wide organisations representing the interests of claimants, and some advocates were of the view that ATE premiums should be recoverable, arguing that the problems of satellite litigation were now mainly resolved. One respondent noted that ATE premiums for clinical negligence actions could be particularly expensive. Some respondents in favour of recoverable ATEs and success fees placed a caveat to the effect that they

[41] "Claims farmers" were referred to in a debate in the House of Lords in December 2006, in a debate about the Compensation (Claims Management Services) Regulations 2006, as claims management services which "encourage frivolous claims through aggressive marketing techniques, mislead consumers about the options for funding their claim, and provide poor-quality advice and service." http://www.parliament.the-stationery-office.co.uk/pa/ld200607/ldhansrd/text/61205-gc0001.htm

would not want to see the introduction of such a system if it were to replace legal aid funding, as it had in England and Wales.

112. Others, including insurers, defenders' firms and a number of pursuers' firms, were opposed to the recovery of success fees and ATE premiums on the following grounds: it does not encourage pursuers to be realistic in considering settlement offers; it may lead to more actions going to proof; it had been responsible for disproportionate increases in costs in England and Wales; it had encouraged satellite litigation there; it might encourage an increase in frivolous claims by removing one of the risk factors in litigation and by removing from pursuers a personal stake in the outcome; it might increase the risk of unregulated 'claims farmers'; and Scotland had avoided the worst excesses of the English claims industry because premiums and success fees were not recoverable.

113. Other respondents, however, were of the view that the difficulties experienced in the use of CFAs in England and Wales were well on the way to being sorted out, and that Scotland could learn from that experience and avoid the pitfalls experienced there.

Would allowing recovery of success fees and ATE premiums improve access to justice?

114. There appears to be considerable debate as to whether allowing the recovery of ATE premiums and success fees under CFAs in England and Wales has been successful in extending access to justice. The argument made there to the Government was that unless they were recoverable, CFAs were not capable of providing claimants with full and fair compensation.[42] Others, however, are of the view that allowing recovery of success fees and ATE premiums has provided claimants' litigators with a carte blanche. In *Campbell v MGN Ltd (No 2)*[43] Lord Carswell observed that their recoverability under the 1999 Act had completely changed the balance between litigating parties. While the courts must accept the regimen of CFAs and the imposition of these changes as legislative policy, Lord Carswell was far from convinced about the justice of the system:

> "The losing party is now liable for not only his own costs, which he could generally not recover when he won against a legally aided party, but the success fee payable to the winner's lawyer, which could be up to 100% of the base costs, and even the premium paid by the winner for insurance to protect himself against the consequences of losing the case."[44]

[42] Reported by Mr Justice Brian Langstaff in his address to the Faculty of Advocates Personal Injury Conference on 25-26 November 2005

[43] [2005] UKHL 61

[44] In *Campbell*, damages of £3,500 and costs had been awarded to the claimant, Naomi Campbell. The claimant's solicitors had served on the defendant bills of costs amounting to £1,086,295, which included success fees of £279,981.The defendants MGN Ltd (publishers of the Daily Mirror) sought a ruling that the percentage uplift provided between the claimant, and her solicitors and counsel in respect of her appeal to the House of Lords should be wholly disallowed on the grounds that such a liability was wholly disproportionate and an infringement of the defendant's right as a newspaper

115. Others have focused on the changes in the source of funding for litigation that CFAs have brought and their implication for access to justice. In *Campbell*, Lord Hoffman observed that there was no doubt that:

> "a deliberate policy of the 1999 Access to Justice Act which introduced the recoverability of success fees and insurance premiums was to impose the cost of all CFA litigation, successful or unsuccessful, upon unsuccessful defendants as a class. Losing defendants were to be required to contribute to the funds which would enable lawyers to take on other cases which might not be successful but would provide access to justice for people who could not otherwise have afforded to sue. In some kinds of litigation, such as personal injury actions, the funds provided by losing defendants were intended to be in substitution for funds previously provided by the state in the form of legal aid."

116. Lord Hoffman had earlier described it as a rational social and economic policy.[45] Because insurers who were called upon to pay costs passed them on to road users through increased premiums, the cost of road accident litigation was eventually borne by and restricted to road users. This had also meant that a great many people who were formerly ineligible to apply for legal aid funding could now access funding for litigation.

117. For defamation actions, the imbalance created by recoverability has been acknowledged. Media organisations argued strongly that funding such actions by CFAs, particularly where the claimant had significant personal wealth, impinged on the media's right to freedom of expression. The success fee could effectively double a claimant lawyer's cost. The excessive cost of litigation was forcing the media, and other organisations,[46] to settle claims they might otherwise have fought. As a result, the Civil Justice Council recommended that recoverable success fees should be fixed and recoverable ATE premiums capped, a scheme called the Theobalds Park Plus Agreement. The Ministry of Justice published a consultation paper in February 2009, *Controlling Costs in Defamation Proceedings*. It invited views on issues such as limiting recoverable hourly rates and mandatory cost capping. At the same time, it was

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publisher to freedom of expression under article 10 of the European Convention on Human Rights. They argued that the claimant's means were such that she could afford to appeal without recourse to a CFA. The House of Lords rejected this argument. Giving the leading speech, Lord Hoffman held (at paragraph 22 *et sequitur*) that nothing in the relevant legislation required a solicitor, before entering into a CFA, to inquire into the client's means and satisfy himself that the client could not fund the litigation himself. As such, it would be most unfair for the success fee to be afterwards disallowed by the court on the ground that the client did have sufficient means. "Notwithstanding the need to examine the balance on the facts of the individual case, I think that the impracticality of requiring a means test and the small number of individuals who could be said to have sufficient resources to provide them with access to legal services entitled Parliament to lay down a general rule that CFAs are open to everyone." *Obiter*, he raised concerns that the use of CFAs to fund defamation actions might seriously inhibit freedom of expression: paragraph 29 *et sequitur*.

[45] *Callery v Gray* [2002] 1 WLR 2000

[46] For example, a lawyer for ASLEF observes with regard to a libel action brought by a BNP member against the union: "Anyone who has been sued for libel by someone on a no-win, no-fee agreement will know the gut-wrenching feeling of injustice that it brings." (Jenny Walsh, 'The BNP did not defeat us' in *The Guardian*, 18 January 2006)

acknowledged that the recoverability of success fees may not create these imbalances in other areas of the law, where claimants are unlikely to have significant wealth and where insurers, unlike publishers, can manage the claims against them by passing the cost on to their customers. Nor, as Lord Hoffman stated in *Campbell*, is there a human right to drive a vehicle upon the road free of the cost of litigation arising from road accidents.

118. While recoverability of success fees and ATE premiums may have extended access to justice, this may have been overshadowed by the satellite litigation and the 'fall-out' that has followed in its wake. Decisions of the Court of Appeal on satellite litigation have oscillated over the past years between findings in favour of insurers and findings in favour of claimants and their legal representatives. This appears to have prolonged the 'war' considerably. In his keynote address to the Association of Personal Injury Lawyers (APIL) conference in April 2008, the Master of the Rolls, Sir Anthony Clarke, was still voicing his concerns about the large amount of satellite litigation generated by the Conditional Fee Agreements Regulations 2000. In an interview conducted in June 2008 with Richard Langton, the outgoing President of APIL, the planning which accompanied the introduction of reforms to the Civil Procedure Rules was contrasted with the way in which CFA legislation was rushed in. As a result, so Langton observes, "CFAs have been an unmitigated disaster and continue to blight our lives even though the 2000 Regulations were revoked three years ago".[47]

119. The problems associated with CFAs have resulted in the Ministry of Justice and the CJC looking at alternative means of funding civil litigation, including contingency fees.[48] In June 2008 the Ministry of Justice commissioned three senior academics to do a scoping and feasibility study into the operation of conditional and contingency fees in personal injury, employment and defamation actions (the 'no win, no fee' academic review), to see whether these may provide appropriate levels of access to justice and associated cost issues.

120. The CJC commissioned senior costs judge Peter Hurst and academic researcher Richard Moorhead to conduct a study into the use of contingency fees in foreign jurisdictions. This followed the publication of the CJC paper, *The Future of Litigation- Alternative Funding Structures* in June 2007, which proposed further research to ascertain whether contingency fees can improve access to justice in the resolution of multi-party cases, and of civil disputes more generally. The study was also informed by a perception that the level of challenges generated by the recoverability of success fees and ATE premiums in CFAs has meant that "the ATE market continues to experience difficulties in its establishment."

121. In their report to the CJC, Moorhead and Hurst found that contingency fees could operate effectively in England and Wales, though access to justice may be

[47] 'Interview with Richard Langton', *PI Focus*, June 2008, APIL.
[48] A type of 'no win no fee' arrangement, where the lawyer is paid nothing if the case is lost, and a percentage of any damages recovered for a claimant if he wins, rather than a fee based on the work involved.

narrowed, particularly for low-value cases, even if multi-party and higher value cases may benefit.[49] However, they also found that lawyers tended to cross-subsidise lower value claims through contingency fee recoveries in larger cases. They were of the view that contingency fees without cost-shifting would provide a cleaner and less complicated model, as it would wipe out the need for summary and ex post facto costs assessment, as well as most satellite litigation around costs. Contingency fees would also reduce the transactional costs in personal injury claims. Moorhead and Hurst also found that contingency fees in the US were not generally extravagant, that there was no evidence of improper disincentives to settle or that they necessarily promoted high rates of litigation, frivolous claims or a litigation culture, and that they regularly included some element of costs shifting, particularly in relation to disbursements. They considered this to be of significance since there would be merit in introducing some element of costs shifting, for example, in relation to formal offers to settle under Part 36 of the Civil Procedure Rules.

122. CFAs are discussed in Part 4 of the Jackson Report and the recoverability of success fees and ATE premiums in Part 8. Lord Justice Jackson concludes that there is no doubt that the decision to make success fees and ATE premiums recoverable has (a) promoted access to justice for claimants; and (b) massively increased the costs burden upon defendants. He asks whether the correct balance has been struck and notes that in other jurisdictions where CFAs or contingency fee agreements are allowed, the additional costs of such arrangements are not normally transferred to other parties. His economic assessor, Professor Paul Fenn, suggests that if success fees and ATE premiums become irrecoverable, as they were before April 2000, then market forces would once more come into play: "While there might be costs then faced by claimants to come out of their damages, it is possible that the increased efficiency of the system could lead to reductions in these costs as well as knock-on reductions in liability insurance premiums."

123. Lord Justice Jackson has considered the issue of cost shifting and appears to favour a one way costs shifting regime whereby defendants pay the successful claimants' costs, but each side bears its own costs when claimants lose. This would undoubtedly benefit claimants and would also obviate their need to take out ATE insurance. It may also be of considerable benefit to defendants who would no longer be required to reimburse ATE premiums. In personal injury cases, he does not appear to be persuaded by the argument that deductions, such as success fees, should never be taken from claimants' damages. He hints that he may recommend the abolition of recoverability of success fees and ATE insurance in the context of other likely recommendations, such as one-way costs shifting and contingency fee agreements.

124. It also seems likely that Lord Justice Jackson will propose that the fixed recoverable costs for fast track cases recommended by Lord Woolf, already partially implemented, will now be implemented in full. He appears to take the view that

[49] R Moorhead and P Hurst (2008), *Contingency Fees: A Study of their Operation in the USA – a Research Paper informing the Review of Costs*, Civil Justice Council.

costs are too high, especially in lower value claims, and could be reduced by extending the new claims process currently in development for road traffic accidents up to £10,000 to cover other straightforward claims. The Jackson Report also considers whether costs in commercial and more complex cases could be reduced, for example, by focusing disclosure and limiting witness statements.

Recommendations

125. The primary justification for allowing success fees and ATE premiums under speculative fee agreements in Scotland to be recovered would be to promote access to justice. It would be foolhardy not to keep developments in England and Wales under close observation, particularly since the views of many respondents to our consultation – whether in favour of recoverability or against it – were informed by their understanding and perceptions of the situation there.

126. In view of the in-depth reviews on costs and the operation of CFAs which are currently underway in that jurisdiction, and the divergence of views among our respondents as to whether introducing recoverability of success fees and ATE premiums would improve access to justice, we consider it premature to recommend any changes to the current regime. We also note the work going on in England and Wales to look at the possible benefits of contingency fee agreements, but are not persuaded that the case is yet made out for allowing such arrangements.

127. Care should be exercised in drawing conclusions from the situation in England and Wales. Recoverability of success fees and ATE premiums was welcomed there for extending access to justice at a time when legal aid was withdrawn from actions for which CFAs could be arranged. Legal aid is available in Scotland for those categories of case from which it has been withdrawn in England and Wales. We do however recommend that this issue should be addressed as a matter of urgency by the Working Group on Judicial Expenses that we recommend should be established. Should a one-way costs shifting regime be introduced in England and Wales but not in Scotland, for example, this would create a major disincentive to claimants to litigate in Scotland where there is a choice of jurisdiction and unfairness where there is not.

'Before the Event' (BTE) legal expenses insurance

128. The Consultation Paper also sought views on the role of BTE insurance.

129. A number of respondents commented that such insurance can be included as part of the standard cover or as an 'add-on' in motor or household insurance policies. It is not clear how many people in Scotland have such insurance since there are no published studies which relate solely to Scotland or provide figures broken down as between Scotland and England. One respondent referred to Scottish research which had suggested that use of BTE insurance in Scotland appears to have been low in the past,[50] but this may be changing if Scotland is following a trend identified in the more recent research carried out on behalf of the Ministry of Justice.[51] This research, conducted across Great Britain in July 2007 and involving a sample of 1022 adults, attempted to identify the size of the market for BTE insurance and the extent of 'market penetration' in Great Britain as a whole. It found that although there was low awareness of the terms "before the event" or "after the event" legal expenses insurance - just under 1 in 4 had heard of either - 59% of those polled said they had some such insurance. Most commonly it was part of car insurance (48%), with 35% having it as an add-on to household insurance, 17% as part of travel insurance and only 3% as a stand-alone policy. Over a quarter (27%) were sure they did not have any kind of legal expenses insurance, but 14% did not know whether they had it or not.

130. The Ministry of Justice research notes that a Mintel survey carried out in September 2006 had put market penetration for legal expenses insurance at 50%, indicating a statistically significant increase of 9% in less than a year, if the July 2007 survey is reliable.

131. Many respondents were in favour, in principle, of encouraging greater take up of BTE insurance on the basis that this would help to address the 'middle income trap'. Some potential problems were however identified. It was noted that the terms and conditions upon which BTE insurance is offered vary considerably and clients need to read the small print to be aware of restrictions on the policy. It was also said that BTE insurers generally insist on the client using a firm of solicitors on their panel, which restricted choice and could limit competition.[52] It also had an impact on the solicitor/client relationship. The limits of the indemnity which legal expenses insurance policies normally provide (£50,000, although the Ministry of Justice study

[50] H Genn and A Paterson, (2001), *op.cit*, p172
[51] FWD Research (2007), *The Market for 'BTE' Legal Expenses Insurance*, Ministry of Justice
[52] Under the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI 1990/1159), which implemented a European Directive, a legal expenses insurance contract must allow the insured person the freedom to choose a lawyer to defend, represent or serve his interests in any inquiry or proceedings. Insurance companies have generally interpreted the Regulations to mean that freedom of choice only applies from the point proceedings commence, and not to any pre-litigation inquiry. This has been the subject of examination by the Insurance Ombudsman, who concluded that "in the absence of clear guidance from the courts …we would not require an insurer to offer the policyholder a choice of solicitor at the start of the claim."

noted that a number of companies had increased this to £100,000) was also said to be too low, particularly in relation to medical negligence actions, which some BTE policies exclude altogether. An additional problem with medical negligence claims was that the panel solicitors used by BTE insurers may be personal injury specialists but not necessarily specialists in medical negligence claims.

132. One respondent noted that although BTE premiums are currently fairly low, this is probably because take up is low and some people who have such cover may not be making claims because they do not realise they can. If awareness and hence the number of claims grow, premiums may increase. Another respondent counselled a degree of caution in encouraging the take up of BTE insurance as this might lead to a system of referral fees[53] being paid by solicitors, which could have an impact on pursuers' agents outside Scotland's Central Belt.[54]

133. In general, however, respondents saw BTE insurance in a positive light and a number of respondents went so far as to suggest that a system of compulsory BTE insurance should be introduced, with one respondent suggesting that such a proposal should be the subject of a cost and feasibility study.

134. The Jackson Report draws a distinction between (a) BTE cover where insurers pay solicitors to act for the insured when a claim arises; and (b) BTE cover where, in return for referral fees, insurers will "sell" solicitors claims, which the solicitors then pursue by way of a CFA.

135. In Lord Justice Jackson's view the former type brings a number of benefits and serves the public interest. First and foremost, an insured person is able to bring or defend claims, which may otherwise be beyond his means. Secondly, insurers provide a stream of work to their panel solicitors. Insurers have an interest in keeping down costs. Accordingly, they will use their bargaining power to hold down hourly rates or to negotiate alternative fee structures, in the same way that liability insurers have done for many years.[55]

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[53] Solicitors' practice rules in Scotland prohibit the sharing of fees with unqualified persons, with certain limited exceptions. Guidance on the rules issued by the Professional Practice Committee of the Law Society of Scotland says that the principal type of arrangement which the practice rules prohibit is an arrangement to pay commission for the introduction of business on a case by case basis. Solicitors are entitled to pay for the cost of marketing or promoting the practice. They are entitled to pay a fee to be included on a panel to whom referrals will be made provided that that fee is not expressed as a specific sum per referral or as a percentage of the fees chargeable for referred business. In England and Wales solicitors are permitted to pay for referrals, and to be paid by an introducer to provide services to the introducer's customers, subject to conditions. Following concerns that some firms in England and Wales were acting unethically in relation to referral arrangements, the Solicitors' Code of Conduct has been amended and the Solicitors' Regulation Authority says that it is "cracking down on solicitors whose referral arrangements compromise their clients' interests, and who undermine public confidence in solicitors."

[54] The Ministry of Justice study (FWD Research (2007) *op. cit*), notes that "the pricing of [BTE] products is geared towards volume sales but the major source of profitability of such insurance is in fact the referral fees from law firms or medico-legal reporting agencies…. The cost of the policy to the insurer is subsidised by the referral fees."

[55] See, for example, the information supplied by the ABI and FOIL set out in Chapter 10 of the Jackson Report.

136. He considered that the latter type was less beneficial as the litigation will be run on a CFA, which simply drives up costs. The BTE insurers have no interest in the rates charged by their panel solicitors (they will not be paying those rates) and they have no reason to negotiate such rates downwards. The referral fee will further drive up the costs which, one way or another, the solicitors must recover. The insured person could perfectly well instruct solicitors on a CFA without the intervention of BTE insurers. On the other hand, BTE insurers do provide free legal advice by telephone. This is a valuable service, particularly in relation to consumer claims.

137. Lord Justice Jackson's tentative conclusion was that it was in the public interest to promote a substantial extension of BTE insurance, especially in category (a) referred to above as the cost of litigation by the few insured who need to bring or defend claims in any year will then be borne by the many who do not.

138. He noted a proposal by the Bar's CLAF Group that compulsory BTE should be introduced, covering a wide range of accidents. In his view this merits serious consideration. The mechanism would be as follows:

a) motorists should be required to take out BTE insurance in addition to third party liability insurance. Such BTE insurance would cover themselves, their passengers and any pedestrians whom they might injure;

b) employers, occupiers of business premises, operators of trains and others required to have public liability insurance should also be required to take out BTE cover in respect of personal injury claims suffered by themselves, employees, visitors or customers;

c) such insurance would cover legal expenses only, not damages. Claims would be supported by insurers, subject to a merits test;

d) BTE insurers will recover their costs, but no success fee or ATE premium, in cases won. BTE insurers would pay the defence costs in cases lost.

139. Lord Justice Jackson invited views on the feasibility and merits of the proposal and suggestions from the insurance industry and others as to how to promote a substantially more extensive take up of BTE.

140. We agree that BTE insurance has a contribution to make in terms of improving access to justice, within its limitations. For people who can afford it, and who may not be eligible for legal aid, it can provide convenient access to legal advice for certain kinds of problem as well as a useful measure of protection against potential legal costs, albeit with certain restrictions. We would not wish to see legal expenses insurance made compulsory or promoted at the expense of the legal aid system, but consider that it can play a valuable role as part of a mixed economy of funding for legal advice and litigation. We therefore recommend that the Scottish

Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance. The Ministry of Justice study referred to above would provide a useful starting point in considering how that might be done.

Legal aid

141. It was not part of our remit to review civil legal aid or advice and assistance. It has, however, been instructive for us to receive comments from respondents about these matters as they affect access to justice. We have also been aware of the need to take account of current policy and possible future developments in the field of publicly funded legal assistance in so far as these have relevance for our recommendations. Our recommendations in relation to in-court advice services, for example, take account of the extended powers now available to SLAB to fund advice providers.

142. We consider that Scotland is fortunate in continuing to have a civil legal aid system under which people who meet the eligibility criteria can obtain publicly-funded legal help of some kind for virtually any type of legal problem, and where the size of the legal aid budget is not capped but determined on the basis of demand. A legal aid system which aims to ensure that the less well-off members of society can obtain access to legal advice and help is, in our view, a vital component of a modern civil justice system. While we agree that other funding arrangements such as conditional fees or legal expenses insurance can, as we have discussed above, facilitate access to justice in some kinds of case, we would not wish to see legal aid being withdrawn from whole classes of case and replaced with reliance on CFAs, as has happened in England and Wales. Other than this, we do not consider it appropriate for us to make recommendations about the legal aid system or legal aid policy. On certain points some respondents have quite different perspectives from SLAB as to how the legal aid system operates and whether changes to policy and practice are required. We are not in a position to arbitrate on these matters. We have in general adopted the approach of simply recording the concerns expressed to us about legal aid policy and the operation of the legal aid system and noting recent developments. We only make recommendations concerning legal aid where our other recommendations about court structures or procedures raise questions about legal aid that need to be addressed or where current legal aid policy or practice appears to us to be anomalous or in conflict with the objectives that our recommendations seek to achieve.

Responses to the Consultation

143. A number of questions in the Consultation Paper prompted responses which commented on the legal aid system. As well as general questions in Chapter 3 of the Consultation Paper about the cost and funding of litigation and how the availability of legal advice and assistance and legal aid affected access to justice, many respondents also took the opportunity to comment about legal aid in their answers to

questions in Chapter 2. The Scottish Legal Aid Board (SLAB) responded to the consultation and provided a separate paper which commented on many of the points about legal aid made by other respondents.

Financial eligibility

144. Many respondents were concerned about the financial eligibility criteria for legal aid.

145. Because the consultation closed at the end of March 2008, these comments preceded the Scottish Government's announcement in November 2008 that it intended to increase the upper disposable income threshold for eligibility for civil legal aid from £10,306 to £25,000, and to introduce a system of tapered contributions for those with disposable incomes between £10,306 and £25,000 so that those with higher earnings would pay a higher rate of contribution. These changes came into effect on 7 April 2009. The Government has said that this means that over a million more people in Scotland will become potentially eligible for free or subsidised legal aid, that is, around three quarters of the adult population are potentially eligible. These are welcome reforms which we believe will go at least some of the way to meeting some of our respondents' concerns.

Rates of remuneration

146. Another area of concern was the level of remuneration for solicitors doing legal aid work, said to be significantly lower than private client rates: less than half, according to one respondent, while another commented that a solicitor in the centre of Edinburgh doing legal aid work would make a loss of around £60 per hour.

147. SLAB's position is that it is unrealistic to expect that there would only be a minimal gap between legal aid rates and private rates, particularly given the amount of work available to solicitors on a private fee paying basis. They draw attention to the recent increase in civil legal aid rates[56] and comment that "The growth in private rates over recent years has been very large as evidenced by the Law Society's cost of time survey. This growth is likely to slow or even reverse as the economy slows down."

[56] On 23 May 2008, the Scottish Government announced a number of proposed improvements to the civil legal aid fees rates, including an increase in the value of the unit on which block fees are based from £19 to £21; a comparable level of increase (10.52%) to the detailed fees paid for work not covered by the block fee system; the introduction of exceptional arrangements to enable solicitors to be paid on a detailed rather than a block basis for certain types of family law cases; increased flexibility in the criteria where a solicitor can apply to the Board for an additional fee or uplift; and modernisation of the table of fees for summary cause actions and an increase to the value of the fees. The amendments will see increases to the civil legal aid fees, which are being backdated to cover both detailed and block fees for work done or outlays incurred on or after 1 April 2008.

148. This issue is linked with the question of judicial expenses and rates of recovery, on which we have made recommendations earlier in this chapter. SLAB has also told us that in practice solicitors will accept judicial expenses rather than seeking payment from SLAB in 98% of cases where expenses are awarded. In the vast majority of cases, those acting for individuals who are in receipt of civil legal aid will opt to accept judicial expenses notwithstanding any difference between expenses awarded and the level of work actually done, because the return for a solicitor who has been acting under a grant of civil legal aid will usually be greater where judicial expenses are accepted than is the case where the account is paid by SLAB. In unsuccessful cases, and where the court orders that no expenses are due to or by either side, as in most family actions, the solicitor acting under a legal aid grant will require to seek payment from SLAB. If there is a substantial differential between legal aid rates and private market rates this may act as a disincentive for solicitors to take on legal aid cases except where they are very confident of winning the case. In our view the differential should not be allowed to become too large or there will be a risk to the supply of solicitors willing to undertake legal aid work.

Legal aid rates for clinical negligence actions

149. We were told that the rates of remuneration present particular difficulties in relation to clinical negligence cases, see paras 7, 111 and 131 above. These cases are almost always factually complex and the legal issues involved include time bar, proof of negligence and causation. In order to advise a client on the prospects of success the solicitor will need to take a detailed precognition, recover and consider the medical records and instruct a medico-legal expert to advise. Many cases do not proceed beyond this point so recovery of judicial expenses does not arise.

150. SLAB advises that it has special arrangements under which an increase in authorised expenditure may be made, with the result that nearly £3,000 is available for the investigation of a clinical negligence claim, and that in 2007/2008 586 grants of advice and assistance were made in relation to medical negligence claims.

151. We are not in a position to adjudicate on the different perspectives of practitioners and SLAB as to whether the funding available is adequate.

Supply of legal aid solicitors

152. Many respondents pointed to what they thought was a decreasing availability of solicitors willing to do civil legal aid work generally, and also in relation to particular areas of law or in certain areas of the country. Family / matrimonial work including protective orders and children's hearings, and housing and social welfare law were the subject areas most often mentioned as having a poor supply of solicitors willing to take on legal aid work. Rural areas were most often identified as not having a sufficient supply of legal aid solicitors, but inner city areas were also mentioned in some responses.

153. SLAB, commenting on the responses, said that perceptions as to the diminishing supply of solicitors providing legally aided services do not necessarily tie up with the information it collects regarding application trends and legal aid activity by firms. SLAB agreed that there has been a reduction in the number of 'active outlets' providing a civil legal assistance service over the last ten years, but said that while the trend is downwards, figures for 2007/08 showed that all local authority areas had at least one active outlet, and ten areas had an increase in applications in 2007/08. They described a number of actions they are taking to identify shortages in the supply of legal aid services and to explore recruitment and retention problems in different legal markets including legal aid,[57] as well as actions being taken to fill gaps in the market, whether geographical or by subject matter. One of the ways of doing this is through the use of employed solicitors, an example being the creation of the Civil Legal Assistance Office in Inverness. SLAB has told us that Scottish Ministers have made clear that they will approve expansion of such an approach where there are gaps in private practice and that they have the matter under continual review.

Formalities of the legal aid system

154. There were some complaints from respondents about the formal requirements of the legal aid system and the way it is administered, such as excessive bureaucracy and delays in granting applications. There were also comments on how SLAB deals with applications for sanction for the instruction of experts, with one respondent saying that SLAB does not always allow the "right" experts to be instructed and another that it can be difficult to find experts willing to accept instructions for the level of remuneration that SLAB has sanctioned.

155. SLAB has a responsibility to decide each application carefully on its merits and to scrutinise accounts to ensure that public funds are spent appropriately. It comments that it continues to look at ways to streamline processes for civil legal aid, including minimising the amount of information that has to be given on a repeated basis and the use of block fees. Advice and assistance applications can be made on-line and there are a wide range of templates to assist different types of application. As regards sanction for the use of experts, SLAB reports that it granted 88.4% of requests for sanction in 2007/08 and that 99% of requests were dealt with in less than 2 days. Its policy on the use of experts is that where a case is fairly standard there would not normally be justification for the foremost expert in any particular field to be instructed, but that if it is told that there are issues of novelty and complexity involved or a new area of expert evidence is being tested, it will consider such requests.

[57] SLAB reports that it expects to publish the findings of its research into recruitment and retention in the near future, (SLAB website as of August 2009)

Modification of expenses due by legally-assisted persons

156. Another recurring theme raised by respondents was what they saw as the inequality of arms which can arise where one party to an action is legally aided and the other is not. They argued that a legally aided party is not exposed to the usual risks of litigation because his liability in expenses is likely to be modified to nil in the event of an unsuccessful outcome, giving the legally aided party an unfair advantage over his opponent. One proposal was that the general practice of modifying expenses to nil should be abolished, with either SLAB or the assisted person being responsible for meeting the expenses. This would encourage a prudent approach to the management of litigation and settlement.

157. The ability to modify the expenses payable by an assisted party is a matter for the court's discretion in terms of section 18 (2) of the Legal Aid (Scotland) Act 1986. Whether to modify expenses should be decided on a case by case basis, taking account of all the circumstances, including the parties' conduct in connection with the dispute,[58] and modification should not be routinely granted in every case. Where a modification is granted, it will not always be appropriate to modify expenses to nil. There will also be situations where it would be appropriate for a successful defender to seek expenses from the Legal Aid Fund under section 19 of the Legal Aid (Scotland) Act 1986. The test that the unassisted party will suffer severe financial hardship if an order under section 19 is not made applies only in proceedings at first instance which were instituted by the legally assisted person.

Mental health and incapacity

158. The joint response from the Mental Welfare Commission and Alzheimer Scotland drew to our attention what they consider to be an unhelpful inconsistency of approach as between the provision of legal aid for welfare guardianship and intervention orders under the Adults with Incapacity (Scotland) Act 2000, and the provision of ABWOR in relation to proceedings before the Mental Health Tribunals. They also consider that it is inappropriate that there should be a means test for the granting of legal aid for representation of a patient in an appeal to the Court of Session against a decision of the Mental Health Tribunal, whereas ABWOR without a means test was available at the Tribunal hearing itself. On the face of it, these do seem to be matters which would merit consideration and we recommend that the Scottish Government should review its policy on them.

[58] Section 18 (2) of the Legal Aid (Scotland) Act 1986 provides as follows: "The liability of a legally assisted person under an award of expenses in any proceedings shall not exceed the amount (if any) which in the opinion of the court or tribunal making the award is a reasonable one for him to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute."

Legal aid and the simplified procedure in the sheriff court

159. This is one of the matters on which we wish to make a substantive recommendation regarding the availability of legal aid. We have recommended that there should be a single simplified procedure for actions for £5,000 or less which would be dealt with by the district judge, in effect doing away with the distinction between summary cause and small claims cases. At present, legal aid is available for cases dealt with under summary cause and ordinary cause procedure, but not for small claims cases.[59] The question therefore arises as to whether or not legal aid should be available for all types and values of cases covered by the new simplified procedure. The question is particularly relevant as regards housing matters, since these are currently dealt with under summary cause or ordinary cause procedure and civil legal aid is available, subject to the usual eligibility and merits tests, for legal representation in such cases.[60]

160. There seem to be two principal justifications for the current policy of not making legal aid available for small claims cases, other than for appeals. One is that the small claims procedure is a quick, informal, low cost way of dealing with claims of low monetary value, with the court taking a "hands-on" approach to identify the issues and sort out the dispute, and that it is therefore not necessary for parties to be legally represented. The other is that it would be disproportionate, and therefore not in the public interest, to expend significant sums of public money on providing legal representation for cases where the amount at stake is small, and where, if the parties seeking legal aid had been able to fund the case themselves, they would be unlikely to consider it worth employing a lawyer to do so. The first argument depends entirely on the procedure working in practice as intended; the second becomes weaker the higher the value at which the cut-off point for the procedure is set. Neither argument takes account of (a) the possibility of complex legal issues arising in a dispute of a relatively low monetary value; (b) the importance of the issues to the parties themselves; (c) the varying needs and skills of parties involved in a dispute; or (d) the reality that one side is frequently an individual with no previous experience of court, facing a "repeat player" who is often legally represented.[61]

161. Staying within the general parameters of the current legal aid system, there are a number of possible options for cases which will be dealt with under the simplified procedure.

a) All such cases could be treated in the same way as small claims, so that civil legal aid would not be available. Our aspiration is that cases under the simplified procedure will be dealt with swiftly and efficiently, with the

[59] Civil legal aid is not available for small claims at first instance by virtue of paragraph 3(b) of Schedule 2 of the Legal Aid (Scotland) Act 1968.
[60] SLAB's Annual Report for 2007/08 shows that there has been an increase in applications relating to debt and housing as compared with the previous year, although overall there were 3% fewer applications for civil legal aid. Most of the increase in housing cases related to rent arrears cases, but there was a 10% increase in cases under the Mortgage Rights (Scotland) Act. (see p 36 of the Report)
[61] E Samuel (1998), *In the Shadow of the Small Claims Court: The impact of small claims procedure on personal injury claimants and litigation*, Scottish Office Central Research Unit

court taking an interventionist approach and ensuring that cases progress to a conclusion as quickly as possible. To that extent it can be compared with the small claims procedure and be regarded as aiming to achieve what that was intended to achieve. However, given that the upper limit for the simplified procedure will be £5,000 as compared with the current small claims limit of £3,000, and that it will encompass rent arrears and mortgage repossession cases where legal aid is currently available, this does not seem an acceptable option.

b) Cases with a monetary value below a set amount could simply be excluded from being eligible for legal aid. There would be no difference in the procedure for claims below that level, so the decision as to where the cut-off point is set would be a pragmatic one, based entirely on the second, "not in the public interest" argument mentioned above. This could be said to be simply maintaining the status quo, but that would not be the case since it would mean excluding actions for recovery of possession of heritable property where the rent arrears were less than £3,000, likely to be the majority of such cases. For those reasons this approach also seems problematic.

c) Legal aid could be made available for specific categories of case within the simplified procedure. Rent arrears and mortgage repossession cases are obvious examples, since legal aid is currently available for them, as it is for cases which include a claim for damages in respect of personal injury, which are currently treated as summary causes even if the amount claimed is less than £3,000. There might be some difficulty in defining the categories of case precisely, but that is unlikely to be an insurmountable problem. There would however also be an argument that a case which did not fall within the set categories might raise legally complex issues where legal representation was required.

d) There could be a combination of b) and c), with a general rule that legal aid is not available for cases below a certain value, except for certain types such as housing and personal injury. This would be more or less the status quo.

e) Legal aid could be made available for all types of proceedings under the simplified procedure. The grant of legal aid is already subject to the tests set out in the Legal Aid (Scotland) Act 1968:

> "civil legal aid shall be available to a person if, on an application made to the Board
> (a) the Board is satisfied that he has a probabilis causa litigandi; and
> (b) it appears to the Board that it is reasonable in the particular circumstances that he should receive legal aid."

162. These tests are already applied by SLAB in every application for legal aid, and it would be a consistent and principled approach simply to rely on the same tests being applied in all cases. Whether it is proportionate to grant legal aid in a case of

very low value would fall to be considered as part of the "reasonableness" test; SLAB could also take into consideration, as it does at the moment, what other facilities are available to the applicant. For example, the availability of self-help resources or an in-court advice or mediation service and the complexity of the issues in dispute would be relevant considerations, as would the more interventionist approach to be taken by the court under the new procedure. We consider that option e) is the right approach. We therefore recommend that legal aid should be available, subject to the usual tests, for all types and values of proceedings under the simplified procedure

Travelling expenses

163. The other matter on which we wish to make a substantive recommendation on legal aid is in relation to travelling expenses for parties to attend hearings. The recommendations we make about specialisation, particularly in relation to family actions, may result in hearings taking place at courts other than a party's local court, for example, where an action is being dealt with by a specialist family sheriff rather than by a district judge at the local sheriff court. Where the personal attendance of a party at a court other than the party's local court is essential for the proper conduct of a substantive hearing, we recommend that a party who is otherwise in receipt of legal aid should be able to claim reasonable travelling expenses to attend.

Court fees

164. The consultation paper asked whether the current system of levying court fees affects access to justice. There was a mixed response, with the majority taking the view that the current system does not have an adverse effect on access since court fees are only a small part of the overall costs of litigation compared with legal and experts' fees. Some respondents did question whether there should be any payment at all for use of the courts, but others commented that, as with other public services, those who use them should be expected to make some contribution to the cost. Fees could act as a deterrent to frivolous litigation, with one respondent making the point that it was important to have fees to show that litigation is a serious process that should not be embarked upon lightly. The exemption from court fees for those who are legally-aided was generally supported. Two respondents however pointed out the anomaly that if the legally-aided party was successful the court fees would not be included in the account of judicial expenses, and the Auditor's fee for taxing the account would also be exempt. The benefit of the exemption, which involved a loss to the public purse, would however accrue to the losing party, often an insurance company. We recommend that the relevant legislation is amended to ensure that exempted court fees and Auditor's fees can be recovered from the losing party. There were also some comments from respondents about solicitors "bankrolling" court fees until the conclusion of the case, at which point they would be recovered from the unsuccessful defender. This would be eased by the introduction, as recommended above, of a power to award interest at the judicial rate on outlays from the date on which they are incurred.

165. We are aware of research carried out on behalf of the Ministry of Justice into the impact of changing court fees on users of civil and family courts in England and Wales.[62] The study involved both quantitative and qualitative methods. The quantitative survey found that overall, individuals felt that the total cost of pursuing a claim played a minor role in the process of deciding to go to court, being ranked eighth from a list of nine factors.[63] The primary drivers for going to court related to the need for resolution, such as 'getting a final decision' which was especially important for those going through a divorce or in child contact or residence cases, and 'getting justice'. Court fees were more of an issue for people who were seeking repayment of money from a defendant, but less of an issue for those claiming compensation as the fees would most likely be paid by the insurer or no-win/no-fee solicitor, and claimed back from the defendant. When those surveyed were asked whether their decision to proceed to court would have been affected by higher court fees, seven out of ten said that it would not have made a difference.

166. We consider that it is reasonable for those who engage in litigation to be required to contribute to the cost of providing and administering the court system, and for fees to be structured in a way which bears some relation to the actual costs of providing the facilities or processes being used. The fee structure should also support the court's case management functions and promote the efficient use of resources.[64] We have not been made aware of any specific evidence that, up till now, court fees have presented any real obstacle to access to justice, but we are aware that there have recently been significant increases made to court fees.[65] There continues to be a number of exemptions for people in receipt of certain state benefits or receiving civil legal aid or advice and assistance. We are not in a position to judge whether the recent increases will have any adverse impact on access to justice, but consider that in principle fees should not be set at levels or structured so as to create a disincentive

[62] Opinion Leader Research (2007), *What's Cost Got To Do With It? The impact of changing court fees on users*, Ministry of Justice Research Series 4/07

[63] It is important to note, however, that the research "was carried out amongst individuals who were already progressing their claim through the courts. As such, for civil cases, the individuals had already made the decision that the costs were viable against the value of their claim. No individual who had considered but not progressed a claim on the basis of cost were included in this research." *ibid*, p 19.

[64] Examples of how this could be done would be for increased fees to be payable for late lodging of documents, or for reductions in fees to be given for making use of email communication, where practical.

[65] New fee levels for proceedings in the sheriff court were specified in The Sheriff Court Fees Amendment Order 2008, SSI 2008/239. Schedule 1 to the Order specifies fees payable from 1st August 2008, which reflect an average increase of 31%. Schedules 2 and 3 to the Order specify fees payable from 1st April 2009 and from 1st April 2010 respectively and reflect an average increase of 3% in each year. Some further changes were made in 2009 by the The Sheriff Court Fees Amendment Order 2009, SSI 2009/89.

New fee levels for proceedings in the Court of Session were specified in the The Court of Session etc. Fees Amendment Order 2008, SSI 2008/236. Schedule 1 to the Order specifies fees payable from 1st August 2008, with an average increase in the level of fees in 2008 of 49%. Schedules 2 and 3 provide details of increases as from 1st April 2009 and 1st April 2010 respectively, the average increase being 3% in each of those years. Some further changes were made in 2009 by The Court of Session etc. Fees Amendment Order 2009, SSI 2009/88.

to litigation or restrict access to the court for people on low incomes. Otherwise we make no recommendation in this regard.

CHAPTER 15 A CIVIL JUSTICE COUNCIL FOR SCOTLAND

1. In this chapter we consider the role of the current Court of Session and Sheriff Court Rules Councils; discuss whether there is a need for a single set of rules; and explore the rationale for a Civil Justice Council for Scotland.

Background

2. The Court of Session Rules Council was established in its present form by section 8 of the Court of Session Act 1988. Its remit is to frame rules regarding any of the matters relating to the Court that may be regulated by act of sederunt and to submit these to the Court for approval.

3. The Council consists of the Lord President *ex officio*, two other judges of the Court of Session appointed by the Lord President, five members of the Faculty of Advocates appointed by the Faculty and five solicitors appointed by the Council of the Law Society. It contains no lay members. The Osler Review of the Scottish Court Service[1] (SCS) recommended that the relevant legislation should be amended to make provision for lay members.

4. Legal and administrative support is provided to the Council by the Lord President's Private Office, assisted by staff from the SCS.

5. The Council meets twice a year. The Minutes of its meetings are posted on the SCS website but only when approved at the next meeting. The Council does not publish a business plan or other document outlining the issues that it proposes to address, nor does it publish annual or other reports of its activities. At its meeting on 8 December 2008 the Council decided that it might be appropriate to establish committees or sub-groups to which particular matters could be remitted. This could allow members of the Council to be more pro-active rather than reactive. It also decided to have more frequent meetings, the next meeting being fixed for 27 April 2009.

6. The Sheriff Court Rules Council was established in its current form by section 33 of the Sheriff Courts (Scotland) Act 1971. Its remit is to keep under review the procedure and practice followed in civil proceedings in the sheriff court and to prepare and submit draft rules to the Court of Session.

[1] D Osler (2006), *Agency Review of the Scottish Court Service*, Scottish Executive

7. Members of the Sheriff Court Rules Council are appointed by the Lord President. Membership comprises two sheriffs principal, three sheriffs, one advocate, five solicitors, two sheriff clerks and two lay members who should have knowledge of the working procedures and practices of the civil courts, knowledge of consumer affairs and an awareness of the interests of litigants in the sheriff courts. There is also one member appointed by the Minister for Justice, who is usually a senior civil servant with policy responsibility in the civil justice field.

8. The Sheriff Court Rules Council meets on a quarterly basis to review procedure and practice in civil proceedings in the sheriff court. It prepares draft rules and submits them to the Court of Session as the ultimate rule making authority.*

9. The Sheriff Court Rules Council sets up *ad hoc* committees to deal with particular issues such as IT, mediation and the Ordinary Cause Rules. When significant or innovative rule changes are proposed, it is the Council's practice to publish consultation papers. In recent years the Council has published consultation papers on mediation, IT, and practice and procedure in personal injury cases.

10. The Sheriff Court Rules Council publishes a Business Plan setting out its objectives and its progress in fulfilling them.

11. The secretariat for the Sheriff Court Rules Council previously consisted of SCS staff on secondment to the Justice Department of the Scottish Government. It was brought within SCS following a recommendation of the Osler Report. That report also recommended that the secretariat function for both Rules Councils should be provided by a single unit on the view that there would be an opportunity to share experience and expertise across the Councils, to seek greater consistency and to provide a slimmer, more efficient service. The Lord President's Private Office (LPPO) drafts the rules for both councils.

Responses to the Consultation

12. The main criticisms of the current arrangements are that there is duplication of effort in the process of drafting rules; that it is unhelpful to have different procedures where courts have concurrent jurisdiction; and that the councils' membership does not adequately represent court users.

13. Three quarters of respondents on this point thought that the current arrangements for making the rules of civil procedure were unsatisfactory. Half of those who took that view thought that there should be a single Rules Council. It was thought to be inefficient for the Court of Session Rules Council and the Sheriff Court

* Section 32 of the Sheriff Courts (Scotland) Act 1971.

Rules Council to be considering the same issues separately and adopting different solutions. Concerns were also expressed about the composition of the Rules Councils. It was suggested that membership should be widened to include court users and representative bodies. It was suggested that the Rules Councils are under-resourced and that they should consult more widely with users of the system and give feedback on the responses they receive. Others suggested that the system for communicating rule changes to the profession and to the public should be improved. Some respondents were concerned about piecemeal reform. Others drew attention to problems created by the rules being interpreted or applied differently in different sheriff courts.

14. Some respondents were not convinced that a unified Rules Council would be appropriate, since the Court of Session and the sheriff court have different functions and cultures and the existing arrangements by which the Rules Councils liaise informally or establish joint sub-committees works reasonably well.

15. Although a single Rules Council need not mean a single set of rules, there is a closely linked issue of whether the rules of the Court of Session and of the Sheriff Court should be consolidated or harmonised.

16. We asked whether there should be a single set of rules of civil procedure in both the Court of Session and the sheriff court. Three quarters of those who responded thought that there should.

17. It was suggested that having different sets of rules gives rise to problems in relation to access to justice and creates artificial barriers for those who might otherwise elect to litigate in the Court of Session. It was suggested that where one court has exclusive jurisdiction in a particular type of action, there might need to be a procedure that was tailor made for that type of case; but that where there is concurrent jurisdiction, the procedure and terminology in both courts should be common. Others doubted whether it would be practicable to operate under a common set of rules, but recognised that there was scope for some harmonisation to ensure a reasonable degree of consistency. If there were a common set of rules for the Court of Session and the sheriff court, the Court of Session could give authoritative guidance on the interpretation of the rules.

18. Others were not persuaded that a single set of rules would be practicable or appropriate given the different functions of the Court of Session and the sheriff court. Actions brought in the Court of Session might be more complex. A different approach might then be required from that taken in the sheriff court where the emphasis is on speed and simplicity. This contrasted with what other respondents said about the benefits of the Chapter 43 procedure in the Court of Session, which was said to be more streamlined and less complicated than ordinary procedure in the sheriff court. It was cited as an example of the need for a common approach.

Other jurisdictions

19. Other jurisdictions have looked at these issues. One of the key recommendations of Lord Woolf's report was the creation of a uniform set of rules for the High Court and the county court and the establishment of a single Civil Procedure Rules Committee in England and Wales.

20. These reforms were considered by the Northern Ireland Civil Justice Reform Group. It recommended the retention of separate rules councils for the High Court and the county court in that jurisdiction. It considered that a single code of procedure was understandable and appropriate when there was a unitary system of commencing proceedings. However, as the Group envisaged that a distinction would be maintained between High Court and county court procedure, it seemed desirable and practicable to retain separate procedural rules. See the Annex to this chapter for further details.

21. The procedure for making rules and the disadvantages or benefits in having a single rule making body was reviewed by the Victorian Law Commission in 2008 and is summarised in the Annex to this chapter. The Commission concluded that it would be sensible to retain separate rules committees in Victoria "because each court deals with discrete practice areas". Similarly, it did not think it desirable for a uniform set of rules to be adopted in Victoria "having regard to the variety of areas of law and types of litigation conducted in each court". It considered that there should be a greater degree of harmonisation between the rules of the various courts, in particular in relation to terminology and forms. It also concluded that the rules of the Victorian courts would benefit from a further detailed review aimed at simplifying their structure and language and bringing them into line with procedural rules in other jurisdictions.

22. A common set of rules does not necessarily apply uniformly in all courts in which it has effect. It does, however, simplify matters by adopting a common procedure, terminology, forms and practice directions or notes for those types of action in which there is concurrent jurisdiction between different courts in the hierarchy.

23. Uniform sets of rules have been adopted in New South Wales, Queensland and the Australian Capital Territory. Major reform projects in relation to harmonisation and modernisation of court rules have been undertaken or are in train in Alberta, British Columbia, Quebec, Ontario and Nova Scotia.

24. A comprehensive review of rules of court is a major task. It requires a heavy investment in terms of funding and the creation of a mechanism to consult with the public and the profession, to identify areas for reform, to prioritise tasks, to draft new rules and to consult on them. In addition to dealing with specific issues such as costs or expert evidence, many projects include in their remit the simplification and modernisation of language, reorganisation of the rules in a coherent fashion,

updating of rules in response to developments in technology, and facilitating access to justice in terms of fairness, accessibility, timeliness and cost effectiveness.

25. In some jurisdictions this exercise has been conducted by a Rules Project or Task Force, the remit of which has been to overhaul and reform the rules of court, usually as a mid to long term project. The projects are funded by government or the relevant law reform commission and include representation by the relevant legal professional bodies.

26. In other jurisdictions oversight of the implementation of proposals for reform to the civil justice system, responsibility for monitoring the success of those reforms, and the giving of advice to government about the operation of the courts has been entrusted to a body with a permanent remit to keep these matters under review, that is to say, a Civil Justice Council.

A Single Rules Council and Harmonisation of the Rules

27. A single Rules Council could establish a structure of committees or other working practices to ensure that appropriate account was taken of the different cultures and historical working arrangements of the courts. A single Council would have an overview of the civil court system and promote communication between the courts and court users; sharing of developments in good practice; and consistency in procedures. It would also achieve economies of scale in its administrative support. It would approach the development of rules with a presumption that they should be similar unless there was a good reason why they should not. Alternatively, separate Rules Councils could continue to draft rules independently but liaise where there were matters under consideration that were of obvious relevance to all the courts.

28. This problem has been looked at on several occasions in the recent past. From time to time the Lord President and the Chairman of the Sheriff Court Rules Council have agreed that subcommittees of the two Councils should meet together, the most recent example being joint meetings on IT. But this is the exception rather than the norm, even though the two Councils frequently consider the same questions.

29. Strands of work that proceed in parallel may lead to duplication of effort, delay and the risk of inconsistent approaches. Where there is conflict between the Councils on the policy to be adopted, there can be stalemate.

30. An example of this problem occurred on the question of ADR. The Sheriff Court Rules Council took up the subject in November 2004. It concluded that a rule should be introduced that encouraged, but did not compel, parties to consider ADR. In contrast to the position taken by the Court of Session Rules Council, the rules proposed by the Sheriff Court Rules Council did not require parties to make averments about what consideration had been given to ADR and did not contain a specific power to take a failure to utilise ADR into account in making awards of expenses. To date no rules have been made in relation to ADR and mediation in either the sheriff court or the Court of Session. On 8 December 2008 the Court of

Session Rules Council considered the issue once more and noted that there was considerable interest in this issue. The report by the Business Experts and Law Forum had recommended that the courts should formally acknowledge the role that mediation can play in the civil justice system in Scotland and should routinely recommend ADR to litigants. In addition, the Lord President had received two letters on the subject from the Director of Professional Practice at the Law Society of Scotland and from the Chairman of the Sheriff Court Rules Council. Similar points had been made in both letters. The Council was inclined to await the outcome of this Review before taking any action.

31. Even where Councils reach a consensus, there will be inevitable delay for the Council that first looked at the issue. For example, the Sheriff Court Rules Council noted in June 2004 that doubts had been expressed about the competency of taking evidence in civil cases by video link in the absence of legislative authority or any express rule. In June 2005 a draft rule was considered and approved by the Sheriff Court Rules Council. At a joint meeting of the Court of Session and Sheriff Court Rules IT Committees in June 2006 a policy was agreed on taking evidence by video link and it was subsequently agreed that there should be a common rule. The relevant act of sederunt was not made until the beginning of 2007.

32. Where there is a need to explore a joint approach, the fact that each of the two Rules Councils has a separate secretariat can lead to difficulties. A single secretariat would at the very least facilitate a more speedy consideration of issues applying to the different courts. It would also assist with the active management of a comprehensive programme of reform that would avoid the situation where one Council had to react to an initiative from the other that could adversely affect its work plan.

33. It is clear from the responses to the Consultation Paper that there is a high degree of dissatisfaction with the way in which the Rules Councils operate. Unlike the court structure in many other legal systems, there is a considerable overlap between the jurisdiction of the Court of Session and that of the sheriff court. The categories, and more importantly the volume, of actions in which either court has exclusive jurisdiction are limited. In relation to many proposed rule changes it is desirable, as both Councils acknowledge, that there should be a common approach.

34. Although the Sheriff Court Rules Council has published consultation papers and carried out comparative research, it is evident that the Councils do not have the resources to undertake a comprehensive review of the rules of court; to commission research into how effectively they operate; to conduct surveys of court practitioners, court users or other interested parties; or to undertake a comparative analysis of other jurisdictions. The difficulty lies in the basis upon which the Councils are resourced and in a system that does not make the best use of the resources available.

35. Many of the proposals for reform that we make will require new rules of court. It is important to ensure that the process of reform does not lose momentum or focus and that there should not be divergent approaches to common issues. It is also

important to ensure that the impact of any changes made to the rules is monitored to ensure that they are achieving their purpose.

36. It has not been possible in the context of this Review to undertake a comprehensive review of the rules of court.

37. We see advantages in there being a single rule making body. The task facing such a body will be substantial. We consider that it will be wider than simply the drafting of rules. We have therefore considered whether there is a need for a Civil Justice Council for Scotland.

Do we need a Civil Justice Council?

England and Wales

38. In his final report Lord Woolf recommended that a Civil Justice Council (CJC) should be established to contribute to the development of his proposed reforms.

39. Under section 6 of the Civil Procedure Act 1997 the CJC is charged with:

- Keeping the civil justice system under review
- Considering how to make the civil justice system more accessible, fair and efficient
- Advising the Lord Chancellor and the judiciary on the development of the civil justice system
- Referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and making proposals for research

40. Membership of the CJC must include:

- Members of the judiciary
- Members of the legal profession
- Civil servants concerned with the administration of the courts
- Persons with experience in and knowledge of consumer affairs
- Persons with experience in and knowledge of the lay advice sector
- Persons able to represent the interests of particular kinds of litigants, for example, business or employees

Ex Officio and Preferred Memberships[2]

41. The Master of the Rolls as Head of Civil Justice and the Deputy Head of Civil Justice are *ex officio* members of the CJC. The Head of Civil Justice is the Chair. Preferred members are: the Chair of the Judicial Studies Board, a High Court judge, a

[2] Civil Justice Council (2008), *Annual Report 2007*

Circuit judge (preferably a Designated Civil Judge), a district judge, a barrister (on recommendation of the Bar Council), a solicitor representing claimants' interests, a solicitor representing defendants' interests, an official of the Law Society, a senior civil servant representing the interests of the Ministry of Justice and Court Service, a representative of the insurance industry, an advice service provider, and a representative of consumer interests.

Structure of the CJC

42. The Civil Justice Council has a full Council of twenty-six members (including those appointed *ex officio*). An Executive Committee, comprising the Chair, Deputy Head of Civil Justice, three Council members, and the Chief Executive of the Council, makes management and planning decisions. Six committees currently undertake the Council's day-to-day activities.[3] The Committees are: Alternative Dispute Resolution, Access to Justice (including responsibility for the Fees Consultative Panel and Public Legal Education Working Group), Housing and Land, Clinical Negligence and Serious Injury, Expert Witnesses, and Rehabilitation.[4] In the past, there was also a Costs Committee and Working Group, as well as a Pre-Action Protocol Committee.

43. The membership of the committees varies between 5 and 12 members.

44. In February 2008 the Justice Minister commissioned an independent review of the CJC. The terms of reference were:

- To review the role and performance of the CJC and make recommendations
- To evaluate the continuing need for a body to perform the role and functions of the CJC as set out in the Civil Procedure Act 1997
- To review whether a non departmental body like the CJC remains the most appropriate form of body to carry out those functions
- To assess the past effectiveness of the CJC
- To consider ways in which the CJC could be made more effective

45. The main findings of the report of the review[5] were that the concept of the CJC was sound and that a significant strength was its extensive and diverse practitioner expertise. Its proposals were generally well grounded and practical; it provided a neutral environment for contacts between the judiciary and other civil justice stakeholders; it had been successful in getting different interests to sit down together and engage in constructive dialogue and had played an essential mediating role in

[3] http://www.civiljusticecouncil.gov.uk/about/about.htm
[4] This committee was set up to consider how to make rehabilitation play a more central role in the personal injury compensation system.
[5] J Spencer (2008), *Review of the Civil Justice Council: responding to the needs of users*, Ministry of Justice

the so-called "Costs War."[6] The review recommended that the CJC's work programme should be given a sharper and more strategic focus on the needs of users and a move away from the historic central focus on personal injury cases. There should be a shift in the balance of its membership towards court users.

46. The clear conclusion of the review was that the CJC continued to have a distinctive contribution to make to the civil justice scene; and that an arms length body chaired by the Master of the Rolls was the right form to discharge the functions laid down in the Civil Procedure Act 1997.

47. The CJC's remit is not restricted to monitoring the implementation of the Woolf reforms or to keeping the rules under review. Its remit is much wider. It extends to keeping the whole civil justice system under review and considering how to make it more accessible, fair and efficient. It is for this reason that it has looked at the funding of litigation, pre-action protocols, rehabilitation in the context of personal injury cases, and codes of conduct for experts. It has performed a negotiation and facilitation role in relation to the development of pre-action protocols, agreements in relation to predictable costs[7], fees for experts in low value cases, and in mediating an agreement in the Costs War. It has commissioned its own research on questions involving costs and multi-party actions.

48. So far as its policy functions are concerned, the CJC was given a clean bill of health by the review although there were a number of recommendations regarding its identification of strategic objectives and priorities; its focus on personal injury actions; its committee structure and their working methods; its communications strategy; and its relationship with user groups and other interest groups.

49. If a civil justice council were to be established for Scotland, consideration would have to be given to its remit: what would be its function over and above overseeing the implementation of the recommendations of this Review; whether it would have an ongoing remit to consolidate/harmonise the rules and/or to keep the rules under review; and whether it would have a broader remit to keep under review the matters covered by this Review. In those jurisdictions that have or propose to introduce a civil justice council it does not take the place of the rules council, which is responsible for drafting the rules. For example, in Victoria the work of a civil justice council was seen as being entirely distinct from a review of the rules.

50. In England and Wales the CJC plays a complementary role to the Civil Procedure Rule Committee, for example, by carrying out research on whether the rules are operating in the way intended.

[6] See Chapter 14 for a discussion of the satellite litigation regarding costs in England and Wales and the Civil Justice Council's role in negotiating agreements on predictable costs.
[7] See Chapter 14 and Annex for a discussion of the development of predictable costs in England and Wales.

A Civil Justice Council for Scotland

51. We recommend the creation of a body with a remit similar to that of the CJC in England and Wales, but which also has responsibility for drafting the rules of court. In a small jurisdiction like Scotland this would be preferable to having a civil justice council sitting alongside the two existing Rules Councils or even a unified Rules Council, which might lead to duplication of effort or to a divergence of views.

52. A unified Rules Council might meet some of the concerns expressed about the current arrangements, but its remit would be limited to keeping the rules under review and proposing any desirable changes. In our opinion, the real need, if the benefits achieved by reform are to be maintained, is for the creation of a body with a wider remit and a more strategic vision, similar in purpose if not in scale to the CJC in England and Wales. The role of the Civil Justice Council for Scotland (CJCS) would be similar to the remit of this Review: to keep under review the provision of civil justice by the courts in Scotland, including matters such as the structure of the courts, their jurisdiction, procedures and working methods, and the cost of litigation. The CJCS would monitor the implementation and operation of the recommendations made by this Review; receive representations and proposals for reform; have the power to commission research; and keep abreast of reforms and developments in other jurisdictions. The CJCS would advance proposals for reform of the civil justice system and would comment on and give expert advice on proposals made by the Scottish Government. In this way, reform and improvement of the civil justice system would be an ongoing process.

53. To avoid duplication of effort and to ensure the most effective use of resources, the function of the two existing Rules Councils would be transferred to the CJCS, which would thereafter be responsible for drafting rules for approval by the Court of Session in accordance with section 8(4) of the Court of Session Act 1988. The CJCS would probably delegate this work to two working groups: one for the Court of Session and the other for the sheriff court. This procedure would make use of the knowledge and experience of practitioners in each court. The aim, however, would be to adopt a common approach unless there were good reasons for having different rules in each court. The working groups would submit their drafts to the Executive Board of the CJCS for approval and the Board would resolve any issues upon which there was a divergence of views. The CJCS could set up other ad hoc working groups as the need arose.

54. We propose that the CJCS would be an advisory non departmental public body chaired by a senior member of the judiciary nominated by the Lord President. Members of the Executive Board would be drawn from the judiciary; both branches of the profession; and lay members who may include individuals with experience of the Scottish civil courts and representatives of advice services, consumer organisations or SLAB. The Chief Executive of the SCS or a senior official could also be appointed along with a senior official of the Scottish Government.

55. It would be necessary to ensure that the CJCS was supported by a suitable secretariat, with personnel of sufficient seniority and experience to coordinate the work of the Council and its working groups; assist with the planning and organisation of its work; commission or undertake research; carry out consultations, both formal and informal, with interested parties; provide policy support and advice to the Executive Board and the working groups; and draft rules for approval by the Court of Session.

56. The secretariat should include a team of dedicated and professional support staff drawn from a range of backgrounds, including legal specialists, researchers and administrators. It would seem unlikely that it would be desirable that the CJCS should take on responsibility for the wide range of duties and responsibilities which are attached to any organisation which employs staff. Staff should therefore be recruited by the SCS, which is to be established as a non-Ministerial Department following implementation of the Judiciary and Courts (Scotland) Act 2008. The SCS would also be able to provide the secretariat with administrative support such as IT, finance and human resources services. This would keep administrative costs to a minimum although, of course, some additional funding would require to be allocated to the SCS.

57. Prior to its formal creation by statute the CJSC could be set up on a shadow basis in order to oversee the implementation of the recommendations made in this Review. A further priority would be to draw up a programme for a comprehensive review of the rules of the Court of Session and the sheriff court with a view to consolidating or harmonising them; introducing common terminology and procedure for those types of case that may be litigated in either court; modernising the language of the rules; and doing away with the distinction between ordinary and petition procedure in the Court of Session and between ordinary procedure and summary applications in the sheriff court. Another task would be to keep under review the scope and operation of pre-action protocols.

58. We consider that there is considerable scope for making changes to the rules in advance of the introduction of primary legislation to implement our recommendations and that the Rules Councils should take our recommendations forward where this is possible.

59. In Chapter 14 we recommend that a Working Group on Judicial Expenses should be set up to review as a matter of urgency the existing principles and practice, having regard to recent developments in England and Wales and the recommendations that will emerge from Lord Justice Jackson's Review of Civil Litigation Costs.

RECOMMENDATIONS

Chapter 4 Structure of the civil court system

Reliance on temporary and part-time resources

1. The Scottish Court Service should plan for the elimination of part-time judicial resources instead of constantly adding to them. If there are to be part-time judges or sheriffs at all, they should be available for emergencies only. (Paragraph 30)

2. An urgent priority is to bring to an end the use as temporary judges or part-time sheriffs of those still in practice. (Paragraph 33)

3. If there are to be temporary judges at all, they should be drawn from the ranks of retired judges of the Court of Session, or serving or retired sheriffs or sheriffs principal. If there are to be part-time sheriffs at all, they should be drawn from the ranks of retired sheriffs or retired practitioners. (Paragraph 37)

The need for specialisation

4. A system should be introduced whereby a number of sheriffs in each sheriffdom will be designated as specialists in particular areas of practice. (Paragraph 64)

5. There should be no strict demarcation between civil and criminal business in the sheriff court. The categories of designation should include at least solemn crime, general civil, personal injury, family and commercial. It should be possible for sheriffs to seek to become designated in additional areas, providing they have the necessary experience. (Paragraph 66)

6. Sheriffs principal should have responsibility for designating sheriffs within their sheriffdom to hear cases in a particular area of specialisation. (Paragraph 67)

7. When a vacancy arises in a sheriffdom, the sheriff principal will require to assess what skills he would like the person who is to fill that vacancy to have. The Judicial Appointments Board for Scotland will then require to select a candidate who matches those skills. (Paragraph 69)

Sheriff Appeal Court

8. A national Sheriff Appeal Court should be established. The court would hear summary criminal appeals from lay justices, district judges, and sheriffs during the transitional period when both sheriffs and district judges would be dealing with summary criminal cases, and civil appeals from district judges and sheriffs. (Paragraph 79)

9. A small number of judicial officers of equivalent rank to a sheriff principal should be appointed to sit as members of the court with the existing sheriffs principal who will be *ex officio* members. (Paragraph 82)

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

11. The Sheriff Appeal Court would hear all summary appeals against conviction or sentence; or both; and Crown appeals against acquittal and against sentence. For appeals in relation to sentence only the bench would comprise two members. For appeals against conviction, conviction and sentence and Crown appeals, the appeal would be to a bench of three. (Paragraph 86)

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

13. Although the Sheriff Appeal Court would have a national jurisdiction, civil appeals would be administered and heard within the sheriffdom from which they emanate. (Paragraph 88)

14. Appeals in cases subject to the new simplified procedure should be heard by a single member of the Sheriff Appeal Court unless they raise questions of wider public importance. (Paragraph 89)

15. Within the Sheriff Appeal Court a single member of the court should have the power to conduct procedural business. (Paragraph 90)

16. There should be a restricted right of appeal from the Sheriff Appeal Court to the Inner House. (Paragraph 93)

17. An appeal from the Sheriff Appeal Court to the Inner House should be subject to a requirement to obtain leave, which should in the first instance be sought from the Sheriff Appeal Court. If leave is refused then the party seeking to appeal should be able to seek leave from the Inner House. (Paragraph 94)

18. The test for granting leave should be that (a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Inner House to hear it. The principle of proportionality should form part of the test and the court should have regard to the stage of proceedings to which the appeal relates. (Paragraphs 94-95)

Other appeals to the Inner House

19. We share Lord Penrose's view that the Scottish Ministers should consider introducing legislation that would make provision for a sift mechanism for reclaiming motions and statutory appeals. (Paragraphs 97-98)

First instance business in the Court of Session

20. The privative jurisdiction of the sheriff court should be raised to £150,000. (Paragraph 123)

21. The court should have the power to remit an action from the Court of Session to the sheriff court at the stage of signetting if it is apparent that the value of the action is likely to be below the privative limit of the sheriff court. (Paragraph 125)

22. It would be for the judge at the first or any subsequent case management hearing to consider whether the value of the case was likely to be less than the privative limit and, if so, whether there were any special features that would justify the retention of the case in the Court of Session. (Paragraph 126)

23. Those actions raised in the Court of Session which do not have a monetary conclusion should remain there, subject always to the exercise of our proposed power of remit under the active judicial case management model. (Paragraph 127)

24. Where a pursuer is awarded a sum less than the privative jurisdiction of the sheriff court, expenses will be awarded on the sheriff court scale unless the pursuer can show cause why it was necessary or appropriate to raise the action in the Court of Session. (Paragraph 128)

25. A rule should be introduced enabling a tender of a value below the threshold to be accompanied by an offer of sheriff court expenses in full and final settlement. (Paragraph 129)

Powers of remit

26. If the privative limit of the sheriff court is increased to £150,000 the legislation governing remit from the sheriff court to the Court of Session would have to be amended to enable actions below the privative limit to be remitted to the Court of Session in exceptional cases. The Court of Session should have the power to decline a proposed remit if the judge is not satisfied that the case is one that should be heard there. (Paragraph 134)

27. Where the value of an action raised in the Court of Session is likely to be below the privative limit, as assessed by the judge at a case management hearing, there should be a presumption in favour of a remit to the sheriff court. In considering whether or not to remit the Court should be entitled to take into account the

business and operational needs of the Court as well as the interests of the parties. (Paragraph 136)

Exclusive Jurisdiction of the Court of Session

28. The Court of Session should retain exclusive jurisdiction in relation to more complex corporate matters, patents, Exchequer cases, actions under the Hague Convention and certain devolution issues. (Paragraph 138)

29. The Court of Session should retain concurrent jurisdiction in family actions. Concurrent jurisdiction should be conferred on the sheriff court in relation to actions of proving the tenor and of reduction, except actions of reduction of sheriff court decrees. As regards the winding up of companies, there should be a significant increase in the value of the paid up share capital which limits the jurisdiction of the sheriff court. Otherwise the exclusive jurisdiction of the Court of Session should remain as it is at present. (Paragraph 141)

Other jurisdictional issues

30. The powers to make orders *ad factum praestandum* and orders for specific implement on an interim or final basis conferred on the Land Court by section 84 of the Agricultural Holdings (Scotland) Act 2003 should be conferred on the Court of Session and the sheriff court. (Paragraph 143)

31. The Court of Session should have jurisdiction to grant a decree of removal or ejection. (Paragraph 144)

Specialist Personal Injury Court in the Sheriff Court

32. An all-Scotland jurisdiction for personal injury actions should be conferred on Edinburgh Sheriff Court. (Paragraph 154)

33. The amended version of Chapter 43 that is to be extended to the sheriff court would apply to actions raised in the sheriff court including the specialist personal injury court. Parties could apply, on cause shown, for a case to be remitted out of this procedure. In that event, an active judicial case management model would be applied. (Paragraph 155)

Civil Jury Trials

34. The right to a civil jury trial in the enumerated causes should be retained. (Paragraph 162)

35. Civil jury trial should be extended to the new specialist personal injury court, but not to those actions that are litigated in other sheriff courts. (Paragraph 163)

Organisation of the sheriff court

36. There should be a review the purpose of which is to rationalise the boundaries of the sheriffdoms with those of other public authorities. The relevant legislation and rules of court should be amended to enable actions to be transferred between sheriff courts within a sheriffdom and between sheriffdoms. The sheriff court legislation should be amended to provide that an interdict or other interim order granted in one sheriff court shall be enforceable throughout Scotland. (Paragraph 172)

Creation of the office of district judge

37. A new judicial office should be created, that of district judge. A district judge would sit in the sheriff court and would hear summary criminal business and civil claims of a modest value. (Paragraph 176)

38. The jurisdiction of the district judge in relation to summary crime should be limited to those summary criminal cases that are currently tried by sheriffs. (Paragraph 186)

39. A district judge would have a civil jurisdiction comprising actions with a value of £5,000 or less, housing actions, and appeals and referrals from the children's hearing. (Paragraph 193)

40. The district judge will have concurrent jurisdiction with the sheriff in relation to family actions. If parties chose to bring proceedings in their local court before the district judge rather than before a specialist sheriff the district judge would have full jurisdiction to make any orders in relation to financial provision even if the value of the assets was greater than £5,000. (Paragraph 199)

41. The district judge would also have jurisdiction to hear urgent motions for interim orders in ordinary actions. (Paragraph 200)

Criminal jurisdiction

42. Over time, district judges will assume responsibility for the summary criminal trials that are presently heard by sheriffs. Where an accused person appears on petition in a court in which there is no resident sheriff the district judge would have jurisdiction to deal with the examination of the accused and to grant bail. (Paragraph 201)

Accommodation

43. Both district judges and sheriffs would be accommodated in the existing sheriff court and JP court estate. Where the volume of business would not justify there being a resident district judge on a full time basis, a single district judge might cover more than one court. (Paragraph 202)

Programming of Business

44. Specific days or half days should be set aside for the conduct of civil business by district judges. (Paragraph 203)

Transitional arrangements

45. Part-time sheriffs would be employed only where there were unexpected absences or unforeseen peaks in demand. They would be drawn from the ranks of retired sheriffs or retired practitioners. District judges should in the short term assume responsibility for the summary crime and the less complex civil business that is now being done by part-time sheriffs. As sheriffs retired or moved to other sheriffdoms they would usually be replaced by district judges. (Paragraph 204)

Flexibility and transfer of complex cases

46. If pressure of business and efficiency required it, a sheriff could be allocated to undertake the work of a district judge but district judges would not be entitled to undertake the work of a sheriff. Part-time sheriffs would play a role in providing cover for district judges. (Paragraph 205)

47. There should be a mechanism for a district judge to transfer a case to a sheriff, on the application of one or more of the parties or on his own initiative, subject to consultation with and approval of the sheriff principal. (Paragraph 206)

Chapter 5 A new case management model

48. There should be explicit recognition of the principle that the court should have power to control the conduct and pace of all cases before it. (Paragraph 6)

Judicial continuity and a single docket system

49. A docket system should be introduced in the Court of Session and the sheriff court. (Paragraphs 44, 73)

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

51. There should be an appointment-based system for the hearing of procedural business, whether by representation in person or by telephone or video conferencing. Where representation in person is required, the appointments should be fixed on a "not before" basis. (Paragraph 47)

A new case management model of general application

52. With the exception of certain specified types of action, all actions in the Court of Session or the sheriff court should be subject to judicial case management. On the lodging of defences, a case should be allocated to the docket of a particular judge or sheriff. A case management hearing should be fixed shortly thereafter. This would normally take place by means of a telephone conference call. (Paragraphs 48, 72, 74)

Case Management in the Court of Session

The Inner House

53. We endorse Lord Penrose's recommendations and recommend that they should be implemented without delay. (Paragraph 52)

The Outer House

54. In exceptional cases, active judicial intervention should be available in a Chapter 43 action at any stage, on the application of either party or by the court on its own initiative. (Paragraph 62)

55. Actions transferred out of Chapter 43 will be subject to active judicial case management. The grounds upon which a personal injury action may be appointed to proceed as an ordinary action should be extended to include the desirability of active judicial case management in the particular circumstances of the case. (Paragraph 63)

56. The Civil Justice Council for Scotland should address the amendments required to abolish the distinction between ordinary and petition procedure in the Court of Session. The Council should also examine the need to modernise the terminology used in the rules, both in the Court of Session and in the sheriff court. Apart from proceedings which are exclusive to either court, the terminology that applies to proceedings in the Court of Session and in the sheriff court should be the same. (Paragraph 70)

Case Management in the Sheriff Court

Actions before the sheriff

57. Jurisdiction in civil actions should be shared between sheriffs and district judges. Sheriffs will have jurisdiction to hear all civil business in the sheriff court. District judges will have jurisdiction to hear housing actions, actions for payment of £5,000 or less, referrals and appeals from children's hearings, and will have concurrent jurisdiction with sheriffs in family actions. District judges hearing family actions may deal with financial matters of unlimited value. (Paragraph 71)

58. With the exception of personal injury actions, all civil business for which the sheriff has jurisdiction will be heard by designated sheriffs and be subject to their active case management. (Paragraph 72)

59. Actions and other court proceedings under active judicial case management will proceed on the lines we have described. There will be no need to retain the distinction between ordinary cause procedure and summary application procedure. On the lodging of defences, the case will be allocated to a suitably designated sheriff. A case management hearing will be held two weeks after defences are lodged and will normally be conducted by telephone or video conferencing. It will be open to parties to request a hearing in open court. (Paragraph 74)

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

61. Actions subject to the sheriff's jurisdiction may be raised in any sheriff court having jurisdiction, but may be transferred to a court where a suitably designated sheriff is resident. Procedural business should be conducted by email, telephone, video conferencing or in writing. There should be a presumption that any proof or other hearing will be heard in the court to which the action has been transferred although parties may apply for the designated sheriff to hear the proof or debate at the local court, if court accommodation permits. (Paragraph 76)

Personal injury actions under the sheriff's jurisdiction

62. All substantive hearings in personal injury actions proceeding under case-flow management will be heard by a designated personal injury sheriff, who will also deal with motions to vary the timetable or other procedural business. (Paragraph 79)

63. Active judicial intervention may be introduced at any stage in the procedure on the application of either party or by the court on its own initiative. (Paragraph 80)

Family actions

64. If the case involves an application for urgent interim orders, it will be dealt with by an available sheriff or district judge and will then be transferred to the docket of either a family sheriff or a district judge as requested by the pursuer. (Paragraph 88)

65. It should be open to the defender at the first case management hearing to submit that the case should be transferred from the family sheriff to a district judge or vice versa. (Paragraph 89)

66. If the case is allocated to a family sheriff there would be a presumption that all procedural business would be conducted by telephone or videoconference (provided the parties consent) and that substantive hearings would take place in the court in which that sheriff sits. Arrangements could be made exceptionally for a hearing to take place in a more convenient venue. (Paragraph 90)

67. The first case management hearing would also fulfil the function of a Child Welfare Hearing. (Paragraph 91)

68. The sheriff or district judge should make the requirement for full and early disclosure clear at the first case management hearing. Active case management throughout the case should include firm action to deal with failure to comply with time limits and control of the use of expert evidence. (Paragraph 92)

69. The number of days allocated to a proof should reflect the number of days it is expected to last. (Paragraph 93)

70. In courts where the resident judicial officer is a district judge, it will be desirable to set aside in the court programme specific days or half days for the conduct of civil business, in particular family actions. Where practicable, criminal business in courts where there is only one court room should not be programmed for those days. Deferred sentences should not be fixed for days or parts of days programmed for civil business. (Paragraph 94)

71. A forum of family sheriffs and district judges should be established so that knowledge and experience can be shared and issues of common concern discussed. District judges should receive appropriate training when they are appointed. (Paragraph 95)

Children's referrals

72. In the first instance all children's hearing referrals should be allocated to a district judge. Cases identified as complex or lengthy may be allocated to a sheriff. There should be a procedure for remit of a case by the district judge to the sheriff should it prove more complex than it seemed at the outset. (Paragraph 97)

73. The rules for children's hearing referral cases be should be amended and supplemented by practice notes to permit active case management in those cases that require it. (Paragraph 99)

Curators, reporting officers, safeguarders and court reporters

74. For children, the following are required:

- An open, fair and transparent system of recruiting panels of people from whom curators, reporting officers, safeguarders and reporters can be appointed by the court.
- Clarity and consistency as to the qualifications and experience required for each type of appointment.
- Rates of remuneration which reflect the actual work required to fulfil the remit of the particular appointment.
- Access to appropriate induction and training for people appointed to panels, as well as opportunities for continuing professional development and the sharing of good practice.
- Clarity for appointees as to what is expected of them. For some appointments this may be laid down in rules of court, for others it may be appropriate to have non-statutory guidance. In any event, the sheriff or children's hearing making the appointment should always ensure that the person appointed is clear as to what is required of them, if necessary by specifying this in detail in the order.
- A system for monitoring the quality of the work done and reports provided by appointees and for dealing with situations where they fall below the standard expected. (Paragraph 111)

75. The courts, the Scottish Government, local authorities, SCRA, SLAB and the legal profession should collaborate to develop systems which will meet these objectives. (Paragraph 112)

76. For adults, the basic requirements of the systems of appointment, training and remuneration of safeguarders and curators *ad litem* are the same as set about above. The relevant organisations should work together in a similar way to develop appropriate systems. (Paragraph 113)

Information, family support and mediation services

77. Rule 33.22 of the Ordinary Cause Rules should be broadened to allow referral to mediation of any matter arising in a family action. (Paragraph 117)

78. The provision and funding of national mediation and family support bodies and local family mediation services, and in particular of family contact centres, should be treated as a priority by the Scottish Government and kept under review by the Scottish Parliament. (Paragraph 121)

Actions before the District Judge

79. There should be a single new set of rules for cases for £5,000 or less. (Paragraph 125)

80. The new rules for low value cases should be based on a problem solving or interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. (Paragraph 126)

81. The new rules should be written in plain English and be as clear and straightforward as possible. (Paragraph 127)

82. At the first hearing the district judge should decide what further information is required and what the next stage of procedure should be. He should be able to continue the case to a later date if he considers that to do so will enhance the prospects of achieving a settlement. There should be a permissive provision that will allow the district judge to assist the parties to reach a settlement at any point in the case, rather than a requirement that he should do so at the first hearing in every case. (Paragraph 128)

83. The simplified procedure should enable a party litigant, with the help of written explanatory guidance and/or support from an in-court or other advice agency, to initiate a claim or lodge a defence and conduct his case to a conclusion. Such a party should be entitled, with the permission of the court, to have his case presented for him by a suitable lay representative. (Paragraph 130)

84. The rules should be drafted for party litigants rather than practitioners. They should describe in outline how the case will proceed. They should also entitle the judge to permit lay representation and to hold any hearing in chambers. (Paragraph 131)

Actions which include a claim in respect of personal injury

85. The rules should provide that an action for damages for personal injury for up to £5,000 action can be transferred to the ordinary court or to the specialist personal injury court, if it raises complex or novel issues. (Paragraph 132)

Housing cases

86. The Scottish Government should develop and extend in-court advice services, including services offering specialist help in housing matters, as part of a broader strategy to improve and co-ordinate the provision of publicly-funded civil legal assistance and advice generally. (Paragraph 147)

87. Legal aid should continue to be available for housing cases, but there is also considerable scope for representation by specialist lay advisers. (Paragraph 148)

88. The new simplified procedure, with certain modifications, should apply to all cases involving housing matters. (Paragraph 153)

89. The procedural protections available to defenders in rented housing repossession cases should be of the same order as those available in mortgage repossession cases. In both types of case the judge should be given sufficient information by the pursuer and defender to apply the statutory tests. (Paragraph 154)

90. All housing cases should call in court. (Paragraph 157)

Expenses under the new simplified procedure

91. There should continue to be separate tables of expenses. One would be for claims up to £3,000. Another would be for claims between £3,001 and £5,000, to include all housing cases regardless of the amount of any arrears. Finally, there would be a separate table of expenses for any action which includes a claim for damages for personal injury. (Paragraph 159)

Specialisation by the district judge

92. Judicial specialisation in housing and family cases should be encouraged where possible. (Paragraphs 162-163)

93. District judges should receive special training relevant to the scope of their work. (Paragraph 164)

Chapter 6 Information technology

94. There should be no bar to conducting case management hearings by means of telephone or videoconferencing, if certain safeguards are in place. In deciding whether it would be compatible with article 6 for a case management hearing to take place in private, the court should have regard to the questions to be decided; whether the parties have consented or have by implication waived their rights to a hearing in open court; and whether the questions to be decided involve the public interest or are of such importance that the public would have an interest in having the hearing take place in open court. (Paragraph 63)

95. Generally, we would encourage the increased use of IT to support the work of the civil courts in Scotland. In particular we recommend that:

- The SCS should develop an up to date strategy for enhanced provision of IT based on research commissioned to identify the needs of all court users;
- The SCS Website should be a source of guidance and support particularly for parties in cases covered by the proposed simplified procedures falling within the jurisdiction of the district judge. It should include information

on other sources of advice and assistance; providers of mediation and other forms of ADR including links as appropriate; and self help materials;
- The use of email as a means of communicating with the courts and the judiciary should be encouraged;
- The proposed pilot of an online small claims and summary cause system should be actively pursued as soon as is practicable and consideration should be given to extending the system to other undefended actions;
- Video and telephone conferencing should be encouraged;
- Consideration should be given to means of encouraging court users to communicate electronically. This may involve entering into some sort of agreement with a provider to allow access to systems locally; managing the provision of such access directly, for example with local authorities; or by lower court fees; and
- All evidence in civil cases, apart from those under the simplified procedure, should be recorded digitally. (Paragraph 84)

Chapter 7 Mediation and other forms of dispute resolution

96. ADR is a valuable complement to the work of the courts, but the court should not have power to compel parties to enter into ADR. That is contrary to the constitutional right of the citizen to take a dispute to the courts of law. (Paragraph 24)

97. Advisers and agencies who provide first line advice should be aware of all the dispute resolution options that are available. That requires suitable training. (Paragraph 26)

98. The Scottish Court Service website should contain explanatory material on ADR and links to sources of further information about ADR. (Paragraph 28)

99. Our proposals in relation to pre-action protocols and active judicial case management provide the opportunity for the court to encourage parties to consider alternatives to litigation. (Paragraph 32)

100. We do not consider it necessary to make any specific provision in court rules for sanctions in expenses where a party has refused to engage in ADR. Parties should not have to justify to the court why they did not engage in ADR or, if they did, why it did not result in settlement. As a general rule parties should bear their own expenses in relation to mediation, unless they agree otherwise, and such expenses should not normally be part of an award of expenses by the court. (Paragraph 35)

101. The Scottish Government should consider establishing a free mediation service for claims which could be dealt with under the new simplified procedure and a mediation telephone helpline. (Paragraphs 37-39)

Chapter 8 Facilitating settlement

Pre-action protocols

102. Compliance with the current pre-action protocols in relation to personal injury and industrial disease claims should be compulsory. (Paragraph 33, 53)

103. In principle, the pre-action protocols should apply to all categories of personal injury claim. (Paragraph 34)

104. It should be possible to develop a protocol on clinical negligence actions similar to that in England and Wales. Pending the establishment of a Civil Justice Council for Scotland, the Law Society should take the lead in consulting interested parties on the merits of such a proposal. (Paragraph 35)

105. In family actions our preference would be for the court to make any necessary orders in relation to disclosure of financial information at the first case management hearing. (Paragraph 37)

106. The court should have the power to make orders in relation to expenses and interest for non-compliance with pre-action protocols. (Paragraph 53)

Offers in settlement

107. The common law system of judicial tenders should be replaced by a rule regulating the making of formal offers by any party. It should be open to any party to make a monetary or a non-monetary offer in full or partial settlement of the action. It should be open to any party to make such an offer before the commencement of proceedings. (Paragraph 86)

108. The usual rule should be that where the pursuer fails to achieve an outcome that is as favourable as the offer made, the defender should be entitled to expenses on a 'party and party' basis from the date on which the offer was made. (Paragraph 88)

109. In relation to pursuers' offers, if the pursuer obtains an outcome more favourable to him than his offer, the defender should be liable to pay an uplift of 50% on the fee element of expenses on a 'party and party' basis from the date of the offer. The court should have discretion to award a higher or lower percentage uplift. (Paragraph 89)

110. The application of these rules should be subject to the overall discretion of the court, to be exercised as laid down in *Carver v BAA plc*: success should be judged by looking at the conduct of the parties and the whole circumstances of the case. (Paragraph 90)

111. It should be open to a party making an offer to specify that it is open for acceptance only for a specified period. (Paragraph 92)

Chapter 9 Enhancing case management

Guiding principles

112. A preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court. (Paragraph 13)

Enhanced powers of case management

Disclosure of evidence

113. We do not recommend a move to the English system of disclosure. (Paragraph 36)

114. As part of the case management function a judge, sheriff or district judge should be entitled to order the disclosure of documents relating to the action together with authority to recover documents either generally or specifically; and order the lodging of documents constituting, evidencing or relating to the subject matter of the action within a specified period. The normal procedures for recovery of evidence should also be available to the parties. Recovery of documents should be competent at any stage in the proceedings. Any documents founded on in the pleadings should be lodged in advance of the first case management hearing. (Paragraph 38)

The use of witness statements

115. The provisions of RCS Rule 47.11, whereby the commercial judge may order the reports of skilled persons or witness statements to be lodged in process, and at the procedural hearing may determine in light of these that proof is unnecessary on any issue, should apply generally to all types of action that are subject to active judicial case management. (Paragraph 47)

Pleadings

116. For all actions in the Court of Session and sheriff court, with the exception of those subject to Chapter 43 procedure, pleadings should be in an abbreviated form. A docketed judge or sheriff should determine whether adjustment of the pleadings is necessary to focus the issues in dispute and should have the power to determine what further specification is required and how that should be provided. (Paragraph 60)

Expert evidence

117. The provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals. (Paragraph 78)

118. In those cases subject to active judicial case management, parties should be required to consider whether it would be appropriate to instruct one or more joint experts in relation to either liability or quantum and should be in a position to address the court on this issue at case management hearings. Where the court thought it appropriate to do so, it could order the parties to instruct a joint expert. (Paragraph 81)

119. There should be a presumption in personal injury cases falling within the proposed simplified procedure that medical evidence should be restricted to the GP and the treating consultant, subject to the court's discretion. (Paragraph 83)

120. A rule should be introduced which clarifies that the overriding duty of an expert witness is to assist the court. A code of conduct and guidance on the format and information to be contained in expert reports should be adopted. Parties who wish to rely upon an expert report should be obliged, on request, to disclose all written and oral instructions to the expert and the basis upon which the expert is remunerated. (Paragraph 86)

121. In all cases to which the active case management model applies, the court should have power to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements. (Paragraphs 88-89)

122. A rule should be adopted to introduce a presumption that an expert's report would be treated as his evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence. (Paragraph 91)

Summary disposal

123. At any stage in proceedings either party should be able to seek summary disposal. The test should be whether the pursuer or the defender has no real prospect of success and where there is no other compelling reason why the case should proceed. The court should also have the power *ex proprio motu*, and as part of its active case management function, summarily to dispose of an action or defence by applying the same test. (Paragraphs 103)

Managing time efficiently

Time estimates

124. The assessment of time required for a hearing will be one of the case management functions of the docketed judge or sheriff in charge of the case. (Paragraph 113)

Time limited hearings

125. The court should expect parties to agree on a timetable for presentation of the evidence or submissions so that the most effective use is made of court time. A judge or sheriff should, as part of his case management functions, have the power to time limit hearings in particular types of case where he considers it appropriate. (Paragraph 117)

Use of outline arguments

126. We endorse Lord Penrose's recommendations that written notes of argument should be lodged following the exchange of the grounds of appeal and answers, but before the court ordered a substantive hearing, and that clear guidance on the scope and content of notes of argument should be published by way of practice notes. We believe that the approach he recommends for the Inner House can be applied generally. As part of his case management function a judge or sheriff should have the power to order that written arguments should be lodged and to prescribe the level of detail required. Parties should not be entitled to raise new issues without the permission of the court on cause shown. (Paragraph 119, 126)

Effective sanctions for non-compliance with rules or court orders

127. Where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the court to impose such sanctions as it considers appropriate. (Paragraph 146)

128. The rules of court should entitle the court to:

a) dismiss the action or counterclaim, in whole or in part;
b) grant decree in respect of all or any of the conclusions of the summons, or of the craves of the initial writ, or counterclaim;
c) refuse to extend any period for compliance with a provision in the rules or an order of the court;
d) make an award of expenses;
e) disallow a party from amending or updating part of its claim;
f) disallow a party from calling one or more witnesses, including expert witnesses;
g) deprive a claimant who is in default of all or some of the interest that would otherwise have been awarded;

h) order caution for expenses and
i) order immediate payment of expenses incurred in procedural matters and assess them summarily. Payment of the sum would be a condition precedent of further procedure.

We do not propose this as an exhaustive list. (Paragraph 148)

129. The court's power to make solicitors personally liable for expenses occasioned by their own fault, or where they are guilty of an abuse of process, ought to be incorporated in statute; and that it should be extended to cover all those with rights of audience. (Paragraph 149)

130. The courts should have the power to order that agents or counsel may not charge their clients or SLAB for any work that is occasioned by any improper, unreasonable or negligent act or omission on their part. (Paragraph 150)

Party litigants and vexatious litigants

Managing party litigants

131. The sheriff clerk should be given discretion to refer any ordinary action or summary application presented by a party litigant to a sheriff who may direct whether or not the action should be allowed to proceed. That decision should be based on whether or not, in the sheriff's opinion, the writ discloses a stateable case. The decision of the sheriff should be final and not subject to review. (Paragraph 166)

132. At any case management hearing the court should explain to a party litigant the requirements of any order made and the sanctions for non-compliance. (Paragraph 168)

Vexatious litigants

133. The civil courts should have powers similar to those in England and Wales in relation to civil restraint orders which would provide for a system of orders regulating the behaviour of parties who persist in conduct which amounts to an abuse of process. In considering whether or not to impose a civil restraint order, the court should be entitled to take into account proceedings in other jurisdictions. (Paragraph 190)

Rule making powers of the Court of Session and the sheriff court

134. The rule making powers of the Court of Session and the sheriff court should be reviewed to ensure that they are sufficiently wide to accommodate the range of case management powers that are necessary in a modern civil justice system. It would also be desirable to have a special procedure for adopting rules on an emergency basis and a specific provision that would allow the court to set up pilot projects by way of Practice Notes. (Paragraph 191)

Chapter 10 Judgments

Form and content of judgments

135. It should be for the sheriff or district judge to decide whether to make *avizandum* or pronounce an *extempore* judgment. If he chooses the latter option, he should give reasons for the decision he has reached. Parties should have the right to request a written judgment in ordinary causes within seven days of delivery of the *extempore* judgment. (Paragraph 13)

136. In the Court of Session it should be for the judge or Division to decide whether to give its reasons orally, in short form, or by means of a full written judgment. In the simplest cases reasons may be expressed as bullet points within the interlocutor. In more complex cases, a brief narrative of the facts, circumstances and decision should suffice, with only the most complex requiring a full judgment. In cases that turn on their own facts the court may consider that a full written judgment is unnecessary. Where submissions are made on legal points which may have broader application the Court should be expected to deliver a fully reasoned judgment. (Paragraph 14)

137. It should be open to the Sheriff Appeal Court or the Inner House to give reasons in short form, for example, by referring to the reasoning of the inferior court. (Paragraph 15)

138. It should be open to parties to request a full written judgment in those cases in which an oral or abbreviated judgment is given, within seven days of delivery of the oral or abbreviated judgment. (Paragraph 16)

139. For simplified procedure cases we do not recommend any changes in practice from that currently applicable to small claims and summary cause actions. (Paragraph 17)

Delay in issuing judgments

140. A register of cases awaiting written judgments should be established on the Scottish Courts website for those cases in which judgment has been outstanding for more than three months. The judge, sheriff or district judge should be required to provide an explanation for the delay and to indicate when the judgment is likely to be issued. These cases should continue to be brought to the attention of the judge, sheriff or district judge at one monthly intervals until judgment is issued, and should be given the personal attention of the Lord President or sheriff principal. (Paragraph 35)

141. The need for an adequate amount of time to be assigned to write up a judgment should be recognised when drawing up the court programme. (Paragraph 36)

Chapter 11 Access to justice for party litigants

Public legal education

142. The promotion of public legal education should be an element of any strategy to improve access to justice in Scotland. (Paragraph 8)

Self help services

143. There should be a section of the SCS website which is much more obviously aimed at the public and contains all the information required to start or defend a case under the simplified procedure. There should also be information about the structure of the civil courts and other civil procedures. (Paragraph 22)

144. The SCS website should provide links to other bodies' websites which can be a source of advice and guidance e.g. Citizens' Advice, the Scottish Government, law centres, Consumer Focus Scotland etc. Information about mediation and other methods of dispute resolution should also be provided. (Paragraph 24)

145. The proposals which SCS have in hand to establish a new system for dealing with party litigants within the Court of Session should be extended to all courts. In particular, consideration should be given to the documentation of service standards which should be made available to party litigants in cases under the simplified procedure. (Paragraph 25)

In court advisers

146. In-court advice services should be developed and extended to be more widely available, if not in every sheriff court then within a reasonable distance. Such development should happen within the context of the Scottish Legal Aid Board's broader plans for the improvement and co-ordination of publicly-funded civil legal assistance and advice. In addition to the matters identified in the evaluation reports, SLAB should also consider the quality and consistency of advice and help being provided by the different services. (Paragraphs 36, 37)

147. Consideration should be given to whether in-court advice services are to be targeted at any particular group of potential users and therefore, by implication, to be unavailable to other groups. (Paragraph 38)

148. Where the in-court adviser is unable to assist an inquirer, there should be clear and consistent protocols for referrals to other sources of advice and help. (Paragraph 39)

McKenzie friends

149. A person without a right of audience should be entitled to address the court on behalf of a party litigant, but only where the court considers that such representation would be of assistance to it. The court should be entitled to refuse to allow any particular person to appear on specific grounds relating to character and conduct. The court's decision should be final and not subject to appeal. The rules of court should specify the role to be played by the individual and should provide that he or she is not entitled to remuneration. (Paragraph 53)

Chapter 12 Judicial review and public interest litigation

Title and interest to sue

150. The current law on standing is overly restrictive and should be replaced by a single test: whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings. (Paragraph 25)

A time limit to bring proceedings for judicial review

151. The general rule should be that petitions for judicial review should be brought promptly and, in any event, within a period of three months, subject to the exercise of the court's discretion to permit a petition to be presented outwith that period. (Paragraph 38-39)

Introduction of a leave or permission stage

152. A requirement to obtain leave to proceed with an application for judicial review should be introduced, following the model of Part 54 of the Civil Procedure Rules in England and Wales. The respondent should be entitled to oppose the granting of leave. The papers should be considered by the Lord Ordinary, who will not normally require an oral hearing. If leave is refused, or granted only on certain grounds or subject to conditions, the petitioner should be entitled to request that the matter be reconsidered at an oral hearing before another Lord Ordinary. There should be a further right of appeal to the Inner House. For urgent cases provision should be made for an appeal to be made forthwith. (Paragraph 51)

153. The test that should be applied in deciding whether or not to grant leave should be whether the petition has a real prospect of success. (Paragraph 52)

Case management

154. Where leave to proceed is granted on the papers the Lord Ordinary should issue standard orders to include, where appropriate, (a) the date by which answers shall be lodged; (b) the date up to which parties have a right to adjust their pleadings; (c) the date by which all relevant documents shall be lodged; (d) the date by which all authorities on whom parties intend to rely shall be lodged; and (e) the date by which notes of argument shall be lodged. It should be open to the parties to request, or the court to fix on its own initiative, a case management hearing to deal with procedural issues. A hearing on the merits should be fixed no later than 12 weeks from the lodging of answers. (Paragraph 58)

Expenses in public interest litigation

155. An express power should be conferred upon the court to make special orders in relation to expenses in cases raising significant issues of public interest. (Paragraph 73)

156. The model proposed by the Australian Law Reform Commission for making a public interest costs order could usefully be adapted for introduction in Scotland. (Paragraph 76-78)

Chapter 13 Multi-party actions

157. We endorse the Scottish Law Commission's recommendation that there should be a special multi-party procedure. (Paragraph 64)

Certification criteria

158. There should be a procedure for certifying an action as suitable for multi-party proceedings. In considering whether to certify an action, the court should be satisfied that the applicant is one of a group of persons whose claims give rise to common or similar issues of fact or law; that the adoption of the group procedure is preferable to any other available procedure for the fair, economic and expeditious determination of the similar or common issues; and that the applicant is an appropriate person to be appointed as a representative party, having regard in particular to his financial resources, and will fairly and adequately represent the interests of the group in relation to the common issues. (Paragraph 65)

159. Before granting certification the court should be satisfied, on the basis of the pleadings and documents presented in support of the application for certification, that the pursuers have demonstrated a *prima facie* cause of action. (Paragraph 66)

160. The 'any other available procedure' test should include the availability of ADR, administrative remedies and regulatory mechanisms. (Paragraph 68)

161. Should representative bodies be given standing to bring proceedings on behalf of consumers or other groups whom they represent, the multi-party procedure should be designed in such a way as to permit those bodies with standing to make use of it. (Paragraph 69)

162. At any time after a certification order has been granted, the court should be entitled to order that the case should be transferred out of the group procedure on grounds that the criteria for certification are no longer satisfied. (Paragraph 70)

An opt-in or opt-out model?

163. It should be for the court to decide whether in the particular circumstances of a case an opt-in or an opt-out model would be appropriate. (Paragraph 79)

164. It will be necessary to amend the legislation relating to prescription and limitation to take account of a group litigation procedure which permits opting out. (Paragraph 82)

165. It will also be necessary to confer powers on the court to make an aggregate or global award of damages and for the disposal of any undistributed residue of an aggregate award. (Paragraph 83)

166. We agree with the SLC's recommendation that the new procedure should initially be introduced only in the Court of Session. (Paragraph 84)

The case management of multi-party actions

167. The certification order should describe the class or group of claimants on whose behalf the action is brought, the question or questions of fact and law which are common to the class and the remedy sought. It should also appoint the representative party or parties. (Paragraph 85)

168. The Court should have at its disposal a wide range of case management powers similar to those conferred on the commercial judge in the Court of Session and a general power to regulate procedure as thought fit with regard both to certified questions and any other matters at issue. In addition, the judge should have the power to make such orders as may be appropriate to ensure that the group proceedings are conducted fairly and without avoidable delay. (Paragraph 86)

169. Where a number of pursuers have a common factual or legal basis to their claims but initiate proceedings on an individual basis, it should be open to defenders to apply to the Court, or for the Court on its own initiative, to transfer the cases to the multi-party procedure. (Paragraph 87)

170. There should be a case management mechanism that would enable multiple sheriff court actions bearing on the same subject matter to be transferred to the Court of Session and managed on a multi-party basis, either on the motion of one or more

of the parties or by the sheriff on his own initiative. In addition, the Lord President should have the power to direct that such litigation should be transferred to the Court of Session to be managed under the multi-party procedure. (Paragraph 88)

171. If an opt-out model is to be made available, it would be necessary to introduce a requirement for the court's approval of proposals to abandon or settle the action in order to safeguard the interests of those group members who are not parties to the action. (Paragraph 89)

Appeals

172. We agree with the recommendations made by the SLC regarding the circumstances in which it should be competent for the representative party to reclaim without leave an interlocutor disposing of an application for certification or decertification or identifying the common questions; and that where the representative party does not reclaim it should be competent for a group member to do so. (Paragraph 90)

How should multi-party actions be funded?

173. The general rule that expenses follow success should apply, in principle, to multi-party actions. The recommendations that we make in Chapter 12 on awarding expenses in public interest cases should apply to multi-party actions which satisfy the wider public interest criteria. (Paragraph 94, 109)

174. The additional responsibility involved in managing a group action should be a specific ground for awarding an additional fee. (Paragraph 97)

175. There needs to be a special funding regime for multi-party actions. On balance, we consider that it would be preferable to have special funding arrangements for multi-party actions to be administered by SLAB. (Paragraph 108)

176. There should be scope, in appropriate cases, for an award of expenses to be made against the multi-party action fund that we propose. (Paragraph 112)

177. Special criteria would need to be satisfied in order for financial assistance to be granted to a representative party. In particular, in applying the test of reasonableness, SLAB would have regard to the prospects of success, the number of members of the group, the value of their claims, the resources of the proposed defenders, and whether the proposed action raises issues of wider public interest that would justify the expenditure of public funds. It would be helpful for SLAB to be assisted by an advisory committee in dealing with such requests for funding. (Paragraph 113)

178. It should be possible for a grant of funding to be made on a conditional basis, for example, on a staged basis. The advisory committee should give advice to SLAB

in relation to an initial request for funding, at the review stage, and also in relation to any offers in settlement. (Paragraph 114)

179. If a person seeks public funding to bring a multi-party action then this would have to be by way of an application to the multi-party action fund. Class members who are not representative parties would be able to apply for legal advice and assistance. (Paragraph 116)

180. It should be open to the multi-party action fund to limit funding to litigation of the common issues. (Paragraph 117)

181. Where multiple applications for civil legal aid are made by individuals which raise the same or similar issues of fact or law, such that it would be desirable for these to be litigated under the multi-party action procedure, SLAB should have the power to refuse to grant legal aid on an individual basis, applying the reasonableness test, and to invite an application to the multi-party action fund for funding for a multi-party action. (Paragraph 118)

182. Funding could be made available on a different basis for actions by representative bodies. An application for funding by a representative body would have to meet a public interest merits test. In addition, the multi-party action fund would have a broad discretion to determine whether it would be reasonable to make public funds available, having regard to the resources of the organisation and the potential for the issues to be resolved by other means. (Paragraph 119)

Chapter 14 The cost and funding of litigation

Judicial Expenses

183. There should be a significant increase in the block fee for pre-litigation work to reflect work properly and reasonably carried out in connection with investigation and intimation of the claim, discussions on settlement and compliance with a pre-action protocol where applicable. (Paragraph 50)

184. The Lord President's Advisory Committee should review the adequacy of the block fee for proof preparation. (Paragraph 52)

185. We support the introduction of a judicial table of fees for counsel in the Court of Session, as well as in the sheriff court for those cases in which sanction for the employment of counsel is given. (Paragraph 55)

186. There should be a procedure for sanctioning the employment of a solicitor advocate in proceedings in the sheriff court. The fees of the solicitor advocate should be included in the judicial account as an outlay. The table of fees that we recommend for counsel should apply to solicitor advocates. (Paragraph 56)

187. We support the introduction of a power to award interest at the judicial rate on outlays from the date they are incurred. (Paragraph 57)

188. A tariff-based system for judicial expenses would be worthy of more detailed consideration. (Paragraph 65)

189. The cost of litigation should form part of the remit of the proposed Civil Justice Council for Scotland. Pending its establishment the Scottish Government should set up a Working Group on Judicial Expenses. In the meantime, the current judicial tables and their operation should be reviewed to address the concerns about recovery rates. (Paragraph 66)

190. The outcome of Lord Justice Jackson's review and whether, in the light of his recommendations, the rule that expenses follow success may require to be modified in this jurisdiction, are matters that should urgently be addressed by the Working Group on Judicial Expenses. (Paragraph 67)

Taxation

191. The offices of Auditor of the Court of Session and sheriff court auditors should be salaried posts, subject to the usual rules regarding public appointments. The status of the Auditor of the Court of Session as a member of the College of Justice should continue. Fees payable for extra-judicial taxations and assessments should be paid into public funds. (Paragraph 83)

192. For sheriff court auditors, commissions should be granted only to those holding qualifications as solicitors or law accountants and with relevant skills and experience. (Paragraph 84)

193. Greater use should be made of information technology so that taxations can take place by telephone or videoconference, with any necessary papers being filed with the auditor electronically. (Paragraph 85)

194. Small claims and summary cause assessments should be carried out by the sheriff court auditor, not by the sheriff clerk. (Paragraph 86)

195. The Auditor of the Court of Session should have a role as 'head of profession'. (Paragraph 87)

196. The Auditor of the Court of Session should have jurisdiction over taxations in actions raised in the all-Scotland personal injury court. (Paragraph 88)

197. Where a party wishes to recover counsel's fees, the account should be supported by detailed fee notes, disclosed to the paying party on request. If objection is taken to the reasonableness of counsel's fees, paying parties should specify what sum, in their view, would be appropriate. There should be a similar

obligation where objection is taken to the fees payable to expert and other witnesses. (Paragraph 90)

198. The procedure in the Court of Session whereby specific points of objection require to be intimated in advance of the diet of taxation should be extended to the sheriff court. The period of notice, which at present is three working days prior to the diet of taxation, should be lengthened. (Paragraph 91)

199. It should be open to parties to agree elements of an account and to restrict the taxation to only those items of the account that are in dispute. (Paragraph 92)

Speculative fee arrangements

200. In view of the in-depth reviews on costs and the operation of Conditional Fee Agreements currently underway in England and Wales, and the divergence of views as to whether introducing recoverability of success fees and After The Event premiums would improve access to justice, we consider it premature to recommend any changes to the current regime. This issue should be addressed as a matter of urgency by the Working Group on Judicial Expenses. (Paragraphs 125-127)

'Before the Event' legal expenses insurance

201. The Scottish Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance. (Paragraph 140)

Legal aid

202. The Scottish Government should review its policy on the provision of legal aid for welfare guardianship and intervention orders under the Adults with Incapacity (Scotland) Act 2000, the provision of ABWOR in relation to proceedings before the Mental Health Tribunals, and the means testing of legal aid for representation in an appeal against a decision of the Mental Health Tribunal. (Paragraph 158)

203. Legal aid should be available, subject to the usual tests, for all types and values of proceedings under the simplified procedure. (Paragraph 162)

204. Where personal attendance at a court other than the party's local court is essential for the proper conduct of a substantive hearing, a party who is otherwise in receipt of legal aid should be able to claim reasonable travelling expenses. (Paragraph 163)

Court fees

205. The relevant legislation should be amended to ensure that court fees and auditor's fees can be recovered from the losing party where the successful party is legally aided. (Paragraph 164)

Chapter 15 A Civil Justice Council for Scotland

206. A Civil Justice Council for Scotland should be established with a remit similar to that of the Civil Justice Council in England and Wales and responsibility for drafting the rules of court. (Paragraphs 51-59)

ANNEXES TO CHAPTERS 10 - 15

ANNEX TO CHAPTER 10 JUDGMENTS

Written judgments in other jurisdictions

England and Wales

1. At the conclusion of the trial or a hearing the judge may deliver judgment immediately. Such judgment is known as an *extempore* judgment. However, in complex cases the judge will take time for consideration and will adjourn the case until judgment.[1] In this case, the judgment is reserved. A judge should not, generally speaking, give an oral judgment at the end of a complex hearing without taking time to consider all the evidence at leisure, to dwell on the importance of the contemporary notes, and to reflect on the overall probabilities in a structured way.[2]

2. Particularly in the High Court, there are cases where the judge will reserve judgment and provide the legal representatives with a written draft judgment usually about one day before the date fixed for pronouncing judgment.[3] Such judgment is not delivered until it is formally pronounced in court.

3. The Civil Procedure Rules provide that a judgment or order takes effect from the day when it is given or made, or such later date as the court may specify. [4]

Ireland

Supreme Court

4. Occasionally, the decision of the court is given directly following the hearing of an appeal in an *extempore* judgment. More frequently, however, because of the complexity of the issues involved, the court reserves its judgment to give full consideration to the matters raised in the hearing and the legal authorities cited. The court then delivers a considered written judgment at a later date of which the parties are notified in advance.[5]

5. Considered judgments are published on the Courts Service website; *extempore* judgments are not published as a matter of course, but may be reported.[6]

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[1] A Zuckerman (2006), *On Civil Procedure: Principles of Practice*, 2nd ed., Sweet & Maxwell, London.
[2] *Ibid*.
[3] W Rose (2008), *Blackstone's Civil Practice*
[4] CPR 40.7
[5] Information retrieved from the official site of the Irish Court Service, see Courts: Supreme Court section at www.courts.ie
[6] T Daly (2005), Questionnaire Response Prepared on Behalf of the Chief Justice of Ireland for the 8th Conference of Presidents of European Supreme Courts, Paris, Cour de Cassation, 26-27 October 2005

Register of reserved judgments

Extract from the Courts and Court Officers Act, 2002

46.— (1) The Courts Service shall establish and maintain in the prescribed form and manner a register of every judgment reserved by the Supreme Court, the High Court, the Circuit Court and the District Court in any civil proceedings to be known as the Register of Reserved Judgments (in this section referred to as "the register").

(2) Such particulars as may be prescribed in respect of any proceedings in which judgment is reserved shall be entered in the register.

(3) Subject to subsection (6), if judgment in the proceedings concerned is not delivered within the prescribed period or periods from the date on which it is reserved, the Courts Service shall list the proceedings before the judge who reserved judgment therein on a date not later than such period as may be prescribed after the first-mentioned prescribed period and shall give notice of the listing in the prescribed form to the parties to the proceedings and a copy of the notice to the President of the Court concerned.

(4) The judge concerned shall, on a listing of proceedings under subsection (3), fix a date not later than such period as may be prescribed after the listing by which judgment in those proceedings shall be delivered.

(5) The date fixed under subsection (4) shall be entered in the register in relation to the proceedings concerned.

(6) Subsection (3) shall not apply if the judge who reserved judgment in the proceedings concerned dies, or if the judge concerned is ill, for the duration of his or her illness or in such other circumstances as may be prescribed.

(7)(a) The register or any part of it shall be kept at a place or places to be prescribed and shall be made available for inspection by any person on payment of such fee (if any) as may be prescribed and at such times as may be prescribed.

(b) A person may, on a request being made by him or her in the prescribed manner and on payment of such fee (if any) as may be prescribed, obtain a copy certified in such manner as may be prescribed of any entry or entries in the register.

(8) The functions of the Courts Service under this section shall be performed by the Chief Executive Officer of the Courts Service, but such of those functions as may be specified by him or her may be performed by such member or members of the staff of the Courts Service as may be authorised in that behalf by him or her.

(9)(a) The Minister for Justice, Equality and Law Reform may by regulations provide for any matter referred to in this section as prescribed or to be prescribed.

(b) Different periods may be prescribed under subsections (3) and (4) in respect of proceedings of different kinds and, in particular, shorter periods may be prescribed in respect of applications for interim or interlocutory orders.

(10) In this section, references to a judge shall, in the case of a court constituted of more than one judge, be construed as references to the presiding judge of the court.

(11) In this section—

"prescribed" means prescribed by the Minister for Justice, Equality and Law Reform by regulations under this section;

"reserved", in relation to a judgment in court proceedings, means where a decision in the proceedings or the reasons for such decision or both are not announced by the court immediately upon the conclusion of the hearing of the proceedings but instead are postponed—

(a) without a date for such announcement being specified at the time, or

(b) for a period of not less than 14 days after such conclusion.

Australia

Queensland

6. On the day of the hearing and once both sides have completed their submissions, the court may take a short break to deliberate before giving judgment.[7] If the court does not deliver judgment on the day, the decision will be delivered within the next few months. This process is called reserved judgment. The court endeavours to deliver reserved judgments within three months of the hearing (excluding court leave periods). The registry is not able to provide a likely date for delivery of the judgment. As soon as the registry is advised that judgment is ready for delivery the parties are advised. Delivery is usually, but not always, on Fridays.[8]

[7] Information retrieved from the official site of Queensland Courts, see Courts: Court of Appeal section at http://www.courts.qld.gov.au
[8] *Ibid*

Victoria[9]

7. In practice the county and Supreme Courts give reasons when finally disposing of a matter, but often do not do so in interlocutory applications. Reasons are generally not given in decisions on leave to appeal in the Court of Appeal. The Court of Appeal has advised that it delivers *extempore* judgments as often as possible.

8. In the magistrates' court, reasons for decisions are normally given in open court and recorded on the transcript. Parties need to apply to the court for a record of the transcript. For small-claim arbitrations in the magistrates' court, awards are in writing but the reasons for the award may not be. If a statement of reasons was not included in the award, one must be furnished on request within a reasonable period.

9. The only reference to reasons for judgment in the Supreme Court (General Civil Procedure) Rules 2005 and the County Court Rules of Procedure in Civil Proceedings 1999 is in rule 59.04, which provides that where the court gives any judgment or makes any order and the reasons are written, "it is sufficient to state the result orally without reasons, but the written reasons shall then and there be published by delivery to the Associate." The commentary on this rule is that if the court "gives oral reasons for judgment, it is permissible for the court to revise the reasons to reflect what the court intended to say or to correct any infelicity of expression. However the court cannot alter the substance of its reasons."

High Court of Australia

10. Different techniques are deployed when reasons are given *extempore*, at the conclusion of, or shortly after, argument in a case. *Extempore* reasons disposing of appeals and proceedings in the original jurisdiction of the High Court of Australia are comparatively rare. However, short *extempore* reasons are commonly given in rejecting hundreds of special leave applications every year, whether by disposition on the papers or following an oral hearing. Occasionally, such reasons will be more elaborate. They may reflect the differences of view that have emerged as a result of argument. *Extempore* reasons are commonly briefer than reserved reasons. Some are later edited (without substantive changes) and form precedents, particularly on matters of practice and procedure.[10]

11. In virtually all cases in the High Court in appellate matters, judgment is reserved. It is very rare to give an *extempore* judgment in the Full Court.[11]

[9] Information taken from Victorian Law Reform Commission , (2008), *op.cit*, Chapter 5
[10] G Blank and H Selby (2008), *Appellate Practice*, Federation Press, Sydney, p.226
[11] M Kirby (The Honorable Justice Michael Kirby of the High Court of Australia) (1997) 'What is it really Like to Be a Justice of the High Court of Australia? - A Conversation of Law Students with Justice Kirby University of Sydney', Text of an Address at the University of Sydney, Faculty of Law on 23 May 1997 http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_sydu.htm

Court of Appeal of Australia

12. Each month, the President settles the Court of Appeal sitting list. In every appeal or summons listed for hearing, the President will have assigned a primary obligation to one of the Judges of Appeal, not necessarily the president judge. In certain cases, where it is thought that an *extempore* judgment may be appropriate, the list available to the judges (although not to the advocates) will assign the responsibility of preparing for the first *extempore* judgment to one judge. In all other cases, a judge will be assigned to prepare the first draft opinion. This system of assignment is important for the handling of the hearing of the appeal. Although all judges will usually have read the judgment under appeal and reviewed the written submissions of the parties, typically one judge will have a more detailed knowledge of the appeal papers and of the issues.[12]

Alberta, Canada

13. An order or judgment is presumed to take effect as soon as it is pronounced, that is, when the parties learn of the judgment. If judgment is reserved and written reasons are later filed, it is deemed to have been pronounced when the parties have a reasonable chance to get a copy of the reasons.[13]

14. The kinds of decision given by the courts in Alberta vary according to the level of court (Queen's Bench, Court of Appeal, Supreme Court of Canada). Generally there are four kinds of decision that a Court may give:[14]

Oral judgment, unrecorded

15. Judges often pronounce judgment directly from the bench, usually immediately after closing arguments from counsel. The judge normally delivers an oral judgment from personal notes. Counsel take their own notes of what the judge says to report to their clients and to help prepare the Order. The Order is a document prepared by counsel after they receive the judgment. It records the result of the judgment, but not any reasons given by the judge. The successful counsel may file the Order directly if all counsel present agree its contents. The presiding judge may settle its terms in the event of disagreement. There is no other official, permanent record of an unrecorded oral judgment.

Oral judgment, recorded

16. A judge may deliver a decision orally but instruct the presiding clerk to tape record the decision. A judge may do this where a permanent record of the reasons behind the decision might be helpful but written reasons are not practicable. Judges

[12] M Kirby (The Honorable Justice Michael Kirby of the High Court of Australia) (1995), 'Ten Rules of Appellate Advocacy', *The Australian Law Journal*, 69, p. 964

[13] Alberta Law Reform Institute, *Motions and Orders*, Consultation Memorandum No. 12.10, July 2004

[14] Information taken from Alberta Labor Relations Board (2003), *Procedure Guide: Court Decisions - Chapter 36(e)* http://www.alrb.gov.ab.ca/procedureguide.html

wishing to deliver recorded oral reasons usually adjourn at the close of argument and prepare extended notes or a draft of their reasons. Where a judge gives a recorded oral decision, it is the responsibility of counsel to secure a transcript of the reasons from the court reporter. If no counsel requests a transcript, none is prepared. Once prepared and released to counsel, however, a transcript of oral reasons becomes a part of the record on any appeal.

Memorandum of judgment

17. The Court of Appeal disposes of many of its appeals by Memorandum of Judgment. This is usually a short written memorandum (five pages or less) that records the Court's decision and the main reasons behind it. A Memorandum of Judgment is prepared mainly for the benefit of the parties. It assumes familiarity with the facts and the legal issues. It does not set out the facts of the case in any detail, nor does it go into a detailed examination of the law. A Memorandum of Judgment may confirm a decision given orally, or it may be released shortly after the Court has reserved judgment on the case.

Reasons for judgment

18. These are formal written reasons that set out the court's disposal of a case and offer detailed reasons for the decision. They normally set out the facts of the case in detail, outline the legal issues and argument before the court, and show the logical process by which the court reached its decision. Judges almost never use formal written reasons to confirm oral judgments. They use Reasons for Judgment to pronounce on the more difficult or complicated cases before them, upon which they reserved their decision.

Employment Tribunals

19. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004[15] provide that at the end of a hearing the chairman (or, as the case may be, the tribunal) shall either issue any order or judgment orally or reserve the judgment or order to be given in writing at a later date.[16] When judgment is reserved a written judgment is sent to the parties as soon as practicable. All judgments (whether issued orally or in writing) are recorded in writing and signed by the chairman.[17]

20. Reasons may be given orally at the time of issuing the judgment or order or they may be reserved to be given in writing at a later date. Written reasons are provided in relation to judgments only if requested by one of the parties within 14 days of the date on which the judgment was sent to the parties. This time limit may be extended by a chairman where he considers it just and equitable to do so.[18]

[15] SI [2004] 1861
[16] *Ibid*, schedule 1, Rule s.28 (3)
[17] *Ibid*, Rule 29 (1)
[18] *Ibid*, Rule 30

ANNEX TO CHAPTER 11 ACCESS TO JUSTICE FOR PARTY LITIGANTS

Comparative Analysis of Rights of Audience in other Jurisdictions

England and Wales

1. There are four classes of person who have, or who may be given, rights of audience in the courts in England and Wales. Among them are litigants in person and persons authorised by a court in relation to proceedings before the court.[19]

2. When acting in person, a litigant is entitled to bring to the court a friend to take notes, quietly make suggestions and give advice. Such persons are often called McKenzie friends, a title which derives from a case by that name.[20] Current law on this topic is set out in the Court of Appeal decision in *R v Bow County Court, ex parte Pelling*.[21] In public hearings, a litigant in person should be allowed the assistance of a McKenzie friend unless the interests of fairness and justice require otherwise. Where proceedings are being conducted in private, the nature of these proceedings may make it undesirable in the interests of justice for a McKenzie friend to assist. A judge should give reasons for refusing to allow a litigant in person the assistance of a McKenzie friend. Although a litigant may have a right to a McKenzie friend, a McKenzie friend never has a right of audience unless the court hearing the proceedings grants him such rights.[22]

3. A court may grant an unqualified person a right of audience in exceptional circumstances and after careful consideration. The litigant in person should in normal circumstances explain to the court why such permission is appropriate. If it is granted, the litigant in person should normally remain in court while the rights of audience are being exercised.[23]

Northern Ireland

4. In both the High Court and county court in Northern Ireland an unrepresented person can be accompanied by a friend who may advise and take notes. However, the courts may impose conditions or restrictions to ensure that the case proceeds in an orderly manner. The county court may grant leave in special circumstances for any other person to appear instead or on behalf of any party.[24]

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[19] Sections 27 and 28 of the Courts and Legal Services Act 1990.
[20] *McKenzie v McKenzie* [1971] P 33.
[21] *R v Bow County Court, ex p. Pelling* [1999] 1 WLR 1807.
[22] J O'Hare and K Browne (2005), *Civil Litigation*, 12th ed.
[23] *Ibid.*
[24] County Courts (Northern Ireland) Order 1980 (No. 397(N.I.3)).

New Zealand[25]

5. In general, only legally qualified advocates have a right of audience in New Zealand courts. However, judges do have discretion to permit lay people to support unrepresented litigants, and even to appear and speak for them. Section 57 of the District Courts Act 1947 provides that the court may permit any party to appear by an agent authorised in writing in special circumstances, but the agent is not entitled to receive a fee unless he is a barrister or solicitor. The Court of Appeal has said that this discretion should be exercised primarily in emergency situations or straightforward cases where the assistance of counsel is not needed by the court, or where it would be unduly burdensome to insist on counsel. In addition, any person may attend as a friend of a litigant with leave of the court, take notes, quietly make suggestions and give advice to the litigant.

6. The New Zealand Law Commission examined the issue of rights of audience, lay representation and McKenzie friends in its review of the structure and operation of all state-based adjudicative bodies in New Zealand. It considered that allowing lay representation in all court cases would create a new tier of advocates who would not be regulated or formally accountable. In the absence of professional standards, ethical obligations and disciplinary procedures, the unrepresented litigant could be exposed to risks of malpractice or unscrupulous conduct, and have no redress for complaints. Proceedings might become unnecessarily protracted or complicated by advocates who did not accept they have a duty to the court as well as to their client. The costs of representation would not necessarily be any lower for a litigant who might be no more able to afford lay representation than he would a lawyer. It also recognised the counter arguments. The increase in the choice of representatives could in itself ensure that the costs to the litigant were contained. Lay advocates in summary criminal and minor civil cases would be likely to develop expertise and knowledge about those types of cases that would not necessarily be inferior to that of legal practitioners. A regulatory regime could check malpractice and unethical conduct. There was no reason to assume that lay practitioners would be less ethical or less careful than lawyers.

7. In the Commission's opinion the main benefit of expanding lay representation is that litigants and defendants of limited means who would otherwise be unrepresented, but who do not feel capable of speaking for themselves in a court setting, could have access to an alternative form of representation. Accordingly, although full legal representation is preferable, where this is not viable alternatives that could improve the position of those appearing must be investigated. The Commission did not, however, favour a general right for a party to be represented by a lay advocate. Instead, it recommended that the leave of the court should presumptively be given for assistance by a McKenzie friend at any court hearing. Should the unrepresented party litigant request that his support person speak for him, the litigant should first satisfy the court that leave should be given in the circumstances of the case. Otherwise, at a full hearing of the merits of the case a

[25] Based on New Zealand Law Commission (2004), *op. cit*, Report 85

support person would have no right to examine or cross-examine witnesses or address the court. In effect, the proposal provided for legislative recognition of the current practice in respect of McKenzie friends, and broadened the scope for a support person to assist an unrepresented party.

Ireland

8. In Ireland the right of audience in the district court is reserved for any party to the proceedings, the solicitor for such party and counsel instructed by the solicitor. Members of the party's immediate family are entitled to appear and address the court if the party is unable to appear himself and after the leave of the court has been granted.[26]

Germany[27]

9. In general, parties can either conduct their legal proceedings themselves, give any person written authority to take steps in the proceedings on their behalf as an "authorised person" or allow such a person to appear with them as an assistant.[28] The right of representation in oral hearings is restricted to members of Lawyers' Chamber, the purpose being to uphold standards. Accordingly there is an absolute prohibition on representation at the oral hearing by anyone other than persons who on an independent professional basis regularly deal with legal affairs for others. Civil servants, employed persons or those who occasionally handle legal matters for third parties are not prevented from appearing. The Court has a discretionary power to stop a party or party's representative from making further submissions, if the person concerned lacks the ability to present the case properly.

[26] Order 6, rule 1 District Court Rules, 1997.
[27] Based on H Fisher (2002), *The German Legal System and Legal Language: A General Survey Together with Notes and German Vocabulary*
[28] Title 4 para. 78-90 Code of Civil Procedure (Zivilprozeβordnung)

ANNEX TO CHAPTER 12 JUDICIAL REVIEW AND PUBLIC INTEREST LITIGATION

Time limits for judicial review in some other jurisdictions

Jurisdiction	Relevant legislation	Time limits	Power to extend time limits
England & Wales	Supreme Court Act 1981, s.31.6 Civil Procedure Rules 54.5	Claims must be brought promptly and in any event, within three months, commencing on the date when grounds for judicial review first arose.	The time limit may not be extended by agreement between the parties. The court has power to extend the time limit if it is satisfied by the reasons given in order to do so.
Ireland	Rules of the Superior Courts 1986, Order 84 rule 21(1)	Applications for judicial review shall be made promptly and in any event within three months from the date when grounds for JR first arose or six months if the relief sought is certiorari. Note: in 2004 the Irish Law Reform Commission recommended that there should be "a standard limit of six months which would be subject to the requirement of promptness and open to the possibility of an extension where the court considers that there is good reason."	The court has the power to extend the period within which the application for JR shall be made.
Northern Ireland (NI)	Rules of the Supreme Court (NI) (Amendment No.5) 1989, Ord.53,r.4	Applications for judicial review shall be made promptly and in any event within three months from the date when grounds for JR first arose	The court has the power to extend the period within which the application for JR shall be made.
New Zealand	Judicature Amendment Act 1972, Section 4 High Court Rules 1908, Part 30 (as at 1 July 2009)	There are no time limits	

Jurisdiction	Relevant legislation	Time limits	Power to extend time limits
Canada: British Columbia	Judicial Review Procedure Act [RSBC 1996] c.241, s.11 Administrative Tribunals Act [SBC 2004] c.45, s.57 This Act is applied selectively to individual tribunals, by consequential amendment to the affected tribunal's enabling statute, according to the nature, role and mandate of each tribunal.	1996 Act: there are no time bars unless: a) an enactment otherwise provides and b) the court considers that substantial harm is caused to any other person by reason of delay. 2004 Act : unless otherwise provided by the 2004 Act or the tribunal's enabling statute, the time limit for filing an application for JR of a final decision of the tribunal is 60 days from the date the decision is issued	The court may extend the time for making the application, either before or after expiration of the time, if it is satisfied that there are serious grounds for relief, if there is a reasonable explanation for the delay and if no substantial prejudice or hardship is caused to a person by reason of delay
Canada: Alberta	Alberta Rules of Court 1968, Rule 753.11[29]	Application for judicial review must be filed and served within six months after the decision or act to which it relates.	
Australia: South Australia	Supreme Court Civil Rules 2006[30], r.200 s.2	An application for review must be issued as soon as practicable after the date when the grounds for the review arose and, in any event, within 6 months after that date.	The court has power to extend the time limit.
Australia: Queensland	Judicial Review Act 1991[31], Part 5 r.46	An application for review must be made as soon as possible and, in any event, within 3 months after the day on which the grounds for the application arose.	The court may extend the period of 3 months—the application must be made before the end of the extended period.

[29] http://www.canlii.org/en/ab/laws/regu/alta-reg-390-1968/latest/alta-reg-390-1968.html
[30] Available at http://www.courts.sa.gov.au/lawyers/index3.html
[31] http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/J/JudicialRevA91.pdf

Development of the use of Protective Costs Orders (PCO) in other jurisdictions

England and Wales

1. The Court of Appeal in *Corner House*[32] summarised the applicable principles for a PCO as follows:

> (1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> (i) the issues raised are of general public importance;
> (ii) the public interest requires that those issues be resolved;
> (iii) the applicant has no private interest in the outcome of the case;
> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that is likely to be involved it is fair and just to make the order;
> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.
>
> (2) If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, at its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above.

2. Despite initial conflicting first instance decisions on this point, there is now clear Court of Appeal authority that the principles identified in *Corner House* are to be treated as guidance rather than rules.[33] In *R (Compton) v Wiltshire PCT*[34] Waller LJ held that the paragraphs in *Corner House* were not, in his view, to be read as statutory provisions, nor to be read in an over restrictive way.[35] Furthermore, Smith LJ agreed that "the principles [in *Corner House*] are not part of the statute and, in my view should not be construed as if they were." [36]

General Importance and Public Interest[37]

3. Given the Court of Appeal's comments in *Corner House*, it is, of course, key that an applicant for a PCO is able to satisfy the court that the issues which he or she seeks to bring to the court are of (i) general importance and (ii) in the public interest. There has been a lot of debate as to what suffices. It is agreed that it is not enough that the case raises public law issues, even significant ones, as this would bring most, if not all, judicial review challenges within the definition. However, it is difficult to

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[32] *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192, para 74.
[33] B Jaffey (2006), 'Protective Costs Orders in Judicial Review' *Judicial Review*, *11(2)*
[34] *R (Compton) v Wiltshire PCT* [2008] EWCA Civ 749
[35] *Ibid*, para 23
[36] *Ibid*, *para* 74
[37] The following text is largely excerpted from P Patel and K Grange (2007), *Protective Costs Orders in Judicial Review* and B Jaffey (2006), *op. cit.*

be more prescriptive. Although various tests were discussed by the Working Group on Facilitating Public Interest Litigation (chaired by Sir Maurice Kay)(15th June 2006),[38] the report declined to lay down any more precise definition but concluded that a broad purposive interpretation ought to be given and the definition ought not to become unduly restrictive.[39]

4. In *Goodson v. HM Coroner for Bedfordshire and Luton and another*[40], the claimant sought leave to bring judicial review proceedings on the grounds *inter alia* that the inquest held into the death of her father, which occurred as a result of injury sustained during surgery at Luton & Dunstable hospital, did not comply with the procedural obligations under Article 2 of the ECHR. Unsuccessful at first instance, she was granted leave to appeal, the judge indicating that the case raised an issue of general importance. Her legal team was acting under a Conditional Fee Agreement and she had insurance against the risk of having to pay the coroner's costs, but not the hospital's. She therefore sought a PCO whereby there would be no order in relation to the costs of the appeal, whatever the outcome, on the grounds that it raised issues of general public importance which she could not afford to pursue. The Court of Appeal rejected her application. Giving the judgment of the Court, Moore-Bick LJ said that the Court had to decide whether it was in the public interest that the issue should be determined *in this case* rather than any other, even though that could only be achieved at the expense of the hospital. The Court was satisfied that the appeal, in circumstances where it was contended an individual had died as a result of injury sustained during surgery, raised an issue of general public importance. However, it was not satisfied that it was in the public interest that the issue be litigated, by reason of similar litigation afoot in the courts.

5. In *Wilkinson v. Kitzinger*[41] the petitioner sought a declaration that her Canadian marriage to the respondent was valid as a marriage in the United Kingdom, rather than a civil partnership under the Civil Partnership Act 2004. The petitioner contended that the inability or failure to recognise her Canadian marriage as a marriage in the United Kingdom constituted a breach of Articles 8, 12 and 14 of the ECHR and that the applicable statute (section 11(c) of the Matrimonial Causes Act 1973) should be declared incompatible in those respects (under section 3 of the Human Rights Act). In the circumstances, the Lord Chancellor's Department (LCD) intervened in the proceedings. The petitioner sought a PCO that each party should bear its own costs and that there should be no further order as to costs. The court refused to make the order sought, though did cap at £25,000 the sum that could be awarded to the LCD by way of costs:

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[38] Liberty Report (National Council for Civil Liberties) (2006), *Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation*, see para 70: "the case should raise a serious issue which affects or may affect the public or section of it; the case should raise issues which transcend the interests of the person bringing the case; the case should raise issues which it is the collective interest to resolve."

[39] *Ibid*, paras 75 and 76

[40] *Goodson v. HM Coroner for Bedfordshire and Luton* [2005] EWCA Civ. 1172

[41] *Wilkinson v. Kitzinger* [2006] EWHC 835 (Fam)

> "While the issues are of public interest and importance in the sense that any question of alleged discrimination deserves public concern and the court's attention, the issue raised in this case relates to a measure carefully and recently considered and passed by Parliament with a view to producing equivalence, in a context in which the ECtHR clearly recognises the margin of appreciation and permits it to operate. Further, there is scant evidence before me that a substantial number of same-sex couples are in the same position as the petitioner and first respondent, or consider that the status, rights, and responsibilities accorded to them under the Civil Partnership Act disadvantage or demean them in any way in comparison to married couples. In the circumstances, I am not persuaded that the issues raised require resolution as a matter of general public importance."[42]

6. In *R (Bullmore) v. West Hertfordshire Hospitals NHS Trust*,[43] the court refused to make a PCO in respect of a claim brought by members of a local hospital action or pressure group challenging the Trust's decision to close certain hospital services at Hemel Hempstead hospital. On the application for permission to appeal, Hughes LJ concluded that Lloyd Jones J was entitled to conclude that the case did not raise sufficient issues of general public importance so as to require, in the public interest, that they should be litigated at the expense of the defendants whether they succeeded or not. In contrast, a challenge brought by the British Union for the Abolition of Vivisection to the decision of the Secretary of State to grant Cambridge University licences under the Animals (Scientific Procedures) Act 1986 was held to raise matters of general importance in the public interest.[44]

7. The Court of Appeal has now considered the proper approach to the public importance/ public interest principle in *R (Compton) v Wiltshire PCT*.[45] *Compton* concerned two linked judicial review challenges to the closure/reconfiguration of local hospital services in Wiltshire. The majority of the Court of Appeal held that local issues can amount to matters of public importance and public interest. They considered that, ultimately, the issue was one for the judge dealing with the PCO application. Because it is impossible to define what amounts to an issue of general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general.[46]

Private Interest[47]

8. In *Corner House*, the Court of Appeal adopted Dyson J's analysis in *Child Poverty Action Group*[48] that the applicant for a PCO should have no private interest in the outcome of the proceedings. However, this issue was not directly in point in

[42] *Ibid*, para 56, per Sir Mark Potter, P.
[43] *R (Bullmore) v. West Hertfordshire Hospitals NHS Trust* [2007] EWCA Civ. 600
[44] *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250 (Admin.), *per* Bean J, paras 3 and 15
[45] R *(Compton) v Wiltshire PCT* [2008] EWCA Civ 749
[46] *Ibid per* Smith LJ at paras 73-78.
[47] The following text is largely excerpted from Patel and Grange (2007), *op.cit*, and Jaffey (2006), *op.cit.*
[48] *R v Lord Chancellor*, *ex parte Child Poverty Action Group* (CPAG) [1999] 1 WLR 347

Corner House and was not the subject of argument. It was common ground that *Corner House* had no private interest. This requirement has been subject to much criticism.

9. In the Liberty report[49] it was stated that the bar on an applicant with a private interest in a proceeding seeking a PCO has been unduly restrictive. The term 'private interest' was not explained in the decision. As Stein and Beagent have pointed out, it seems that 'only the "public-spirited individual" with nothing to gain personally, or an NGO with no direct connection to individuals who might benefit, would be eligible for a PCO'.[50]

10. Stein and Beagent further note that often, for example, in relation to judicial review, it is actually necessary for a party to have something resembling a private interest in a proceeding to have standing to commence it in the first place. On this basis they suggest that the 'no private interest' requirement cannot be the subject of a strict construction. Rather, they suggest: "Ultimately, it will be a matter of fact and degree as to whether the personal interest of the claimant is to be characterised as a 'private interest', and it is suggested that the financial benefit to the claimant will be the most telling factor."[51]

11. Nevertheless, the Court of Appeal in *Goodson v HM Coroner for Bedfordshire*[52] not only confirmed that it was a requirement which to be established before a PCO could be obtained but interpreted the requirement narrowly.

12. Mrs Goodson sought a full coroner's inquiry into the circumstances of her father's death. The Court of Appeal refused to make a PCO in her favour. In relation to private interest:

> (a) Having considered the relevant authorities, the Court in *Corner House* was "well-placed to decide where to draw the line in terms of private interest. The requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have formulated this part of the guidelines in more qualified terms corresponding to the submission of [the claimant] if it thought it appropriate to do so."[53]
>
> (b) The Court noted the relationship between the requirement that the applicant have no private interest in the outcome of the case and the rules on standing for judicial review. It concluded: "All this suggests that a personal litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case, although in rare cases a public-spirited individual may be permitted to make such an application in relation to a matter

[49] Liberty Report (2006), *op. cit*, para 75
[50] R Stein and J Beagent (2005), 'Case Law Analysis—*R (Corner House Research) v The Secretary of State for Trade and Industry*,' *17 Journal of Environmental Law* 413, p.438
[51] *Ibid*, p. 439
[52] *Op. cit.*
[53] *Ibid*, para 27

in which he has no direct personal interest separate from that of the general population as a whole."

Lord Justice Moore-Bick concluded that:

> "Leaving aside Mrs. Goodson's undoubted private interest in the proceedings, I can see no reason for concluding that the public interest in having the issues which arise in this case decided by this court is so great that they should be decided in this appeal and at the inevitable expense of the Hospital as regards its own costs. When one adds to that the fact that Mrs. Goodson has a strong interest of her own in seeing the case through to a successful conclusion, the case for refusing an order becomes even stronger."

13. Although *Goodson* has not yet been formally overruled, it has since been subjected to various degrees of doubt and disapproved by the courts. The current position appears to be that a private interest may be a relevant matter to take into consideration in an appropriate case, but it is not a bar to a PCO.

14. In *Wilkinson v. Kitzinger*[54] referred to above, Sir Mark Potter, the President of the Family Division declined to apply *Goodson*. He held (granting a limited PCO) that the 'private interest' principle was no more than a "flexible element in the court's consideration of whether it is fair and just to make the order." [55]

15. *Wilkinson v. Kitzinger* was approved by the Court of Appeal in *R (England) v. London Borough of Tower Hamlets & ors.*[56] Furthermore, in *R (Eley) v SSCLG*[57] Collins J stated that the no personal interest condition in *Corner* House was in his view unsustainable and granted a PCO. The Court of Appeal dismissed an application by the Secretary of State for permission on appeal on 5 November 2008 and held that the fact that a person has standing for the purposes of bringing a claim for judicial review or a statutory planning appeal is not a bar to being granted a PCO.

Costs capping[58]

16. In *Corner House,* the Court of Appeal provided for a system of capping the costs of the claimants, as a *quid pro quo* for the grant of a PCO. Costs capping orders may only be prospective, that is, deal with costs to be incurred in the future.[59] This system was designed to ensure that claimants did not run up excessive costs and to ensure that the grant of a PCO strikes a fair balance between the interests of the

[54] *Wilkinson v. Kitzinger* [2006] EWHC 835 (Fam)
[55] *Ibid*, para 54
[56] *R (England) v. London Borough of Tower Hamlets & ors.* [2006] EWCA Civ. 1742
[57] *R (Eley) v SSCLG* 1 July 2008
[58] This text is based on: B. Jaffey (2006), *op.cit*, M Mildred (2009), 'The development and future of costs capping,' *Civil Justice Quarterly 2009, 28(1)*, and P Cashman (2007), '*The Cost of Access to Courts*', paper for presentation at Conference on *Confidence in the Courts*, 9-11 February 2007, Victorian Law Reform Commission
[59] The Supreme Court Act 1982 s.51 and CPR r. 3.1(2) (m) provide the jurisdictional basis for making costs capping orders. New rules (44.18-20) came into force on 6th April 2009

claimant and the interests of the Defendant. In such cases, the court will normally impose a costs capping order that will prescribe, in advance, a total amount of recoverable costs. The Court of Appeal made clear that claimants should not expect the capping order to provide for anything more than: solicitors fees and a fee for a single advocate of junior counsel status that are no more than modest. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.[60]

17. The 'junior counsel only' principle is no longer good law. In *R (Buglife) v Thurrock Thames Gateway Development Corporation*[61] the Court of Appeal held that "we would certainly accept that there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases where it would be unjust to do so."[62] Furthermore, in *Buglife* it was stated that there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount.[63]

18. In the Liberty report however, it was stated that it is easily conceivable that the costs capping procedure, under which a PCO-protected applicant can be limited to a 'moderate' level of representation, will in practice 'create an artificial inequality of arms'. The limitation on the scope of legal representation permitted under a PCO could 'limit the number of cases where PCOs will significantly increase access to justice'.[64]

Australia[65]

19. Particular rules for awarding costs in public interest litigation have been under consideration in Australia for over a decade. The Australian Law Reform Commission (ALRC) considered the question of costs in proceedings with a 'public interest' element. Their report, *Cost Shifting—Who Pays for Litigation in Australia* noted that although the courts had the power to depart from the usual rule that costs follow the event, its exercise was uncommon.[66] The ALRC concluded that 'the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules'[67], and recommended that courts be permitted to make specific

[60] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, para 76
[61] *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209
[62] *Ibid*, para 25
[63] *Ibid*, para 26
[64] Liberty Report (2006), *op. cit*, para 93. Other members of the group considered the restriction to be a reasonable one: see para 92
[65] The following text is largely excerpted from the Victorian Law Reform Commission (2008), *op. cit.*
[66] Australian Law Reform Commission (ALRC) (1995), *Cost Shifting—Who Pays for Litigation*, Report No 75, paras 13.3– 13.4
[67] *Ibid*, para 13.11

public interest costs orders.[68] The ALRC proposed that a court or tribunal ought to be empowered to make a 'public interest costs order' (PICO) in respect of proceedings that will: determine, enforce or clarify an important right or obligation affecting a significant sector of the community; involve the resolution of an important question of law or 'otherwise has the character of public interest or test case proceedings'.[69]

20. The ALRC determined that a personal interest on the part of one or more parties ought not to preclude a court making a PICO, although the extent and nature of parties' commercial interests were matters to be taken into account in determining whether or not to do so.[70] The ALRC's criteria were designed to 'reflect those already developed by the courts' and 'preserve the ability of a court or tribunal to determine whether litigation is in the public interest in light of all the circumstances of a the case'.[71] The ALRC considered that a court should retain a broad discretion as to the terms of a PICO, and proposed that such an order could leave the parties to bear their own costs, eliminate or cap the applicant's liability for the other party's costs, or render a third party liable for such costs.[72] The ALRC chose not to address the difficulties surrounding the definition of public interest litigation, preferring to leave that issue to the courts. Such a broad approach has attracted some criticism. Campbell argues that they are 'so broadly framed as to embrace many kinds of cases which courts have not hitherto recognised as coming within the category of public interest litigation.'[73]

21. The ALRC recommendations have not been implemented, though the courts have continued to refine the criteria for adjusting or reversing the normal rule that the losing party should pay the winning party's costs.

22. Courts have a wide discretion to vary the 'usual rule' regarding costs.[74] The High Court case of *Oshlack v Richmond River Council*[75] affirms the court's discretion to include the public interest character of litigation as a relevant factor when determining an award of costs. In this case, no order as to costs was made on the grounds that the proceedings had been brought to enforce environmental laws (not a private interest) and Oshlack's concerns had been shared by a significant sector of the public.

23. Departure from the usual costs award is said to occur only in unusual cases.[76] The result of some litigation has been to confirm that public interest is only one factor in the exercise of discretion. In *Ruddock v Vadarlis*, it was concluded that '[t]he award of costs must remain an exercise of discretion having regard to all the

[68] *Ibid*, Recommendation 37
[69] *Ibid*, para 13.13
[70] *Ibid*, para 13.11
[71] *Ibid*, para 13.16
[72] *Ibid* ,para 13.22
[73] E Campbell (1998), 'Public Interest Costs Orders', *Adelaide Law Review*, *20*, 245, p. 255
[74] *Supreme Court Act 1986* s 24, *County Court Act 1974* s 78A
[75] *Oshlack v Richmond River Council* (1998) 193 CLR 72
[76] *Ruddock v Vadarlis* [2001] FCA 1865, para 29

circumstances of the case'.[77] Factors which support the usual costs award being made are: whether the successful party was wholly successful[78], the amount of costs incurred by the successful party, whether the decision turned on factual, rather than legal matters.[79]

24. The following factors will support judicial discretion to vary a costs award: the case 'raises a novel question of much public importance and some difficulty',[80] the liberty of the individual is at stake,[81] the case has been brought 'selflessly' and conducted 'in a manner that was wholly commendable,'[82] the case raises difficult and important questions of construction, there is public interest in the matter and whether it has been reached according to law,[83] whether sufficient public interest related reasons connected with or leading up to the litigation warrant a departure from or outweigh the important consideration that a wholly successful respondent would ordinarily be awarded its costs.[84]

25. In *Ruddock v Vadarlis*,[85] the following factors were relevant to Chief Justice Black and Justice French's decision not to make an award as to costs:

- The proceedings raised novel and important questions of law concerning the alleged deprivation of the liberty of the individual, the executive power of the Commonwealth, the operation of the Migration Act 1958 (Cth) and Australia's obligations under international law.
- The issues were difficult, and the subject of divided judicial opinion.
- The Commonwealth Parliament had passed laws to exclude the applicants from pursuing the matter further, and legislated to entrench the decision of the Full Court on the merits.[86]
- The VCCL and Vadarlis had no financial interest in the proceedings, and their legal representation was provided free of charge.[87]

26. The case law illustrates that the award of costs is ultimately a matter of judicial discretion, that is, it is possible for the court to decline to award costs, award part of the winner's costs, or order full recovery. In *Mees v Kemp (No 2)*[88], for example, Justice Weinberg noted that the proceedings had raised difficult and important

[77] *Ibid*, para 25
[78] In *Ruddock v Vadarlis*, Beaumont J dissented, holding that the Commonwealth had been 'wholly successful' in defending the proceeding, and that there was no 'good reason' for departing from the usual rule: [2001] FCA 1865, paras 40–42, citing *Milne v Attorney-General (Tas)* (1956) 95 CLR 460
[79] *Northern Territory v Doepe*l (No 2) [2004] FCA 46 [14]; see also *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8, para 73.
[80] *Ruddock v Vadarlis* [2001] FCA 1865, para 17
[81] *Ibid*, para 21
[82] *Mees v Kemp* [2004] FCA 549, paras 20–2.
[83] *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8, para 73
[84] *The Wilderness Society v Minister for the Environment and Water* Resources [2007] FCA 1863, para 30
[85] *Ruddock v Vadarlis* [2001] FCA 1865
[86] *Ibid*, *para* 28
[87] *Ibid*
[88] *Mees v Kemp (No 2)* [2004] FCA 549

questions of construction and had been brought 'selflessly'. His Honour ordered the applicant to pay 50 per cent of the first respondent's costs, noting that the award of costs need not be an 'all or nothing' proposition.

27. What is important to note is that a personal interest does not preclude the proceedings from being characterised as having some public interest element.[89] However, this will have some impact on the award of costs. In *Jacomb v Australian Municipal, Administrative, Clerical & Services Union*, a proceeding to clarify the operation of the Sex Discrimination Act 1984 was taken to be in the public interest.[90] The fact that the public interest was subservient to the applicant's own interest, however, was also a relevant consideration and the applicant was ordered to pay 75 per cent of the respondent's costs.

British Columbia[91]

28. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*,[92] the Supreme Court of Canada, by a 6-3 majority, granted a quite radical version of an interim order, directing the respondents to pay the costs of the appellant, on a strictly controlled basis, as the proceedings went on. LeBel J cited concerns about access to justice and the desirability of mitigating severe inequality between litigants and identified the following principles:

- The party seeking the order must be impecunious to the extent that without such an order that party would have been deprived of the opportunity to proceed with the case;
- The claimant must establish a prima facie of sufficient merit to warrant its pursuit; … the case must fall into a subcategory where the special circumstances that justified an award of interim costs were related to the public importance of the questions at issue in the case;
- It was for the judge at first instance to determine whether a particular case, which might be classified as special by its very nature as a public interest case, was special enough to rise to the level where the unusual measure of ordering costs would be appropriate.[93]

29. The decision was not without contention, however, and the dissenting opinion raised concerns that an advance award of costs could be seen as prejudging the merits and amounted to 'a form of judicially imposed legal aid'.[94]

30. The capacity to award interim costs so that litigation may proceed is perhaps

[89] *Smith v Airservices Australia* [2005] FCA 997
[90] *Jacomb v Australian Municipal, Administrative, Clerical & Services Union* [2004] FCA 1600, para 10
[91] The following text is largely excerpted from O McIntyre (2006), 'The Role of Pre-emptive / Protective Costs Orders in Environmental Judicial Review Proceedings', *Irish Planning and Environmental Law Journal, 13(2)* and the Victorian Law Reform Commission (2008), *op. cit.*
[92] *British Columbia (Minister of Forests) v Okanagan Indian Band* (2003) 114 CCR 2d 108
[93] *Ibid*, paras 36 and 38
[94] *Ibid*, para 62

the most progressive approach to public interest costs to date. The *Okanagan Indian Band* decision is important in three respects: for its affirmation of the social utility of addressing costs issues early in the course of such proceedings; for its unequivocal assertion of the judicial jurisdiction to undertake this task; and for its recognition that, in certain exceptional public interest cases, only an interim costs award will satisfy the interests of justice.

Ireland[95]

31. In the *Village Residents Association (No. 2)* case,[96] the Irish High Court confirmed that it has jurisdiction to make a 'pre-emptive costs order', directing that the applicant should not be liable for the costs of any other party to those proceedings as may arise, or for the reserved costs of any such party as might have arisen in those proceedings to date, on the basis of section 14 of the Courts (Supplemental Provisions) Act, 1961 and Order 99, Rules 1(1) and 5 of the Rules of the Superior Courts 1986.[97] Though finding that the application in that particular case met none of the relevant requirements, Laffoy J approved the position adopted by the English High Court in the *CPAG* case in relation to the grant of PCOs.

32. The Law Reform Commission has examined the issue of pre-emptive costs orders and describes this as an 'area of developing law at present'.[98] The Commission highlights the extent of the protection that might be conferred on a successful applicant for a PCO, pointing out, for example, that 'The pre-emptive costs order will be sought at a preliminary stage and if the applicant succeeds in obtaining such order, it will apply regardless of the fact that intermediate stages may be dealt with by other judges than the final full hearing.'[99]

33. In the light of this risk, the Commission recommends, not only that the courts exercise their jurisdiction in relation to PCOs only in exceptional circumstances, but also that 'where any doubt exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings'.[100]

34. The Commission points out that the court would be able, under its inherent jurisdiction as to costs, merely to give an indication as to the likely outcome in

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[95] This text is based on O McIntyre (2007), *op. cit.*
[96] *Village Residents Association Ltd v. an Bord Pleanala* [2000] IEHC 34
[97] *Ibid*, para 24. Laffoy J goes on to explain that section 14 of the 1961 Act 'provides that the jurisdiction vested in and exercisable by this Court is to be exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by the rules of court in force …'. She also explains that Rule 1(1) of Order 99 'provides that the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively' and that Rule 5 'provides that costs may be dealt with by the Court at any stage of the proceedings … notwithstanding that the proceedings have not been concluded'
[98] Law Reform Commission of Ireland (2003), *Consultation Paper on Judicial Review Procedure*, p. 96
[99] *Ibid*
[100] Law Reform Commission of Ireland (2003), *op. cit*, p. 98-99. The Commission included this recommendation in its *Report on Judicial Review Procedure* (LRC 71-2004) (February 2004)

relation to costs and explains that 'This approach would have the advantage of flexibility.[101] The Commission noted that notwithstanding the perfectly reasonable position taken by the Irish High Court in relation to the grant of pre-emptive costs orders in *Village Residents*, the superior courts might consider the more relaxed test in relation to establishing the merits of an applicant's challenge applied in *Corner House.*

35. The Irish courts enjoy considerable scope to grant PCOs containing a variety of terms, ranging from orders directing that an applicant's liability for the respondent's costs be capped at a reasonable level, thereby discouraging excessive spending by well resourced public bodies, through orders directing that there be no order as to costs whatever the outcome of the substantive proceedings, to orders requiring that the respondent pay the applicant's reasonable costs as the proceedings progress. The former, presenting less of a risk of inequity to the respondent, might permit the grant of PCOs in slightly less 'exceptional' circumstances. However, it is very unlikely that the Irish courts would take a similar approach to the Court of Appeal in England and Wales in relation to the capping of applicant's costs, in order to reduce the possible exposure of respondents where the challenge is successful, as this would be likely to offend the unenumerated right to legal representation identified under Article 40.3.1 of the Constitution.[102]

36. In considering the desirability of equitable access to justice for concerned groups or individuals, the Irish courts might consider, among the additional factors alluded to by Laffoy J. in *Village Residents*, the very limited provision of civil legal aid in Ireland and the objectives underlying the Aarhus Convention. Also, in determining whether a PCO is warranted, the Irish courts might consider the likely benefit to the public broadly, in terms of the efficient production of timely precedent to inform the application of rules of general public importance. In the absence of the general availability of civil legal aid, the judicious use of PCOs could represent an efficient allocation and use of public funds.

[101] *Ibid*, p. 98
[102] See, for example, *Re Commission to Inquire into Child Abuse* [2002] 3 IR 459 and *O'Brien v Personal. Injuries Assessment Board and Others* [2005] IEHC 100

ANNEX TO CHAPTER 13 MULTI-PARTY ACTIONS

A USA, CANADA AND AUSTRALIA

USA[1]

1. In the USA group litigation with representative plaintiffs and outcomes that bind absent parties has been possible since the mid 19th century. However, class actions were introduced in 1938 by Rule 2 of the Federal Rules of Court Procedure (FRCP) to which significant amendments were made in 1966, the most important of which was the change from an opt-in to an opt-out procedure. Most states have adopted rules of class actions based on the Federal model.

2. Class actions fall into two main categories: those in which the plaintiff seeks injunctive or declaratory relief and monetary class actions. One of the policy objectives underlying the 1966 reforms was to facilitate the raising of institutional reform class actions. Examples include claims regarding discrimination in college admissions, conditions in state mental hospitals, industrial runoff polluting nearby rivers, deduction of union dues from the wages of non-union workers, and a mass transit agency's funding balance between fixed rail and bus options.

3. Monetary class actions fall into three broad types: mass torts, securities and shareholders, and other type of financial interest claims. When the 1966 reforms were drafted it was anticipated that few mass tort claims would be certified as suitable for class action procedure as it was thought that the specific nature of damage claims advanced by individual class members would make it difficult to satisfy the criteria relating to commonality. However, from the early 1980s mass torts arising out of Agent Orange, asbestos, breast implants, and other products began to be certified as class actions. This was seen to be an efficient way of resolving a body of litigation which threatened to overwhelm court resources and as means of controlling costs for both plaintiffs and defendants. More recently, the courts have not been so willing to certify such claims, owing to the lack of commonality in the claims and the concern that the most severely injured claimants will be given 'short shrift' in a class wide resolution. It is said that classes arising out of a single, localised event such as oil spills, airliner crashes or building collapses might have an easier time of satisfying the criteria for certification.

[1] This text is drawn from N Pace (2007), 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature', a report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007. Full transcripts of reports detailing the position of multi-party litigation in 29 jurisdictions and presented to the Oxford conference may be located at: http://globalclassactions.stanford.edu/. Additional materials and updated reports, as well as legislation and rules pertaining to a number of jurisdictions are also located on this website.

4. The Rule 23 procedure is often used in claims relating to securities. Typically, the class is comprised of investors in a company, the defendants are the company's officers and directors, and the action is being brought to recover investment losses resulting from management decisions.

5. Other types of financial injury cases include employment claims (for example, relating to discrimination or pay), anti trust or consumer cases:

- Cardholders against credit card companies for late fees on mailed payments
- Cellular phone customers against their providers for rounding up per-minute charges
- Account holders against their banks for the way interest rates and other charges were calculated
- Customers against a mail-order DVD rental service for falsely advertising "unlimited" rentals for a monthly flat fee
- Banks against a retailer for allowing credit and debit card numbers to be stolen from its unencrypted computers
- Customers against a television shopping network for selling computers without providing promised post-purchase technical support
- Customers against an internet service provider for supplying software that blocks access to other providers
- Borrowers against a mortgage lender for excessive document preparation fees

6. In order to be certified as a class action the court must be satisfied that the claims meet certain criteria in relation to numerosity, commonality, typicality and adequacy of representation. Very few class actions proceed to proof and the court must approve the settlement agreement. Review and approval by the court is an important protection for the absent class members who have no direct involvement in or control over the conduct of the litigation. Notification of the terms of settlement is given to class members who have the opportunity to object to the provisional terms of settlement and, possibly, to opt out at that stage. The court then applies the principles of fairness, reasonableness and adequacy in determining whether to approve the settlement.

7. Most settlements take the form of a common fund which is distributed amongst the class members. In many cases there may be unclaimed funds owing to the inability to identify all the class members. In some cases the agreement provides for return of unclaimed funds to the defendants. In others the surplus is paid to a third party such as a charitable organisation for distribution (known as a cy pres distribution).

8. Like other litigation in the USA, class actions are funded on a contingency fee basis, with no cost-shifting. The costs of the plaintiffs' legal representatives are generally met from the fund although, unlike ordinary litigation, these are subject to scrutiny by the court. The fees are generally calculated as a percentage of the common fund. In certain classes of case, for example, anti trust or civil rights actions, the court may order the defendant to pay the plaintiffs' costs on a cost-shifting basis.

Discussion

9. One commentator has argued that the culture informing the US federal jurisdiction may render comparisons with other jurisdictions of little value.[2] As Hodges observes, class actions in the US have been viewed as a means by which corporate and governmental behavior may be controlled. He argues that the role which is given to private litigation is fitting in a society which is deeply mistrustful of Federal agencies and highly suspicious of their capture by political and business interests. This may help to explain some of the distinctive features of the US legal system and the US class action, all of which provide significant incentives for claimants and their intermediaries to litigate: the lack of a "loser pays" costs-shifting rule; the funding of litigation through contingency fees; the right to extensive discovery of documentary evidence and to pre-trial depositions; the availability of both generally high damages and punitive damages; and the availability of jury trials.

Canada[3]

10. Class actions have been implemented in almost all provinces and territories and by the Federal Court. Reforms were led by the Ontario Law Reform Commission which recommended the introduction of a group action procedure.

11. All Canadian jurisdictions have a certification process. The details of the tests differ but, generally speaking, there are 5 criteria that must be satisfied in order for the action to be certified:

- the pleadings must disclose a cause of action
- there must be an identifiable class
- the proposed representative must be appropriate
- there must be common issues and
- the class action must be the preferable procedure

[2] C Hodges (2009), 'From class actions to collective redress: a revolution in approach to compensation', *Civil Justice Quarterly*, *Vol. 28(1)*

[3] This text is drawn from W A Bogart, J Kalajdzic and I Matthews (2007), 'Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?' report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007

12. Canadian jurisdictions (with one limited exception) have adopted opt-out regimes because of the widely held belief that most class members are passive and that an opt-in regime would have the effect of widely diminishing the size of the most classes because the members would not take action to opt in or may not have obtained notice of the action. Research has shown that few class action members chose to opt out.

13. There are no restrictions regarding the types of action or remedies that may be claimed. The relevant legislation and/or Rules of Court provide for the assessment of aggregate awards and distribution of these amongst the members of the class on an average or proportional basis; participation of individual members of the class for determination of issues particular to them; and for distribution of a cy pres basis.

14. Like the USA, class actions are generally funded by private lawyers on a contingency basis. Contingency fee agreements, which must be approved by the court, may include a percentage fee recovery. Other options include a 'lodestar' or base/multiplier under which the lawyer is paid the usual rate multiplied by the number of hours expended multiplied by a factor of 1-5. The fee awarded is generally in the range between 1 and 3. A recent study of Ontario class action counsel fees approved by the court between 1996 and 2006 indicated that the medial multiplier was 2.5 and the median percentage recovery was approximately 15%.

15. In Ontario and Quebec there are government funds to which representative plaintiffs may apply. In Ontario there is funding for disbursements only and in Quebec there may be funding for both disbursements and legal fees. It is said that the funding granted is often very modest but in addition to financial support the representative plaintiffs are indemnified by the Fund against adverse costs. The Fund collects a percentage of any judgment or settlement. In Ontario this is a percentage on top of funding previously paid to the representative plaintiffs. In Quebec the rate varies but applies to every class action, not just those to which funding has been granted. It is reported that the Ontario Fund is little used owing to the relatively modest level of grants, scrutiny of the merits by the Class Procedure Committee and the percentage charged on funds recovered. In contrast, the Quebec fund is a said to be a vibrant entity: the fact that the Fund takes a portion of all class judgments or settlements is said to create an energising cycle.

16. Owing to the risk to claimants of an award of adverse costs a number of Canadian jurisdiction have adopted a "no costs" rule for class actions. However, this rule also deprives successful plaintiffs of their costs and has led to a degree of controversy. Even in those jurisdictions which retain a "two way" costs regime for class actions, the court may modify the usual rule that costs follow success for those unsuccessful claimants who have raised a novel point of law that was a matter of broad public interest.

17. Generally speaking, there is little opposition in principle to class actions in Canada: these are seen as enhancing access to justice.

Australia[4]

18. Many Australian jurisdictions have a procedure for 'representative actions' similar to the English model. However, the need to establish that the members of the class have the 'same interest' means that the utility of the procedure is limited. In February 1977, the Australian Law Reform Commission was asked by the Federal Attorney General to report on the adequacy of the existing law relating to class actions. The ARLC's report was tabled in December 1988. It recommended the introduction of a grouped proceeding procedure which in its opinion would advance "the objective of access to the courts and judicial economy, while providing safeguards against possible abuse". The relevant Federal Court procedure (Part IVA) came into operation in March 1992.

19. In 1997 the Victorian Law Reform Advisory Council recommended the introduction a group procedure similar to the Federal model and the legislative framework for group actions was adopted in 2000.

20. Federal and state legislation makes special provision for group actions in a number of areas such as trade practices, discrimination, industrial relations and privacy.

21. The model adopted for class action procedure in Australia is an opt-out one. There are three threshold requirements: 7 or more persons have a claim against the same person; the claims must arise out of the same, similar or related circumstances; and the claims must give rise to a substantial common issue of fact or law. These requirements have developed through case law so that plaintiffs need not have suffered personally from the conduct of the defendant(s). It is sufficient if the person bringing proceedings, which may be a public body or entity, has standing to sue. For example, the Australian Competition and Consumer Association (ACCA) has standing to bring proceedings on behalf of affected consumers in which the court may award damages to the members of the class other than the ACCA.

22. In the Australian model there is no procedure whereby the court authorises the bringing of an action by way of a certification procedure. However, the court may 'decertify' a class action in certain circumstances: (a) the costs that would be incurred if the proceeding were to continue as a class proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; (b) all the relief sought can be obtained by means of a proceeding other than a class proceeding; (c) the class proceeding will not provide an efficient and effective means of dealing with the claims of class members; or (d) it is otherwise inappropriate that the claims be pursued by means of a class proceeding.

[4] This text is drawn from Vincent Morabito (2007), 'Group Litigation in Australia-"Desperately Seeking" Effective Class Action Regimes', report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007

23. The ALRC recommended the establishment of a class action fund to provide support for applicants and to meet the costs of the representatives if the action is unsuccessful. Another option proposed by the ALRC was the introduction of speculative or conditional fees for class actions. These recommendations were not accepted by the legislature when the class action procedure was adopted. However, a number of Australian jurisdictions have, since then, introduced conditional fee agreements for litigation generally. The uplifts payable under CFAs are restricted to 25%. Until recently, CFAs were the most common way of funding class actions in Australia. Unlike lawyers, commercial litigation funders are permitted to charge contingency fees. They may enter into agreements with class members to finance the litigation, provide security for costs, and provide an indemnity against adverse costs orders. In exchange, the plaintiff agrees to pay the litigation funder a percentage of the amount recovered. However, the representative plaintiffs cannot bind the other members of the class so the commercial provider must seek the agreement of every class member to this arrangement Commercial providers will generally refuse to fund litigants who will not agree to this arrangement so classes may be restricted to those persons who have entered into a litigation funding agreement.

24. Proceedings may not be settled or withdrawn without the approval of the court. The settlement terms are publicised and members of the class have the opportunity to opt out and pursue their own remedies. There are no formal criteria which the court must apply in approving the settlement other than the tests of fairness and reasonableness. The fairness and reasonableness of the settlement are, in turn, usually determined by the application of the following criteria, enunciated by Justice Goldberg of the Federal Court in 2000:

> "The amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement."

25. Justice Goldberg also noted that the nine factors formulated by the US Court of Appeals for the Third Circuit were equally useful:

> "(1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of the attendant risks of litigation."

26. As in other jurisdictions which have adopted an opt-out regime, the court has the power to award aggregate damages without specifying the amounts awarded in respect of individual class members.

B EUROPEAN UNION[5]

Sweden

27. Under Swedish legislation various forms of class action are permitted. These may be brought by individuals or organisations such as consumer associations or a Government appointed authority. Claims can be for injunctive or declaratory relief or for damages.

28. There is a requirement for commonality, the group must be well defined and the representatives must be suitable. It must be shown that the class action procedure is preferable to other forms of procedure such as test cases.

29. The Swedish model is an opt-in one. The 'loser pays' principle applies to the costs in class actions and in the event of the action being unsuccessful the representative claimant may be found liable in costs. The other members of the group have no liability for costs. This, it is argued, acts as a deterrent for anyone thinking of prosecuting a group action.

Denmark

30. New rules were introduced in Denmark in 2008. There is a certification process. Plaintiffs may be individuals or an association or mandated public authority such as the Consumer Ombudsman. Opt-in is the normal regime although the court may permit an opt-out model in restricted circumstances, generally where the value of individual claims is below a certain threshold.

Norway

31. Class action procedures were introduced in Norway in 2005. Again, claims may be brought by individuals or associations, trusts, or public bodies such as the Consumer Ombudsman. The procedures are primarily based on an opt-in model although opt-out may be used where the claims are of a minor nature in that it would not be viable to sue individually and the claims are not likely to give rise to specific non generic questions. The representative is liable for costs awarded to the opponent party but may claim reimbursement from the other class members.

Finland

32. A Finnish class action procedure was introduced in 2007 but is more restricted than other Scandinavian countries. Proceedings are generally brought by the Consumer Ombudsman but may be brought by individuals when the Ombudsman decides not to take action. The nature of the disputes covered by the procedure is limited to defects in consumer goods, interpretation of contract terms, or disputes

[5] This is largely drawn from D Fairgrieve and G Howells (2009), Collective Redress Procedures-European Debates, *International and Comparative Law Quarterly*, *Vol. 58*, pp 379-409

between consumers and entrepreneurs regarding the sale and marketing of investment products and insurance.

Portugal

33. A class action procedure was introduced in 1995 for claims concerning public health, the environment, consumer protection, cultural heritage and public property. The procedure is an opt-out model. There is a preliminary ruling on eligibility to ensure that the subject matter is covered by the legislation, the claim is not manifestly unfounded and the claimant is entitled to act as a class representative. The court has power to award aggregate damages where these cannot be individually assessed. Unclaimed funds are passed to the Ministry of Justice to finance further actions.

Netherlands

34. Dutch law does not provide for a procedure to initiate a single class action but where multiple actions have been brought concerning the same issue and where the parties have reached a settlement the court may approve a collective settlement on an opt-out basis. The procedure is designed primarily for mass exposure and mass disaster PI claims.

France

35. There have been a number of recent legislative proposals to introduce a class action procedure for consumer claims in France but these have not been enacted. There are concerns about the wisdom of importing an American style litigious culture.

Italy

36. New procedures were introduced in 2008 which enable consumer associations to bring an action for damages collectively for tort liability, unlawful commercial practices, or anti competitive behaviour and contract terms. There is an initial admissibility review followed by notification to allow interested parties to opt in. the court makes a decision on the issue of liability which has declaratory effect. If agreement on quantum cannot be reached the offer in settlement may be referred to a conciliation committee or to an out of court settlement procedure before public or private dispute resolution bodies.

Germany

37. Germany does not have a class action procedure as such but in 2005 a new test case procedure for securities litigation was introduced in response to the courts being flooded by the Deutsche Telekon case in which 15,000 individuals lodged claims in the Frankfurt Regional Court. Under the procedure, where several claims have been brought for damages due to wrong, misleading or omitting information on the capital markets, the parties may choose a test or lead case to determine common

factual or legal issues, the outcome of which will have a binding effect on all other claims. The legislation has been introduced for a limited period of 5 years.

Ireland

38. Ireland currently has no special procedure for class actions. There is a procedure for 'representative actions', which allow one action to be brought on behalf of different parties with the same interest.[6] However, they are subject to several limitations. For example, parties to a representative claim must have identical interests in the proceedings and the Irish Courts have strictly applied this requirement. In 2005, The Law Reform Commission of Ireland issued a Report on Multi-Party Litigation in 2005, which recommended the introduction of a 'Multi-Party Action' (MPA) procedure on as opt-in basis, subject only to a power vested in the court to oblige an action to be joined to an existing group.[7] It proposed that the MPA should be employed, where appropriate, as an alternative to existing procedures, such as the test case and should be based on three core principles: procedural fairness and practicality for both plaintiffs and defendants; procedural efficiency in terms of resources and time savings; and promotion of access to justice. For example, cases for which certification is sought should give rise to common issues of fact or law rather than be required to show strict commonality; provisions should be made for defendant MPAs; and that in deciding whether to certify proceedings as a MPA, the court must be satisfied that a MPA would be appropriate, fair and efficient procedure in the circumstances. No legislation has been forthcoming in the intervening 4 years to implement the Commission's recommendations.

Discussion[8]

39. Most European countries have adopted an opt-in model rather than the American opt-out model. Where an opt-out model has been adopted it is generally restricted in scope. An opt-in model has been preferred owing to concerns over potential abuse in relation to opt-out regimes and, in certain countries for constitutional reasons. Developments in Europe have favoured a gatekeeper approach with proceedings being brought by consumer associations or public bodies. Many regimes are limited in terms of the types of claims that may be brought under the class action or group procedure.

Initiatives at EU level

40. There is no uniform collective action procedure in Europe, though many member states are developing their own procedures for collective redress. Hodges[9] identifies two sources of pressure for these developments: those coming from the

[6] International Comparative Legal Guide (2009), *Class and Group Actions*, Chapter 16
[7] Law Reform Commission of Ireland (2005), *op. cit.*
[8] This discussion relies upon Christopher Hodges (2009) *op. cit*
[9] Christopher Hodges (2009), *ibid.*

courts, which are looking for an aggregate procedure to manage multiple claims; and those coming from government, which is looking to civil litigation as a means of improving economic performance. At the same time, Hodges observes that the momentum building up at the European level is being spearheaded by the commissioners for competition and consumer affairs.

The Courts: Managing multiple claims

41. As Hodges observes, the procedures introduced by different states are confusing in their variety. So, for example, the Group Litigation Order introduced under CPR in England and Wales is primarily a managerial tool, integrated into the Woolf approach to the case management of civil cases by giving the courts "the ability to collect similar cases together for a single judge to make whatever managerial decisions seem best suited to the particular nature of the litigation."[10] It is also a judicial decision as to whether the case will proceed via the selection of a test case. Under German law, by contrast, all individual claims are sisted/stayed pending the resolution of a model case by an appeal court, the result of which is binding on the rest.

42. As yet, so Hodges notes, there has been no reconciliation between this type of collective procedure, which involves individual claimants surrendering their individual autonomy, and the human rights requirements of Article 6 of ECHR. There are also other unresolved issues, such as whether damages must be proved individually.

Government: Improving economic performance

43. Hodges further observes that pressure for the introduction of collective procedures has also been applied by government as a means by which the enforcement of regulatory law may be increased, mainly with regard to consumer protection and competition law. While the discourse around which these measures have been introduced is in terms of increasing access to justice for people with small claims, Hodges argues that this is subsidiary to the overriding economic policy of the European Union, which is the enhancement of competitiveness. Indeed, the development of its collective redress procedures in the area of competition claims is currently more developed that its consumer policy.

44. There have been moves towards the development of collective redress procedures across the EU, particularly in the area of competition claims, for which competition authorities in both the UK and Europe have been trying to generate interest as an enforcement tool. By their nature, so it has been argued, breaches of competition law have the potential to involve multiple claimants. A Green Paper was published in 2005, and a White Paper in April 2008, which stated that there was a clear need for a substantially revised collective redress mechanism which could be applied across member states and would encourage claimants to bring low value

[10] *Ibid.*

claims. The Directorate-General on competition (DG COMP) proposed that this would operate by aggregating individual claims to ensure that victims of antitrust (competition) were not deterred from bringing low value claims.

45. The EU favours that actions of this kind should be brought by a third party representative organisation. Interestingly, it adopts the 'opt-in' rather than 'opt-out' joining mechanism, partly because of its concern that parties make an express decision to participate, and partly because of its concern that litigants must not be deprived of the right to bring their own individual action for damages should they wish to do so, (for fear of being contrary to Article 6(1) of ECHR). However, it also proposes that representative actions should be brought by consumer organisations or trade bodies on behalf of identified and identifiable individuals, which pushes the boundaries somewhat further since 'identified' individuals are currently allowed in most Member States. A suggestion has also been made to move away from cost shifting ('loser pays') principles, which are presently adhered to across the EU, and to a costs regime where the losing claimants may not necessarily be required to pay the costs of successful defendants.

While pressure is being exerted from Europe, there remains uncertainty as to the shape that EU requirements for dealing with consumer issues will take. Benchmarks have been established with which to assess individual mechanisms and a Green Paper was published in November 2008, which sets out the options. However, the Directorate-General for Consumer Protection (DG SANCO) has not indicated what model should be followed with regard to consumer protection issues, partly because of difficulties with regard to establishing best practice.[11] In any case, given the expiry of the mandates of the European Commission and Parliament in mid-2009, any legislative proposals by the European Commission are unlikely to pass until at least 2010.

C THE UNITED KINGDOM

England and Wales

The 'representative rule' and Group Litigation Orders

46. Prior to the introduction of the Woolf reforms the mechanisms for dealing with multi-party actions in England and Wales were somewhat limited. As Lord Woolf observed:

> "Unlike the position in some other common law countries, there are no specific rules of court in England and Wales for multi-party actions. This causes difficulties when actions involving many parties are brought. In addition to the existing procedures being difficult to use, they have proved disproportionately costly. It is now generally recognised, by judges, practitioners and consumer representatives, that there is a need

[11] *Ibid.*

for a new approach both in relation to court procedures and legal aid. The new procedures should achieve the following objectives:

(a) provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;

(b) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;

(c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."[12]

47. Lord Woolf further observed that although the existing rules of court provide means of dealing with multi-party actions,

> "they were not drafted with group actions in mind and therefore none has provided a sufficient answer to the problems they create. Representative actions are provided for by RSC Order 15, rule 12 but the experience here and in comparable jurisdictions is that there are definite limits to the weight the rule can bear. Cases can also be joined or consolidated under Order 15, rule 4 and Order 4, rule 9(1). But consolidation deals with situations where actions have already been begun, and it is better that multi-party litigation be dealt with on a collective basis before then, and joinder is not satisfactory where the interests of claimants differ."[13]

48. Prior to the reforms introduced following Lord Woolf's Report, the principal disadvantages of the representative rule were that the representative parties to the action must have the "same interest" and that equitable relief, such as an injunction or declaration was the primary remedy, an award of damages not being generally available. The rule could only be used where parties were seeking the same relief so that if some class members did not have a claim for relief which is identical to those of all other class members, even though their claims have the same factual basis (for example, where following the sinking of a ship, passengers could claim personal injury or property damage or both), a representative proceeding could not be used to claim damages.[14] Developments in case law both before and after the Woolf reforms have led to a liberalisation of the "same interest" test and more flexibility in relation to the award of damages but the general view is that the representative rule has not been successful in facilitating multi-party litigation.[15]

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[12] Lord Woolf (1996), *Access to Justice: Final Report*, Chapter 17, para 2
[13] *Ibid*, Chapter 17 para 7.
[14] R Mulheron (2005: 2) 'From representative rule to class action: steps rather than leaps', *Civil Justice Quarterly Vol.24*
[15] A Zuckerman (2006), *Zuckerman on Civil Procedure – Principles of Practice*, Sweet & Maxwell and Civil Justice Council (2008), *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Action*

49. Under the 'Woolf reforms', the representative action was retained (with amendments) but a new procedure, the Group Litigation Order (GLO), was introduced with a view to providing an effective one stop case management tool by which judges could oversee claims involving large numbers of claimants with some common, but not consistently identical, issues.

50. A Group Litigation Order (GLO) is an order to provide for the case management of claims which give rise to common or related issues of fact or law. The court may make a GLO where there are, or are likely to be, a number of claims giving rise to common or related issues of fact or law. The order establishes a register of claims, specifies the issues which will identify the claims and specifies a management court. The order may direct claims which raise one or more GLO issues to be transferred to the management court, order their stay, or direct their entry on the group register; the court may direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court; and give directions for publicising the GLO. Where a judgment is made in relation to one or more of the GLO issues that judgment is binding on the parties to all other claims on the group register at the time the judgment is given. One of the distinctive features of the GLO is that it may be made on the application of any party or on the initiative of the court.

51. Many of the features of the CPR19 and related Practice Direction (PD) regarding the case management of group litigation are based on innovations developed by judges prior to the introduction of the Woolf reforms to deal with the difficulties that multi-party litigation presents: such as the appointment of lead solicitors, the setting of cut-off dates for joining group proceedings, and the selection of test cases. The GLO procedure as adopted is an opt-in regime. Lord Woolf had recommended a hybrid system permitting opt-out in certain types of case. The court fixes a cut off date by which claims must be entered on the group register. The PD provides that an early cut off date may be appropriate in the case of 'instant disasters' such as transport accidents, where the class is readily identifiable. It states that in consumer claims, particularly pharmaceutical claims, it may be necessary to delay fixing a cut off date.

52. Unlike proceedings brought under the representative rule, actions brought together by GLOs remain separate proceedings, with each group member proceeding to establish his entitlement to relief separately following the resolution of common issues either by a generic issues hearing or by trials of a small number of cases selected as test claims.[16]

53. The management court may make directions for the trial of common issues and test cases and for the trial of individual issues. Common issues and test cases will normally be determined by the management court but individual issues may be tried at other courts whose locality is convenient for the parties.

[16] A Zuckerman (2006), *op cit* p 517

54. The CPR and PD do not make any express provision for the award of aggregate or global damages as described above nor is there any requirement that the courts should approve a withdrawal or settlement of the claims (although it has power to substitute a new test case).

55. Although the GLO procedure has been a welcome development in relation to the handling of multi-party actions, some commentators have argued that it has significant drawbacks and that a full class action procedure with an opt-out regime would be preferable. In particular, the requirement for each claimant to issue proceedings before the claim can be entered in the group register is said to erect an expensive and unnecessary barrier to access to justice.[17] This may explain the low rate of participation found under the GLO regime, with less than 30% of potential claimants registering a claim.[18]

56. As Zuckerman has observed, the utility and fairness of the opt-in approach depends on fair notice being given so that potential claimants are alerted to the existence of proceedings and have the opportunity to join. Yet neither the rules nor practice directions provide guidance as to what may constitute appropriate advertising or who should pay for it. In addition, while a cut-off date is an essential (*sine qua non*) component of an 'opt-in' joining mechanism, it is not always appropriate, for example, in claims with regard to 'creeping disasters' such as CJD or asbestosis, or concerning defective pharmaceuticals[19] The opt-in regime has also been responsible for raising a considerable number of case management issues.[20]

LCD Consultation on widening the scope for representative actions

57. In 2001, the Lord Chancellor's Department issued *Representative Claims: Proposed New Procedures*, a consultation paper that sought views as to the feasibility of allowing representative bodies to bring actions on behalf of a group of individuals when they did not themselves have a legal interest in the case. In private law cases, so it observed, claimants must show they themselves have a legal right that they are seeking to enforce. As a result, no other person, nor organisation, can take action on behalf of an individual whose rights have been infringed, unless their rights have also been infringed. In public law in England and Wales, however, anyone with sufficient interest may apply for judicial review and "on the whole, the courts have

[17] *Ibid.* p 519
[18] R Mulheron (2008), *Reform of Collective Procedure Redress in England and Wales: A Perspective of Need*
[19] A Zuckerman (2006), *op. cit*, p 523
[20] In *Taylor v Nugent Care Society* [2004], a claimant who had not joined the group action by the cut-off date was refused permission to join late. The claimant went ahead and served individual proceedings, which the defendant pled was an abuse of court process, a plea that was initially upheld. However, the Court of Appeal (Lord Woolf) held that even if it were an abuse of court process, it was not a proportionate response to strike out his claim and the claim was reinstated in the GLO. Lord Woolf held that it was not an abuse of court process in this particular case since, because the claimant was never subject to management orders, he had never disobeyed them. He held that though the court has no power to order a claimant to join a GLO, however, it may make an order to protect the defendant. This constitutes a strong deterrent for remaining outside a GLO, since a claimant may incur costs that he is unable to recover if successful (Zuckerman:(2006), op. cit, p.522).

taken an increasingly liberal view as what constitutes sufficient interest."[21] This has allowed organisations such as Greenpeace and Which? to take action in public law cases in England and Wales, whereas they have no right to do so in private law. The Government was of the view that its policy of ensuring access to justice might be better served if a wider range of bodies were to be empowered to protect the interests of those they represent. It was in this context that the Lord Chancellor consulted on widening the scope of representative claims in England and Wales.

58. The Lord Chancellor's Department put proposals out for consultation, which included the following:

- Those wishing to act in a representative capacity would require permission from the court to issue proceedings
- They must establish that a representative claim is the appropriate way to proceed and that the range of claims and remedies available should be the same as if individuals had brought the claims themselves
- Representative claims can be made on behalf of a group whose individuals are named or un-named but where a situation exists in which an individual would have a direct cause of action
- Where possible, the court should be provided with the names of those represented; alternatively, whereby they can be easily notified, individuals to be represented could be given the opportunity to opt out
- The applicant should satisfy the court that it is an appropriate body or person to represent the interests of the individuals concerned.

59. LCD's proposals were not limited to claims in the sphere of consumer or competition law. The Consultation Paper noted that in keeping with the aims of the civil justice reforms, court proceedings to resolve disputes should be seen as a last resort and used after other more appropriate means, for example action by a statutory body, industry codes of practice and ombudsman schemes. Responsible representatives will have a good understanding of the various relevant non-court remedies and should aim to assist individuals towards satisfactory settlements without recourse to litigation. Nevertheless, there will be some situations, for example, the protection of consumer interests or the rights of members of a group or association, where a representative could usefully pursue court action on behalf of those directly affected. The Paper noted a number of European Union initiatives which provided for the principle of representative claims for the vindication of rights of consumers or other individuals.

Representative actions: UK competition law cases

60. A new procedure for representative actions by designated bodies was introduced by sections 47A and 47B of the Competition Act 1998 as inserted by section 19 of the Enterprise Act 2002. Under section 47B a body representing those harmed by an unlawful practice may bring an action on behalf of those who have

[21] Lord Chancellor's Department (2001), *Representative Claims: Proposed New Procedures*, p.1

suffered loss. The persons who have been harmed are not themselves party to the action and are not required to pay the other side's costs if the case is lost (although the representative body may be required to do so). Representative actions on behalf of named consumers are only allowed on a 'follow-on' basis rather than a 'stand-alone' basis. Thus, a representative action may only be brought in the Competition Appeal Tribunal where the OFT, a concurrent regulator or the European Commission has made an infringement decision. The representative action is brought on behalf of named consumers, that is, an 'opt-in' mechanism for joining to the action is in operation. A body seeking to bring a representative action before the Competition Appeal Tribunal must apply for authorisation to do so.

61. To date only one body has been authorised to bring proceedings under section 47B, namely, the Consumers Association (now Which?), and only one representative action has been brought in the Competition Appeal Tribunal (see Chapter 4, para 75).

62. Speaking at an antitrust conference in November 2008, the Head of Legal Services of Which? said that it was unlikely that it would bring any further actions under section 47B. Which? had devoted a considerable proportion of its resources to bringing the claim and had doubts about whether this was cost effective given the relatively small number of consumers who benefited from it, either directly or indirectly.

63. For this reason Which? is strongly in favour of an opt-out regime and the Head of Legal Services has expressed the opinion that as most representative bodies will be charities, there will always be concern about proportionality, from both a cost and time perspective, if an opt-in system prevails.

64. In April 2007 the Office of Fair Trading published a discussion paper in relation to proposals to make private competition law actions effective by introducing, or modifying, provisions for representative bodies.[22] The OFT paper enumerated 6 principles underpinning its proposals:

- consumers and businesses suffering from losses as a result of breaches of competition law should be able to recover compensation, both as claims for damages on a standalone basis as well as in follow on cases brought after public enforcement action
- responsible bodies which are representative of consumers and businesses should be allowed to bring private actions on behalf of those persons
- private competition law actions should exist alongside, and in harmony with, public enforcement
- any changes must be aimed at providing access to redress for those harmed by anti competitive behaviour, whilst at the same time, guarding against the development of a 'litigation culture', in particular the costs, diversion of management time and chilling effects that can arise for actual or threatened ill-founded litigation

[22] Office of Fair Trading (April 2007), *Private Actions in Competition Law: Effective Redress for Consumers and Business*

- processes and systems should facilitate effective ways of resolving private competition law actions, and to encourage settlement of cases without going to court or trial wherever possible, and
- the right balance should be struck between requiring defendants and others to disclose relevant materials to claimants, and ensuring that this process is not abused.[23]

65. Later in that same year, OFT published a Paper making recommendations to the Government on steps that should be taken to improve the effectiveness of redress for those who have been harmed by breaches of competition law.[24] It recommended, *inter alia,* that the Government should consult on the following issues:

- modifying existing procedures, or introducing new procedures, to allow representative bodies to bring stand alone and follow-on representative actions for damages and injunctions on behalf of consumers (named consumers and consumers at large)

- modifying existing procedures, or introducing new procedures, to allow representative bodies to bring stand alone and follow-on representative actions for damages and injunctions on behalf of businesses (named businesses and businesses at large).[25]

66. OFT noted that section 47B of the Competition Act 1998 only permits representative actions to be brought on a follow-on basis, that is, after an enforcement decision has been taken by a relevant authority. As the competition authorities have finite resources, this limits the situations in which consumers can seek redress. It would weaken the strength of the enforcement regime if competition authorities had to expend resources on investigating all cases where consumers may have been harmed. OFT has sought to optimise the impact of its enforcement role by focusing on high impact outcome rather than the number of investigations. There are, therefore, cases which the competition authorities do not pursue and which consumers would find difficult to pursue on an individual basis. In OFT's view, there would be clear benefits to allowing standalone actions of behalf of consumers. OFT acknowledged the availability of the GLOs, but considered that representative actions would have significant advantages as GLOs require consumers individually to issue claims (before common issues can be assessed). Also, GLOs often involve the cost of a test case being shared among individual litigants, thereby exposing them to the risk of an adverse finding in costs, with the result that a consumer may be reluctant to issue the first claim. Representative actions offer economies of scale and may be of particular benefit where the individual loss is small.

67. OFT was of the opinion that if representative actions on behalf of consumers and businesses were permitted, the features of the US civil justice system which are often associated with a 'litigation culture' are not present in the UK. First, in the US,

[23] *Ibid*, para 2.5
[24] Office of Fair Trading (November 2007), *Private Actions in Competition Law: Effective Redress for Consumers and Business*
[25] *Ibid*, para 1.2

a class action may be brought by one member of the entire class. A member of the class may be an individual with little interest in the litigation and with no cost exposure to the defendant if the claim fails. A representative action is an action brought by a designated body or a body given permission by the court. Only those bodies genuinely acting in the interest of consumers or businesses would be given standing. Second, in the US, treble damages are available. This is not the case in the UK where punitive damages may only be awarded in limited circumstances. Third, in the US the claimant is not liable for the defendant's costs, whereas the general rule is that costs follow success in the UK. Fourth, in the US, the claimant has the right to a jury trial and the jury decides on both liability and quantum. In the UK, however, civil competition cases are tried by a judge alone. The OFT also noted that in the UK the courts have wide case management powers and can strike out cases where these are without merit.

68. OFT observed that the potential for introducing an effective procedure was already in place in England and Wales, due to the strong case management powers available to the courts, for example, the power to strike out statements of case disclosing no reasonable grounds for bringing or defending the claim, as well as the power to apply a costs sanction. However, it advised that where appropriate, further safeguards may be introduced whereby the representative body need apply for permission to bring an action on behalf of consumers or businesses depending on whether it has already been authorised to act as a representative body. It advised that judicial supervision of funding arrangements and any settlement could also be considered.

69. In OFT's view opt-in and opt-out regimes could co-exist and it should be for the judge to decide, in the circumstance of each case but on the basis of "appropriately defined criteria and filters", whether given claims should be brought as a representative action on behalf of consumers/businesses at large (opt-out), as a representative actions on behalf of named consumers/businesses (opt-in), or as individual actions. It recommended that the Government consult on what procedures, criteria and filters should be required. OFT also recommended that a fair, efficient and cost effective system should be devised in order to calculate damages in the aggregate without the necessity to prove the individual loss suffered by each individual consumer or business. The court could be given the power to award damages on a restitutionary basis, that is, based on the benefits gained by the wrongdoer from the breach rather than on the loss suffered by consumers or businesses.

Representative actions: UK consumer protection cases

70. In 2004, the DTI consulted on the possibility of introducing representative actions as part of a raft of proposals setting out its consumer strategy.[26] The proposal

[26] Referred to in DTI (2006), *Representative Actions in Consumer Protection Legislation: Consultation*. As the DTI went on to note, consumer protection is a matter for Westminster in respect of England, Scotland and Wales, though is a transferred matter in relation to Northern Ireland. Any

was well supported by consumer groups and enforcement officers. However, there were concerns about the danger of unwittingly creating a compensation culture, putting good business at risk of inappropriate or spurious claims. In its consumer strategy, *A Fair Deal for All* (2005), the DTI endorsed the principle of permitting representative actions for breaches of consumer protection legislation.

71. In 2006, the DTI consulted on how that those policy objectives could be put into action.[27] While seeking to extend consumer access to justice, the DTI also suggested a number of safeguards that would avoid exposing business to spurious or vexatious claims, or unwittingly creating a compensation culture:

- Representative actions to be brought only by bodies designated by the Secretary of State

- Actions to be brought on behalf of named consumers who could demonstrate a loss and who wished to pursue a claim for damages, repair or replacement of faulty goods

- Permission would have be sought from the court prior to bringing the action

72. The DTI put the following questions out to consultation, at the same time as stating its own position (in italics below)

- Should representative actions be for consumers at large ('opt-out') or named consumers ('opt-in')?
  DTI's preferred option was for named consumers, with a view to avoiding the potential problem of companies paying damages to consumers 'at large' as well as individual consumers who have pursued private cases. It also provides the opportunity of offering replacement or repair of faulty products

- Should representative actions be brought only by designated bodies?
  DTI's preferred option was that only bodies designated by the Secretary of State should be able to bring representative actions. It proposed that bodies wishing to be designated should be of good reputation; have the ability to handle the case; and be able to demonstrate that they have the welfare of the consumer at the heart of their ethos.

- Should permission be sought from the court before bringing the case?
  This is to provide a filter to prevent weak or spurious claims proceeding. DTI doubted the need for a permission stage if only designated bodies are permitted to raise actions.

- What types of cases should be open to representative actions?
  DTI's preference was to limit the scope to 'business- to-consumer' infringements, and to limit them to cases where the facts of each case are straightforward and sufficiently similar

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policy with respect to consumer protection, therefore, is GB-wide, although implementation in Scotland is likely to differ due to the Scottish civil justice regime.

[27] *Ibid.*

73. The 2006 Consultation Paper also considered the different requirements that may be involved in introducing its proposals in Scotland. In the case of England and Wales, representative actions could take existing provisions (the 'representative rule') a step further by allowing a representative body to bring proceedings on behalf of a group of consumers where the body itself does not have a legal interest. DTI noted that there are nor procedures to formally manage group claims in Scotland. However, it observed that consumers are able to assign their rights of action to others. Therefore, introducing primary legislation to allow individuals to assign their rights of action to a suitably designated body and ensuring that the designated body has power to litigate on their behalf may be sufficient to allow such cases to proceed within current civil procedures in Scotland.

74. DTI did not propose that representative actions should be funded by the public purse but saw a role for consumer bodies or other similarly interested groups to do so. It suggested that there should be a clear agreement between the representative body and each consumer at the outset, explaining how damages would be distributed. Such an agreement might permit the representative body to retain a proportion of the winnings to cover administration and other costs.

75. A summary of responses to the DTI consultation was published in 2008 and is instructive.[28] Of the 60 responses received, business representatives generally opposed the proposals on the grounds that there was no evidence as to need. For some, indeed, representative actions constituted a first step towards American-style class actions and the blooming of a litigious culture. Consumer organisations and OFT supported the proposals, and suggested that for them to be effective, named and unnamed consumers should be joined to the action by an 'opt-out' mechanism. Trading standards authorities supported the proposals for representative actions in consumer cases but favoured named claimants, joining via an 'opt-in' mechanism. Finally, legal firms and lawyers were divided as to whether there was a need for representative actions. There is no information as to whether their positions reflected the nature of their firms, for example, whether they were from mainly claimant or defendant firms).

76. While the majority of respondents favoured a permission stage to avoid inappropriate cases and to provide an opportunity for case management, some were concerned that a permission stage may be redundant and unnecessarily costly, particularly if representative actions were to be brought only by designated bodies.

77. One of the main purposes of the consultation had been to identify what 'real-life' cases would benefit from being taken on by designated organisations. Though consumer groups and enforcement representatives, including Trading Standards, provided some examples of possible cases, the Government concluded that more work was needed to examine the evidence base, partly because respondents frequently stated that the evidence was lacking and partly because there had been

[28] Department for Business Enterprise and Regulatory Reform (2008), *Representative Actions in Consumer Protection Regulation: Responses to the Government Consultation*

policy developments since the initial consultation in 2005. For example, the Macrory Review[29] had considered more informal mechanisms for redress, such as restorative justice, by encouraging companies that had infringed regulations to determine together with those most directly affected by a wrongdoing what needed to be done to repair the harm.

78. Recent discussions concerning procedures to deal with multi-party actions have been conducted under the new discourse of 'collective redress'. This may be seen as indicative of the growing movement over the most recent past towards a complete overhaul of the system, rather than piece-meal reform around what is currently available. It also indicates the movement to see litigation as one of several options, including restorative justice, or as a 'last resort' under the superiority principle. Commentators, however, vary significantly as to the direction that this overhaul should take.

79. Pressure towards making a comprehensive overhaul has been on two fronts: from the Civil Justice Council and at the European level, where the European Commission has indicated that there is a pressing need to introduce better and more efficient redress mechanisms for consumers.

The Civil Justice Council (CJC)

80. The CJC has taken a great interest in the issue. In 2006, the CJC conducted a Chatham House forum, attended by a broad range of stakeholders (judiciary, academics, claimant and defendant lawyers, Government officials, consumer and advice representatives), which looked at whether there should be reform, either in process or funding. It concluded, *inter alia*, that:

- current group litigation procedure (GLO) worked well, but could be improved
- an opt-out procedure was appropriate in consumer claims, on grounds that consumers are "ill-informed", "incapable of running claims", and "completely frightened of conventional court process". It may also be possible to start claims much earlier under an opt-out system, thus preventing further damage
- the judiciary should take a more pro-active role in controlling and managing multi- party litigation

[29] Richard Macrory (November 2006) *Regulatory Justice: Making Sanctions Effective*, *Final Report*, Better Regulation Executive: Cabinet Office. Macrory examined the main reasons why businesses were not compliant with regulations, and made recommendations to ensure that regulators had access to a flexible set of modern 'fit for purpose' sanctioning tools consistent with the risk based approach to enforcement. Only one of his nine main recommendations was with regard to restorative justice. Some of his recommendations have already been taken forward by the Regulatory Enforcement and Sanctions Act 2008.

81 A further three stakeholder events were held in 2007 and 2008 to consider: evidence of need; the legal and legislative changes that may be required to address those needs; and the first draft of the CJC report.[30]

82. Research was also conducted by Rachael Mulheron[31] which informed the deliberations of the CJC and its final report. Mulheron's research was undertaken to examine whether there was a need to supplement the existing procedural devices available to claimants in England and Wales. By the time that her research was completed (in 2007), 62 actions (mainly for alleged care home abuses and environmental claims) had been raised under the GLO regime since its introduction in 2000, which itself indicated a demand for the new provisions for collective redress. However, she found participation rates were highly variable, from very low percentages to almost all of the group members opting to participate in the litigation. However, the typical participation rate was less that 30%. Many reasons were given to explain this, not least the task of identifying all group members at the outset of 'opt-in' litigation, the low value recoveries per group member and the disinclination of some potential members to 'opt-in' for fear of losing the goodwill of defendants with whom they were in an on-going relationship. Indeed, legal practitioners enumerated more than twenty 'barriers to litigation', that is, reasons why group members failed to join the class at the outset of the action.

83. In Mulheron's view, this has had an impact on the number of actions brought under the Group Litigation Order regime, and notes that far fewer disputes have been handled than under 'opt-out' collective redress regimes in, for example, Australia and Ontario over the same period. It has had an impact on the number of actions brought under the specialist regime for representative actions which was introduced with regard to competition claims, with only one action having been raised. Empirical data from the United States and Victoria confirm that the rates of participation under opt-out regimes are very high (more than 87%). The European experience where opt-in is used for consumer claims, by contrast, is that there have been instances where less than 1% of potential members were caught in the litigation net in litigations where class sizes were very large.

84. In Mulheron's view, evidence of a need for new provisions in England and Wales is conclusive. Her chief recommendation is the introduction of provisions for opt-out mechanisms in respect of a generic 'build the field and they will come' type regime, which covers all types of scenarios giving rise to collective actions. The research and her recommendations were submitted to the Civil Justice Council.

85. The Civil Justice Council made a series of recommendations to the Lord Chancellor in November 2008. Its final report, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Action,* built upon its own review of alternative funding mechanisms, [32] as well as Mulheron's research findings.

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[30] Civil Justice Council (2008), *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Action*
[31] R Mulheron (2008), *op cit*
[32] Civil Justice Council (2007), *The Future Funding of Litigation – Alternative Funding Structures*

Improving Access to Justice through Collective Actions: Key Assumptions

86. The report, findings and recommendations to the Lord Chancellor were based on some important key assumptions:

- It is unrealistic to expect the Government to provide the funds to enable a new method of resolving collective claims outside the civil process
- Ombudsman or Regulatory Systems are not primarily suited to resolve the very wide range of detriment that can give rise to the need for large scale remedial action
- Private enforcement is to be preferred to state funded regulatory intervention due to the differing primary aims of private enforcement and regulation
- Collective action reform is consistent with the Government's policy statements supportive of collective private action and is in addition desirable in the light of European policy which is focused on improving collective redress for consumers.

87. It should be noted that these assumptions may not be universally held. Nevertheless, individuals are now being encouraged by the government and by consumer groups to take private enforcement action following the findings of regulators where a business has been found guilty of anti-competitive actions. The European Commission is likewise encouraging private actions to be brought on the back of the findings of regulators.

Improving Access to Justice through Collective Actions: Key Findings

88. The Civil Justice Council reported its key findings, as follows:

- Existing procedure does not provide sufficient or effective access to justice for a wide range of citizens (particularly, though not exclusively, consumers, small business, employees wishing to bring collective or multi-party actions)
- Existing collective actions are effective in part, but could be improved considerably to promote better enforcement of citizens' rights, whilst protecting defendants from unmeritorious litigation
- There is overwhelming evidence that some meritorious claims are not being pursued (and that need has been established)
- Meritorious claims could fairly be brought with greater efficiency and effectiveness on a collective rather than unitary basis
- Effective collective actions promote competition and market efficiency, as well as uphold individual rights
- Collective claims can also benefit defendants by resolving disputes more economically and efficiently, with greater conclusive certainty than can arise through unitary claims
- The court is the most appropriate body to ensure that any new collective procedure is fairly balanced between claimants and defendants

- The proposed new collective procedure should apply to all civil claims which affect multiple parties. There should be no presumption as to whether collective actions should be litigated on an opt-in or opt-out basis. The court should decide which mechanism is the most appropriate for any particular action, taking into account all the relevant circumstances

CJC: Key Recommendations for collective redress procedures

89. The Civil Justice Council proposed a new generic procedure, under "an enhanced form of case management by specialist judges", that should apply to all civil claims which affect multiple claimants.

90. This generic procedure would allow a broad range of representatives – individuals and organisations - to bring collective actions on an 'opt-in' or 'opt-out' basis, depending on the circumstances of the case and at the discretion of the court. The procedure could be extended to tribunals such as the Competition Appeal Tribunal or employment tribunals.

91. The core elements of the generic procedure are as follows:

- Collective claims may be brought by a wider range of representative bodies than the designated bodies presently allowed and would include: individual representative claimants or defendants; designated bodies; ad hoc bodies, as well as authorised bodies such as consumer watchdogs
- Collective claims may be brought on an opt-out basis as well as an opt-in basis, subject to certification by the court
- Where an action is brought on either an opt-in or opt-out basis the limitation period for class members should be suspended. Consequential changes to the law of limitations will therefore be required
- No collective claim is to be permitted to proceed unless it is certified by the court as suitable for proceeding as a collective claim. The CJC views certification as an "absolutely mandatory element of any collective action" and recommends that this takes place as early as possible in the litigation. The court is to have wide ranging powers at this stage, such as granting representative status to a party, setting the minimum number of identifiable claimants; and establishing that there is sufficient commonality of interest and remedy within the group
- To protect the interests of the represented class of claimants any settlement agreed between the representative claimants and the defendants must be approved by the court within a 'Fairness Hearing', before it can bind the represented class of claimants.
- Appeals from either positive certification, or its refusal, should be subject to current rules of permission to appeal from case management decisions. All other appeals brought within collective action proceedings are to be subject to the normal appeal rules. Class members may seek to appeal final judgments and settlement approvals.

- Collective claims should be subject to an enhanced form of case management by specialist judges, covering all aspects of the claim and entitling the court to provide guidance in all procedural and evidential aspects of the case.
- Where the case is brought on an opt-in or opt-out basis, the court should have the power to aggregate damages in an appropriate case.
- There should be full costs shifting, as a deterrent against speculative, vexatious or so-called blackmail litigation.
- There should be changes to the law to permit the award of aggregate damages, so as to avoid the need for claimants to prove individual loss. Unallocated damages from an aggregate award would be distributed by a trustee of the award according to general trust law principles (i.e. cy pres distribution).

92. The report also includes detailed draft procedural rules, draft practice direction and proposals for funding, while setting out the areas that require primary legislation.

93. Most importantly, the rules make provision for safeguards in order to control potential abuse. These include what is described as a rigorous certification process requiring the representative party to satisfy the court that:

- The claim can be brought in a way that furthers the overriding objective
- The representative party has the standing and the ability to represent the interests of the class of consumer claimants both properly and adequately
- The claim is not merely justiciable (discloses a genuine cause of action) but has legal merit i.e. certification requires the court to conduct a preliminary merits test
- There is a minimum number of identifiable claimants
- There is sufficient commonality of interest and remedy
- There is a reasonable expectation that the claimants will recover an acceptable proportion of their claim, if the claim is successful
- Collective proceedings are the most appropriate legal vehicle to resolve the consumer issues, i.e. it is a superior redress mechanism than, for instance, either pursuing the claim on a traditional, unitary, basis through the civil courts or a specialist tribunal or alternatively, through pursuit of compensatory remedy via regulatory action where that is available and where it is able to deliver effective access to justice
- The parties have reasonably considered alternative forms of resolution.
- Any funding arrangement is fair as between the parties

94. CJC's recommendations were considered by the Ministry of Justice, which responded in July 2009.[33] Its response is contained in the main text of Chapter 4.

[33] Ministry of Justice (2009), *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'*

D FUNDING

95. One of main issues concerning the introduction of new provisions for collective redress is how different procedures may be funded.

96. The Scottish Consumer Council (1982) recommended the creation of a Class Actions Fund to finance class actions.[34] This was not supported by the Scottish Law Commission (1996),[35] which argued that funding for class actions should be dealt with by the Scottish Legal Aid Board.

97. More recently, the Justice 1 Committee of Scottish Parliament was of the view that "there may be a case to extend the scope of legal aid to incorporate collective action, organisations and representative bodies" (Legal Aid Inquiry: 8th Report 2001). It went on to recommend that the Scottish Executive should examine how access to legal aid could be made available to support a variety of collective actions, organisations and representative bodies.

98. In its *Strategic Review on the Delivery of Legal Aid, Advice and Information*, the Scottish Executive (2004) made a number of observations, but no new proposals. It noted that a factor "common to a number of funding bodies may be a desire to support cases whose outcomes are of wider significance beyond the individual whose case it is. A wider public interest may be served where such a case is likely to establish an important precedent that would affect a wider group. This may either be so where there are other, already existing similar cases which may not need to be heard and could be settled once this case is decided, or might be the case where the outcome would have the effect of clarifying the law for people who may at a later point face a similar situation." It suggested that where a case had a significant wider interest, lower thresholds may be applied to the reasonableness test. It may even mean that it was reasonable to grant legal aid where the cost to the taxpayer is likely to outweigh the benefit to an individual applicant.[36] In short, the Scottish Executive proposed that the reasonableness rule be relaxed on 'access to justice' grounds where a single case may be in the interest of many.

99. The Scottish Executive also considered the notion of 'reasonableness' with respect to efficient allocation of legal aid funds. It advised that it in cases where a large number of potential litigants apply for legal aid in similar cases, it might not be reasonable to allow all cases to proceed separately, even though the statutory tests may be satisfied in each individual case. Instead, it may be considered more reasonable (and appropriate) for the common issues, for example liability, to be determined by the court considering a single or small number of (test) case(s). Thus instead of a commitment to meet the costs of a whole series of cases, the expense of fees for solicitors, counsel and also perhaps several costly experts can be contained in a single case. This investment in one case may then result in either settlements for

[34] SCC (1982), *op. cit*
[35] SLC (1996), *op. cit*
[36] Scottish Executive (2004), *Strategic Review on the Delivery of Legal Aid*, *Advice and Information: Report to Ministers and the Scottish Legal Aid Board*, 4.29-4.30

the other affected parties without the need for further expensive litigation or, if the initial case is unsuccessful, actions being dropped at no further cost to the public purse.[37]

100. In 2003, SCC (2003) observed that there was still merit to its 1982 proposal for a Class Actions Fund with relation to class actions, since not all those involved in a class action will qualify for legal aid.[38] As far as representative actions were concerned, different issues were raised. SCC noted that if public bodies are to litigate in the public interest, difficulties associated with the funding of multi-party actions will be addressed, by default, by public funding. However, SCC pointed out that designated bodies may be private organisations and they, too, could be taking action in the public interest. If normal legal expenses rules are to apply, there will be little incentive for designated organisations to become involved. It argued that some financial incentive is therefore needed, such as treble damages available in American anti-trust law or some enhancement of the legal expenses normally awarded to a successful party, to make it feasible for designated organisations to take on the task. SCC was therefore of the view that there was a strong case for making funds available from the public purse to non-public designated bodies that raise actions in the public interest. In support, it referred to the recent (2001) recommendation made by Justice 1 Committee to consider how legal aid might be available for actions by organisations and representative bodies. SCC urged that a full assessment of the various funding options be undertaken, both with respect to class actions and representative actions by designated bodies.

101. In its joint response to the 2006 DTI consultation,[39] the National Consumer Council and Scottish Consumer Council criticised the DTI consultation for not exploring issues around the funding of representative organisations, without which there is likely to be little incentive for them to become involved in representative actions. Just as for individuals, NCC/SCC were strongly of the view that there was an 'access to justice' issue for organisations. Amongst other things, NCC/SCC proposed legal aid for non-profit consumer organisations, given the strong public interest value of the claims that they would be likely to deal with. They also wanted government assurance that publicly funded consumer bodies would be allowed to fund cases from their own budgets.

102. In England and Wales the Legal Services Commission (LSC) may grant funding for cases which have a public interest element. There is a dedicated panel (the Public Interest Advisory Panel) which is charged with reviewing applications for funding on this basis. Applications which satisfy the threshold of demonstrating a significant public interest are categorised as 'significant', 'high' and 'exceptional'. While such cases are means tested, they are subject to a less stringent cost benefit test.

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[37] *Ibid*, 4.32

[38] SCC (2003), *op. cit.* It should be noted that there have been substantial changes to the financial eligibility criteria since SCC reported in 2003.

[39] Department for Business Enterprise and Regulatory Reform (2008), *op .cit*

103. The LSC guidance assumes that most multi-party actions will automatically be able to demonstrate a wider public interest. However, the LSC appears to be taking a tougher line on public funding now, for example, in actions relating to MMR and Gulf War Syndrome. Until recently, the LSC undertook to fund the research that was required to investigate the basis of the claim. After some high cost litigation, however, the LSC now appears to be reluctant to fund actions requiring further or innovative research to prove causation, and as of 2008, was limiting funding for multi-party litigation to £3m per year."[40] Without public funding for the necessary, and very frequently, expensive preparatory work, it is unlikely that multi-party actions of this type can be raised. This is reflected in the number of legally aided multi-party actions raised in England and Wales between 2000-1 and 2006-7, which dropped from 133 in 2000-1 to just 4 cases in 2006-7.[41]

104. Since 2000, when the *Access to Justice Act 1999* came into effect, funding for personal injury claims in England and Wales has been available mainly under conditional fee agreements. The CFA regime may have worked well for straightforward claims, where the merits and quantum can be assessed with relative ease. This is in contrast, however, to the complexity of multi-party actions, both with respect to the issues themselves and their administration and management. Moreover, After the Event (ATE) insurance, which has been used in the CFA regime to cover defendants' costs under the 'loser pays' rule, is both difficult to arrange for multi-party actions and may be prohibitively expensive.

105. There has been a move towards the serious consideration of contingency funding in England and Wales, both for civil litigation in general and multi-party actions in particular. In 2005, the Civil Justice Council (CJC) examined the role of contingency fees in civil litigation, as part of its investigation into alternative funding structures. While it did not recommend the blanket introduction of contingency fees in contentious business, it recommended that contingency fees should be permitted (albeit subject to proper court control) to provide access to justice as a means of funding group actions where neither legal aid nor any other form of funding was available, that is, as a last resort.[42]

106. In 2006, the Chatham House forum organized by the CJC concluded, *inter alia,* that:

- funding was the greatest barrier to bringing legitimate multi-party consumer redress claims
- proposals for alternative funding systems that would take a percentage of the damages were widely accepted

[40] J Robins (2008), 'Group litigation: the coming of class actions?' *Law Society Gazette*, 11 Dec. 2008 According to Robins, this followed the failure of the benzodiazepine tranquiliser cases, which "*drained £30m of taxpayers' money without seeing the inside of a courtroom"*
[41] R Mulheron (2008), *op. cit.*
[42] Civil Justice Council (2005), *Improved Access to Justice-Funding Options and Proportionate Costs*

107. In its second report on alternative funding structures,[43] the CJC again recommended that contingency fees should be permitted in multi-party actions, and made its case on several grounds:

- that there is a growing interest in the area of consumer rights in multi-party claims;
- that the European Court of Justice has ruled that member states should provide detailed rules for bringing damages actions in claims for infringements of anti trust rules;
- that DTI (2006) has observed that many consumers are unable to bring a claim to court since the size of their losses is outweighed by potentially high legal costs;
- that the UK Government (Budget speech: March 2007) has referred to private actions as an important aspect of a well functioning competition regime, has welcomed the progress that OFT had made on this issue and has pledged that it will continue to work with OFT to identify key barriers to private actions;
- that the CFA/ATE regime may not be sustainable; and that properly regulated contingency fees should reduce satellite litigation, thereby leading to savings for parties and in the resources spent on the court's role in resolving costs disputes in the administration of the court;
- and that contingency fee funding would introduce a system which was transparent for clients in consumer actions.

108. The CJC made the following recommendations in relation to funding:

1. A Supplementary Legal Aid Scheme should be established and operated by the Legal Services Commission. A self-funding mechanism could be introduced whereby, if a case was won, costs would be recovered and an additional sum would be payable to the fund by means of a levy to be paid as a percentage of damages recovered, or out of recovered costs. It would also offer protection to parties from adverse costs if a case was lost.

2. Third Party funding should be recognized as an acceptable option for mainstream litigation, with rules of court to ensure that there are effective controls over the conduct of litigation where third parties provide the funding.

3. Contingency funding should be permitted, though subject to regulation, where no other form of funding is available for multi-party actions.

[43] Civil Justice Council (2007), *The Future Funding of Litigation-Alternative Funding Structures*

109. In its April 2007 discussion paper, OFT argued that a more effective private action system was needed to promote a greater culture of compliance with competition law and to ensure that public enforcement and private actions worked together in the interests of both business and consumers. In OFT's view, however, consumer rights were insufficiently protected since potential exposure to litigation costs could act as a major disincentive to the bringing of well-founded private competition law actions.[44]

110. In its subsequent report of November 2007, OFT, concluded that new methods of funding be introduced for representative actions, on the grounds that:

- the public interest dimension in representative actions was generally greater than in individual cases;
- representative actions provide access to justice for a range of persons who have been harmed in the same way;
- representative actions are novel and require activity over and above what is normally required in competition cases, and particularly at the pre-action stage;
- that current CFA arrangements are frequently inadequate in cases of this kind;
- currently, the unavailability of CFAs and/or third party funding may result in well founded claims not being brought.[45]

111. OFT made the following recommendations:

- In relation to CFAs, a percentage increase of more than 100% may be justified in certain competition law cases. There should be judicial supervision of the funding arrangements in representative actions
- The Government should consult on introducing measures to codify, or in Scotland, introduce, a discretion for the courts to cap parties' costs in competition cases. In some cases, and representative actions in particular, it may be appropriate to cap the claimant's liability for the defendant's costs at zero, thereby giving the claimant full cost protection in appropriate cases. In OFT's view, these proposals could be confined to representative actions, since they have a greater public interest dimension "and the counterfactual is often that no action is brought at all."
- Third party funding is an important source of funding and should be permitted subject to judicial supervision

[44] OFT (April 2007), *Private Actions in Competition Law: Effective Redress for Consumers and Business: Discussion Paper*. OFT cited Ashurst (2004), *Study on the conditions of claims for damages in case of infringement of EC competition rules*, a research report commissioned by the EU for empirical support for its conclusions.
http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.
[45] OFT (Nov 2007), *Private Actions in Competition Law: Effective Redress for Consumers and Business: Recommendations*

- A merits-based litigation fund should be established. The fund would intervene where funding on a commercial basis was not available, for example, through CFAs or third party funding.

112. This is in line with proposals put forward by the CJC (June 2007).[46] OFT envisions that the fund could finance a number of cases needed to develop a solid basis of case law, which would then provide a clear framework for obtaining redress though settlement. OFT recommends that the government consults on a number of complex issues, such as who should administer the fund, whether the fund should have costs protection, and the ways in which the fund could be rewarded (for instance, through a claim to a share of the other party's costs, a share of the damages recovered, a multiple of the funding provided or a percentage increase on the damages paid by defendants).

113. The Civil Justice Council's latest view on contingency funding was published in its major report on funding options and proportionate costs.[47] It recommends contingency funding, but only in multi-party actions and other complex cases, where it will assist access to justice and where no other funding is available:

> "In contentious business cases where contingency fees are currently disallowed, American style contingency fees requiring abolition of the fee shifting rule should not be introduced. However, consideration should be given to the introduction of contingency fees on a regulated basis to assist access to justice in group actions and other complex cases where no other method of funding is available".

114. Support for the introduction of contingency funding has recently come from one of the foremost civil law commentators in England and Wales, partly on the grounds of its greater transparency for clients.[48] It has likewise found support in Scotland, where Consumer Focus Scotland has called for serious consideration of contingency funding, (see, for example the response of Scottish Consumer Council to the Consultation Paper of the Scottish Courts Review, available on Scottish Court Service website).

[46] Civil Justice Council (2007), *op. cit*
[47] Civil Justice Council (2009), *Access to Justice: Funding Options and Proportionate Costs*
[48] See, for example, M Zander (2002) 'Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?' *DePaul Law Review*, *52*

ANNEX TO CHAPTER 14 THE COST AND FUNDING OF LITIGATION

Judicial Expenses in Other Jurisdictions

England & Wales

The Woolf Report

1. In his interim report Lord Woolf stated that; "The problem of cost is the most serious problem besetting our litigation system." In his final report he identified a number of objectives in relation to costs:

(a) reduce the scale of costs by controlling what is required of the parties in the conduct of proceedings;
(b) make the amount of costs more predictable;
(c) make costs more proportionate to the nature of the dispute;
(d) make the courts' powers to make orders as to costs a more effective incentive for responsible behaviour and a more compelling deterrent against unreasonable behaviour;
(e) provide litigants with more information as to costs so that they can exercise greater control of the expenses which are incurred by their lawyers on their behalf.

2. Specifically, he proposed a system of fixed costs for fast track cases:

(1) There should be a regime of fixed recoverable costs for fast track cases.
(2) The guideline maximum legal costs on the fast track should be £2,500, excluding VAT and disbursements.
(3) The costs payable by a client to his own solicitor should be limited to the level of the fixed costs plus disbursements unless there is a written agreement between the client and his solicitor which sets out clearly the different terms.
(4) The costs regime should reflect case value in two bands; up to £5,000 and up to £10,000. There should be two levels of costs within each value band, one for straightforward cases and the other for cases requiring additional work.
(5) The fixed costs should be divided into tranches relating to the stage the case reaches.
(6) There should be a fixed advocacy fee for each band payable in cases which go to trial whether the advocate is a solicitor or a barrister. A cancellation fee should be payable to the advocate to cover work undertaken on cases which settle shortly before trial.
(7) The Law Society's rule of conduct requiring a solicitor to attend trial with counsel except in specified circumstances should be revoked.
(8) The costs of interlocutory hearings, applications for interim injunctions and hearings for the court to approve a settlement should be additional to the fixed costs.

(9) The indemnity principle should be modified so that the costs recoverable are the fixed costs.

(10) There should be further detailed work to establish the levels of the fixed costs, standard fees for experts' reports and an appropriate fee for defended debt cases.

(11) The levels of the fixed costs should be reviewed each year, and the general operation of the fixed costs regime should be reviewed every three years by a committee reporting to the Lord Chancellor through the Civil Justice Council.

3. Lord Woolf was of the view that, for low value cases, a fixed costs regime was the only way of addressing the problems of proportionality and predictability. His proposals on costs were not, however, fully implemented although a fixed fee for both solicitors and counsel was introduced for the trial diet in fast track cases. The Woolf recommendations were, to a degree, overtaken by the abolition of legal aid for personal injury cases and the introduction of conditional fees and the recoverability of success fees and ATE premiums.

Fixed Costs and Fixed Success Fees

4. The Civil Justice Council (CJC) has been involved in a number of initiatives concerned with the principles of proportionality and predictability in relation to costs. The first of these to be adopted was a regime for road traffic accident (RTA) claims.

Road Traffic Accident Claims

5. The position is governed by Section II of Part 45 of the Civil Procedure Rules, which prescribes fees according to the value of the claim. This Rule only applies to cases which settle prior to litigation and in which the value exceeds the small claims track (£1,000 for PI cases), but is less than £10,000 and in which the only issue is one of costs ('costs only proceedings'). The Rule provides for recovery of a fixed fee, certain defined disbursements, and a success fee.

6. The *fixed recoverable* costs are £800 plus 20% of the sum agreed up to £5,000 and 15% of the sum agreed between £5,000 and £10,000. Where a claimant has entered into a CFA he may recover a success fee of 12.5% of the fixed recoverable costs.

7. The court may award a sum in excess of the fixed recoverable costs only in exceptional circumstances.

8. Section III of Part 45 makes provision for fixed percentage increases in fees for those RTA cases which are litigated or which settle before a claim is issued (but which are not costs only proceedings within the meaning of section II) and in which the claimant has entered into a CFA which provides for a success fee.

9. The percentage increase for solicitors' fees is 100% where a case is concluded at trial and 12.5% if the case concludes before trial or if the case settles before a claim is issued.

10. The percentage increase for counsel's fees is 100% where the case is concluded at trial; for fast track cases, 50% where the case concludes 14 days or less before the trial date and 12.5% if settled before then; for multi track cases, 75% where the case concludes 14 days or less before the trial date or 12.5% if settled before then.

11. Application may be made for an increase in those rates where the case is worth more than £500,000 discounting any allowance made for contributory negligence.

Employers Liability claims

12. Section IV of CPR 45 provides for fixed success fees in employers' liability cases in which the claimant has entered into a CFA. The section does not apply to accidents prior to 1 October 2004, to RTAs or to disease cases. The general rule is that an uplift of 25% will apply to solicitors' and counsel's fees (or 27.5% in a case in which a membership organisation has undertaken to meet the claimant's liabilities in costs in terms of section 30 of the Access to Justice Act 1999, i.e. cases funded by trade unions).

13. Section V applies to fixed recoverable success fees for claims in relation to occupational diseases. It does not apply to claims intimated prior to 1 October 2005. The percentage uplift is related to the category of disease: Type A, claims relating to asbestos; Type B, psychiatric injury and work related upper limb disorders; and Type C, other types of disease.

14. Where the claim concludes at trial the percentage increase for solicitors' fees is 100%. Where the case settles at an earlier stage the relevant percentages are: for type A claims 27.5% (30% for membership organisation cases); for type B claims 100%; for type C claims 62.5% (70% for membership organisation cases).

15. The percentage uplift for counsel's fees depends on the type of case and the stage at which settlement is reached and is set out in tables in Section V of the Rule.

16. Application may be made for an increase in those rates where the case is worth more than £250,000 discounting any allowance made for contributory negligence.

Cases to which the fixed/predictable costs regimes do not apply

17. The normal rules in relation to costs are applicable to other types of case. The general principles are set out in Part 44 of the Civil Procedure Rules. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party although the court may make a different order. Costs are assessed on the standard basis or on the indemnity basis although costs which are unreasonable in amount or which have been unreasonably incurred will not be allowed.

18. Where costs are assessed on the standard basis they must be proportionate to the matters in issue. Any doubt in relation to whether costs have been reasonably incurred or are reasonable or proportionate will be resolved in favour of the paying party. Where costs are assessed on the indemnity basis the court will resolve any doubt whether costs were incurred reasonably or were reasonable in favour of the receiving party.

19. There are special rules for small claims and fast track cases.

Assessment of costs

20. Where the court makes an order requiring a party to pay costs (other than a case involving fixed costs) it will make a summary assessment itself or make an order for a detailed assessment to be carried out by a costs officer. 'Costs officer' means a district or costs judge or an authorised court officer. The Supreme Courts Costs Office (SCCO) produces a guide to the rules and practice directions on costs.

21. In cases which proceed to a detailed assessment either party may make an offer to settle the claim for costs which is expressed to be "without prejudice, save as to the costs of the detailed assessment proceedings". An offer can relate to any issue in dispute between the parties. According to the SCCO guide paying parties should normally make an offer within 14 days after service of proceedings. Receiving parties should normally make their offers to pay within 14 days after service of the points of dispute. Offers made after these times are likely to be given less weight unless there are good reasons for the offer not having been made earlier.

22. If the court decides that an offer to settle made by the paying party ought to have been accepted by the receiving party the court may disallow the receiving party the whole or part of the costs of the detailed assessment (these would normally be awarded to the receiving party) or may award the costs of the detailed assessment to the paying party who made the offer.

Expert fees for medical reports

23. On 9 May 2007 ten major insurance companies and eight major medical reporting agencies signed an agreement regarding capped costs for obtaining medical reports (GP's records, orthopaedic consultants and A&E consultants) for most PI cases under £15,000 in value. A number of other insurance and medical

reporting agencies have now acceded to the agreement. In its 2007 Annual Report the CJC expressed the hope that this agreement would pave the way for further consensus on predictable medical report fees.

Proposals for Reform

24. In its report *Improved Access to Justice — Funding Options and Proportionate Cost* (2005), the CJC made a number of recommendations for reform. These included:

- The starting point for recovery of costs for PI cases below £5,000 should remain at £1,000.
- The fast track limit for PI cases should be increased to £25,000.
- The predictable costs scheme (CPR Part 45 Section II) should be extended to all PI claims in the fast track and should include fixed costs from the pre action protocol stage through to trial with an escape route for exceptional cases. Fixed success fees, fixed/guideline ATE premiums and fixed/guideline disbursements should also be part of the scheme.
- For RTA claims worth less than £10,000 there should be a presumption that the claimant will obtain a GP report at a fixed fee; a tariff database for general damages (solatium) should be developed; there should be standard forms and fixed fees for police reports; and priority should be given to rehabilitation in accordance with the Code agreed between APIL/ABI.
- Strengthening the court's powers in relation to costs estimates.
- Measures related to budgeting and cost capping.
- Benchmark costs for pre action protocol work in multi track cases.
- Alternative funding options should be considered where ATE is not available.
- Regulated contingency fees should be considered where no other funding is available.
- Costs capping orders, particularly in public law cases.
- Third party funding as a last resort.
- Encouragement of BTE.
- Between parties costs should be payable on the basis of costs and disbursements reasonably and proportionately incurred, which should be assessed at hourly rates determined from time to time by a Costs Council.
- Regulation of claims companies.

25. The CJC were of the view that there were some gaps in the predictable costs regime for RTA cases and the agreed success fees for certain categories of PI claims that should be filled in order to provide a complete framework of proportionate and predictable fees. The gaps were:

- Predictable costs for RTA claims below £10,000 for work done between conclusion of the PAP and trial.
- Predictable costs for RTA cases above £10,000.
- Fixed fees for medical and police reports in RTA cases below £10,000.

- Reduction of transactional costs in RTA cases below £10,000.
- Predictable costs for all non RTA cases to complement the success fees already agreed.
- Agreement on fixed or predictable ATE premiums in all fast track PI claims.

26. Appendix A to the report contains a detailed description of the costs regimes in Australia, Canada, New Zealand, the USA, Germany, Sweden, France, Japan, and the European Court of Justice.

27. The CJC's proposal to establish a Cost Council which would have responsibility for setting fixed and predictable costs was not taken up by the Ministry of Justice. In its 2006 Annual Report the CJC said:

> "having achieved five predictable costs agreements, and with the prospect of more to follow to complete the programme, the CJC has been considering how these predictable costs may best be kept under review. One of the early criticisms of fixed costs rules was that once they were made into law, their uprating was nearly always ignored. The CJC has completed a review of the first predictable costs agreement, but it is apparent that it is not feasible to re-negotiate the figures. The CJC has recommended to the Lord Chancellor the establishment of a Costs Council. This independent body will conduct thorough economic analysis of litigation rates and make recommendations for their timely revision. A Costs Council would also address the concerns of the OFT on the collection of information to inform guideline hourly rates."

28. In their 2007 Annual Report the CJC record:

> "disappointingly the CJC recommendation for a Costs Council, with a remit going beyond the review of hourly rates and as an independent body including stakeholder membership, was not accepted by the MoJ that has instead established an internal costs advisory committee which appears to have a narrow remit. The CJC and its costs committee will therefore continue to maintain responsibility for keeping access to justice policy issues under review in the area of funding and proportionality."

29. In March 2007 an academic study of the predictable costs regime by Professor Paul Fenn was published. It concluded that costs had reduced as a result of the scheme although there was evidence that a minority of firms had issued proceedings to escape from the scheme.

30. The CJC Annual Report for 2007 states that predictable costs will continue to be rolled out for ATE, medical exert reports, public liability claims and post issue injury claims.

31. In April 2007 the Ministry of Justice issued a Consultation Paper on *Case Track Limits and the claims process for PI claims*. An analysis of the responses and the Government's proposals was published in July 2008. The Government accepted that the small claims limit for PI cases should remain at £1,000, as should the limit for

housing disrepair cases. It also concluded that the general small claims limit should remain at £5,000. More controversially, the Government decided that the fast track limit should be raised from £15,000 to £25,000.

32. So far as reforms to the claims process are concerned, the Government withdrew its proposal that ATE premiums should not be recoverable in respect of pre litigation work. It has been argued by respondents that this cover was necessary to fund pre litigation investigation and quantification of claims.

33. The new streamlined procedure which will be conducted to a strict timetable will only apply to claims with a value of less than £10,000. It will not apply to claims for clinical negligence (which apart from private treatment, are covered in England & Wales by the NHS Redress Act 2006), nor to occupational disease or environmental liability or product liability claims.

34. The claims procedure does not apply where liability/causation are in dispute or where contributory negligence is in issue.

35. The Ministry of Justice set up an Advisory Committee on Civil Costs rather than the Costs Council recommended by the CJC. The Committee will make recommendations in relation to a system of fixed recoverable costs.

36. The Government accepted that it would not be practicable to introduce a database for the assessment of general damages (solatium). The issue is however still a live one. In Chapter 28 of his Preliminary Report Lord Justice Jackson discusses the whether the assessment of general damages for personal injuries could be made simpler and more predictable in lower value cases. He invites comments on whether a judicially-approved points-based software system for assessing general damages in personal injury claims falling within the small claims track and fast track (i.e. all claims up to £25,000) might be developed; whether such a system might reduce the risks of under-settlement; and whether it might help to reduce the cost of handling lower value PI claims.

37. Where damages cannot be agreed there will be a simplified procedure before the district judge which could, with the consent of the parties, be determined on paper. Further work will be done on how the Part 36 regime (offers to settle) can be adapted to the new process.

Ireland

38. In Ireland, as in Scotland, the normal rule is that costs follow success. There is a distinction between party and party costs and solicitor and client costs: the former is defined as such costs as are necessary and proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. On taxation of costs as between solicitor and client all cost are allowed except those which are of an unreasonable amount or have been unreasonably incurred.

39. There is a schedule of fees chargeable for contentious matters set out in Annex W to the Rules of the Superior Courts which lists 81 items and a prescribed fee for all but 10 of them. In addition a solicitor is entitled to charge an instruction fee for preparing for trial or settlement. As the itemised list of charges in Annex W was not uprated in line with inflation time it became redundant and solicitors effectively charged a global instruction fee for virtually all the work involved in preparing and presenting the case or negotiating a settlement. This gave rise to considerable difficulties in taxing accounts as there was no guidance as to appropriate levels of remuneration for different elements of work not specifically covered by the list in Annex W.

40. In September 2004 the Minister for Justice, Equality and Law Reform established a Working Group on Legal Costs to examine the level of fees and costs and the system of taxation, to make a comparative study of other jurisdictions and to consider whether there should be a system of scale fees for solicitors and counsel.

41. The Working Group took the view that greater predictability and transparency was required and recommended the establishment of a legal costs regulatory body to formulate guidelines setting out the amounts of legal costs that normally can be expected to be recovered in respect of particular types of proceedings or steps within proceedings. The scale fees would not have mandatory effect but it would be for the party seeking higher costs to justify those in the particular circumstances of the case. The guidelines should also allow for flexibility to reflect individual and exceptional circumstances.

42. The Group also recommended that the taxation system should be replaced by a new system of costs assessment carried out by a Legal Costs Assessment Office. It also recommended that parties should be encouraged to have only those elements of costs under dispute assessed and that the charge for assessment should be adjusted separately. It also recommended reform of the levels of charges for taxation to be confined to recovering the expenses of the legal costs assessment, appeals and regulatory bodies.

43. It also recommended that the party liable to pay costs should be able to make a lodgement or tender in advance of assessment, and in the event that the amount of the offer or tended is not exceeded on assessment, that the opposing party should be liable to pay the court fees in respect of the assessment.

44. The Group also noted that where a plaintiff accepts a lodgement by a defendant in High Court proceedings which falls within the jurisdiction of a lower court, the plaintiff cannot be confined to receiving costs on the scale appropriate to the lower jurisdiction. The Group took the view that this discouraged early settlement and recommended that the relevant legislation be amended to remedy this defect.

45. The Group recommended that the courts should be enabled to deal with cases justly and that this expressly requires the court to allot to individual cases an appropriate share of the court's resources, while considering the needs of other cases. They considered that existing procedural rules designed to minimise delay and contain costs were under-utilised and that there should be an overriding rule of interpretation prescribing objectives which should be pursued in interpreting the rules. The Group recommended the adoption of a principle of interpretation which would require that a balance between the right of access of individual litigants and the rights of access of parties to other cases be struck by the courts when applying the rules of court in individual cases.

46. They also made recommendation in relation to sanctions for delay such as the introduction of 'unless' orders, an extension of the power to make awards of costs against solicitors personally, and the introduction of a provision to give effect to post proceedings letters of offer ('without prejudice save as to costs') particularly in relation to cases where satisfaction other than by means of a monetary payment is involved in the settlement.

47. The Government accepted the recommendations of the Working Group and work is in hand to set up a legal costs regulatory body and the establishment of a Legal Costs Assessment Office to replace the existing system of taxation of costs.

Northern Ireland

48. In Northern Ireland there is a system of scale fees in the county courts prescribed by the County Court Rules Committee and approved by the Lord Chancellor after consultation with the Lord Chief Justice. In its final report of June 2000 the Civil Justice Reform Group recommended to the Lord Chancellor that the system of scale fees in the county court should continue. It further recommended that the scales should be regularly reviewed and that while having regard to any similar scales in England & Wales and to the need for professional services to be remunerated on a fair and reasonable basis, regard should also be paid to the need to ensure that litigation in the county courts in Northern Ireland is conducted efficiently and economically. The Group also recommended that the County Court Rules Committee should have regard to the provision of scale fees for experts, to be formulated after consultation with the relevant professional bodies.

Canada

Alberta[1] and the ALRI Review

49. *Alberta* has a partial indemnity system for the legal costs component of party and party costs. Outlays, if properly incurred, area usually recovered in full. The Alberta system provides for a recovery rate of 30-50% of the actual legal costs. According research carried out by the Alberta Law Reform Institute (ALRI) the recovery rate in the UK is approximately 70-80% of a successful party's actual costs. In many civil law countries such as Switzerland there is a prima facie complete cost shifting structure in which successful litigants are awarded all expenses from an opposing party, except for apportionment rules which apply to cases of partial success.

50. The ALRI consulted on a possible move to the American "no costs" system but there was no support for that. There was general support for a partial indemnity system but opinions differed as to the balance to be struck between the recoverable and non recoverable portions. The ALRI was of the view that a move towards either of the two extremes (no cost shifting or full indemnity) could put access to justice out of reach of ordinary Albertans unless the courts retained a significant discretion. They accordingly favoured retaining the status quo, i.e. a system of partial indemnity.

51. The ALRI noted that other jurisdictions had different methods of awarding costs based on a partial indemnity. For example, British Columbia uses a tariff based on the complexity of an action and provides for 5 scales with a different value per unit for each scale: scale 1 (for matters of little difficulty) is $40 per unit and scale 5 (for matters of unusual difficulty or importance) is $120 per unit. The court determines the degree of complexity of an action and sets the appropriate scale and the registrar decides what fees are reasonable within the ranges of units provided in the tariff. The overall purpose of the reformed rules which were introduced in 1990 was to partially indemnify the successful litigant in the approximate range of 50% of actual legal costs. The Attorney General's Rules Revision Committee considers that the level of indemnity is probably closer to 25-30%.[2]

52. Nova Scotia and New Brunswick have block tariffs similar to those in Alberta. Their tariff A contains no itemized list of steps in the proceedings. Instead it is a table which awards a lump sum as costs for the 'amount involved'. The 'amount involved is defined by the damages award but it also takes into account factors such as the conduct of the parties, and the importance and complexity of the case. There are 5 lump sums based on scales 1-5, with scale 3 being the default or basic scale and scales 1, 2, 4 and 5 award 60%, 80%, 120% and 140% of scale 3 respectively. For example, if the 'amount involved' is $25,000 the basic costs will be

[1] Based on the Alberta Law Reform Institute, *Alberta Rules of Court Project: Costs and Sanctions* (Consultation Memorandum No 12.17, 2005)
[2] Manitoba Law Reform Commission (2005), *Costs Awards in Civil Litigation*, at page 17.

$3,000 while costs under scale 1 and 5 would be $1,800 and $4,200 respectively. Scale 3 was intended to represent around 40% of the solicitor/client bill in an average case but may be lower than that.[3]

53. Tariff A applies to cases which go to proof. Both Nova Scotia and New Brunswick have different tariffs for cases which settle: tariff C which has an itemized list of procedural steps.

54. ALRI did not favour the approach adopted in Ontario (see below) as it was felt that seniority of counsel was not an appropriate criterion as it did not take into account the complexity of the issues or the skills exercised by counsel. They considered that parties should not be required to pay more merely because of their opponent's choice of counsel.

55. The ALRI concluded that the present system provides a degree of "rough justice". Their form of tariff provided certainty, a reasonable level of indemnity, and could be employed with relative ease. They considered that certainty assisted parties in deciding whether to continue with an action or reach a settlement. They thought that the systems employed in British Columbia, the Federal Court and the UK (E&W) were labour intensive, complicated, expensive and time consuming.

56. They did, however, accept that the court should retain a discretion in relation to costs and sought views on the factors which the court should take in to account in deciding whether to depart from the tariff. The ALRI also sought views on whether there should be a mechanism for uprating the tables to account for inflation. Under the Federal system there are 5 columns based on the complexity of an action with a range of units within each column for each step of the action. The unit value is set each year and increases are based on a formula which takes Consumer Price Index into account.

57. ALRI noted that the Australia Law Review Commission had recommended that event based scales should be introduced for all federal jurisdictions and that a federal costs recovery advisory committee should undertake a continuing revision of the amounts in the fee scales.[4]

58. ALRI was in favour, in principle, of introducing a system for taking inflation into account but could not reach consensus on the most appropriate method and sought further views on this.

59. Alberta has a rule that where an action is commenced in the Court of Queen's Bench and the sum sued for or the amount of the judgment does not exceed the amount of the jurisdiction of the Provincial Court ($25,000) the costs to and including

[3] The Ontario Civil Justice Review considered that the tariff only provides about 10% indemnity but this estimate was based on legal fees in Ontario which may be higher than the maritime provinces.
[4] Australian Law Reform Commission (2000), *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89). See Chapter 4 of the Manitoba Law Reform Commission (2005), *op. cit*, for an update on the extent to which those recommendations have been implemented.

judgment will be taxed at 75% of that provided for under the High Court tariff. Some were of the view that this had discouraged inappropriate litigation in the Court of Queen's Bench. Others thought that the rule created difficulties in that it was not cost effective to have legal counsel in the Provincial Court as the costs recovery was so low, yet some issues might require legal argument. ARLI sought views on this issue.

Manitoba and the Law Reform Commission Report

60. Manitoba also operates a partial indemnity system. Judicial expenses are based on a tariff divided actions into 4 classes, generally according to the amount in issue, and then block fees are awarded under each of 20 possible steps in proceedings.

61. Class I proceedings are those which fall within the small claims procedure ($7,500 or less) and the costs are limited to $100 plus disbursements. Class II are those where the "class amount" (amount awarded, amount which the court would have awarded if the party had been successful or the amount claimed) is under $50,000. Class III is for proceedings between $50,000 and $150,000; and Class IV for actions worth more than $150,000.

62. The table of fees specifies a number of steps of procedure and assigns a figure to that step which may differ according to the class, for example:

	Class II	**Class III**	**Class IV**
Pleadings	$350	$525	$700
Discovery	$100	$150	$200
Evidence	$350 per half day	$525 per half day	$700 per half day
Preparation for trial	$1,000	$1,000	£1,000
Pre trial conference	$350	$350	$350
Trial/hearing	$350 per half day	$525 per half day	$700 per half day

63. The relationship between tariff costs and solicitor/client costs is less than 50%, with some practitioners estimating these at no more than 25% or even less than 10%.

64. Chapter 4 of the Manitoba Law Reform Commission's Report *Costs Awards in Civil Litigation*, 2005 contains a summary of recent costs reforms in other jurisdictions. It has a particularly useful account of the reforms in Ontario, a short critique of the Woolf reforms, and a description of the position in Australia (where the recovery rate is around 60-70%) and New Zealand (which provides for a daily recovery rate of two thirds).

65. The Commission recommended that Manitoba should retain the principle of partial indemnity; that judicial expenses should continue to be calculated on a tariff or block fee basis; and that the tariff should be based on a recovery level of approximately 60% of reasonable (as opposed to actual) fees. The Commission also

recommended that there should be 6 classes in the tariff based on the relative degree of difficulty and/or importance of the case, rather then the amount of money in issue.

66. As this might undermine the principle of predictability as parties would not know the class to which the case would be assigned by the court until the end of proceedings, the Commission recommended that this should be assessed by the court shortly after the pleadings have closed (unless the parties agree the appropriate class).

67. The Commission also made recommendations in relation to the point in time at which submissions in relation to costs should be made (i.e. before parties know the outcome) and that the costs of interlocutory applications should be payable forthwith in order to discourage improper or unnecessary steps in the litigation.

The Canadian Federal Court

68. Rule 407 of the Federal Court Rules provides that unless the court orders otherwise party and party costs shall be assessed in accordance with column III of the table to Tariff B. The value of the Unit is uprated annually and as at 1 April 2008 was $120.

69. Table B lists 28 steps of procedure and has 5 columns (I to V) against each step. Each column has a range of units. For example, step 1 relates to all preparatory work in preparing and filing an originating document and step 2 relates to all work involved in preparing and lodging a defence or similar document. The relevant entries for those two steps are as follows:

Column I	Column II	Column III	Column IV	Column V
1-3	2-5	4-7	5-9	7-13

British Columbia

70. In British Columbia a new system of party/party costs was introduced for assessments conducted after 31 December 2006 in relation to orders and settlements made after that date.

The court fixes costs by reference to 3 scales:

Scale A for matters of little or less than average difficulty
Scale B for matters of ordinary difficulty
Scale C for matters of more than ordinary difficulty

71. The court can order that one or more steps in proceedings are to be assessed under a different scale than that fixed for other steps.

72. Scale B is the 'default' scale which will apply to settlements etc which are silent as to the appropriate scale.

73. Each of the scales has a unit value:

Scale A	$60
Scale B	$110
Scale C	$170

74. The court has discretion to increase the value of each unit in a proceeding or for any step in that proceeding, by 1.5 times the value that would otherwise apply to a unit in that scale where as a result of unusual circumstances an award of costs on the relevant scale would be grossly inadequate or unjust.

75. Costs are assessed by means of a tariff which specifies the various steps in an action and assigns a number of units to that step in procedure. For certain steps of procedure a minimum and maximum range is specified, for example, 1 to 5 or 30 to 50. Failing agreement, the registrar assesses the appropriate figure within that range.

76. The tariff in British Columbia was simplified in 2006 when the number of scales related to complexity was reduced from 5 to 3.

Ontario

77. In 2002 Ontario introduced a new system which abolished the previous item by item tariff of costs and replaced in with two scales of costs, one involving "partial indemnity" (party/party) and one "substantial indemnity" (agent/client). Costs were calculated by reference to a costs grid which divided legal services into 4 categories. The first allowed certain types of work to be charged on an hourly basis up to a maximum hourly rate which depended on the lawyer's seniority. The other categories related to different types of court appearances and provided for maximum amounts depending on the length of the hearing. The new system was very controversial and led to lengthy hearings on expenses and was criticised by the judiciary.

78. In 2005 the system was amended, with the Costs Grid being withdrawn. Maximum rates which may be claimed for lawyers called to the Bar for less than 10 years, 10-20 years or 20 years and over are laid down. There is not specific tariff although guidance is given on the type of work which may be claimed for. Parties must prepare cost estimates for the court accompanied by submissions on the various factors to which the court must have regard in assessing costs. These are made available in advance of the hearing or trial and are placed in sealed envelopes, i.e. parties are to make submissions on costs before they know the outcome of the action.

Australia

79. The position in Australia is broadly similar: the Federal Court and the courts of the states operate on a partial indemnity system largely based on block or scale fees. However, the scale are set at a more generous level than in Canada and successful parties recover greater proportion of their actual legal costs, estimated as much as 60-70%.

80. In Western Australia, with a few exceptions, a single scale of costs applies to Supreme and District Court litigation. The scale is based on "time charging for discrete steps in the process but with the important safeguard of a recommended/estimated amount of time that each step should take. The scale also establishes a maximum charge out rate for practitioners at different levels of seniority." The Review of the civil and criminal justice system recommended that there should be a separate scale for the district court.

81. The scale fixes a fee referable to each step of proceeding although a range is applicable to certain items and the fee for preparing the case for trial is linked to the value of the action where this exceeds $25,000. The court has discretion to increase or reduce the amounts specified in the scale; to fix a cap; or to award a lump sum.

82. The Victorian Law Reform Commission examined the issue of costs in its review of the civil justice system. It concluded that the gap between party- party costs and solicitor-client costs was unreasonable in a number of cases. The test in Victoria as to what is recoverable on a party-party basis is what is 'necessary or proper for the attainment of justice'. It recommended that recoverable costs on a party-party basis should usually be 'all costs reasonably incurred and of a reasonable amount'. It also suggested that the court should consider making an award on a specified percentage of the actual (reasonable) solicitor and client costs, with a view to avoiding the costs and delays associated with the process of taxation. It recommended that the court scales of costs should be revised/updated and that there should be a common scale across courts. The question whether there should be proportionate differentials, between courts, was one for the Costs Council which they recommended should be established as a division of the Civil Justice Council.

83. The Rules of the Supreme Court of Victoria include a scale of costs itemising the various steps in a court action with fixed fees referable to each step. The court may on special grounds arising out of the nature and importance or the difficulty or urgency of the case allow an increase of not more that 30% generally or in relation to any step in the proceeding.

84. In the county court there are 4 scales depending on the value of the action: up to $7,500; $7,500 to $20,000; $20,000 to $50,000 and over $50,000.

ANNEX TO CHAPTER 15 A CIVIL JUSTICE COUNCIL FOR SCOTLAND

Rules councils in other jurisdictions

Northern Ireland

1. A review of the civil justice system in Northern Ireland was carried out shortly after the Woolf review and reported in June 2000.[1] In its Interim Report the preferred option of the Civil Justice Reform Group was for procedural rules for all civil courts to be made by a unified body to be known as the Civil Procedure Rule Committee, chaired by the Lord Chief Justice or his nominee and with a representative membership. The rationale for a combined Rule Committee was to ensure procedural consistency between the High Court and the county courts. However, due to reforms in High Court procedure, the Group reconsidered this proposal as they were wary of entrusting the county courts to a Committee that may, in practice, be compelled to concentrate its efforts on the Supreme Court. The Group saw force in the idea that specialist practitioners and judges know best how to regulate court procedure in their particular areas of practice and they were persuaded that given their common secretariat there was little chance of the Supreme Court and County Court Rules Committees subscribing to a radically different agenda.[2]

2. The Group recommended that the Rules Committees should include two lay members, one with experience in and knowledge of consumer affairs and the other from the lay advice sector (this is also a requirement of the Civil Procedure Rule Committee in England and Wales). The Group thought that those who practice or litigate in the courts have valuable insight into the problems of the system and that in the light of the fact that both Committees have power to establish scale fees for practitioners, their membership should be more representative of the legal community and litigants as a whole.

3. The Group recommended the retention of separate sets of rules for the Supreme Court and County Courts. It considered that a single code of procedure is understandable and appropriate when there is a unitary system of commencing proceedings. However, as the Group envisaged a distinction being maintained between High Court and County Court procedure, it seemed desirable and practicable to retain separate procedural rules. Nevertheless the Group saw the need for a major overhaul of the rules, which it considered should be drafted in conjunction with practice directions and pre action protocols to be formulated by agreement with the judiciary and the legal profession. The Group said that it was anxious to ensure that the revised civil justice system had the confidence of the community, and that this would be quickly eroded if rules are introduced in "a piecemeal or tardy fashion". Redrafting the rules of the entire civil justice system was not a task that could be tackled in the midst of other responsibilities. It therefore

[1] The Civil Justice Reform Group (2000), *Review of the Civil Justice System in Northern Ireland - Final Report*
[2] *Ibid*, para 164

recommended that this task be entrusted to two full time lawyers. It was appreciated that this would have cost implications for the Court Service but considered that efficiency savings would be made in the longer term and that "maintaining the momentum of reform justifies the necessary expenditure".

4. The Group was persuaded that there was a real need for a civil justice council in Northern Ireland. They were influenced by strong support for this by those responding to the interim report and by valuable work undertaken by the CJC in England and Wales. The Group considered that a civil justice council could only have a useful role if it was truly independent and properly funded: "it must have adequate resources for its work, which should include the publication of high quality and influential research. Furthermore, it should be able to rely on the practical assistance of the Northern Ireland Court Service, most importantly, in the provision of detailed and accurate statistical information relating to the civil justice system."

5. The recommendation to establish a civil justice council does not appear to have been implemented.

Australia

Victoria

6. The Victorian Law Reform Commission reviewed the rules and rule-making powers for the courts in that jurisdiction in 2008. In so doing, it considered the position in other Australian jurisdictions, Canada, New Zealand, the UK and the USA. In Victoria there are three principal sets of rules: the Supreme Court Rules, the County Court Rules and the Magistrates' Court Civil Procedure Rules.

7. The Law Commission noted that in South Australia there is a Joint Rules Advisory Committee (JRAC), the remit of which is to prepare, review and revise the rules and practice directions for the Supreme Court and the District Courts. The JRAC liaises directly with the profession by consulting with professional organisations such as the Law Society and Bar Council and was instrumental in a major overhaul of the rules and practice directions in 2006.

8. New South Wales, Queensland and the Australian Capital Territory each have a single rules committee to develop and monitor the rules for all courts within their jurisdiction. NSW has adopted a set of Uniform Procedure Rules (2005), which apply to all proceedings in the Supreme, District and local courts. There is a Uniform Rules Committee comprising judicial members from all levels of the court hierarchy, a barrister appointed by the Bar Council and a solicitor appointed by the Law Society Council. In addition there is a Civil Procedure Working Party, the remit of which is to develop amendments to the rules and review civil forms. As well as judicial members, it has representatives of the NSW Bar, Law Society and Attorney General's department. The working party developed the uniform rules in consultation with the judiciary, profession and special interest groups.

9. Queensland adopted a uniform set of civil procedure rules in 1999. The rules introduced an overriding philosophy and promote court control of proceedings. As in NSW, the Rules Council has judicial members drawn from all levels of the civil courts.

10. In addition to a Rules Committee, which is responsible for drafting the rules, the Australian Capital Territory has a Joint Rules Advisory Committee comprising representatives from both courts, the courts registrars, the ACT Law Society, the ACT Bar Association, the DPP, Parliamentary Counsel and a public servant nominated by the Justice Department.

11. In some jurisdictions the rule-making authority must exercise its rule-making power in accordance with certain statutory objectives. For example, in Western Australia the rules must ensure that cases are dealt with 'justly' which includes ensuring:

- that case are dealt with efficiently, economically and expeditiously;
- so far as practicable, that the parties are on an equal footing; and
- that the court's judicial and administrative resources are used as efficiently as possible.

12. In order to achieve a degree of harmonisation across superior courts, the Council of Chief Justices of Australia has established a National Harmonisation of Rules Committee, the recommendations of which are implemented through each court's own rule making process. The Council has appointed a monitoring committee to review the operation of the new rules and to recommend amendment of these as necessary.

13. The Victorian Law Commission concluded that it would be sensible to retain separate rules committees "because each court deals with discrete practice areas." Similarly, it did not think it desirable for a uniform set of rules to be adopted in Victoria "having regard to the variety of areas of law and types of litigation conducted in each court". It did, however, consider that there should be a greater degree of harmonisation between the rules of the various courts, in particular in relation to terminology and forms. It also concluded that the rules of the Victorian courts would benefit from a further detailed review aimed at simplifying their structure and language and bringing them into line with procedural rules in other jurisdictions.

14. A number of the Commission's recommendations for reform related to the courts' case management powers. Doubts had been expressed about whether the existing rule-making powers were sufficiently wide to enable appropriate rules to be adopted.

15. The Commission accordingly recommended that the rule-making power should be amended to explicitly authorise judges to make rules in respect of any matter relating to:

(a) the powers, authorities, duties and functions of the court in imposing limits, restrictions or conditions on any party in respect of the conduct of proceedings[3] or
(b) the management of cases, or
(c) the referral (with or without the consent of the parties) to any form of alternative dispute resolution, or
(d) the means by which the [proposed] overriding purpose may be furthered.

16. Although the Commission did not favour the adoption of a uniform set of rules or a single Rules Council it was persuaded of the value of a body such as the civil justice council. The Commission's conclusions on this issue were as follows:

> "Review and reform of the civil justice system is a complex undertaking. It is necessary to take into account the rights and interests of a diverse range of participants, including litigants large, small and self-represented, the legal profession, government and the courts. Reform initiatives may have unforeseen consequences, or may require modification in light of practical experience. They should therefore be subject to ongoing review and evaluation to ensure their objectives are being met. The collection of relevant data is also required to inform the reform and policy process.
>
> The commission proposes the establishment of a new body to carry out these responsibilities. The Civil Justice Council would have ongoing statutory responsibility for review and reform of the civil justice system. Its purpose would be to investigate ways to make the civil justice system more just, efficient, and cost effective.
>
> The Civil Justice Council would have the following functions:
>
> - to monitor the operation of the civil justice system generally
> - to identify areas in need of reform
> - to conduct or commission research
> - to bring together various stakeholder groups with a view to reaching agreement on reform proposals, including through the use of mediation and other methods
> - to recommend reforms, including amendments to statutory provisions and rules governing the civil justice system
> - to facilitate education programs about developments in the civil justice system.

[3] An alternative formulation is: 'To allow obligations, prohibitions and restrictions to be imposed on any party for the purpose of furthering the [proposed] overriding purpose'.

The Civil Justice Council should also assist in the implementation of the reforms proposed by the Victorian Law Reform Commission and monitor the impact of such reforms, which may include:

- developing specific pre-action protocols for each relevant area (for example, commercial disputes, building disputes, medical negligence, general personal injury, etc)
- monitoring the operation of the protocols and general standard of pre-action conduct so that any modifications considered necessary in the light of practical experience can be implemented
- overseeing and developing further the operation of pre-trial examinations, including:
  - developing a general code of conduct in respect of examination conduct
  - developing codes of practice to govern the use of pre-trial examinations in particular litigation contexts
  - overseeing the establishment of education and training programs to assist practitioners and other interested parties to develop good examination practices
  - reviewing the provisions relating to pre-trial examinations with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The Council should also consider and make recommendation on the question of whether pre-trial examinations should be permissible in matters within the jurisdiction of the Magistrates' Court, and if so, whether any modifications to the general scheme are required in relation to such matters;
- constituting a specialist Costs Council to oversee and monitor issues to do with legal costs
- reviewing ADR processes in all three courts
- scrutinising the operation of the Justice Fund
- assisting in a review of the rules of civil procedure.

The Civil Justice Council should comprise members from a broad range of participants in the civil justice system and stakeholder groups, including:

- members of the judiciary
- members of the legal profession
- public servants concerned with the administration of the courts
- persons with experience in and knowledge of consumer affairs
- persons with experience and expertise relevant to particular types of litigation (for example representatives from the business community, insurance industry, consumer organisations, and the community legal sector).

The chair and members of the Civil Justice Council should be appointed by the Attorney-General after calling for nominations from the courts and relevant stakeholder groups.

> Members of the Civil Justice Council would be appointed for their expertise and experience, and not necessarily as representatives of the entities or organisations for which they work.
>
> Members of the Civil Justice Council would serve in an honorary capacity but would be reimbursed for expenses etc. There would be a secretariat comprising a chief executive officer and support staff.
>
> The Civil Justice Council should be able to co-opt people to form committees to focus on specific areas under review.
>
> The Civil Justice Council should be entitled to an allocation of funds from the Justice Fund to assist it to carry out its functions."

17. In his Justice Statement of 2 October 2008, the Attorney General announced that the Ministry of Justice would develop a proposal for a Civil Justice Council to monitor the performance of the civil courts and drive further reform.[4]

Canada

18. In 1996 the Canadian Bar Association's Taskforce on Systems of Civil Justice recommended that:

> An independent national organisation on civil justice reform be created for the purposes of:
>
> (a) collecting in a systematic way information relating to the system for administering civil justice;
> (b) carrying out in-depth research on matters affecting the operation of the civil justice system;
> (c) promoting the sharing of information about the use of best practices;
> (d) functioning as a clearing house and library of information for the benefit of all persons in Canada concerned with civil justice reform;
> (e) developing liaison with similar organisations in other countries to foster exchanges of information across national borders; and
> (f) taking a leadership role on information provision concerning civil justice reform initiatives and developing effective means of exchanging this information.[5]

19. The Canadian Forum on Civil Justice was created under the Canada Corporations Act 1998 as a result of the above recommendation. Its formal objects are to seek to improve the civil justice system in ways and means including but not restricted to the following:

- collecting in a systematic way information relating to the system for administering civil justice;

[4] www.justice.vic.gov/au
[5] Canadian Bar Association Task Force (1996), *Report on Systems of Civil Justice*, recommendation 52

- carrying out in-depth research on matters affecting the operation of the civil justice system;
- promoting the sharing of information about the use of best practices;
- functioning as a clearing house and library of information for the benefit of all persons in Canada concerned with civil justice;
- developing liaisons with similar organisations in other countries to foster exchanges of information across national borders; and
- taking a leadership role in providing information concerning civil justice reform initiatives and developing effective means of exchanging this information.

20. The Forum consists of a board and advisory board, members of which include leading members of the Bar, government, court administration, the judiciary, legal academia and the lay public.[6]

[6] Canadian Forum on Civil Justice www.cfcj-fcjc.org at 3 March 2008.

APPENDICES

APPENDIX 1 MEETINGS HELD BY THE CIVIL COURTS REVIEW

The Judiciary

During the course of the Review members of the Project Board have had a number of meetings, both formal and informal, with members of the judiciary to discuss the issues raised in the Consultation Paper and the responses to it.

We also held meetings with representatives of associations representing the judiciary:

2 December 2008	The Scottish Justices Association
11 December 2008	Sheriffs Association
29 April 2009	Part Time Sheriffs Association

We organised a number of Focus Group meetings with sheriffs:

18 February 2008	Glasgow, North and South Strathclyde
28 February 2008	Grampian Highlands and Islands
29 February 2008	Tayside, Central & Fife
4 March 2008	Lothian & Borders

Scottish Court Service

We have had regular meetings and discussions with staff of the Scottish Court Service who have provided us with much of the data underpinning our recommendations. We have had meetings with staff at Headquarters and with staff at Parliament House including the Deputy Principal Clerk of the Court of Session and the Keeper of the Rolls and have given presentations to staff there. In addition, we met with the sheriffdom business managers and held a focus group meeting with sheriff clerks.

We have also had meetings with the Secretariat to the Rules Councils and with the Joint IT Committee of the Court of Session and Sheriff Court Rules Committees.

Scottish Parliament

On 29 August 2007 the Chairman attended a meeting with the members of the Justice Committee.

Other Public Bodies

2 and 22 August 2007	Scottish Children's Reporters Administration
29 February 2008	Her Majesty's Court Service

Legal Profession

22 October 2007	Solicitor Advocates
3 December 2007	Practitioners in Glasgow sheriff court
29 January 2008	PI practitioners
31 January 2008	PI practitioners
4 February 2008	Royal Faculty of Procurators in Glasgow
27 February 2008	WS/SSC Society
28 February 2008	Aberdeen Bar Association
18 March 2008	Medical Negligence practitioners
20 April 2008	Family Law Association
20 May 2008	Faculty of Advocates
27 May 2008	Faculty of Advocates Personal Injury Group
2 June 2008	Family law practitioners
18 July 2008	Professional Remuneration Committee of the Law Society

Other Groups

20 June 2007	SCOLAG
25 June 2007	RBS
28 August 2007	Families Need Fathers
5 October 2007	ASSIST
24 October 2007	Clydeside Action on Asbestos
10 January 2008	Scottish Mediation Network
21 February 2008	Scottish Committee of the Administrative Justice and Tribunals Council
29 February 2008	Quantum Claims
29 February 2008	In- court adviser, Aberdeen Sheriff Court
29 February 2008	Mediation co-ordinator, Aberdeen Sheriff Court
4 March 2008	Core Mediation
6 March 2008	In- court adviser, Hamilton Sheriff Court
12 March 2008	Mediation practitioners
17 March 2008	Civil Justice Advisory Group/Scottish Consumer Council
1 April 2008	UNITE
3 April 2008	Stewart Mullan
17 April 2008	Mediation providers
30 April 2008	Forum of Scottish Claims Managers
15 May 2008	In- court adviser, Airdrie Sheriff Court
15 May 2008	In- court adviser, Kilmarnock Sheriff Court
20 May 2008	Scottish Association of Law Centres
3 July 2008	Child Support Agency
24 July 2008	Stephen Moore Legal Technology
24 July 2008	BT
9 December 2008	BT
29 May 2009	In-court advisers, Dundee Sheriff Court

Visits to Other Jurisdictions

Members of the Project Board visited London In July 2007 when they attended the Royals Courts of Justice and met with Sir Anthony Clarke, Master of the Rolls, Lord Justice Waller, Vice President of the Court of Appeal, Mr Justice Steel and staff in the Civil Appeals Office. They also met with Robert Musgrove and Michael Napier CBE, QC of the Civil Justice Council; and Andrew Fraser, Janet Howe and John Stacey of the Ministry of Justice and HMCS. They also visited the Central London Civil Justice Centre at the invitation of His Honour Judge Paul Collins CBE and met with his colleagues and staff at the Centre. Those meetings gave us a useful insight into the impact which the Woolf reforms have had in that jurisdiction and we are most grateful to those whom we met for letting us have their considered views.

In March 2008 members of the Project Board and Review team visited Dublin where they met the Hon Mr Justice John L Murray and other members of the Supreme Court, members of the High Court, staff of the Supreme Court and High court and staff at the Courts Service, all of whom were very generous with their time and which gave us a great deal of information about the court system in Ireland and recent civil justice reforms in that jurisdiction. The Board also visited the Dundalk Courthouse in Co Louth where they sat in on proceedings before the circuit court and the district court.

Members of the Project Board and Review team attended a presentation by the Personal Injuries Assessment Board (PIAB), solicitors specialising in personal injury work, a representative of the Bar Council, trade unions, insurers and the State Claims Agency.

Conferences attended

20 June 2007	Access to Justice: Keeping the Doors Open, Gresham College
27 - 29 June 2007	Institute of Advanced Legal Studies WG Hart Legal Workshop 'Access to Justice'
25 September 2007	Four Courts Conference
19 March 2008	Scottish Association of Law Centres
27 May 2008	Scottish Competition Law Forum
10 - 11 April 2008	European Mediation Conference
25 March 2009	Consumer Government and Scottish Government Analytical Services Conference on Public Legal Education

Speaking Engagements

11 October 2007	Scottish Law Agents Society, Barty Lecture
2 - 3 November 2007	Joint Legal Aid Conference: Law Society and SLAB
26 November 2007	Holyrood Conference on the Civil Justice System
8 March 2008	Sheriffs Association Conference
11 June 2008	The Chartered Institute of Arbitrators and the Law Society of Scotland: The Future of Commercial Dispute Resolution
19 November 2008	Family Law Association Conference
8 - 9 May 2009	Law Society Annual Conference

Project Board Meetings

3 May 2007

9 May 2007
25 May 2007
12 June 2007
18 June 2007
22 October 2007
18 December 2007
12 February 2008
8 April 2008
11 August 2008
1 October 2008
15 October 2008
10 November 2008
24 November 2008
2 December 2008
8 December 2008
15 December 2008
15 January 2009
19 February 2009
16 March 2009
31 March 2009
29 April 2009
13 May 2009
27 May 2009
13 July 2009
23 July 2009
18 August 2009

Policy Group Meetings

21 May 2007

18 June 2007
16 July 2007
18 October 2007
22 November 2007
21 January 2008
21 January 2008
20 March 2008
20 March 2008
18 September 2008
24 September 2008
3 November 2008
24 November 2008
26 January 2009
16 February 2009
30 March 2009
2 March 2009
27 April 2009
19 May 2009

APPENDIX 2 REPORT OF THE REVIEW OF INNER HOUSE BUSINESS

By the Rt Hon Lord Penrose

2009

INTRODUCTION

1.1 Review of the arrangements for the disposal of Inner House business was originally instructed against the background of a concern of the then Lord President, the Rt Hon The Lord Cullen of Whitekirk, that current procedural rules and practices failed fully to secure the effective use of the resources of the court.

1.2 Particular issues identified by him included:

- Whether written submissions would increase the efficiency of use of judicial time in court by facilitating preparation and, later, in writing;
- Whether the current system of By Order hearings under Rule 6.3 was efficient or could be improved on; and
- Whether the management of single bills could be improved.

1.3 It was anticipated by Lord Cullen that statistical data would be available to underpin the analysis of current practice and to support proposals for change. In the event, that expectation was frustrated by the lack of readily available data. The systems in force did not provide the information required fully and effectively to monitor performance on a current basis, and similarly failed to provide data for retrospective analysis. It became important to understand why that was the case, given the overall objective of securing improvement in the handling of business, and the need to justify expenditure on research that would provide a basis for assessing the needs of the Court for amended or new procedural rules.

1.4 The IT system in operation, from which one might have expected to obtain relevant information, had reflected the Statement of User Requirements for computerisation of civil and criminal court operations (the Morris report) which had last been up-dated in March 1998. It had been prepared in a format required by the Scottish Court Service. The emphasis in the report was on the I.T. requirements of the administrative staff in reporting on the performance of their duties in servicing the courts. Paragraph 2.1.1. of the overview of the then current system stated:

> "SCS provides the staff, buildings and services to support the judiciary in the Supreme and Sheriff Courts. The judiciary themselves are not a part of the SCS but rather an autonomous group. The independence of the judiciary in Scotland is an essential constitutional principle and the basis of SCS operations lies in the co-operation with the judiciary to meet agreed objectives."

Negatively, the recognition of judicial independence, in itself eminently correct in constitutional terms, had the consequence in this context that the requirements of the judiciary for management information, and in particular prospective information, were not addressed by the system. It was recognized that the procedural rules of court were not controlled by the agency[1]. The IT system devised had, therefore, to provide maximum flexibility to ensure that future procedural changes could be accommodated. However, there was a resulting dislocation between the information routinely produced and any requirements the Court had for information about the operation of its procedural rules.

[1] Paragraph 2.1.3. of the Morris report

1.5 In relation to work of the Inner House, the data maintained was simply based on that required for first instance business. In relation to 'appeals', the report stated[2]:

> "There are a range of appeals heard in the Court of Session and High Court and also civil appeals which are heard by the Sheriff Principal of the appropriate Sheriffdom. Most follow the normal pattern of calling in court for the court to deal with but there will be considerable differences in how much of the arguments relied on by the parties will be in writing. They may be referred to as Reclaiming Motions, Bills of Suspension, Stated Cases etc …
>
> In the first implementation of the system, Appeals will be treated as newly entered, separate actions but in the longer term a link between the case record and the appeal record would be desirable. In many cases an appeal is dealt with by another Court or Department and will halt or limit the proceedings in the original action. It is therefore essential that the system allows information on the processing of the appeal to be recorded in the original Court."

1.6 The basic requirements of the system, for all purposes, were:

"..to record and manage cases passing through the Courts. There are three principal stages to the process:

- Registration or initiation of the case
- Tracking the progress of the case
- Disposal of the case by recording the outcome at each stage.

The key component of the proposed system was to comprehensively track the progress of cases to allow us to have an electronic summary process to supplement the paper system. Having an electronic system will allow multiple judiciary and staff to locate and peruse case details for case management and consideration, responding to enquiries, for reporting and for statistics...

The system will need to record a series of summary "Event Records" in a tracking history … The recording of various events affecting the case will also provide the foundation for more sophisticated systems which can be adopted such as automated fee processing, semi-automated document generation, calendar management and pro-active case management."

1.7 The more sophisticated systems anticipated were not realised. The 'foundation system' did not provide for calendar management or pro-active case management. Relatively sophisticated IT systems had already been developed for commercial procedure which did incorporate a diary system, with automated reporting of progress against event targets set by the judge and recorded forward in the court diary. The general, foundation, system did not provide for the comparison between anticipated progress and actual progress, with reports being generated on deviations on which action could be taken. It was essentially an events system, recording what had happened, but telling one little about the relationship between performance and expectation. As a result, the systems could provide reports of events that had occurred in the life of a given case, but did not allow the operator to interrogate the records to discover the background to those events, or to relate them to what might have been expected in relation to the efficient disposal of the business.

[2] Paragraph 2.1.8. of the Morris report

1.8 In summary, the data that the system could provide was restricted to

- The number of outstanding reclaiming motions and 'other appeals'.
- The 'other appeals' were not subdivided into classes, even so as to correspond with the procedural variations in Chapters 38 – 41 of the Rules.
- The numbers of and time taken up by single bills: there was no further analysis, and no means of identifying the reasons for the numbers arising or the orders being sought.
- Current waiting periods, targets and actual delays against target: the system recorded the time it took for cases to be heard. The reasons were not explored or recorded[3].

1.9 The deficiencies in the existing system were well understood by the administrative staff. Largely driven by the need for an effective system for the arrangement of High Court business under the Bonomy reforms, the development of an effective electronic diary system was already in hand, and the opportunity was taken to improve the system of fixing civil diets at the same time. However, the design, development and implementation of a new system would necessarily take time, and it was clear that acceptable data from such a system would not be available at a date that would enable one to rely on it for the purposes of this review.

1.10 One major deficiency in the current system was described[4] in these terms:

> "One thing we have never done, at least not in any ongoing, systematic way, is consider how much civil appeal court time will be needed to deal with the estimated time required for all outstanding business. We proceed simply on the basis that two Civil Divisions each week in term will just have to do. Another major assumption is that the estimated time required for the hearing is reasonably accurate. There are problems at both ends of this equation. We don't know whether the court time provided is what is actually needed, nor do we know whether the estimate provided by parties is accurate or, indeed, based on any consideration of the need to use court time productively."

The system could only provide data on the numbers of hearings fixed and the amount of court time they use up. This description reflected, in a general way, what appeared from anecdotal evidence, and experience. A fundamental problem with Inner House business was that the court did not have a clear picture of the demands that the business was likely to make, nor of the resources required for the efficient disposal of that business, and was not well equipped to manage its resources effectively and efficiently in the disposal of the business that did arise.

1.11 There were some problems that were easily identified. There was an unacceptably high proportion of late settlements or abandonments. Single bills and other incidental business were disruptive of substantial business. When cases did run, the time required was seldom that forecast by parties. Successive stages in procedure were dealt with by differently constituted divisions, resulting occasionally in inconsistent management, and perhaps more frequently in wasted time as differently constituted Divisions tried to discover the full procedural history of the case, and the reasons for steps taken by others. There was still a tendency for counsel to pull rabbits from capacious hats at the last minute, disrupting programmes. These problems suggested that on any view a fairly radical change of direction was required if significant

[3] R. Cockburn
[4] R. Cockburn

improvements were to be achieved. But it was recognised that that approach could only be justified if the need could be supported by hard data and proper analysis.

1.12 It was necessary to commission independent research.

RESEARCH AND ANALYSIS

Incidental Business in the Inner House

2.1 Dr Rachel Wadia was commissioned to conduct an empirical investigation into the efficient and effective use of Inner House resources in order to inform the review of the need for change, and to assist in defining the baselines for future evaluation of data. Her investigations confirmed that there was a lack of statistical data within the existing system to enable her to carry out her investigation in accordance with standard research norms. A significant empirical base was required, and that had to be constructed from data that could be obtained within the court process folders, supplemented by information from the General Department, the Keeper's Office, and the Clerk of the First Division. After a preliminary examination of the material available, cases initiated in 2002 were selected for examination. A sufficiently high percentage of the relevant information was available for that block of cases to constitute a statistically significant base that could be tracked and analysed with confidence.

2.2 Dr Wadia's research disclosed that basic inefficiency among practitioners was a significant issue. For example, in a number of cases in which leave to appeal was required from the relevant court or tribunal of first instance, leave was not sought and that generated demand for Inner House time. In some cases leave was sought late, requiring a court appearance. Late answers from respondents in tribunal cases had a disruptive impact on substantive Inner House business. A full bench of three judges was frequently required to deal with the relatively minor procedural issues arising.

2.3 Dr Wadia reported 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. 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

2.4 Motions for early disposal, whether obligatory in terms of the Rules of Court or voluntary, occupied the time of the court in a large number of cases, requiring a bench of three judges to sit. The average time taken for such a motion was estimated to be 10 to 15 minutes, reflecting the fact that there were seldom issues of substance to be determined. But the aggregate time committed to all such motions amounted to some 4.5 judge days.

2.5 The time devoted by three-judge Divisions to motions on Single Bills generally and to By Order hearings was found to be considerable. Dr Wadia analysed the patterns of business in detail. The baseline data indicated that procedural business was running at a level of about 400 hours per calendar year.

2.6 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.

Fixing of substantive hearings

2.7 In cases appointed to the Summar Roll current practice required parties to arrange with the Keeper of the Rolls an appropriate date for the hearing. Dr Wadia's research showed that the loss of control by the court at this stage of the procedure could result in considerable delay. The data available in the sample was not comprehensive and might not be representative. However, the interval between the date on which business was appointed to the Summar Roll and the date on which the Keeper fixed a date for the hearing ranged from 12 days to 8 months.

2.8 In the group of cases for which data was available, the parties in reclaiming motions approached the Keeper within 3 to 6 weeks of the order. In the case of appeals from decisions of tribunals, most involved contact with the Keeper between 17 and 19 weeks, and two involved longer delays. Sheriff court appeals disclosed that about half of the appeals led to an approach to the Keeper within 4 weeks; three cases took up to 9 weeks, and three took periods of 15, 31 and 31 weeks respectively.

2.9 The allocation of hearings by the Keeper, after the office has been approached by parties, takes account of the availability of judicial time in the Inner House, parties' representations about preparation time, and the counsel's diaries. The research disclosed a number of factors of possible significance, but few problems for which there were clear definitive explanations.

2.10 Reclaiming motions from Outer House decisions took the shortest time to the start date of the substantive hearing. Appeals from tribunal decisions took the longest time to that date. Cases originating in the Outer House typically achieved faster progress through the procedural stages in the Inner House, notwithstanding that they generated a higher proportion of procedural hearings. Tribunal and sheriff court business spent longer at the procedural stages, but generated a proportionately lower number of procedural hearings. The tentative view was that Court of Session business was pursued with greater diligence and application. But other possible factors included the varying proportions of party litigants involved in the different classes of business.

Early disposal cases

2.11 In those cases in which early disposal was ordered, there was a much wider discrepancy between the dates of first Summar Roll hearing and final disposal than in other business. The allocation of an early hearing did not necessarily lead to an early resolution. In 60% of the cases granted early disposal, the diet allocated was discharged, with time constraints, the availability of counsel and inadequate time for preparation being given as factors. Documents were tendered late in a proportion of the cases resulting in discharge. In two cases there had to be a second discharge because of the late lodging of documents relative to the already postponed hearing. The problems inherent in relating preparation to the date of hearing were aggravated in early disposal cases. However, overall, there was a tendency for business to be disrupted because the allocation of hearings was not directly related to parties' preparedness for the hearing.

2.12 While early disposal did, on average, result in cases being disposed of faster than general Inner House work (26 weeks as against 51 weeks) in one-third of the cases final disposal was by settlement or other form of private resolution.

Pattern of disposals

2.13 The pattern overall indicated that 46% of all cases studied were disposed of by judicial decision; 28% were abandoned; 13% were settled by joint minute or other overt procedure; 6% were dismissed; and the remaining 7% in other ways.

2.14 Dr Wadia's detailed analysis of the abandonments showed that they were spread across all stages of procedure in the Inner House. But there were clusters before grounds of appeal were lodged, and in the run up to Summar Roll hearings, the times of the 'two main reality checks for litigants', in Dr Wadia's words. The high proportion of withdrawals at the final stage coincided with the Rule 6.3 By Order hearing approximately five weeks before the hearing. 41% or all abandonments took place within the last few weeks prior to the Summar Roll diet. A similarly high proportion of all settlements took place at this late stage – 63% in the run up to the Summar Roll hearing and 78% from the Rule 6.3 By Order hearing to the Summar roll diet.

2.15 Almost 80% of discharged hearings occurred within the last four weeks before a Summar Roll hearing. Tactical manoeuvring might have been a factor contributing to these figures in addition to late preparation. But whatever the reason, late cancellation of hearings wasted judicial time.

Estimates of duration and the impact on speed of disposal

2.16 While one might have expected that longer hearings would involve longer waiting time to a hearing, that did not emerge from the research as a consistent factor affecting the allocation of diets.

2.17 In the case of appeals from tribunal decisions, only one-day and half-day hearings were fixed within thirty weeks of the interlocutor sending the case to the Summar Roll. Within forty weeks there were allocations of two-day diets. Longer diets were allocated within fifty weeks. However, one-day diets were booked across the whole spectrum. The availability of counsel, particularly those with specialist practices, mutual indulgence of parties, and the disinclination of respondents to accelerate proceedings were thought to major factors affecting the spread.

2.18 Sheriff court appeals also reflected a wide spread of periods. Diets could be and were allocated within short periods. A four-day and a two-day hearing were allocated within five weeks. Hearings of similar length were allocated within thirty weeks, and within fifty weeks. However, one-day hearings continued to be allocated up to 69 weeks from the interlocutor appointing the case to the Summar Roll. Again factors related to the parties and their representatives were thought to be responsible for the erratic pattern.

2.19 Reclaiming motions were dealt with in shorter periods. A three day diet was allocated to a commercial action within four weeks, and within the same period a six-day hearing in a judicial review was fixed. In few cases were there long periods of delay. The longest period was forty-two weeks in a case with a party litigant.

2.20 The Keeper operated a 'fast track' scheme under which parties might be offered an accelerated diet. And some classes of work were accommodated earlier. This applied to cases involving children, family issues generally, litigants with serious illnesses and similar personal factors.

2.21 Practice current at the time of Dr Wadia's research required parties to appear by order to intimate to the Court their estimates of the time the substantive hearing would require. It was on the basis of the information then provided to the court that parties were expected to arrange with the Keeper suitable diets for the Summar Roll hearing. Accurate prediction would be difficult in the best of circumstances. Frequently, however, counsel appearing at the by order hearings had little or no personal knowledge of the case, and merely passed on information gleaned from others. It was hardly surprising that there were significant distortions.

2.22 In the case of half-day and one-day hearings, duration was accurately predicted in 36% only of cases. In the case of two-day hearings, there was 41% accuracy. For three-day hearings the accuracy rate was 17%. For four-day cases the rate was 40%. A 50% rate was achieved in five-day cases. Only one case – a seven day case – was predicted accurately.

2.23 Inaccurate predictions resulted in discharged diets in a high proportion of cases, further delaying final disposal. In other cases, the result was a continued diet, involving a requirement to assemble the same bench of judges, and the same counsel, with consequent delay.

The impact of incidental business on the efficient disposal of substantive hearings

2.24 Dr Wadia's research demonstrated that a significant amount of time was devoted to procedural hearings relating to single bills and by order appearances in particular. She commented that while this could be a cause of distortion of the time taken to dispose of substantive business as against prediction at the by order stage. But litigation practitioners were well aware of the problem and should have made allowance for it in estimating the time required. However, accurate prediction of the impact of other business was generally impossible, and the most that counsel could be expected to do would be to make a broad guess.

2.25 The actual impact of incidental business on the progress of substantive hearings was shown to be considerable. It reduced the time available for hearings, reducing the efficiency of use of judicial time. And it was expensive for litigants.

2.26 The standard length of an Inner House day for recording purposes was four and a half hours. Inner House judges regularly dealt with criminal business before the start of

civil business. Time after court rose was spent in conference and in writing and preparation for subsequent business. The result, for substantive business, was that the time available was already short. The impact of delay caused by incidental business was correspondingly high.

2.27 Dr Wadia found that in aggregate approximately ninety court days (equivalent to two hundred and seventy judge days) were being used for single bills and by order hearings. Another way of expressing the same result is that at least two full days were fully occupied in such business.

Sists

2.28 Dr Wadia found that by far the greatest cause of disruption of progress was sist. Forty cases in her study group were sisted, mainly for legal aid. The average period of sist was forty-six weeks.

2.29 In the case of tribunal business all sists were for legal aid. The periods involved ranged from nine to one hundred and eighty-nine weeks. Sheriff court business was sisted for between two and one hundred and thirty-six weeks. Court of session business was sisted for between seventeen and forty-six weeks.

Discharge of Summar Roll diets

2.30 Dr Wadia found that a high percentage of Summar Roll diets were discharged, 43% of her study group. Fourteen of these were allocated fresh diets. Together with continued diets approximately 17% of the total cases involved the Keeper in re-allocation of business. The intervals between the original diet and the re-allocated diets ranged from two to sixty-six weeks. Eight of these re-allocated diets were discharged again, three on the day of the fresh diet, one during the hearing, three within the two weeks prior to the diet, and one fifteen weeks before the diet. In three cases a third diet required to be fixed. Long periods of delay resulted.

2.31 A significant cause of disruption of the business of the court was the timing of intimation of discharge. As a general rule, a minimum of four weeks notice of a Summar Roll diet was required. Discharge with that period almost invariably results in waste of judicial time. In Dr Wadia's sample, 3.6% of discharges occurred during the hearing; 43% occurred on the day or first day of the hearing; and 12.5% occurred within the week before the hearing. 82% of all discharges occurred within the critical four-week period. Since the average waiting period for a Summar Roll hearing was thirty-five weeks, the timing of intimation of discharge gave rise to concern. The concern grew when one took note of Dr Wadia's next finding, that 93% of all discharges occurred within five weeks of the hearing.

2.32 As with other findings, the source of the business was a factor. 20% of business from the Outer House was discharged. The rate for tribunals was 30% and the rate for business originating in the sheriff court was 50%. Tribunal business gave rise to the highest percentage of discharges on the day of the hearing. Settlement, abandonment and amendment were the principal reasons given for discharge.

2.33 Late amendment was explained in various ways. New evidence was a factor. Administrative oversight was a factor. Delay in obtaining notes of evidence was tendered as an explanation in some cases. The largest number of explanations related to the availability of counsel to give advice or to prepare minutes of amendment.

2.34 Within the sample, forty cases required amendment, and in these sixty-two minutes of amendment were tendered. There was an even spread across the main types of business.

Preliminary assessment

2.35 Dr Wadia's findings, based on the sample studied, demonstrated that there was considerable inefficiency in the management of Inner House business, and that the deployment of judicial resources was ineffective. It also suggested that the reasons for the state of affairs disclosed were complex.

2.36 The data relating to late discharges of Summar Roll hearings suggested that a culture of late preparation and brinkmanship, and the influence of the 'court-door syndrome' were contributory factors. The inaccuracy of predictions of time required also reflected a lack of preparation at a relatively late stage in the procedure. Another pointer in the same direction was the data relating to late amendments. However, while the court might influence change in cultural values by imposing discipline, it seemed unlikely that improvement could be achieved without legislation or changes in the Rules of Court.

2.37 There were, on the other hand, limits to what the Court might achieve by revision of the Rules of Court alone. While the Court might, by public observations on the impact of delay for example, influence the speed of resolution of legal aid issues, the Rules of Court could not provide a mechanism for control of another authority. The disruptive effect of sisting causes for legal aid might, again, be influenced by imposing discipline on parties, and, indirectly, by encouraging legal aid administrators to greater speed of resolution of outstanding cases. But effective control could not be imposed.

2.38 However, it appeared from Dr Wadia's analysis that there were areas within the control of the Court that could be dealt with. And, subject to legislation, there was further scope for improvement. Since radical change would have far-reaching implications for practitioners and the litigating public, it was thought that there should be a check on Dr Wadia's findings before proceeding. She was therefore instructed to carry out a second investigation.

RESEARCH AND ANALYSIS: THE SECOND PHASE

3.1 Dr Wadia presented her second report in April 2006. It extracted from available records and analysed data relating to cases commencing in 2003. The source data had not been improved between the two base periods and Dr Wadia required to use a mixture of sources of information as before. In general, her approach followed the pattern of her earlier exercise. The cases were tracked to 10 March 2006. Approximately the same number of cases were examined, and provided, in Dr Wadia's view, a highly significant statistical base for tracking and analysis, justifying confidence in the results.

3.2 In her second report, Dr Wadia noted:

> "Observing litigating behaviour in a different mix of appeals, with a different set of litigants, before the same forum is an ideal basis for drawing out the independent variables which may colour research and analysis. The numbers may be different, the mix may be different, but correlations in litigating behaviour point towards a working culture. The conclusions are therefore purified by a second sift, and more indicative of the basic problems within the system."

As a cross-check on her previous work, the second report was important.

Incidental business in the Inner House

3.3 The total time devoted to single bills and by order hearings, procedural business in general terms, was set out in the report as follows:

Calendar year	Hours spent on procedural business
2002	313
2003	271.75
2004	401.75
2005	410.25

The figures for the last two periods together confirmed the view based on the first exercise that such business had a serious impact on the availability of judicial time for disposal of substantive business.

3.4 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.

3.5 The range of business in the second sample differed from that found in the previous exercise. However, the general findings of the study on analysis of the data were consistent, within acceptable limits. This was a significant pointer towards the reliability of the analysis and Dr Wadia's views expressed on the basis of it.

3.6 Leave to appeal continued to raise issues. The actual numbers varied as among the classes of business from the earlier exercise. The majority of applications for leave were unopposed. Nevertheless, there remained a pattern of sluggish response that slowed down the appointment of cases to the Summar roll.

3.7 The incidence and pattern of competency issues changed as between the two studies. Fewer party litigants were involved in such issues in the second exercise. But the number of hearings required in the cases in which they were involved was relatively high. One party litigant had four single bill hearings fixed, two of which had to be continued because of non-appearance, continuing the pattern of unpredictable disruption of timetables and of opposing parties' progress that had been identified in the earlier exercise.

Fixing of substantive hearing

3.8 The interval between the date on which cases were appointed to the Summar Roll and the date on which the Keeper was approached to fix a date for the substantive hearing of the case raged from one week to sixty-three weeks during this stuffy period. The average period was seven weeks.

Early disposal cases

3.9 The proportion of cases in which early disposal was a feature was broadly the same as in the earlier study, about 25%. There was a consistent pattern of delay in final disposal. The average period to the allocation of a first Summar Roll hearing was 20 weeks, as against nineteen in the first study. The average period to final disposal was thirty two-weeks, the same as in the earlier study. The two studies demonstrate that while the Court could order early hearing, this did not necessarily result in an earlier resolution of the dispute.

3.10 The pattern of behaviour in the second study replicated that found in the first. In a proportion of cases, the early disposal procedure forced parties to adopt views and to make representations to the court about future progress before they were properly prepared. Dr Wadia considered that the pattern of behaviour that emerged appeared to be dictated by working practice. The more preparation time was restricted, the higher was the proportion of discharged diets. In early disposal cases discharges were more likely to be related to late production of documents.

3.11 Nevertheless, the majority of cases that were granted early disposal did complete much faster than those that were not granted early disposal. About 25% of cases did not benefit from early disposal.

Pattern of disposals

3.12 The most likely outcome of appeal remained adjudication, but by a narrow margin. The relative proportions as among the three broad divisions of work, reclaiming motions, sheriff court appeals and tribunal appeals, changed, with the most significant change being in the proportion of sheriff court appeals resulting in a judicial opinion. But there was little significance in that, given that the differences were affected by external variables that were outwith the control of the Court.

3.13 As in the earlier study, there were instances of early withdrawal in sheriff court and tribunal business. On this occasion, there were also early withdrawals in reclaiming motions. Together this data suggested that there was a practice of early assessment of prospects related to the preparation of grounds of appeal. There was a similar incidence of withdrawal in the early procedural stages of Inner House business when counsel began to be instructed to appear before the court in cases that had at earlier stages involved solicitors only.

3.14 However, the highest proportion of all cases that were disposed of without adjudication were brought to an end at the Summar roll stage. 35% of all abandonments occurred before grounds of appeal were lodged. 39% occurred in the period approaching the Summar roll diet. The high incidence of abandonments at these two stages points strongly to these as the stages at which prospects of success received serious consideration.

Estimates of duration and the impact on speed of disposal

3.15 Tested against the theoretical hypothesis that there should be a direct correlation between the projected duration of a hearing and the capacity of the system to accommodate the hearing, which Dr Wadia applied in her initial report, the outcome of the second inquiry was consistent. The postulated correlation did not exist in any consistent way. Explanations suggested by her findings tended to be personal and tactical rather than the direct result of the system. Dr Wadia stated:

> "The transparency of personal agendas is conclusive, and the evidence is not only comparative but cumulative. The timing of a hearing is tactical and personal, not predicated on the court time available. Currently the Court has no control over extended waiting times."

3.16 The detailed analysis underlying this view was consistent with her first study. In the case of appeals from tribunal decisions, only one-day and half-day hearings were booked within thirty weeks. Within fifty weeks, a three day hearing was accommodated. Hearings predicted to last one day were booked across the whole spectrum from seven to one hundred and two days, reflecting the availability of counsel, mutual indulgence of parties and sheer inertia.

3.17 In the case of sheriff court appeals, one-day hearings were booked across a range between three and ninety-one weeks. Hearings of longer predicted duration were booked over a wide, but less dramatic, range of periods. Reclaiming motions again reflected a narrower range of periods for all durations.

3.18 The pattern that emerged fully justified Dr Wadia's finding that the court had no control over the management of business once a Summar roll hearing had been appointed.

The impact of incidental business on the efficient disposal of substantive hearings

3.19 A summary of Dr Wadia's findings in the time spent on single bills and by order hearings has been provided above. The impact on the time available for Summar roll hearings is, superficially, obvious. But it is in the analysis of particular examples that the full significance of this factor becomes apparent.

3.20 The Minutes of Proceedings examined by Dr Wadia disclosed that very few Inner House days were actually available for full use for substantive business. A half-day allocation resulted in periods from one to four hours being available. Full day allocations resulted in one and a half hours to five hours being available for use for substantive business. Two day allocations averaged seven hours of hearing over the two day period.

3.21 Dr Wadia concluded that there was little reality in the notional full working day.

Sists

3.22 Sists continued to be the cause of the most extensive interruptions of progress. Approximately 25% of all business involved sist. The vast majority of those involved sists for legal aid. The average time involved was thirty-four weeks, again well beyond the Scottish Legal Aid Board's target response time.

3.23 Dr Wadia suggested that sist had become a 'procedural lay-by'. Cases were conveniently parked for prolonged period, without judicial intervention. Sisting the cause interrupted the running of the relevant procedural clock. In the case of tribunal appeals, sists for legal aid were lodged at the earliest possible stages. In all but two cases the initiative in recalling sist was taken by the party on whose motion sist was pronounced.

3.24 In sheriff court appeals, sist was again sought at an early stage in a number of cases, mostly for legal aid. In this group most motions for recall of the sist were marked by the opponent of the party on whose motion the sist was granted. The implication was that in tribunal cases the respondent was frequently content to show indulgence or indifference to the progress of the appeal. A party to a sheriff court appeal was less likely to be indifferent to the ultimate outcome, but the data showed a high degree of indulgence before steps were taken to recall the sist.

3.25 In the case of reclaiming motions, periods of sist ranged over five to fifty-one weeks, a materially wider range than in the earlier exercise.

Discharge of Summar Roll diets

3.26 In the second study, discharge of Summar roll hearings continued to be a regular feature. 47% of cases allocated a Summar roll hearing involved a discharge. Eleven cases were re-allocated dates. Twelve cases required continued diets. Twenty-three cases were returned to the Keeper for second allocations. Continuity of the judicial bench was, and is, essential. The accommodation of the judges' programmes, added to the need to accommodate counsel and parties, inevitably caused disruption of progress.

3.27 The intervals between first and second Summar roll hearings ranged from one day to one hundred and thirteen weeks.

3.28 As in the previous study considerable problems resulted from the timing of discharges. The later the discharge, the greater the difficulty in re-allocating judicial resources and the more likely it was that judicial time would be wasted.

3.29 The pattern that emerged from the second study showed that 3% of diets were discharged during the hearing; 51% were discharged on the day fixed for the hearing; 13% were discharged within the pervious week; 6% were discharged within the two previous weeks; 5% were discharged within three weeks; and a further 4% within the critical four week period within which the fast-track system operated by the Keeper could not effectively be applied. 19% only were discharged five weeks or more before the diet, and of those 11% were discharged within the marginal period of six weeks.

3.30 The results in the second group involved marginally fewer late discharges – 87% within five weeks as against 92% in the earlier study group. However, the difference was immaterial, given the disruption caused.

3.31 Dr Wadia calculated that the cases that were discharged on the day of the hearing had been allocated fifty court days, equivalent to one hundred and fifty judge days, which were irretrievably lost. Within the period after the Rule 6.3 By Order hearing, discharges lost eighty-two court days, equivalent to two hundred and forty six judge days.

3.32 Settlements, abandonments, and late amendments again dominated the picture. Examination of accounts of expenses showed that in some cases consultation with counsel only occurred within the last month before the Summar roll hearing. Assessment of prospects, and the state of preparation, were assessed only at the last stage available. Dr Wadia concluded that the high percentage of late withdrawals indicated that late preparation was the prevalent working practice, and pointed towards a culture of late preparation, brinkmanship and the influence of the 'court door syndrome'.

Assessment

3.33 Dr Wadia's conclusions provide a damning indictment of the efficiency and cost-effectiveness of Inner House business. She stated:

> "There is a working culture within the Inner House which appears to be unmanaged and unmanageable in its current form."

Dr Wadia was an experienced and respected researcher, with wide experience of studying the court. Such an assessment had to be taken seriously.

3.34 She concluded that late preparation and organisation by the parties led to discharged hearings, and that at a late stage in the procedure. There was a one in two chance of a diet being discharged, and a one in four chance of that occurring on the date fixed for the hearing.

3.35 Her findings indicated that the current management tool, the Rule 6.3 By order hearing, was ineffective. Estimates of time were inaccurate, and assurances given to the court about parties' preparedness for substantive hearings were flawed. Early disposal business had the highest incidence of non-appearance at Rule 6.3 By order hearings, and the highest incidence of discharges and continuations.

3.36 The high proportion of party litigants who conduct litigation without legal representation or skill was distorting the pattern, absorbing a disproportionate amount of time on procedural business. The use of a full bench in open discussion of party litigants' positions, with provision of advice on procedure, reflected tolerance of parties' 'blunderbuss' approach to business, with failure to comply with procedural requirements rewarded by allowing extended oral presentation, often misguided, at the expense of opponents.

3.37 A hard core of party litigants are abusive towards staff, causing disruption of the administration of business. Some of these, though fewer, continue that pattern of conduct in court.

3.38 The problem of multiple procedural hearings was aggravated by a charging policy for court fees that encourages repeat appearances.

3.39 Dr Wadia also concluded that the Court itself shared responsibility for the disruption of progress. Significantly, dedicating substantial periods to procedural business disrupted the substantial business of the Court.

3.40 Further, lack of sanctions, and a laissez faire approach to compliance with procedural requirements tolerated, if not encouraged, late preparation, late discharge and non-appearance at hearings.

3.41 There was a lack of an established managerial approach on which litigants could rely for guidance in conducting practice. There was no systematic requirement for advance notice of argument. Oral presentation of notes of evidence absorbed considerable amounts of time, often without profit.

3.42 The lack of data meant that the court could not assess its own effectiveness and efficiency.

3.43 The Inner House was heavily dependent on the skills of clerks who could not readily be replaced, and was vulnerable to considerable disruption on the retirement of long-serving clerks because of the lack of a defined structure in the approach to the work of the Court.

DISCUSSION

5.1 The disruptive effect of procedural business on the court's capacity to deal with substantive Summar Roll hearings was shown to be considerable. In her first report, Dr Wadia raised the question whether the court day could be extended. But it was clear that that could not be achieved without, at least, simultaneous re-organisation of criminal business. That would present too great a challenge if improvements were to be introduced within a reasonable time-scale, given the need to co-ordinate the requirements of the two separate systems. The alternative, and practicable, solution seemed to be to allocate single bills and by order business to a single Inner House judge for disposal, subject to provision for remit to a larger court in case of need. Dr Wadia also recommended the introduction of sanctions for disruption caused by the conduct of parties. Under the existing regime too much was left to the initiative of the parties and their representatives, uncontrolled by the court. An ill-disciplined approach to the use of judicial resources was encouraged by the lack of appropriate mechanisms for intervention.

5.2 However, a radical review of procedure would require changes to primary legislation in addition to extensive alterations to the structure of the Rules of Court. Section 2 (3) of the Court of Session Act 1988 prescribed the quorum for a Division of the Inner House as three judges. Amendment of that provision would be a matter for the Parliament, and any representations relating to the amendment of the Act would require to be addressed to the appropriate Ministry. That was a material consideration in instructing Dr Wadia's second investigation.

5.3 Taking the results of both studies together, it appeared that there was ample justification for promoting the proposal that Section 2 (3) of the Court of Session Act 1988 should be amended. The impact of procedural business, in the form of single bills and by order hearings, on the time available for substantive business, demonstrated a need for review of the current arrangements on any view. It was apparent that such business had been increasing in volume, with a corresponding reduction in the proportion of the court day available for disposal of Summar roll and other substantive business of the court. The finding that there was little reality in the notional full court-day for the disposal of substantive business was a serious indictment of the use of a full Division for the disposal of routine procedural business.

5.4 The volume of procedural business was such that one could not accommodate it by increasing marginally the length of the court day, even if that were otherwise acceptable on general grounds. Dedicating Monday to such business would not suffice. In any event regarding Monday as available for judicial sittings would not be acceptable without a major re-organisation of the use of judicial resources to provide alternative periods for preparation and writing judgments.

5.5 It was clear that much procedural business was routine, and undemanding. A single Inner House judge could deal with most single bills and by order hearings effectively, on behalf of his Division, without engaging colleagues. Efficiency in the deployment of Inner House resources would be improved materially if such business could be delegated on a routine basis to a single Inner House judge. There would be an increase in demand for clerking and macer support services. And court space would be required. On the credit side, the direct cost associated with two Inner House judges' time would be saved in most cases. The most significant benefit, however, would be in the ability effectively to deploy the Divisions in hearing Summar roll and other substantial business without the disruptive interposition of procedural business.

5.6 It was also clear that unqualified delegation of some procedural business to a single judge would be unacceptable. It would be necessary to provide for the remit of particular business to a full Division, either at the instance of the single judge or on motion of parties. There were certain examples of procedural business that raised issues of general importance or novelty. One would be anxious to avoid the need to deal with appeals on procedural matters. The preferred course would be to provide that the single judge would have discretion to remit issues arising on any single bill or by order hearing to a larger court for determination in the first instance. If that were done, the decision of the single judge in all other cases could properly be final, without right of appeal. Parties would have the opportunity at the hearing before the single judge to identify any issue that the single judge should not determine finally without remit.

5.7 It seemed that, provided that the nomination of a single judge for procedural business were for a reasonable period of time, such a system would have other benefits than simple relieving the full Divisions of the work. A factor contributing to the inefficiency of the existing system was change in the composition of the Divisions dealing with successive stages of individual cases. There was often a need to instruct a differently constituted division in the procedural history of the case properly to inform the judges of the context in which the instant issue arose. A single dedicated judge would have knowledge of past events. This procedure would have to have IT support, and in particular more ample minutes of proceedings than have been traditional.

5.8 It seemed also that management of cases involving party litigants could be facilitated by delegating case management to a dedicated individual judge. It appeared that in the case of such litigants confidence in the individuals dealing with cases was a material consideration. That could be difficult to develop when the complement of judges in a Division changed frequently, and the litigant was confronted by different individuals, sometimes tendering differing advice. Further, there could be a need for firm discipline in dealing with party litigants. That would be facilitated by having the case management in the hands of a single individual.

5.9 The first recommendation made in my earlier report, therefore, was that the Scottish Parliament should be encouraged to amend the Court of Session Act 1988 to reduce the quorum of a Division of the Inner House for procedural business to one.

5.10 In the Judiciary and Court (Scotland) Act 2008, section 46 (3), provision was made for the amendment of section 2 the Court of Session Act 1988 as follows:

> (3) In section 5 (power to regulate procedure etc. in the Court of Session by act of sederunt), after paragraph (b) insert—
>
> "(ba) to make provision as to the quorum for a Division of the Inner House considering solely procedural matters…".

The legislative framework was created for changes to the Rules of Court to promote improvements in the management of Inner House business.

PREVIOUS RECOMMENDATIONS

6.1 In the light of Dr Wadia's findings, and anticipating the legislative changes required, I made a series of recommendations on the basis of which further study of the changes that might be proposed to the Rules of Court might be carried out. It seems appropriate to set these out. They were:

1. That the Rules of Court should be amended to provide for delegation by the Lord President to one or more nominated Inner House judges of the disposal of procedural business, as defined by the minute of delegation, for such period or periods as the Lord President thinks fit;

2. That such delegation should permit the nominated judge, on his or her own motion or on motion of one or more parties, to remit any matter arising within the scope of delegated powers to a larger court for determination; and

3. That otherwise the decision of the nominated judge should be final on matters within the scope of the delegation;

4. That all Inner House business will be registered at initiation;

5. That on registration an automatic template will be generated setting an initial timetable reflecting the procedures prescribed in the Rules of Court for the class of business in question;

6. The initial timetable would follow a theoretical model for the appropriate class of business assuming progress through the initial stages of Inner House procedure without deviation from the prescribed periods for satisfaction of the Rules of Court;

7. The initial stages of procedure would encompass all stages to the pronouncing of an interlocutor making an order for a hearing to dispose of the appeal;

8. Objections to competency would require to be raised by the DPC or intimated by motion within fourteen days of intimation of the marking of the appeal. All objections to competency would be disposed of by a single Inner House judge, subject to reference to a larger court in case of need;

9. All other motions would continue to be enrolled, intimated and allocated diets as at present;

10. The initial timetable would be revised as necessary to accommodate changes in the succeeding steps in procedure following on the interpolation of diets for procedural hearings;

11. The critical stages in procedure, for which amended Rules of Court would be required in some cases, that would be reflected in the initial timetable template would be:

    a. A date by which any objection to competency must be intimated;

    b. A date for lodging grounds of appeal, which would be a mandatory requirement in every case. This date would be fixed without reference to the time required to dispose of any objection to competency, but it, and subsequent dates, would be adjusted as necessary on intimation of an objection to competency;

c. Amendment of grounds of appeal would be permitted, but restricted to a period ending not later than a short specified period before the By Order diet prescribed below; (Amendment on cause shown after that period, if allowed, would carry automatic liability in expenses.)

d. Every respondent intending to enter the process would be required to lodge answers to the grounds of appeal, and the grounds of any cross appeal, within a specified period. The timetable would reflect the final date for such answers, subject to revision to accommodate interposed business;

e. All parties would be required to lodge written notes of argument within a specified period of the final date for answers;

f. All motions for extension of time would require cause to be shown, and would be on such conditions as to expenses as the court considered appropriate. Any extension granted would be reflected in adjustment of the timetable;

g. Not later than seven days before the By Order hearing mentioned in the next paragraph, any party seeking early disposal would enrol a motion to that effect;

h. Within a period following the expiry of the period or adjusted period for lodging written notes of argument, specified in the Rules of Court, the appeal would call By Order on the date specified in the timetable, as then revised;

i. At that By Order hearing, the court, in consultation with the Keeper, would, if satisfied that the parties were prepared and that all prospects of alternative dispute resolution had been exhausted, either fix a diet for the disposal of the appeal or continue the By Order hearing, with such additional procedural requirements as the court considered necessary to bring the case to full preparation for hearing, and such orders for expenses as the court considered appropriate in view of any deficiencies in preparation that were apparent at that stage;

j. Within a short prescribed period of the fixing of a diet of hearing for disposal of the appeal, parties would be required to fee fund the appeal for the whole duration of the substantive diet. All such sums would be liable to forfeiture if the diet fell for any reason, subject to liability in expenses inter parties;

k. Fee fund dues for continued diets extending beyond parties' forecast at the By Order hearing would be at enhanced rates.

Proposals were made for the amendment of the Rules of Court accordingly.

6.2 Many of the considerations focused in my earlier report remain valid. The over-riding purpose of these proposals was to enable the Court to manage the procedural stages of appeal business so as to ensure, so far as practicable, the effective and cost-efficient use of judicial resources, while taking care to avoid prejudice to the legitimate interests of litigants. It was clear from Dr Wadia's study that material delay could arise when the initiative in promoting the disposal of business was left to the parties, unsupervised by any form of management by the Court. In a party led system this is and will continue to be inevitable to some degree. However, since recourse to the court implied the use of scarce and expensive public resources, a balance had to be achieved and maintained between the freedom of the litigant to define and pursue

interests on a partisan basis and the interests of the Court in particular and the public generally in securing the efficient and effective application of the resources of the judicial system.

6.3 The impact of unrestrained freedom to pursue party interests without Court-imposed discipline was clear from Dr Wadia's reports. The intervals of time between the date of appointment of business to Summar roll hearing and the approach of parties to the Keeper's office illustrated this. Under current procedure, the appointment of a case to the Summar roll defined the end of a period of relatively active involvement of the court in the conduct of cases. Procedure was regulated by timetabling requirements of the Rules of Court, or by the disposal of single bills until that point. Thereafter the fixing of a hearing required a fresh initiative by parties. The variation in the periods that emerged in fact was, on the face of it, inexplicable and incapable of rational justification. The court had, and continues to have, a legitimate interest in the disposal of outstanding business: it is a possible measure of the efficiency of the judicial system. To leave it to parties freely to extend the total time required for the disposal of business by failing to book a diet for the hearing of the substantive stage in an appeal, after the court has appointed a case for hearing, did not appear to be, and does not appear to be, acceptable.

6.4 In the case of early disposal business, this feature seemed to be of particular significance. The provisions for early disposal reflected an attempt to achieve a measure of judicial management of the use of the resources of the Court by focusing attention on the need to reach final resolution as a matter of relative urgency in particular cases or classes of cases. The selection of classes of cases for compulsory consideration of early disposal in terms of the Rules of Court was a reflection of the court's interest in this matter. But it appeared that the intention of the court could be frustrated by tardiness of parties in the fixing of an appropriate diet. The loss of control of the process as soon as the case had been appointed for early disposal appeared to be unacceptable in principle.

6.5 Dr Wadia's studies of the histories of early disposal cases at the later stages of procedure in the Inner House cast doubt on the effectiveness of the initial stages in early disposal procedure. While this might have reflected inefficiency in the management of business generally, it was not immaterial that business which, of its nature, should be disposed of with expedition, was frequently delayed. In each study data indicated that prorogations of time to meet timetabling obligations, lack of time for preparation, unavailability of counsel, late lodgement of documents, and late settlements all figured as reasons for disrupting progress. Early disposal procedure was effective in a relatively high proportion of cases in securing relatively quick disposal. Intervention had an impact. But there remained too high a proportion -25%- in which this form of procedure was ineffective.

6.6 The pattern of disposals found by Dr Wadia also suggested that early intervention would be of value. The pattern of withdrawal at or about the stage of preparing grounds of appeal, and at the early stages of Inner House procedure before the court suggested that the need to consider the merits of appeal either in the course of the preparation of papers or in anticipation of a court appearance provided a focus. Once those stages were past, serious consideration of the case was postponed to a late stage, resulting in disruption of programmed work, and inefficient use of judicial resources.

6.7 Dr Wadia suggested that some litigants reached physical, emotional or financial exhaustion in the course of their cases. 26% of abandonments took place during the Summar roll hearing. On any view it appeared that at critical stages the litigant's

mind was focused, and final decisions were taken, usually provoked by the imminence or currency of formal stages in procedure. It appeared that it would be in the interests of efficiency and of the effective use of judicial resources to increase judicial supervision over the conduct of Inner House business to maximise the impact of judicial management. It cannot be acceptable for the court rolls to be inflated by cases fifty per cent of which are probably going to be disposed of without a judicial decision, and many of those at a late stage when the resources of the court cannot be deployed effectively otherwise.

6.8 In the final analysis, there was no justification for the allocation of a Summar roll diet to any case that had not been fully prepared. In any system there will be some late disposals on an extra-judicial basis. Changes in the law or in the commonly held views of the law do occur. A well prepared case may be undermined by a decision in another case. Parties do become emotionally and physically exhausted by the litigation process. The realisation that litigation is not a precise science and that utter conviction that one's case is logically irrefutable is insufficient for success may dawn late in the day, whatever advice has been tendered. But the routine postponement of rational analysis of the risks of litigation until a late stage, however understandable in human terms, is unacceptable if it leads to waste of scarce public resources, and that appeared to characterize the Scottish approach.

6.9 It was suggested that nothing short of a radical change in the procedural rules, backed by up-dated and efficient IT systems, was required. The essential features of the proposals required the design and installation of new software, borrowing from the experience obtained from work in Commercial Court IT system, and in the High Court systems implementing the Bonomy reforms. For Inner House purposes, one would require a comprehensive case tracking and timetabling system, with provision for recording interlocutors, with full supporting minutes, fully integrated with the judges' programmes to ensure the effective and efficient allocation of diets in co-operation with the Keeper. A full specification would require to be developed in the light of the outcome of consultation on the proposed Rule changes.

6.10 The object of the proposals was, broadly, to front-load parties' preparation and commitment timetable, in an attempt to ensure that only cases that were ready for hearing passed a new By Order stage. That would not prevent late amendments being proposed or other incidental orders being sought. But it would be legitimate to place obstacles in the way of change, given the overall objective of ensuring the cost-effective and efficient use of judicial resources. That would be done by requiring cause to be shown and by providing for expenses to be awarded, including the immediate award of the cost of fee funding the appeal, as a pre-condition of making any change that interfered with the timetable.

6.11 Dr Wadia's findings on the lack of correlation between predicted duration and the fixing of diets for Summar roll hearings demonstrated that the Court had at that time no control over the allocation of diets for substantive business. In the result, the allocation of judges to hear cases was a casual by-product of the approach parties adopted in fixing diets: the judges allocated to hear the cases were drawn from those available rather than selected to ensure most beneficial use of the judicial resources that could be made available on a rational assessment of need.

6.12 The solution proposed was intended to provide for correlation of available judicial time with demand by the court, in co-operation with the Keeper, at the point at which a case destined for the Summar roll and fully prepared for hearing would be appointed to that roll.

6.13 The need for active judicial management of business was further emphasized by the research findings relating to sist. The long periods of inactivity introduced following sist, often for legal aid, far exceeded the target periods for disposal of applications set by the Scottish Legal Aid Board. As matters stood there was no mechanism for judicial intervention so long as an opponent was willing to accommodate the party in whose interests the cause had been sifted. Since long periods of sist inevitably reflected on the efficiency of disposal of business, the court had a legitimate interest in policing sifts, and accordingly in setting a timetable that requires parties to report progress in the area justifying the sist, whether that be legal aid, settlement or other feature of the case.

WRITTEN ARGUMENT

6.14 Dr Wadia's research did not deal with the first issue raised in Lord President Cullen's initial reference, the possible use of written submissions as an aid to efficiency of use of judicial time in court by facilitating preparation, and, later, in writing. While Dr Wadia commented on the lack of a requirement for written arguments, she was not able to provide data to assist in the discussion of that issue.

6.15 There were, and remain, widely differing views on the use of written argument in the Scottish system generally, and, where it has been used, on its effectiveness. Scottish pleading has for many decades been heavily dependent on oral advocacy, and that may be taken to characterize litigation culture as it now exists. However, formerly extensive written argument was the norm in civil procedure in the Court. The procedural requirements of any civil litigation system must be adapted to contemporary conditions in the society it seeks to serve. The abandonment of written pleadings in the past reflected a reaction against its then current form in the circumstances that then existed. If the introduction of written argument were required now to improve the efficiency of Inner House work, that would be merely a response to current need, and should raise no issue of principle. Procedure is and must remain the servant of the public interest in the efficient and effective disposal of civil business, not its master.

6.16 A review of the appropriateness of written argument must begin with parties' interests, though that was not an issue raised by Lord President Cullen. For the parties, written argument, prepared and intimated at an appropriate stage in the proceedings, expands on formal grounds of appeal, and provides notice of the factual and legal analyses on which the grounds of appeal are based. For the party preparing the argument, the requirement focuses attention on the basis of that party's case and provides an opportunity for review of the merits of the case to be advanced. For the party receiving intimation of a note of argument, notice is provided of the case to be met. Full and frank exchange of information about the other parties' positions in an appeal must remove some of the mystery that currently exists, and would inevitably deny litigants such advantages as now arise from opponents' ignorance of the strength of one's arguments. Litigation is not an exact science, and the proofs available to parties do not have the precision of mathematical theorems. It is of little advantage to discuss the wish of litigants to keep an edge of advantage over their opponents. But it is relevant to consider how far such selfish interests should weigh in the balance against the advantages inherent in an open system that requires communication of the essence of each party's position in advance of the point at which parties and the court become committed to the allocation of significant periods of time for disposal of the appeal.

6.17 Rational decisions about the scope of any item of Inner House business, about the time required for its disposal, about the particular and general importance of the case,

and about the relative importance of the item in the context of the total case load of the court are essential if the use of judicial resources is to be efficient and cost effective. The initial assessment by parties of their own and their opponents' cases is the first line of defence against inappropriate decisions on these and similar matters. An appropriate requirement for the exchange of written notes of argument would improve openness in communication, would inform decisions at an appropriate time in the course of the litigation, and would improve the efficiency of the system by (a) facilitating the removal from the system of cases that had poor prospects of success; (b) identifying cases that required accelerated or extended treatment; and (c) facilitating rational decisions on the extra-judicial disposal of business.

6.18 Disclosure to the Court of notes of argument would facilitate preparation for hearings at and after the point selected for their exchange and production to the Court. There can be no justification for the perpetuation of a system in which the Court can be asked to take material decisions about the future conduct of any item of business without full information about the scope of that business. Yet, at present, cases can be remitted to a Summar roll hearing on the basis of summary grounds of appeal and submissions by a party or a party's representative with little knowledge or understanding of the issues that may arise. It has already been argued that there is no justification for the allocation of a Summar roll hearing in a case that has not been fully prepared. It is in the interests of the Court to have intimation of that state of preparation before remitting a case for a substantive hearing. Indeed it is difficult to see how the Court could properly decide that a hearing was required without information about the issues to be raised and decided.

6.19 In relation to the specific points identified by Lord President Cullen, it is clear that prior notice of parties' arguments in writing can increase the efficiency of use of judicial time. Such procedures do not necessarily reduce court time. Indeed the identification of substantial issues for determination may extend the time required for hearing a specific case. However, the alternative in such a situation may be that the requirement to dispose of business that has not been prepared to an appropriate degree may affect the efficiency of the judges in preparing and issuing judgment. Time spent in overcoming deficiencies of argument is unlikely to reflect an effective use of judicial resources. A decision that discloses that the court has not been properly informed of the full range of issues and the appropriate authorities merely generates other litigation to resolve the problems that are created. And the instant litigants' dissatisfaction with the process may well be reflected in satellite litigation against former legal advisers.

6.20 Written argument would facilitate the rational disposal of business. The timing of exchanges of notes of argument would require to fit with the regime proposed for early case management.

6.21 It was thought necessary to formulate and to publish clear guidance on the scope and content of notes of argument. One might not wish to encourage unnecessarily extensive pleadings, as if in substitution for oral argument. On the other hand a minimalist approach might not take one materially further forward than the formal grounds of appeal. A minimum requirement to meet the needs of parties in relation to the law might be disclosure of statutory sources, authorities and text-book sources and the propositions derived from them in support of the individual grounds of appeal. In relation to the facts, intimation of the sources of evidence relied on might suffice. But these were thought to be practical matters that would best be prescribed by practice notes rather than formal Rules of Court so that they could be developed and amended as experience dictated.

RULE 6.3 BY ORDER HEARINGS

6.22 The third specific issue identified by Lord President Cullen related to the efficiency of the current procedure under Rule 6.3 of the Rules of Court. That provision currently requires parties enrolling for appointment of a case to the Summar roll to include an estimate of the time likely to be required for the hearing. Approximately five weeks before the allocated date, the case is called by Order, and parties are required to inform the court whether the hearing is to proceed and to provide an up-dated assessment of the time required for its disposal.

6.23 Dr Wadia's findings on the effectiveness of the By Order stage of this procedure have been discussed in the context of her research generally. It is apparent that the procedure is not effective generally to avoid late changes of position, late abandonments, late amendments, and distortions of the time required for the proper disposal of business. Among the reasons for this state of affairs is that even at the late stage of five weeks before Summar roll diets parties are frequently not adequately prepared for the hearing.

6.24 It was proposed that the existing By Order requirement should be deleted, and that the emphasis should be on front-loading preparation, with parties being required to commit to binding estimates of time prior to the allocation of a substantive hearing. It would be destructive of the effectiveness of that procedure if the rules were to continue to provide for a relatively late re-assessment of requirements.

6.25 Following the delivery of my previous report, I visited the Civil Appeals Office of the Court of Appeal, and had a useful discussion with Robert Hendy, Deputy Master. The current system had been explored in meetings held by the Lord Justice Clerk with Lord Justice Waller and Mr Hendy as part of the Lord Justice Clerk's Civil Courts Review and it was clear that there were lessons to be learned from English practice.

6.26 As matters stood in England, there was no automatic right of appeal. Permission was required in almost all cases. Having regard to the variety of forms of appeal and the legislative and regulatory structures applicable in Scotland, there was no prospect of following English practice directly: it would have been a major innovation to require leave to reclaim in practically all cases, far beyond the scope of the current project. However, it appeared that it might be possible to introduce a sifting mechanism that could produce substantially the same result as was achieved in that jurisdiction.

6.27 It was therefore proposed that, in addition to the recommendations previously made, consideration should be given to new Rules of Court that would provide for the following steps:

- At an early stage, typically soon after the Court had available the opinion or note of the court below, the single judge of the Inner House should consider the grounds of appeal, answers and any appendices lodged by the reclaimer, and, if thought fit, might put the cause out for hearing by order for submissions on the question whether the reclaiming motion or any of the grounds of appeal should be refused on the ground that it or they was or were not arguable;
- The procedural judge would cause the question to be intimated to parties, specifying as appropriate the particular issues to be raised at the by order hearing, and the parties would be entitled to be heard on the question or questions posed;

- A decision of the procedural judge to refuse the reclaiming motion or to refuse any ground or grounds of appeal on the ground that it was or they were unarguable would be final and not open to review;
- The single judge would adjust the timetable as necessary in the light of this procedure;
- Notwithstanding the finality provision, a Division of the Inner House comprising three or more judges would have power to reopen a final determination by the single judge that a reclaiming motion or any ground of appeal in such a reclaiming motion was unarguable, if:

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

There were ancillary procedural proposals to supplement these core proposals.

6.28 It appeared that the notion of a sift was established in the criminal sphere, and there seemed to be no reason in principle why it should not be introduced into civil procedure. The notion of reopening an issue was taken from the English civil appeals rules, and in particular rule 52.17. The English Court had had teething troubles, but the practice had settled down b y the time of my discussions with Mr Hendy. Finality – and excluding automatic rights of appeal as an aspect of it – was justified in England by section 54 (4) of the Access to Justice Act 1999. It appeared that Scotland would also require primary legislation to enable these proposals to be given effect.

6.29 The proposed Rules of Court appended to this report do not make provision for sifting of appeals. The amendment of the Court of Session Act restricts the role of the single judge to procedural matters. Disposal of an appeal on its merits would not be justified. The only mechanism that would enable the Court to respond to argument that an appeal was unarguable would be use of the procedure for urgent disposal. In exercise of the powers proposed, a single judge could accelerate the appeals procedure to enable a Division of three or more judges to dispose of an allegedly unarguable appeal. This approach would not replicate the procedures available in England, however, and I would respectfully suggest, albeit outwith the scope of my remit, that there is a need for such an approach that might properly be urged on Scottish Ministers.

THE PRESENT PROPOSALS

7.1 There is appended to this report, a draft Act of Sederunt containing four new chapters of the Rules of Court to be substituted for the chapters currently regulating reclaiming, applications for new trial, and appeals from lower courts. If the recommendations relating to these classes of Inner House business are accepted, it would be appropriate to amend the Rules relating to statutory appeals, Chapter 41, to adopt the core procedural changes proposed, with suitable adaptations to reflect the statutory background. However the work required, involving examination of all of the statutory provisions enabling appeals, would not be justified if major changes are required to the current proposals.

7.2 Chapter 37A makes provision for the specification of the procedural business to be remitted to a single judge of the Inner House, and for the selection by the Lord President of the nominated judge. In accordance with section 2 of the Court of Session Act 1988 as amended by section 46 of the Judiciary and Courts (Scotland) Act 2008, the remit of the single judge is restricted to procedural business.

7.3 Chapter 38 sets out a new set of rules regulating procedure in reclaiming the decisions of the Outer House. Chapters 39 and 40 adapt the core features of Chapter 38 to meet the requirements of the different classes of appeal business that they cover. The essential features of the major changes to the system can be described by reference to Chapter 38. The proposed Rule does not prescribe the administrative arrangements proposed for registration. The recommendations for these can be implemented without an Act of Sederunt. They are:

- All Inner House business should be registered at initiation;
- On registration, an automatic template should be generated setting an initial timetable reflecting the procedures prescribed in the Rules of Court for the class of business in question;
- The initial timetable should follow a theoretical model for the appropriate class of business assuming progress through the initial stages of Inner House procedure without deviation from the prescribed periods for satisfaction of the Rules of Court; and
- The initial stages of procedure should encompass all stages to the pronouncing of an interlocutor making an order for a hearing to dispose of the appeal.

7.4 Draft Rule 38.12 reflects the recommendation that:

- Objections to competency should require to be raised by the Deputy Principal Clerk of Session or intimated by motion within fourteen days of intimation of the marking of the appeal. All objections to competency should be disposed of by a single Inner House judge, subject to reference to a larger court in case of need.

The proposal includes provision for regulating such objections as a whole, taking them out of the scope of the timetabling requirements.

7.5 Draft Rules 38.13, 38.24, and 38.15 make provision for the timetable proposed for all reclaiming motions. Form 38.13 prescribes the proposed form of the timetable. The form of the timetable has been altered from the earlier proposals in some respects. A time limit for objections to competency is not included, the procedure being regulated by Draft Rule 38.12. Again, the timetable does not prescribe a period for amendment of grounds of appeal. Amendment is dealt with by Draft Rule 38.18, which requires

any party proposing amendment to enrol for variation of the timetable in terms of Draft Rule 38.14, with all of the consequences there set out. Draft Rule 38.15 provides the procedural judge with power to enforce the timetable.

7.6 Draft Rule 38.16 sets out the requirements for a procedural hearing. This provision is central to achieving the object of the proposals: to ensure that no appeal (other than a case subject to accelerated procedure under Draft Rule 38.11) is sent for a hearing on its merits unless the single judge is satisfied that such a hearing is necessary and that the parties are prepared for it. There is, therefore, no provision for a By Order hearing near to the diet of Summar roll or Single Bills for review of the parties' state of readiness. That is presumed from the order sending the case for hearing. The present draft does not include the quasi-penal provisions for expenses and payment of Fee fund dues proposed in my earlier recommendations, viz:

- Within a short prescribed period of the fixing of a diet of hearing for disposal of the appeal, parties would be required to fee fund the appeal for the whole duration of the substantive diet. All such sums would be liable to forfeiture if the diet fell for any reason, subject to liability in expenses inter parties.
- Fee fund dues for continued diets extending beyond parties' forecast at the By Order hearing would be at enhanced rates.

7.7 On reflection, it does not appear appropriate to regulate such matters by Rule of Court.

7.8 I recommend that the proposals should now be subject to consultation.

S C O T T I S H S T A T U T O R Y I N S T R U M E N T S

2009 No.

COURT OF SESSION

Act of Sederunt (Rules of the Court of Session Amendment No. [ ]) (Causes in the Inner House) 2009

Made - - - -	*2009*
Coming into force - -	*[ ] 2009*

The Lords of Council and Session, under and by virtue of the powers conferred by section 5 of the Court of Session Act 1988([a]) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. [ ]) (Causes in the Inner House) 2009 and shall come into force on [ ] 2009.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session

2. The Rules of the Court of Session 1994([b]) shall be amended as follows.

3. In rule 4.7(1) (lodging of documents in Inner House causes)–

(a) in subparagraph (d), for "38.6(2)" insert "38.5(2)";

(b) in subparagraph (f), for "40.7(2)(a)(ii)" substitute "40.7(2)(b)";

(c) in subparagraph (g)–

(i) for "39.5" substitute "39.8"; and

(ii) for "40.17" substitute "40.20".

4. Rule 6.3 (allocation of diets in the Inner House) is revoked.

5. In rule 4.16 (Inner House interlocutors), in paragraph (2)–

(a) after subparagraph (b) insert–

"(c) in relation to any procedural business dealt with by a procedural judge within the meaning of rule 37A.1 (quorum of Inner House for certain business), by the procedural judge who determined the matter to be dealt with in the interlocutor. "; and

([a]) 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 c.32, section 2(3), the Children (Scotland) Act 1995 c.36, Schedule 4, paragraph 45 and the Judiciary and Courts (Scotland) Act 2008 (asp 6), section 46(3).

([b]) S.I. 1994/1443, last amended by S.S.I. 2005/632.

(b) in paragraph (3), after "Division of the Inner House" insert "or, as the case may be, by the procedural judge before whom the motion was brought".

6. For Chapters 38, 39 and 40 there shall be substituted the following Chapters–

"CHAPTER 37A

QUORUM OF INNER HOUSE FOR PROCEDURAL BUSINESS

Quorum of Inner House for certain business

37A.1.—(1) In relation to such procedural business of the Inner House as is specified in paragraph (3) or otherwise by the Lord President, the quorum of a Division of the Inner House shall be one judge nominated by the Lord President.

(2) In this Chapter and in Chapters 38, 39 and 40, "procedural judge" means a single judge of the Inner House nominated in accordance with paragraph (1).

(3) The procedural business mentioned in paragraph (1) is such business as arises under–

(a) Chapter 38 (reclaiming), up to and including the procedural steps mentioned in rule 38.16(3);

(b) Chapter 39 (applications for new trial or to enter jury verdicts); and

(c) Chapter 40 (appeals from inferior courts), up to and including the procedural steps mentioned in rule 40.14(2);

(4) Notwithstanding any provision of these rules to the effect that business of the Inner House may be disposed of by a procedural judge, it shall be competent for that business to be disposed of by a Division of the Inner House comprising three or more judges.

CHAPTER 38

RECLAIMING

Introduction

38.1.—(1) This Chapter applies subject to any other provision in these rules or any enactment.

(2) Any party to a cause who is dissatisfied with an interlocutor pronounced by–

(a) the Lord Ordinary;

(b) the Lord Ordinary in Exchequer Cases; or

(c) the vacation judge,

and who seeks to submit that interlocutor to review by the Inner House shall do so by reclaiming within the reclaiming days in accordance with the provisions of this Chapter.

(3) In this Chapter, "reclaiming days" means the days within which an interlocutor may be reclaimed against.

Reclaiming days

38.2.—(1) An interlocutor disposing, either by itself or taken along with a previous interlocutor, of–

(a) the whole subject matter of the cause; or

(b) the whole merits of the cause whether or not the question of expenses is reserved or not disposed of,

may be reclaimed against, without leave, within 21 days after the date on which the interlocutor was pronounced.

(2) Where an interlocutor which reserves or does not dispose of the question of expenses is the subject of a reclaiming motion under paragraph (1)(b), any party to the cause who seeks an order for expenses before the disposal of the reclaiming motion shall apply by motion to the Lord Ordinary for such an order within 14 days of the date of enrolment of that reclaiming motion.

(3) An interlocutor disposing of the merits of the action and making an award of provisional damages under section 12(2)(a) of the Administration of Justice Act 1982([a]) may be reclaimed against, without leave, within 21 days after the date on which the interlocutor was pronounced.

(4) An interlocutor mentioned in paragraph (5) may be reclaimed against, without leave, within 14 days after the date on which the interlocutor was pronounced.

(5) Those interlocutors are–

(a) an interlocutor disposing of part of the merits of a cause;

(b) an interlocutor allowing or refusing proof, proof before answer or jury trial (but, in the case of refusal, without disposing of the whole merits of the cause);

(c) an interlocutor limiting the mode of proof;

(d) an interlocutor adjusting issues for jury trial;

(e) an interlocutor granting, refusing, recalling, or refusing to recall, interim interdict or interim liberation;

(f) an interlocutor in relation to an exclusion order under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981([b]);

(g) an interlocutor granting, refusing or recalling a sist of execution or procedure;

(h) an interlocutor loosing, restricting or recalling an arrestment or recalling in whole or in part an inhibition used on the dependence of an action or refusing to loose, restrict or recall such an arrestment or inhibition,

(i) an interlocutor granting authority to move an arrested vessel or cargo;

(j) an interlocutor deciding (other than in a summary trial) that a reference to the European Court should be made.

(6) An interlocutor (other than a decree in absence or an interlocutor mentioned in paragraph (2), (3) or (5) of this rule) may be reclaimed against, with leave, within 14 days after the date on which the interlocutor was pronounced.

Leave to reclaim etc. in certain cases

38.3.—(1) An interlocutor granting or refusing a motion for summary decree may be reclaimed against only with the leave of the Lord Ordinary within 14 days after the date on which the interlocutor was pronounced.

(2) In the application of section 103(3) of the Debtors (Scotland) Act 1987([c]) (appeals on questions of law arising from making, variation or recall of time to pay directions)–

([a]) 1982 c.53; section 12 was modified by the Consumer Protection Act 1987 (c.43), sections 6, 41 and 47.
([b]) 1981 c.59; section 4 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.
([c]) 1987 c.18.

(a) leave to appeal shall be sought within 14 days after the date of the decision of the Lord Ordinary appealed against; and

(b) an appeal shall be made by motion to the Inner House within 14 days after the date on which leave was granted.

(3) An interlocutor, other than an interlocutor determining the application, pronounced under Chapter 58 (applications for judicial review) may be reclaimed against only with the leave of the Lord Ordinary within 14 days after the date on which the interlocutor was pronounced.

(4) The decision of the Lord Ordinary on a note of objection to the report of the Auditor under rule 42.4 may be reclaimed against only with the leave of the Lord Ordinary within 7 days after the date on which the decision was made.

(5) An interlocutor granting or refusing a motion under rule 47.10(1) (appointing action to be a commercial action) may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.

(6) An interlocutor pronounced on the Commercial Roll, other than an interlocutor which makes such disposal as is mentioned in rule 38.2(1), may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.

Applications for leave to reclaim

38.4.—(1) An application for leave to reclaim against an interlocutor shall be made by motion.

(2) A motion under paragraph (1) shall be brought–

(a) before the Lord Ordinary who pronounced the interlocutor;

(b) where that Lord Ordinary is, for whatever reason, unavailable, before another Lord Ordinary; or

(c) before the vacation judge.

(3) Where a motion under paragraph (1) is brought before a judge under paragraph (2)(b) or (c), that judge shall–

(a) continue the motion until the Lord Ordinary who pronounced the interlocutor is available; or

(b) where the matter is of such urgency that a continuation would not be appropriate, grant or refuse leave, as the case may be.

(4) Any period during which a motion under paragraph (1) is continued by virtue of an order under paragraph (3)(a) shall not be taken into account in calculating the reclaiming days under rule 38.2(6) (reclaiming days and leave) or rule 38.3 (leave to reclaim etc. in certain cases).

(5) In granting leave to reclaim, the Lord Ordinary may impose such conditions, if any, as he thinks fit.

(6) The decision of the Lord Ordinary or the vacation judge to grant or refuse leave to reclaim shall be final and not subject to review.

(7) Leave to reclaim against an interlocutor shall not excuse obedience to or implement of the interlocutor unless by order of the Lord Ordinary, a procedural judge or the vacation judge.

Method of reclaiming

38.5.—(1) A party who seeks to reclaim against an interlocutor shall mark a reclaiming motion by enrolling a motion for review in Form 38.5 before the expiry of the reclaiming days.

(2) On enrolling a motion for review under paragraph (1), the reclaimer shall lodge a reclaiming print in the form of a record which shall contain–

(a) the whole pleadings and interlocutors in the cause;

(b) where the reclaiming motion is directed at the refusal of the Lord Ordinary to allow the pleadings to be amended in terms of a minute of amendment and answers, the text of such minute and answers; and

(c) where available, the opinion of the Lord Ordinary.

(3) A party who reclaims against an interlocutor adjusting issues for jury trial shall, on enrolling the motion for review–

(a) lodge in process the issue or counter-issue proposed by him showing the amendment to the issues, as adjusted, sought to be made; and

(b) send a copy of the issue or counter-issue, as the case may be, to every other party.

Effect of reclaiming

38.6.—(1) Subject to paragraph (2), a reclaiming motion shall have the effect of submitting to the review of the Inner House all previous interlocutors of the Lord Ordinary or any interlocutor of the Lord Ordinary in a motion under rule 38.2(2), not only at the instance of the party reclaiming but also at the instance of any other party who appeared in the cause, and without the necessity of any counter-reclaiming motion.

(2) Where an interlocutor, either by itself or taken along with a previous interlocutor, has disposed of the whole merits of the cause, a reclaiming motion against a subsequent interlocutor dealing with expenses shall have the effect of submitting to review only that interlocutor and any other interlocutor so far as it deals with expenses.

(3) After a reclaiming motion has been enrolled, the reclaimer shall not be at liberty to withdraw it without the consent of the other parties who have appeared in the cause; and if he does not insist on the reclaiming motion, any other party may do so in the same way as if the motion had been enrolled at his instance.

(4) An unopposed motion by a party to refuse a reclaiming motion shall be treated as if all parties consented to it.

(5) Where an interlocutor contains an award of custody, access or aliment, the marking of a reclaiming motion shall not excuse obedience to or implement of the award of custody, access or aliment, as the case may be, unless by order of the court.

Effect of extracted interlocutor

38.7. Review by the Inner House of an interlocutor shall not be prevented by reason only that extract has been issued before the expiry of the reclaiming days.

Appeals treated as reclaiming motions

38.8. In respect of the following appeals, the rules in this Chapter shall apply to those appeals as they apply to reclaiming–

(a) an appeal from a decision of the Lord Ordinary under section 6 of and Article 37 or 41 of the convention in Schedule 1 or 3C to, the Civil Jurisdiction and Judgments Act 1982([a]) (appeals in relation to decisions on enforcement); and

(b) an appeal from a decision of the Lord Ordinary under section 103(3) of the Debtors (Scotland) Act 1987([b]) (appeals on questions of law).

Reclaiming against decree by default

38.9.—(1) Where decree by default has been granted against a party in respect of his failure to lodge a step of process or other document, a motion for review by that party of the interlocutor granting such decree shall be refused unless the document is lodged on or before the date on which the motion is enrolled.

(2) A decree by default may, if reclaimed against, be recalled on such conditions, if any, as to expenses or otherwise as the court thinks fit.

Reclaiming out of time

38.10.—(1) In a case of mistake or inadvertence, a procedural judge may, on an application made in accordance with paragraph (2), allow a motion for review to be received outwith the reclaiming days and to proceed out of time on such conditions as to expenses or otherwise as the judge thinks fit.

(2) An application under paragraph (1) shall be made by motion included in the motion for review made under rule 38.5(1).

Urgent disposal of reclaiming motion

38.11.—(1) Where the reclaimer seeks urgent disposal of a reclaiming motion, he shall include in his motion under rule 38.5(1) either the words "and for urgent disposal on the Summar Roll" or the words "and for urgent disposal in the Single Bills".

(2) Where the respondent seeks urgent disposal of a reclaiming motion, he shall, within the period allowed for opposing the motion, endorse on the motion of the reclaimer under rule 38.5(1), or send by post or facsimile transmission a notice of opposition in Form 23.4 including the words "The respondent (name) seeks urgent disposal in the Summar Roll" or the words "The respondent (name) seeks urgent disposal in the Single Bills".

(3) The entry in the rolls in respect of the motion for urgent disposal shall be starred; and the motion shall call before a procedural judge.

(4) At the hearing of the motion, the parties shall provide the judge with an assessment of the likely duration of the hearing to determine the reclaiming motion.

(5) The judge may–

(a) grant the motion for urgent disposal and either appoint the reclaiming motion to the Summar Roll for a hearing or direct that the reclaiming motion be heard in the Single Bills;

(b) refuse the motion for urgent disposal.

(6) Where the judge grants the motion for urgent disposal, he may make such order as to the future timetabling of, and procedure in, the reclaiming motion as he thinks fit.

([a]) 1982 c.27. Section 6 was amended by the Civil Jurisdiction and Judgments Act 1991 (c.12), Schedule 2, paragraph 3(b). Schedule 1 was substituted by S.I. 1990/2591 and Schedule 3C was inserted by section 1(3) of the Act of 1991.
([b]) 1987 c.18.

(7) Rules 38.12 to 38.16 shall apply to a reclaiming motion in respect of which the judge has granted a motion for urgent disposal only to the extent that he so directs.

Objections to the competency of reclaiming

38.12.—(1) Any party other than the reclaimer may object to the competency of a reclaiming motion by–

(a) lodging in process; and

(b) serving on the reclaimer,

a note of objection in Form 38.12.

(2) Where the Deputy Principal Clerk considers that a reclaiming motion may be incompetent he may (whether or not any party has lodged and served a note of objection under paragraph (1)) refer the question of competency to a procedural judge.

(3) Where the Deputy Principal Clerk refers a question of competency, he shall intimate to the parties the grounds on which he considers that question of competency arises.

(4) A note of objection may be lodged, and the Deputy Principal Clerk may refer a question of competency, only in the period of 14 days after the date on which the reclaiming motion was marked.

(5) Where a note of objection is lodged, or the Deputy Principal Clerk has referred a question of competency, the Keeper of the Rolls shall–

(a) allocate a diet for a hearing before a procedural judge; and

(b) intimate the date and time of that diet to the parties.

(6) Each party shall, within the period of 14 days after the date on which a note of objection is lodged or a question of competency is referred by the Deputy Principal Clerk–

(a) lodge in process; and

(b) serve on the other party,

a note of argument giving fair notice of the submissions which the party intends to make as to competency.

(7) At the hearing allocated under paragraph (5), the judge may–

(a) refuse the reclaiming motion as incompetent;

(b) direct that the reclaiming motion is to proceed as if the note of objection had not been lodged or the question not been referred, whether under reservation of the question of competency or having found the reclaiming motion to be competent; or

(c) refer the question of competency to a bench of three judges,

and he may make such order as to expenses or otherwise as he thinks fit.

(8) Any decision of a procedural judge under paragraph (7) shall be final and not subject to review.

(9) Where a procedural judge refers a question of competency under paragraph (7)(c), the cause shall be put out for a hearing in the Single Bills before a Division of the Inner House composed of three judges.

(10) At the hearing in the Single Bills arranged under paragraph (9), the Inner House may–

(a) dispose of the objection to competency;

(b) appoint the cause to the Summar Roll for a hearing on the objection;

(c) reserve the objection until grounds of appeal have been lodged and order such grounds to be lodged;

(d) reserve the objection for hearing with the merits.

Timetable in reclaiming motion

38.13.—(1) The Keeper of the Rolls shall–

(a) issue a timetable in Form 38.13, calculated by reference to such periods as may be specified from time to time by the Lord President, stating the date by which the parties shall comply with the procedural steps listed in paragraph (2) and the date and time of the hearing allocated in terms of subparagraph (b) of this paragraph; and

(b) allocate a diet for a procedural hearing in relation to the reclaiming motion, to follow on completion of the procedural steps listed in paragraph (2).

(2) The procedural steps are–

(a) the lodging of grounds of appeal and answers;

(b) the lodging of any appendices to the reclaiming print or, as the case may be, the giving of intimation that the reclaimer does not intend to lodge any appendices;

(c) the lodging of notes of argument; and

(d) the lodging of estimates of the length of any hearing on the Summar Roll or in the Single Bills which is required to dispose of the reclaiming motion.

(3) The Keeper of the Rolls shall take the steps mentioned in paragraph (1)–

(a) where no note of objection has been lodged and no question of competency has been referred by the Deputy Principal Clerk within the period mentioned in rule 38.12(4), within 7 days of the expiry of that period;

(b) where a procedural judge has made a direction under rule 38.12(7)(b), within 7 days after the date that direction was made; or

(c) where a question of competency has been referred to a bench of three judges and–

(i) an interlocutor has been pronounced sustaining the competency of the reclaiming motion under rule 38.12(10)(a) or following a Summar Roll hearing under rule 38.12(10)(b), or

(ii) an interlocutor has been pronounced under rule 38.12(10)(c) or (d),

within 7 days after the date of that interlocutor.

Variation of timetable in reclaiming motion

38.14.—(1) A reclaiming motion may be sisted and the timetable may be varied on the application by motion of any party.

(2) An application under paragraph (1) shall be–

(a) placed before a procedural judge; and

(b) granted only on special cause shown.

(3) The procedural judge before whom an application under paragraph (1) is placed may–

(a) determine the application;

(b) refer the application to a bench of three judges; or

(c) make such other order as he thinks fit to secure the expeditious disposal of the reclaiming motion.

(4) The decision of a procedural judge under paragraph (3) shall be final and not subject to review.

(5) Where the timetable is varied, the Keeper of the Rolls shall–

(a) discharge the procedural hearing fixed under rule 38.13;

(b) fix a date for a procedural hearing; and

(c) issue a revised timetable in Form 38.13.

Failure to comply with timetable in reclaiming motion

38.15.—(1) Where a party fails to comply with the timetable, the Keeper may, whether on the motion of a party or otherwise, put the reclaiming motion out for a hearing before a procedural judge.

(2) At a hearing under paragraph (1), the procedural judge may–

(a) in any case where the reclaimer or a respondent fails to comply with the timetable, make such order as he thinks fit to secure the expeditious disposal of the reclaiming motion;

(b) in particular, where the reclaimer fails to comply with the timetable, refuse the reclaiming motion; or

(c) in particular, where a sole respondent fails or all respondents fail to comply with the timetable, grant the reclaiming motion.

(3) The decision of a procedural judge under paragraph (2) shall be final and not subject to review.

Procedural hearing in reclaiming motion

38.16.—(1) At the procedural hearing fixed under rule 38.13, the procedural judge shall–

(a) ascertain, so far as reasonably practicable, the state of preparation of the parties; and

(b) ascertain whether the dispute which is the subject matter of the reclaiming motion may appropriately be disposed of by any form of alternative dispute resolution.

(2) Where the judge determines that the dispute which is the subject matter of the reclaiming motion may appropriately be disposed of by any form of alternative dispute resolution, he shall make such order or orders as he thinks fit for the disposal of the dispute.

(3) Otherwise, he shall–

(a) appoint the reclaiming motion to the Summar Roll for a hearing and allocate a date and time for that hearing;

(b) appoint the reclaiming motion to the Single Bills for a hearing and allocate a date and time for that hearing; or

(c) make such other order as he thinks fit to secure the expeditious disposal of the reclaiming motion.

Amendment of pleadings in reclaiming motions

38.17.—(1) Where, after a reclaiming motion has been marked, any party applies by motion to have the pleadings amended in terms of a minute of amendment and answers, he shall apply to a procedural judge for a direction as to further procedure.

(2) Where it appears to the procedural judge that the proposed amendment makes a material change to the pleadings, he may recall the interlocutor of the Lord Ordinary reclaimed against and remit the cause back to the Lord Ordinary for a further hearing.

Grounds of appeal in reclaiming motions

38.18.—(1) Grounds of appeal shall consist of brief specific numbered propositions stating the grounds on which it is proposed to submit that the reclaiming motion should be granted.

(2) On lodging grounds of appeal, the party lodging them shall–

(a) lodge three copies of them in process; and

(b) send a copy of them to every other party.

(3) A party who has lodged grounds of appeal or answers to the grounds of appeal may apply by motion to amend the grounds or answers, on cause shown.

(4) An application under paragraph (3) shall include any necessary application under rule 38.14(1).

(5) An application under paragraph (3) shall be heard by a procedural judge.

(6) The decision of the procedural judge shall be final and not subject to review.

Lodging of appendices in reclaiming motions

38.19.—(1) Where, in a reclaiming motion, the reclaimer considers that it is not necessary to lodge an appendix to the reclaiming print, the reclaimer shall, by the date specified in the timetable–

(a) give written intimation of that fact to the Deputy Principal Clerk; and

(b) send a copy of that intimation to each respondent.

(2) Where the reclaimer provides intimation under paragraph (1), a respondent may apply to a procedural judge, by motion, for an order requiring the reclaimer to lodge any appendix that the procedural judge considers necessary, within such time as the procedural judge may specify.

(3) An order under paragraph (2) may only be granted by a procedural judge after having heard parties.

(4) Paragraph (5) applies where–

(a) a respondent seeks to submit for consideration by the court notes of evidence or documents in respect of which the reclaimer has given written intimation to the respondent that the reclaimer does not intend to include in his appendix; and

(b) a procedural judge has not made an order under paragraph (2) requiring the reclaimer to lodge an appendix which includes such notes of evidence or documents.

(5) The respondent shall incorporate such notes or documents in an appendix which he shall lodge within such period as is specified by the procedural judge in disposing of the application under paragraph (2).

(6) Where, in any reclaiming motion other than one in which intimation is given under paragraph (1)–

(a) the opinion of the Lord Ordinary has not been included in the reclaiming print; or

(b) it is sought to submit notes of evidence or documents for consideration by the court,

the reclaimer shall lodge an appendix incorporating such documents with such period as is specified in the timetable.

Notes of evidence not extended when agreed

38.20. Where, in a reclaiming motion, the parties are agreed that on any particular issue the interlocutor reclaimed against is not to be submitted to review, it shall not be necessary to reproduce the notes of evidence or documents relating to that issue.

Single Bills

38.21. At any hearing of a reclaiming motion in the Single Bills, the Inner House may determine the motion or make such other order as it thinks fit.

CHAPTER 39

APPLICATIONS FOR NEW TRIAL OR TO ENTER JURY VERDICTS

Applications for new trial

39.1.—(1) An application under section 29(1) of the Act of 1988 (application for new trial) shall be made to a procedural judge, by motion, within 7 days after the date on which the verdict of the jury was written on the issue and signed.

(2) A motion under paragraph (1) shall specify the grounds on which the application is made.

(3) An application under section 29(1)(a), (b) or (c) of the Act of 1988 may not be made unless–

(a) in the case of an application under section 29(1)(a) (misdirection of judge), the procedure in rule 37.7 (exceptions to judge's charge) has been complied with;

(b) in the case of an application under section 29(1)(b) (undue admission or rejection of evidence), objection was taken to the admission or rejection of evidence at the trial and recorded in the notes of evidence under the direction of the judge presiding at the trial;

(c) in the case of an application under section 29(1)(c) (verdict contrary to evidence), it sets out in brief specific numbered propositions the reasons the verdict is said to be contrary to the evidence.

(4) On enrolling a motion for a new trial under paragraph (1), the party enrolling it shall lodge–

(a) a print of the whole pleadings and interlocutors in the cause incorporating the issues and counter-issues;

(b) the verdict of the jury; and

(c) any exception and the determination on it of the judge presiding at the trial.

(5) Rule 38.6 (effect of reclaiming) shall, with the necessary modifications, apply to an application for a new trial under section 29 of the Act of 1988 as it applies to a reclaiming motion.

Applications out of time

39.2.—(1) A procedural judge may, on an application made in accordance with paragraph (2), allow an application for a new trial under section 29(1) of the Act of 1988 to be received outwith the period specified in rule 39.1(1) and to proceed out of time on such conditions as to expenses or otherwise as the judge thinks fit.

(2) An application under paragraph (1) shall be made by motion included in the motion made under rule 39.1(1).

Objections to the competency of application

39.3.—(1) Any party other than the applicant may object to the competency of an application for a new trial under section 29(1) of the Act of 1988 by–

(a) lodging in process; and

(b) serving on the applicant,

a note of objection in Form 39.3.

(2) A note of objection may be lodged only in the period of 7 days after the date on which the motion under rule 39.1(1) was enrolled.

(3) Where a note of objection is lodged, the Keeper of the Rolls shall–

(a) allocate a diet for a hearing before a procedural judge; and

(b) intimate the date and time of that diet to the parties.

(4) Each party shall, within the period of 7 days after the date on which a note of objection is lodged–

(a) lodge in process; and

(b) serve on the other party,

a note of argument giving fair notice of the submissions which the party intends to make as to competency.

(5) At the hearing allocated under paragraph (3), the judge may–

(a) refuse the application for a new trial as incompetent;

(b) direct that the application for a new trial is to proceed as if the note of objection had not been lodged or the question not been referred, whether under reservation of the question of competency or having found the application to be competent; or

(c) refer the question of competency to a bench of three judges,

and he may make such order as to expenses or otherwise as he thinks fit.

(6) Any decision of a procedural judge under paragraph (5) shall be final and not subject to review.

(7) Where a procedural judge refers a question of competency under paragraph (5)(c), the cause shall be put out for a hearing in the Single Bills before a Division of the Inner House composed of three judges.

(8) At the hearing in the Single Bills arranged under paragraph (7), the Inner House may–

(a) dispose of the objection to competency;

(b) appoint the cause to the Summar Roll for a hearing on the objection;

(c) reserve the objection for hearing with the merits.

Timetable in application for a new trial

39.4.—(1) The Keeper of the Rolls shall–

(a) issue a timetable in Form 39.4, calculated by reference to such periods as may be specified from time to time by the Lord President, stating the date by which the parties shall comply with the procedural steps listed in paragraph (2) and the date and time of the hearing allocated in terms of subparagraph (b) of this paragraph; and

(b) allocate a diet for a procedural hearing in relation to the reclaiming motion, to follow on completion of the procedural steps listed in paragraph (2).

(2) The procedural steps are–

(a) the lodging of any appendices to the documents mentioned in rule 39.1(4) or, as the case may be, the giving of notice that the applicant does not intend to lodge any appendices;

(b) the lodging of any notes of argument; and

(c) the lodging of estimates of the length of any hearing required to dispose of the application for a new trial.

(3) The Keeper of the Rolls shall take the steps mentioned in paragraph (1)–

(a) where no note of objection has been lodged, within 7 days of the expiry of that period;

(b) where a procedural judge has made a direction under rule 39.3(5)(b), within 7 days after the date that direction was made; or

(c) where a question of competency has been referred to a bench of three judges and–

(i) an interlocutor has been pronounced sustaining the competency of the application for a new trial under rule 39.3(8)(a) or following a Summar Roll hearing under rule 39.3(8)(b), or

(ii) an interlocutor has been pronounced under rule 39.3(8)(c) or (d),

within 7 days after the date of that interlocutor.

Variation of timetable in application for a new trial

39.5.—(1) The timetable issued under rule 39.4(1) may be varied on the application by motion of any party.

(2) An application under paragraph (1) shall be–

(a) placed before a procedural judge; and

(b) granted only on special cause shown.

(3) The procedural judge before whom an application under paragraph (1) is placed may–

(a) determine the application;

(b) refer the application to a bench of three judges; or

(c) make such other order as he thinks fit to secure the expeditious disposal of the reclaiming motion.

(4) The decision of a procedural judge under paragraph (3) shall be final and not subject to review.

(5) Where the timetable is varied, the Keeper of the Rolls shall–

(a) discharge the procedural hearing fixed under rule 39.4;

(b) fix a date for a procedural hearing; and

(c) issue a revised timetable in Form 39.4.

Failure to comply with timetable in application for a new trial

39.6.—(1) Where a party fails to comply with the timetable, the Keeper may, whether on the motion of a party or otherwise, put the application for a new trial out for a hearing before a procedural judge.

(2) At a hearing under paragraph (1), the procedural judge may–

(a) in any case where the applicant or a respondent fails to comply with the timetable, make such order as he thinks fit to secure the expeditious disposal of the application;

(b) in particular, where the reclaimer fails to comply with the timetable, refuse the application; or

(c) in particular, where a sole respondent or all respondents fails or fail to comply with the timetable, allow the application.

(3) The decision of a procedural judge under paragraph (2) shall be final and not subject to review.

Procedural hearing in application for a new trial

39.7.—(1) At the procedural hearing fixed under rule 39.4, the procedural judge shall–

(a) ascertain, so far as reasonably practicable, the state of preparation of the parties; and

(b) ascertain whether any dispute which is the subject matter of the application for a new trial may appropriately be disposed of by any form of alternative dispute resolution.

(2) Where the judge determines that the dispute which is the subject matter of the application may appropriately be disposed of by any form of alternative dispute resolution, he shall make such order or orders as he thinks fit for the disposal of the dispute.

(3) Otherwise, he shall–

(a) appoint the application to the Summar Roll for a hearing and allocate a date and time for that hearing;

(b) appoint the application to the Single Bills for a hearing and allocate a date and time for that hearing; or

(c) make such other order as he thinks fit to secure the expeditious disposal of the application.

Lodging of appendix

39.8. Rule 38.19 (lodging of appendices in reclaiming motions) shall, with the necessary modifications, apply to an application for a new trial under section 29(1) of the Act of 1988 as it applies to a reclaiming motion.

Applications to enter jury verdict

39.9.—(1) An application under section 31(1) of the Act of 1988 (verdict returned subject to opinion of Inner House on point reserved) shall be made by motion to a procedural judge.

(2) On enrolling a motion under paragraph (1), the party enrolling it shall lodge in process four copies of the closed record incorporating–

(a) all interlocutors pronounced in the cause and any amendments to the record allowed;

(b) the issue and counter-issues;

(c) any exception taken during the trial and the determination on it of the judge presiding at the trial: and

(d) the verdict of the jury,

and send one copy of it to every other party.

(3) Unless the procedural judge otherwise directs, it shall not be necessary for the purposes of such motion to print the notes of evidence, but the notes of the judge presiding at the trial may be produced at any time if required.

(4) In the case of complexity or difficulty, the procedural judge may appoint an application referred to in paragraph (1) to the Summar Roll for hearing.

Single Bills

39.10. At any hearing of an application for a new trial in the Single Bills, the Inner House may determine the motion or make such other order as it thinks fit.

CHAPTER 40

APPEALS FROM INFERIOR COURTS

Application and interpretation of this Chapter

40.1.—(1) This Chapter applies to an appeal to the court from any decision pronounced by an inferior court which may be appealed to the court.

(2) In this Chapter–

(a) "appeal process" means–

(i) the process of the inferior court; or

(ii) where the cause is recorded in an official book of an inferior court, a copy of the record in that book certified by the clerk of the inferior court;

(b) "decision" includes interlocutor, judgment or other determination;

(c) "inferior court" means–

(i) the Lyon Court; or

(ii) the sheriff with respect to judgments or interlocutors to which section 28 of the Sheriff Courts (Scotland) Act 1907([a]), or section 38(b) of the Sheriff Courts (Scotland) Act 1971([b]), applies.

([a]) 1907 c. 51. Section 28 was substituted by section 2 of the Sheriff Courts (Scotland) Act 1913 (c.28) and was amended by section 4 of, and Part II of Schedule 2 to the Sheriff Courts (Scotland) Act 1971 (c.58).

([b]) 1971 c. 58. Section 38(b) was amended by section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73).

Applications for leave to appeal from inferior court

40.2.—(1) Where leave to appeal is required, an application for such leave shall be made in the inferior court unless the enactment allowing the appeal requires the application to be made to the court.

(2) Where–

(a) the inferior court has refused leave to appeal and such refusal is not final, or

(b) leave to appeal is required from the court and not the inferior court,

any application to the court for leave to appeal shall be made in Form 40.2 to a procedural judge.

(3) An application to the court under paragraph (2) for leave to appeal shall be lodged in the General Department–

(a) within the period prescribed by the enactment by virtue of which it is made; or

(b) where no such period is prescribed, within 14 days after the date specified in paragraph (4).

(4) The date referred to in paragraph (3)(b) is–

(a) the date on which the decision of the inferior court refusing leave to appeal was intimated to the appellant; or

(b) where the application for leave to appeal is required to be made to the court and not the inferior court–

(i) the date on which the decision of the inferior court complained of was issued; or

(ii) where the inferior court issued reasons for its decision later than the decision, the date of issue of the reasons.

(5) An application to the court for leave to appeal shall include a statement setting out the proposed grounds of appeal and the grounds on which leave to appeal is sought.

(6) There shall be lodged with an application to the court under paragraph (3)–

(a) a process in accordance with rule 4.4 (steps of process);

(b) where applicable–

(i) evidence that leave to appeal has been refused by the inferior court;

(ii) a copy of the grounds of appeal intimated to the inferior court; and

(iii) any note by the inferior court setting out the reasons for its refusal;

(c) a copy of the decision of the inferior court complained of and any reasons for that decision; and

(d) where the inferior court itself exercised an appellate function, a copy of the decision of the tribunal from which that appeal was taken and any reasons given for that decision.

Determination of applications for leave to appeal from inferior court

40.3.—(1) On lodging an application for leave to appeal under rule 40.2, the applicant shall apply by motion to a procedural judge for an order for intimation and service.

(2) On expiry of the period within which answers may be lodged, the applicant may apply by motion to a procedural judge for the application to be granted.

(3) The decision of a procedural judge on an application under this rule or rule 40.2(2) shall be final and not subject to review.

Time and method of appeal

40.4.—(1) An appeal from an inferior court shall be made–

(a) within the period prescribed by the enactment by virtue of which the appeal is made; or

(b) where no such period is prescribed, within 21 days after–

(i) the date on which the decision appealed against was given;

(ii) where the inferior court issued written reasons for its decision later than the decision, the date on which the written reasons were issued; or

(iii) where leave to appeal was granted by the inferior court or application for leave to appeal was made to the court under rule 40.2(2), the date on which leave to appeal was granted by the inferior court or the court, as the case may be.

(2) A party seeking leave to appeal from an inferior court shall mark an appeal by writing a note of appeal in Form 40.4–

(a) on the interlocutor sheet, minute of court or other written record containing the decision appealed against; or

(b) where such a decision is not available or the proceedings of the inferior court are recorded in an official book, on a separate sheet lodged with the clerk of the inferior court.

(3) A note of appeal shall–

(a) be signed by the appellant or his agent;

(b) bear the date on which its is signed; and

(c) where the appellant is represented, specify the name and address of the agent who will be acting for him in the appeal.

Leave to appeal out of time

40.5.—(1) An application to allow an appeal to be received outwith the time prescribed for marking an appeal and to proceed out of time shall be included in the note of appeal.

(2) Within 14 days after the date of receipt by the Deputy Principal Clerk of the appeal process from the clerk of the inferior court under rule 40.6(1), the appellant shall apply by motion to allow the appeal to be received outwith the time prescribed for marking an appeal and for leave to proceed out of time.

(3) The motion enrolled in terms of paragraph (2) shall be disposed of by a procedural judge.

(4) The decision of the procedural judge on a motion under paragraph (2) shall be final and not subject to review.

(5) Where a motion under paragraph (2) is refused, the Deputy Principal Clerk shall–

(a) give written intimation to the clerk of the inferior court that leave to appeal out of time has been refused; and

(b) transmit the appeal process and note of appeal to him.

Transmission of appeal process

40.6.—(1) Within 4 days after an appeal has been marked, the clerk of the inferior court shall–

(a) give written intimation of the appeal to every other party and certify on the interlocutor sheet, other record or separate note of appeal, as the case may be, that he has done so; and

(b) transmit–

(i) the appeal process, and

(ii) any separate note of appeal,

to the Deputy Principal Clerk.

(2) On receipt of an appeal process sent to him under paragraph (1), the Deputy Principal Clerk shall–

(a) mark the date of receipt on the interlocutor sheet, other record or separate note of appeal, as the case may be; and

(b) give written intimation of that date to the appellant.

(3) Where the clerk of the inferior court or the Deputy Principal Clerk fails to comply with a provision of this rule, the appeal shall not be invalidated; but the court may give such remedy for any disadvantage or inconvenience occasioned thereby as it thinks fit.

Procedure following transmission of appeal process

40.7.—(1) Within 14 days after the date of receipt by the Deputy Principal Clerk of the appeal process, each party seeking to appear in the appeal shall–

(a) give written intimation to the Deputy Principal Clerk of, or

(b) state by note written on the interlocutor sheet, minute of court, or other record containing the decision appealed against, or on the separate note of appeal, as the case may be,

his name and address and that of his agent (if any).

(2) Subject to rule 40.16(2) (appeals deemed abandoned), within 28 days after the date of receipt by the Deputy Principal Clerk of the appeal process, or the date of the interlocutor granting a motion made under rule 40.5(2) (leave to appeal out of time), whichever is the later, the appellant shall–

(a) lodge a process, including each part of the appeal process, in accordance with rule 4.4 (steps of process);

(b) lodge an appeal print in the form of a record which shall contain–

(i) the whole pleadings and interlocutors in the cause; or

(ii) where the appeal is directed at the refusal of the inferior court to allow the pleadings to be amended, the text of the proposed amendment; and

(iii) where available, the judgment of the inferior court (including in an appeal in a summary cause under the Act of Sederunt (Summary Cause Rules) 2002([a]) or a small claim under the Act of Sederunt (Small Claim Rules) 2002([b]), the stated case of the sheriff); and

(c) send a copy of the appeal print, in accordance with rule 4.6(1) (intimation of steps of process).

([a]) S.S.I. 2002/132, last amended by [ ].
([b]) S.S.I. 2002/133, last amended by [ ].

Required application for urgent disposal of appeal against interlocutor other than final judgment

40.8. On lodging an appeal print under rule 40.7(2)(b) in respect of an appeal marked against–

(a) an interlocutor of an inferior court in a case where the interlocutor is not a final judgment; or

(b) an interlocutor of an inferior court containing an order made under the Adoption Act 1978 or under section 11(1) of the Children (Scotland) Act 1995,

the appellant shall make an application under rule 40.9(1)(a) for urgent disposal of the appeal.

Urgent disposal of appeal

40.9.—(1) Where the appellant seeks urgent disposal of an appeal (whether or not by virtue of rule 40.8), he shall, on lodging an appeal print under rule 40.7(2)(b), apply by motion to a procedural judge for urgent disposal of the appeal, specifying in the motion whether he seeks urgent disposal on the Summer Roll or urgent disposal in the Single Bills.

(2) Where a respondent seeks urgent disposal of the appeal, he shall–

(a) within the period allowed for opposing the motion, endorse on the motion of the appellant under paragraph (1), or send by post or facsimilie transmission a notice of opposition in Form 23.4 including the words "The respondent (name) seeks urgent disposal in the Summar Roll" or the words "The respondent seeks urgent disposal in the Single Bills"

(b) enrol a motion for urgent disposal on the Summar Roll or for urgent disposal in the Single Bills, within 7 days of the respondent intimating his name and address and that of his agent (if any) in terms of rule 40.7(1).

(3) The entry in the rolls in respect of a motion for urgent disposal under this rule shall be starred; and the motion shall call before a procedural judge.

(4) At the hearing of the motion, the parties shall provide the judge with an assessment of the likely duration of the hearing to determine the appeal.

(5) The judge may—

(a) grant the motion for urgent disposal and either appoint the appoint the cause to the Summar Roll for hearing or direct that the cause be heard in the Single Bills;

(b) refuse the motion for urgent disposal.

(6) Where the judge grants the motion for urgent disposal, he may make such order as to the future timetabling of, and procedure in, the reclaiming motion as he thinks fit.

(7) Rules 40.10 to 40.14 shall apply to an appeal in respect of which the judge has granted a motion for urgent disposal only to the extent that he so directs.

Objections to the competency of appeals

40.10.—(1) Any party other than the appellant may object to the competency of an appeal made under this Chapter by–

(a) lodging in process; and

(b) serving on the appellant,

a note of objection in Form 40.10.

(2) Where the Deputy Principal Clerk considers that an appeal made under this Chapter may be incompetent he may (whether or not any party has lodged and served a note of objection under paragraph (1)) refer the question of competency to a procedural judge.

(3) Where the Deputy Principal Clerk refers a question of competency, he shall intimate to the parties the grounds on which he considers that question of competency arises.

(4) A note of objection may be lodged, and the Deputy Principal Clerk may refer a question of competency, only within 14 days after the expiry of the period specified in rule 40.7(2) (lodging process etc.).

(5) Where a note of objection is lodged, or the Deputy Principal Clerk has referred a question of competency, the Keeper of the Rolls shall–

(a) allocate a diet for a hearing before a procedural judge; and

(b) intimate the date and time of that diet to the parties.

(6) Each party shall, within the period of 14 days after the date on which a note of objection is lodged or a question of competency is referred by the Deputy Principal Clerk–

(a) lodge in process; and

(b) serve on the other party,

a note of argument giving fair notice of the submissions which the party intends to make as to competency.

(7) At the hearing allocated under paragraph (5), the judge may–

(a) refuse the appeal as incompetent;

(b) direct that the appeal is to proceed as if the note of objection had not been lodged or the question not been referred, whether under reservation of the question of competency or having found the appeal to be competent; or

(c) refer the question of competency to a bench of three judges,

and he may make such order as to expenses or otherwise as he thinks fit.

(8) Any decision of a procedural judge under paragraph (7) shall be final and not subject to review.

(9) Where a procedural judge refers a question of competency under paragraph (7)(c), the cause shall be put out for a hearing in the Single Bills before a Division of the Inner House composed of three judges.

(10) At the hearing in the Single Bills arranged under paragraph (9), the Inner House may–

(a) dispose of the objection to competency;

(b) appoint the cause to the Summar Roll for a hearing on the objection;

(c) reserve the objection until grounds of appeal have been lodged and order such grounds to be lodged;

(d) reserve the objection for hearing with the merits.

Timetable in appeal from inferior court

40.11.—(1) Upon expiry of the period specified in rule 40.7(1), the Keeper of the Rolls shall–

(a) issue a timetable in Form 40.11, calculated by reference to such periods as may be specified from time to time by the Lord President, stating the date by which the parties shall comply with the procedural steps listed in paragraph (2) and

the date and time of the hearing allocated in terms of subparagraph (b) of this paragraph; and

(b) allocate a diet for a procedural hearing in relation to the reclaiming motion, to follow on completion of the procedural steps listed in paragraph (2).

(2) The procedural steps are–

(a) the lodging of a process in accordance with rule 40.7(2)(a);

(b) the lodging and sending a copy of the appeal print in accordance with rule 40.7(2)(b);

(c) the enrolling of any motion to sist the cause in terms of rule 40.15;

(d) the lodging of grounds of appeal and answers;

(e) the lodging of appendices to the appeal print or, as the case may be, the giving of intimation that the appellant does not intend to lodge any appendices;

(f) the lodging of notes of argument; and

(g) the lodging of estimates of the length of any hearing on the Summar Roll or in the Single Bills which is required to dispose of the appeal.

(3) The Keeper of the Rolls shall take the steps mentioned in paragraph (1)–

(a) where no note of objection has been lodged and no question of competency has been referred by the Deputy Principal Clerk within the period mentioned in rule 40.10(4), within 7 days of the expiry of that period;

(b) where a procedural judge has made a direction under rule 40.10(7)(b), within 7 days after the date that direction was made; or

(c) where a question of competency has been referred to a bench of three judges and–

(i) an interlocutor has been pronounced sustaining the competency of the appeal under rule 40.10(10)(a) or following a Summar Roll hearing under rule 40.10(10)(b), or

(ii) an interlocutor has been pronounced under rule 40.10(10)(c) or (d),

within 7 days after the date of that interlocutor.

Variation of timetable in appeal from inferior court

40.12.—(1) The timetable issued under rule 40.11(1) may be varied on the application by motion of any party.

(2) An application under paragraph (1) shall be–

(a) placed before a procedural judge; and

(b) granted only on special cause shown.

(3) The procedural judge before whom an application under paragraph (1) is placed may–

(a) determine the application;

(b) refer the application to a bench of three judges; or

(c) make such other order as he thinks fit to secure the expeditious disposal of the appeal.

(4) The decision of a procedural judge under paragraph (3) shall be final and not subject to review.

(5) Where the timetable is varied, the Keeper of the Rolls shall–

(a) discharge the procedural hearing fixed under rule 40.11;

(b) fix a date for a procedural hearing; and

(c) issue a revised timetable in Form 40.11.

Failure to comply with timetable in appeal from inferior court

40.13.—(1) Where a party fails to comply with the timetable issued under rule 40.11(1), the Keeper may, whether on the motion of a party or otherwise, put the appeal out for a hearing before a procedural judge.

(2) At a hearing under paragraph (1), the procedural judge may–

(a) in any case where the appellant or a respondent fails to comply with the timetable, make such order as he thinks fit to secure the expeditious disposal of the appeal;

(b) in particular, where the appellant fails to comply with the timetable, refuse the appeal; or

(c) in particular, where a sole respondent fails or all respondents fail to comply with the timetable, allow the appeal.

(3) The decision of a procedural judge under paragraph (2) shall be final and not subject to review.

Procedural hearing in appeal from inferior court

40.14.—(1) At the procedural hearing fixed under rule 40.11, the procedural judge shall–

(a) ascertain, so far as reasonably practicable, the state of preparation of the parties; and

(b) ascertain whether the dispute which is the subject matter of the appeal may appropriately be disposed of by any form of alternative dispute resolution.

(2) Where the judge determines that the dispute which is the subject matter of the appeal may appropriately be disposed of by any form of alternative dispute resolution, he shall make such order or orders as he thinks fit for the disposal of the dispute.

(3) Otherwise, he shall–

(a) appoint the appeal to the Summar Roll for a hearing and allocate a date and time for that hearing;

(b) appoint the appeal to the Single Bills for a hearing and allocate a date and time for that hearing; or

(c) make such other order as he thinks fit to secure the expeditious disposal of the appeal.

Sist of process of appeal

40.15.—(1) Within 14 days after the date of receipt by the Deputy Principal Clerk of the appeal process, the appellant may apply by motion to a procedural judge for a sist of the process.

(2) On enrolling a motion under rule 40.5(2) (leave to appeal out of time) or under paragraph (1) of this rule, the appellant shall lodge a motion sheet and an interlocutor sheet, if not already lodged.

(3) Where the procedural judge grants a motion under paragraph (1), the period of 28 days mentioned in rule 40.7(2) (lodging process etc.) shall not run during any period in which the appeal is sisted.

(4) Upon recall of the sist, the Keeper of the Rolls shall issue a revised timetable for the cause, in Form 40.11.

(5) A decision of a procedural judge on a motion made under this rule shall be final and not subject to review.

Appeals deemed abandoned

40.16.—(1) If an appellant fails–

(a) to apply by motion in accordance with rule 40.5(2) (leave to appeal out of time), or

(b) to comply with the requirements of rule 40.7(2) (lodging process etc.) which, in a case where rule 40.8 (required application for urgent disposal) is applicable, shall mean the requirements of rule 40.7(2) as read with rules 40.8 and 40.9(1) (motion for urgent disposal of appeal),

he shall be deemed to have abandoned his appeal on the expiry of the period for marking an appeal or for complying with the requirements of rule 40.7(2), as the case may be.

(2) Where an appeal has been deemed to be abandoned by reason of paragraph (1)(b), a respondent may, within 7 days after the date on which the appeal is deemed to be abandoned, comply with the requirements of rule 40.7(2) (lodging process etc.) and thereafter insist in the appeal as if it had been marked by him; and the following provisions of this Chapter applying to an appellant shall, with the necessary modifications, apply to an appeal by a respondent under this paragraph.

(3) Where a respondent insists on an appeal under paragraph (2), the appellant shall be entitled to insist in the appeal notwithstanding that his appeal has been deemed to be abandoned.

(4) If, on the expiry of the period of 7 days after the date on which an appeal is deemed to be abandoned by virtue of paragraph (1)–

(a) the appellant has not been reponed under rule 40.17, and

(b) a respondent does not insist in the appeal under paragraph (2) of this rule,

the decision appealed against shall be treated in all respects as if no appeal had been marked, and the Deputy Principal Clerk shall transmit the appeal process to the clerk of the inferior court in accordance with paragraph (5) of this rule.

(5) Where an appeal process falls to be transmitted to the inferior court under paragraph (4), the Deputy Principal Clerk shall–

(a) write on the interlocutor sheet, minute of court or other record containing the decision appealed against or on the separate note of appeal, as the case may be, a certificate in Form 40.16;

(b) send the appeal process to the clerk of the inferior court; and

(c) give written intimation to each party to the appeal of the date on which the appeal process was transmitted.

(6) Where an appeal is deemed to be abandoned under paragraph (1) and has been transmitted to an inferior court under paragraph (5)–

(a) a respondent in the appeal may apply by motion to that court for an award of the expenses of the abandoned appeal; and

(b) the inferior court shall on such motion grant decree for payment to that respondent of those expenses as taxed by the Auditor of the Court of Session.

Reponing against deemed abandonment

40.17.—(1) An appellant may, within 7 days after the date on which the appeal has been deemed to be abandoned under rule 40.16(1), apply by motion to a procedural judge to be reponed.

(2) A procedural judge may grant a motion under paragraph (1) on such conditions as to expenses or otherwise as the judge thinks fit.

(3) On enrolling a motion under paragraph (1), the appellant shall lodge a process (or such necessary steps of process as have not already been lodged) and an appeal print.

(4) A decision of a procedural judge on a motion made under this rule shall be final and not subject to review.

Amendment of pleadings in appeals

40.18.—(1) Where, after an appeal has been marked, any party applies by motion to have the pleadings amended in terms of a minute of amendment and answers, he shall apply to a procedural judge for a direction as to further procedure.

(2) Where it appears to a procedural judge that the proposed amendment makes a material change to the pleadings, he may set aside the decision, or recall the interlocutor of the inferior court appealed against and remit the cause back to the inferior court for a further hearing.

Grounds of appeal

40.19.—(1) Grounds of appeal shall consist of brief specific numbered propositions stating the grounds on which it is proposed to submit that the appeal should be allowed.

(2) On lodging grounds of appeal, the party lodging them shall–

(a) lodge three copies of them in process; and

(b) send a copy of them to every other party.

(3) A party who has lodged grounds of appeal or answers to the grounds of appeal may apply by motion to amend the grounds or answers, on cause shown.

(4) An application under paragraph (3) shall include any necessary application under rule 40.12(1).

(5) An application under paragraph (3) shall be heard by a procedural judge.

(6) The decision of the procedural judge shall be final and not subject to review.

Lodging of appendices in appeals

40.20.—(1) Where, in an appeal under this Chapter, the appellant considers that it is not necessary to lodge an appendix to the appeal print, the appellant shall, by the date specified in the timetable–

(a) give written intimation of that fact to the Deputy Principal Clerk; and

(b) send a copy of that intimation to each respondent.

(2) Where the appellant provides intimation under paragraph (1), a respondent may apply to a procedural judge, by motion, for an order requiring the appellant to lodge any appendix that the procedural judge considers necessary, within such time as the procedural judge may specify.

(3) An order under paragraph (2) may only be granted by a procedural judge after having heard parties.

(4) Paragraph (5) applies where–

(a) a respondent seeks to submit for consideration by the court notes of evidence or documents in respect of which the appellant has given written intimation to the respondent that the appellant does not intend to include in his appendix; and

(b) a procedural judge has not made an order under paragraph (2) requiring the appellant to lodge an appendix which includes such notes of evidence or documents.

(5) The respondent shall incorporate such notes or documents in an appendix which he shall lodge within such period as is specified by the procedural judge in disposing of the application under paragraph (2).

(6) Where, in any appeal other than one in which intimation is given under paragraph (1)–

(a) the opinion of the inferior court has not been included in the appeal print, or

(b) it is sought to submit notes of evidence or documents for consideration by the court,

the appellant shall lodge an appendix incorporating such documents within such period as is specified in the timetable.

Notes of evidence not extended when agreed in appeals

40.21. Where, in an appeal, the parties are agreed that on any particular issue the decision appealed against is not to be submitted to review, it shall not be necessary to reproduce the notes of evidence or documents relating to that issue.

Referral to family mediation in appeals from the sheriff court

40.22. In an appeal 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([a]) is in issue, a procedural judge may, where the procedural judge considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.

Use of Gaelic

40.23.—(1) This rule applies where an inferior court has authorised the use of Gaelic by a party.

(2) If the party wishes to address the Inner House in Gaelic at any hearing fixed under rule 40.14(3), he may–

(a) at any time up to and including the procedural hearing fixed under rule 40.11(1)(b), apply by motion to the procedural judge for authority to do so; or

(b) at any time after the procedural hearing fixed under rule 40.11(1)(b) and before final disposal of the appeal, apply by motion for authority to do so.

(3) Where proof has been ordered by the Inner House, if the party wishes to give oral evidence in Gaelic, he may apply by motion for authority to do so.

(4) Where the court has granted authority under paragraphs (2) of (3), an interpreter shall be provided by the court.

([a]) 1995 c.36. Section 11 was amended by the Family Law (Scotland) Act 2006 (asp 2), section 24.

Single Bills

40.24. At any hearing of an appeal pronounced by an inferior court in the Single Bills, the Inner House may determine the motion or make such other order as it thinks fit.".

7. In the Appendix–

(a) for Form 38.6 substitute the Forms 38.5, 38.12, 38.13, 39.3 and 39.4 set out in Schedule 1 to this Act of Sederunt; and

(b) for Form 40.9 substitute the Forms 40.10, 40.11 and 40.16 set out in Schedule 2 to this Act of Sederunt.

Transitional and saving provision

8. Paragraphs 2 to 7 of this Act of Sederunt shall not apply–

(a) in relation to reclaiming against a interlocutor pronounced before [ ] 2009;

(b) in relation to an application for a new trial where the motion was lodged before that date;

(c) in relation to an appeal from an inferior court, where an appeal was marked before that date.

Lord President
I.P.D.

Edinburgh
2009

Paragraph 7(1)

SCHEDULE 1

Rule 38.5

Form 38.5

Form of reclaiming motion to be written on Form 23.2

On behalf of the pursuer [*or as the case may be*], for review by the Inner House of the interlocutor of (*date*) of the Lord Ordinary.

Rule 38.12

Form 38.12

Form of note of objection to competency of reclaiming

(Cause Reference number)

IN THE COURT OF SESSION

NOTE OF OBJECTION TO COMPETENCY OF RECLAIMING

[A.B.]

Pursuer [*or* Petitioner]

against

[C.D.]

Defender [*or* Respondent]

To the Deputy Principal Clerk of Session

(*Name of reclaimer*), pursuer [*or* petitioner *or* defender *or* respondent] and reclaimer, has marked a reclaiming motion in the above cause. (*Name of objecting party*), [*where applicable*: pursuer *or* petitioner *or* defender and] respondent, objects to the competency of the reclaiming motion on the following grounds:

(*set out the grounds in brief numbered paragraphs*)

Date (*insert date*)

(Signed)

Solicitor for Pursuer/Petitioner/Defender/Respondent
(Address)

Rule 38.13

Form 38.13

Form of timetable in reclaiming motion

(Cause Reference number)

IN THE COURT OF SESSION

TIMETABLE IN RECLAIMING MOTION

[A.B.]

Pursuer [*or* Petitioner]

against

[C.D.]

Defender [*or* Respondent]

This timetable has effect as if it were an interlocutor of the court signed by the procedural judge. [*Where applicable*: This is a revised timetable issued under rule 38.14(5)(c) which replaces the timetable issued on (*date*).]

1. The diet for a procedural hearing in relation to this reclaiming motion, which will follow on from the procedural steps listed in paragraphs 2 to 7 below, will take place on (*date and time*).

2. The reclaimer shall lodge grounds of appeal in the reclaiming motion, under rule 38.18 (1) and (2), not later than (*date*).

3. Any answers to grounds of appeal lodged under rule 38.18(1) and (2) shall be lodged by a party other than the reclaimer not later than (*date*).

4. Subject to the terms of any order made by a procedural judge under rule 38.19(2), any appendices to the reclaiming print shall be lodged no later than (*date*).

5. Any written intimation by the reclaimer under rule 38.19(1) that he does not intend to lodge any appendices to the reclaiming print shall be provided by (*date*).

6. Not later than (*date*) parties shall lodge notes of argument in the reclaiming motion.

7. Not later than (*date*) parties shall lodge estimates of the length of any hearing required to dispose of the reclaiming motion.

(*Date*)

Rule 39.3

Form 39.3

Form of note of objection to competency of application for a new trial

(Cause Reference number)

IN THE COURT OF SESSION

NOTE OF OBJECTION TO COMPETENCY OF APPLICATION

[A.B.]

Applicant

against

[C.D.]

Respondent

To the Deputy Principal Clerk of Session

(*Name of applicant*), applicant, has made an application for a new trial under section 29(1) of the Court of Session Act 1988 in the above cause. (*Name of objecting party*), respondent, objects to the competency of the application on the following grounds:

(*set out the grounds in brief numbered paragraphs*)

Date (*insert date*)

(Signed)

Solicitor for Respondent
(Address)

Rule 39.4

Form 39.4

Form of timetable in application for a new trial

(Cause Reference number)

IN THE COURT OF SESSION

TIMETABLE IN APPLICATION FOR A NEW TRIAL

[A.B.]

Applicant

against

[C.D.]

Respondent

This timetable has effect as if it were an interlocutor of the court signed by the procedural judge. [*Where applicable*: This is a revised timetable issued under rule 39.14(5)(c) which replaces the timetable issued on (*date*).]

1. The diet for a procedural hearing in relation to this application, which will follow on from the procedural steps listed in paragraphs 2 to 7 below, will take place on (*date and time*).

2. Subject to the terms of any order made by a procedural judge under rule 38.19(2), any appendices to the application shall be lodged no later than (*date*).

3. Any written intimation by the applicant that he does not intend to lodge any appendices to the reclaiming print shall be provided by (*date*).

4. Not later than (*date*) parties shall lodge notes of argument in the application.

5. Not later than (*date*) parties shall lodge estimates of the length of any hearing required to dispose of the application.

(*Date*)

Paragraph 5(2)

SCHEDULE 2

Rule 40.10

Form 40.10

Form of note of objection to competency of appeal from inferior court

(Cause Reference number)

IN THE COURT OF SESSION

NOTE OF OBJECTION TO COMPETENCY OF APPEAL

[A.B.]

Appellant

against

[C.D.]

Respondent

To the Deputy Principal Clerk of Session

(*Name of appellant*), appellant, has marked an appeal from an inferior court in the above cause. (*Name of objecting party*), respondent, objects to the competency of the appeal on the following grounds:

(*set out the grounds in brief numbered paragraphs*)

Date (*insert date*)

(Signed)

Solicitor for Respondent

(Address)

Rule 40.11

Form 40.11

Form of timetable in appeal from inferior court

(Cause Reference number)

IN THE COURT OF SESSION

TIMETABLE IN APPEAL

[A.B.]

Appellant

against

[C.D.]

Respondent

This timetable has effect as if it were an interlocutor of the court signed by the procedural judge. [*Where applicable*: This is a revised timetable issued under rule 40.12(5)(c) which replaces the timetable issued on (*date*).]

1. The diet for a procedural hearing in relation to this appeal, which will follow on from the procedural steps listed in paragraphs 2 to 10 below, will take place on (*date and time*).

2. The appellant shall lodge a process under rule 40.7(2)(a) no later than (*date*).

3. The appellant shall send copies of the appeal print under rule 40.7(2)(b) no later than (*date*).

4. Any motion by the appellant to sist the process of the appeal under rule 40.15(1) shall be lodged no later than (date).

5. Grounds of appeal under rule 40.19(1) shall be lodged not later than (*date*).

6. Any answers to grounds of appeal lodged under rule 40.19(1) shall be lodged not later than (*date*).

7. Subject to the terms of any order made by a procedural judge under rule 40.20(2), any appendices to the appeal print shall be lodged no later than (*date*).

8. Any written intimation by the appellant under rule 40.20(1) that he does not intend to lodge any appendices to the appeal print shall be provided by (*date*).

9. Not later than (*date*) parties shall lodge notes of argument in the appeal.

10. Not later than (*date*) parties shall lodge estimates of the length of any hearing on the Summar Roll or in the Single Bills which is required to dispose of the appeal.

(*Date*)

Rule 40.16(5)(a)

Form 40.16

Form of certification by Deputy Principal Clerk on retransmitting abandoned appeal

(*Date*) Retransmitted in respect of the abandonment of the appeal.

(*Signed*)

Deputy Principal Clerk of Session

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes amendments to the Rules of the Court of Session 1994 (S.I. 1994/1443).

It introduces new rules of procedure for causes in the Inner House. These rules relate to the quorum of the Inner House for dealing with procedural business, as well as the procedures for dealing with reclaiming motions, applications for new trials or to enter jury verdicts and appeals from inferior courts.

Consequential amendments are made to the rules on the lodging of documents in Inner House causes and on the issuing of Inner House interlocutors.

A reclaiming motion against an interlocutor pronounced before [date], an application for a new trial lodged before [date] and an appeal from an inferior court marked before [date] will all be governed by the rules of procedure in force prior to that date.

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