

**SCOTTISH GOVERNMENT
RESPONSE**

**TO THE REPORT AND
RECOMMENDATIONS OF THE
SCOTTISH CIVIL COURTS REVIEW**



"When we speak of a legal system let us think... of the body of principles and doctrines which determine personal status and relations, which regulate the acquisition and enjoyment of property and its transfer between the living or its transmission from the dead, which define and control contractual or other obligations, and which provide for the enforcement of rights and the remedying of wrongs.

These are the matters which inevitably touch the lives of all citizens at many points from the cradle to the grave, and their regulation is a function of government with which no civilised community can dispense and on the due administration of which the well-being of every society depends."

Rt. Hon. Lord Cooper of Culross, Lord Justice-General and Lord President of the Court of Session (1947 - 1954), "The Scottish Legal Tradition".

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MINISTERIAL FOREWORD

Civil justice is a hallmark of all developed societies, providing for social stability, respect for the person and the necessary conditions for economic growth.

The civil courts are vital to the effective functioning of a civil justice system. They provide the architecture within which private agreements are honoured and the economy operates. They reaffirm the behaviours and standards required of a nation's private citizens, its businesses and its public bodies, including its government.

These matters are of fundamental importance to a healthy society.

Following the publication in 2007 of *Civil Justice: a case for reform* by the Civil Justice Advisory Group under the chairmanship of Lord Coulsfield, Cathy Jamieson MSP, then Minister for Justice, invited the Lord Justice Clerk to conduct a Review of the Scottish Civil Courts.

The remit of Lord Gill's Review was to review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to:

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

Lord Gill was invited to make recommendations for change with a view to improving access to civil justice in Scotland, promoting the early resolution of disputes, making the best use of resources and ensuring that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised.

A Review Board and broader policy group were established, supported by a team of officials. Lord Gill received 40 written submissions from invited parties before issuing questions for public consultation, eliciting more than 200 responses from interested individuals and organisations.

In October 2009, Lord Gill presented me with his final report.

I thank Lord Gill and the members of his project board, Lord McEwan, Sheriff Principal James Taylor and Sheriff Mhairi Stephen, together with all the members of the broader policy group and others who also participated in the Review, either as individuals or as representatives of organisations. Their collective contributions have provided a landmark in the development of Scottish civil justice.

The diagnosis of Scotland's civil courts presented by Lord Gill's final report is too easily recognised. The current system has served us well for 100 years, but our civil

courts are still based on a largely unreformed Victorian model, now sometimes characterised by unacceptable delays. The system has not kept pace with the rapid social changes of the 20th Century and was not designed to serve a property owning, insurance reliant, rights based, socially democratic, welfare state in membership of the European Union.

Lord Gill has presented 206 recommendations for change, representing a comprehensive programme of reform. In the following pages I set out the Scottish Government's response to the recommendations and the timetable of next steps, including the work that still requires to be done before primary legislation can be introduced to the Parliament.

Lord Gill's recommendations have been broadly welcomed by the Scottish Government, by Scotland's legal community and by the Parliament. I am keen to maintain a broad consensus as we set about implementing the required changes. This will enable progress to be sustained across different sessions of the Parliament, as will be necessary with the timescales involved in fundamental change.

In taking forward the reforms, we will need to take full account of the pressure on public finances. This will significantly constrain investment in system improvements or transitional costs. But if anything, this pressure makes reform more, not less necessary. We cannot accept that the waste and inefficiency identified by Lord Gill should be a permanent feature of the civil justice system, and must be prepared to take radical steps where necessary to address them.

Lord Gill's remit was to consider the civil courts, but the reforms need to be seen in the context of the wider justice system – including criminal justice, Tribunals and other means of securing access to justice. The Scottish Government is establishing a major change programme, entitled Making Justice Work, which will co-ordinate and oversee reforms across the system.

Looking at the wider system has influenced our response to some aspects of the Review's recommendations. For example, the way in which the proposed third judicial tier should be constituted needs to be considered alongside the work of Lord Philip's group and the Administrative Justice and Tribunals Council on the organisation of Tribunals. We also await further recommendations on access to justice by the Civil Justice Advisory Group, which has been established under the chairmanship of Lord Coulsfield.

Overall, though, we believe Lord Gill is right in his diagnosis and right in his prescription. It is now for the Scottish Government, the judiciary and the Scottish Court Service to ensure that this landmark report leads to the fair, just, accessible and efficient civil justice system that Scotland deserves.

**Kenny MacAskill MSP
November 2010**

2. EXECUTIVE SUMMARY

Principles guiding reform

1. The Scottish Civil Courts Review (“the Review”) set out six principles under which it believed the system of civil justice should operate¹.

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

These principles have informed this response to the Review’s recommendations.

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

3. The Scottish Government accepts Lord Gill’s analysis of the problems facing Scotland’s civil courts. The current system of civil justice has served us well for more than a century but there are now too many aspects of our civil courts that are in some respects and to differing degrees unsatisfactory, unaffordable or inefficient. Delays and excessive costs are unsatisfactory; the rising costs of the courts are unaffordable; rescheduled hearings are inefficient.

4. The fundamental shift set out by the Review is to a court system which is, to a much greater degree than before, properly managed – with cases being allocated to judges with the skills and experience to handle them appropriately and cost-effectively, and with greater control by the court of the progress of cases. This builds on the historic changes introduced by the Judiciary and Courts (Scotland) Act 2008, which confirmed the Lord President’s role as head of the judiciary, giving him new responsibilities to ensure the efficient disposal of business in the Scottish courts, and establishing the Scottish Court Service as a non-ministerial department under the chairmanship of the Lord President.

¹ Chapter 1 paragraph 5.

5. That constitutional settlement means it is not for the Scottish Government alone to deliver the reforms recommended by Lord Gill. The Scottish Government, the judiciary and the Scottish Court Service must each play their part, and this response has taken account of the response to the Review by the judges of the Court of Session².

Summary of response to key recommendations

6. The Scottish Government accepts the vision provided by Lord Gill and broadly accepts the detail of Lord Gill's recommendations.

7. In particular, the Scottish Government accepts the recommendation to allocate civil court business to appropriate judicial levels. The introduction of a more structured case allocation system to the courts of first instance is perhaps the most innovative of Lord Gill's proposals, being of a different character to traditional forms and structures of Scottish justice. Previously the choice of court was largely left to the parties, usually the pursuing party. The precise mechanisms of allocation will require public debate, but there is potential to reduce the costs to parties in dispute as well as to the public purse, and to achieve more locally delivered civil justice.

8. Appropriate case allocation is a necessary part of the key concept of a three-tier civil judicial hierarchy comprising senator, sheriff and district judge, with restricted rights of onward appeal across the tiers and the handling of much court business conducted at a lower level than at present. The creation of a third judicial tier and the changes to concurrent jurisdictions, with the sheriff court's privative jurisdiction greatly extended, are all recommendations with which the Scottish Government agrees in principle.

9. The Scottish Government agrees in principle that the sheriff courts could and should handle most of Scotland's lower value civil court business, and that the Court of Session should not handle business of low value unless this is justified by other factors, such as a wider legal significance. The Scottish Government is therefore minded to accept the proposed limit of £150,000 for the new privative jurisdiction of the sheriff court, subject to further modelling work.

10. The Scottish Government also agrees in principle that a specialised personal injury court be established as part of Edinburgh Sheriff Court.

11. The Scottish Government also agrees the need for an appropriate proper civil appellate structure which will include the introduction of early sifts based on permissions and tests of legal merit. These are essential features of an efficient legal system that is designed to ensure a proportionate deployment of available resources. The particular proposal for a sheriff appeal court to hear centrally administered summary criminal appeals and civil appeals administered in local sheriffdoms is attractive and it is agreed that such a court would keep summary criminal and civil appeal business at an appropriate level in the system.

² <http://scotland-judiciary.org.uk/27/484/The-response-by-the-Judges-of-the-Court-of-Session-to-the-Scottish-Civil-Courts-Review>

12. The Scottish Government is supportive in principle of the introduction of a new judicial tier, but wishes to examine ways in which this might be improved, including how the mix of criminal and civil business might be handled. It wishes to avoid replicating in the proposed new district judge tier the tensions between criminal and civil business currently experienced in the Court of Session and the sheriff courts, which were strongly criticised by the Review.

13. The average workload of a district judge under the Gill proposals would comprise between 70% and 80% summary crime. This risks crowding out civil business, and may militate against third tier civil work being conducted in the informal, inquisitorial manner recommended by the Review.

14. There may be scope to adapt the model somewhat – for example by having a number of district judges who specialise in crime (as stipendiary magistrates do currently), with others specialising in civil work. This might involve more use of part time judges than is envisaged by the Review.

15. For this and other reasons the Scottish Government does not agree with the recommendation to eliminate all part-time judicial offices.

16. The Scottish Government supports the recommended approach to better case handling, with case docketing, more reliance on active judicial case management and the further development of case flow management procedures in other types of action. This will be largely for the judiciary and Scottish Court Service to take forward, although the Scottish Ministers will have an interest in the potential impact on the overall requirement for judicial office holders. Judicial case management and case flow management will have particular resource implications, for example for court IT systems.

17. The Scottish Government also agrees that new court rules should be developed with plainer language, providing appropriate consistency of practice across different courts.

18. The recommendations framing a new approach to handling cases are intertwined with the recommendations for designated specialist judges. The Scottish Government agrees these in principle and will take forward with the Lord President and the Judicial Appointments Board for Scotland consideration of the implications for appointment, training and conduct of judges at each level — and the consequential structure of judicial careers.

19. The Scottish Government supports in principle the recommendations that procedures for judicial review should be reformed and clarified, and that provision should be made for multi-party actions. The detail of these will require working out both in legislation and procedural rules.

20. Lord Gill recommends the establishment of a Civil Justice Council, both to take forward the implementation of the report and to keep the civil justice system under review. The Scottish Government is not persuaded that a new non-departmental public body ("NDPB") is required in the longer term, but agrees that

arrangements need to be made, even before primary legislation is enacted, to drive forward the necessary organisational and procedural changes following the Review. It is working with the judiciary and the Scottish Court Service to put these arrangements in place.

21. Lord Gill makes various recommendations for greater investment in publicly funded user support services, including integrated and specialist advice services and a national mediation service. These investments, alongside the other proposed reforms, must be considered against competing demands for public funds in the current spending round. It is likely that any new or expanded support services will only be affordable if they are funded by efficiencies delivered through other changes introduced to the justice system. Subject to these financial constraints, the Scottish Government will consider carefully any recommendations of the Civil Justice Advisory Group led by Lord Coulsfield, which is examining ways to create and support user friendly dispute resolution processes for claims of low financial value, and how best to ensure access to justice, including through public legal education and alternative dispute resolution.

22. The Scottish Government has agreed in principle to the establishment of a review of costs and funding of litigation, though a suitable chairman still has to be identified and the precise remit finalised.

23. A number of the Review's recommendations are already being taken forward, including:

- providing a basis for rights of audience for lay representatives in the Legal Services (Scotland) Act 2010;
- modernising arrangements for safeguarders in the Children's Hearings (Scotland) Bill;
- the implementation of Lord Penrose's recommended reforms to the handling of business in the Inner House;
- the codification by the Lord President of current practice on lay advisers (McKenzie friends); and
- preparation by the Court of Session Rules Council of new rules governing the award of protective cost orders in environmental cases.

How the Scottish Government will go forward

24. Over the coming months, the Scottish Government will prepare proposals for the legislation necessary for reform. Its proposals will be informed by detailed analysis of the likely impact of Lord Gill's recommendations on the three essential resource requirements of the civil courts — the estate, the judiciary and the administrative support. It also needs to consider the wider implications for court users and other justice organisations and interests.

25. This work will be jointly undertaken by the Scottish Government and the Scottish Court Service, consulting with others as required. It will focus on the key recommendations for procedural and structural reforms.

26. To date, the impact of Lord Gill's recommendations for structural reform on the required judicial complement have been modelled. Initial modelling of these recommendations demonstrates a requirement for a greater total number of judges but with scope for a small annual saving in judicial remuneration arising from the redistribution of court business. Further modelling work is underway, for example, taking account of the impact of judicial specialisation on the efficiency and flexibility of court programmes.

27. Initial estimates do not yet take account of the impact of the new approach to case management recommended by the Review. The way cases are managed is likely to have a much more substantial impact on costs than the level in the judicial hierarchy at which a case is taken. These procedural reforms will be led by the judiciary, who will be consulted as to the assumptions required to model their impact.

28. The Scottish Court Service will also need to prepare the operational programmes and infrastructure that will be required to deliver the reformed system, including workforce planning, facilities and estate management and the design of modern information and communication technologies.

29. The Scottish Government recognises that needs differ between urban and rural areas and this may result in variations between courts and areas in how access to justice is delivered fairly and effectively. Rural and island communities may benefit particularly from the better use of information and communication technology, and may also have different requirements for judicial deployment. Full account will be taken of these differences in planning for implementation of the reforms.

30. Reform of our civil courts cannot be progressed in isolation; it is part of the reform of the wider justice system. This will be co-ordinated through the Making Justice Work programme, which has been established by the Scottish Government. The detail of the programme is being developed, and it will operate under the overall stewardship of the Justice Outcomes Group established by the Scottish Government in June 2010³. These structures will help to consider the interaction between the reforms to the civil courts and other related developments, for example, arising out of

³ This group brings together representatives and advisors from across the Scottish justice system, ensuring the alignment of public services with the achievement of the Scottish Government's core purpose and strategic objectives. The remit of the group is to:

- identify priorities within the justice system to support the Scottish Government's National Outcomes;
- oversee the operation of a set of programmes linked to those priorities, taking an overview of outputs and whether the programmes are achieving the aims set for them;
- ensure that the programmes are focused on making a positive impact on the citizen as well as on justice;
- work in partnership to remove barriers to achieving the priorities and programme objectives;
- develop methods for aligning individual business plans and resource decisions to overall system needs and programme objectives;
- maintain a strong focus on costs, benefits and value for money;
- identify significant long-term changes in the justice environment and ensure these are factored into work in programmes and organisations; and
- encourage collective dialogue of significant current issues.

Sheriff Principal Bowen's independent review of sheriff and jury procedures, and Tribunal reforms.

31. As mentioned previously, however, the reforms recommended by Lord Gill must be viewed in the context of the current pressures on public spending which will constrain the scope for additional investment, and at the very least will require that reforms are managed carefully and phased in over a period of years.

3. BACKGROUND TO THE REVIEW

Problems

32. Chapter 2 of the Review identifies and proposes solutions to eight key problems which it argues inhibit the achievement in Scotland of an affordable, efficient and fair civil justice system. These are as follows.

- The pressure of criminal business which delays and disrupts civil litigation, contributes to inefficiency and adds expense.
- The absence of judicial specialisation can lead to a lack of consistency in judicial decision making, exacerbated by the absence of judicial continuity.
- Large overlaps in jurisdiction between the courts, the extensive jurisdiction of a sheriff and largely unrestricted rights of appeal all combine to ensure an inefficient and wasteful use of judicial resources.
- Temporary and part-time resources may exacerbate inconsistent decision making and inefficiency in case management.
- Courts have insufficient control of the conduct and pace of litigation, with some respondents to consultation suggesting there was a *laissez faire* approach to rules and time limits.
- Modern information and communications technology (“ICT”) offers opportunities for more affordable and efficient management of civil business which are still to be exploited.
- The system is sometimes inaccessible or difficult to understand for party litigants who will, in turn, create inefficiencies by their conduct.
- The system is rendered unaffordable to many by the cost of litigation and methods for recovering expenses.

Context

33. It is important to acknowledge that the Scottish system of civil justice has largely served Scotland well since the last major overhaul, the passage of the Sheriff Courts (Scotland) Act 1907, and many of the problems now encountered in Scotland have also developed in other, comparable legal systems.

International comparisons

34. Lord Gill draws widely on this international experience in the annexes to his final report, with frequent references to solutions developed in Canada, New Zealand, Australia, Ireland, and England and Wales.

Woolf

35. The Review paid particular attention to reforms in England and Wales proposing the incorporation of some of their recent innovations and rejecting or modifying others.

36. The civil justice reforms in England and Wales arose primarily from Lord Woolf's review of the civil justice system in England and Wales, published in June

1996⁴. In many respects his findings — that the civil justice system was too slow, too costly and too complex and that there was a need for new, simple and simply expressed procedural rules with a view to securing an accessible, fair and efficient system — are strikingly similar to Lord Gill's.

37. As a result of Lord Woolf's review, the new Civil Procedure Rules came into force in 1999, designed to encourage the early settlement of disputes through a combination of pre-action protocols, active case management by the courts, and cost penalties for parties who unreasonably refused to attempt negotiation or consider alternative dispute resolution. There is some debate about whether the Woolf reforms have had the desired effect. In a paper for a conference to mark the 10-year anniversary of the Civil Procedure Rules, Professor John Peysner commented: "Virtually all commentators agree that Lord Woolf's vision of the new litigation landscape has been largely successful except in relation to costs." But some commentators, such as Professor Michael Zander, opposed the proposed reforms from the outset, fearing that they would have the opposite effect to what was intended, and now believe that the evidence broadly shows that, on the main issues, their fears were justified.

38. Even those who believe that the Woolf reforms are working concede, however, that the reforms have resulted in costs arising earlier in actions – so called 'front-loading'. In cases which might have settled anyway, this increases costs to parties and pressure on judicial time. Similarly, where parties are required to attempt mediation which then does not succeed, the net outcome is likely to be higher costs for the parties.

39. Lord Gill's recommendations draw on the approach in the Woolf reforms of promoting active management of cases, but are more flexible in their expectations in respect of mediation and pre-court procedure. It may be that this approach will be more suited to a smaller, less busy jurisdiction. Nevertheless, consideration and adoption of Lord Gill's recommendations on case management will require careful development of the detail.

Associated developments

40. Another important UK development was Sir Andrew Leggatt's report on tribunals⁵, which led directly to the Tribunals Courts and Enforcement Act 2007. This legislation formalised the operation of tribunals under senior judicial supervision and a superior court of record, the Upper Tribunal.

41. Further changes to the tribunal landscape are likely to emerge as a consequence of the UK Government's plans to merge HM Court Service and the UK Tribunal Service. The implications of this for tribunals operating in Scotland will be considerable, and require to be taken into account alongside Lord Gill's recommendations.

⁴ <http://www.dca.gov.uk/civil/final/index.htm>

⁵ <http://www.tribunals-review.org.uk/>

42. Lord Justice Jackson's Review of Civil Litigation Costs⁶ examined the merits of different methods of funding litigation, as well as identifying causes of disproportionate costs and methods of controlling them. This work will inform the Scottish Government's review of the cost and funding of litigation.

43. These developments are complementary to the significant constitutional reforms of the last 10-15 years, including the Human Rights Act, the establishment of the Supreme Court of the United Kingdom, and the re-establishment of the Scottish Parliament itself. These reforms have had a major impact on the nature of civil cases before the Scottish courts.

44. Substantial procedural reform in the criminal courts has also been seen with the implementation of Lord Bonomy's recommendations for High Court reform, Sheriff Principal McInnes' summary justice reform, and Sheriff Principal Bowen's recent report on sheriff and jury trials.

45. From April 2010, the constitutional reforms contained in the Judiciary and Courts (Scotland) Act 2008 have fully come into effect, including the establishment of the Scottish Court Service as an independently managed body corporate, the formalisation of Scotland's judicial hierarchy under the headship of the Lord President, and a statutory requirement for the independent assessment of candidates recommended for judicial office.

46. The Court of Session and sheriff courts are ancient and historic institutions which have adapted over many centuries to the changing nature of Scotland. There is now an opportunity to place these courts within a comprehensive modern framework of civil justice, tailored to the specific needs of Scotland's people.

Expenditure and volumes

47. Lord Gill's recommendations for the reform of Scotland's civil courts need to be considered against the scale of the tasks performed by those courts, and implemented at a time of almost unprecedented pressure on public expenditure.

48. The caseload of the Court of Session in 2009/10 was around 6,700 cases, of which around half were personal injury actions. Fewer than 300 appeals and reclaiming motions were lodged with the Inner House, of which one fifth came from the sheriff courts. This civil caseload represents approximately one half of all the cases and only one third of the time taken by the court to manage the overall caseload of Scotland's supreme courts, much of which is criminal business heard in the High Court of Justiciary.

49. The sheriff courts handled around 110,000 civil cases during 2009/10, excluding summary applications, approximately seventeen times as many as the Court of Session. In that year, 38% of the cases were ordinary causes, including personal injury cases. A further one quarter of the cases were summary causes (of

⁶ <http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs>

which 9% were personal injury cases in 2009/10) and 37% were small claims. Over 90% of the small claims were debt actions.

50. A reasonable estimate of total public expenditure on civil justice in Scotland is £150m, of which £25m is recovered in fees charged⁷.

51. The pressures on public spending are such that substantial savings will require to be found over the next few years in all of the budgets which make up this total. The Scottish Government's Spending Review is underway, and will report in November 2010.

52. Initial modelling suggests that, on their own, the structural recommendations of the Review will not substantially reduce the overall costs of running the courts and some recommendations, for example for judicial case management, would require up-front investment. The experience of England and Wales is that a move to greater judicial case management, whatever its benefits in terms of the efficient handling of individual cases, does not inevitably reduce the on-going costs to the courts or to parties.

53. Many of the Review's recommendations are worth pursuing for the improvements they will bring to the quality of the service provided in the civil courts, even if they do not result in substantial savings. Overall, though, the kind of fundamental system reform envisaged by the Review will only be possible if implementation costs are kept to a minimum, and the end-state is a system which is financially sustainable at a significantly lower level of public expenditure than now.

54. The Scottish Government believes there is scope for savings to be made across the justice system as a whole, through more efficient deployment of resources, incentivising early resolution of cases, and through ensuring cases are dealt with at the lowest level which is appropriate for the nature of the litigation. As the details of reform are worked through, it could become apparent that some adjustment to boundaries and local models of delivery is necessary to generate efficiencies and maximise access to a more effective, better system of civil justice.

⁷ The annual expenditure from the Scottish Government's central budget is currently in the region of £113m, including a £39m share attributable to civil court business of £139m total court service costs, and a similar proportion (28%, or £11m) of the total judicial remuneration costs. Other costs included are £22m spent on civil legal aid, £21m on civil legal assistance by way of representation, £15m on Scottish tribunals, £4m on legal advice services including in-court advice and £0.5m on Scottish civil appeals to the Supreme Court for the United Kingdom. Significant expenditure is funded from UK Government Department budgets, including an estimated £40m on UK Tribunals operating in Scotland. Other minor costs include central Government support and funding to mediation services, and corresponding portions of local government expenditure.

4. RESPONSE TO KEY RECOMMENDATIONS

4.1 STRUCTURES

55. Most recommendations for changes to structure are contained in Chapter 4 of the Review (Structure of the civil court system). The key proposal is to move from a two tier civil court system with largely concurrent jurisdictions across both courts to a three tier judicial structure of civil courts, with clearer case allocations and a proper appellate hierarchy. The proposal is for:

- (i) a new third level of generalist district judge, to deal with a high volume of cases of monetary value less than £5000 under a simplified procedure. The civil jurisdiction of the new district judge would cover some family cases, most housing cases, and most referrals from children's hearings, as well as summary crime and they would sit in the hierarchy immediately under sheriffs.
- (ii) a sheriff court with a national personal injury court and in each sheriffdom designated specialist sheriffs in at least the areas of family, commercial, general civil, personal and solemn criminal business. The jurisdiction of the sheriff court would cover all other summary applications and ordinary cause actions under a new combined procedure, with active judicial case management and the development of case flow management procedures, including for personal injury cases which opted not to use the national personal injury court.
- (iii) a sheriff appeal court presided over by sheriffs principal and judicial officers of equivalent standing, to deal with civil appeals emanating from sheriffs and district judges, with restricted rights of onward appeal, and appeals against conviction and or sentence in all summary criminal cases and bail appeals.
- (iv) a Court of Session with reformed Inner House procedures, with the Outer House dealing with civil actions in which the Court agreed that complex or novel questions of law arose, all complex corporate matters (over a jurisdiction limit to be revised) and cases exceeding a monetary value of £150,000. The Court would retain exclusive jurisdiction in specified case types, including patents, judicial review, Exchequer cases and certain devolution issues.

56. In addition, Professor Neil Walker has separately proposed⁸ a range of options with respect to the appellate jurisdiction of the UK Supreme Court, including a restricted right of onward appeal from the Court of Session to the Supreme Court, with no right of further appeal for cases raising only distinct questions of Scots law.

⁸ Final Appellate Jurisdiction in the Scottish Legal System:
<http://www.scotland.gov.uk/Publications/2010/01/19154813/0>

Response to the recommendations for structural reform

57. Most of the recommendations for structural reform of the civil courts⁹ are for the Scottish Government to progress through primary and secondary legislation and require the resource impacts to be modelled in conjunction with the Scottish Court Service. This work is being taken forward under the overall supervision of the Making Justice Work programme board. Once the resource implications are fully understood, it may be necessary to refine the details of the structural reforms.

58. Subject to this detailed policy development, the Scottish Government agrees in principle to the general approach adopted by Lord Gill to the structure of the civil courts. In particular it supports the aims of creating an appropriate hierarchy of first instance and appellate courts, and of ensuring that litigation is conducted in the court that is most appropriate for the nature and importance of the case – which will normally mean the lowest level at which the matter can be competently dealt with.

59. This process will take several years, given the need for legislation to be passed, terms and conditions to be set, the Judicial Appointments Board to work with Scottish Government and the Lord President to develop appropriate selection and appointment mechanisms, and the Judicial Studies Committee to develop a programme of appropriate training, especially including case management skills.

60. Just as importantly, the new judges will only be affordable through reduction in the current complement of sheriffs and senators, essentially through retirement, and to some extent by replacing the use of part-time sheriffs with district judges. The current estimate is that it could be approximately a decade from initial implementation before there is a stable complement of judges at all three levels, although the final position will depend on other decisions, for example about judicial specialisation, case management and the structure of the new third judicial tier.

Sheriff appeal court¹⁰

61. The establishment of a sheriff appeal court is a key recommendation, linked to multiple other recommendations. A particular effect would be a reduction in the criminal appeal caseload of the High Court of Justiciary. The Scottish Government supports the aims of reducing the number of criminal and civil appeals which require to be dealt with in the High Court and Inner House respectively; rationalising the various appeal routes from sheriff courts, tribunals, and JP courts; and ensuring that a coherent body of case law can develop in respect of appeals currently heard by a sheriff principal.

62. However, it is necessary to undertake further detailed consideration of the resource implications of establishing a new appeal court, including the implications for making new judicial appointments, for judicial and staff training, for estate and court services configuration, for support and ICT.

⁹ Chapter 4, recommendations 1-47.

¹⁰ Recommendations 8-18.

63. The Scottish Government therefore agrees in principle with the recommendation for a sheriff appeal court and in the coming months will continue to model the resource implications of implementing this proposal.

64. It is estimated that the sheriff appeal court, in the model proposed by the Review, would require twelve full-time salaried judges, an addition of six to the current complement of sheriffs principal.

65. There is a significant variation in the criminal and civil appellate business arising in the different sheriffdoms, with Glasgow and Strathkelvin generating over a fifth of the total business of the sheriff appeal court, in terms of judge days, and North Strathclyde generating just 12%.

66. It is, therefore, agreed that criminal appeals should be administered centrally and the envisaged six holders of the new office of appellate sheriff should not be allocated to a particular sheriffdom, but should be able to sit throughout Scotland when hearing civil appeals.

67. The additional annual judicial costs would be around £1.2 million, which would require to be justified by a corresponding reduction in the costs of senators of the College of Justice and temporary judges, who would no longer be required to hear the relevant appeals.

68. The Scottish Government also wishes to consider appeal routes from tribunals, in the light of the current consultation by the Administrative Justice and Tribunals Council¹¹ ("AJTC") and the recent proposals by the Lord Chancellor regarding the possible devolution to Scotland of responsibility for tribunals dealing in Scotland with matters reserved to Westminster (such as employment and social security). The AJTC suggests¹² that one option is that appeals from first tier Tribunals, which currently are dealt with by the UK Upper Tribunal, be made to the sheriff appeal court. There are many detailed issues which would need to be resolved in respect of any such proposal, including how to maintain the specialist expertise and links to UK jurisprudence of the current Upper Tribunal. This option might better be considered as the creation of a single, flexible appellate court below the Inner House, which might provide for a coherent and proportionate appellate structure for a jurisdiction of Scotland's size.

Appeals to the Inner House¹³

69. We agree that allowing a single judge to sift out unarguable reclaiming motions and statutory appeals is an efficient and proportionate reform. In the coming months the Scottish Government will identify the legislative requirements and instruct the drafting of corresponding proposals. Some of this may be achievable in secondary legislation.

¹¹ Options for Tribunal Reform in Scotland – Discussion paper June 2010.

¹² Paragraphs 7.27-7.29 of Options for Tribunal Reform in Scotland – Discussion paper June 2010.

¹³ Recommendation 19.

First instance business in the Court of Session¹⁴

70. There can be little doubt that the Court of Session is currently handling a significant amount of civil business which is neither complex nor high value, and which does not require the attention of a senator to resolve.

71. The recommendation to increase the privative jurisdiction of the sheriff court to £150,000 from the current level of £5,000 is a bold proposal. It would significantly alter the way in which civil court business in Scotland is handled.

72. Such an increase would on current volumes result in an additional 500 ordinary cause actions (excluding personal injury and commercial actions) being heard by sheriffs instead of senators. These cases represent 60% of all the ordinary actions currently heard in the Court of Session and if transferred to the sheriff court would generate an additional need for around 135 sitting days in the sheriff courts.

73. The proposed increase in privative jurisdiction would similarly require an extra 138 sheriff court sitting days for transferred personal injury actions and an additional 50 sitting days for transferred commercial actions.

74. It is recognised that this is one of the more controversial recommendations of the Review. For example, the Faculty of Advocates, while not opposing in principle a raising of the privative jurisdiction of the sheriff court, has commented that the figure of £150,000 ‘seems inexplicably high’¹⁵.

75. The Scottish Government intends to carry out further modelling work to test the impact of different options for a privative jurisdiction limit below £150,000, but is currently minded to accept this recommendation.

76. Although the Scottish Government accepts that there may be arguments to consider the level of increase, the proposition that there should be a significant increase in privative jurisdiction is sound. It also accepts the underlying premise that, if a new specialist court is to be created at the sheriff court level, it makes sense to transfer the great majority of cases to that court. It does not believe that handling such cases in the sheriff court diminishes the quality of justice. On the contrary, it is the disproportionate allocation of the highest judicial and court resources to matters of little legal complexity and low monetary value that serves to diminish the quality of justice in Scotland.

77. Nor does the Scottish Government accept that the current system should be retained on the basis that the reforms to the handling of personal injury cases in the Court of Session have been successful, as most cases are settled without going to proof. It believes it should be possible to replicate the successful aspects of the current system at the sheriff court level.

¹⁴ Recommendations 20-27.

¹⁵ Response by the Faculty of Advocates to the Civil Courts Review pages 39 and 43.

78. The Faculty of Advocates has queried whether the use of counsel will be sanctioned in the sheriff court in personal injury cases. The Scottish Government believes that it would be difficult to justify that straightforward, low value personal injury actions should be dealt with in the Court of Session simply so that counsel may be employed. In the light of Lord Gill's proposals on increased specialisation, a new model of specialisation seems likely to develop in the sheriff court in relation to personal injury cases using solicitors, solicitor-advocates or advocates as appropriate in particular cases. The proposed review of the costs and funding of litigation may well take a view on how to maximise the cost effective and proportionate use of resources.

79. The Scottish Government wholly accepts that the monetary value of a claim is not the sole determinant of its importance – either to the parties, or to the development of case law. Nevertheless, monetary value is the simplest and most efficient first sift mechanism to administer. It has worked well in other jurisdictions, as well as in Scotland for distinguishing summary cause from ordinary cause, and small claims from summary cause. Further, a first sift of cases based on monetary value reduces the likelihood of litigation costing more than the value of a case.

80. Other allocation options, including certification of cases, were considered by the Review or proposed in response to consultation, but the report persuasively argues why they would not represent better or more workable arrangements under the proposed model for Scotland's civil courts.

81. The Scottish Government therefore agrees with the recommendation that cases below the privative limit may be referred to the Court of Session, and will consider whether the grounds for remit should be wider than the category of 'exceptional cases' recommended by the Review¹⁶.

82. Particular concern over the proposed increase in privative jurisdiction of the sheriff courts has been expressed by professionals with an interest in personal injury.

83. In 2009/10 there were almost ten thousand personal injury cases raised in Scotland, with around two thirds raised in the sheriff court. Under the proposed arrangements, 94% of personal injury cases would be heard in the sheriff court.

84. Under the current arrangements, an average of 70 personal injury cases are scheduled in the Court of Session each sitting week, but they are scheduled with confidence that most will not need to be heard, creating a disproportionate use of the court's administrative resources. It is worth noting that there were only 14 proofs heard in personal injury actions throughout 2009/10 and over the same period no civil jury trials proceeded in any personal injury action.

85. The value of a claim does not necessarily reflect the settled value in a personal injury case, but it is the best currently available indication of the value of personal injury cases in Scotland. Between 1 April 2009 and 31 March 2010, the value of the claim exceeded £150,000 in around 600 of the personal injury cases

¹⁶ Recommendation 26.

raised in the Court of Session. This represents a little less than 1 in 5 of all personal injury cases heard in the Court of Session, and around 6% of the personal injury cases heard in Scotland. Under the proposed arrangements, assuming that the amount claimed is an accurate reflection of the case's value, these cases would continue to be heard in the Court of Session, along with any of the remaining 94% exhibiting any of the specified special features.

86. Almost one quarter of commercial actions would also transfer from the Court of Session to the sheriff courts under the proposed arrangements.

87. The proposed arrangements therefore suggest that just under a fifth of the personal injury cases, 40% of the ordinary causes and three-quarters of the commercial actions currently heard in the Court of Session would still continue to be heard in the Court of Session. This represents a proportionate use of the available judicial and court resources. Coupled with associated recommendations for a new specialised personal injury court at Edinburgh with an all-Scotland jurisdiction, and a new, designated personal injury sheriff in each sheriffdom, it does not undermine the principles of securing just outcomes and accessible courts.

Exclusive and concurrent jurisdiction of the Court of Session¹⁷

88. It is agreed that the exclusive jurisdiction of the Court of Session should remain as it is at present, except only that 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.

89. It is also agreed in principle that the value of the paid up share capital which limits the jurisdiction of the sheriff court as regards the winding up of companies should be significantly increased from the current level of £120,000. The Scottish Government will consult on what may be an appropriate level of increase.

90. In principle, the Scottish Government accepts the Review's recommendation that some family actions may still be raised in the Court of Session. However, the Review's recommendations create, in effect, three concurrent jurisdictions in family cases – the Court of Session, the sheriff and the district judge. It would be consistent with the general approach of the Review to ensure that only family cases of particular complexity or significance could be raised in the Court of Session, and the Scottish Government will consider how this might be achieved.

Specialist personal injury court in the sheriff court¹⁸

91. Lord Gill recommends that an all-Scotland jurisdiction for personal injury actions should be conferred on Edinburgh Sheriff Court and also that the right to conduct civil jury trials in personal injury cases should extend to that court.

¹⁷ Recommendations 28-29.

¹⁸ Recommendations 32-33.

92. It is important to retain for Scotland a central court of expertise, around which a professional cluster of expert practitioners and the associated infrastructure has developed. For these reasons, the proposed specialist personal injury court is an important complement to the proposal to raise the privative jurisdiction of the sheriff court. The recommended arrangements will provide users with a choice between central expertise and local service, and will limit the impact on local sheriff courts of transferring most personal injury cases out of the Court of Session.

93. Based on the assumption that all cases valued at less than £150,000 transferring out of the Court of Session would be heard in the specialist personal injury court and not before the designated sheriff in other sheriffdoms, approximately 200 sitting days and two specialised sheriffs would be required to resource the personal injury court in Edinburgh.

94. Primary legislation will be required to establish a sheriff court with all-Scotland jurisdiction, but progress has already been made towards establishing a specialised personal injury court at Edinburgh Sheriff Court. Further progress can be made to establish the court in advance of the required legislation.

95. It is worth noting that the Scottish Government has already commissioned an expert group under the chairmanship of Professor Sheila McLean of Glasgow University to look at no fault medical compensation. If such a scheme is recommended and implemented, this may remove some personal injury work from the court system completely.

Organisation of the sheriff court¹⁹

96. The existing model of regional organisation of courts in six separate sheriffdoms, with dedicated sheriffs appointed to sheriffdoms, was widely endorsed by consultation responses and agreed by the Review.

97. However, the Scottish Government agrees that there should be greater flexibility within this framework, and that it should be possible for actions to be transferred between sheriff courts within a sheriffdom and between sheriffdoms, in cases where such transfer is not already possible, and also that an interdict or other interim order granted in one sheriff court should be enforceable throughout Scotland.

98. The Scottish Government is not persuaded by the requirement for a complete review of sheriffdom or sheriff court district boundaries for the sole purpose of arranging coterminous boundaries with other public authorities, including the Procurator Fiscal Service, Police and Local Government.

99. The modelling of the recommendations of the Gill Review has been conducted on the basis of existing sheriffdom and sheriff court district boundaries. The way in which judicial resources are deployed within the system varies hugely²⁰,

¹⁹ Recommendation 36.

²⁰ The structure comprises six separate sheriffdoms with:

and will require substantial further adjustment if court business is redistributed through the system in accordance with recommendations of the Review.

100. Balancing judicial deployments, service configuration and funding combines the responsibilities of the Lord President, the sheriffs principal, the Scottish Court Service and the Scottish Ministers.

101. Judicial deployment is a matter for the Lord President and the sheriffs principal, in so far as they are responsible for securing the efficient disposal of business in their respective sheriffdoms. It is unclear how sustainable the current arrangements will be in a reformed system which also introduces additional constraints on judicial deployment through a case docketing system, the new judicial office of district judge and the introduction of designated specialist sheriffs and designated specialist district judges in each sheriffdom.

102. It will be for the Scottish Court Service, in consultation with the judiciary, court users and the Scottish Government, to configure new models of service delivery. It is clear that the service delivery models in Glasgow and Edinburgh are of a very different character to those of all other sheriff courts, and that Scotland's rural and island areas have particular and specific service needs which require to be addressed in any delivery model.

103. Any future arrangements will need to be delivered within available financial resources, and it is the Scottish Government's responsibility to ensure that adequate resources are provided and that sufficient individuals are appointed to judicial office, on the advice of the Judicial Appointments Board for Scotland.

104. The joint work will need to consider the overall cost of the new sheriff court system, as well as projected business flows and opportunities afforded by ICT.

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- 2 large-court sheriff court districts representing national operation centres with more than 20 full-time resident sheriffs (Edinburgh and Glasgow);
 - 4 smaller-court sheriff court districts representing regional operation centres with 5 to 8 full time resident sheriffs (Aberdeen, Dundee, Hamilton and Paisley);
 - 12 small-court sheriff court districts operating with 2 to 5 full time resident sheriffs (at Airdrie, Ayr, Dumbarton, Dumfries, Dunfermline, Falkirk, Inverness, Kilmarnock, Kirkcaldy, Linlithgow, Perth and Stirling);
 - 10 single-sheriff sheriff court districts operating with a single resident sheriff (at Alloa, Arbroath, Cupar, Dunoon, Elgin, Forfar, Greenock, Haddington, Lanark and Peterhead);
 - 14 sheriff court districts operating with a resident sheriff shared with other sheriff courts in a small circuit (at Banff, Dornoch, Dingwall, Duns, Fort William, Jedburgh, Kirkwall, Lerwick, Lochmaddy, Oban, Peebles, Rothesay, Stornoway and Wick); and
 - 7 sheriff court districts operating without a resident sheriff (at Campbeltown, Kirkcudbright, Portree, Selkirk, Stonehaven, Stranraer & Tain).

Conduct of court business in sheriff court districts operating without a full-time resident sheriff is reliant on routine deployment from a 30-strong pool of full-time all-Scotland floating sheriffs, most of whom work only in the sheriffdom to which they are appointed. All-Scotland floating sheriffs also supplement the complement of resident sheriffs in larger courts as a matter of routine. In some cases, floating sheriffs are virtually resident in a single court. The small circuits of resident sheriffs covering a group of smaller courts may also include courts with one or more other resident sheriffs. Across Scotland, the full-time complement of sheriffs is supplemented by part-time sheriffs.

Projected business flows and corresponding costs based on the current boundary arrangements will be presented early in 2011. The current arrangements may need reconsideration if recommendations are to be fully implemented, particularly in the current financial climate. If so, alternative options for the organisation of sheriff courts and sheriffdoms will need to be developed before primary legislation is introduced.

105. These considerations are of greater fundamental importance than the achievement of coterminous boundaries. The aim — in so far as it is desirable — of achieving coterminous boundaries should therefore be addressed only within this broader consideration of sheriffdom and sheriff court district boundaries, in which the Scottish Government, the judiciary and the Scottish Court Service will work together.

Jurisdiction of the district judge²¹

106. The recommended jurisdiction of the new judicial office of district judge covers summary crime, small claims, summary cause, ordinary housing and some family actions, as well as most appeals and referrals from children's hearings. Between 70% and 80% of the caseload would be summary crime.

107. The transfer of these cases from the sheriff to the new judicial office of district judge is agreed in principle. The Scottish Government's intention to consider different options for the make-up of this third tier of civil courts is discussed below.

108. The Scottish Government wishes to consider further the position of family actions. The Review proposals would create three potential first instance jurisdictions for such actions – the district judge, the sheriff, and the Court of Session. It agrees that actions in relation to contact might primarily be for district judges as well as interim orders and urgent protective measures, while more legally complex cases would be for a sheriff. It is anticipated that only cases of particular complexity or significance would go to the Court of Session, but the grounds for cases going to either the sheriff or the Court of Session will have to be carefully considered.

Flexibility and transfer of complex cases²²

109. It is agreed that sheriffs' jurisdiction should not be altered to remove that which will be allocated to the district judge. It should remain possible for sheriffs to undertake work which is within the sphere of the district judge and 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 or her own initiative, subject to consultation with and approval of the sheriff principal.

²¹ Recommendations 37-42.

²² Recommendations 46-47.

UK Supreme Court

110. The Supreme Court is Scotland's highest Civil Court, having acquired jurisdiction over civil appeals formerly heard in the House of Lords.

111. Professor Neil Walker, in a report commissioned by the Scottish Ministers²³, sets out a range of options for the development of final appellate jurisdiction in the Scottish legal system. Of the various options discussed, Professor Walker favours a 'quasi-federal' model, where cases would be eligible for appeal to the Supreme Court only where they raised issues of wider relevance within the UK.

112. A subsidiary issue discussed by Professor Walker is leave to appeal from the Court of Session²⁴. The report notes that the hurdle to raising a case from England and Wales (permission from the Court of Appeal, which failing from the Supreme Court itself) is somewhat higher than that for raising a case from Scotland (certification by two Scottish counsel that the appeal is reasonable).

113. The Scottish Government is considering Professor Walker's report. It does not propose to initiate any substantive reforms during the current Parliament. In respect of criminal business, it has responded to the Advocate General's consultation on the position of the Lord Advocate²⁵. It has made its general view clear that the final court of appeal in criminal matters should continue to be the High Court of Justiciary, and that action should be taken to address the anomaly that actions of the Lord Advocate in respect of criminal prosecutions are more vulnerable to ECHR challenge in the Supreme Court than those of her counterparts in other jurisdictions.

114. Lord Gill made no recommendations concerning the UK Supreme Court. However, one of the aims of the Review is to focus the Court of Session on the most important civil business. It may be consistent with this affirmation of the status and significance of the Court of Session that appeals onward from that Court should be restricted to cases of real significance. Furthermore, the approach Lord Gill adopts generally is of proportionate allocation of judicial resources, with appeals subject to sifts and tests of legal merit. In principle, the Scottish Government believes that this approach should also be adopted in relation to appeals onward to the Supreme Court.

²³ <http://www.scotland.gov.uk/Publications/2010/01/19154813/0>

²⁴ See paragraph 3.5.1 of the Final Appellate Jurisdiction in the Scottish Legal System report.

²⁵ Devolution issues and acts of the Lord Advocate:

[http://www.advocategeneral.gov.uk/oag/files/section%2057\(2\)%20-%20informal%20consultation%20paper%20-%20final\(R\)%20\(2\).doc](http://www.advocategeneral.gov.uk/oag/files/section%2057(2)%20-%20informal%20consultation%20paper%20-%20final(R)%20(2).doc).

4.2 JUDICIAL OFFICES

115. The creation of any new judicial office will require full and careful consideration: it needs the agreement of Parliament in primary legislation and full consideration of the new office's proper place in the Scottish judicial hierarchy.

116. Such considerations in respect of Lord Gill's proposals include recognising the distinctions between a sheriff principal of a particular sheriffdom, with his or her significant burdens of executive and administrative duties and statutory responsibilities, and the proposed new office of an appellate sheriff or appellate sheriff principal, travelling around Scotland to hear appeals. The offices are evidently very different and a job evaluation will be required to compare them before terms and conditions of appointment, including salary and pension arrangements, could be satisfactorily settled.

117. Similar evaluation of the proposed office of district judge, with direct comparison with stipendiary magistrates on the one hand and sheriffs on the other, would also need to be taken into account, as would the new system's requirements for resident, floating and designated sheriffs, including the two sheriffs who would be required to sit in the all-Scotland personal injury court.

118. Judicial salaries and pensions are reserved matters under the Scotland Act 1998, so these considerations will need to complement the UK Government's programme of work to review and consider such matters, and will need to fit into a UK-wide system.

119. It is not unreasonable for the Scottish Government to expect with confidence a full UK review of judicial salaries and pensions at some point in the next five years, and this requirement should not therefore impede the implementation of reforms recommended by Lord Gill. However, for this reason as well as the requirements for primary legislation it is not envisaged that the first appointments to any new offices could be made for several years.

Specialisation²⁶

120. Judicial specialisation at the shrieval level is central to the Review's concept of a court system which actively manages litigation, with judges 'owning' a case, and taking responsibility for ensuring that parties identify and focus quickly on the issues upon which a particular case turns. Further arguments advanced in favour of specialisation by the Review include the increased complexity in the law, and the trend towards specialisation in the wider legal profession (from which the judiciary is drawn).

121. The Scottish Government recognises that this is a significant shift from the Scottish tradition of a generalist sheriff, and that it raises operational issues, particularly in smaller and rural courts. Overall, though, it is persuaded that the case

²⁶ Recommendations 4-7.

for specialisation is compelling. As discussed below, the Scottish Government is also supportive of specialisation at the level of the district judge.

122. The issue is how to operate a system of specialisation efficiently in a small jurisdiction, with a large number of different courts, alongside the introduction of a new judicial tier.

123. A resident sheriff in small towns and in rural areas, even if provided on a part-time circuit basis, has been seen as a guarantee of locally delivered justice. The Scottish Government believes that local justice remains vital, but that there may be better and more efficient ways of achieving this, through better use of technology and more flexible deployment of judicial resources. In particular, it is anticipated that specialist sheriffs will, in some areas, cover more than one sheriff court.

124. The Scottish Government agrees that the number of specialisations needs to be manageable, and accepts Lord Gill's recommendation for the designation of specialist sheriffs for solemn crime, general civil, personal injury, family (including matters relating to Adults with Incapacity) and commercial actions, with the possibility of further designation at the discretion of the sheriff principal or Lord President.

125. This change will have significant implications for judicial appointments and training. The Scottish Government will work with the Judicial Appointments Board for Scotland and the Lord President to ensure that the process of judicial appointment takes sufficient account of the breadth of specialist skills required in each sheriffdom. It is anticipated that this may be supported by guidance issued jointly by the Lord President and the Scottish Government to the Board.

126. The necessary judicial training programmes will be for the Lord President to determine, with the advice and support of the Judicial Studies Committee.

127. Specialisation would have specific practical and financial implications for the Scottish Court Service, including in accommodating specialist courts and re-located judicial posts.

128. Scotland's larger court locations, where specialist courts are most likely to be located, are already operating at relatively high levels of occupancy, following court unification. The Scottish Court Service will also need to consider the impacts of designated specialist sheriffs on future models of service delivery in rural areas and in small towns, where current service forms and standards of local delivery already differ from those in urban regions of central Scotland.

129. It has not yet been possible to model fully the cost of introducing specialist sheriffs, but there is a balance between the reduced costs associated with efficient disposal of court business and the implications for the distribution of business and court programming, with particular additional demands on ICT.

130. On balance, the Scottish Government is persuaded by the Review's conclusion that formal specialisation should not be introduced in the Court of Session²⁷.

District judges

131. The creation of the office of district judge to sit in the sheriff courts is a key recommendation, supporting the other recommended structural adjustments. The Scottish Government agrees that it is desirable to introduce a third judicial tier in civil courts, but wishes to consider more flexible options than a cohort of full-time generalist judges dealing both with summary crime and the proposed range of civil business.

132. One of the principal justifications of creating the new office would be the transfer of summary crime from sheriffs and stipendiary magistrates, a workload which is estimated will account for approximately 70 to 80% of the judicial sitting days of a district judge. This transfer would allow for a significant reduction in the required shrieval complement, even when business transferring to the sheriff from the Court of Session is taken into account.

133. However, there are difficulties in reconciling a proposal to establish joint civil and criminal jurisdiction at the lowest level of civil courts with the clear diagnosis that it is the constant pressures of criminal business which distort the handling of civil business and create delays at higher levels in the court system.

134. The Scottish Government also agrees with the Review that there should be opportunities to develop specialisation at district judge level, for example for those with experience in housing, law centre work or family and child law²⁸, and that the general approach for many of the cases should be a problem solving or interventionist one²⁹. This is more comparable to the approach adopted in many Tribunals than with the handling of summary crime.

135. The Scottish Government considered simply splitting civil and criminal business at the district judge level. However, only 20 to 30% of each proposed district judge's workload would comprise civil actions, suggesting that the civil business of a district judge alone would require the appointment of no more than 30 full-time office holders across Scotland. This appears unworkable in a jurisdiction with 49 sheriff court districts.

136. The answer, it is believed, is a flexible model of district judge, which allows for a greater use of part-time district judges, a degree of specialisation, and a closer link to the role of a tribunal judge.

137. The Scottish Government believes that part-time judges, if properly managed, can deliver justice effectively, and the possibility of part-time appointment has benefits for the diversity of the holders of judicial office.

²⁷ Chapter 4 paragraphs 59-63.

²⁸ Chapter 5 paragraphs 162-164.

²⁹ Chapter 5 paragraph 126.

138. Although the Review considered whether certain kinds of action such as housing cases might be transferred to specialist tribunals³⁰, its remit did not extend to a wider examination of the relationship between tribunal judges and judges in the courts. Since the Review reported, that issue has increased in significance with the reports of the Administrative Justice Steering Group led by Lord Philip³¹, the consultation by the Scottish Committee of the AJTC³², and the Scottish Government's intention to develop an integrated structure of Scottish Tribunals, including Tribunals dealing with reserved issues such as employment and immigration.

139. Within the UK Tribunal Service, a model has already emerged of a shared judicial office, with holders of that office being 'ticketed' to deal with particular types of case. The Scottish Government wishes to examine whether a similar model covering district judges and tribunal judges can be created.

140. All such appointments would be made on the recommendations of the Judicial Appointments Board, and would be subject to a common standard of general competence in judicial decision-making. However the appointment would also specify the categories of case which could be dealt with by the judge.

141. One element of this might be to develop the existing role of stipendiary magistrates³³, to form a larger cohort of district judges dealing specifically with summary crime.

142. Other judges, perhaps particularly outwith the central belt, may be appointed to handle the full range of criminal and civil business. Yet others could hold a commission to handle civil cases, or a subset such as family cases, alongside a ticket to sit on specified tribunals. (At the moment, it is common for part-time sheriffs also to hold office as tribunal judges in areas such as employment or mental health.)

143. These options will be developed further, taking account of the advice on Scottish Tribunals from the AJTC, and the views of the Civil Justice Advisory Group, led by Lord Coulsfield, both of whom should report by the beginning of 2011.

Lay justices

144. The Review indicated³⁴ that, had it been considering issues from first principles, it would have been minded to recommend that all cases currently dealt with by lay justices be handed over to professional district judges. Ultimately, however, it concluded that the recent reforms to summary justice, including the improvements in the training and appointment of lay justices, are now in place, and no recommendations were made regarding this. The Review also considered the

³⁰ Chapter 5 paragraphs 134-141.

³¹ Future Administration and Supervision of Tribunals in Scotland :
<http://www.ajtc.gov.uk/scottish/scottish.htm>

³² Options for Tribunal Reform in Scotland – discussion paper, June 2010.

³³ Stipendiary magistrates currently only sit in Glasgow.

³⁴ Chapter 4, paragraphs 179-192.

possibility of lay justices being given a role in relation to some civil cases, but concluded that lay justices may not possess the legal skills necessary to conduct these cases, particularly in the more interventionist manner envisaged.

145. The Scottish Government agrees that lay justices should be retained for the kind of criminal cases currently dealt with in the JP court. It also accepts the force of the Review's arguments concerning civil jurisdiction, but is prepared to consider further whether there are particular kinds of low value civil cases which might be appropriate for JPs.

Reliance on temporary and part-time resources

146. The workload of the current part-time shrieval complement is approximately equal to 26 full-time district judges. The Review points out that a fifth of all sitting days in the sheriff court were conducted by part-time sheriffs in 2008/9 and 2009/10. They are clearly an integral part of the current system – although the Scottish Court Service intends to reduce significantly the reliance on this resource.

147. The Review concluded that part-time judges should only be deployed in emergencies, the Court Service should work towards their elimination, and that those part-time sheriffs that might remain should be drawn from the ranks of retired practitioners³⁵.

148. The Scottish Government agrees that a substantial reduction in reliance on part-time and temporary judicial resources is required as a complement to the proposed system of docketing and judicial continuity. However, it does not agree that it should seek the complete elimination of part-time judicial resources. There are several benefits of retaining a complement of part time judges.

149. These benefits include offering enhanced flexibility in judicial deployment and the encouragement of a diverse judiciary, by making opportunities for judicial office more available to those who may have family or other caring commitments.

150. Although Scotland does not have a formal career structure for the judiciary, it is notable that many sheriffs served as part-time judges prior to their appointment, and this feature of progress towards the bench is shared with many other jurisdictions. Reliance on part-time judicial resource is deeply embedded in England and Wales, for example, with recorders and deputy district judges playing an important role.

151. Rightly, it is extremely difficult to remove a full-time judge once appointed, and it is helpful to allow people the opportunity to develop and demonstrate their fitness for judicial office before such an appointment is made.

152. For these reasons, the Scottish Government intends to continue to provide for a part-time complement of judicial office holders, and does not agree that these offices should be restricted to those with prior experience of judicial office. As

³⁵ Recommendations 1-3.

discussed above, it agrees with the Review that it should also be possible to be appointed as a district judge on a part-time basis³⁶.

153. One concern which has been expressed is that the use of part-time sheriffs will impede effective case-management, since they may not be available to see cases through to their conclusion. The Scottish Government does not believe this is a fundamental problem, but recognises that part-time sheriffs may need to be more actively managed than is the case at the moment.

154. The judges of the Court of Session, in their response to the Review, agreed that progress should be made to eliminate the use of practitioners, sheriffs and sheriffs principal as temporary judges in the Court of Session, but considered that the court should continue to avail itself of those retired judges who were willing and able to continue to work on a part-time basis.

155. The Scottish Government agrees that the use of temporary judges in the High Court and Court of Session should be substantially reduced, if not eliminated. The raising of the sheriff court's privative jurisdiction and the creation of the sheriff appeal court should substantially reduce the workload in the Court of Session and High Court, making it possible to achieve this. Subject to further modelling of likely business volumes, the Scottish Government is minded to accept the Review's recommendation that temporary judges should only be appointed from the retired judiciary and the serving shrieval bench.

³⁶ Chapter 4, paragraph 177.

4.3 PROCEDURE

156. The Review proposes improvements to the handling of civil litigation through the greater use of caseflow management procedures, modernised language and enhanced judicial case management powers at all three judicial levels. It recommends:

- a new simplified procedure in plain English for civil actions before the proposed district judge;
- time set aside in the sheriff court programme for hearing civil business; ordinary cause actions with modernised terminology; the early adoption of case flow management procedures, including time limits and requirements for disclosure to facilitate early disposal; a roll-out of existing personal injury and commercial case flow management procedures and a suite of recommendations for handling family actions and cases involving children; docketing of cases for judicial continuity and active judicial case management; and
- enhanced case management powers in the Court of Session with resources set aside for a programme of civil business, including powers of sanction to facilitate active judicial case management in docketed cases except personal injury, for which suitably improved case flow management procedures should continue, with judicial intervention in exceptional cases. In concurrent jurisdictions, the sheriff court and the Court of Session to use consistent terminology. For statutory appeals and judicial reviews, the introduction of time limits and permissions to proceed.

157. The implementation of procedural recommendations³⁷ will primarily be the responsibility of the Lord President and the Court of Session, reflecting the Lord President's statutory responsibility for the effective and efficient operation of the courts, and particularly his and the court's responsibility for making procedural rules, advised by the Sheriff Court Rules Council and the Court of Session Rules Council. However, the recommendations carry significant implications for the Scottish Government and the Scottish Court Service, too: active judicial case management and case docketing carries significant resource and operational implications for the courts, and primary legislation will be required in some areas to establish a proper basis for the creation of procedural rules.

³⁷ Most of the procedural recommendations are contained in Chapter 5 of the report but several of them are also further elaborated or explained in other chapters. The recommended new powers that are required to make the new procedures work well are described in Chapter 9. Specific changes to the procedure for judicial review and public interest litigation are described in Chapter 12 and a completely new procedure allowing for the introduction of class actions is described in Chapter 13.

Response to the recommendations

158. The Scottish Government agrees with the fundamental conclusion of the review, and also with the majority of comments received during public consultation, that the court should exercise effective control over the conduct and pace of litigation³⁸.

159. Scottish civil procedure should be characterised by a greater emphasis on active judicial management and this would be better achieved if the court had greater powers to control the conduct and pace of cases brought before it. There should be set out an explicit articulation of the court's role and responsibilities in these respects. The Scottish Government also supports moves towards simplification through both the abolition of separate petition and ordinary cause procedures in Court of Session and the combination of summary cause and small claims under simplified procedure in actions before the district judge.³⁹

160. Case flow management procedures setting out standard timetables are particularly suitable for high volumes of routine cases and, although Lord Gill makes no particular recommendations for new case flow models, these should be encouraged and further developed in appropriate case types.

161. Overall, a carefully balanced package of case management policies is required, tailored specifically to different case types and linked to administrative capacity and available resources. Taken together, the recommendations require close working arrangements for the purposes of avoiding duplication of effort, as well as ensuring coherent overall stewardship.

162. The legislative framework governing civil procedure is complicated, incorporating different Acts of Parliament and multiple instruments of secondary legislation. Lord Gill's recommendation to simplify procedures, by abolishing unnecessary distinctions and combining separate procedures, is welcomed and will assist in the development of self help tools, supporting the principle of accessibility.

163. Overall, these recommendations amount to a fundamental reworking of the procedural rules of the Court of Session and the sheriff court. The Scottish Government accepts the view of the Review that such a task, which will take several years, is beyond the capacity of the Court of Session and Sheriff Court Rules Councils, as currently constituted and resourced. However, it would not be appropriate to await statutory reform of the rules councils to begin this work. It will, therefore, seek to agree with the Lord President and the Scottish Court Service shared working arrangements to resource and oversee phased work to review and update the procedural rules⁴⁰.

³⁸ Recommendation 48.

³⁹ Recommendations 52, 56, 79 and 80.

⁴⁰ See further discussion in relation to the proposed Civil Justice Council in part 4.5.

Multi-party actions⁴¹

164. The Review discusses in detail the arguments for and against special procedures for multi-party or class actions. Overall, the Scottish Government supports the general thrust of the Review's conclusions – that the lack of such a procedure in Scotland can reduce access to justice, and increase expense and waste time, where multiple cases involving similar facts are litigated, but that it is important to avoid measures which might promote 'blackmail litigation', or the raising of cases with little merit.

165. The Scottish Government has also taken account of the fact that provisions for multi-party action in particular types of case are likely to arise as a result of UK legislation. Such provisions were proposed before the recent UK election in respect of consumer issues, financial actions and equality cases, but these were lost in the legislative wash-up before the election. In general, it is believed that it would be better to have a consistent set of arrangements for such actions, on which individual types of case can draw, rather than see a series of discrete provisions emerge in a haphazard fashion.

166. The recommendation that there should be a special multi-party procedure⁴², based on the proposals of the Scottish Law Commission is therefore agreed in principle. This will require primary legislation to introduce, and there will be a consultation on the detailed provisions of the legislation, taking account of any relevant recommendations of the planned review of the cost and funding of litigation.

167. The Scottish Government notes the Review's recommendation that this procedure should initially only be introduced in the Court of Session⁴³. This reflects the fact that multi-party actions are likely, by their very nature, to be complex and involve significant financial claims. However, in view of the time taken before such legislation can be introduced, and reflecting the generally enhanced role for the sheriff court arising from the Review, it will consider carefully the option of making the procedure available in the sheriff court.

Judicial review⁴⁴

168. Judicial review is a fundamental safeguard for the citizen against the arbitrary or excessive use of power by public bodies, and it is important that a modern civil justice system provides effective access to such review in appropriate cases. At the same time, it is not in the interests of the courts or the wider public interest if judicial review become a tactical device to frustrate or delay proper public policy decisions, or a vehicle to articulate what are essentially political arguments in the judicial sphere. The balance struck by the Review is, in the Scottish Government's view, broadly correct.

⁴¹ Chapter 13.

⁴² Recommendation 157.

⁴³ Recommendation 166.

⁴⁴ Chapter 12.

169. Judicial reviews are opposed more often than most other actions, and for that reason contribute a more significant amount of the Court of Session's caseload than simple numbers would suggest. Less than one quarter of the consultation responses to the Review considered that judicial review procedures are satisfactory.

170. The Review proposes a clarification of the provisions which determine who may bring an action of judicial review, replacing the current tests of title and interest with a single and simpler test of whether the petitioner has determined a sufficient interest in the subject matter of the proceedings⁴⁵. The Scottish Government agrees that this is appropriate. It may in some cases broaden the range of people or organisations that may bring an action, but the report makes clear that the test should not be applied to allow academic points to be pursued, or general pronouncements to be made on the law. As has always been the case, it is important that there be a real issue between parties before the courts intervene⁴⁶.

171. This clarification of the rules on title and interest is balanced with the other recommendations – the introduction of a time limit to bring a case (a maximum of three months, unless on cause shown⁴⁷) and a leave or permission stage⁴⁸.

172. The introduction of a time limit to bring proceedings introduces a necessary element of discipline to the conduct of parties and allows for a degree of certainty in public policy. The Scottish Government will, however, consider whether three months is too strict a limit, particularly in complex cases involving multiple parties.

173. The Scottish Government also supports the requirement for leave to proceed, which provides an important filter of cases of little merit, as well as providing the opportunity for an early case management hearing.

174. The report also discusses the issue of expenses in public interest litigation – particularly the question of whether the court should be able to protect a petitioner from the risk of meeting all the costs of the opponent should they lose. So called 'protective costs orders' have already been made by the Court of Session⁴⁹, and the European Commission has raised questions as to whether, in environmental cases, the current regime in the UK complies with the *Aarhus* convention, which requires that legal remedies should not be prohibitively expensive.

175. The Lord President has indicated to the Scottish Government that he intends to make rules to address this issue in environmental cases and the Court of Session Rules Council has now proposed new rules for such cases. The Scottish Government has indicated that it supports a wider codification of the rules on protective costs, to avoid the haphazard and inconsistent development of costs regimes in particular types of action.

⁴⁵ Recommendation 150.

⁴⁶ Chapter 12 paragraph 25.

⁴⁷ Recommendation 151.

⁴⁸ Recommendation 152.

⁴⁹ *McArthur v Lord Advocate* 2006 SLT 170.

Judicial continuity and a single docket system⁵⁰

176. The introduction of a judicial docket system is explored at length in the report⁵¹. The arguments in favour of docketing are formidable – particularly in the context of a model of managed litigation and a more interventionist and specialised judiciary. It has the potential to increase both the efficiency and quality of justice, by avoiding matters being re-opened in litigation, and ensuring the judge is fully apprised of all the material factors in a case from start to finish.

177. The objections to docketing are essentially practical. It requires a fundamental shift from an operational model based on the short term juggling of judicial resources, and may create costs or delays in the wider system if other work cannot be fitted at short notice into a judge's allocation. A docketing system will also require a significant investment in ICT by the Scottish Court Service, the costs of which can as yet only be estimated.

178. However, the report provides international evidence that such a system can be made to work effectively, and it is clear that the general approach adopted by the Review depends very largely on such a system. The Scottish Government, therefore, supports the recommendations in principle, and will work with the Lord President and the Scottish Court Service to test out how docketing can be made to work cost-effectively in the Scottish context.

A new case management model

179. Lord Penrose's 2009 recommendations for the reform of Inner House business are now being implemented, as recommended in the Review⁵².

180. Proposals for active judicial intervention and active judicial case management, for combining petition and ordinary cause procedure, for modernised procedural practise and terminology, and for consistency across the sheriff courts and Court of Session are all welcomed in principle⁵³.

181. Other initiatives such as limiting the amount of time which litigants have to make oral submissions may also be worth considering. This approach operates successfully in senior courts such as the Supreme Court and the European Court of Justice.

182. Where it has been introduced in Scotland and in England and Wales, judicial case management has imposed additional up front case costs for the courts, including additional demands on judicial time.

183. These costs have not yet been fully modelled. It is estimated that if a level of intensive judicial intervention were to be introduced for all cases similar to that which is experienced in commercial actions, then ten new senators would be required for

⁵⁰ Recommendations 49-51.

⁵¹ In particular, Chapter 5 paragraphs 18-47.

⁵² Recommendation 53.

⁵³ Recommendations 54-73.

the current Court of Session caseload to be effectively managed. However, as the Review points out⁵⁴, different kinds of judicial control will be appropriate in different kinds of case.

184. A lighter touch case management model will be required for more high volume litigation and cases where the issues are typically straightforward or routine. Striking the right balance in particular kinds of case, and ensuring that any increase in judicial involvement at the beginning of a case is balanced out by greater system efficiency overall, will be key elements of the reforms to procedural rules in the Court of Session and sheriff court, discussed above.

Information technology⁵⁵

185. The Scottish Government agrees that there should be no bar to supporting the new case management model by technology such as telephone or videoconferencing⁵⁶. Improved ICT is fundamental to the operation of the case management system. The availability of resources to support this will be a key determinant of how far and how fast the Review's recommendations can be implemented. At this stage, no commitments can be made in respect of future capital investment, and this will be a matter for the Scottish Government and the Scottish Court Service to consider in developing plans for spending over the next few years.

186. The Scottish Government also agrees that ICT has the potential to play a more strategic role in enhancing efficiency and access to justice, including through litigation being initiated and handled online, a fundamental shift from paper-based to electronic systems, and through providing information and support to members of the public. The constraints on public finances mean that such initiatives are likely to require to be funded through savings in the system, but there will be careful exploration of opportunities to move towards this more strategic use of ICT.

Actions before the district judge

187. The recommendations⁵⁷ for a single set of new rules in plain English setting out procedure for low value cases based on a problem solving, interventionist judicial approach are welcomed.

188. The Scottish Government supports the general aim that it should be possible for most people to represent themselves in such actions, aided where necessary by an appropriately trained lay representative.

189. These recommendations are linked to recommendations for in-court advice services including specialist housing advice services, web-based self-help tools,

⁵⁴ Chapter 5 paragraph 6.

⁵⁵ Chapter 6.

⁵⁶ Recommendation 94.

⁵⁷ Recommendations 79-84.

support for party litigants and a public legal education strategy⁵⁸, discussed further in part 4.5 of this response.

Enhancing case management

190. The proposals set out in Chapter 9 provide a carefully balanced package of measures to support case management, including provisions regarding disclosure, expert evidence, efficient time management, and sanctions for non-compliance. In the main, their detailed consideration will be for the detailed work of recasting the rules of procedure, overseen by the Lord President.

191. However, there are two measures in particular for which Parliamentary sanction will be sought in primary legislation. These are:

- the addition of a preamble identifying a guiding principle that the purpose of the rules is to provide parties with a just resolution of their disputes 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 court⁵⁹, and
- any broadening of the rule making powers themselves, following a review to ensure they are sufficiently wide to support modern case management, and to allow the court to adapt and improve procedure flexibly and quickly⁶⁰.

Curators, reporting officers, safeguarders and court reporters

192. The Review raised a number of concerns regarding the appointment, training, management and payment of these various appointees in cases involving children, and adults who lack capacity. Many of these echo previous concerns raised in the reports of the Adoption Policy Review Group and the Research Working Group on the Legal Services Market in Scotland, and the Scottish Government's consultation on the reform of the Children's Hearing System⁶¹.

193. The Scottish Government agrees that it is now time to develop a coherent system of recruitment, training and monitoring of quality of work, alongside greater clarity for appointees of what is expected of them, and will work with the Scottish Court Service, local government, the Scottish Legal Aid Board and the Scottish Children's Reporters Administration to this end.

194. On safeguarders, the regulation making powers in s30(2) of the Children's Hearings (Scotland) Bill provide the means to make the necessary improvements to the safeguarder service to meet the recommendations made by Lord Gill. Work has already begun with safeguarders to scope out the potential content of regulations that would be the subject of further consultation in future. On reporters, the Scottish Government has carried out further research into this area and will be publishing the report findings shortly. This research confirms the points made by Lord Gill and the

⁵⁸ Recommendations 86, 87, 142-144, 146-148.

⁵⁹ Recommendation 112.

⁶⁰ Recommendation 134.

⁶¹ Chapter 5 paragraphs 100-113 and recommendations 74-76.

Scottish Government is considering how best to take forward both Lord Gill's recommendations and the findings from its own research.

Party litigants

195. The right to represent oneself in a case is an important one. Indeed the proposals in the Review, particularly with respect to cases before the district judge, may increase the extent to which self-representation is a reasonable means for protecting and securing rights. However, the Scottish Government recognises that, particularly in the higher courts, party litigants may pose a considerable burden on the courts, without any particular benefit accruing to the litigants themselves. The Scottish Government therefore agrees to the measures proposed for management of vexatious litigants and party litigants in summary and ordinary applications (subject to introduction of new case management models as proposed)⁶².

Judgments⁶³

196. The proposed requirements for the form and content of judgments are agreed⁶⁴, as is the proposal for a published register of cases awaiting judgment⁶⁵. The Review proposes that this register should apply to cases in which judgement has been outstanding for more than three months. The Scottish Government considers that late judgments, where they arise, are a matter of great concern, and it is vital that there is effective operational support and judicial oversight to ensure that judgments are available within a reasonable time. It therefore believes that there may be advantages in registering all cases awaiting judgment, leading to greater transparency and public understanding, and will explore this option with the Lord President and the Scottish Court Service.

Cost and funding of litigation⁶⁶

197. The Review highlighted a range of important matters concerning the cost and funding of litigation which it had not been able to consider with the time and resources available to it. These have been considered at length by Lord Justice Jackson's Review of Civil Litigation Costs in England and Wales. Some of the provisions which have raised concern in England and Wales are not applicable here, but it is clear that there are a number of matters which require review. One of these is whether and how claims management companies should be regulated in Scotland, which was raised during the passage of the Legal Services (Scotland) Bill⁶⁷.

⁶² Recommendations 131-133.

⁶³ Chapter 10.

⁶⁴ Recommendations 135-139.

⁶⁵ Recommendation 140.

⁶⁶ Chapter 14.

⁶⁷ <http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-0102.htm#Col2529> column 2551

<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-0202.htm#Col2570> columns 2598-9

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0428-02.htm#Col25752#Col25752> column 25787

<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1902.htm#Col3174>

198. The Scottish Government therefore agrees that there should be a review of cost and funding of litigation. This should take account of the detailed work undertaken by Lord Justice Jackson, and consider how costs can be allocated between parties at all judicial levels in a manner which is fair and promotes access to justice. The review should consider how to encourage Scotland as a forum of choice for litigation which could be raised in other jurisdictions, different options for funding litigation, and the extent to which alternatives to public funding may secure appropriate access to justice. The Scottish Government is currently considering who should lead such a review and intends to announce further details by the end of 2010.

Taxation

199. Lord Gill raised a number of concerns regarding the current arrangements whereby taxation of accounts is undertaken in most parts of the country by sheriff clerks holding a commission from the sheriff principal. This work may include judicial taxation to fix the costs of litigation payable by a party against whom expenses are awarded, and extra-judicial work on behalf of solicitors – often to fix accounts for work other than litigation.

200. The Scottish Government agrees that commissions should only be granted where the person has the relevant training and expertise, but is not convinced that it is necessary to create a new cadre of sheriff court auditors who would perform only this function. Judicial taxation should remain a responsibility of the Scottish Court Service, and it will be for them to devise the most practical and cost-effective arrangements for training and deploying this function.

201. The Scottish Government agrees that the role of the Auditor of the Court of Session should be modernised, and that this should be a salaried post, funded from audit fees, which should be paid into public funds.

4.4 CIVIL JUSTICE COUNCIL⁶⁸

202. Scotland's civil justice system requires oversight. Its strategic reform requires drive and co-ordination. The Scottish Government accepts Lord Gill's analysis that there is a gap in current organisational arrangements which may make it difficult to drive forward the implementation of the Review's recommendations for court procedure and organisation.

203. No single body or person has the strategic overview, capacity and authority to undertake this task. The power to amend court rules rests with the Court of Session and primary responsibility for reforming procedures rests with the Lord President in practice. The responsibility for providing the property, services and staff required to support the functions exercised by the courts and the Scottish judiciary rests with the Scottish Court Service, a body corporate with a board chaired by the Lord President and comprising a majority of judicial members. The statutory functions of the Court of Session, the Scottish Court Service and the Lord President must each be respected during the reform process, as must the Scottish Government's power to introduce proposals for primary legislation and responsibility to balance competing resource needs in the Scottish budget.

204. At the strategic level, the establishment of the Making Justice Work programme, with Board representation from the Scottish Government and the Scottish Court Service, and advice from nominated judges⁶⁹, is designed to ensure appropriate co-ordination between the key parties in the reform process. However, it will also be necessary to put in place proper arrangements to drive forward the detailed technical changes which will be necessary to give full effect to the reforms.

205. Neither the Judicial Office for Scotland nor the existing rules councils are appropriate bodies to provide the necessary oversight and drive. The Judicial Office for Scotland has limited resources and the rules councils operate at a more detailed and technical level, mainly reacting to specific procedural issues arising in the courts or policy changes driven by the Scottish Government or statutory changes agreed by the Scottish and Westminster Parliaments. As Lord Gill also implies, having two separate rules councils (three if criminal rules are also considered) is not helpful in taking forward a consistent reform agenda across the entire court system.

206. The Review recommends that the Civil Justice Council be established as a new statutory NDPB, which would take on the functions of the existing rules councils, as well as exercising a broader responsibility for keeping the civil justice system under review⁷⁰.

207. Before introducing primary legislation, the Scottish Government will consider whether the work of the rules councils can be combined into a single entity, what broader role such a body could play, and what links should be made to the

⁶⁸ Chapter 15.

⁶⁹ Lord Pentland, a senator, and Colin Milne, an employment judge, have been appointed in an advisory capacity.

⁷⁰ Recommendation 206.

administrative justice field, in the light of the UK Government's proposal to abolish the AJTC.

208. However, the Scottish Government will also bear in mind the agenda for simplification of the public sector and the complex governance which already exists in respect of the courts following the passage of the Judiciary and Courts (Scotland) Act 2008. These factors make the Scottish Government disinclined to create a new, free-standing NDPB.

209. In any event, as the Review recognises, procedural reform needs to begin well before primary legislation can be enacted. The Scottish Government is, therefore, working with the Lord President and Scottish Court Service to put in place arrangements to oversee procedural reform and provide the necessary policy direction to the rules councils.

4.5 ACCESS TO JUSTICE

210. Lord Gill makes a number of recommendations designed to ensure greater access to justice. They include an expansion of services for in-court advice, a national mediation service, more in-court assistance, simple, web-based self-help tools presented in plain English and a public legal education campaign⁷¹.

211. The Scottish Government strongly agrees that securing access to justice must be a key aim of the civil justice system. In the last two years, it has significantly expanded in-court advice and related services to provide enhanced protection for people affected by the economic downturn. It has also greatly broadened financial eligibility for legal aid, created new rights in the Home Owner and Debtor Protection (Scotland) Act 2010, and, in the Legal Services (Scotland) Act 2010, created a new responsibility on the Scottish Legal Aid Board to monitor and report on the availability and accessibility of legal services in Scotland, and new provisions to allow for rules of court to be made on oral submissions by lay representation in court.

212. Despite these measures, the Scottish Government is not complacent, and knows that more could be done, were resources infinite. The difficulty, of course, is that Scotland faces a period of unprecedented pressure on public finances, and it is clear that simply spending more money on a wider range of publicly funded services to improve access to justice is unaffordable and unsustainable. It will be necessary to prioritise, to co-ordinate expenditure more efficiently, and to be innovative in identifying opportunities to secure justice in new, cheaper ways.

213. The Scottish Government has already begun to do this, through work with the Scottish Legal Aid Board and the Convention of Scottish Local Authorities to move towards a more strategic and co-ordinated approach to publicly funded legal assistance, whether provided via legal aid or advice services funded by Scottish Government, the UK Government, local authorities or voluntary funding.

214. In the coming months the Scottish Government will work closely with the Scottish Legal Aid Board to look at different models of publicly funded legal assistance, to consider those which can be delivered within available resources and are best suited to the model of civil courts recommended by Lord Gill. It anticipates that different forms of assistance may be most appropriate in different parts of the system, with a greater reliance on self help and lay assistance at the district judge level.

215. The Scottish Government agrees that it could be made easier for people to resolve disputes without litigation, or represent themselves effectively should litigation be necessary, through carefully targeted legal education and support for self help; although any such new provision would almost certainly require to be resourced by savings elsewhere in the system. These issues are currently being considered by the Civil Justice Advisory Group led by Lord Coulsfield, and the Scottish Government will consider carefully their recommendations when they report early in 2011.

⁷¹ Recommendations 86-87, 101, 142-148.

216. The Group is also considering the opportunities afforded by mediation and other forms of alternative dispute resolution (“ADR”). It is noted that the Review did not favour ‘compulsory’ mediation, in the sense of court rules making specific provision for sanctions in expenses for parties who refuse to engage in ADR⁷².

217. Nonetheless, the Scottish Government believes that mediation offers significant opportunities for parties to reach an acceptable settlement of disputes, potentially at less cost to the public purse, and often with less distress and inconvenience to the parties. Subject to the caveats above regarding public funding, the Scottish Government agrees that the other Review recommendations concerning mediation are generally worthwhile⁷³, but is not persuaded that, by themselves, they will support a major shift towards ADR. It will therefore consider what further options may be available and affordable.

⁷² Recommendations 96 and 100.

⁷³ Recommendations 97-99, 101.



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