

COURTS REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Courts Reform (Scotland) Bill introduced in the Scottish Parliament on <Introduced Date>:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill <Bill Number>-PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

4. Civil courts are vital to the effective functioning of a civil justice system. However, the structure of the civil courts in Scotland is still largely based on a Victorian model. Because of that, and the massive social and legal changes which have taken place over the last century, the structure is now under a considerable degree of strain: too much business is taken up in higher courts - particularly the Court of Session - which could be more appropriately dealt with by lower courts; cases need to be better monitored and managed; the civil procedure rules urgently need modernised and made more accessible to the citizen; and there needs to be far greater flexibility in the ways actions can be brought and funded.

5. Scotland is not alone in reforming its civil courts structure. A number of ambitious court structure reforms have taken place in other Commonwealth jurisdictions over the past decade: in England and Wales (following the recommendations of Lord Woolf); in Australia; in New Zealand; and in Hong Kong.

Review of the Scottish civil justice system

6. In 2007, the then Minister for Justice, Cathy Jamieson, invited Lord Gill, then Lord Justice Clerk, and now Lord President of the Court of Session, to conduct a Review of the Scottish Civil Courts. His remit 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.
- The issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts.

7. 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.

8. Lord Gill presented his report, the Scottish Civil Courts Review (“SCCR”)¹, representing a comprehensive programme of reform, in 2009. The Review’s recommendations were broadly welcomed at the time by the Scottish Government, by Scotland’s legal community and by the Parliament.

9. The Gill Report made 206 recommendations for change, with a number of key themes emerging :

- The pressure of criminal business impacts on the time available to hear civil cases; this in turn impacts on the quality of civil justice in terms of delay and judicial continuity.
- There is a need for a greater degree of judicial specialisation and in the sheriff courts.
- The hierarchy of the courts needs to be restructured to arrive at a more appropriate use of judicial resources.
- There is an over reliance on temporary resources.
- There needs to be better case management and reformed procedures for dealing with them.
- Technology should be used to improve the system where possible; for example through better case tracking software and through teleconferencing.
- There should be a new forum or method of dealing with lower value cases, and greater flexibility for party litigants.
- There needs to be greater flexibility around how litigation can be funded.

10. Some of the recommendations in the Review are being taken forward earlier and others later. Establishing a Scottish Civil Justice Council² is a key recommendation of the Review for implementing its recommendations. The new body will replace the Court of Session Rules Council and the Sheriff Court Rules Council

11. The legislation to do that, the Scottish Civil Justice Council and Criminal Legal Assistance Bill, was passed by the Scottish Parliament on 29 January 2013. The Bill will allow the Council to be established by the summer of 2013, in time to consider the Courts Reform (Scotland) Bill (which the proposals in this consultation relate to) as it passes through its parliamentary stages, and, importantly, to be able to start work on implementation of that Bill as soon as possible.

¹ Report and Recommendations of the Scottish Civil Courts Review (2009)
<http://www.scotcourts.gov.uk/civilcourtsreview/>

² Recommendation 206. The Consultation can be found at <http://www.scotland.gov.uk/Publications/2011/09/28125601/0> and report and analysis of responses can be found at <http://www.scotland.gov.uk/Publications/2012/08/8415>.

12. One of the SCCR's recommendations was that further work should be carried out regarding the cost and funding of litigation³. That is being taken forward by Sheriff Principal James Taylor⁴, who is expected to report during 2013.

13. Once Sheriff Principal Taylor reports, the Scottish Government will then develop the detailed policy for a new multi-party action procedure, which the SCCR also recommended⁵. The design of such an action is very much tied up with the funding of it, for example, how legal aid might should interact with any other type of collective fund to fund the action, and how awards should be distributed. Sheriff Principal Taylor is considering the funding of public interest litigation more generally, and the Scottish Government wishes to see Sheriff Principal Taylor's recommendations in this area before developing further policy.

THE BILL

14. The Bill does not attempt to legislate for all of the recommendations made in the SCCR which are not being taken forward in other legislation or reviews as set out above. Many of the changes which have been recommended have already been implemented, or will be implemented by court rules made by the Court of Session by Act of Sederunt. The Bill seeks to set out the framework within which the court rules will add the necessary detail.

15. The opportunity has been taken to modernise and consolidate most of the remaining provisions of the Sheriff Courts (Scotland) Acts of 1907 and 1971 (although a few provisions still remain). Not every provision has been replicated and the wording has been changed in some provisions. Some provisions have been amalgamated while others have been expanded.

COMMENTARY ON SECTIONS

PART 1 - SHERIFF COURTS

Chapter 1 - Sheriffdoms, sheriff court districts and sheriff courts

Section 1 – Sheriffdoms, sheriff court districts and sheriff courts

16. Subsections (1) to (3) set out, for the first time in statute, the structure of sheriffdoms and sheriff court districts in Scotland. They take account of the fact that not all sheriffdoms are divided into sheriff court districts (Glasgow and Strathkelvin is currently the only sheriffdom that is not so divided) and retain flexibility to cater for the possibility that in the future other sheriffdoms may be undivided. Subsections (4) and (5) provide for the continuation of the existing sheriffdoms, sheriff court districts and sheriff courts and effectively replicate section 3(1) of the 1971 Act.

Section 2 – Power to alter sheriffdoms, sheriff court districts and sheriff courts

17. Section 2 essentially replicates the powers to alter sheriffdoms and sheriff court districts at sections 2(1) and 3(2) of the 1971 Act with the associated ancillary powers and merges the two powers into one. Under subsection (4) and (5), the Scottish Ministers may only make

³ Recommendation 183.

⁴ An overview of the work of Sheriff Principal Taylor's review can be found at <http://scotland.gov.uk/About/Review/taylor-review>.

⁵ Recommendations 157-182 . The Scottish Government agrees with the SCCR's recommendation.

changes with the consent of the Lord President of the Court of Session and the Scottish Court Service, the latter being placed under a duty to consult parties who are likely to have an interest. Subsection (3) replicates section 2(3)(b) and 3(4) of the 1971 Act. The Scottish Court Service is a part of the Scottish Administration by virtue of the Judiciary and Courts (Scotland) Act 2008 (Consequential Provisions and Modifications) Order 2009 (S.I. 2009/2231). The Scottish Administration is a reserved matter under section 51(2) of the Scotland Act 1998. Remuneration of sheriffs and sheriffs principal is reserved to Westminster. This section preserves the ability to pay compensation to those judicial officers should they suffer loss of employment, or loss or diminution of emoluments as a consequence of an order under subsection (1). Reserved matters are covered by the draft Bill in order to give a complete policy picture, however, it is proposed that reserved issues will be provided for in a section 104 order made under the Scotland Act 1998 that will be passed in consequence of the Bill.

Chapter 2 - Judiciary of the sheriffdoms

Permanent and full-time judiciary

Section 3 – Sheriff principal

18. Section 3(1) provides a statutory basis for the office of sheriff principal. A transitional order will provide for the continuation in office of the existing sheriffs principal. The qualifications for all judicial officers in the sheriff court (apart from honorary sheriffs) are prescribed in section 15.

19. Subsection (4) does not appear to have an equivalent in existing legislation but makes clear that a sheriff principal has the same competence at first instance as a sheriff, unless otherwise provided expressly or by implication (subsection (5)). This provides maximum judicial flexibility in that it permits a sheriff principal to sit as a sheriff if necessary when the volume of business in a sheriffdom necessitates this.

Section 4 – Sheriffs

20. Subsection (1) provides a statutory basis for the office of sheriff and reflects the intention that sheriffs will continue to be appointed to a specific sheriffdom. A transitional order will provide for the continuation in office of the existing sheriffs. References to a “~~sheriff of a sheriffdom~~” include sheriffs who were appointed to that sheriffdom and those who may have been re-allocated to that sheriffdom under sections 30 or 31.

Section 5 – Summary sheriffs

21. Section 5 introduces a new office of summary sheriff who will be subject to the same appointment procedures as for sheriffs.

Temporary and part-time judiciary

Section 6 – Temporary sheriff principal

22. Section 6 effectively re-enacts, with amendments, section 11 of the 1971 Act. In subsection (1), a vacancy may occur for reasons of, for example, illness, death, re-allocation, promotion or extended absence for personal reasons. The Lord President may declare that the sheriff principal is unable to carry out some or all of the functions of the office or the sheriff principal may “~~self-declare~~”. Under subsection (2), only existing sheriffs – from any sheriffdom

in Scotland – may be appointed as a temporary sheriff principal. Summary sheriffs will not be eligible for appointment. Under subsection (5), the Lord President will only request the appointment of a temporary sheriff principal if there is likely to be a delay in the administration of justice in the sheriffdom, so it is unlikely that any absence for only a short period of a few days would necessitate a temporary appointment.

Section 7 – Temporary sheriff principal: further provision

23. Section 7 makes further provision for the arrangements for a temporary sheriff principal. Subsection (4) makes it clear that a temporary sheriff principal will exercise all of the powers of the usual occupant of that office within the relevant sheriffdom without further authorisation until the appointment is recalled under subsections (1) to (3). The temporary sheriff principal will retain appointment as a sheriff (subsection (5)), but under subsection (6) will only be able to act as a sheriff within the sheriffdom in which appointment as the temporary sheriff principal is held and not in their “home” sheriffdom which is different.

Section 8 – Part-time sheriffs

24. Section 8 replicates the majority of section 11A of the 1971 Act, though 11A(8) is not reproduced here but is dealt with in section 17(5) and (7). Subsection (5) reflects the practical arrangements whereby sheriff clerks forward requests for judicial cover, and part-time sheriffs give their availability, to the Judicial Office for Scotland which supports the Lord President in his role as head of the Scottish judiciary with responsibility for the efficient disposal of business in the courts. With knowledge of availability, location and case type, the Judicial Office will instruct the allocation of a part-time sheriff. The limit on the number of part-time sheriffs has been removed.

Section 9 – Reappointment of part-time sheriffs

25. Section 9 replicates with some amendments section 11B of the 1971 Act in full (albeit with some changes to sequencing). Section 11B(9) is dealt with in section 16(3).

Section 10 – Part-time summary sheriffs

Section 11 – Reappointment of part-time summary sheriffs

26. Sections 10 and 11 replicate the provisions of sections 8 and 9 in respect of part-time summary sheriffs.

Re-employment of retired holders of certain judicial offices

Section 12 – Re-employment of retired sheriffs principal

Section 13 – Re-employment of retired sheriffs principal, etc: further provision

27. Sections 12 and 13 replicate most of section 14A of the 1971 Act, but have been expanded to allow for the re-employment of former summary sheriffs as well as former sheriffs principal and sheriffs. Remuneration under section 14A is dealt with in section 17.

Honorary sheriffs

Section 14 – Honorary sheriffs

28. Section 14 makes similar provision to section 17 of the 1907 Act and permits the sheriff principal to appoint honorary sheriffs. Honorary sheriffs, of whom there are over 300 in Scotland, carry out urgent judicial functions in remote, rural sheriff courts throughout Scotland where the sheriff may not be resident or absent on leave, etc. Previously, honorary sheriffs had the same powers and competence of a ~~full~~ sheriff, even though there was no necessity for them to be legally qualified. The competence of an honorary sheriff is now limited by section 44.

Qualification and disqualification

Section 15 – Qualification for appointment

29. Section 15 retains the basic approach of section 5 of the 1971 Act by requiring that 10 years' legal qualification is required for appointment to any of the judicial offices specified in subsection (2). These offices now include summary sheriff and part-time summary sheriff. Subsection (1)(a) recognises experience in a judicial office (even though tenure as a sheriff does not affect status as an advocate or solicitor) during the previous 10 years.

Section 16 – Disqualification from practice, etc.

30. Section 16 restates the provision of section 6 of the 1971 Act which prohibits sheriffs and sheriffs principal (where they are determined to be included by the Scottish Ministers) from engaging in any other business, or be in partnership with or employed by or act as agent for any person so engaged. The prohibition is now extended to sheriffs principal (without the need for Ministerial determination) and summary sheriffs. The prohibition on private practice and business is intended to cover all private business as there would be an obvious potential for conflict of interest if a sheriff, etc had outside business interests.

31. Part-time sheriffs and part-time summary sheriffs are not prohibited from practice since they are appointed specifically for their expertise and experience in that practice, but subsection (3) makes clear that they cannot act in the part-time judicial capacity in the sheriff court district in which their place of business as a solicitor is situated. This prohibition now extends to any place of business as a solicitor, not just the main place of business.

Remuneration and expenses

Section 17 – Remuneration

32. The remuneration of sheriffs principal and sheriffs is a reserved matter under the Scotland Act 1988 and subsections (1) and (2) replicate section 14 of the 1907 Act. Subsections (3) and (4) provide for the remuneration of summary sheriffs by the Scottish Ministers. Subsections (5), (6) and (7) deal with the remuneration of part-time and re-employed judiciary, again by the Scottish Ministers. Subsections (8) and (9) replicate section 10(4) of the 1971 Act in relation to payments to be made to sheriffs principal and sheriffs who are directed to perform their judicial functions in another sheriffdom. Subsections (10) and (11) make similar provision in relation to summary sheriffs who act in another sheriffdom.

33. Subsection (12) makes it clear that salaries and remuneration will be paid by the Scottish Court Service to reflect the fact that, when the Lord President became responsible for the deployment of the judiciary under the Judiciary and Courts (Scotland) Act 2008, budgets in support of that (for example travel and subsistence and part-time sheriffs) were transferred to the Scottish Court Service or the Judicial Office. The salary budget (which is paid from the Scottish Consolidated Fund) did not transfer because the appointment of the judiciary remains a matter

for Her Majesty on the advice of the Scottish Ministers. As any extra remuneration would not be salary (as it is in addition to salary), it could not be charged to the Consolidated Fund. Subsection (13) provides that the salaries of sheriffs principal and sheriffs and the remuneration due to summary sheriffs will be charged on the Scottish Consolidated Fund.

Section 18 – Expenses

34. There are a variety of provisions in the 1971 Act that make provision for the payment of expenses and allowances to holders of judicial offices in the sheriff court and which are distinct from remuneration provisions. These are section 10(4) (sheriff directed to perform duties in a sheriffdom other than that which he was appointed), section 11(8) (temporary sheriffs principal), section 11A(8) (part-time sheriffs), section 14A(6) (re-employment of retired sheriffs) and section 19 (travelling expenses for sheriffs principal). These provisions appear to involve some anomalies. Section 18 therefore simply provides that the judicial officers listed in subsection (2) should be paid expenses by the Scottish Court Service if they were reasonably incurred in the performance of the officer's duties. There is now no provision for the payment of ~~allowances~~.

Residence

Section 19 – Place of residence

35. Section 19 replicates sections 13(1) and 14(2) of the 1971 Act to make it clear that the Lord President may require a judicial officer to have an ordinary residence at such place as the Lord President may require – which would normally be within reasonable travelling distance to the court or courts where that judicial officer sits. The list of judicial officers affected by this provision now includes, for the avoidance of doubt, a temporary sheriff principal as it would be impractical for a temporary appointee to the sheriffdom of Grampian, Highlands and Islands, say, to continue to live in Edinburgh or Glasgow. The provision does not make it possible to prescribe where part-time or re-employed retired sheriffs live. In the former case, a part-time sheriff is not permitted to act in such sheriff court district in which his or her place of business is situated (which will usually be where they live) so it is necessary for them to travel. In the latter case, it is unlikely that a retired sheriff would wish to be re-employed if there was a prospect that they might be required to live somewhere other than where they have retired to. Section 13(2) and (3) regarding leave of absence are not re-enacted, as these are considered to be operational matters which do not require to be in primary legislation.

Cessation of appointment

Section 20 – Cessation of appointment of judicial officers

36. Subsection (2) provides that the appointment of all judicial officers (apart from temporary sheriffs principal and honorary sheriffs) will end when the individual resigns, retires from office, is removed from office under section 25 (due to inability, neglect of duty or misbehaviour) or is appointed to another judicial office (normally on promotion). Section 5A of the 1971 Act has not been replicated as the Judicial Pensions and Retirement Act 1993 provides for the retirement of judicial officers at the age of 70 (though there is power to authorise continuance up to the age of 75 on an annual basis). It is considered that, in order to preserve the integrity and coherence of the 1993 Act, it would be best to leave all of the rules on retirement in that legislation as there are other related provisions which depend on the retirement rules. It is intended that the 1993 Act will be amended to include summary sheriffs within its remit. The appointment of part-time sheriffs and part-time summary sheriffs for periods of five years is subject to the provisions of this section.

Fitness for office

Section 21 – Tribunal to consider fitness for office

37. Section 21 replicates section 12A of the 1971 Act but is expanded to cover summary sheriffs and part-time summary sheriffs. The effect of subsection (4)(b) is that if the person under investigation is a summary sheriff then a summary sheriff will be part of the tribunal.

Section 22 – Tribunal investigations: suspension from office

38. Section 22 replicates section 12B of the 1971 Act.

Section 23 – Further provision about tribunals

39. Section 23 replicates section 12C of the 1971 Act.

Section 24 – Tribunal report

40. Section 24 replicates section 12D of the 1971 Act.

Section 25 – Removal from office

41. Section 25 replicates most of section 12E of the 1971 Act but is expanded to include summary sheriffs and part-time summary sheriffs. Subsections (4)(b) and (5) of section 12E are not reproduced as it seems sufficient to provide for negative procedure for an order under section 25(2).

Chapter 3 - Organisation of business

Sheriff principal's general responsibilities

Section 26 – Sheriff principal's responsibility for efficient disposal of business in sheriff courts

42. Section 26 covers the provisions of section 15 and section 16(1) of the 1971 Act. The “judiciary of the sheriffdom” is defined in section 99(2) as all judicial officers within the sheriffdom including part-time sheriffs and part-time summary sheriffs. Section 16(2) and (2A) are not reproduced as it is considered that annual leave arrangements are not a matter which requires to be set out in primary legislation and may be managed by the Lord President and the sheriffs principal using their respective powers for the proper running and administration of the courts. Subsection (7) makes it clear that the powers of the sheriff principal under this section are subject to the Lord President's overall responsibility for the efficient disposal of business in the Scottish courts under the 2008 Act.

Section 27 – Sheriff principal's power to fix sittings of sheriff courts

43. Section 27 replicates section 17 of the 1971 Act but does not repeat the detailed provisions on winter, spring and summer sessions as it is believed that the sheriff courts now sit on a virtually all year round basis and such provisions would therefore be meaningless. The provisions of section 27 are again subject to the Lord President's overall responsibility for the efficient disposal of business in the Scottish courts.

Section 28 – Lord President's power to exercise functions under sections 26 and 27

44. Section 28 replicates section 17A of the 1971 Act, but has recast slightly for clarity.

Deployment of judiciary

Section 29 – Power to authorise a sheriff principal to act in another sheriffdom

45. Sections 29 to 32 enable the Lord President to deploy sheriffs principal, sheriffs and summary sheriffs across sheriffdoms, and, in the case of sheriffs and summary sheriffs across sheriff court districts.

46. Section 29 replicates section 10(1), (1A) and (3) of the 1971 Act so far as it applies to sheriffs principal. As the Lord President is now responsible for the efficient disposal of business in the Scottish courts under the 2008 Act, he or she (rather than Scottish Ministers) will now take the appropriate action. Subsection (5) makes it clear that a sheriff principal acting in another sheriffdom may act as a sheriff in that sheriffdom. Subsection (6) removes any doubt that a temporary sheriff principal may be asked to act in another sheriffdom while appointed. Subsection (4) is not replicated as it is dealt with in section 17.

Section 30 – Power to re-allocate sheriffs and summary sheriffs between sheriffdoms

47. Section 30 replicates section 14(4) of the 1971 Act and is extended to cover summary sheriffs. This provision does not apply to part-time sheriffs, part-time summary sheriffs or honorary sheriffs: part-time sheriffs and part-time summary sheriffs are already employed on a Scotland-wide basis and are allocated as per sections 8(5) and 10(5), while honorary sheriffs may not act outwith the sheriffdom for which they have been appointed. For the reasons explained under section 29, the Lord President (rather than Scottish Ministers) is permitted to make the direction that a sheriff or summary sheriff will be re-allocated to another sheriffdom. Under subsection (3), the direction may be given to a sheriff or summary sheriff who was appointed to the sheriffdom or who has already been re-allocated to that sheriffdom. Section 30 is intended to permit “permanent transfers” of judicial officers, whereas section 31 deals with temporary ones.

Section 31 – Power to direct a sheriff or summary sheriff to act in another sheriffdom

48. Section 31 replicates section 10(2) of the 1971 Act though without the preconditions for the exercise of the power in order to give maximum flexibility. This provision is extended to summary sheriffs, but does not apply to part-time sheriffs, part-time summary sheriffs or honorary sheriffs for the same reasons set out in relation to section 30. As above, the Lord President (rather than Scottish Ministers) is permitted to make the direction that a sheriff or summary sheriff will perform their judicial functions in another sheriffdom in addition to, or instead of, their “home” sheriffdom (subsections (1) and (2)). When acting in the “host” sheriffdom (as opposed to the “home” sheriffdom), judicial officers will be subject to the governance of the sheriff principal in that sheriffdom. Subsection (3) permits the Lord President to make a further direction to require the sheriff or summary sheriff to work in a further sheriffdom. Subsection (4) makes it clear that a direction may require the sheriff or summary sheriff to perform the functions in a sheriffdom in addition to, or instead of, such other sheriffdoms in which the sheriff or summary sheriff has previously been directed to perform functions.

Section 32 – Allocation of sheriffs and summary sheriffs to sheriff court districts

49. Section 32 replicates section 14(3) of the 1971 Act and is extended to summary sheriffs, but does not apply to part-time sheriffs, part-time summary sheriffs or honorary sheriffs for the same reasons set out in relation to section 30. All sheriffdoms are divided into sheriff court

districts apart from the sheriffdom of Glasgow and Strathkelvin and the Lord President is required to designate the sheriff court district in which the sheriff or summary sheriff is to sit.

Judicial specialisation

50. Sections 33 to 36 are new provisions which implement the recommendations of the Scottish Civil Courts Review in relation to the desirability of greater specialisation in the sheriff courts. The proposals for specialisation relate to other initiatives recommended by the Review on case management, case continuity and case ownership. Greater specialisation is thought to be required in view of the increasing complexity of the law, specialisation in the legal profession and the potential for early identification of key issues. Stakeholders with an interest in family and housing cases in particular have argued for greater specialisation among sheriffs. Lord Gill argued that “specialisation is one of the keys to the success of a sheriff court whose jurisdiction will be significantly re-aligned” (due to the proposed uplift in the privative limit for the sheriff court).

Section 33 – Determination of categories of case for purposes of judicial specialisation

51. Subsection (1) permits the Lord President to decide upon the categories of cases within the sheriff courts which he/she concludes should be heard by judicial officers who have been designated for that kind of case. Such specialists will have experience and expertise in the area of designation but may also have received training by the Judicial Institute for Scotland. Subsection (5) defines “judicial officer” in this sense as being sheriffs, part-time sheriffs, summary sheriffs and part-time summary sheriffs. This therefore opens up the possibility of specialisation being extended from sheriffs and part-time sheriffs alone to summary sheriffs and part-time summary sheriffs (when they are appointed), which will permit greater flexibility in judicial resources.

52. It is anticipated that the categories of designation may include personal injury, family, housing, commercial, general civil and solemn crime. Other areas of specialisation may be desirable depending on the specific circumstances and requirements of particular sheriffdoms. Subsection (2) makes clear, however that the categories of cases designated for specialisation by the Lord President may also be determined by value or other such criteria as the Lord President considers appropriate, as well as subject matter. Subsections (3) and (4) give the Lord President further flexibility in relation to the operation of specialisation among the judicial officers.

Section 34 – Designation of specialist judiciary

53. Once categories of cases for specialist treatment have been determined by the Lord President under section 33, section 34(2) permits a sheriff principal to designate one or more sheriffs or summary sheriffs as specialists in cases falling within those categories and which are within the competence of those judicial officers. A sheriff or summary sheriff may be designated in more than one category (subsection (3)), while the designation of a sheriff or summary sheriff may be withdrawn by the sheriff principal or his or her successor (subsection (4)). Under subsections (5) and (6), the Lord President is permitted to designate one or more part-time sheriffs or part-time summary sheriffs as specialists in cases similarly falling within designated categories and which are within the competence of those judicial officers, though the Lord President may also withdraw that designation

54. Subsection (7) makes it clear that the designation of a judicial officer as a specialist in one of the categories determined by the Lord President does not affect that officer's ability to deal with cases other than those in relation to which they have been designated as specialists (paragraph (a)). In order to ensure that the flexibility of judicial officers is not diminished because they have not been designated to deal with any specialism, paragraph (b) ensures that the lack of specialisation does not mean that the judicial officer cannot deal with a matter that falls within a specialisation.

55. Matters relating to what will happen when, for example, a specialist sheriff moves on to another sheriffdom are not provided for, as it is anticipated that these kinds of detailed transitional issues will be dealt with administratively without the need for over complicated provision in the Bill.

Section 35 – Allocation of business to specialist judiciary

56. Section 35 places a duty on both the Lord President and the sheriff principal of a sheriffdom that, when they are allocating business within a sheriffdom, that they should have regard to the desirability of ensuring that cases which fall within the specialist categories are dealt with by judicial officers who are designated as specialists in those categories.

Section 36 – Saving for existing powers to provide for judicial specialisation

57. Section 36 makes it clear that, notwithstanding the provisions of sections 33 to 35, any other power which the Lord President already has to allocate business including specialist business among the judiciary of the sheriff courts is not affected by those sections.

Chapter 4 - Competence and Jurisdiction

58. This chapter of the Bill restates the existing provisions of the Sheriff Courts (Scotland) Acts 1907 and 1971 concerning those actions and other applications that can competently be brought in the sheriff court and the competence and jurisdiction of that court. It makes certain additions to the range of actions that can competently be raised in the sheriff court, in line with recommendations made by the Scottish Civil Courts Review, and also makes fresh provision regarding the privative jurisdiction of the sheriff court. It also provides for the area of competence and jurisdiction of the summary sheriff and the honorary sheriff who will deal with a sub-set of the area of competence of the sheriff court. The territorial jurisdiction of sheriffs is restated and extended to summary sheriffs.

Sheriffs: civil competence and jurisdiction

Section 37 – Jurisdiction and Competence of sheriffs

59. Subsection (1) is a statement of the civil competence of sheriffs. The approach taken in the Bill is to frame this in terms of the competence of a sheriff, rather than the sheriff court. The generality provided for in subsection (1) that sheriffs will retain all the competence and jurisdiction which they had before this Bill is enacted is not affected by the specific kinds of actions listed in subsection (2). This list reflects extensions to competence and jurisdiction after the Sheriff Courts (Scotland) Act 1907. Actions for proving the tenor of documents and reduction are added to the list as recommended by the Scottish Civil Courts Review.

Section 38 – Exclusive competence

60. Section 38 implements one of the most important and fundamental recommendations of the Scottish Civil Courts Review: that the privative jurisdiction of the sheriff court should be raised from £5000 to £150,000. The Scottish Civil Courts Review did not consider that it was appropriate for low value cases to be litigated in the Court of Session: given the higher costs involved, the Review concluded that this was not in the public interest and the Court of Session should only deal with the most complex and important cases, while most routine litigation should be conducted in the sheriff court. The privative jurisdiction is the monetary limit below which actions must be raised in the sheriff court, rather than the Court of Session. It is proposed that in future this should be referred to as its “exclusive competence”.

61. Subsections (1) and (2) provide that actions in which an order for value (defined in subsection (6)) is sought may only be brought in the sheriff court if the value does not exceed £150,000. Claims may not be aggregated simply in order to raise an action in the Court of Session. The intention is that it should only be if a claim on its own exceeds £150,000 that it should be able to be dealt with in the Court of Session. Claim and counter-claim are to be treated separately. Actions which are raised in the Court of Session which have no monetary value will remain there unless they are remitted to the sheriff court (see section 83).

62. Subsection (3) makes it clear that the new exclusive competence will not apply to:

(a) family proceedings, unless the only order sought is an order for the payment of aliment (subsection (4)); and

(b) where proceedings are remitted to the Court of Session if the sheriff, on application of the parties, requests the Court of Session to allow the proceedings to be remitted to that Court if the sheriff considers that there are exceptional circumstances (section 82(8)).

63. Subsection (5) permits the Scottish Ministers to amend the exclusive competence figure by order if it is desired to adjust the proportions of civil business raised in the Court of Session or the sheriff court and to take into account cost of living increases.

64. Determination of which parts of the common law are to continue to apply and where to innovate in determination of “value” lies better with the Court of Session assisted by the new Scottish Civil Justice Council and subsection (7) therefore proposes that the court be given the power to set out, through Act of Sederunt, the way in which value is determined. Section 87 gives the court power to make court rules.

Section 39 – Territorial jurisdiction

65. Section 39 re-enacts section 4 of the 1907 Act so far as it applies to civil proceedings. The provision refers to the jurisdiction of the sheriff as all of the judiciary of the sheriff court (sheriff principal (section 3(4)), summary sheriff (sections 42 and 43), part-time sheriffs (section 8(4)), part-time summary sheriffs (section 10(4) together with sections 42 and 43) and honorary sheriffs (section 44)) are essentially exercising the sheriff’s competence and jurisdiction, or a sub-set of it. There are statutory provisions that may extend or modify the territorial extent in certain cases and common law rules which have a bearing on the territorial extent of the jurisdiction. Subsection (4) ensures that those other rules are not affected.

Section 40 – Power to confer all-Scotland jurisdiction for specified cases

66. The Scottish Civil Courts Review recommendation that the privative jurisdiction of the sheriff court should be increased to £150,000 (which will be implemented by section 38) will result in much of the personal injury litigation currently conducted in the Court of Session moving to the sheriff court. The Review accepted arguments to the effect that the consequent dispersal of this litigation would involve the loss of economies and efficiencies of scale which accrue through centralising much of the personal injury litigation in one court. It therefore recommended that an all-Scotland jurisdiction for personal injury actions should be conferred on Edinburgh sheriff court and the Government accepted this recommendation. The intention was that jurisdiction would supplement the existing grounds of jurisdiction and it would therefore be possible to raise a personal injury action at a local sheriff court (where there may in any case be a specialist personal injury sheriff) or at the specialist personal injury court in Edinburgh sheriff court.

67. In order to cater for the possibility that it might in the future be desired to provide for further cases of all-Scotland jurisdiction, section 40 provides that Scottish Ministers may by order stipulate that the jurisdiction of a sheriff of a specified sheriffdom sitting at a specified sheriff court will be all-Scotland for specified kinds of civil proceedings. This section will therefore allow for the establishment of a specialist personal injury court in Edinburgh sheriff court, but would also permit, for example, another sheriff court such as Glasgow to have all-Scotland jurisdiction for personal injury actions as well as Edinburgh. It would also permit any other sheriff court to be given all-Scotland jurisdiction in specified types of proceedings. Clearly the conferring of all-Scotland jurisdiction on a particular sheriffdom or sheriff court will require the consent of the Lord President of the Court of Session, given his statutory responsibility for the efficient disposal of business in the Scottish court system, and this is provided for in subsection (3). Subsection (4) makes it clear that the jurisdiction or competence of any other sheriffdom or sheriff court to deal with proceedings specified in the order is not affected by the specification of a sheriffdom or sheriff court to have all-Scotland jurisdiction. This allows actions to be raised locally rather than at the sheriff court specified in the order.

Section 41 – Jurisdiction over persons etc.

68. Section 41 re-enacts section 6 of the 1907 Act in relation to jurisdiction. There is some doubt as to whether section 6 still has any application due to other legislation on civil jurisdiction including the Civil Jurisdiction and Judgements Act 1982, but, in order to avoid any inadvertent repeal of an outstanding provision, it is replicated in section 41. Subsection (3) makes it clear that section 41 is subordinated to other rules on jurisdiction.

Summary sheriffs: civil and criminal competence and jurisdiction

Section 42 – Summary sheriff: civil competence and jurisdiction

69. The main justification for the introduction of summary sheriffs is that they should be capable of undertaking work in the sheriff court to relieve sheriffs of the burden of dealing with the more the routine, low value and straightforward civil cases and to thus permit sheriffs to be available for more serious casework. Section 42 sets out that a summary sheriff may exercise all of the powers competence of a sheriff in relation to civil proceedings, but their competence is restricted to the proceedings and matters listed in schedule 1.

Section 43 – Summary sheriff: criminal competence and jurisdiction

70. The corollary to summary sheriffs undertaking the more straightforward civil work in the sheriff court is that they should also undertake summary criminal work in the sheriff court to relieve sheriffs of the burden of dealing with more minor offences and make them available for more serious cases. Under section 43, summary sheriffs will exercise all of the powers and competence of a sheriff in relation to summary criminal proceedings, including those under section 5 of the Criminal Procedure (Scotland) Act 1995.

Honorary sheriffs: civil competence and jurisdiction

Section 44 – Honorary sheriff: civil competence and jurisdiction

71. There is no requirement for honorary sheriffs to be legally qualified and it is not proposed to introduce such a requirement. Many honorary sheriffs are legally qualified, being retired sheriffs or legal practitioners. But some honorary sheriffs have no legal qualification. As the Bill is now introducing a new tier of judicial officers, who will be legally qualified, but who will have a restricted competence beneath that of “full” sheriffs, it seems anomalous to continue to permit honorary sheriffs to exercise the full competence of a sheriff. Section 44 therefore makes it clear that honorary sheriffs will continue to exercise the full powers and jurisdiction of a sheriff, but only in relation to the list of proceedings and other matters set out in schedule 2.

PART 2 - SHERIFF APPEAL COURT

72. The Scottish Civil Courts Review has recommended the establishment of a Sheriff Appeal Court to deal with all civil appeals from the sheriff court and all criminal appeals from summary prosecutions (whether emanating from the sheriff court or the Justice of the Peace Court).

73. In civil appeals, the appellate jurisdiction that presently attaches to the office of sheriff principal will cease, as will the right to take an appeal directly from the sheriff court to the Inner House. Instead all appeals will lie to the Sheriff Appeal Court in the first instance. It will have power to remit or transfer a particularly important or complex appeal to the Inner House. Onward appeal to the Inner House will require the permission of the Sheriff Appeal Court, failing which the Inner House, and permission will only be given if a “second appeals” test is met.

74. In summary criminal cases there will no longer be a right of appeal directly to the High Court against conviction or sentence or, in the case of the Crown, against acquittal or sentence. Such appeals will also lie to the Sheriff Appeal Court in the first instance, although there will be a corresponding power to remit complex appeals to the High Court. An onward appeal to the High Court would require permission, which would only be granted where there are clearly arguable grounds of appeal.

75. The provisions in this Part of the Bill simply provide for the establishment of the Sheriff Appeal Court, its membership, its clerking arrangements, its rules of court etc, on a stand alone basis. The territorial jurisdiction of the Court is determined by the courts whose decisions are appealable to the Court.

Chapter 1 - Establishment and role

Section 45 – The Sheriff Appeal Court

76. This provides for the establishment of the Sheriff Appeal Court as a “court of law” which makes clear that the court has the inherent jurisdiction of court of law and thus ensures that, for example, the law on contempt of court and other rules relative to courts and court proceedings such as rules about privilege apply.

Section 46 – Jurisdiction and competence

77. The actual provisions providing for an appeal to the Sheriff Appeal Court are elsewhere in the Bill, but subsection (1) states its general role as a court of appeal from the decisions of sheriffs and the other judiciary of the sheriff courts (the subsection refers to sheriffs but this term is taken to include all the judiciary of the sheriffdom by virtue of section 99(1)). Subsections (3) and (4) set out the various powers and disposal options available to the Sheriff Appeal Court

Section 47 – Status of decisions of the Sheriff Appeal Court in precedent

78. Currently civil appeal arrangements mean that, while the decisions of a sheriff principal are treated as binding by the sheriffs in that sheriffdom, they do not bind other sheriffs principal or the sheriffs in other sheriffdoms. This may have the effect that different practices and decisions may be followed in different sheriffdoms. The Scottish Civil Courts Review therefore recommended that the civil and criminal decisions of a national Sheriff Appeal Court should be binding on all sheriffs throughout Scotland so that case law should be more coherent and consistent case law. This is the purpose of section 47. In relation to criminal matters, the decisions of the Sheriff Appeal Court will be binding on the sheriff solemn despite there being no appeal from the sheriff solemn to the Sheriff Appeal Court.

Chapter 2 – Appeal sheriffs

Section 48 – Sheriffs principal to be Appeal Sheriffs

79. The existing sheriffs principal will automatically become Appeal Sheriffs, which is what the judiciary will be called in the Sheriff Appeal Court, without the need for formal appointment. Sheriffs principal will thus hold two offices, governed by different rules.

Section 49 – Appointment of sheriffs as Appeal Sheriffs

80. Section 49 provides that sheriffs who have held office as such for at least 5 years may be appointed to be Appeal Sheriffs in the Sheriff Appeal Court. This is a departure from the recommendation of the Scottish Civil Courts Review, which recommended that there should be a new cadre of judicial officers of equivalent rank to sheriffs principal, but with no administrative role in relation to any sheriffdom and who would simply work in the Sheriff Appeal Court. The number of appointed appeal sheriffs will be a matter for the Lord President.

Section 50 – Re-employment of retired Appeal Sheriffs

81. Section 50 permits the Lord President to appoint retired Appeal Sheriffs to sit in the Sheriff Appeal Court in the same way and under the same conditions as retired sheriffs principal, sheriffs and summary sheriffs may be re-employed. This permits retired sheriffs principal to sit as Appeal Sheriffs but not as sheriffs principal.

Section 51 – Expenses

82. Under section 49(7), an Appeal Sheriff who is a sheriff (rather than a sheriff principal) is not entitled to additional remuneration for acting as an Appeal Sheriff, but under section 51 the Scottish Court Service may pay any expenses which are reasonably incurred in the performance of duties as an Appeal Sheriff.

Chapter 3 - Organisation of business

President and Vice President

Section 52 – President and Vice President of the Sheriff Appeal Court

Section 53 – President and Vice President: incapacity and suspension

83. Sections 52 and 53 make provision for the appointment of the President and Vice-President of the Sheriff Appeal Court who will be appointed from the ranks of the sheriffs principal. It is intended that the role of the President and Vice-President will be purely administrative and will be concerned solely with the organisation of sittings of the Sheriff Appeal Court. Section 53 is modelled on sections 4 to 7 of the Judiciary and Courts (Scotland) Act 2008.

Disposal of business

Section 54 – President’s responsibility for efficient disposal of business

84. The President of the Sheriff Appeal Court is tasked with the organisation of the efficient disposal of business in the Court along the same lines as a sheriff principal is responsible for this in his or her sheriffdom. It is anticipated, however, that the President may delegate some functions to the Vice-President. The President’s duties in this regard are subject to the Lord President’s overall responsibilities for the efficient disposal of business in the Scottish courts.

Section 55 – Sittings of the Sheriff Appeal Court

85. The Scottish Civil Courts Review made specific recommendations about where the Sheriff Appeal Court should sit in its civil and criminal modes. Subsection (1) permits maximum flexibility to allow the Court to sit at any sheriff court in Scotland. This means that although it may sit centrally in Edinburgh for, say, criminal appeals, there will remain the possibility of civil appeals being heard in the sheriffdom in which they originated. Under subsection (5), these arrangements are subject to the overall responsibility for the efficient disposal of business in the Scottish courts placed on the Lord President.

Section 56 – Rehearing of pending case by a larger Court

86. Section 56 provides for the Appeal Sheriffs to “remit” a case to a fuller Bench of the Sheriff Appeal Court in circumstances where they are divided or where they consider the matter to merit such treatment.

Chapter 4 – Administration

Clerks

Section 57 – Clerk of the Sheriff Appeal Court

Section 58 – Deputy Clerks of the Sheriff Appeal Court

Section 59 – Clerk and Deputy Clerks: further provision

87. Sections 57, 58 and 59 make provision for the clerking arrangements in the Sheriff Appeal Court.

Records

Section 60 – Records of the Sheriff Appeal Court

88. Section 60 provides for the records of the Sheriff Appeal Court.

PART 3 – CIVIL PROCEDURE

Chapter 1 – Sheriff Court

Civil jury trials

89. Civil jury trials in the sheriff court were abolished by section 11(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.

90. The Scottish Civil Courts Review recommended that Edinburgh sheriff court should have an all-Scotland jurisdiction for personal injury actions and that, while the right to a civil jury trial should be retained in the Court of Session, the procedure should be extended to actions in the specialist personal injury court in Edinburgh sheriff court, but not other sheriff courts. Some personal injury actions which would previously have been eligible for trial by jury in the Court of Session will now have to be raised in the sheriff court due to the increase in the exclusive competence of the sheriff court under section 38, either in the specialist personal injury court in Edinburgh sheriff court or a local sheriff court, but civil jury trials will not be available in the local court.

91. The Review proposed that the existing Court of Session practice and procedure in relation to jury trials should be transplanted in its entirety into the personal injury court in Edinburgh sheriff court. The approach followed in sections 61-69 is therefore based on the Court of Session model as set out in sections 9, 11, 12, 13, 14, 15, 16, 17, 29, 30 and 31 of the Court of Session Act 1988.

Section 61 – Civil jury trials in an all-Scotland sheriff court

92. The approach taken in section 40 is that Scottish Ministers may by order stipulate that the jurisdiction of a sheriff of a specified sheriffdom at a specified sheriff court will be all-Scotland for specified kinds of civil proceedings. This will allow for the establishment of a specialist personal injury court in Edinburgh sheriff court, but will also permit any other sheriff court to be given all-Scotland jurisdiction in specified types of proceedings. Subsections (1) and (8) therefore define the categories of cases, and the courts, in which civil juries are competent, based on designations under section 40. When Scottish Ministers specify a sheriff court under section

40 as having an all-Scotland jurisdiction for personal injury actions, then civil jury trial will be competent in actions for damages for personal injury raised in that sheriff court.

93. Subsections (2), (3) and (4) are drawn from sections 9 and 11 of the 1988 Act. As with civil jury trials in the Court of Session, a jury will consist of 12 people (subsection (5)). Subsection (6) is the equivalent of section 12 of the 1988 Act in relation to the summoning of jurors.

Section 62 – Selection of the jury

94. Section 62 is based on section 13 in the 1988 Act. Further detailed rules, for example on how the ballot is to be conducted, may be made in relation to civil jury trials in the sheriff court under section 86.

Section 63 – Application to allow the jury to view property

95. Section 63 is based on section 14 in the 1988 Act.

Section 64 – Illness or death of juror during trial

96. Section 64 is based on section 15 of the 1988 Act, except that subsection (4) makes further provision if the number of members of the jury falls below 10.

Section 65 – Trial to proceed despite objection to opinion and direction of the sheriff

97. Section 65 is based on section 16 in the 1988 Act.

Section 66 – Return of verdict

98. Section 66 is drawn from section 17 of the 1988 Act. Court rules will be provided under section 86 in relation to giving effect to the jury's verdict.

Section 67 – Application for new trial

99. Subsections (1) to (4) are based on section 29(1) and (2) of the 1988 Act except that the application for a new trial from the all-Scotland sheriff court will be to the Sheriff Appeal Court rather than the Inner House. Subsection (5) is new and makes clear, for the avoidance of doubt, what the consequences are of granting a new trial. Subsections (6) and (7) are based on section 29(3) of the 1988 Act.

Section 68 – Restrictions on granting a new trial

100. Section 68 is drawn from the provisions of section 30 of the 1988 Act. Subsection (4) varies from section 30(2) of the 1988 Act, however, in that in the circumstances set out in section 68(1), the court must refuse to grant a new trial, whereas section 30(2) states that the court may refuse to grant a new trial.

Section 69 – Verdict subject to opinion of the Sheriff Appeal Court

101. Section 69 is based on section 31 in the 1988 Act.

Simple procedure

102. At present, cases for sums up to £5000 fall to be dealt with under small claims or summary cause procedure in the sheriff court. The Scottish Civil Courts Review concluded that it was unnecessary to have two different sets of procedures for cases for £5000 or less, but that there was a continuing need for a distinct procedure for low value claims. It considered that the financial limit should be set at £5000 for the time being, but recommended the creation of a new procedure for cases under £5000, to be dealt with by summary sheriffs. The Bill refers to this new procedure as ~~“Simple Procedure”~~ rather than the ~~“Simplified Procedure”~~ named in the Review since the use of ~~“simplified”~~ seems to imply that it is simpler than another procedure, whereas this is intended to be a new approach to such low value casework.

103. The Review advocated a flexible procedure based on a problem-solving, interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. The idea was that the new procedure should be accessible to party litigants, with clear, straightforward court rules in plain English and under which the summary sheriff would be able to assist the parties to reach settlement.

Section 70 – Simple procedure

104. Subsection (1) establishes the new procedure, while subsection (2) makes it clear that most of the provisions about simple procedure will be made by court rules made under section 87. Subsection (3) lists the kinds of proceedings which can only be brought by simple procedure: subsection (11) provides that the sums of money specified in section 70 may be amended in the future, while subsection (10) makes clear that sums in subsection (3) will be exclusive of interest and expenses. As with section 38(7), the calculation of sums of money under subsection (3) will be determined by rules of court under section 87(2)(o)). Under subsections (6) and (7), any existing references to ~~“summary cause procedure”~~ will in future be construed as ~~“simple procedure”~~. Subsection (9) creates a label for proceedings subject to simplified procedure which is used subsequently throughout the provisions.

Section 71 – Proceedings for aliment of small amounts under simple procedure

105. Section 71 is intended to re-enact section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963. The 1963 Act will now be wholly repealed.

Section 72 – Rule-making: matters to be taken into consideration

106. Section 72 establishes an expectation that as far as possible simple procedure rules will enable an interventionist and problem-solving approach. It does not address the question of drafting the rules in language as clear and easy to understand as possible, as this is covered by section 2(3)(b) of the Scottish Civil Justice Council and Criminal Legal Assistance Bill. The power to make rules of court is to be exercised ~~“so far as possible”~~. This is to avoid any obligation to create rules that are inconsistent or contradictory with one another. Paragraph (d) is intended to ensure that the rules are flexible enough to allow a sheriff to follow the procedure that is most appropriate to the circumstances of the case.

Section 73 – Rules of court: service of documents

107. Section 73 is a broader version of section 36A of the 1971 Act and is included notwithstanding the provisions of section 3 of the Citation Amendment (Scotland) Act 1882.

Subsection (2) extends the references to parties and documents to include references to descriptions of parties and documents as may be specified in rules.

Section 74 – Evidence in simple procedure cases

108. Subsection (1) is based on section 35(3) of the 1971 Act and is a reflection of the desire to make the simple procedure less bound up in technical, legal rules. Subsection (2) replicates section 36(3) of the 1971 Act which was included as ordinary cause rules in the sheriff court require the recording of evidence. It is anticipated that, although ordinary cause procedure will not exist after the Bill is enacted, the rules of procedure are likely to require the recording of evidence in at least some cases and so section 74(2) is necessary to make it clear that such recording is not required in simple procedure cases.

Section 75 – Transfer of cases to simple procedure

109. The word “~~transfer~~” has been used in sections 75 and 76 as the word “~~permit~~” is not thought to be appropriate when the intention is to require or permit proceedings to follow one set of procedural rules instead of another in the same court. These sections do not deal with remission of cases between courts. Section 75 follows section 37(1)(a) of the 1971 Act and provides for cases which are not being dealt with under simple procedure to be transferred to that form of proceedings. Subsection (2)(b) permits cases to be transferred to simple procedure if the parties agree even if the sum sought would exceed the usual monetary limit for simple procedure cases.

Section 76 – Transfer of cases from simple procedure

110. Section 76 follows section 37(2) of the 1971 Act and provides for the transfer of cases out of simple procedure. As it is left to court rules under section 86 to determine if a uniform set of rules is to be adopted for all remaining cases outwith simple procedure or if different rules are to apply to different kinds of cases, this provision simply states that cases will be transferred from simple procedure without specifying the procedure to which they are being transferred.

Section 77 – Expenses in simple procedure cases

111. The Scottish Civil Courts Review recommended that, even within the simple procedure, there should be different tables of expenses for different types of action, along the lines for small claims and summary cause actions. The table of fees and associated regulations that apply to summary causes (including small claims) were included in an Act of Sederunt under the general enabling power in section 32(1)(i) of the 1971 Act. Section 36B of the 1971 Act has the effect of superseding the tables and regulations when the summary cause is a small claim and when certain conditions are met. A new provision corresponding to section 36B would not be appropriate for all types of simple procedure. In the absence of a category corresponding to the small claim, it will be necessary for the Scottish Ministers to take a power to prescribe categories of simple procedure to which alternative expenses rules will apply by SSI. Section 77(2) makes it clear that these categories will be defined by reference to the value of the claim. An order under subsection (1) could therefore specify one category where the value of the claim was under £3000 and another where the claim was between £3001 and £5000. These would correspond to small claims and summary cause actions. The first category in subsection (1)(a) is where no expenses can be claimed and the under the second in subsection (1)(b) only limited expenses could be claimed (the limit being prescribed in the order).

112. Subsection (3) then sets out cases in which those rules are disapplied. Subsection (4) is based on section 36B(3) of the 1971 Act and lists the circumstances in which the restrictions on expenses should not apply due to the behaviour of the one of the parties to the case.

113. Subsections (5) and (6) allow the sheriff to make an order disapplying the restrictions on expenses in an order under subsection (1) in complex cases.

Section 78 – Appeals from simple procedure cases

114. The Scottish Civil Courts Review recommended that a single member of the Sheriff Appeal Court should hear an appeal from a simple procedure case unless the appeal raised “questions of wider importance” in which case a bench of 3 appeal sheriffs was proposed. No provision on this point is made here as the quorum of appeal sheriffs for particular appeals to the Sheriff Appeal Court will be addressed in court rules under section 86. No provision is made either for further appeals of simple procedure cases from the Sheriff Appeal Court to the Court of Session since such appeals will be governed by the general rules applicable to such appeals.

Execution of deeds relating to heritage

Section 79 – Power of sheriff to order sheriff clerk to execute deed relating to heritage

115. Section 79 is intended to replicate and to have the same legal effect as section 5A of the 1907 Act, though the distinction in section 5A(2) between applications and summary applications is not perpetuated as the latter are no longer to be a defined category of proceedings in the Bill. The grantee will simply make an application for an order in either of the cases mentioned in subsection (1).

Interim orders

Section 80 – Interim orders

116. At present there appear to be no statutory powers conferring on sheriffs a general power to grant interim orders corresponding to section 47 of the Court of Session Act 1988. There therefore suggests that there is a real doubt regarding the power of a sheriff to grant an interim order ad factum praestandum and that it would be appropriate to confer an express power on sheriffs to make such orders along with the power to grant orders regarding the interim possession of any property to which the proceedings relate. This is the purpose of section 80.

117. Paragraph (a) is modelled on section 47(2) of the Court of Session Act 1988 and paragraph (b) is modelled on section 84(1)(b) of the Agricultural Holdings (Scotland) Act 2003 (although there is no need to reproduce the power to make final orders ad factum praestandum or for specific implement as that is already within a sheriff’s competence).

Chapter 2 – Remit of cases between courts

Section 81 – Remit of cases to the Court of Session

118. The Scottish Civil Courts Review recommended that if the privative limit (now the exclusive competence) of the sheriff court were to be increased to £150,000, the legislation governing remit from the sheriff court to the Court of Session would have to be amended to enable actions below the privative limit to be remitted to the Court of Session in exceptional cases. It further recommended that the Court of Session should, however, have the power to

decline a proposed remit if the judge was not satisfied that the case is one that should be heard there. Section 81 implements these recommendations.

119. Subsections (1) and (2) permit a sheriff to remit a case (to which the exclusive competence of the sheriff court under section 38 does not apply, ie if the £150,000 limit does not apply) if the sheriff considers that the importance or difficulty of the case makes it appropriate. This replicates section 37(1)(b) of the 1971 Act.

120. The recommendation that the Court of Session should be able to decline the remit of a case below the exclusive competence (where section 38 does apply) is given effect to in subsections (3) and (4) which permit the sheriff to request the Court of Session to allow proceedings to which section 38 does apply to be remitted to that Court if there are exceptional circumstances and under subsection (5), where the Court of Session may permit the proceedings to be remitted ~~if~~ special cause is shown". The test in section 7 of the 1907 Act for remits of cases to the Court of Session if they were above the privative limit was that ~~the~~ importance or difficulty of the cause make it appropriate" to remit. Transmission of a case below the exclusive competence would seem to require a more stringent test and subsection (5) specifies that special cause must be shown. This is the test used when considering whether to allow a proof rather than a jury trial under section 9 of the 1988 Act.

121. The Review considered that the fact that the Court could not take into account its own operational and business needs when considering remits (rather than simply the needs of the parties) was a serious weakness and this is addressed by subsection (6).

122. There is no right of appeal against the decision of the sheriff in subsection (4) or of the Court of Session under subsection (5), though a further application is possible under subsection (12), but the decision of the sheriff under subsection (2) may be appealed to the Sheriff Appeal Court (subsection (9)).

Section 82 – Remit of cases from the Court of Session

123. The Review also recommended that where the value of an action raised in the Court of Session is likely to be below the privative limit, as assessed by the judge at a case management hearing, there should be a presumption in favour of a remit to the sheriff court. In considering whether or not to remit, the Court would be entitled to take into account the business and operational needs of the Court as well as the interests of the parties. Section 82 implements these recommendations.

124. Subsection (1) sets out that cases are to be remitted to the sheriff court only where they would have been subject to the exclusive competence of the sheriff court (if only the sum sued for had been lower, or if it had been averred that the property concerned was of lower value). There is a presumption under subsection (2) that the proceedings ~~must~~ be remitted unless there are special reasons for doing so. Under subsection (3), the Court will not have to reach any view on liability or contributory negligence and ~~likely value~~ is to be assessed on the assumption that liability will be established. Subsections (4) and (5) give a permissive power to the Court to remit cases to which the monetary rule does not apply.

Section 83 – Remit of cases to the Scottish Land Court

125. Section 83 reproduces section 37(2D) of the 1971 Act to permit remits to the Scottish Land Court in appropriate cases. There is no appeal against a decision to remit or not to remit.

Chapter 3 – Judicial review

Section 84 – Judicial review

126. Section 84 inserts new sections 27A to 27D into the Court of Session Act 1988. Section 27A provides that a time limit of 3 months starting from the date that the grounds giving rise to the application for judicial review arose will apply to applications to the supervisory jurisdiction of the court.

127. Sections 27B, 27C and 28D add a new preliminary stage at which permission to proceed to judicial review is granted or refused. Each case will be considered by a judge from the Outer House of the Court of Session. There will be no necessity for a hearing at this stage. The judge will consider whether the applicant has sufficient interest in the subject and whether the application has a reasonable prospect of success. The possible outcomes are that the court may:

- grant leave for the application to proceed
- grant leave for the application to proceed, but with specified conditions or only on particular grounds; or
- refuse the leave.

128. If the permission to apply for judicial review is refused or granted subject to conditions or only on particular grounds, the applicant has 7 days within which they can request an oral hearing to review the original decision.

129. The request will be considered by a different judge. If the request is another refusal of permission, there is no appeal and the application fails. If there is an oral hearing and the application is again refused, there is an appeal to the Inner House of the Court of Session.

Chapter 4 – Regulation of Procedure and Fees

130. Lord Gill, the Lord President of the Court of Session and principal author of the Scottish Civil Courts Review, has said that ~~the~~ reforms – which have been devised as an integrated solution to our present problems – will be made effective through new rules of court”. As noted above, the Bill sets out the reformed framework for the civil courts system in Scotland, but the detail will be provided in rules of court. The objective is that the Bill will facilitate modernisation of the civil court system – for example, in relation to case management – and to that end section 5 of the Court of Session Act 1988 and section 32 of the 1971 Act require to be updated and supplemented where necessary.

131. Sections 85 and 86 provide powers for the Court of Session to make rules of court by Act of Sederunt to regulate procedure in the Court of Session (section 85) and in the sheriff court and the Sheriff Appeal Court (section 86). The powers to make rules of court are intended to be broadly similar, but with specific variations required to take account of the different jurisdictions of the courts.

132. Given the critical role which rules of court will therefore have in implementing the Scottish Civil Courts Review, the powers granted in sections 85 and 86 provide the vires for rules of court made in respect of the matters enumerated in those sections.

Section 85 – Power to regulate procedure etc in the Court of Session

133. Section 85 replaces sections 5 and 5A of the Act 1988 by a new section 5 which is inserted into the 1988 Act. Subsection (1) expresses the power to make rules about practice and procedure and matters ancillary and incidental thereto as a general power. Subsection (2) makes it clear that this includes the power to make provision on the specific matters listed. This illustrates the breadth of the general power, but does not tie the matters at subsection (2) narrowly to practice and procedure, as ancillary and incidental powers are also covered. It is intended that this will give the Court of Session powers to implement many of the Scottish Civil Courts Review recommendations free from doubts as to vires and avoiding a debate as to whether a matter relates to “practice and procedure”.

134. Subsection (2)(b) permits rules to be made on such matters as the use of alternative dispute resolution (ADR) and pre-action protocols. The use of ADR may be encouraged but not required. These are linked in that they relate to mitigating the length and complexity of cases and avoiding the need for litigation. Subsection (2)(c) will permit rules to be made regarding the use of technology in proceedings in the Court of Session, but paragraph (c) is intended to cover case management more generally, both active judicial case management and case-flow management. Existing section 5(1) is covered by new section 5(2)(p) and section 5(m) is replicated in new section 5(3)(b). Subsection (2)(o) replicates existing section 5(ba).

135. Subsection (3) provides the ancillary powers which the Court is likely to need to give full effect to the changes to Court of Session proceedings which are to be implemented by Act of Sederunt. Subsection (4) provides that the new section 5 does not displace any other provisions which enable the Court to regulate proceedings in the Court of Session and the inherent powers of the Court. Subsection (5) is included as the 1988 Act (into which the provisions are being inserted) is governed by the Interpretation Act 1978 which would otherwise exclude Acts of the Scottish Parliament and instruments made under them from the meaning of “enactment”. Section 85(2) saves the provisions of any extant Acts of Sederunt made under the existing section 5

Section 86 – Power to regulate procedure etc. in sheriff court and Sheriff Appeal Court

136. Section 86 replaces section 32 of the 1971 Act. Rather than a simple rewrite of section 32, the approach is again to give a more general description of the matters for which rules can be made (subsection (1)), but including the power to make provision on the matters listed in subsection (2), in the same way, and for the same reasons, as in section 86. Subsection (2)(o) now includes a power to make provision by Act of Sederunt as to the quorum of the Sheriff Appeal Court when dealing with different types of business in that court. The references to specific pieces of legislation in the 1971 Act are removed. Subsection (1)(a) makes it clear that the provision relates only to civil proceedings.

137. Subsection (3) provides that the provisions listed which relate to simple procedure take precedence over the powers listed in subsection (1). Subsection (4) provides the ancillary powers which the Court is likely to need to give full effect to the changes to civil proceedings in the sheriff court which are to be implemented by act of sederunt. Subsections (5) and (6) acknowledge the role of the Scottish Civil Justice Council in relation to making rules of court for

the sheriff court and Sheriff Appeal Court. Subsection (7) saves the provisions of any extant Acts of Sederunt under section 32 of the 1971 Act.

138. Reference to proceedings under the Children's Hearings (Scotland) Act 2011 is included in subsection (8) as civil proceedings are generally considered to be proceedings relating to private rights and all proceedings under the Children's Hearings legislation do not necessarily fit into that category. Subsection (9) is a saving provision for any other statutory provisions which enable the Court to regulate civil proceedings in the sheriff court and the inherent powers of the courts.

Section 87 – Power to regulate fees

139. Section 87 replicates section 40 of the 1907 Act, though the power to regulate fees is now specifically restricted to civil proceedings in the sheriff court or the Sheriff Appeal Court.

PART 4 – CIVIL APPEALS

Section 88 – Abolition of appeal from sheriff to the sheriff principal

140. While the office of sheriff principal will continue, the right of appeal from the sheriff to the sheriff principal is to be ended as henceforth appeal will be to the Sheriff Appeal Court. This only applies to appeals from the sheriff to the sheriff principal and does not affect any statutory appeals or applications to the sheriff principal from tribunals or other bodies. Subsections (2) and (3) provide that any specific provisions in other enactments which provide for an appeal from a sheriff to the sheriff principal will now be to the Sheriff Appeal Court.

Section 89 – Appeal from sheriff to the Sheriff Appeal Court

141. Section 89 is based on section 27 of the 1907 Act but provides that the appeal is to the Sheriff Appeal Court rather than the sheriff principal. Leave to appeal is not required in relation to the matters set out in subsection (1). Subsection (2) provides that leave to appeal is, however, required against any other interlocutor of a sheriff in civil proceedings. Subsections (4) to (6) contain a number of qualifications and are intended to replicate section 28(2) of the 1907 Act and in particular to preserve any specific provision regarding appeal to the Sheriff Appeal Court or Court of Session that may be contained in other enactments.

Section 90 – Remit of appeal from Sheriff Appeal Court to Court of Session

142. In order to address concerns that the Sheriff Appeal Court might in some cases simply be seen as an extra and unnecessary layer of appeal which merely adds to the cost of appealing an action, the Review recommended that the Sheriff Appeal Court should be able to permit an appeal directly to the Court of Session if the case merited this. It is assumed that this will be to the Inner House though the provision does not expressly say this. It is not intended that parties should be able to bypass the Sheriff Appeal Court since the rationale for having such a court is that not all civil appeals merit the attention of the Inner House. Section 90 permits the Sheriff Appeal Court to remit an appeal on the application of a party to the Court of Session if the Sheriff Appeal Court considers that it involves complex or novel points of law.

Section 91 – Appeal from Sheriff Appeal Court to Court of Session

143. The Scottish Civil Courts Review recommended that there should be a restricted right of appeal from the Sheriff Appeal Court to the Inner House in civil matters and that there should be a mechanism for sifting out appeals which are without merit. Section 91 provides for an appeal to the Court of Session from a final judgement of the Sheriff Appeal Court, subject to a requirement to obtain leave, in the first instance from the Sheriff Appeal Court and if refused then from the Court of Session (subsection (1)). As the first appeal from the summary sheriff or sheriff to the Sheriff Appeal Court is available as of right, the Review considered that any further right of appeal should be subject to a stringent test and this is set out in subsection (2). It is the same test as for appeals to the Court of Appeal in England and Wales. Subsection (2) provides that leave to appeal may only be granted if the appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Session to hear the appeal. Subsections (3) and (4) replicate section 28(2) of the 1907 Act to preserve any specific provision regarding appeals from the Sheriff Appeal Court to the Court of Session that may be contained in other enactments.

Section 92 – Appeal from sheriff principal to the Court of Session

144. There are some existing enactments which provide for a statutory application or appeal direct to the sheriff principal rather than the sheriff. Section 92 deals with such first instance judicial decisions made by sheriffs principal and makes it clear that appeals from such judgements are to the Court of Session rather than the Sheriff Appeal Court. It does not seem appropriate for an appeal against a sheriff principal's decision to be dealt with by other sheriffs principal (or sheriffs acting up as appeal sheriffs) in the Sheriff Appeal Court.

Section 93 – Effect of appeal

145. Section 93 is intended to replicate section 29 of the 1907 Act.

PART 5 – JUSTICE OF THE PEACE COURTS

Section 94 – Abolition of office of stipendiary magistrate

146. The Scottish Civil Courts Review made a number of recommendations relating to criminal matters, particularly with reference to how the volume of criminal business impacts on civil cases in the sheriff court and the proposal that summary sheriffs' competence should include all summary crime. The Review did not, however, consider the position of stipendiary magistrates which are provided for in section 74 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. Only four are currently provided and all four sit in Glasgow.

147. The Scottish Civil Courts Review built on earlier work by the Summary Justice Review Committee headed by Sheriff Principal McInnes who envisaged that what are now to be called –summary sheriffs” would take over the role of stipendiary magistrates and no further stipendiary magistrates would be appointed. Section 94 provides that the office of stipendiary magistrate is abolished. The existing (full-time) stipendiary magistrates are to be appointed as summary sheriffs unless they decline appointment. This will mean that they will have a civil competence as well as their current criminal competence. In practice, however, it is expected that due to their workload, the former stipendiary magistrates may do little civil work.

148. Section 74(5) of the 2007 Act provides that a person is not to be appointed as a stipendiary magistrate unless the person is, and has been for at least 5 years, a solicitor or advocate. It is therefore possible in theory that a person currently appointed as a stipendiary magistrate may not be qualified for appointment as a summary sheriff under section 15 which requires 10 years' legal qualification. Subsection (4) ensures that they may still be appointed as summary sheriffs.

Section 95 – Summary sheriffs to sit in justice of the peace courts

149. This section permits summary sheriffs to sit in the justice of the peace courts. This will help with the programming of business in those courts. When summary sheriffs sit in the justice of the peace court, they will, however, only be entitled to exercise the same summary criminal powers as the justice of the peace, whereas when they sit in the sheriff court, they will be able to exercise the same powers as the sheriff (in relation to summary criminal cases).

PART 6 – GENERAL

Section 96 – Modifications of enactments

150. Section 96 introduces the modifications of other enactments listed in schedule 3.

Section 97 – Subordinate legislation

151. The power to make different provision for different purposes or areas under subsection (1)(a) is intended to permit pilot schemes to be operated in specified parts of the country.

Section 98 – Interpretation

152. Section 98(1) sets out definitions that apply throughout the Bill unless the context requires otherwise. Subsection (2) lists the judicial officers who are meant by references to the “judiciary of a sheriffdom”. Subsections (3) and (4) make provision in relation to the interpretation of references to a sheriff and the exercise of the jurisdiction and competence of a sheriff by other members of the judiciary of a sheriffdom, though subsection (5) sets out exceptions to these rules.

Section 99 – Ancillary provision

153. Section 99 gives the Scottish Ministers power to make incidental, supplementary, consequential, transitional, transitory or saving provision by freestanding order to implement the Bill, including by modifying enactments, instruments or documents.

Schedule 1 – Civil proceedings, etc in relation to which summary sheriff has competence

154. Schedule 1 lists the categories of proceedings in which the new summary sheriffs are to have competence.

Schedule 2 – Civil proceedings, etc in relation to which honorary sheriff has competence

155. Schedule 2 lists the categories of civil proceedings in which honorary sheriff will have competence in the future. At present honorary sheriffs have the same powers and competence as a sheriff.

Schedule 3 – Modifications of enactments

156. Schedule 3 lists the modifications of existing enactments under the following headings:

Part 1 – Sheriff courts

Part 2 – Sheriff Appeal Court

Part 3 – Civil jury trials

Part 4 – Simple procedure

Part 5 – Civil appeals

Part 6 – Justice of the Peace courts