

# **COURTS REFORM (SCOTLAND) BILL**

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## **EXPLANATORY NOTES**

### **(AND OTHER ACCOMPANYING DOCUMENTS)**

#### **CONTENTS**

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 6 February 2014:

- Explanatory Notes;
- a Financial Memorandum;
- a Report by the Auditor General for Scotland;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 46–PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. 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.
2. 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.

### **OVERVIEW OF THE BILL**

3. The Bill seeks to support the aims set out in the Policy Memorandum by introducing reforms to modernise and enhance the efficiency of the Scottish civil justice system. The provisions in the Bill take forward many of the recommendations from Lord Gill's review of the civil courts, The Scottish Civil Courts Review<sup>1</sup> (SCCR), which reported in 2009. The Scottish Government issued its response<sup>2</sup> to the review in 2010. Some recommendations from the SCCR have already been taken forward, such as modernising children's hearings. The Bill will implement the majority of the recommendations that the Government accepted in its response in 2010. A consultation in 2007 informed the review. Further consultations on the draft Bill and treatment of civil appeals from the Court of Session were undertaken in 2013. Further information on the Scottish Government consultations can be found in the Policy Memorandum.
4. The Bill does not attempt to legislate for all of the recommendations made in the SCCR, some of which have been or are being taken forward separately such as reforms to children's hearings. Many of the changes which have been recommended have already been implemented such as some of the reforms of the Inner House of the Court of Session, or will be implemented by court rules made by the Court of Session by act of sederunt such as some of the procedural reforms within the Court of Session envisaged by the Bill. The Bill seeks to set out the framework within which the court rules will add the necessary detail.
5. 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 of the 1907 Act will 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.
6. The Bill amends the Judiciary and Courts (Scotland) Act 2008 to establish a joint administration for courts and tribunals. It renames the organisation and changes the board structure to allow the merged organisation to operate effectively for both courts and tribunals.

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<sup>1</sup> The Scottish Civil Courts Review - <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

<sup>2</sup> The Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review - <http://www.scotland.gov.uk/Resource/Doc/330272/0107186.pdf>

7. The Bill is in eight Parts.

8. Part 1 (Sheriff courts) includes provisions on sheriffdoms, sheriff court districts and sheriff courts, the judiciary of the sheriffdoms, the organisation of the business, and competence and jurisdiction of the sheriffs. This part provides for the creation of the summary sheriff judicial office holder, and for the designation of specialist judiciary. It also provides for the power to confer an all-Scotland jurisdiction for specified cases on a specific court which is intended to enable an all-Scotland specialist personal injury court. It provides for the raising of the exclusive competence of the sheriff court. Schedule 1 specifies the civil proceedings etc. in relation to which a summary sheriff will have competence.

9. Part 2 (The Sheriff Appeal Court) makes provision for the Sheriff Appeal Court which will hear summary criminal appeals from the sheriff court and the justice of the peace (JP) court, as well as civil appeals from the sheriff court. The provisions specify the jurisdiction and competence of the Sheriff Appeal Court as well as the status of its decisions in precedent, and sets out the arrangements for the President and Vice President of the Sheriff Appeal Court. The provisions set out how sheriffs principal and sheriffs are able to be Appeal Sheriffs. They confer on the President the responsibility for the efficient disposal of business in the Sheriff Appeal Court. They make further provision about court sittings, the Clerk and Deputy Clerks. (Further provision on criminal appeals is made in Part 5.)

10. Part 3 (Civil procedure) makes provision for civil jury trials in an all-Scotland sheriff court. It also includes provisions for simple procedure which will replace small claims and summary cause procedures. (The Court of Session is able to make further general provision about simple procedure in an act of sederunt made under section 97). This part also includes provisions on the granting and enforcement of interdicts with effect in more than one sheriffdom, the execution of deeds relating to heritage by the Sheriff Clerk and interim orders. It includes provision on judicial review and warrants of ejection. This part also makes provision for the remit of cases to or from the Court of Session, and to the Scottish Land Court. It includes provision on lay representation in simple procedure cases and in other proceedings. It includes provision on jury service. It includes provisions to allow the Court of Session to regulate its own procedure and that of the sheriff court and Sheriff Appeal Court. It also contains provisions on vexatious litigants.

11. Part 4 (Civil appeals) includes provisions on civil appeals to the Sheriff Appeal Court and to the Court of Session, the effect of appeal, and appeals to the Supreme Court.

12. Part 5 (Criminal appeals) makes provision for appeals from summary criminal proceedings including appeals from the Sheriff Appeal Court to the High Court and bail appeals. Schedule 2 makes modifications to the Criminal Procedure (Scotland) Act 1995 consequential upon the transfer of summary appeal jurisdiction from the High Court to the Sheriff Appeal Court.

13. Part 6 (Justice of the peace courts) makes provision relating to the establishment, relocation and disestablishment of JP courts, the abolition of the office of stipendiary magistrate, the conversion of existing stipendiary magistrates to be summary sheriffs, and a provision enabling summary sheriffs to sit in JP courts.

14. Part 7 (The Scottish Courts and Tribunals Service), together with schedule 3 amends the Judiciary and Courts (Scotland) Act 2008 to change the name of the Scottish Court Service to the Scottish Courts and Tribunals Service (SCTS) and confers power on the merged organisation to provide administrative support for the Scottish Tribunals and their members.

15. Part 8 (General) includes provision in relation to subordinate legislation, interpretation and commencement, and gives effect to schedule 4 which makes minor and consequential amendments to a number of enactments.

## **THE BILL**

### **PART 1 - SHERIFF COURTS**

#### **Chapter 1 - Sherifffdoms, sheriff court districts and sheriff courts**

##### *Section 1 – Sherifffdoms, sheriff court districts and sheriff courts*

16. Subsections (1) to (3) set out that Scotland is to be divided into sherifffdoms which are to be further divided into sheriff court districts. They take account of the fact that not all sherifffdoms are divided into sheriff court districts (Glasgow and Strathkelvin is currently the only sherifffdom that is not so divided) and retain flexibility to cater for the possibility that in the future other sherifffdoms may be undivided. Subsections (4) to (6) provide that, subject to any order under section 2, existing sherifffdoms, sheriff court district and sheriff court locations will continue as they are following the coming into force of section 1.

##### *Section 2 – Power to alter sherifffdoms, sheriff court districts and sheriff courts*

17. Section 2 updates the powers to alter sherifffdoms and sheriff court districts in sections 2(1) and 3(2) of the 1971 Act, combining the two powers into one section, and also adds new provisions. Previously the Scottish Ministers were only able to make changes with the consent of the Lord President of the Court of Session and the Scottish Courts Service, the latter being placed under a duty to consult parties who are likely to have an interest. This meant that the Scottish Courts Service first had to consult, the Scottish Ministers then made an order and then the Lord President had to consent to the order including further consultation with e.g. the sheriffs principal. The process was bureaucratic and not well sequenced. The provisions now set out in subsections (2) to (5) endeavour to make the process more straightforward. Firstly, the Scottish Courts and Tribunals Service (SCTS) (as the Scottish Court Service is renamed by section 22 of the Bill) must consult such persons as it considers appropriate before submitting a proposal under subsection (1). Then it may, with the agreement of the Lord President, submit a proposal to the Scottish Ministers. The Scottish Ministers must then consider the proposal, and decide whether to make an order and what provision to make in the order. The making of the order is subject to the consent of the SCTS and the Lord President. The order made by the Scottish Ministers is subject to negative procedure.

## **Chapter 2 - Judiciary of the sheriffdoms**

### *Permanent and full-time judiciary*

#### *Section 3 – Sheriff principal*

18. Section 3 provides that there continues to be the office of sheriff principal, appointed by Her Majesty on the same basis as prior to the Bill (that is, on the recommendation of the First Minister, after consulting the Lord President, in accordance with section 95(4)(b) of the Scotland Act 1998). The appointment procedure set out in section 3 does not affect the operation of section 11 of the Judiciary and Courts (Scotland) Act 2008, the effect of which is that the First Minister may only recommend an individual who has been recommended for appointment by the Judicial Appointments Board for Scotland (subsection (4)).

#### *Section 4 – Sheriffs*

19. Section 4 provides that there continues to be the office of sheriff, appointed by Her Majesty on the same basis as prior to the Bill (that is, on the recommendation of the First Minister, after consulting the Lord President, in accordance with section 95(4)(b) of the Scotland Act 1998). The appointment procedure set out in section 4 does not affect the operation of section 11 of the Judiciary and Courts (Scotland) Act 2008, the effect of which is that the First Minister may only recommend an individual who has been recommended for appointment by the Judicial Appointments Board for Scotland (subsection (4)).

#### *Section 5 – Summary sheriffs*

20. Section 5 introduces a new office of summary sheriff who will be subject to the same appointment procedures as for sheriffs – that is, subject to the qualification requirements contained in section 14, and appointed by Her Majesty on the recommendation of the First Minister, after consulting the Lord President. The appointment procedure set out in section 5 does not affect the operation of section 11 of the Judiciary and Courts (Scotland) Act 2008, the effect of which is that the First Minister may only recommend an individual who has been recommended for appointment by the Judicial Appointments Board for Scotland (subsection (4)). Sections 43 and 44 make provision about the competence and jurisdiction of summary sheriffs.

### *Temporary and part-time judiciary*

#### *Section 6 – Temporary sheriff principal*

21. Section 6 which effectively re-enacts, with amendments, section 11 of the 1971 Act makes provision for the appointment of a temporary sheriff principal in the circumstances set out in subsection (1). In these circumstances, and if the Lord President requests, the Scottish Ministers must appoint a temporary sheriff principal. Those eligible for appointment are a sheriff (subsection (2)(a)) or a “qualifying former sheriff principal” (subsection (2)(b)) defined in subsection (3) as an individual who ceased to hold office as sheriff principal other than by virtue of an order under section 25 (removal from office) and who has not reached the age of 75. Subsection (4) sets out that a temporary sheriff principal may be appointed to exercise either all of the sheriff principal’s functions which the sheriff principal is unable to perform or is precluded from exercising. The Lord President may request the appointment of a temporary sheriff principal on the ground that a vacancy has occurred in the office of sheriff principal, only

if the Lord President considers such an appointment to be necessary or expedient in order to avoid a delay in the administration of justice in the sheriffdom (subsection (6)).

*Section 7 – Temporary sheriff principal: further provision*

22. Section 7 makes further provision for the arrangements for a temporary sheriff principal. An appointment as a temporary sheriff principal ceases when it is recalled by the Scottish Ministers on the request of the Lord President (subsection (2)) or when the individual concerned ceases to be a sheriff or is suspended from that office (subsection (3)). (For suspension and removal of sheriffs, see section 22 and 25 respectively). Except where the temporary sheriff is appointed to exercise only limited functions (in terms of section 6(4)(b)), he or she may exercise the jurisdiction and powers of sheriff principal of the sheriffdom (subsection (4)). A temporary sheriff principal retains his or her appointment as a sheriff (subsection (5)), but where the appointment is as a temporary sheriff principal of a sheriffdom other than that for which the person is a sheriff, he or she 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 his or her “home” sheriffdom (subsection (6)).

*Section 8 – Part-time sheriffs*

23. Section 8 which governs the appointment of part-time sheriffs, replicates the majority of section 11A of the 1971 Act (sections 11A to 11D of which were inserted by the Bail, Judicial Appointments etc (Scotland) Act 2000). Subsection (1) provides for the Scottish Ministers to appoint individuals to “act as” sheriffs, and for individuals so appointed to be known as “part-time sheriffs”. The qualifications for appointment, set out in section 14 are the same as for sheriffs, and the Scottish Ministers may make an appointment only after consulting the Lord President (subsection (2)). In terms of subsection (3), an appointment as part-time sheriff lasts for five years, unless it ceases in accordance with section 20 (Cessation of appointment of judicial officers); but see section 9, which provides (with exceptions) for automatic re-appointment at the end of each five-year period. A part-time sheriff may exercise the powers and jurisdiction that attach to the office of sheriff in every sheriffdom (subsection (4)) and is subject to the administrative direction of the sheriff principal of the sheriffdom in which the part time sheriff is for the time being sitting (subsection (5)) (for the powers of sheriffs principal in this regard, see sections 27 and 28). Sheriffs principal are directed by subsection (6) to have regard to the desirability of ensuring that each part-time sheriff is given the opportunity of sitting for at least 20 days, and not more than 100 days, per year. Section 11A(5) of the 1971 Act, as amended by the Maximum Number of Part-Time Sheriffs (Scotland) Order 2006 (S.S.I 2006/257) imposed a limit of 80 upon the number of part-time sheriffs. Section 11A(5) is not re-enacted, and there is no longer a limit on the number of part-time sheriffs.

*Section 9 – Reappointment of part-time sheriffs*

24. Section 9 replicates with some amendments section 11B of the 1971 Act. The Bill does not, however, re-enact the prohibition on those aged 69 from being reappointed. Retirement ages in general are not reproduced in the Bill and are instead consolidated through amendments made to the Judicial Pensions and Retirement Act 1993 by schedule 4, paragraph 8. Section 11B(9), of the 1971 Act which prevented part-time sheriffs who were solicitors from acting as part-time sheriffs in the same sheriff court district as that individual’s principal place of business, is substantially re-enacted in section 15(3).

25. The effect of section 9 is that, except where one of the conditions in subsection (1)(a)-(c) is met, or the individual in question has reached the statutory retirement age of 70 contained in section 26(1) of the Judicial Pensions and Retirement Act 1993, that individual must be re-appointed at the expiry of each five-year appointment.

*Section 10 – Part-time summary sheriffs*

26. This section creates the office of part-time summary sheriff on terms identical to those applying to part-time sheriffs. Reference is made to the notes at paragraph 23.

*Section 11 – Reappointment of part-time summary sheriffs*

27. Section 11 replicates the provisions of section 9 in respect of part-time summary sheriffs. Reference is made to the notes at paragraph 24.

*Re-employment of former holders of certain judicial offices*

*Section 12 – Re-employment of former judicial office holders*

28. Section 12 substantially re-enacts section 14A of the 1971 Act, as inserted by the Judiciary and Courts (Scotland) Act 2008. That section provided for the re-appointment of retired sheriffs principal and sheriffs; section 12 also allows for the re-appointment of former qualifying part-time sheriffs and summary sheriffs and part-time summary sheriffs. The section allows a sheriff principal to appoint a qualifying former sheriff principal, a qualifying former sheriff or a qualifying former part-time sheriff to act as a sheriff of the sheriffdom and a qualifying former summary sheriff or part-time summary sheriff to act as a summary sheriff of the sheriffdom. Such an appointment only permits the individual in question to act during such period or periods as the sheriff principal may determine (subsection (2)), and an appointment may only be made where it appears to the sheriff principal to be expedient as a temporary measure in order to facilitate the disposal of business in the sheriff courts of the sheriffdom (subsection (3)). So, for example, a former judicial office holder might be appointed to fill a temporary gap created by the appointment of one of the sheriffs of the sheriffdom as a temporary sheriff principal in terms of section 6. Subsections (4) to (8) define what is meant by a “qualifying” former judicial office holder: in order to be “qualifying”, the former office holder must not have been removed from office under section 25, nor have reached the age of 75.

*Section 13 – Re-employment of former judicial office holders: further provision*

29. This section makes further provisions about the use of former judicial office holders. Subsection (1) provides that an appointment continues until recalled by the relevant sheriff principal. Subsections (2) and (3) provide that a re-appointed judicial officer may exercise the powers of a sheriff, or as the case may be a summary sheriff of the sheriffdom. Subsection (4) provides that an appointment under section 12(1) comes to an end when the individual reaches the age of 75. Subsection (5) permits an individual to continue to deal with matters relating to a case begun before the ending of his or her appointment under section 12(1) and providing that for that purpose the individual concerned is to be treated as acting under that appointment.

### *Qualification and disqualification*

#### *Section 14 – Qualification for appointment*

30. Section 14 sets out the qualification for appointment as a sheriff principal, sheriff, summary sheriff, part-time sheriff or part-time summary sheriff. It re-enacts the substance of section 5 of the 1971 Act by requiring that an individual must have been a solicitor or advocate during the 10 years immediately prior to appointment. Subsection (1)(a) makes it explicit that experience in a judicial office specified in subsection (2) immediately prior to appointment also qualifies an individual for appointment.

#### *Section 15 – Disqualification from practice, etc.*

31. Subsections (1) and (2) of section 15 prohibit sheriffs principal, sheriffs and summary sheriffs from engaging in any other business, or being in partnership with or employed by or acting as agent for any person so engaged. (In doing so, they substantially re-enact, and extend to summary sheriffs, section 6 of the 1971 Act). 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.

32. Part-time sheriffs and part-time summary sheriffs are not prohibited from practice since they are appointed specifically for expertise and experience in that practice, but subsection (3) makes clear that part-time sheriffs and part-time summary sheriffs 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 16 – Remuneration*

33. Section 16 consolidates a number of provision of the 1907 and 1971 Acts dealing with the remuneration of sheriffs, sheriffs principal, part-time sheriffs and re-employed former judiciary and makes new provision for the remuneration of summary sheriffs and part-time summary sheriffs. The remuneration of sheriffs principal and sheriffs is a reserved matter under the Scotland Act 1998. Subsections (1) and (2) in providing for the determination of the remuneration of sheriffs and sheriffs principal by the Secretary of State with consent of the Treasury, re-enact section 14 of the 1907 Act. Subsections (3) and (4) provide for the remuneration of summary sheriffs to be determined and paid by the Scottish Ministers. Subsections (5), (6) and (7) deal with the remuneration of part-time and re-employed judiciary. Again the remuneration of these judiciary is determined by the Scottish Ministers. Subsections (8) and (9) restate section 10(4) of the 1971 Act in relation to payments to be made to sheriffs principal and sheriffs who are directed to perform the judicial functions of sheriffs principal and sheriffs in another sheriffdom. Subsections (10) and (11) make similar provision in relation to summary sheriffs who act in another sheriffdom; in contrast to sheriffs principal and sheriffs, in respect of whom the function of determining remuneration continues to rest with the Secretary of State with the consent of the Treasury, any additional remuneration of summary sheriffs is to be determined by the Scottish Ministers.



34. Subsection (12) makes it clear that salaries and remuneration for the judicial officers listed under subsections (1) to (11) will be paid by the Scottish Courts and Tribunals 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 Courts Service or the Judicial Office.<sup>3</sup> 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. 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 17 – Expenses*

35. 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). Section 18 consolidates these provisions and provides that the judicial officers listed in subsection (3) may be paid expenses by the Scottish Courts and Tribunals Service if they were reasonably incurred in the performance of the officer's duties. There is now no provision for the payment of "allowances".

#### *Leave of absence*

##### *Section 18 – Leave of absence*

36. Section 18 provides for leave of absence for sheriff court judiciary. In terms of subsection (1) it is for the Lord President to approve leave of absence for sheriffs principal and temporary sheriffs principal. In terms of subsection (2) it is for the sheriff principal to approve leave of absence for a sheriff or summary sheriff. The maximum amount of recreational leave which may be approved for any one judicial officer in a given year is seven weeks (subsection (3)), although this limit may be exceeded with the permission of the Lord President (subsection (4)), which the Lord President may give only if there are special reasons which justify exceeding the limit in the particular case (subsection (5)). There is no limit upon the amount of leave which may be approved for non-recreational purposes (defined in subsection (7) as including, without limitation, sick leave, compassionate leave and study leave). Subsection (6) allows the Lord President to delegate to another judge of the Court of Session any of the functions conferred upon the Lord President by this section. (So far as leave of absence for sheriffs principal and sheriffs is concerned, the provision made by section 18 is substantially equivalent to that currently provided for in sections 13(2) and (3) and 16(2) and (2A) of the 1971 Act).

#### *Residence*

##### *Section 19 – Place of residence*

37. Section 19 replicates sections 13(1) and 14(2) of the 1971 Act to preserve, and extend to summary sheriffs, the existing power of the Lord President to require a judicial officer to have an

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<sup>3</sup> The Judicial Office is a part of the Scottish Court Service that provides support to the Lord President in his role as head of the Scottish judiciary undertaking such functions as training, welfare, deployment etc.

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.

### *Cessation of appointment*

#### *Section 20 – Cessation of appointment of judicial officers*

38. Section 20 sets out the grounds upon which the appointment of a sheriff principal, a sheriff, a summary sheriff, a part-time sheriff or a part-time summary sheriff may come to an end. Subsection (1) allows for resignation at any time by giving notice to that effect to the Scottish Ministers. Subsection (2) provides that the appointment of that officer will end on giving such notice or resignation, upon retirement, upon removal from office in accordance with section 25, or upon appointment as another judicial officer specified in subsection (3).

### *Fitness for office*

39. Section 21 to 25 re-enact, and extend to summary sheriffs and part-time summary sheriffs, sections 12A to 12E of the 1971 Act, as inserted by the Judiciary and Courts (Scotland) Act 2008. These provisions are consistent with those which apply to the senior judiciary by virtue of sections 35 to 39 of the latter Act.

#### *Section 21 – Tribunal to consider fitness for office*

40. Section 21 provides that the First Minister must set up a tribunal to investigate and report on whether a person is unfit to hold judicial office by reason of inability, neglect of duty or misbehaviour where requested to do so by the Lord President (subsection (1)) or in other such circumstances as the First Minister thinks fit, having consulted the Lord President (subsection (2)). Subsection (3) provides that sheriffs principal, sheriffs, summary sheriffs, part-time sheriffs and part-time summary sheriffs are all subject to the jurisdiction of such tribunals. Subsection (4) provides that the tribunal is to consist of one judge who must be a qualifying member of the Judicial Committee of the Privy Council (and who will, by virtue of subsection (7), chair the tribunal and have a casting vote); one holder of the relevant judicial office; one individual who has been qualified for at least 10 years as a solicitor or advocate; and one individual who does not, and never has, fallen within any of the other categories. The terms “qualifying member of the Judicial Committee of the Privy Council” and “relevant judicial office” are defined in subsection (5). The membership of the tribunal is to be selected by the First Minister, with the agreement of the Lord President (subsection (6)).

#### *Section 22 – Tribunal investigations: suspension from office*

41. Section 22 provides for the suspension from judicial office of the individual who is the subject of the tribunal’s investigation. This suspension may be effected by the Lord President, where the tribunal was constituted at the Lord President’s request (subsections (1) and (2)), or by the First Minister, on receiving a recommendation to that effect from the tribunal (subsections (4) and (5)). In each case, the suspension lasts until the person who made it orders otherwise (subsections (3) and (6)). Suspension does not affect the remuneration of the suspended judicial officer (subsection 7)).

*Section 23 – Further provision about tribunals*

42. Section 23 provides that a tribunal may require any person to attend its proceedings to give evidence or may require any person to produce documents (subsection (1)). The limits upon the requirements which may be made are the same as those which apply to requirements made by a court (subsection (2)). Subsection (3) provides for the enforcement of these requirements by providing that if a person fails to comply with either or both of these requirements the tribunal may make an application to the Court of Session. The Court of Session may, in turn make an order enforcing compliance or deal with the matter as if it were a contempt of the court (subsection (4)). Subsection (5) gives the Court of Session power, by act of sederunt, to make provision as to the procedure to be followed by and before a tribunal constituted under section 21 (subsection (5)). The expenses of a tribunal, and the payment of remuneration and expenses to its members are for the Scottish Ministers (subsection (6)).

*Section 24 – Tribunal report*

43. Section 24 provides that the report of a tribunal must be in writing, contain the reasons for the tribunal's decision, and be submitted to the First Minister (subsection (1)), who must then lay the report before the Parliament (subsection (2)).

*Section 25 – Removal from office*

44. Section 25 provides for a judicial office holder's removal from office following the report of a tribunal constituted under section 21. Subsection (1) provides that the First Minister may remove an individual from the office of sheriff principal, sheriff, part-time sheriff, summary sheriff or part-time summary sheriff if the tribunal has reported that the individual is unfit to hold that office, and after the report has been laid before the Parliament. In the case of a sheriff principal, sheriff or summary sheriff, such removal requires an order made by statutory instrument under the negative procedure (subsection (2) and (3)).

## **Chapter 3 — Organisation of business**

*Sheriff principal's general responsibilities*

*Section 27 – Sheriff principal's responsibility for efficient disposal of business in sheriff courts*

45. Section 27, which substantially re-enacts the provisions of sections 15 and 16(1) of the 1971 Act, gives the sheriff principal responsibility to ensure the efficient disposal of business in sheriff courts (subsection (1)) and power to make such arrangements as appear necessary or expedient for the purpose of carrying out that responsibility (subsection (2)). In particular, the sheriff principal has power to allocate business among the judiciary of the sheriffdom (subsection (3)), and to give directions of an administrative character to such judiciary and to members of the staff of the Scottish Courts and Tribunals Service (subsection (5)). The "judiciary of the sheriffdom" is defined in section 125(2) as all judicial officers within the sheriffdom including part-time sheriffs and part-time summary sheriffs. 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 provisions in the Judiciary and Courts Act 2008.

*Section 28 – Sheriff principal’s power to fix sittings of sheriff courts*

46. Section 28, which re-enacts and updates section 17 of the 1971 Act, gives the sheriff principal power by order to prescribe where and when sheriff courts will sit and the descriptions of business to be disposed of at those sittings. The provisions of section 28 are again subject to the Lord President’s overall responsibility for the efficient disposal of business in the Scottish courts.

*Section 29 – Lord President’s power to exercise functions under sections 27 and 28*

47. Section 29 permits the Lord President to intervene where the Lord President considers that a sheriff principal has exercised functions under section 27 or 28 in a way which is prejudicial to the efficient disposal of business in the sheriff courts, is prejudicial to the efficient organisation or administration of those courts, or is otherwise against the public interest (subsection (1)). In such a case, the Lord President may rescind the exercise of the function by the sheriff principal and exercise the function (subsection (2)). This section makes equivalent provision to section 17A of the 1971 Act.

*Deployment of judiciary*

*Section 30 – Power to authorise a sheriff principal to act in another sheriffdom*

48. Sections 30 to 33 enable the Lord President to deploy and re-allocate sheriffs principal, sheriffs and summary sheriffs across sheriffdoms, and, in the case of sheriffs and summary sheriffs, across sheriff court districts.

49. Section 30 permits the Lord President to authorise the sheriff principal of one sheriffdom to exercise all or some of the functions of sheriff principal of another sheriffdom in any of the circumstances set out in subsection (1). Subsection (6) removes any doubt that a temporary sheriff principal may be asked to act in another sheriffdom while appointed.

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

50. Section 31 provides that a sheriff or summary sheriff may be directed by the Lord President to perform the judicial functions that that individual already performs in another sheriffdom or sheriffdoms until the Lord President directs otherwise (subsections (1) and (3)). It also provides that this may be instead of, or in addition to, the performance of the duties that that individual already performs in the sheriffdom in which they are based (subsection (2)) or, where that individual has already been directed to act in another sheriffdom, to that individual’s duties in that sheriffdom (subsection (4)).

*Section 32 – Power to re-allocate sheriffs principal, sheriffs and summary sheriffs between sheriffdoms*

51. This section enables the Lord President permanently to transfer sheriffs principal, sheriffs and summary sheriffs between sheriffdoms. (So far as sheriffs are concerned, this power re-enacts the existing provision in section 14(4) of the 1971 Act).

*Section 33 – Allocation of sheriffs and summary sheriffs to sheriff court districts*

52. Section 33 updates and replicates section 14(3) of the 1971 Act and extends its provisions to summary sheriffs. It provides that the Lord President is to designate in a direction a particular sheriff court district in which a sheriff or summary sheriff is to sit. Further it allows the Lord President to move a sheriff or summary sheriff to a different district within the sheriffdom by designation in a direction. Subsection (3) clarifies the interaction between the power in subsection (1) with the power of the sheriff principal to make temporary special provisions under section 27(3)(b), giving precedence to the sheriff principal's use of that power.

*Judicial specialisation*

53. Sections 34 to 37 are new provisions which implement the recommendations of the SCCR in relation to the desirability of greater specialisation in the sheriff courts.

*Section 34 – Determination of categories of case for purposes of judicial specialisation*

54. This section permits the Lord President to decide categories of cases within the sheriff courts which should be heard by judicial officers who specialise in that category of case.

55. Subsection (2) provides that the categories of cases designated for specialisation by the Lord President may be determined by subject matter, value or other such criteria as the Lord President considers appropriate. Subsections (3) and (4) give the Lord President further flexibility in relation to the operation of specialisation among the judicial officers.

*Section 35 – Designation of specialist judiciary*

56. Once categories of cases for specialist treatment have been determined by the Lord President, section 35 permits a sheriff principal to designate one or more sheriffs or summary sheriffs as specialists in one or more of those categories. Under subsections (5) and (6), the Lord President is permitted to similarly designate one or more part-time sheriffs or part-time summary sheriffs as specialists in cases falling within designated categories and which are within the competence of those judicial officers.

57. Subsection (7) provides 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 specialist, nor does it mean that a judicial officer who has not been designated as a specialist cannot deal with a matter that falls within a specialisation.

*Section 36 – Allocation of business to specialist judiciary*

58. Section 36 places a duty on both the Lord President and the sheriff principal of a sheriffdom, when allocating business within a sheriffdom, to 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 37 – Saving for existing powers to provide for judicial specialisation*

59. Section 37 provides that, notwithstanding the provisions of sections 34 to 36, 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**

60. This chapter of the Bill restates and updates the existing provisions of the 1907 and 1971 Acts 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 SCCR, and also makes fresh provision regarding the privative jurisdiction of the sheriff court (referred to in the Bill as the “exclusive competence”). It specifies the competence and jurisdiction of the summary sheriff. The territorial jurisdiction of sheriffs is re-stated and extended to summary sheriffs.

*Sheriffs: civil competence and jurisdiction*

*Section 38 – Jurisdiction and competence of sheriffs*

61. 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 restricted 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.

62. Actions for proving the tenor of documents and reduction are added to the list as recommended by the SCCR.

*Section 39 – Exclusive competence*

63. Section 39 provides that an order of value of £150,000 or less in civil proceedings may only be sought in the sheriff court (described in the Bill as falling within its exclusive competence).

64. Subsection (3) exempts family proceedings (defined in section 124), from the operation of this section, unless the only order sought is an order for payment of aliment. Subsection (4) provides that this section is subject to the operation of section 88(8) of the Bill which permits remit of cases to the Court of Session in exceptional circumstances. Subsection (5) provides that the Scottish Ministers may by order (subject to affirmative procedure) substitute for the sum of £150,000 another sum. Subsection (6) defines what is meant by an “order of value”. Subsections (7) and (8) provide that further detail on how the value of an order is to be determined may be set out in act of sederunt made by the Court of Session which may make different provision for different purposes.

*Section 40 – Territorial jurisdiction*

65. Section 40 re-enacts section 4 of the 1907 Act so far as it applies to civil proceedings provides for the territorial jurisdiction of the sheriff. Given the operation of section 123 which governs reference to ‘sheriff’ throughout the Bill, the reference to sheriff in this provision includes reference to any other member of the judiciary of the sheriffdom. The general provisions of the section are without prejudice to any other enactment or rule of law which has effect for the purposes of determining the territorial jurisdiction of a sheriff (subsection (4)), and are subject to an order under section 41(1) (subsection (5)).

*Section 41 – Power to confer all-Scotland jurisdiction for specified cases*

66. Section 41 provides that the Scottish Ministers may by order (subject to negative procedure) set out that the jurisdiction of a sheriff of a specified sheriffdom sitting at a specified sheriff court will extend throughout Scotland for specified kinds of civil proceedings, (such as personal injury proceedings)(subsection (1)). An order may be made by Ministers only with the consent of the Lord President (subsection (2)), and does not affect the jurisdiction of any other sheriff court, which may still deal with the kind of proceedings, nor does it restrict the specified court to only deal with the specified kinds of proceedings (subsection (3)). The section does not apply in relation to proceedings under the Children’s Hearings (Scotland) Act 2011 (subsection (5)).

*Section 42 – Jurisdiction over persons etc*

67. Section 42 makes provision in relation to the civil jurisdiction in the sheriff court. It is a re-enactment of section 6 of the 1907 Act. Section 6 of the 1907 Act is a source of jurisdiction in relation to certain civil matters, where no other legislation has impliedly or explicitly displaced its operation and accordingly its re-enactment is required in this section. In recognition, however, that section 6 has been largely but not completely displaced, subsection (3) provides that its re-enactment in section 42 is subject to any other rules of jurisdiction.

*Summary sheriffs: civil and criminal competence and jurisdiction*

*Section 43 – Summary sheriff: civil competence and jurisdiction*

68. Section 43 provides that a summary sheriff may exercise all of the jurisdiction and powers of the sheriff in relation to civil proceedings, but only with regard to the proceedings and matters listed in schedule 1 (subsection (1)). Subsection (2) provides that a sheriff still has jurisdiction and competence over the matters in schedule 1. Subsection (3) permits the Scottish Ministers by order to amend schedule 1. (For the procedure applying to such an order, see section 122).

*Section 44 – Summary sheriff: criminal competence and jurisdiction*

69. Section 44 provides that a summary sheriff may exercise all of the jurisdiction and powers of the sheriff in criminal investigations and proceedings (subsection (1)) including the powers of a sheriff under the Criminal Procedure (Scotland) Act 1995 (subsection (2)). This is subject to subsection (3), which exempts certain aspects of solemn criminal proceedings from the powers and jurisdiction of the summary sheriff. The provisions of this section are without prejudice to the jurisdiction and competence of a sheriff in relation to criminal investigations and proceedings (subsection (4)).

## **PART 2 - SHERIFF APPEAL COURT**

70. The SCCR recommended the establishment of a Sheriff Appeal Court to deal with all civil appeals from the sheriff court and all summary criminal appeals by an accused on conviction or sentence; appeals by the Crown on acquittal or sentence; and bail appeals (emanating from the sheriff court or the justice of the peace court).

71. 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 civil appeals from cases heard at first instance by the sheriff court will lie to the Sheriff Appeal Court. It will have power to remit or transfer a particularly important or complex appeal to the Inner House. Onward appeal to the Inner House from the Sheriff Appeal Court 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.

72. 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, on a point of law.

73. The provisions in this Part of the Bill provide for the establishment of the Sheriff Appeal Court, its membership, its clerking arrangements and its rules of court etc. 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*

74. This section provides for the establishment of the Sheriff Appeal Court as a “court of law”. This point is expanded upon in section 46. Subsection (2) provides that the court is made up of judicial office holders each known as an Appeal Sheriff.

#### *Section 46 – Jurisdiction and competence*

75. Subsection (1) sets out the jurisdiction and competence of the Sheriff Appeal Court, providing that it will determine appeals to such extent as is provided for in the Bill or in any other enactment. With regard to the Bill, the court will hear civil appeals under the provisions set out in Part 4 and criminal appeals under the provisions set out in Part 5. The court is a collegiate one with a decision of the court being constituted by a decision of the Appeal Sheriffs. Subsection (3) expands upon the phrase “court of law” used in section 45, putting beyond any doubt that the Sheriff Appeal Court is a court with the same inherent features as other courts in Scotland. This is intended to make clear that the court has the inherent jurisdiction of a 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, are to apply.



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

76. This section makes specific provision about precedent. While the position of the court in the hierarchy of courts in Scotland should ensure that its decisions will be binding upon those courts whose appeals it hears, this section puts that beyond doubt. Accordingly this section provides that in its interpretation or application of the law, the criminal decisions of the Sheriff Appeal Court will be binding on all JP courts throughout Scotland; and, the civil and criminal decisions of the Sheriff Appeal Court will be binding on all sheriffs throughout Scotland, as well as on the Sheriff Appeal Court (unless that Court is composed of a greater number of Appeal Sheriffs than composed the Court which made the decision). The use of ‘sheriff’ in subsection (1)(a) and (2), will take on the definition in section 123, and will therefore bind the decisions of a sheriff principal sitting as a judge of first instance and any other judicial officer in the sheriff court.

77. Subsection (2) puts beyond doubt that a decision of the Sheriff Appeal Court also binds sheriffs in solemn criminal proceedings (before a sheriff and jury). Part 5 of the Bill does not provide for an appeal from a solemn case in the sheriff court. Accordingly it was thought necessary to ensure that, despite the absence of such an appeal, the interpretation and application of the law as set out by the Sheriff Appeal Court will be the same when applied by the sheriff, whether in a summary or solemn case.

**Chapter 2 – Appeal sheriffs**

*Section 48 – Sheriffs principal to be Appeal Sheriffs*

78. This section makes provision for sheriffs principal to automatically become Appeal Sheriffs without the need for formal appointment. Sheriffs principal will thus hold two offices. Holding office as an Appeal Sheriff is dependent upon the sheriff principal continuing to hold office as a sheriff principal. Further, suspension from the office of sheriff principal will mean suspension from the office of Appeal Sheriff.

*Section 49 – Appointment of sheriffs as Appeal Sheriffs*

79. Section 49 provides that sheriffs who have held office as such for at least five years may be appointed by the Lord President to be Appeal Sheriffs. The Bill makes no distinction between Appeal Sheriffs who are appointed by virtue of section 48 or 49 in terms of the judicial functions of Appeal Sheriffs or judicial authority; accordingly an Appeal Sheriff appointed by virtue of section 48 is not to be treated as a more senior Appeal Sheriff to an Appeal Sheriff appointed under section 49.

80. Sheriffs appointed under this section may continue to act as sheriffs. The number of appointed Appeal Sheriffs will be a matter for the Lord President. In a similar way to section 48, holding office as an Appeal Sheriff is dependent upon the sheriff continuing to hold office as a sheriff, and suspension from the office of sheriff will mean suspension from the office of Appeal Sheriff.

*Section 50 – Re-employment of former Appeal Sheriffs*

81. Section 50 enables 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 in the sheriff court. Accordingly, it provides that the Lord President may appoint as a temporary measure, in order to facilitate the disposal of business, former Appeal Sheriffs to act as an Appeal Sheriff. In order to be able to be appointed, the former Appeal Sheriff must not have been removed from office under section 25 or 49(7), nor be aged 75 or over.

#### *Section 51 – Expenses*

82. This section allows the Scottish Courts and Tribunals Service, as it sees fit, to pay expenses to Appeal Sheriffs which are reasonably incurred in the performance of the duties of Appeal Sheriffs.

### **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 those Appeal Sheriffs who are also sheriffs principal. Provision is also made here for where the President or Vice President is unable to carry out the function of the office that these individuals hold or is suspended from office. 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. Accordingly the President or Vice President will, in terms of judicial functions or judicial authority, not be treated as a more senior Appeal Sheriff to an Appeal Sheriff who does not hold that role.

#### *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 similar to the sheriff principal's responsibility for this in his or her sherriffdom. The President has wide powers in subsection (2) to make such arrangements as are necessary or expedient in the carrying out of that responsibility. Subsection (4) provides that, in carrying out the responsibility imposed by subsection (1), the President may give administrative directions to those persons referred to in subsection (5). Subsection (6) makes it clear however that the President's responsibilities conferred by this section are subject to the overall responsibility of the Lord President for the efficient disposal of business in the Scottish courts.

#### *Sittings*

##### *Section 55 – Sittings of the Sheriff Appeal Court*

85. Subsection (1) permits maximum flexibility to allow the Sheriff Appeal Court to sit at any place in Scotland designated by the Bill as a place for the holding of a sheriff court (which may be as general as a reference to a town or city). For example, this means that, although the Sheriff Appeal Court could sit centrally in Edinburgh for criminal appeals, there will remain the

possibility of civil appeals being heard in the sheriffdom in which they originated. (This also includes the possibility that criminal and civil appeals could be heard in Parliament House in Edinburgh as “Edinburgh” is currently (and will remain) a place designated where a sheriff court is to be held.) 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 determine that a case be heard by 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. Individuals can hold the office of the Clerk of the Sheriff Appeal Court only if they also hold the office of sheriff clerk. Provision is made for the Scottish Courts and Tribunals Service to determine periods of appointment and terms and conditions for individuals’ appointed as Clerk and Deputy Clerks. The Clerk and Deputy Clerks of the Sheriff Appeal Court are staff of the Scottish Courts and Tribunals Service. The Clerk, with permission of the Scottish Courts and Tribunals Service, may delegate his or her functions to a Deputy Clerk of the Sheriff Appeal Court or a member of staff of the Scottish Courts and Tribunals Service, for example the functions conferred by section 60(1)(b). Further provision is made for the Scottish Courts and Tribunals Service to make provision to cover temporary absences of the Clerk, or Deputy Clerk, with other members of staff of the Scottish Courts and Tribunals Service.

*Records*

*Section 60 – Records of the Sheriff Appeal Court*

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

**PART 3 – CIVIL PROCEDURE**

**Chapter 1 – Sheriff court**

*Civil jury trials*

89. Sections 61 to 69 provide for civil jury trials in certain sheriff courts. The intention is to introduce a procedure similar to that operating in the Court of Session and, accordingly, the provisions largely reflect the language and procedures currently set out in the Court of Session Act 1988 (the “1988 Act”).

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

90. Section 61(1) read with subsection (8) sets out the types of actions which may require a jury trial. The section only applies to those types of civil proceedings which have been specified in an order made under section 41, and only at the sheriff court or courts which have been specified as having jurisdiction throughout Scotland for those types of civil proceedings. Further, subsection (8) provides that a civil jury trial is only to take place for those types of proceedings which, if they were competent in the Court of Session, would be tried by a jury there, under section 11 of the 1988 Act.

91. Section 61(2) makes it clear that a jury trial must take place where proceedings have been remitted to probation (i.e. that it has been decided to allow evidence to be led to establish the facts). This qualification makes it clear that it is unnecessary to have a jury trial where the pleadings are irrelevant or there is some other fundamental problem. However, subsection (2) also makes it clear that a jury trial will not go ahead if the parties agree otherwise or special cause is shown. The use of the phrase “special cause” is deliberately identical to that in section 9(b) of the 1988 Act and subsection (3) explicitly provides that the sheriff will apply that test in the same way as the Court of Session currently does.

92. Subsection (4) sets out the questions which are to be put to the jury, being the “issues” put to the jury in the equivalent action in the Court of Session, in terms of section 12 of the 1988 Act. Again, as with civil jury trials in the Court of Session, a jury will consist of 12 people, subsection (5) with subsection (6) providing the equivalent authority to section 12 of the 1988 Act in relation to the summoning of jurors.

*Section 62 – Selection of the jury*

93. Section 62 is based on section 13 of the 1988 Act, with the continued expectation that practice and procedure in the Court of Session, including with regard to the effect of any challenge to a potential juror, will be adopted in this regard in the sheriff court. Further detailed rules in relation to civil jury trials in the sheriff court, for example on how the ballot is to be conducted, may be made in an act of sederunt under section 97.

*Section 63 – Application to allow the jury to view property*

94. Section 63 is based on section 14 of the 1988 Act. It provides for a party to the proceedings to apply to the sheriff to allow the jury to view any property which is relevant to the proceedings.

*Section 64 – Discharge or death of juror during trial*

95. Section 64 provides that the sheriff may allow a juror not to take any further part in the proceedings, and for the way in which the proceedings are to continue should a juror be permitted to take no further part or die during proceedings. It 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*

96. Section 65 is based on section 16 in the 1988 Act and provides similarly that if an objection is taken during the trial to the opinion or direction of the sheriff, that this is not to prevent the trial from proceeding nor the jury returning the verdict and assessing damages.

*Section 66 – Return of verdict*

97. Section 66 is drawn from section 17 of the 1988 Act. It concerns the determination of a verdict by the jury and the status of that verdict, and includes provisions on the selection of a juror to speak for the jury and the ability of the sheriff to discharge the jury and order another jury trial should the jury be unable to agree upon a verdict after a period of three hours. Court rules will be provided under section 97 in relation to giving effect to the jury's verdict.

*Section 67 – Application for new trial*

98. 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. It concerns the grounds under which a party to the proceedings may apply to the Sheriff Appeal Court for a new trial and what that court may do with such an application. Subsection (4) makes it clear that the powers of the Sheriff Appeal Court are subject to the operation of section 68 which sets out conditions on those powers. 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 and provide where the Sheriff Appeal Court may, instead of granting a new trial, set aside the decision of the jury and enter a judgment in favour of the unsuccessful party.

*Section 68 – Restrictions on granting a new trial*

99. Section 68 is drawn from the provisions of section 30 of the 1988 Act. It provides for various circumstances where the court must grant a new trial, may grant a new trial restricted to the question of damages, or may not grant a new trial. 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*

100. Section 69 is based on section 31 of the 1988 Act. It provides that a party to the case may apply to the Sheriff Appeal Court for that court to direct that a verdict be returned in whole (or in part) in that party's favour. It further sets out what the Sheriff Appeal Court may do in respect of that application.

*Simple procedure*

101. At present, cases for sums up to £5,000 fall to be dealt with under small claims or summary cause procedure in the sheriff court. The SCCR concluded that it was unnecessary to have two different sets of procedures for cases for £5,000 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 £5,000 for the time being, but recommended the creation of a new procedure for cases

under £5,000, to be dealt with primarily by summary sheriffs. The Bill refers to this new procedure as “simple procedure”.

102. 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 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*

103. Subsection (1) establishes a new type of civil proceedings in the sheriff court called simple procedure. Simple procedure replaces the form of procedure known as summary cause which will be abolished through the repeal of sections 35 to 38 of the 1971 Act by paragraph 6 of schedule 4 to the Bill. The abolition of summary cause proceedings will also mean the abolition of small claim proceedings which are a subset of summary cause proceedings. Subsection (2) makes it clear that most of the provisions about simple procedure will be made by court rules made under section 97.

104. Subsection (3) lists the types of proceedings which can only be brought by simple procedure, providing a monetary limit of £5,000 with respect to such proceedings. Subsection (5) provides that court rules made by an act of sederunt by the Court of Session will determine the way in which that sum may be calculated. Subsection (9) provides that the £5,000 limit may be varied by the Scottish Ministers by order (which is made subject to affirmative procedure by virtue of section 122(2)(a) of the Bill).

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

105. Section 71 re-enacts and updates the drafting of section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963. It provides that, regardless of the general rules in any enactment on simple procedure, that an action for aliment where the amount claimed does not exceed a certain sum may be brought subject to simple procedure. The sum set by the section may be varied by an order made by the Scottish Ministers, subject to negative procedure. Given the re-enactment of section 3, the 1963 Act is now wholly repealed by paragraph 21 of schedule 4 to the Bill.

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

106. Section 72 establishes that, as far as possible, the rules of court which govern simple procedure will enable an interventionist and problem-solving approach. It is to be read subject to the obligation on the Scottish Civil Justice Council to draft the rules in accordance with the principle that they should be as clear and easy to understand as possible, in terms of section 2(3)(b) of the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013. The obligation to make rules of court which reflect such principles is deliberately framed to be exercised “so far as possible” in order to avoid any obligation to create rules that may be 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 – Service of documents*

107. Section 73, which is derived from section 36A of the 1971 Act, permits rules made under section 97 to provide for the sheriff clerk to be required to effect service of any document on behalf of parties in a simple procedure case.

*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. Ordinary cause procedure will not exist after the Bill is enacted (by virtue of the repeal of Schedule 1 to the 1907 Act by schedule 4 paragraph 4(h) of the Bill). However the new 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. Section 75 provides for cases which are not being dealt with under simple procedure to be transferred to that form of proceedings, provided they are of a type that could be brought under simple procedure. 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 provides for the transfer of cases out of simple procedure. Given the abolition of ordinary cause rules, it is left to court rules under section 97 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 case. 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. Section 77 re-enacts section 36B of the 1971 Act with modifications to reflect the new system of simple procedure. Subsection (1) provides that the Scottish Ministers may prescribe, by order (subject to affirmative procedure by virtue of section 122(2)(a)), categories of simple procedure to which alternative expenses rules will apply. Subsection (2) makes it clear that these categories will be defined by reference to the value of the claim or the subject matter of the claim, permitting types of actions, for example personal injury, to be excluded from any limitation on expenses.

112. An order under subsection (3) could also specify some civil proceedings where different expenses could apply, excepting them from categories set out in subsection (2).

113. Subsection (4) then sets out cases in which those rules are disapplied. Subsection (5) 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 one of the parties to the case. Subsections (6)

and (7) allow the sheriff to make an direction disapplying the restrictions on expenses in an order under subsection (1), in complex cases.

*Section 78 – Appeals from simple procedure cases*

114. This section provides that an appeal on a point of law may be taken to the Sheriff Appeal Court, however only against the final judgment of the sheriff. No provision is made 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.

*Section 79 – Transitional provision: summary causes*

115. Section 79 makes provision to deal with the transition between summary cause procedure and its replacement, simple procedure. This ensures that all references in legislation which currently refer to summary cause are to be read as referring to simple procedure.

*Interdicts and other order: effect outside sheriffdom*

*Section 80 – Interdicts having effect in more than one sheriffdom*

*Section 81 – Proceedings for breach of an extended interdict*

116. Section 80 gives a sheriff competence to grant an interdict or interim interdict having effect outwith the sheriff's sheriffdom.

117. Section 81 sets out that these types of interdicts are to be known as "extended interdicts", and that proceedings for a breach of an extended interdict will be capable of being validly raised and enforced by an action in a number of sheriff courts: in the sheriffdom in which the defender is domiciled; in the sheriffdom in which the interdict was granted; and in the sheriffdom in which the alleged breach occurred.

118. Further, on the application of a party to the proceedings or on the sheriff's own initiative, a sheriff may transfer proceedings to a sheriff of another sheriffdom, if satisfied that this would be more appropriate. This sheriff may transfer the proceedings to any other sheriffdom in this case, and is not limited to the sheriffdom in which the defender is domiciled, the sheriffdom in which the interdict was granted or the sheriffdom in which the alleged breach occurred. Where a case is transferred to another sheriff in this way, then that sheriff has the competence to consider and determine the proceedings.

119. This provision is a permissive one, however, and makes it clear that the sheriff will be able to use discretion in determining whether proceedings should be raised before them. This discretion applies to the operation of all the rules in the section. It is anticipated that, by providing that the test does not affect the power of the sheriff to decline jurisdiction, a sheriff will continue to be able to decline jurisdiction on the basis that his or her court is not an appropriate forum for determining the matter in dispute (*forum non conveniens*).

*Section 82 – Power to enable sheriff to make orders having effect outside sheriffdom*

120. Section 82 enables the Scottish Ministers to provide by order (subject to negative procedure) for the types of orders (including interim orders) which a sheriff has competence to



make which would be capable of having effect and be able to be enforced outwith the sheriffdom in which they were granted. This provides that other types of court proceedings may be identified and the effect and enforcement of these proceedings extended in a similar way to that of interdict.

#### *Execution of deeds relating to heritage*

##### *Section 83 – Power of sheriff to order sheriff clerk to execute deed relating to heritage*

121. Section 83 provides, where the grantor of any deed relating to heritable property (as defined in subsection (6)), is unable, refuses or fails to execute a deed relating to heritable property, or cannot be found, that the sheriff may make an order which dispenses with the need for the grantor to execute the deed and directs the sheriff clerk to execute the deed. The effect of an execution by the sheriff clerk is that the deed is taken to have the same effect as it would have if it had been executed by the grantor. This section 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 84 – Interim orders*

122. At present there are no statutory powers conferring on sheriffs a general power to grant interim orders corresponding to section 47 of the 1988 Act. This suggests that there is a real doubt regarding the power of a sheriff to grant an interim order *ad factum praestandum* (that is, an order requiring that something (other than the payment of a sum of money) be done pending the final determination of the proceedings) 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.

## **Chapter 2 – Court of Session**

##### *Section 85 – Judicial review*

123. Section 85 inserts new sections 27A to 27D into the 1988 Act which reform the procedures for petitions for judicial review as recommended in Chapter 12 of the SCCR. At present, there are no statutory time limits within which an application for judicial review must be made. Section 27A provides that a time limit of three 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. This is subject to the exercise of the court's discretion to permit an application to be made outwith that period, for example if there is good reason for delay in making an application, or where the court is satisfied that injustice would result if an application presented outwith the time period is not allowed to proceed. Sections 27B, 27C and 27D 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 matter and whether the application has a real prospect of success.

124. At present, in order to bring a petition for judicial review in Scotland, a petitioner must have title and interest to sue. The Supreme Court in *Axa General Insurance Ltd & Ors v the Lord Advocate & Others* [2011] UK SC 46<sup>4</sup> reviewed the law on title and interest as regards judicial review provision – in particular, Lord Hope at paragraphs 62 to 63 and Lord Reed at paragraphs 170 and 175. The decision related to the “standing” of a third party to enter the process as respondents, but it is clear from the judgments that the statements on “standing” apply to applicants for judicial review, and that the substantive law in Scotland allows for a single test in which the petitioner for judicial review must demonstrate a sufficient interest in the subject matter of the proceedings. The Bill reflects this in section 27B(2)(a) as part of the permission test.

125. The reference to a real prospect of success in section 27B(2)(b), reflects Lord Gill’s recommendations. In deciding whether or not to grant permission, the court will assess not whether the case is merely potentially arguable but whether it has a realistic prospect of success subject to the important qualification that arguability cannot be judged without reference to the nature and gravity of the issue to be argued. Court rules will set out the process for the permission hearing. Lord Gill envisaged that the applicant would be required to serve upon the respondent and any interested party, within seven days of lodging the application, the application itself, a time estimate for the permission hearing, any written evidence in support of the application, copies of any document on which the applicant proposes to rely and a list of essential documents for advance reading by the court with the respondent having 21 days to answer the application and to decide whether to oppose the granting of leave.

126. The possible outcomes at the permission stage are that the court may:

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

127. Section 27C provides that, if the permission to apply for judicial review is refused or granted subject to conditions or only on particular grounds and this was done without an oral hearing, then the applicant has seven days within which to request an oral hearing to review the original decision.

128. The request for review requires to be considered by a different judge. Section 27C(6) provides that section 28 of the 1988 Act does not apply where there is a right to request a review at an oral hearing. In other words, there is no right of appeal to the Inner House against a decision made under section 27B – an applicant who wishes to challenge the decision must request a review under section 27B(2). Similarly, there is no right of appeal to the Inner House if the judge refuses the request for a review.

129. Under section 27D, where the court refuses permission or grants permission subject to conditions or only on particular grounds following an oral hearing (whether at the first stage of

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<sup>4</sup> [http://supremecourt.uk/decided-cases/docs/UKSC\\_2011\\_0108\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf)

permission or following a request under section 27C(2)), the applicant can appeal to the Inner House.

130. The provisions in the Bill also deal with the interaction between the new judicial review permission stage and applications to the Court of Session for judicial review of unappealable decisions of the Upper Tribunal for Scotland. Section 45(4) of the Tribunals (Scotland) Bill (presently before the Parliament) makes provision preventing the Court of Session and the Upper Tribunal for Scotland from granting permission for a second appeal unless the second appeals test set out by the Supreme Court in *Eba v Advocate General for Scotland* [2011] UKSC 29<sup>5</sup> is satisfied - the second appeal raises an important point of principle or practice or there is some other compelling reason for allowing it to proceed.

131. The Bill ensures that the same second appeals test is applied at the permission stage where the application for judicial review relates to a decision of the Upper Tribunal for Scotland in an appeal from the First-tier Tribunal for Scotland under section 41 of the Tribunals (Scotland) Bill – see section 27B(3). Therefore, the court may only grant permission for the application to proceed if it is satisfied that the second appeals test is satisfied in addition to the new judicial review permission test set out in section 27B(3)(a) and (b). The second appeals test is set out in section 27B(3)(c).. It will be necessary for a section 104 order under the Scotland Act 1998 to make similar provision to section 27B(3) to ensure that the second appeals test is dealt with at the permission stage where the application for judicial review relates to an unappealable decision of the UK Upper Tribunal as those decisions relate to reserved matters.

#### *Section 86 – Interim orders*

132. The SCCR recommended at paragraphs 142 -143 of Chapter 4 that powers to make orders *ad factum praestandum* (that is, orders requiring the performance of a certain act other than the payment of a sum of money) and orders for specific implement on an interim or final basis conferred on the Scottish Land Court by section 84 of the Agricultural Holdings (Scotland) Act 2003 should also be conferred on the Court of Session and the sheriff court. Section 87 confers on the Court of Session in section 47 of the Court of Session Act 1988 a power to make an order (either final or interim) *ad factum praestandum*.

#### *Section 87 – Warrants for ejection*

133. The SCCR recommended that the Court of Session should have jurisdiction to grant a decree of removing or warrant of ejection (paragraph 144, Chapter 4). The Court of Session can only grant a decree of removing if this is ancillary to another remedy sought. Section 87 inserts a new section 47A into the Court of Session Act 1988 giving the Court of Session competence to grant a warrant of ejection where it grants a decree for removing, so that no further order is required to compel the occupier of land to give up occupation.

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<sup>5</sup> [http://supremecourt.uk/decided-cases/docs/UKSC\\_2010\\_0206\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2010_0206_Judgment.pdf)

### **Chapter 3 - Remit of cases between courts**

#### *Section 88 – Remit of cases to the Court of Session*

134. Subsections (1) and (2) permit a sheriff to remit a case (to which the exclusive competence of the sheriff court under section 39 does not apply i.e. 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.

135. The recommendation that the Court of Session should be able to decline the remit of a case below the exclusive competence (where section 39 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 39 does apply to be remitted to that Court if there are exceptional circumstances. Under subsection (5), the Court of Session may permit the proceedings to be remitted “if special cause is shown”.

136. The Court can take into account its own operational and business needs when considering a request to remit a case (rather than simply the needs of the parties) by virtue of subsection (6).

137. 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). The decision of the sheriff under subsection (2) may be appealed to the Sheriff Appeal Court (subsection (9)).

#### *Section 89 – Remit of cases from the Court of Session*

138. The SCCR 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 of Session would be entitled to take into account the business and operational needs of the Court of Session as well as the interests of the parties. Section 89 implements these recommendations.

139. Subsection (1) and (2) sets out that proceedings must be remitted to the sheriff court (unless there are special reasons for not doing so), if at any stage the court is of the view that the value of the order is likely to be below the value set for the time being in section 39(1)(b)(ii). 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 90 – Remit of cases to the Scottish Land Court*

140. Section 90 reproduces section 37(2D) of the 1971 Act to permit a case to be remitted by the sheriff to the Scottish Land Court in appropriate cases. There is no appeal against a decision to remit or not to remit.

## **Chapter 4 – Lay representation for non-natural persons**

### *Section 91 – Key defined terms*

141. Section 91 sets out key definitions of non-natural persons (companies and other bodies) in Chapter 4, as well as lay and legal representatives for the purposes of Chapter 4. Chapter 4 makes clear that non-natural persons are entitled to lay representation in certain circumstances in simple procedure cases, and may be permitted, in certain circumstances to be represented by a lay person in other civil proceedings.

### *Section 92 – Lay representation in simple procedure cases*

142. Section 92 sets out the scope for permitting lay representation on behalf of non-natural persons in simple procedure cases. This section is subject to provision that the Court of Session may make by act of sederunt under section 94 regulating the authorisation of lay representatives for non-natural persons.

### *Section 93 – Lay representation in other proceedings*

143. Section 93 sets out the scope for permitting lay representation on behalf of non-natural persons in non-simple procedure cases in the sheriff court, the Sheriff Appeal Court and the Court of Session. The decision on whether to permit lay representation in non-simple procedure cases lies with the court, who may grant permission subject to the fulfilment of the conditions in subsection (3). The suitability of the choice of lay representative is assessed in light of subsection (4) with the assessment of whether permitting lay representation is in the interest of justice in subsection (6). The assessment of such concepts as “interests of justice” and “suitability” in subsection (3) will ensure that the power to determine whether to permit lies firmly in the hands of the court taking into account the particular circumstances of the case.

### *Section 94 – Lay representation: supplementary provision*

144. Section 94 enables the Court of Session to make further provision by act of sederunt about granting permission for lay representatives under section 93 and, more generally, the way that the proceedings are conducted by lay representatives. Subsection (2) sets out particular provisions that the Court of Session may make in the act of sederunt through its powers in subsection (1) including enabling the court (including the sheriff in the case of proceedings in the sheriff court) to make an order preventing a lay representative from conducting proceedings other than non-simple procedure cases before the court and allowing applications to be considered in chambers and without hearing the parties. Subsection (2) is not an exhaustive list of the provisions which may be made under subsection (1).

## **Chapter 5 – Jury service**

### *Section 95 – Jury service*

145. Section 95 provides for the alignment of age limits for jury service for jurors in civil cases with those for jurors in criminal cases i.e. it removes the upper age limit for jurors in civil cases of 65 years of age. It does this through an amendment to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (as amended by the Criminal Justice and Licensing (Scotland) Act 2010). Section 95 also brings arrangements for claiming excusal as of right from civil jury service into line with those established for criminal jury service by the Criminal Justice and

Licensing (Scotland) Act 2010 i.e. that civil jurors aged 71 or over could claim excusal as of right. Jurors serving in criminal cases who attended for jury service but did not serve had their automatic excusal time shortened from five years to two years by the 2010 Act, and this is now applied to jurors serving in civil cases.

## **Chapter 6 – Regulation of procedure and fees**

146. Sections 96 and 97 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 96) and in the sheriff court and the Sheriff Appeal Court (section 97). 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.

147. Given the critical role which rules of court will therefore have in implementing the SCCR, the powers granted in sections 96 and 97 provide the vires for rules of court made in respect of the matters enumerated in those sections.

### *Procedure*

#### *Section 96 – Power to regulate procedure etc in the Court of Session*

148. Section 96 replaces sections 5 and 5A of the 1988 Act with a new section 5, which gives the Court of Session a power to make provision in acts of sederunt concerning the procedure and practice of the Court of Session. Subsection (1) of new section 5 contains a broad, general power to make provision regarding procedure and practice. Subsection (2) contains some specific, illustrative examples of the sort of matters which are procedure and practice for the purposes of this power, including the conduct and management of proceedings in the Court of Session, the forms of documents used, appeals against decisions, awards of expenses and the representation of parties by those otherwise not qualified to do so. Given the width of subsection (1), subsection (2) is not designed to be exhaustive, rather it demonstrates a widening of what can be described as practice and procedure.

149. The approach to the description of the powers of the Court contrasts with the specific and narrower powers contained in the original version of section 5 of the 1988 Act and is designed to effect a substantial widening of the powers of the Court of Session to regulate its practice and procedure.

150. Subsection (3) of new section 5 allows these acts of sederunt to make various types of ancillary provision, and subsection (4) clarifies that these new powers do not affect any existing power to make court rules.

#### *Section 97 – Power to regulate procedure etc. in the sheriff court and the Sheriff Appeal Court*

151. Section 97 is a replacement for the power to make rules of court in relation to the sheriff court in section 32 of the 1971 Act and extends the power to rules in relation to the Sheriff Appeal Court. It gives the Court of Session a broad power to make acts of sederunt concerning the procedure and practice to be followed in civil proceedings in the sheriff court and Sheriff Appeal Court. Subsection (1) contains a broad general power to make provision regarding procedure and practice. Subsection (2) contains some specific illustrative examples of the sort of

matters which are procedure and practice for the purposes of this power, including the conduct and management of proceedings in the sheriff court and Sheriff Appeal Court, the forms of documents used, appeals against decisions, awards of expenses and the representation of parties by those otherwise not qualified to do so.

152. While of a similar nature to section 32 of the 1971 Act, the wider general illustrative examples set out in subsection (2) demonstrate a substantial widening of what can be described as practice and procedure.

153. Subsection (3) provides that the rule-making power is subject to the provisions in sections 70 to 78 concerning simple procedure. Subsection (4) allows these acts of sederunt to make various types of ancillary provision. Subsections (5) and (6) require the Court of Session to consult with the Scottish Civil Justice Council when making acts of sederunt which were not prepared in draft by the Council. Subsection (8) clarifies that these new powers do not affect any existing power to make court rules.

#### *Fees*

##### *Section 98 – Power to regulate fees in the Court of Session*

154. Section 98 inserts a new section 5ZA into the Court of Session Act 1988, which gives the Court of Session a broad power to make acts of sederunt concerning the fees, including the fees recoverable in an award of judicial expenses, of various office-holders and persons in relation to proceedings in the Court of Session. After consulting the Lord President, the Scottish Ministers can, by order (subject to negative procedure by virtue of section 122(3)), specify new persons in respect of whom this power may be exercised.

##### *Section 99 – Power to regulate fees in the sheriff court and the Sheriff Appeal Court*

155. Section 99 is a replacement for section 40 of the 1971 Act. It gives the Court of Session a broad power to make acts of sederunt concerning the fees, including the fees recoverable in an award of judicial expenses, of various office-holders and persons in relation to proceedings in the sheriff court and Sheriff Appeal Court. After consulting the Lord President, the Scottish Ministers can, by order (subject to negative procedure by virtue of section 122(3)), specify new persons in respect of whom this power may be exercised.

## **Chapter 7 – Vexatious proceedings**

### *Section 100 – Vexatious litigation orders*

#### *Section 101 – Vexatious litigation orders: further provision*

156. Sections 100 and 101 replace and update the Vexatious Actions (Scotland) Act 1898. They retain the role of the Lord Advocate as guardian of the public interest, permitting the Lord Advocate to seek a ‘vexatious litigation order’ from the Inner House which requires the vexatious litigant to obtain the consent of a Lord Ordinary prior to raising a civil action (section 100(2)(a)). The test for obtaining an order from the Inner House, and the test which requires to be met by a litigant in seeking permission from a judge of the Outer House remains mostly the same but has been updated with a more modern form of drafting (section 101(1) and (4) respectively). For the first time however, the Court in determining whether to grant a vexatious

litigation order will be able to take into account the proposed vexatious litigant's behaviour in proceedings outwith Scotland (section 101(2)).

157. The sections also allow the Lord Advocate to seek to prevent a vexatious litigant from taking a specified step in specified on-going proceedings (section 100(2)(b)). This power is based on the similar powers of the Attorney General of England and Wales in section 42 of the Senior Courts Act 1981 and the existing power of the Lord Advocate in 33(2)(b) the Employment Tribunals Act 1996. Further, the court may also determine that a vexatious litigation order has effect only for such a period as specified in the order (section 100(4)).

158. Subsections (6) to (8) of section 101 make provision permitting a court dealing with on-going civil proceedings that are halted by an order under section 100(2)(b) to make orders in those proceedings in consequence, including with regard to the disposal of those proceedings.

#### *Section 102 – Power to make orders in relation to vexatious behaviour*

159. Section 104 allows the Scottish Ministers to make regulations (subject to negative procedure by virtue of section 122(3)) to empower the courts to deal with vexatious behaviour. Scottish Ministers will require to consult the Lord President prior to making regulations. The test to be employed for the regulations, is to make provisions in relation to a person who has behaved in a vexatious manner.

160. This section is designed to empower the courts to deal with vexatious behaviour and abuse of process in a similar way to the use of Civil Restraint Orders (CROs) by the courts of England and Wales. CROs are part of the inherent powers of the courts of that jurisdiction and are a form of order which may be granted by them in response to unmeritorious applications or claims by a litigant. The effect of such orders is to require a litigant to obtain the permission of a specified judge or court (as the case may be) prior to making applications in a particular case or cases, or from raising actions, either generally or in specific courts. They are a flexible, court-led response to abuse of the court process, which can be tailored to ensure that the rights of the litigant in question are balanced against both the rights of the other parties to any action and the efficient operation of the court.

161. Despite section 102 there will continue to be a role for the Lord Advocate as guardian of the public interest (under section 100 and 101): it may be possible for a vexatious litigant, through a wide geographical spread of different actions, not to trouble one court sufficiently to trigger the court-led sanction, but in his or her behaviour overall, trouble the system or one litigant in a variety of courts. That said, now that the courts will be given this power, it is expected that the number of actions required to be taken by the Lord Advocate will decrease.

## **PART 4 – CIVIL APPEALS**

### *Appeals to the Sheriff Appeal Court*

#### *Section 103 – Abolition of appeal from a sheriff to the sheriff principal*

162. While the office of sheriff principal will continue, section 103(1) abolishes the right of appeal from the sheriff to the sheriff principal in civil proceedings. 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 104 – Appeal from a sheriff to the Sheriff Appeal Court*

163. Section 104 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. Permission to appeal is not required in relation to the matters set out in subsection (1). Subsection (2) provides that permission 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 105 – Sheriff Appeal Court's powers of disposal in appeals*

164. Section 105 sets out the powers of disposal available to the Sheriff Appeal Court. The power in subsection (1)(a) is designed to be wide and is illustrated, but not limited, by the specific disposals listed in sub-paragraphs (i) to (v). Subsection (2) makes it clear that the provisions do not limit the inherent powers possessed by the Sheriff Appeal Court as a court of law conferred under section 46(3).

*Section 106 – Remit of appeal from Sheriff Appeal Court to Court of Session*

165. Section 106 permits a case to be remitted for the consideration of the Inner House of the Court of Session. However, 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. Accordingly, section 106(2)(b) permits the Sheriff Appeal Court to remit an appeal on the application of a party to the Court of Session only if the Sheriff Appeal Court considers that it involves complex or novel points of law.

*Appeals to the Court of Session*

*Section 107 – Appeal from the Sheriff Appeal Court to the Court of Session*

166. Section 107 provides for an appeal to the Court of Session from a final judgment of the Sheriff Appeal Court, subject to a requirement to obtain permission, in the first instance from the Sheriff Appeal Court and, if refused, then from the Court of Session (subsection (1)). This further right of appeal from a first instance decision is 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 permission 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 108 – Appeal from the sheriff principal to the Court of Session*

167. There are some enactments which provide for applications direct to the sheriff principal rather than the sheriff. Section 108 deals with such first instance judicial decisions made by

sheriffs principal and makes it clear that appeals from such judgments are to the Court of Session rather than the Sheriff Appeal Court.

*Section 109 – Appeals: granting of leave or permission and assessment of grounds of appeal*

168. Section 109 inserts a new section 31A into the Court of Session Act 1988 to give the Court of Session power to provide by act of sederunt for a single judge (a) to determine any applications to the Inner House for leave or permission to appeal to the Inner House; and (b) to consider any appeal proceedings initially (and, where appropriate, after leave or permission has been granted).

169. Section 109 relates to paragraphs 97 to 99 of Chapter 4 of the SCCR which also referred to the Inner House Business Review by Lord Penrose which recommended at paragraph 6.27 what the SCCR termed a “sift mechanism” whereby a single Inner House judge could consider grounds of appeal.

170. By way of background to the new provisions, it is relevant to note that section 2(4) of the 1988 Act provides that, subject to section 5(ba), the quorum for a Division of the Inner House shall be three judges. Section 5(ba) was inserted by the Judiciary and Courts (Scotland) Act 2008 and is replicated in the new section 5(2)(p) of the 1988 Act as inserted by section 98 of the Bill. This subsection gives the Court of Session power to make provision by act of sederunt as to the quorum for a Division of the Inner House considering solely procedural matters. That power is considered sufficient to provide for a single Inner House judge to deal with procedural matters including applications for leave or permission – see Rule 37A of the Rules of Court and as confirmed by the recent case of *MBR v Secretary of State for the Home Department*<sup>6</sup>. However, the power is not considered sufficient to enable Rules of Court to enable a single judge to consider the initial stages of the appeal proceedings and decide by reference to the grounds of appeal whether the appeal proceedings should be allowed to proceed and if so on what grounds.

171. Since a decision on whether to grant leave or permission and an assessment of the grounds of appeal both require some consideration of the merits and will ordinarily affect whether an appeal or part of it can proceed. The Bill provides a power for both of the above matters to enable a consistent approach.

172. New section 31A(1), therefore, provides the Court of Session with a new power relating to applications for leave or permission. When the act of sederunt is made under this new power the existing provisions that deal with the leave or permission process in Chapter 37A (as considered by the Court in the *MBR* case) will be removed. Subsection (1) does not set out the test to be applied by the Court in determining whether leave or permission should be granted. That will be determined by the common law and any particular provisions in the relevant statutes that provide for leave or permission. The second appeals test has now been introduced for the majority of cases – see *Hoseini v Secretary of State for the Home Department* 2005 SLT as referred to by the Court in the *MBR* case.

173. New 31A(2) provides the Court of Session with a separate power to make provision for the initial appeal proceedings to be dealt with by a single judge with reference to whether the

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<sup>6</sup> 2013 SLT 1108; [www.scotcourts.gov.uk/opinions/2013CSIH66.html](http://www.scotcourts.gov.uk/opinions/2013CSIH66.html).

grounds of appeal or any of them are arguable. The Court is also given discretion through this power to apply this procedure to cases where leave or permission has already been granted.

174. New section 31A(3) requires the act of sederunt to make provision about the procedure including for the parties to be heard and for review by a Division of the Inner House.

175. New section 31A(4) provides for the single judge's decision to be final subject to the Inner House review process.

176. New section 31A(7) contains a definition of appeal proceedings. The new process is not capable of being applied to the procedure for permission to appeal to the Supreme Court that is provided for through section 109 of the Bill.

#### *Section 110 – Effect of appeal*

177. Section 110 is intended to replicate section 29 of the 1907 Act, and makes provision about the effect of an appeal to either the Sheriff Appeal Court or the Court of Session. It provides that the court considering an appeal will be able to review all of the decisions in the original proceedings (subsection (2)), and that the appeal may be insisted upon by any party to the appeal, regardless of whether that party was the one who originally brought the appeal (subsection (3)).

#### *Section 111 – Appeals to the Supreme Court*

178. Section 111 sets out new provisions for appeals from the Court of Session to the UK Supreme Court by replacing section 40 of the Court of Session Act with new sections 40 and 40A. It will be competent to appeal against a judgment of the Court of Session to the UKSC, but only with the permission of the Inner House or, failing such permission, with the permission of the UKSC.

179. Section 40 of the 1988 Act currently provides that it is competent to appeal to the Supreme Court against certain types of judgments without requiring leave from the Inner House. The only restriction on those appeals is that the Supreme Court under Practice Direction 4 requires that the note of appeal must be signed by two Scottish Counsel who certify that the appeal is reasonable.

180. In addition to changing the process for appeals to the Supreme Court, in line with the overall approach in the Bill the opportunity has been taken to update the language and modernise terminology (noting that section 40 was itself a consolidation of the Court of Session Acts of 1808 and 1925). This approach has been applied unless there is any particular reason why existing terminology needs to be kept. The Supreme Court in the recent judgment of *Apollo Engineering Limited (Appellant) v James Scott Limited (Respondent) (Scotland)* [2013] UKSC 37<sup>7</sup> made some criticism of the language of section 40.

181. The main changes in terminology in the new section 40 are:

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<sup>7</sup> [http://www.supremecourt.uk/decided-cases/docs/UKSC\\_2013\\_0038\\_Judgment.pdf](http://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0038_Judgment.pdf)

“cause” becomes “proceedings” – Lord Hope notes in the Apollo judgment that “cause” has a very wide meaning and is defined in Rules of Court as covering “any proceedings”;

“leave” becomes “permission” as that is the term that is used more widely now, for example section 288AA(5) of the Criminal Procedure (Scotland) Act 1995 and the Constitutional Reform Act 2005;

“judgment” and “interlocutory judgment” become “decision”. This reflects the fact that “an interlocutory judgment” is any judgment other than a final one and on that basis “decision” is clearer for the user;

“judgment on the whole merits” becomes “final judgment” as defined in new section 40(10). This is consistent with the new term for “judgment on the whole merits” as in section 125(1) of the Bill which in turn is drawn from section 3 of the Sheriff Courts (Scotland) Act 1907;

“dilatory defence” becomes “preliminary defence”. This is discussed in the Apollo judgment where Lord Hope notes that “preliminary defence” is more favoured nowadays. The term is defined in new section 40(10).

182. New section 40(1) provides that an appeal may be taken to the Supreme Court against the relevant types of case only with the permission of the Inner House or, if the Inner House has refused permission, with the permission of the Supreme Court.

183. Subsection (2) lists the kinds of decisions that can be appealed with the permission of the Supreme Court (even though the Inner House has refused permission). These are intended to be the same categories of decision as are covered by the existing provisions in section 40(1)(a) and (2) (with the terminological changes mentioned above). See also *Massie v McCaig* [2013] CSIH 37.<sup>8</sup>

184. Subsection (3) then sets out the rule for other cases. It provides that for those other cases the decision is appealable with the permission of the Inner House. In other words, the Inner House is the gatekeeper alone.

185. Subsection (4) is intended to replicate the second part of the old section 40(2). It sets out that the Supreme Court has the same powers as the Inner House had in relation to an appeal against an application under section 29 of the 1988 Act to grant or refuse a new trial in any proceedings, including in particular the powers in section 29(3) of the 1988 Act (power to set aside the verdict in place of granting a new trial) and section 30(3) of the 1988 Act (power to grant a new trial restricted to the question of the amount of damages).

186. Subsections (5) and (6) are intended to replicate the old section 40(3), namely that an appeal cannot be taken to the Supreme Court against a decision of a Lord Ordinary unless that decision has been reviewed by the Inner House.

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<sup>8</sup> <http://www.scotcourts.gov.uk/opinions/2013CSIH14.html>

187. Subsection (7) is intended to replicate the old section 40(4), with the effect that once an appeal is taken to the Supreme Court all prior decisions are opened up for review by the Supreme Court.

188. Subsection (8) replicates the opening qualification that is currently expressed in the old section 40(1), namely that the procedure is subject to sections 27(5) and 32(5) of the 1988 Act which make special provision for appeals to the Supreme Court and to provisions in any other enactment which restrict or exclude appeals from the Court of Session to the Supreme Court.

189. Under new section 40(9), the provisions do not affect any right of appeal from the Court of Session to the Supreme Court that arises other than under the new section 40 of the 1988 Act – whether statutory appeals or at common law (although the assumption is that all such appeals are statutory now). For example, paragraph 13 of Schedule 6 to the Scotland Act 1998 sets out a separate process in relation to civil devolution issue appeals which is unaffected by the Bill.

190. New sections 40A(1) and (2) provide a time limit for applications for permission to appeal to the Supreme Court. Applications to the Inner House must be made within 28 days of the date of the decision against which the appeal lies, or such longer period as the court considers equitable having regard to the circumstances. The application to the Supreme Court should be made within 28 days of the date on which the Inner House refused permission, or such longer period as the Supreme Court considers equitable having regard to the circumstances. The time limit is equivalent to the time limits recently provided for in relation to applications for permission to appeal compatibility issues (European Convention on Human Rights and European Union challenges) to the Supreme Court through section 288A(7) and (8) of the Criminal Procedure (Scotland) Act 1995.

191. New section 40A(3) sets out that the test that the Court is to apply when considering an application for leave is whether the appeal raises arguable points of law that are of general public importance that ought to be considered by the Supreme Court. This is in line with the comments made by Lord Reed in the case of *Uprichard v Scottish Ministers* [2013] UKSC 21.<sup>9</sup>

## **PART 5 – CRIMINAL APPEALS**

192. The SCCR recommended that the Sheriff Appeal Court should have jurisdiction to deal with all summary criminal appeals by an accused on conviction or sentence, appeals by the Crown on acquittal or sentence and bail appeals. Part 5 gives effect to these recommendations.

### *Appeals from summary criminal proceedings*

#### *Section 112 - Appeals to the Sheriff Appeal Court from summary criminal proceedings*

193. Section 112(1) transfers the existing powers and jurisdiction of the High Court of Justiciary relating to appeals from courts of summary criminal jurisdiction to the Sheriff Appeal Court. “Courts of summary criminal jurisdiction” are the JP court (as established by section 59 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007) and the sheriff sitting as a summary criminal court. The powers and jurisdiction transferred include those in relation to the

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<sup>9</sup> [http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0034\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0034_Judgment.pdf)

hearing and disposal of appeals against conviction and sentence under section 175 of the Criminal Procedure (Scotland) Act 1995, and in relation to bills of suspension and bills of advocacy (for which provision is made in section 191 of that Act). Subsection (2) provides that subsection (1) does not apply to the nobile officium of the High Court: that is, to its inherent jurisdiction to grant, in extraordinary or unforeseen circumstances in which no other remedy is provided for by law, such orders as may be necessary for the purposes of preventing injustice or oppression. Subsection (3) gives effect to Schedule 2, which modifies Part X (appeals from summary proceedings) of the Criminal Procedure (Scotland) Act 1995 in consequence of the transfer of jurisdiction effected by subsection (1).

*Section 113 - Appeals from the Sheriff Appeal Court to the High Court*

194. Section 113 makes provision for appeals from the Sheriff Appeal Court to the High Court of Justiciary, by inserting a new Part 10ZA (consisting of sections 194ZB to 194ZL) after Part X (appeals from summary proceedings) of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”).

195. Inserted section 194ZB(1) provides for an appeal from the Sheriff Appeal Court to the High Court against a decision of the Sheriff Appeal Court in criminal proceedings. Such an appeal may only be made on a point of law, and with the permission of the High Court. Appeals in summary proceedings may be taken either by the defence or by the prosecutor; subsection (2) similarly permits an appeal under subsection (1) to be taken by any party to the appeal in the Sheriff Appeal Court. Subsection (3) limits the grounds upon which the High Court may grant permission by providing that permission may only be granted if the Court considers that the appeal raises an important point of principle or practice or that there is some other compelling reason for the Court to hear the appeal. Such an application for permission to appeal must be made within 14 days after the decision of the Sheriff Appeal Court appealed against (subsection (5)). The High Court may extend this period if satisfied that doing so is justified by “exceptional circumstances” – the same test as is being introduced for other time limits by the Criminal Justice (Scotland) Bill.

196. Inserted section 194ZC provides that an appeal under section 194ZB(1) is to be made by note of appeal (subsection (1)), which must specify the point of law on which the appeal is being made (subsection (2)). (The note of appeal will be the principal document upon which the decision to grant or refuse permission to appeal will be based: see inserted section 194ZF(1)(c)(i)). Subsection (3) makes provision in relation to the quorum of the High Court in considering and deciding an appeal under section 194ZB(1). That quorum is three judges of the High Court. Decisions are to be taken by a majority and each judge is entitled to pronounce a separate opinion.

197. Inserted section 194ZD is based on section 180(1) and (3) of the 1995 Act. As under that section, the decision whether to grant permission to appeal is to be taken by a single judge (subsection (1)), who may, in granting permission, make comments in writing in relation to the appeal (subsection (2)). (As to the effects of these comments, see inserted section 195ZG). Where the single judge refuses permission, that judge must give reasons in writing for the refusal, and, where the appellant has been sentenced to imprisonment and is on bail, must grant a warrant for the appellant’s apprehension and imprisonment (subsection (3)). In terms of

subsection (4), such a warrant will not have effect until the expiry of the time limit for lodging a further application for permission to appeal in terms of section 194ZE.

198. Section 194ZE, which is based on section 180(4) to (5) of the 1995 Act, makes provision for a further application to the High Court where the single judge of the High Court has refused permission under 194ZD. The application must be made within 14 days of intimation of the single judge's refusal (subsection (1)), although the High Court may extend this time limit if satisfied that doing so is justified by exceptional circumstances (subsections (2) and (3)). The application will be considered by a quorum of three judges (subsection (4)). Where the High Court gives permission, subsection (5) provides that it may make written comments in relation to the appeal (for the significance of which, see inserted section 194ZG). In the event of refusal, the High Court must give written reasons and, if the appellant has been sentenced to imprisonment and is on bail, grant warrant for the appellant's apprehension and imprisonment (subsection (6)).

199. Section 194ZF makes further provision about the procedure for determining applications for leave to appeal. Subsection (1)(a), which is based upon section 180(6) of the 1995 Act provides for applications to be determined in chambers without the parties being present. Subsection (1)(b) requires the application to be determined by reference to section 194ZB(4), i.e. the requirement that the High Court must consider that the appeal would raise an important point of principal or practice, or that there be some other compelling reason for the High Court to hear the appeal. Subsection (1)(c) specifies the documents which must be considered in determining the application. These are the note of appeal and such other document or information (if any) as may be specified by act of adjournal.

200. Inserted section 194ZG provides for the restriction of grounds of appeal to those specified in the note of appeal or as arguable in the written comments of the single judge in terms of section 194ZD(2) or, as the case may be, of the High Court in terms of section 194ZE(5). It is based, with appropriate modifications, on section 180(7) to (9) of the 1995 Act. Where written comments are made, they may specify the arguable grounds of appeal (whether or not they were stated in the note of appeal) (subsection (1)) and, where they do so, the appellant may not found upon any ground which has not been so specified without the permission of the High Court (subsection (2)). An application for such permission must be made, and intimated to the Crown Agent, within 14 days of intimation of the written comments (subsection (3)), which period may be extended by the High Court in exceptional circumstances (subsection (4)). The appellant may not found on any matter not stated in the note of appeal, except with the permission of the High Court on cause shown (subsection (5)), or unless that matter, not specified in the note, has been specified as an arguable ground of appeal in written comments made in terms of section 194ZD(2) or 194ZE(5) (subsection (6)).

201. Inserted section 194ZH provides for the powers of the High Court in disposing of an appeal. In terms of subsection (1), the High Court is empowered either (a) to remit the case back to the Sheriff Appeal Court with its opinion as to direction as to further procedure in, or disposal of, the case, or (b) exercise any power that the Sheriff Appeal Court could have exercised in relation to disposal of the appeal proceedings before that Court. Subsection (3) provides that the statutory powers given to the High Court by section 194ZH do not affect any power in relation to the consideration or disposal of appeals that the High Court otherwise has.

202. Inserted section 194ZI(1) applies section 177 (procedure where appellant in custody) of the 1995 Act to appeals from the Sheriff Appeal Court to the High Court, with the exception of the “excepted appeals” set out in subsection (2). Section 177 provides for the court of first instance to be able to grant bail, grant a sist of execution, or make any other interim order pending the determination of an appeal. The “excepted appeals” set out in subsection (2) are bail appeals under section 32, and appeals under section 177(3). In each of these cases, the subject of the appeal is a decision not to grant bail, and it would not make sense to provide for a further application for bail pending the outcome of an appeal against that refusal.

203. Inserted section 194ZJ, which provides for abandonment of an appeal, is based on section 116(1) of the 1995 Act.

204. Inserted section 194ZK re-enacts section 194ZA of the 1995 Act, as inserted by section 81 of the Criminal Justice Bill, currently before the Parliament. That section provides that the judgments of the High Court in an appeal in summary proceedings are final and not subject to review by any court (subsection (1)). The only exceptions to this absolute finality are consideration by the High Court on a reference from the Scottish Criminal Cases Review Commission in terms of Part XA of the 1995 Act, and consideration by the UK Supreme Court on an appeal under section 288AA of that Act (compatibility issues) or in terms of paragraph 13(a) of Schedule 6 to the Scotland Act 1998 (devolution issues). The Criminal Justice Bill inserts this provision into Part X (appeals from summary proceedings). The effect of section 112 of the present Bill is that Part X ceases to be concerned with appeals to the High Court, being concerned instead with appeals to the Sheriff Appeal Court. In consequence, what was inserted section 194ZA requires to be moved from Part X to the new inserted Part 10ZA.

205. Inserted section 194ZL makes equivalent provision for computation of time periods to that found in section 194(1) of the 1995 Act.

#### *Section 114 - Power to refer points of law for the opinion of the High Court*

206. Section 114 amends the 1995 Act to insert a new section 175A after section 175 establishing the basis upon which the Sheriff Appeal Court may refer a point of law in an appeal case to the High Court for its opinion if the Sheriff Appeal Court thinks that the point is a complex or novel one. The Sheriff Appeal Court may do this on its own initiative or on the application of a party in the appeal proceedings.

#### *Section 115 - References by the Scottish Criminal Cases Review Commission*

207. Section 115 amends section 194B (references by the Commission) of the 1995 Act to provide for the Scottish Criminal Cases Review Commission to be able to refer to the High Court cases in which the an appeal was originally heard in the Sheriff Appeal Court.

#### *Bail appeals*

##### *Section 116 - Bail appeals*

208. Section 116 amends section 32 of the 1995 Act (bail appeals) to provide for appeals against bail decisions taken in the sheriff court to go to the Sheriff Appeal Court rather than the High Court.



## **PART 6 – JUSTICE OF THE PEACE COURTS**

### *Section 117 – Establishing, relocating and disestablishing justice of the peace courts*

209. Section 117 replicates the powers to establish JP courts at section 59 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 and updates the powers in subsections (7) and (7A) of the Act so that the Scottish Ministers may make changes only with the consent of the Lord President of the Court of Session and the Scottish Courts and Tribunals Service, the latter being placed under a duty to consult parties who are likely to have an interest.

210. This section amends section 59 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, which provides for the establishment of JP courts. The effect of the amendments at subsections (2) and (3) is that the Scottish Ministers will be able to use their powers to establish, relocate or disestablish a JP court only following the submission of a proposal to do so by the Scottish Courts and Tribunals Service. Such a proposal must be agreed to by the Lord President and have been subject to consultation with persons considered appropriate by the Scottish Courts and Tribunals Service.

211. It will be for the Scottish Ministers to decide, following the submission of a proposal, whether to exercise their order making powers under section 59(2) or (6) of the 2007 Act. If Ministers do decide to make an order, new section 59(7C), as inserted by this section, will require them to obtain the consent of both the Lord President and the Scottish Courts and Tribunals Service before the order is made.

212. This provision re-orders the existing provisions which govern the process for the making of an order under section 59(2) and (6), bringing them into line with the process to be followed for an order under section 2 of the Bill (the power to alter sheriffdoms, sheriff court districts and sheriff courts).

### *Section 118– Abolition of the office of stipendiary magistrate*

213. Section 118 provides that the office of stipendiary magistrate is abolished. Existing stipendiary magistrates are to be appointed as summary sheriffs and part-time stipendiary magistrates are to be appointed as part-time summary sheriffs, unless they decline appointment. Section 74(5) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 provides that a person is not to be appointed as a stipendiary magistrate unless the person is, and has been for at least five years, a solicitor or advocate. It is, therefore, possible that a person currently appointed as a stipendiary magistrate may not be qualified for appointment as a summary sheriff, as section 14 of the Bill requires ten years legal qualification. Subsections (4) and (7) ensure that they may still be appointed as a summary sheriff.

### *Section 119 – Summary sheriffs to sit in justice of the peace courts*

214. This section permits summary sheriffs to sit in JP courts. When summary sheriffs sit in these courts, they will only be entitled to exercise the same summary criminal powers as the JP.

## **PART 7 – THE SCOTTISH COURTS AND TRIBUNALS SERVICE**

### *Section 120 – The Scottish Courts and Tribunals Service*

215. Section 120 amends the Judiciary and Courts (Scotland) Act 2008 to create a merged organisation to provide administrative support for both courts and tribunals. The Scottish Court Service is renamed as the Scottish Courts and Tribunals Service (the “SCTS”). The SCTS is given the function of providing administrative support to the Scottish Tribunals and their members and to any other tribunals that the Scottish Ministers may by order specify (subject to negative procedure). Schedule 3 makes further provision in relation to the SCTS.

## **PART 8 – GENERAL**

### *Section 121 – Modifications of enactments*

216. Section 121 introduces schedule 4, which makes minor modifications of enactments.

### *Section 122 – Subordinate legislation*

217. Subsection (1) of section 122 makes provision allowing any order made by the Scottish Ministers under this Bill to include any incidental, supplemental, consequential, transitional, transitory or saving provision. It also permits an order to make different provisions for different purposes or different parts of the country. Subsections (2) and (3) prescribe the procedure which is to apply to orders made by the Scottish Ministers under the Bill. Subsection (4) provides that this section does not apply to a commencement order made under section 127(2) of the Bill.

### *Section 123 – References to sheriff*

218. Subject to the exceptions narrated by subsection (3), this section makes provision defining references to “sheriff” in the Bill. Accordingly reference to “sheriff” in the Bill and other enactments will be taken, subject to the conditions set out in this section, to include reference to other judiciary of the sheriffdom (as defined in section 125(2)).

### *Section 124 – Definition of family proceedings*

219. This section lists various proceedings which, for the purposes of this Bill, are to be understood as “family proceedings”. The Scottish Ministers may modify this list by an order made under subsection (2) subject to affirmative procedure.

### *Section 125 – Interpretation*

220. Subsection (1) sets out the definitions that apply throughout the Bill unless the context requires otherwise.

221. Subsection (2) lists the judicial officers who are included by references to the “judiciary of a sheriffdom”.

222. Subsection (3) makes provision explaining that “proceedings in the sheriff court” includes proceedings before any member of the judiciary of a sheriffdom.

*Section 126 – Ancillary provision*

223. This section allows the Scottish Ministers, by order, to make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, or in connection with or for the purposes of giving full effect to, any provision made by, or by virtue of, this Act subject to either negative or affirmative procedure.

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

224. Schedule 1, as introduced by section 43, lists civil proceedings in respect of which summary sheriffs are to have jurisdiction and powers. The Scottish Ministers may modify this schedule by order under section 43(3). Any such order is subject to affirmative procedure by virtue of section 122(2)(a).

**Schedule 2 – Transfer of summary criminal appeal jurisdiction to the Sheriff Appeal Court: Modification of 1995 Act**

225. Section 112 of the Bill makes provision transferring summary criminal appeals from the High Court to the Sheriff Appeal Court. This schedule makes amendments to the Criminal Procedure (Scotland) Act 1995 in consequence of this transfer.

**Schedule 3 – The Scottish Courts and Tribunals Service**

*Part 1 - Conferral of additional functions etc. in relation to tribunals*

226. Section 120(3) introduces schedule 3 which confers functions on the SCTS for the effective operation of both courts and tribunals.

227. Paragraph 1 amends the relevant sections in the Judiciary and Courts (Scotland) Act 2008 to update references to the Scottish Court Service to the SCTS. It also confers power on the merged organisation to provide and ensure the provision of property, services and staff as required for the Lord President and the President of the Scottish Tribunals in their tribunals roles. The power of the Scottish Ministers to carry out the functions of the SCTS if they feel that the SCTS is failing to carry out its functions is extended to tribunals. Paragraph 1 of schedule 3 to the Judiciary and Courts (Scotland) Act 2008 is repealed as this provision has never been brought into force. The Scottish Court Service was made an office-holder in the Scottish Administration by section 104 Order (the Judiciary and Courts (Scotland) Act 2008 (Consequential Provisions and Modifications) Order 2009) and so this provision is no longer required.

228. Paragraph 1 also amends the board structure to conflate the senatorial membership on the board with the role of the President of Scottish Tribunals and add a Chamber President of the First-tier Tribunal for Scotland to the board. The President of the Scottish Tribunals and Chamber President are roles created in the Tribunals (Scotland) Bill, currently before the Parliament. Remuneration may be paid if the Chamber President is fee-paid. The Judiciary and Courts (Scotland) Act 2008 is also amended to allow the Scottish Ministers to transfer any property or liability in connection with the operation of the Scottish Tribunals to the SCTS.

*Schedule 3 Part 2 – Transitional provision*

229. Paragraph 2 transfers those staff who currently work as part of the Scottish Tribunals Service to the SCTS.

230. Paragraph 3 creates a power to allow the SCTS to provide administrative support to the listed tribunals until such time as they are transferred-in to the Scottish Tribunals (First-tier Tribunal for Scotland and Upper Tribunal for Scotland) as created in the Tribunals (Scotland) Bill. It also allows a current President of the named tribunals to sit on the board of the Scottish Courts and Tribunals until such time as Chamber Presidents are in operation. The Scottish Ministers may by order add tribunals which are to be transferred-in to the Scottish Tribunals to the list of those to be administered in the interim by SCTS, and add office-holders in those tribunals to the list of office-holder eligible to sit on the SCTS board (sub-paragraph (5)). Such an order is subject to affirmative procedure by virtue of section 122(2)(a).

*Schedule 3 Part 3 – Consequential repeals*

231. Paragraph 4 repeals the provision within the Lands Tribunal Act 1949 that requires the Scottish Ministers to provide administrative support for the Lands Tribunal.

232. Paragraph 5 repeals the provision within the Mental Health (Care and Treatment) (Scotland) Act 2003 that the Scottish Ministers must provide administrative support and accommodation for the Mental Health Tribunal for Scotland.

233. Paragraph 6 repeals the provision within the Education (Additional Support for Learning) (Scotland) Act 2004 that the Scottish Ministers must provide property, staff and services to the President and tribunals of the Additional Support Needs Tribunals for Scotland.

234. Paragraph 7 repeals the provision within the Charities and Trustee Investment (Scotland) Act 2005 that the Scottish Ministers must provide property, staff and services for a Scottish Charity Appeals Panel.

235. Paragraph 8 repeals the provision within the Tribunals (Scotland) Bill (presently before the Parliament) that the Scottish Ministers must provide administrative support for the Scottish Tribunals.

**Schedule 4 – Modifications of enactments**

236. Schedule 4, which is introduced by section 121, makes provision for the amendment of various enactments as a consequence of the provisions of the Bill. Paragraph 12(2) mirrors that in section 1 of the Public Records (Scotland) Act 1937 which deals with the transmission of High Court and Court of Session records by act of adjournal or sederunt (as the case may be).

## **Part 1 – Sheriff courts**

### *Paragraph 1 – Promissory Oaths Act 1868*

237. This paragraph amends the Schedule to the Promissory Oaths Act 1868 as a consequence of the creation of summary sheriffs and part-time summary sheriffs. The effect of the amendment is that summary sheriffs and part-time summary sheriffs will be required to take the oath of allegiance and the judicial oath.

### *Paragraph 2 – Promissory Oaths Act 1871*

238. This paragraph amends section 2 of the Promissory Oaths Act 1871, making provision for persons before whom summary sheriffs and part-time summary sheriffs may take oaths.

### *Paragraph 3 – Sheriff Courts (Scotland) Act 1876*

239. Section 54 of the Sheriff Courts (Scotland) Act 1876 is repealed by this section, so far as not previously repealed. Section 54 gave power to the Court of Session to allocate commissary business in the sheriff courts by act of sederunt. This power now rests with sheriffs principal as part of their general powers to organise the efficient disposal of business in the sheriff courts at sections 27 and 28 of the Bill.

### *Paragraph 4 – Sheriff Courts (Scotland) Act 1907*

240. This paragraph repeals various sections of the Sheriff Courts (Scotland) Act 1907.

241. Sub-paragraph (a) repeals sections 4 to 7 of the 1907 Act which made provision in relation to the jurisdiction of the sheriff court. These sections are largely replaced by Chapter 4 of Part 1 of the Bill, which makes provision in respect of competence and jurisdiction of sheriffs.

242. Sub-paragraph (b) repeals sections 10 and 11 of the 1907 Act. The power of Her Majesty to appoint salaried sheriffs principal and sheriffs previously provided for by section 11 of that Act is recast in sections 3 and 4 of the Bill.

243. Sub-paragraph (c) repeals section 14 of the 1907 Act. Provision for the salaries of sheriffs principal and sheriffs is now made by section 16 of the Bill.

244. Sub-paragraph (d) repeals section 17 of the 1907 Act, which made provision for the appointment of honorary sheriffs by sheriffs principal. The office of honorary sheriff is abolished by section 26 of the Bill.

245. Sub-paragraph (e) repeals section 27 to 29 of the 1907 Act, which dealt with appeals to the sheriff principal and the Court of Session as well as setting out the effect of an appeal. These repeals are in consequence of the creation of the Sheriff Appeal Court by the Bill.

246. Sub-paragraph (f) repeals sections 39 to 40 of the 1907 Act. Section 39 is repealed as consequence of the replacement of ordinary cause rules. The provision in section 40, relating to fees in the Court of Session, is now recast at section 98 of the Bill.

247. Sub-paragraphs (g) and (h) repeal section 50 and Schedule 1 of the 1907 Act respectively. These repeals are in consequence of replacement by the Bill of summary cause procedure by simple procedure (section 70 of the Bill) and the replacement of ordinary cause procedure.

*Paragraph 5 – Sheriff Courts and Legal Officers (Scotland) Act 1927*

248. This paragraph makes amendments to section 8 of the Sheriff Courts and Legal Officers (Scotland) Act 1927. The amendment will allow the Lord Advocate to issue instructions to procurators fiscal both for the purpose of giving effect to the 1927 Act and for the purpose of the efficient disposal of business in the sheriff courts.

*Paragraph 6 – Sheriff Courts (Scotland) Act 1971*

249. The Sheriff Courts (Scotland) Act 1971 is repealed by this paragraph, with the exception of sections 2(3) and 3(4), which provide for compensation payment on loss of shrieval office. Sub-paragraphs (3) and (4) amend these provisions to allow them to operate with section 2 of the Bill. The other provisions of the 1971 Act are largely replaced or recast by the Bill.

*Paragraph 7 – Civil Jurisdiction and Judgments Act 1982*

250. This paragraph amends section 20(3) of the Civil Jurisdiction and Judgments Act 1982 to reflect the recasting of section 6 of the Sheriff Courts (Scotland) Act 1907 as section 42 of the Bill.

*Paragraph 8 – Judicial Pensions and Retirement Act 1993*

251. This paragraph amends the Judicial Pensions and Retirement Act 1993 to ensure that provisions concerning the retirement of judges apply to the offices created by this Bill.

*Paragraph 9 – Judiciary and Courts (Scotland) Act 2008*

252. This paragraph makes various repeals and amendments to the Judiciary and Courts (Scotland) Act 2008.

253. Sub-paragraph (3) brings the offices of summary sheriff and part-time summary sheriff within the remit of the Judicial Appointments Board for Scotland.

254. Sub-paragraph (4) adds the offices of summary sheriff and part-time summary sheriff to the definition of “judicial office holder” at section 43 of the 2008 Act. This has the effect of bringing these officer holders under the Lord President’s responsibility for welfare, training and guidance at section 2 of the 2008 Act.

## **Part 2 – Sheriff Appeal Court**

*Paragraph 10 – Courts of Law Fees (Scotland) Act 1895*

255. This paragraph amends section 2 of the Courts of Law Fees (Scotland) Act 1895, allowing the Scottish Ministers to regulate court fees for the Sheriff Appeal Court.

*Paragraph 11 – Sheriff Courts and Legal Officers (Scotland) Act 1927*

256. This paragraph amends section 1 of the Sheriff Courts and Legal Officers (Scotland) Act 1927 by inserting a new subsection (6) as a consequence of the creation of the office of Clerk of the Sheriff Appeal Court by section 57 of the Bill. New subsection (6) sets out that the appointment of a sheriff clerk as Clerk to the Sheriff Appeal Court under section 57 of the Bill is not to be considered as a removal from office.

*Paragraph 12 – Public Records (Scotland) Act 1937*

257. The Public Records (Scotland) Act 1937 is amended by this paragraph to reflect the creation of the Sheriff Appeal Court by the Bill. The new section 1A inserted into the 1937 Act makes provision for the keeping of Sheriff Appeal Court records.

*Paragraph 13 – Administration of Justice (Scotland) Act 1972*

258. This paragraph amends section 1 of the Administration of Justice (Scotland) Act 1972 by amending subsections (1), (1A) and (3), extending the powers therein to the Sheriff Appeal Court.

*Paragraph 14 – Civil Jurisdiction and Judgments (Scotland) Act 1972*

259. Section 50 of the Civil Jurisdiction and Judgments (Scotland) Act 1972 is amended by this paragraph to include a reference to the Sheriff Appeal Court.

*Paragraph 15 – Legal Aid (Scotland) Act 1986*

260. This paragraph extends the provisions of sections 21(1) and Paragraph 1 of Part 1 of Schedule 2 to the Legal Aid (Scotland) Act 1986 to cover proceedings in the Sheriff Appeal Court.

*Paragraph 16 – Criminal Procedure (Scotland) Act 1995*

261. This paragraph has the effect of requiring one Appeal Sheriff to be appointed to the Criminal Courts Rules Council by amending section 304(2)(c) of the Criminal Procedure (Scotland) Act 1995.

*Paragraph 17 – Judiciary and Courts (Scotland) Act 2008*

262. This paragraph makes further amendments to the Judiciary and Courts (Scotland) Act 2008 to take into account the creation of the Sheriff Appeal Court and the office of Appeal Sheriff.

*Paragraph 18 – Scottish Civil Justice Council and Criminal Legal Assistance Act 2013*

263. This paragraph has the effect of bringing the Sheriff Appeal Court within the remit of the Scottish Civil Justice Council.

*Paragraph 19 – Law Reform (Miscellaneous Provisions) (Scotland) Act 1980*

264. This paragraph amends the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 in light of the provisions of the Bill.

265. Sub-paragraph (2) has the effect of allowing the sheriff to remit a fine imposed on a civil juror for non-attendance where the fine was imposed in the sheriff court.

266. Sub-paragraph (3) amends section 11 of the 1980 Act in light of the creation of all-Scotland sheriff courts by section 61 of the Bill.

*Paragraph 20 – Heritable Securities (Scotland) Act 1894*

267. This paragraph amends the Heritable Securities (Scotland) Act 1894 to reflect the creation of simple procedure by section 70 of the Bill.

*Paragraph 21 – Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963*

268. This paragraph repeals the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963 which made provision for actions for aliment of small amounts by way of a summary cause action. Provision in this regard is now made by section 71 of the Bill, which enables actions for aliment of small amounts to be made by simple procedure.

*Paragraph 22 – Conveyancing and Feudal Reform (Scotland) Act 1970*

269. This paragraph amends the Conveyancing and Feudal Reform (Scotland) Act 1970 to reflect the creation of simple procedure by section 70 of the Bill.

*Paragraph 23 – Legal Aid (Scotland) Act 1986*

270. There is a statutory bar on civil legal aid being available for small claims proceedings as set out in paragraph 3 of Schedule 2 to the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). As a consequence of this Bill, the term ‘small claims’ will no longer be used. This section ensures that the current position is preserved by amending the 1986 Act and substituting the reference to small claims actions with a reference to those types of simple procedure cases which would be, but for the repeal of the 1971 Act, treated as a small claim.

*Paragraph 24 – Tribunals (Scotland) Act 2014*

271. This paragraph inserts a new section 52A into the Tribunals (Scotland) Bill (presently before the Parliament) to provide that it is for the Upper Tribunal to decide whether the petition has been made in accordance with the time limits in section 27A of the Court of Session Act 1988 and whether or not to grant permission for the petition to proceed under section 27B. It also modifies the provisions of sections 27C(3) and (4) of the Bill so that the references in those sections to requests for review of a permission decision being dealt with by a different Lord Ordinary are to be read as references to different members of the Tribunal from those who refused or granted permission subject to conditions. A similar consequential amendment will require to be made to the Tribunals, Courts and Enforcement Act 2007 through a section 104 Order to provide for the UK Upper Tribunal to deal with the permission stage where a petition for judicial review is remitted to it by the Court of Session.



*Paragraph 25 - Law Reform (Miscellaneous Provisions) Scotland Act 1985*

272. This paragraph repeals section 14 of the Law Reform (Miscellaneous Provisions) Scotland Act 1985, which provides for remit from the Court of Session to the sheriff. This is now dealt with by section 89 of the Bill.

*Paragraph 26 - Vexatious Actions (Scotland) Act 1898*

273. This paragraph repeals the Vexatious Actions (Scotland) Act 1898. This subject is now dealt with by Part 3 Chapter 7 of the Bill.

*Paragraph 27 - Execution of Diligence (Scotland) Act 1926*

274. This paragraph repeals section 6 (regulations, forms and fees) of the Execution of Diligence (Scotland) Act 1926. This is now dealt with by new section 5ZA(1)(c) of the 1988 Act, inserted by section 98 of the Bill.

*Paragraph 28 - Administration of Justice (Scotland) Act 1972*

275. As a consequence of the repeal of the Sheriff Courts (Scotland) Act 1971, this paragraph amends a reference in the Administration of Justice (Scotland) Act 1972 to refer to the new provision made by section 97 of the Bill.

*Paragraph 29 - Court of Session Act 1988*

276. This paragraph makes amendments to the Court of Session Act 1988 to take account of the introduction of the Sheriff Appeal Court.

*Paragraph 30 – Constitutional Reform Act 2005*

277. Paragraph 30 repeals section 40(3) of the Constitutional Reform Act 2005 in consequence of the new provisions at section 111 of the Bill. Section 40 of the 2005 Act deals with the jurisdiction of the Supreme Court. Section 40(3) provides that “An appeal lies to the Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section”.

278. Section 40(3) is essentially a transitional provision which stated what the Supreme Court’s Scottish appellate jurisdiction was from day one. It is subject to alteration by subsequent legislation and would always have to be read subject to any such legislation. However, the Bill provides for its repeal to avoid any room for argument that there would be an on-going tension with new section 40(9) of the Court of Session Act 1988 and any suggestion that pre-2005 Act procedures could rely on section 40(3) notwithstanding the replacement of section 40.

*Paragraph 31 - Criminal Procedure (Scotland) Act 1995*

279. This paragraph makes amendments to the Criminal Procedure (Scotland) Act 1995 to take account of the abolition of the office of stipendiary magistrate by section 118 of the Bill.

*Paragraph 32 - Criminal Proceedings etc. (Reform) (Scotland) Act 2007*

280. This paragraph makes amendments to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 to take account of the abolition of the office of stipendiary magistrate by section 118 of the Bill.

*Paragraph 33 - Judiciary and Courts (Scotland) Act 2008*

281. This paragraph makes an amendment to the Judiciary and Courts (Scotland) Act 2008 to take account of the abolition of the office of stipendiary magistrate by section 118 of the Bill.

*Paragraph 34 - Court of Session Act 1988*

282. This paragraph amends the Court of Session Act 1988 to ensure that references in that Act to enactments include Acts of the Scottish Parliament.

## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Courts Reform (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 6 February 2014. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The Policy Memorandum, which is published separately, explains in detail the background to the Bill and the policy intention behind the Bill. The purpose of this Financial Memorandum is to set out the costs associated with the measures introduced by the Bill, and as such it should be read in conjunction with the Bill and the other accompanying documents.

3. The Bill takes forward many of the recommendations of Lord Gill’s Scottish Civil Courts Review (SCCR).<sup>10</sup> The Judiciary and Courts (Scotland) Act 2008 gave the Lord President and the Scottish Court Service the responsibility for the running and administration of Scotland’s courts. This Bill represents an enabling framework and many of the detailed changes will be delivered through court rules.

4. The opportunity is also being taken in the Bill to restate in a modern act much of the existing legislation governing the sheriff courts, which is currently contained in Westminster acts from 1971 and 1907. Therefore, a lot of the provisions will have no financial element as they are just a restatement of the current situation.

5. This Financial Memorandum gives an overview of the Scottish Government, Scottish Court Service, Lord President and the other affected bodies’ current plans for implementation.

6. The estimates of costs contained in this Memorandum are compiled from information provided by those bodies affected by the Bill. The figures and projections provided are the best estimates available for the costs and savings that will be generated as a result of the provisions of this Bill. All costs have been rounded to the nearest £1,000. Figures may not sum due to rounding.

7. This Financial Memorandum assumes that the Bill provisions will take effect in the financial year 2015-16. This is based on the current planning assumptions that the implementation of the reforms will commence from mid-2015.

### **OVERVIEW**

8. The financial implications of the Bill will primarily affect the SCS as the body responsible for the administration of the courts, and the Scottish Civil Justice Council (SCJC), as the body responsible for developing civil court rules. There will also be an impact on the Crown

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<sup>10</sup> <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

Office and Procurator Fiscal Service (COPFS) and the Scottish Legal Aid Board (SLAB). There will also be an effect on the Scottish Government in respect of judicial salaries and related expenses (eg pensions).

9. In the main, the Bill is expected to make the civil justice system in Scotland more efficient by ensuring that cases are heard at the appropriate level in the system and at a proportionate cost to the state and to individuals.

10. The main reforms are being taken forward through projects under the Making Justice Work Programme.<sup>11</sup> These are:

- Judicial structures: the establishment of a new judicial office – summary sheriff;
- Sheriff Appeal Court;
- Personal injury court (including the transfer of business from the Court of Session to the sheriff courts);
- Rules rewrite– relating to the powers given to the courts to ensure they can implement the reforms.

11. In addition to the four projects above, the other main reform is the merger of the Scottish Court Service and the Scottish Tribunals Service. The financial implications of this are also included within this Memorandum.

<b>Making Justice Work - Project</b>	<b>Relevant provisions</b>
Judicial structures	Part 1 and 6
Sheriff Appeal Court	Part 2, 4 and 5
Personal injury court	Part 1 Chapter 4
Rules rewrite	All
Scottish Courts and Tribunals Service – merger	Part 7

12. Where sections are not covered in this Memorandum these are, in the main, concerned with restating current legislation in a modern act and as such do not have any financial implications.

13. Overall, many of the expected impacts of the Bill take the form of administrative efficiencies resulting from new procedures which will be developed by the SCJC to help the courts run more efficiently. Where a cost or saving is expected based on staff time to perform a particular new task, it is anticipated that that this will be dealt with through measures such as full use of existing resources, prioritisation of functions, and increased operational efficiency. Only where a specific need for additional staff or resources has been identified, has this been stated as an additional financial cost or saving. The figures in parentheses are savings.

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<sup>11</sup> <http://www.scotland.gov.uk/Topics/Justice/legal/mjw>

**Table 1: Potential one-off costs**

		One-off costs			
		2013/14	2014/15	2015/16	Total
Scottish Government	Courts and tribunals merger [Table 25]	£700,000 to £1,200,000			Up to £1,200,000
Scottish Court Service	Judicial structures [Table 8]	£46,000	£63,000	£84,000	£193,000
	Sheriff Appeal Court [Table 22]	£15,000	£139,000	£105,000	£259,000
	Personal injury court [Table 14]	£12,000	£74,000	£42,000	£128,000
	Rules rewrite [Table 23]		£427,000	£427,000	£854,000
	<b>Total</b>	<b>£73,000</b>	<b>£703,000</b>	<b>£658,000</b>	<b>£1,434,000</b>
Judicial Appointments Board	Judicial structures [Table 8]		£4,000		£4,000

**Table 2: Potential recurring costs and savings**

		from 2016/17
Scottish Government (Judicial salaries budget)	Judicial structures [Table 8]	£8,000 to (£1,792,000) (after year 10)
	Sheriff Appeal Court [Table 22]	(£319,000)
	Personal injury court [Table 14]	(£57,000)
	<b>Total</b>	<b>Year 1 (£368,000) rising to (£2,168,000) by Year 10</b>
Scottish Court Service	Sheriff Appeal Court [Table 22]	(£19,000)
	Personal injury court [Table 14]	(£7,000)
	<b>Total</b>	<b>(£26,000)</b>
Scottish Legal Aid Board	Sheriff Appeal Court [Table 22]	(£120,000)
	Personal injury court [Table 14]	(£1,200,000)
	<b>Total</b>	<b>(£1,320,000)</b>
Crown and Procurator Fiscal Service	Sheriff Appeal Court [Table 22]	£29,000

#### *Costs on the Scottish Administration*

14. The tables above show that there are expected savings to the Scottish Government which are based on the potential reductions in the judicial salaries budgets. There are also potential savings for the Scottish Legal Aid Board (SLAB) due to the expected reduction in the use of counsel in civil cases.

15. The vast majority of the costs relate to the implementation of the reforms and fall to the Scottish Court Service. The largest costs relate to the merger of the SCS and the Scottish Tribunals Service and the detail of those costs is outlined in the relevant section below.

#### *Costs on local authorities*

16. There are no costs expected on local authorities as a result of the reforms in this Bill. Respondents to the consultation from local authorities indicated that overall they may make some savings especially in relation to the new procedures relating to judicial review as this is likely to reduce the number of cases that get to a lengthy, expensive trial.

#### *Costs on wider court users*

17. There are no costs falling on other persons or bodies as a result of the provisions in this Bill. The impact of the reforms is expected to be positive on parties using the courts to litigate. Ensuring cases are heard at the appropriate level in the system will mean that fees charged will be appropriate to the case.

18. However, whilst there will be no expected costs to organisations, there will be some law firms who specialise in personal injury cases in the Court of Session that are likely to be negatively affected due to the lower fees they will be able to charge. In addition, the Faculty of Advocates have also expressed concern due to the reduction in cases in the Court of Session and the High Court as a result of these reforms, as advocates have exclusive rights of audience in those courts.

## **FUNDING THE REFORMS**

#### *Making Justice Work*

19. Making Justice Work is a programme bringing together a range of reforms to the structure and processes of the courts, access to justice and tribunals and administrative justice. It has been developed and is being delivered with partners across the justice system, including the Crown Office and Procurator Fiscal Service (COPFS), SCS, SLAB and Police Scotland. The programme contains six overarching projects, covering both civil and criminal justice. The reforms outlined in this Bill are an integral part of *MJW Programme 1 - Delivering efficient and effective court structures*. The vision for this programme is:

“To create a cost effective, proportionate, accessible and efficient court structure in which: cases and appeals are heard by the right court in both civil and criminal cases, reserving the use of the highest courts for the most serious and complex cases; court procedures are as easy as possible for all to understand and access; and cases are dealt with as efficiently as possible once they come to court.”

20. The four strategic outcomes of this project are:

- An efficient and effective court structure
- A simplified body of court rules

- Greater use of electronic communication
- Continuous improvement of civil justice

21. The SCS Corporate Plan<sup>12</sup> for the three years to 2014 committed the SCS to working with the Scottish Government to progress the recommendations made in the SCCR, as part of that commitment the SCS board has:

- accepted its CEO taking on the Senior Responsible Officer role of the MJW1 Programme
- approved the budgets for additional posts to support the CEO in the initiation and management of the project
- agreed to fund the increased running costs associated with the SCJC from within the additional fee income built into the 2012 Court Fees Orders.<sup>13</sup>

22. The SCS Corporate Plan for the next three years (2014-2016) is currently under development by a working group of the SCS board, and that plan will reinforce the strong acceptance of the strategic direction with a commensurate increase in the financial commitment to this project.

23. The MJW1 Programme Board has representatives from the Scottish Government, the SCS, the Judicial Office<sup>14</sup> and SLAB. This Board has been involved in the development of the business cases for the main projects that will take forward the implementation of the reforms of the Bill, listed in paragraph 10. These business cases have been used to inform this document.

24. In addition to the four projects identified in paragraph 10, the MJW1 Programme is also responsible for other projects relating to the wider reforms of the courts. These include projects on court structures, a new civil IT system, court fees and the establishment of the SCJC. Taking into account all the projects under MJW1, SCS estimates that, after a 10-year project life, these will return around £6.5m of savings. However, this Memorandum will focus on those projects that are directly related to the provisions in the Bill.

25. The assumption is that the volume of cases will remain similar to the 2011-12 levels or decline slightly. In the main data has been used from 2011-12 for consistency as that is the most up to date data available for the civil caseload.

### *Court fees*

26. As civil actions are generally about resolving disputes between two private individuals, the general principle is that the parties rather than the state should bear the cost of civil actions.

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<sup>12</sup> [http://www.scotcourts.gov.uk/docs/default-source/reports-data/scs\\_corporateplan2011-14.pdf?sfvrsn=2](http://www.scotcourts.gov.uk/docs/default-source/reports-data/scs_corporateplan2011-14.pdf?sfvrsn=2)

<sup>13</sup> Scottish Courts Service summary of all the relevant court fees orders <http://www.scotcourts.gov.uk/docs/default-source/scs-fees-statement/scs-fees-statement---fees-from-10-december-2012-until-31-march-2015.doc?sfvrsn=8>

<sup>14</sup> The Judicial Office for Scotland came into being on the 1 April 2010 as part of the structural changes introduced by the Judiciary and Courts (Scotland) Act 2008. It is a separate part of the Scottish Court Service and was created to provide support to the Lord President in his role as head of the Scottish judiciary with responsibility for the training, welfare, deployment, guidance and conduct of judges and the efficient disposal of business in the courts.

This is done through the setting of court fees which allows the SCS to collect fees for the use of the different courts. The Scottish Government's policy objective is that the fees should recover the costs to public funds of providing those services.

27. The theory is that in moving from a pre-reform set of charges to a post-reform set of charges the SCS could simply amortise the costs of reform, and look to recover that investment through the charges applied over the long run – i.e. the Scottish Government expects SCS to be able to fully fund the reform programme through the level of future fee income.

28. That was the position for the most recent fees orders which passed through the parliamentary process for approval in 2012. The Parliament approved an above-inflation increase on the presumption that the additional percentage increase would help SCS contribute towards the cost of investing in reform.

29. At a practical level the proposals for new fees are made on a three-yearly cycle. The specific fee tables are subject to a public consultation process, and are then required to be put to the Parliament for approval. Separately to this Bill, work is being undertaken by the SCS on a project to look at future court fees.

30. The SCS has agreed to fund the initial increment in the costs of the SCJC and make a start on the investment in the civil IT system from within the fee increase that was agreed in 2012. However, the SCS board has highlighted that the falling level of demand for civil business will have an impact on the overall fee income.

31. Should there be a substantial reduction in fee income, the SCS board has made it clear that the cost of change may need to revert to being an unfunded business pressure for SCS. This may have an effect on the implementation of some of the reforms. The SCS has confirmed that the current fee income is on track to ensure that the costs of the reforms can be met.

32. For the purposes of this Memorandum no change to fee income is assumed at this time.

## **JUDICIAL STRUCTURES**

33. This section considers the project relating to the establishment of the summary sheriff. This is associated with the provisions contained in Part 1 Chapter 2 of the Bill, that deals with the sheriff courts and the judiciary.

### *Current judicial structure*

34. The Bill does not amend the processes or procedures for the appointment of the current judicial offices. However, by virtue of restating current legislation, the Bill will become the legal basis for their appointment. The following table outlines the current structure for 2012-13 and the associated estimated costs.



**Table 3: Estimated costs of current judicial structure**

<b>Judicial Salaries</b>	<b>Base Salary at 01/04/2013<sup>15</sup></b>	<b>FTE Posts</b>	<b>Salary Cost</b>	<b>On Cost<sup>16</sup></b>	<b>Total</b>
		1			
Lord Justice Clerk		1			
Inner House Judge	£198,674	10			
Outer House Judge	£174,481	22			
	£174,481	3		£157,033	
Sheriffs principal		6			£1,091,477
Sheriffs		140			£23,583,378
Sheriffs (part-time - pool of 77)		24.2			£3,449,393
Stipendiary magistrates (Pool of 7)		4.9		£104,790	
<b>Total</b>					

#### *Summary sheriff*

35. The introduction of this new judicial role lies at the heart of the civil courts reform programme and its overarching aim of having the right cases heard by the right level of the judiciary. The main jurisdiction of this role, as set out in the Bill, is summary crime and civil cases in the sheriff courts with a low value claim.

36. The scale of the judicial structure in Scotland reflects a difficult balance that needs to be achieved between two statutory duties:

- The Lord President, and the six sheriffs principal, have the statutory duty for “the efficient disposal of business” (within the resources made available);
- The Scottish Ministers have the statutory duty to set the level of “resources made available” (with due regard to the needs of the courts).

37. Judicial deployment is a matter for the Lord President and sheriffs principal, and future decisions will always be based on what is required to fulfil their statutory obligation for the efficient disposal of business. In presenting the scope and scale of the reforms, there is a need to avoid making any commitments to outcomes in a way that may compromise their future flexibility.

#### *Potential cost reduction per court day*

38. The base salary and pensions for the new post of summary sheriff will be set in due course by the Review Body on Senior Salaries (SSRB). For the purposes of this Memorandum, it has been assumed that the likely grading will be similar to the current post of District Judge in England and Wales which commands a base salary of £103,950 (equivalent to 80% of the current base salary for sheriffs).

<sup>15</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/209683/judicial-salaries-schedule-13-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209683/judicial-salaries-schedule-13-14.pdf)

<sup>16</sup> Estimated at 30% for FT posts to take into account pensions, national insurance contributions etc.

39. The SCS has estimated that the economic benefit of introducing the new judicial tier in Scotland is therefore assessed as a potential saving of £163 for every day where a summary sheriff can be used in lieu of a sheriff:

**Table 4: Estimate of cost of sheriff and summary sheriff**

Office	Base Salary	On Costs <sup>17</sup>	Total	Sitting Days <sup>18</sup>	Cost Per Day
Sheriffs	£129,579	£38,874	£168,453	205	£822
Summary sheriffs	£103,950	£31,185	£135,135	205	£659

40. The exact complement of permanent summary sheriffs that may be necessary will be dependent on a) an uncertain future mix of business coming before the courts in a post-reform environment, and b) the consequential decisions that are then made on judicial deployment to respond to that future demand.

41. Anticipating that mix in ten years' time could be misleading, so the following table provides a sensitivity analysis for various percentage changes in the mix of potential judicial deployment and the savings in judicial salaries that may be realised:

**Table 5: Possible judicial deployment in the sheriff courts**

Office	Possible Deployment Scenarios	Posts <sup>19</sup>	Sitting Days <sup>20</sup>	Potential Reduction in Cost pa (£m) <sup>21</sup>
Sheriffs	100%	140	29,135	
Summary sheriffs	0%	0	0	0
Sheriffs	70%	98	20,395	
Summary sheriffs	30%	42	8,741	1.4
Sheriffs	60%	84	17,481	
Summary sheriffs	40%	56	11,654	1.9
Sheriffs	50%	70	14,568	
Summary sheriffs	50%	70	14,568	2.4

42. The current planning assumptions are that there will be a phased introduction over a ten year period with:

- A 1:1 replacement policy would apply (ie appoint just one summary sheriff as each sheriff retires). In practice, the courts will have an on-going need to recruit replacement sheriffs as well;
- Based on retirement profiles, this will mean around six sheriffs a year will leave the bench. Therefore, six summary sheriffs added in year one, and a further six summary

<sup>17</sup> Estimated at 30% to take into account pensions, national insurance contributions etc.

<sup>18</sup> 205 days is the figure used for court programming.

<sup>19</sup> Based on a 1:1 replacement policy as each sheriff retires.

<sup>20</sup> Based on the sitting days deployed in 2011-12.

<sup>21</sup> Based on a potential saving of up to £163 per court sitting day, if deploying a summary sheriff.

sheriffs added each subsequent year until a full complement of 60 is in place at year ten;

- Each summary sheriff post would be capable of delivering an average of 205 days of bench time per annum;
- A complement of 60 summary sheriffs could deliver 12,300 potential sitting days ( $60 \times 205 = 12,300$ );
- The potential savings to the judicial salaries budget will be increasing by £0.2m each year, until that full complement of 60 is in place and savings plateau at an indicated saving of circa £2.0m per annum.

#### *Part-time sheriffs*

43. The existing complement of sheriffs is made up of two parts: sheriffs and part-time sheriffs. The latter relate to sheriffs who are paid a daily rate and are utilised when there is a particular need in a sheriffdom for cover. There is currently a pool of 77 part-time sheriffs who were used for around the equivalent of 24 full time sheriffs in 2011-12.

44. The introduction of summary sheriffs and the greater flexibility this gives to sheriffs principal may mean that they are able to take on some of those court sitting days that are currently provided by part time sheriffs. However, the Bill also establishes an equivalent role for part-time summary sheriffs.

45. Predicting the best use of part-time resources is more difficult than with the salaried roles. By definition these roles are used for cover and, given that the summary sheriff has a restricted jurisdiction, it will always be necessary to have a pool of part-time sheriffs available. As stated above, the deployment of the judiciary is a matter for the Lord President and the sheriffs principal, and these provisions do give them more flexibility in managing their resources.

46. Anticipating a mix between the part-time roles in future years could be misleading, especially given the consideration that there may be a reduction in the use of part-time resources once summary sheriffs are established. However, based on the assumption made above regarding the expected salary of a summary sheriff, there will be a 20% saving each time a part-time summary sheriff is used instead of a part-time sheriff.

#### *Stipendiary magistrates*

47. A consequence of the establishment of the summary sheriff is that the stipendiary magistrates (STIPs) will be automatically appointed as summary sheriffs, and that the role of stipendiary magistrate will cease to exist.

48. There are currently four full-time and a small number of part-time stipendiary magistrates used. These work exclusively in Glasgow and deal with summary criminal cases. The current planning assumption is that there is a full-time equivalent of 4.9 stipendiary magistrates that will be appointed as summary sheriffs. These will be in addition to the 80/60 split between sheriffs and summary sheriffs as described above.

49. The current base salary for stipendiary magistrates is £71,286 which is below the expected salary for the summary sheriff (£103,950). As shown in Table 6, the difference, once the additional costs for pensions etc. are taken into account, will be around £42,463 for each stipendiary magistrate. Therefore, there will be an increased annual cost to the judicial salaries budget of around £208,000 per annum to replace the full time equivalent of 4.9 stipendiary magistrates.

**Table 6: Difference in salary between stipendiary magistrate and summary sheriff**

	<b>Salary</b>	<b>On Costs</b>	<b>Total</b>
Stipendiary magistrate	£71,286	£21,386	£92,672
Summary sheriff	£103,950	£31,185	£135,135
<b>Difference</b>			<b>£42,463</b>

#### *Honorary sheriffs*

50. One judicial office not listed above is the honorary sheriffs as they incur no costs. However, the Bill does provide for the role to eventually cease as a consequence of the reforms once other technology solutions can be made available. The SCS estimates that honorary sheriffs currently deal with less than 2% of sitting days (circa 500) across the sheriff courts, and longer term it is not expected that an increase in other judicial resource will be required to deal with this workload. The days recorded for honorary sheriffs reflect only a very small amount of work being scheduled and would usually last under an hour.

51. The reforms being taken forward through Making Justice Work, including those through this Bill (eg the establishment of part-time summary sheriffs), will give SCS more flexibility in dealing with this business. In the longer term it is expected that part-time sheriffs and part-time summary sheriffs, supported by technology, will be able to cover this work with a minimal effect on costs.

#### *Implementation costs*

52. The SCS has approved a project team that has been established to take forward the work relating to judicial structures. The cost of this team to the SCS is estimated at £173,000 over the three years (2013-14 to 2015-16).

53. The SCS will need to make minor updates to two of its IT systems (COPII and CMS) to specifically support creation of the new judicial tier. These modifications will be minor and have been estimated at up to £10,000 for each system.

54. The on-going staffing costs for the SCS in relation to supporting the new tier are expected to be cost-neutral as, with the assumption of a 1:1 replacement policy, it is the type of judicial post that is changing rather than the total number of posts being supported. Therefore, no additional operational posts are expected to be required as a direct consequence of this change.

55. In addition, the replacement policy means that training costs for the new posts will be handled as per current budgets as the training will be based on what is currently used for new sheriffs.

56. The recruitment for the summary sheriffs will be undertaken by the Judicial Appointments Board for Scotland (JABS). As this will be based on 1:1 replacement for sheriffs, this is not expected to require any substantial increase in the workload for JABS, as the appointment criteria for the summary sheriff is similar to that for current sheriffs. JABS has estimated that there may be up to £4,000 as a one-off cost to design the appointment criteria. It is expected that this could be absorbed within the existing budget.

57. There may be further costs in future dependent on how the future deployment of shrieval resources is determined. If, over the longer term, JABS were asked to run an annual summary sheriff exercise and an annual or regular shrieval exercise, there would be some additional costs simply because there were two competitions rather than one. It is difficult to be precise about the potential extra cost and this will be dependent on the level of interest. If it is assumed that future fields for sheriff and summary sheriff are likely to be closer to the most recent rate of applications, then it could be assumed that 100-120 people would apply for both positions. The additional expense in considering those applications for each position would be between £8,000 and £10,000. However, it may be feasible to run a joint competition for sheriffs and summary sheriffs, removing the duplication of effort, and this would be considered.

58. Looking further ahead, the creation of the summary sheriff role may offer greater potential for JABS to run selection exercises on a regional basis, perhaps by sheriffdom. This would be likely to involve marginal increases in costs around the hiring of local accommodation for interviews, overnight expenses for panel members and staff and travel expenses. These could be seen as justified by the resultant benefit of attracting a field of candidates who might be more committed to long-term residency in the locality and a visible commitment to local justice. There is no current proposal within the Bill or elsewhere that would require JABS to do so. However, it may be seen as a desirable policy objective by the Scottish Government at that time and, although not a direct consequence of the Bill, arguably a potential indirect consequence.

### **Financial impact of judicial structures project**

**Table 7: Judicial structures project – recurring costs and savings**

<b>Judicial Salaries Budget</b>		<b>2016/17</b>	<b>2017/18</b>	<b>2018/19</b>
Scottish Government	Summary Sheriffs	(£200,000)	(£400,000)	(£600,000)
Scottish Government	Stipendiary Magistrates	£208,000	£208,000	£208,000
<b>Total</b>		<b>£8,000</b>	<b>(£192,000)</b>	<b>(£392,000)</b>

**Table 8: Judicial structures project – one-off costs**

<b>Implementation Costs</b>		<b>2013/14</b>	<b>2014/15</b>	<b>2015/16</b>	<b>Total</b>
Scottish Court Service	Project Team	£46,000	£53,000	£74,000	£173,000
Scottish Court Service	IT Upgrade		£10,000	£10,000	£20,000
Judicial Appointments Board	Appointments			£4,000	
<b>Total</b>		<b>£46,000</b>	<b>£63,000</b>	<b>£88,000</b>	<b>£193,000</b>

*Impact on the Scottish Government*

59. The impact on the Scottish Government is a potential reduction in the judicial pay bill of £0.2m per annum building up to £2m per annum by using summary sheriffs in lieu of sheriffs. However, this is offset slightly by the increase in costs from the appointment of stipendiary magistrates as summary sheriffs, which is estimated at around £0.2m per annum as outlined in paragraph 49.

*Impact on the Scottish Court Service*

60. In terms of costs, there is an estimated £193,000 of one-off investment costs by the SCS to cover the project team and the minor IT updates as shown in Table 8 above.

*Impact on the Judicial Appointments Board for Scotland*

61. In terms of costs, there is an estimated £4,000 of one-off costs to develop the specification for the summary sheriff role. Future decisions will have to be made about how the summary sheriff appointment rounds are handled and how they interact with any possible future sheriff appointment rounds. Depending on those decisions, there could be an additional £8,000-£10,000 cost to JABS but it is expected that decisions would be made to mitigate this extra expenditure.

**PERSONAL INJURY COURT**

62. This section considers the project relating to the establishment of the personal injury court. This is associated with the provisions contained in Part 1 Chapter 4 of the Bill, which deals with the exclusive competence and the power to confer all-Scotland jurisdiction for specified cases.

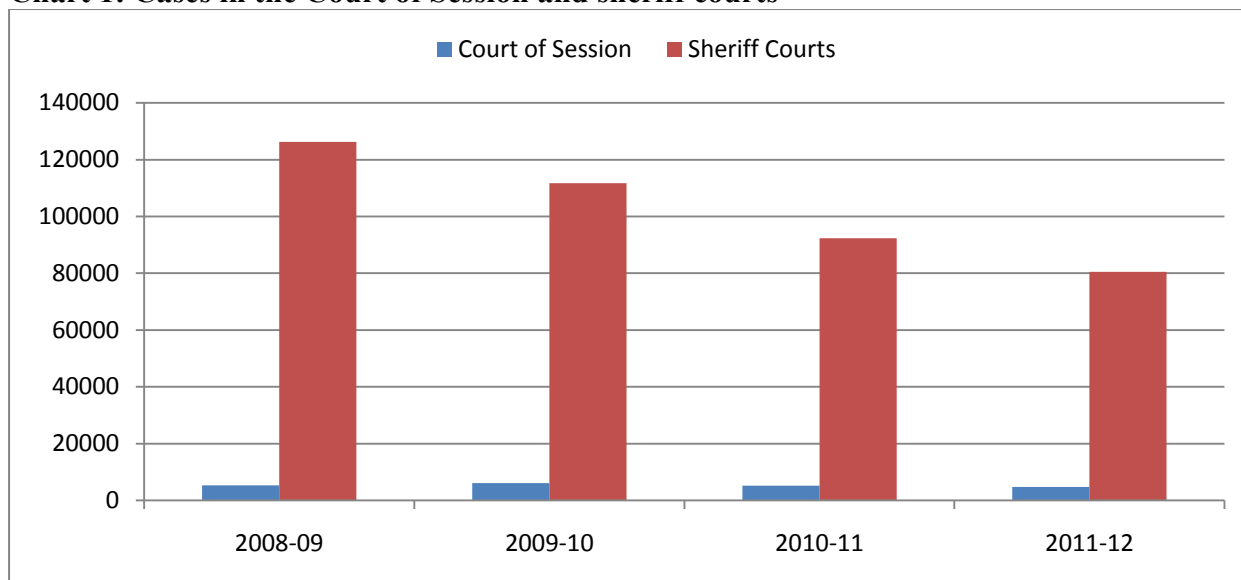
63. The raising of the exclusive competence of the sheriff court from £5,000 to £150,000 is a critical reform recommended by the Scottish Civil Courts Review and provided for in the Bill. The policy objective of the Bill is to ensure that cases are heard at an appropriate level in the court structure. Too many straightforward, low value cases are being considered too high up the system. This reform will see a substantial number of Court of Session cases transferred to the sheriff courts.

64. As will be shown below, the majority of cases affected by this change will be personal injury. To accommodate the shift, the Bill provides for the establishment of a court with all-Scotland jurisdiction which will be used to establish a specialist personal injury court. This will be based in existing court estate (expected to be in Edinburgh) and will replicate many of the advantages of the Court of Session in dealing with personal injury cases, including specialist sheriffs on the bench and the possibility of having civil juries.

*Current business*

65. The overall level of civil actions being initiated at first instance has been on a downward trend over recent years in both the Court of Session and the sheriff courts. In the sheriff courts this equates to a fall of 36% between 2008-09 and 2011-12.

**Chart 1: Cases in the Court of Session and sheriff courts<sup>22</sup>**



66. Generally, the current situation is that all cases with a monetary value below £5,000 are heard in the sheriff court, and for any case with a value above that the pursuer has the choice of using either the sheriff court or the Court of Session. A key element of the reforms is to set a higher exclusive competence limit (£150,000) as a pragmatic driver to shift business from the Court of Session to the sheriff courts.

67. For the 2011-12 financial year there was a total of 85,256 civil actions initiated with the courts and, of those, 94% were lodged with the sheriff courts and the remaining 6% were accommodated in the Court of Session.

68. The Court of Session is split into three with the General Department hearing the cases that will be affected by the rise in the exclusive competence.

**Table 9: Court of Session cases initiated – by department<sup>23</sup>**

Court of Session Department	2008-09	2009-10	2010-11	2011-12	%age of Total
General Department	3,736	4,479	3,723	3,390	71%
Petition Department	1,473	1,555	1,358	1,223	26%
Inner House	120	118	95	141	3%
<b>Total</b>	<b>5,329</b>	<b>6,152</b>	<b>5,176</b>	<b>4,754</b>	

#### *Personal injury*

69. Personal injury cases accounted for 76% of business in the General Department of the Court of Session in 2011-12. Therefore, it is clear that the majority of cases that will be affected by the raising of the exclusive competence will be personal injury cases.

<sup>22</sup> Civil Law Statistics in Scotland 2011-12 (Tables 1 and 2)

<http://www.scotland.gov.uk/Publications/2012/12/9263>

<sup>23</sup> Civil Law Statistics in Scotland 2011-12 (Table 1) <http://www.scotland.gov.uk/Publications/2012/12/9263>

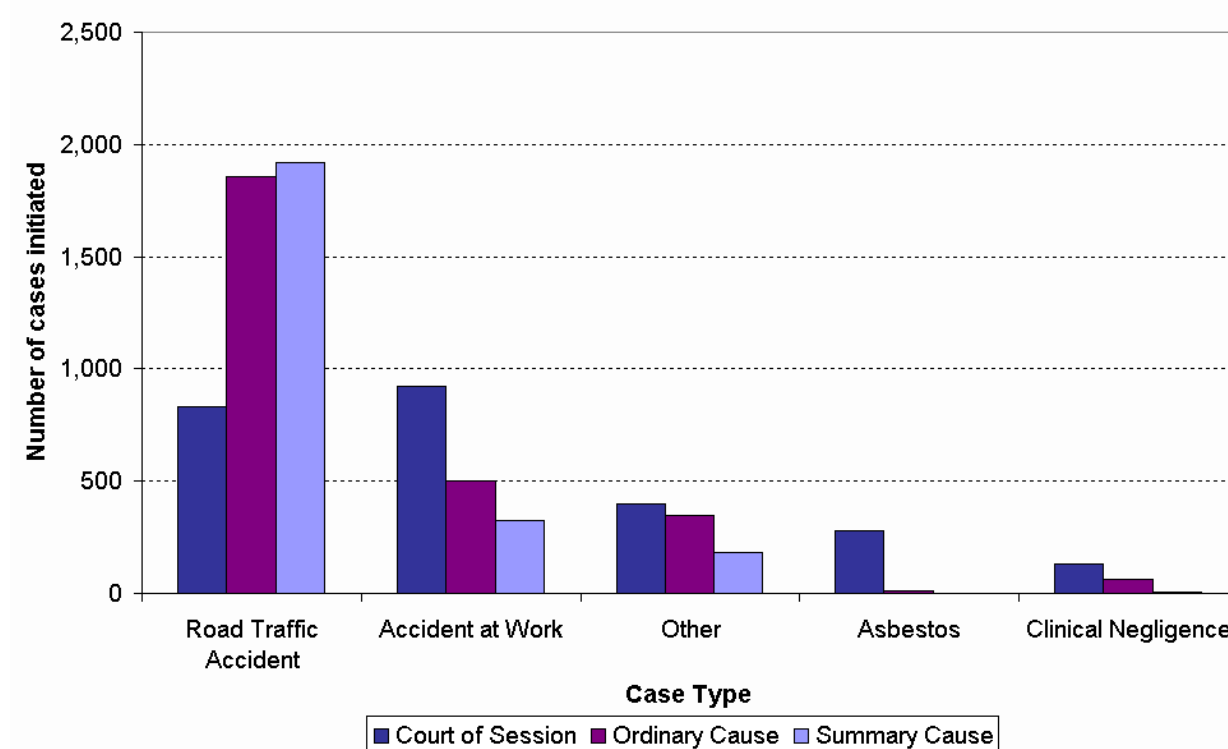
**Table 10: Personal injury cases initiated – by procedure**

Personal Injury Cases	2008-09	2009-10 <sup>24</sup>	2010-11	2011-12	%age of Total
Court of Session	2,568	3,408	2,940	2,571	33%
Sheriff Court - Ordinary <sup>25</sup>	2,562	3,940	3,183	2,784	36%
Sheriff Court - Summary <sup>26</sup>	1,858	2,468	3,011	2,437	31%
<b>Total</b>	<b>6,988</b>	<b>9,816</b>	<b>9,134</b>	<b>7,792</b>	

70. The above table shows that 67% of all personal injury actions are already being heard in the sheriff courts, with the remaining 33% of cases being managed within the Court of Session.

71. Across all the personal injury cases, the majority (81%) of those claims can be accounted for within the two main categories of road traffic accidents (59%) and work related accidents (22%). In terms of the Court of Session: accidents at work accounted for 36%, and road traffic accidents for 32%, of personal injury cases in 2011-12.

**Chart 2: Number of personal injury cases initiated across all courts, by case type, 2011-12<sup>27</sup>**



### *Business shift*

72. The following table shows the latest SCS estimate of the possible business shift. This is consistent with the figures from other sources (including those used by the SCCR and figures supplied by the Faculty of Scottish Claims Managers) and suggests a 3% rise in the civil cases

<sup>24</sup> Figures skewed in this year due to over 1,000 slopping out cases.

<sup>25</sup> Cases over £5,000.

<sup>26</sup> Cases up to £5,000.

<sup>27</sup> Civil Law Statistics in Scotland 2011-12 (Figure 10) <http://www.scotland.gov.uk/Publications/2012/12/9263>



raised in the sheriff courts. This should be seen within the context of the falling civil caseload as outlined previously.

**Table 11: SCS estimates civil caseload split between Court of Session and sheriff court**

	Court of Session		Sheriff Court		Total
Civil Caseload (2011-12)	4,754	6%	80,502	94%	85,256
Expected Shift	-2,700 (-57%)		2,700 (3%)		
<b>Post Reform</b>	<b>2,054</b>	<b>2%</b>	<b>83,202</b>	<b>98%</b>	<b>85,256</b>

73. Of those 2,700 cases to be transferred, by far the majority (circa 2,000) are expected to be personal injury cases. These cases are expected to be dealt with centrally at the national personal injury court, rather than being redistributed across all sheriff courts. This would leave around 700 cases which would be heard across the network of sheriff courts throughout Scotland.

#### *Specialist personal injury court*

74. The SCS looked at the personal injury cases in the Court of Session across the calendar years 2011 and 2012. This data has been used to model the workload for the specialist personal injury court. For the 2012 calendar year there were 2,653 personal injury cases initiated with the Court of Session and, of those, 485 (18%) had an indicated value over the proposed threshold of £150,000.

**Table 12: Value of personal injury cases initiated in the Court of Session for 2011 and 2012**

	2011		2012	
Value of Case	Cases	% of Total	Cases	% of Total
> £150,000	596	22%	485	18%
£100,000 to £150,000	179	7%	213	8%
£50,000 to £100,000	959	36%	961	36%
< £50,000	960	36%	994	37%
<b>Total</b>	<b>2,694</b>		<b>2,653</b>	

75. Based on this, a privative jurisdiction limit of £150,000 could be expected to shift up to 80% of the personal injury workload from the Court of Session. This is consistent with the figures produced for the Scottish Government's response to the SCCR, which accepted that an exclusive competence limit of £150,000 would mean 80% of personal injury cases would be transferred.<sup>28</sup>

76. The real magnitude of that shift will only truly become apparent once the new court is operating. The following sensitivity analysis provides an indication under three separate scenarios (60%, 70% and 80%) of the total demand that is likely to be transferred, based on the personal injury cases in 2011-12.

<sup>28</sup> Paragraph 85 <http://www.scotland.gov.uk/Resource/Doc/330272/0107186.pdf>

**Table 13: Scenarios for personal injury cases business shift from Court of Session**

	<b>2011/12</b>		<b>Scenario 1 (60%)</b>		<b>Scenario 2 (70%)</b>		<b>Scenario 3 (80%)</b>	
<b>Court of Session</b>	2,571	33%	1,028	13%	771	10%	514	7%
<b>Sheriff court</b>	5,221	67%	6,764	87%	7,021	90%	7,278	93%
<b>Total</b>	7,792		7,792		7,792		7,792	
<b>Business shift</b>			1,543		1,800		2,057	

77. That table indicates that, in terms of demand (new cases initiated), it could reasonably be expected that somewhere between 1,500 and 2,100 personal injury cases will transfer out of the Court of Session to the sheriff courts. For the purposes of this document, the assumption is that scenario two is the most likely outcome – i.e. 70% = 1,800 cases.

78. In practice, parties will have the choice of diverting business to their local sheriff court if it is more convenient than accessing the specialist court. However, the personal injury court is expected to offer a more continuous flow of business through the dedicated capacity than local sheriff courts and is likely to make that court the more attractive option for practitioners.

79. As the personal injury court will offer many of the benefits that are currently the basis for practitioners using the Court of Session, it is expected that this will be the forum of choice for these cases.

#### *Sitting days required*

80. The level of judges' sitting days deployed on total civil business in the Court of Session has been relatively stable (between 1,800 and 2,000 days) over recent years. If the resources for appellate courts and commercial courts are excluded, then the SCS estimated around 776 court sitting days are currently deployed on first instance civil business in the planned court programme (5 courts x 36 term weeks + 1 court x 14 vacation weeks).

81. The SCS has estimated that, post-reform, the court programme for the personal injury court could account for up to 200 of those 776 planned sitting days.

82. It should be noted that the sitting days actually used are mainly dependent on the cases that get to the stage of hearings. As noted above, many cases do not get to that stage and SCS states that in 2011-12 there were less than 30 cases that got to this stage of a proof hearing.

83. Using personal injury sheriffs rather than Outer House judges for each of those days will generate a potential saving of £57,000 per annum (200 days x £285 saving per day). Those savings will primarily accrue to the Scottish Government as the main budget holder for judicial salaries, with some possible impact on the relief cover which is funded directly by the SCS.

84. To support the sitting days being transferred, the SCS expects to deploy sheriff clerks as clerks of the Sheriff Appeal Court. This will generate a potential saving of £7,000 per annum (200 court sitting days x £35 saving per day) in comparison to the clerks of court that are used to support the judges in the Court of Session.

85. The ‘rights of audience’ applicable in the supreme courts mean that only advocates and solicitor advocates are currently able to represent appellants in front of those courts. The wider rights of audience that apply in the sheriff court will allow any solicitor to represent appellants for the personal injury cases transferred to the sheriff courts. That change will have two main benefits:

- Legal fees – The fees charged by general solicitors are significantly lower than advocates and that reduced cost should flow directly to those appellants who fund their cases personally.
- Legal aid – Where the appellant is legally aided, then those reduced fees will flow through as a direct saving on the Legal Aid Fund.

#### *Implementation costs*

86. There will be one-off operational costs for the SCS to establish the personal injury court as a viable entity which will include:

- design and set-up of the processes for designating sheriffs as specialist ‘personal injury sheriffs’;
- creating the training programmes (sheriffs and staff);
- confirming the operating model.

87. The SCS has estimated a provisional sum of £10,000 that has been set aside to cover these general set-up costs.

88. In addition, the SCS will need to make minor updates to one of its IT systems to specifically support creation of the personal injury court. This modification has been estimated at up to £10,000.

89. The SCS has approved a project team that has been established to take forward the work relating to establishing the personal injury court. The cost of this team to the SCS is estimated at £107,000 over the three years (2013-14 to 2015-16).

90. The staffing costs for on-going operation of the personal injury court are expected to be cost neutral as the level of demand is already being managed by SCS and the existing staff complement will in effect be redeployed and follow the business. Therefore, no additional operational posts are expected to be required as a direct consequence of this change.

#### *Impact on the Scottish Government*

91. The impact on the Scottish Government is a potential reduction in the judicial pay bill of £57,000 per annum by having the cases heard at the specialist personal injury court.

#### *Impact on the Scottish Court Service*

92. The SCS derives funding from charging fees for civil cases. There is a policy intention for the fees to cover the full costs of the cases. The reduction in the judicial cost pool will help

lift the cost recovery percentage for civil courts. In addition there will be small savings on using sheriff clerks rather than the clerks in the Court of Session – around £7,000 per annum.

93. In terms of costs, there is an estimated £127,000 of one-off investment costs by the SCS to cover the project team and the minor IT updates.

*Impact on the Scottish Legal Aid Board*

94. The fee exemptions granted by the SCS on personal injury cases are very low, which can be attributed to other possible funding arrangements for these types of cases. In personal injury cases, solicitors assess the risk involved. Cases which are straightforward and have a high chance of success will proceed under a ‘no win, no fee’ or other type of arrangement. SLAB receives applications for legal aid in the more difficult cases, to which it applies the statutory tests.

95. SLAB does not pay for all the reparation and medical negligence cases that are granted civil legal aid. If the person is successful (the success rate in publicly-funded reparation cases is around 85%) then legal costs are recovered from any financial contribution SLAB may have calculated the individual had to pay, and, if that is not enough, from any expenses awarded. If that is not enough, SLAB recovers the costs from the award that may have been made to the person by the court or through a settlement. Therefore, where a person wins and seeks expenses, the costs are met that way.

96. The number of grants of civil legal aid for reparation and medical negligence in 2011-12 was 65. In 2011-12 SLAB paid out £7m for these categories of case, of which £3.1m was spent on counsel, and in 2012-13 SLAB paid out £4.9m of which £2.4m was paid to counsel.

97. SLAB expects that there will be savings on the amount spent on counsel. If more cases are presented by solicitors in the sheriff court, then the total expenditure from the Legal Aid Fund may decrease as counsel will not necessarily be instructed in each case before the specialist personal injury court. If the applicant does want to use counsel, the applicant will require to obtain SLAB’s approval for this. SLAB will consider whether the use of counsel is appropriate. In the initial two-three years, SLAB expects that there will be a bedding-in period where quite a few applications for counsel are submitted. However, it expects that the expenditure on counsel will reduce over time and estimates that there could be savings up to 50% of expenditure on counsel (based on the 2012-13 level that would be a saving of £1.2m) as not all cases will require the expertise of counsel in the sheriff court.

**Table 14: Personal injury court – financial implications**

<b>Personal Injury Court</b>		<b>One Off Costs</b>	<b>Recurring Savings (from 2016/17)</b>
Scottish Government	Judicial Salaries		(£57,000)
SLAB	Legal Aid Budget		(£1,200,000) <sup>29</sup>
Scottish Court Service	Payroll (Clerks)		(£7,000)
	Project Team	£107,000	
	Procedures	£10,000	
	IT Upgrade	£10,000	
<b>Total</b>		<b>£127,000</b>	<b>(£64,000)</b>

#### *Non-personal injury caseload*

98. There would also be smaller savings for the other cases that will be heard in the sheriff courts. Using the figures provided by SCS of the 2,700 cases it estimates would be transferred from the Court of Session, 2,000 of these were personal injury, which leaves 700 that are non-personal injury cases. This is expected to be at the top end of the scale. As with the calculations for the personal injury casework above, the sitting days are based mainly on the cases that get to the proof stage and not necessarily the total number of cases (although these will obviously be linked). Given the lower numbers, the savings to the judicial salaries and the SCS are expected to be marginal.

### **SHERIFF APPEAL COURT**

99. This section considers the project relating to the establishment of the Sheriff Appeal Court (SAC). This is associated with the provisions contained in Parts 2, 4 and 5 of the Bill that deal with the SAC.

100. The establishment of a SAC is a key recommendation and is linked to many of the other recommendations of the SCCR. The purpose of the SAC is to reduce the number of criminal and civil appeals which require to be dealt with in the High Court and Inner House respectively. The SAC will consist of judges known as Appeal Sheriffs, who will include all the current sheriffs principal as well as sheriffs appointed by the Lord President. The Lord President may appoint as many appeal sheriffs as is considered necessary and they are not expected to receive any additional remuneration in respect of this role.

#### *Volume trends*

101. There is a declining trend in the volume of appeals initiated over recent years in both civil and criminal cases.

<sup>29</sup> This may be lower in the first few years of implementation.

**Table 15: Criminal appeals<sup>30</sup>**

	2008/09	2009/10	2010/11	2011/12	% Mix
Solemn	765	870	820	810	39%
Summary	1,546	1,486	1,393	1,274	61%
<b>Total</b>	<b>2,311</b>	<b>2,356</b>	<b>2,213</b>	<b>2,084</b>	

**Table 16: Civil appeals<sup>31</sup>**

	2008/09	2009/10	2010/11	2011/12	% Mix
Court of Session	300	287	286	261	45%
Sheriffs Principal	423	498	441	313	55%
<b>Total</b>	<b>723</b>	<b>785</b>	<b>727</b>	<b>574</b>	

102. The planning assumption is that overall volumes will remain similar to the 2011-12 levels, and that the increase in the privative jurisdiction to £150,000 will not have a significant impact on the overall volume of civil appeals.

103. A key driver of the reforms is the potential savings that can accrue from having appeals heard by the right judicial tier, and by ensuring that the use of multi-judge benches is kept to the minimum level necessary to support the interests of justice.

104. A notional day rate based on the assumption that all judicial officers can provide 205 days of bench time on average is outlined below. These ‘average costs per day’ are then used to highlight the significant differences in the judicial pay bill that are available under these proposals.

#### *Civil appeals*

105. The current situation for civil appeals from the sheriff courts is that these are heard by the appropriate sheriff principal. The establishment of the SAC will mean that all civil appeals from the sheriff courts will now be heard by this court.

106. Recommendation 12 of the Civil Courts Review proposed that “For civil appeals there would generally be a bench of three”, which reflected a view that having appeals from a single judge to another single judge was not best practice, and that as a matter of principle using three judges to overturn a judicial decision would provide a far more robust decision-making process.

107. However, the Scottish Government wanted to retain the advantages of the current approach of sheriffs principal sitting alone, a view considered acceptable by appellants as a fast and cost-effective method of dispute resolution and also favoured by respondents to the consultation. Therefore, the intention is to use a three-judge bench only where an appeal sheriff sitting alone deems that the grounds for appeal would specifically warrant that level of response.

108. For the 2011-12 financial year, there were 261 civil appeals lodged with the Court of Session. Of those, only 55 were appeals from the inferior courts and it is this element of business that will transfer to the SAC along with any appeals from cases transferring to the sheriff court as

<sup>30</sup> SCS Annual Accounts 2011-12

<sup>31</sup> Civil Law Statistics in Scotland 2011-12

a result of the change to the exclusive competence. Appeals from the Outer House, and other courts and tribunals, all remain with the Inner House of the Court of Session.

109. The planning assumption is that these are straightforward cases and as such the expected average duration per case will be similar to those appeals currently heard by the sheriffs principal. The SCS estimates this to be 5.1 hours per appeal which will mean that this will require around 56 sitting days for the 55 appeals.

110. The savings will be realised through the difference in salaries paid to the judges of the Inner House of the Court of Session and those paid to sheriffs principal and Appeal Sheriffs as shown in the table below.

**Table 17: Comparison of costs between Inner House Judges and Appeal Sheriffs**

<b>Judicial Costs</b>	<b>Salary</b>	<b>Day Rate<sup>32</sup></b>	<b>On Cost<sup>33</sup></b>	<b>Total</b>	<b>Daily Saving</b>
Inner House Judge	£198,674	£969	£291	£1,260	
Sheriff Principal	£139,933	£683	£205	£887	<b>£373</b>
Appeal Sheriff	£129,579	£632	£190	£822	<b>£438</b>

111. As discussed above, the assumption is that the SAC will use a single-judge bench to progress these appeals, rather than the three-judge bench currently made available by the Court of Session.

**Table 18: Potential savings between Inner House Judges and Appeal Sheriffs**

<b>Judicial Costs</b>	<b>Sitting Days</b>	<b>Total Sitting Days</b>	<b>Daily Rate</b>	<b>Total Cost</b>	<b>Savings</b>
Inner House Judge	56	168 <sup>34</sup>	£1,260	£211,660	
Sheriff Principal	56	56	£887	£49,693	<b>£161,967</b>
Appeal Sheriff	56	56	£822	£46,016	<b>£165,644</b>

112. As shown in the table above, this would mean a recurring saving in judicial salaries of between £162,000 and £166,000 per annum.

113. Similar to the potential savings due to using a different tier of the judiciary to hear the cases, it is also the case that the clerks in the SAC will be a lower grade than those in the Court of Session. This will provide marginal savings to the SCS estimated to be around £5,000 per annum.

114. For the 2011-12 financial year, there were 313 new civil appeals initiated directly from the sheriff courts to the sheriffs principal. There were 330 appeals disposed of, and a total of 335 sitting days required from the sheriffs principal to undertake these appeals. This business will now be heard in the SAC and, whilst there may be some savings as some of these cases will be heard by Appeal Sheriffs that are not sheriffs principal, the differential in salary is not material (£65 per day) and, therefore, it is assumed there will be no substantial savings in respect of this.

<sup>32</sup> This is based on 205 sitting days which is the figure used for court programming.

<sup>33</sup> This is based on 30% to cover costs including pensions and National Insurance contributions.

<sup>34</sup> This is based on 3 Judges hearing each case.

### *Bench of three*

115. Whilst the policy decision is that appeals should be heard by a bench of one there will be cases where this is not appropriate. SCS has stated that its current planning assumption is that around 5% of total civil appeals to the SAC are likely to warrant a bench of three Appeal Sheriffs. The following table provides a sensitivity analysis to highlight the financial impact of any changes to this assumption.

**Table 19: Using bench of three Appeal Sheriffs**

<b>% Bench of 3</b>	<b>Sitting Days<sup>35</sup></b>	<b>Cost Per Year<sup>36</sup></b>
5%	20	£33,000
10%	39	£64,000
25%	98	£161,000
50%	196	£321,000
70%	274	£450,000
100%	391	£643,000

116. It is clear that if a significant number of cases required a bench of three this would have an impact on the costs associated with appeals. However, based on the estimates of 5% of cases requiring this level of judicial time, this will mean a cost of £33,000 per annum to the judicial salaries budget.

### *Court fees*

117. As stated earlier, court fees are charged for civil appeals. The most recent fees orders were approved by the Parliament in 2012 and set the rates up to 2014-15.

**Table 20: Court fees from 1 April 2014**

<b>Marking Appeal to Sheriff Principal</b>			<b>Court of Session</b>		
<b>Small Claim</b>	<b>Summary Cause</b>	<b>Ordinary Procedure</b>	<b>Appeal or Leave to Appeal</b>	<b>Hearing - Bench of 1 (per 30 minutes)</b>	<b>Hearing - Bench of 3 or more (per 30 Minutes)</b>
£0	£56	£107	£202	£90	£225

118. For the purposes of this business case, it is assumed that there will be no change to fee income at this time. Therefore, the costs directly incurred by an appellant or SLAB to progress a case through the sheriff courts will be lower than taking the same case through the Court of Session. SLAB has stated that it granted civil legal aid to 52 applicants in 2010-11, 84 in 2011-12 and 86 in 2012-13. On the basis that legal aid will not fund all the expected 55 appeal cases, it is not expected that there will be a substantial impact on the Legal Aid Fund from the introduction of the SAC for civil appeals.

<sup>35</sup> Based on the total of 391 sitting days.

<sup>36</sup> Based on £822 per day rate for an Appeal Sheriff.



### *Criminal appeals*

119. The current situation is that all appeals on criminal matters are heard in the High Court. The establishment of the SAC will mean that all criminal appeals for summary cases from the sheriff courts and the justice of the peace courts will now be heard by this court.

120. In addition, bail appeals from the sheriff court, whether solemn or summary, will also be heard by the SAC.

121. The procedures for the appeal process will remain the same as they are currently with the only change being that the appeals will be heard by Appeal Sheriffs in the Sheriff Appeal Court rather than judges in the High Court. However, there will be the addition of a 'second appeal' with a decision of the SAC appealable to the High Court. This will be a restricted right of appeal and it will have to be on a point of law and with permission of the High Court. The expectation is that the SAC will be the appropriate court for dealing with summary matters.

122. Paragraphs 123-129 outline the expected implications of Appeal Sheriffs undertaking the work that is currently done by judges of the High Court in relation to summary criminal cases.

### *Bail appeals*

123. There were 3,702 bail appeals in 2011-12, of which 3,556 were from the sheriff and justice of the peace courts. As such it is those 3,556 that would be heard in a Sheriff Appeal Court. SCS estimates that, at an average of five minutes per bail decision, this would require Appeal Sheriffs to be deployed for the equivalent of 59 judicial days to assess whether or not bail should be granted.

124. At an assumed saving of £438 per day, those 59 judicial days on procedural business would equate to a saving of £26,000 per annum to the judicial salaries budget.

### *Criminal sift*

125. In criminal appeals there is a sifting process to assess whether the appeal should proceed. Initially the sift is heard by a single judge, and if the leave to appeal is rejected then that can be taken to a second sift which will be heard by a bench of two (for sentence appeals) or three (for conviction appeals). In 2011-12 there were 1,069 initial sifts and 507 second sifts.

126. In terms of the resources deployed on the criminal sift, the SCS estimates that, at an average of 20 minutes per sift application, Appeal Sheriffs will be deployed in the SAC for the equivalent of 146 judicial days to assess whether or not leave to appeal should be granted on appeals arising from the summary courts.

127. At an assumed saving of £438 per day, those 146 judicial days on procedural business would equate to a saving of £64,000 per annum to the judicial salaries budget.

### *Substantive hearings*

128. There were 661 summary appeal hearings in 2011-12. In terms of the resources deployed, the SCS estimates that Appeal Sheriffs will be deployed in the SAC for the equivalent of 315 judicial days to sit on the substantive hearings of summary conviction and sentence appeals, and miscellaneous appeals.

129. At an assumed saving of £438 per day, those 315 judicial days would equate to a recurring saving of £138,000 per annum to the judicial salaries budget.

### *Staff salaries*

130. The summary criminal workload will account for the equivalent of 174 court sitting days where an EO clerk of court will need to be made available by SCS to support the substantive hearings, and the bail appeal court.

131. At an assumed saving of £81 per day, those 174 court sitting days would equate to a recurring saving of £14,000 per annum to the SCS.

### *Legal costs*

132. The ‘rights of audience’ applicable in the supreme courts mean that only advocates and solicitor advocates are able to represent appellants in front of those courts. The wider rights of audience that apply in the sheriff court will allow any solicitor to represent appellants in summary appeals in the SAC. That change will have two main benefits:

- Legal fees – the fees charged by general solicitors are significantly lower than advocates and that reduced cost should flow directly to those appellants who fund their appeals personally.
- Legal aid – where the appellant is legally aided then those reduced fees will flow through as a direct saving on the Legal Aid Fund.

133. For the 2011-12 year, SLAB paid out £2.8m to support the progress of criminal appeals through the courts. An analysis by SLAB on summary and bail appeals estimated that the introduction of the SAC for criminal appeals would result in a saving of £208,000 per annum to the Legal Aid Fund.

### *Onward appeals*

134. There was some concern that the addition of the SAC for criminal appeals could allow appellants “another bite at the cherry” and that this would increase the overall workload of the courts and COPFS.

135. However, the policy intention is that the SAC should be seen to be the appropriate court for dealing with summary criminal business and any appeal of its decisions should be rare. The Bill provides a tough test for appeals of decisions of the SAC. Any appeal to the High Court would need the permission of that court and would only be given if the court considered that it raised an important point of principle or practice or that there was some other compelling reason for the court to hear the appeal.

136. The number of summary criminal cases has been on a gradual downward trend and the number of appeals for these cases is reducing in line with that trend. The rate of summary cases being appealed has remained reasonably consistent at around 1.7%. It is difficult to estimate how many appeal cases may go forward to a second appeal but it is expected to be very low, although it may peak in the early years as the permission stage is tested and case law built up. In civil cases there is an appeal from decisions of the sheriffs principal and that is at a rate of around 1.5%.

137. Therefore, given the test it is not expected that many of the cases would meet this and therefore, it is estimated that around 5% would be at the top end of the expectations in the early years. The table below shows the potential costs depending on a range of possible rates for 'second appeals'.

**Table 21: Second appeal cases**

Percentage of 'second appeal' hearings	Cases	Judicial Salary Costs <sup>37</sup>	Legal Aid Costs <sup>38</sup>	COPFS Costs
5%	33	£42,000	£88,000	£29,250
10%	66	£83,000	£175,000	£58,499
20%	132	£167,000	£350,000	£116,998
25%	165	£208,000	£438,000	£146,248

#### *Implementation costs*

138. There will be one-off operational costs to establish the SAC as a viable entity which will include:

- design and set up of the processes for designating sheriffs as specialist 'appeal sheriffs';
- creating the training programmes (sheriffs and staff);
- confirming the operating model.

139. The SCS has estimated a provisional sum of £20,000 that has been set aside to cover these general set-up costs.

140. The cost of the project team required to establish the SAC is estimated at £123,000 over the three years 2012-13 to 2014-15.

141. An investment has already been made by SCS in upgrading the COPII system to support the appellate courts. Adding tables and screens to COPII and CMS to specifically support creation of the SAC as an additional court in 2015 should only take minor modifications of up to £25,000.

<sup>37</sup> Using the current resource required for a conviction hearing this would mean a three judge bench taking around one sitting day per case.

<sup>38</sup> This is based on the number of applications to SLAB rather than number of cases.

142. The staffing costs for on-going operation of the SAC are expected to be cost-neutral as the level of demand is already being managed and the existing staff complement will in effect be redeployed across the appellate courts and follow the business (i.e. no additional operational posts are expected to be required as a direct consequence of this change).

143. The availability of civil and criminal courtrooms that are able to accommodate a three-judge bench is limited. Given that the SAC can be heard at any court, and it is expected that for civil appeals these will be heard in the relevant sheriffdom, the SCS has stated that it may need to provide upgrades to ensure certain courts can hear cases that require a three-judge bench.

144. The policy intention is that the SAC for criminal appeals will be a central court but that civil appeals will be heard in the sheriffdom. This is based on the intention to replicate current procedures where criminal appeals are heard at the High Court in Edinburgh and civil appeals by the sheriff principal in the relevant sheriffdom. Therefore, the SCS has estimated that it may need to upgrade three courts at a cost of £30,000 each and has set aside budget to undertake this work as and when required.

**Table 22: Sheriff Appeal Court – financial implications**

Sheriff Appeal Court		One Off Costs	Recurring (from 2016/17)
Scottish Government	Judicial salaries (civil)		£166,000
	Judicial salaries (civil) - three bench		(£33,000)
	Judicial salaries (criminal)		£228,000
	Judicial salaries (criminal) - appeals		(£42,000)
SLAB	Legal aid budget		£208,000
	Legal aid budget (onward appeals)		(£88,000)
COPFS	Staff costs – onward appeals		(£29,000)
Scottish Court Service	Payroll (clerks)		£19,000
	Project team	(£123,000)	
	Procedures	(£20,000)	
	IT upgrade	(£25,000)	
	Accommodation upgrade	(£90,000)	
<b>Total</b>		<b>(£258,000)</b>	<b>£368,000</b>

#### *Impact on the Scottish Government*

145. The impact on the Scottish Government is a potential reduction in the judicial pay bill of £166,000 per annum for civil appeals and £228,000 per annum for criminal appeals.

146. The savings will be offset against expected costs in the onward appeals and using a bench of three for some of the more complex civil appeals. It is expected that the former may cost £42,000 per annum with the latter around £33,000 per annum.

147. This will mean a recurring saving of £319,000 per annum against the judicial salaries budget. As noted, to realise this as a cash saving will rely on a reduction in the number of judges. Therefore, initially it is likely that the savings will be in time with judges able to focus on the cases remaining in the Court of Session and High Court. However, in the mid to longer term this

will give the flexibility to the Scottish Government to reduce the complement of judges and realise the cash savings to the judicial salaries budget.

*Impact on the Scottish Court Service*

148. There will be small savings on using sheriff clerks rather than the clerks in the High Court and Court of Session of around £19,000 per annum.

149. In terms of costs, there is an estimated £258,000 of one-off investment costs by the SCS to cover the project team, minor IT updates and possible building alterations.

*Impact on the Scottish Legal Aid Board*

150. As noted above, there is an expected reduction in the legal aid bill which SLAB has estimated at £208,000 per annum.

151. This will be offset against any expenditure required for the 'second appeals' in criminal cases. At an estimate of 5% of cases, it is estimated that this would incur a potential cost on the legal aid budget of around £88,000.

152. Therefore, there is potential recurring saving to the Legal Aid Fund of around £120,000 per annum.

*Impact on the Crown Office and Procurator Fiscal Service*

153. Most of the reforms relate to civil justice and as such will have no impact on COPFS. However, the criminal part of the SAC will have an impact on COPFS, especially in relation to any onward appeals. Based on the amount of time required by staff of COPFS in relation to these cases, COPFS has estimated that on the business assumptions above this would cost around £29,000 per annum.

*Impact on wider court users*

154. As with the personal injury court, the financial impact is expected to be positive on parties using the courts. Ensuring cases are heard at the appropriate level in the system will mean that fees charged will be lower.

155. However, the other side of that is that there may be some law firms who are likely to be negatively affected due to the lower fees they will be able to charge. In addition, the Faculty of Advocates have also expressed concern due to the reduction in cases in the Court of Session and the High Court as advocates have exclusive rights of audience in those courts.

**RULES REWRITE**

156. This section considers the project relating to the work undertaken by the SCJC to rewrite and develop the rules required to implement the reforms. As all the reforms will require rules and procedures to be developed, this covers almost all provisions in the Bill but especially those in Part 6 where the rule-making powers are outlined.

### *Background*

157. The Lord President of the Court of Session, who led the SCCR, 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”.<sup>39</sup> This part of the Bill is, in the main, ensuring that the court has the appropriate powers to ensure that the reforms envisaged by the SCCR, and that are covered by the previous sections, can be implemented. Whilst there are additional specific procedures outlined in the Bill (e.g. simple procedure), they are not expected to raise any significant costs. The main financial implications relate to the development of the rules that are required for the reforms to be implemented.

158. To take forward the development of the rules, the SCJC was established in May 2013 after the passing of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The work of the Council is anticipated to be two-fold in its initial years: to undertake and complete the civil procedure rules project which will implement many of the reforms from the SCCR, and to ensure all necessary instruments are made to allow the courts to continue to function. Although the new Council will focus primarily on the rules revisions associated with civil courts reform, it will continue the care and maintenance work of the previous Rules Councils in ensuring the rules are amended in line with legislative requirements.

159. Therefore, it is not possible to provide specific costs for the rules of each procedure given the interlocking nature of the procedures. The planning assumption is that the work required for these reforms will make up 80% of the SCJC’s overall workload over 2014-15 and 2015-16.

160. The investment in a comprehensive rules rewrite will remove a considerable barrier to the efficient working of the courts, and create the platform of user friendly court procedures that is needed for a modern justice system to develop and evolve over the coming decades. It will also enable significant efficiencies to be driven out of the system through more efficient working methods and the increased use of IT.

161. The rules will complement the reforms that are outlined in the Bill and, therefore, there are no specific savings recorded against this.

### *Implementation costs*

162. The drafting team is expected to be established with one lead lawyer (G6) and four others (G7) for the first two years along with a member of support staff. After the core rules are developed, that team is expected to be scaled back by 50% for the next four years, and then reduced by a further 50% for the remainder of the 10-year project life to progress the more esoteric rules

163. Deploying that level of resources indicates that over ten years a spend of circa £2m in payroll costs will be required to deliver the complete rewrite and update of all rules of court.

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<sup>39</sup><http://www.scotsman.com/news/no-reverse-gear-as-lord-gill-drives-home-the-direction-of-travel-over-civil-court-reforms-1-2556472>

164. To reflect the people-driven nature of this project, a further sum of £72,000 has been provided as a notional office rental to cover the costs of accommodating a team of that size over a prolonged period. This is based on £15,000 per annum for 2014-2016 and then reducing thereafter as the size of the team reduces.

165. In addition to the development and drafting of the rules, there are a number of generic activities within the rule-making function (eg policy formation, consultation, drafting, approval, publication). For the purposes of this Memorandum, the costs of the ‘drafting rules’ activity only are reflected as the other functions are assumed to be absorbed within the existing roles and responsibilities of the SCJC.

**Table 23: Costs for rules rewrite team**

<b>Cost</b>	<b>2014/15</b>	<b>2015/16</b>
Payroll costs	£412,000	£412,000
Office accommodation - notional rental	£15,000	£15,000
<b>Total</b>	<b>£427,000</b>	<b>£427,000</b>

166. Therefore, the expected cost of the rules rewrite directly related to the Bill is £427,000 per annum for 2014-15 and 2015-16. This is part of the expenditure that the SCS agreed to fund using the increased court fees as outlined in paragraphs 28-30.

167. The drafting work will continue in subsequent years with a reduced team but the rules related to the reforms in the Bill are being prioritised in these two years.

168. Overall, the detail of the new procedures and how they will work will be the responsibility of the Lord President and the full effect of these will not be known until they have been developed by the SCJC.

169. This includes the procedures that have had some of their detail outlined in the provisions of the Bill. These include:

- judicial review – including the introduction of a three-month limit and a permission stage,
- civil juries – these will now be competent in the new all-Scotland sheriff court(s),
- simple procedure – replacing the current small claims and summary cause procedures in the sheriff court.

## **THE SCOTTISH COURTS AND TRIBUNALS SERVICE**

### **Introduction**

170. This section of the Financial Memorandum sets out the expected costs of the provisions in the Bill to create the Scottish Courts and Tribunals Service (SCTS). The policy objective of Part 7 is to merge the Scottish Tribunals Service (STS) with the SCS to protect the independence of the administration of devolved tribunals by separating it from the Scottish Government and to put the administration on the same statutory footing as the administration of courts in Scotland. Merging the STS with the SCS would create a joint independent administration for both courts

and tribunals with one board chaired by the Lord President as head of the judiciary for both courts and tribunals. This section of the Memorandum considers the financial implications for the Scottish Administration and the SCS.

## **Background**

171. The Scottish Government has given detailed consideration to the impact of the proposed merger and has consulted those likely to be affected. As part of the consideration of merging, the Scottish Government ran a joint project with the SCS on the feasibility of merging the STS with the SCS. As part of this project there was a dedicated finance workstream which analysed the costs of running the STS, what costs would be required to merge the STS with the SCS and whether any additional running costs would arise as a consequence.

172. The provisions within Part 7 (including schedule 3) of the Bill, which amend the Judiciary and Courts (Scotland) Act 2008, change the name and the board structure of the STS. The majority of the work required to merge the STS with the SCS, which has a cost impact, will be on an administrative level and is outlined in the remaining paragraphs.

## **Costs on the Scottish Administration**

### *Annual operating costs of the STS*

173. The annual operating cost of running the STS is provided in Table 24. The annual costs are just over £10m per annum (based on projected costs for 2013-14).

174. The Scottish Government proposes that the current operating budget for the STS would be transferred to the annual operating budget of the SCS.

175. There are no new costs for the operation of the tribunals currently supported by the STS in a merged organisation.

**Table 24: STS budget 2013/14**

<b>Tribunal</b>	<b>Budget</b>
Mental Health Tribunal for Scotland	£8,513,000
Additional Support Needs Tribunals for Scotland	£296,000
Private Rented Housing Panel	£429,000
Pension Appeal Tribunals Scotland	£449,000
Lands Tribunal for Scotland	£336,000
Auxiliary Budget	£400,000
Council Tax Reduction Review Panel <sup>40</sup>	£135,000
Homeowner Housing Panel <sup>41*</sup>	£454,000
	£11,012,000
Income Receivable (fees)	(£30,000)
<b>Total STS Budget</b>	<b>£10,982,000</b>

<sup>40</sup> The budget for the Council Tax Reduction Review Panel (CTRRP) represents the transitional costs and operational costs from 1st October 2013.

<sup>41</sup> The budget for the Homeowners Housing Panel (HOHP) for 2013-14 is still subject to change. Costs for this and the CTRRP are still borne by the home policy team as the budgets have not yet been formally transferred to the STS.



### *Costs of merging*

176. Joint work with the SCS indicates that one-off transition costs from within a range of £0.7m to £1.2m over a two-year period will be required to implement the merger.

177. It is proposed to split the implementation costs for the merger over this financial year (2013-14) and the next (2014-15) using provision from within the STS and wider justices budgets and their continuous improvement programme.

**Table 25: Costs for merging the STS with the SCS**

<b>Function</b>	<b>Range</b>	
	<b>Min</b>	<b>Max</b>
Project management	£0	£105,000
IT	£541,000	£692,000
HR and staff training	£89,000	£89,000
Salary harmonisation	£0	£244,000
Communications	£43,000	£43,000
Finance systems	£27,000	£27,000
<b>Total cost</b>	<b>£700,000</b>	<b>£1,200,000</b>

### *Project manager*

178. Costs are estimated for a full-time project manager for 18 months. It may be that this cost can be met by current staffing, in which case additional costs would not be required.

### *IT costs*

179. The bulk of costs for the merging of the STS with the SCS are around costs for IT requirements. These costs include buying of new hardware, transferring of applications and web contracts and conversion of electronic files. In recognition of issues that can arise mid-project relating to IT, a contingency has been built into these figures.

### *HR and staff training costs*

180. These figures illustrate estimated costs to support necessary training for staff in the merged organisation.

### *Terms and conditions harmonisation*

181. Costs also include an estimate for harmonising salary variations if this is required.

### *Communications*

182. A significant 're-brand' of the SCS estate is not expected. Currently the SCS already operates with a number of 'sub-brands' for each of its courts. Similarly the STS supports individual tribunals which have their own brand. It is important for courts and tribunals that they can continue with their distinct identity, supported by a single administration. There is no desire to try and impose an over-arching brand across the whole estate. These costs acknowledge that

there will be a need to build in the new corporate identity of the SCTS into IT, documents and at key corporate buildings.

*Finance systems*

183. These costs support the system migration that would be required for payroll and paying of expenses etc..

*Estates*

184. It is proposed that tribunals will continue to operate from the venues that they currently use, and so the costs for venue hire or leasing will remain as currently included within the STS operating budget. Therefore, there are no additional costs for estates.

*Future efficiencies*

185. This project has been primarily driven by a desire for operational independence, it is not cost-driven. However, it is acknowledged that in time, and through sharing of good practice and some back-office functions, some efficiencies could be delivered.

**Costs on local authorities**

186. The Scottish Government does not expect local authorities to incur any additional costs as a result of merging the STS with the SCS.

**Costs on other bodies, individuals and businesses**

187. The Scottish Government does not expect any other bodies, individuals or businesses to incur any additional costs as a result of merging the STS with the SCS.

## **REPORT BY THE AUDITOR GENERAL FOR SCOTLAND**

### **A REPORT BY THE AUDITOR GENERAL FOR SCOTLAND UNDER RULE 9.3.4 OF THE SCOTTISH PARLIAMENT'S STANDING ORDERS**

#### **COURTS REFORM (SCOTLAND) BILL**

1. This report has been prepared in accordance with Standing Order Rule 9.3.4 under which a bill containing a provision to charge expenditure on the Scottish Consolidated Fund should be accompanied by a report by me setting out my views on whether the charge is appropriate.
2. Section 16(13) of the Courts Reform (Scotland) Bill states that the salaries of each sheriff principal and sheriff and the remuneration of the judicial officer post of 'summary sheriff' should be remunerated by means of a charge on the Scottish Consolidated Fund. For sheriff principals and sheriffs this continues the existing arrangement under Section 14 of the Sheriff Courts (Scotland) Act 1907 whereby payment of salaries to sheriff principals and sheriffs is made from the Scottish Consolidated Fund and extends the arrangement to cover the new judicial office of summary sheriff.
3. Judicial salaries have historically been paid directly from the UK and Scottish Consolidated Funds in order to reinforce the independence of the judiciary and the proposed arrangements in the Bill continue this position.
4. I am of the view that the charge on the Scottish Consolidated Fund is appropriate.

Caroline Gardner

Auditor General for Scotland

4 February 2014

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**SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE  
COMPETENCE**

On 6 February 2014, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Courts Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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**PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE  
COMPETENCE**

On 6 February 2014, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Courts Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”



*These documents relate to the Courts Reform (Scotland) Bill (SP Bill 46) as introduced in the Scottish Parliament on 6 February 2014*

# **COURTS REFORM (SCOTLAND) BILL**

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

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