This Briefing provides an overview of the civil court system in Scotland. In particular it:

- provides an introduction to the civil justice system in Scotland (of which the civil courts form an important part)
- explains key terminology associated with the civil courts
- outlines the structure of the civil court system
- discusses recent policy developments associated with the civil court system, including the Judiciary and Courts (Scotland) Act 2008 (asp 6) and the ongoing review of the civil court system chaired by Lord Gill

This briefing updates the earlier SPICe Subject Map of the same name (Harvie-Clark 2007). For an overview of the system of criminal courts in Scotland see the SPICe Subject Map entitled The Scottish Criminal Justice System: the Criminal Courts (McCallum et al 2007).
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EXECUTIVE SUMMARY

The justice system in Scotland is split into two distinct parts: the criminal justice system and the civil justice system. Broadly speaking the distinction is as follows: the criminal justice system exists to prosecute or otherwise deal with those who are alleged to engage in criminal activity. The civil justice system exists first to provide people with a means to enforce and protect their legal rights, and secondly, to regulate disputes between two or more parties which arise in relation to these rights. The civil justice system, therefore, deals with legal rights and responsibilities created by civil law. There are two main branches of civil law – public law and private law. Public law governs the actions of public bodies whilst private law deals with rights and obligations of citizens and legal entities such as companies towards one another.

In most respects, the Scottish civil justice system is distinct from that of the rest of the UK and is largely devolved to the Scottish Parliament. The main parts of the civil justice system which are reserved to Westminster are the new UK Supreme Court (due to open for business in October 2009) and the majority of specialist tribunals that currently operate in Scotland. The Scottish civil court system has its own terminology, which is distinct from the Scottish criminal courts and, in many respects, from the court system in England and Wales.

Sheriff courts are courts with jurisdiction, ie authority to hear and determine a case, in respect of a wide range of civil (and criminal) matters. Sheriff courts are lower courts, meaning they only have jurisdiction over a specified part of the country. There is a sheriff court in every city and a number of towns. The Court of Session has jurisdiction in respect of most civil matters. It is an upper court meaning it has jurisdiction in respect of the whole of Scotland. It sits only in Parliament House in Edinburgh and is divided into two parts – the Outer House and the Inner House.

The sheriff courts and the Court of Session act as both courts of first instance (ie courts that hear and decide upon a dispute for the first time) and appeal courts, depending on circumstances. Subject to the decisions of the European Court of Justice (the ‘ECJ’) on European Community Law, the final court of appeal from the Scottish civil courts was until 30 July 2009 the House of Lords. In October 2009 the new UK Supreme Court will take over the former judicial function of the House of Lords. The new Supreme Court will also be subject to the decisions of the ECJ on European Community Law.

The Judiciary and Courts (Scotland) Act 2008 (asp 6) (‘the 2008 Act’) reduced the involvement of central government in the day to day running of the court system and enhanced the role of the judiciary in relation to the governance of the courts. Section 2 of the 2008 Act appoints the Lord President of the Court of Session as the head of the Scottish judiciary with overall responsibility for making and maintaining arrangements for the efficient disposal of the business of all courts (including the sheriff courts) and gives the Lord President new statutory responsibilities in relation to judicial conduct, training, welfare and deployment.

Operational functions relating to the day to day administration of the courts are also carried out by the Scottish Court Service. Furthermore, the First Minister also has a number of specific duties in relation to the courts which include those relating to the appointment of judges. However, judges are not subject to ministerial control and the independence of the courts has always been regarded as an important constitutional principle (enshrined in legislation for the
The 2008 Act places the role of the Judicial Appointments Board for Scotland, with its mixture of lay and legal members, on a statutory footing. The creation of the Board in 2002 on a non-statutory basis marked a very big change in the method of appointment of judges. Previously, the appointment procedures for judges lacked transparency, and the Lord Advocate (the chief Scottish law officer and a member of the Scottish Government) played an influential role. Under the current arrangements, the function of the Board is to provide the First Minister with a list of candidates recommended for appointment for various judicial offices including the office of sheriff, sheriff principal or Court of Session judge (except in respect of the Lord President and the Lord Justice Clerk where a separate appointment procedure applies).

In certain circumstances, financial assistance is available to parties pursuing a case in the civil courts. On 7 April 2009 the upper disposable income threshold in relation to eligibility for civil legal aid was increased from £10,306 to £25,000. This change followed a Scottish Government announcement in November 2008 as part of a move to increase access to justice in the context of a tougher economic climate. The Scottish Government estimates that the increase in the disposable income threshold now means that three quarters of all Scots will be eligible for free or subsidised civil legal aid, although those with higher incomes will still be expected to make significant contributions to legal costs.

In February 2007 the then Scottish Executive announced a wide-ranging review of Scotland’s civil courts and the way they work, headed up by the Lord Justice Clerk, Lord Gill. It is anticipated that the final report of the Review will be published in the autumn of 2009. Issues being considered by the Review include the cost of litigation to parties and to the public purse; the need for the development of modern methods of communication and case management; and the need for specialisation of courts or procedures, including the relationship between the civil and criminal courts.
AN INTRODUCTION TO THE CIVIL JUSTICE SYSTEM

CIVIL LAW AND CIVIL JUSTICE
The justice system in Scotland is split into two distinct parts: the criminal justice system and the civil justice system. Broadly speaking the distinction is as follows: the criminal justice system exists to prosecute or otherwise deal with those who are alleged to engage in criminal activity. The civil justice system exists first to provide people with a means to enforce and protect their legal rights, and secondly, to regulate disputes between two or more parties which arise in relation to these rights.

The civil justice system, therefore, deals with legal rights and responsibilities created by civil law. There are two main branches of civil law – public law and private law. Public law governs the actions of public bodies. It concerns the activities of the UK and Scottish parliaments, the Scottish Government, the UK Government, courts, local government and public bodies and their relationships with private individuals. Issues governed by public law include (Scottish Executive 2007b, p 2):

- human rights
- asylum and immigration
- education
- health
- housing
- planning
- tax
- social security

Private law deals with rights and obligations of citizens and legal entities such as companies towards one another. The main areas covered by private law in Scotland include (Scottish Executive 2007b, p 4):

- the creation and enforcement of contracts
- divorce and separation
- contact with, and residence of, children
- the ownership and use of property – both heritable (ie land and buildings) and moveable (eg furniture and money)
- wills and inheritance
- enforcement of debt
- claims for negligence
- bankruptcy, insolvency and sequestration
- consumer goods and services
- company and commercial matters

THE CIVIL COURTS AS PART OF A WIDER SYSTEM
The civil courts remain central to today’s civil justice system. However, the system for resolving disputes is more complex than it was in the past and the courts form only one part of that
system. Today the civil justice system includes the services and mechanisms that:

- provide information and advice about the civil law
- help to resolve problems and disputes about civil law matters
- enforce and protect civil law rights and responsibilities where necessary

Services cover a broad spectrum, from general advice providers such as citizens’ advice bureaux, through specialist advisers on particular issues such as welfare benefits or immigration, to a variety of professions and disciplines, including lawyers, arbiters and mediators.

Mechanisms for resolving disputes range from negotiation-based processes such as mediation and conciliation, through more formal processes involving third-party decision-makers, such as arbitration or adjudication, to formal judicial processes in civil courts and tribunals (Scottish Executive 2007b, p 2).

DEVOLUTION, CIVIL LAW AND THE CIVIL JUSTICE SYSTEM

The Scotland Act 1998 (c 46) (‘the 1998 Act’) devolved substantial areas of civil law to the Scottish Parliament and since the Parliament’s creation it has legislated in a number of areas of civil law including family law, property law, planning law and housing law. However, there are also significant areas of the civil law reserved to the UK Parliament, eg company law, asylum and immigration, tax and social security.

In most respects, the Scottish civil justice system is distinct from that of the rest of the UK. Under the 1998 Act, the administration of the civil justice system in Scotland is almost entirely devolved to the Scottish Parliament. This includes the structures, procedures, jurisdictions and day-to-day running of the courts and other dispute resolution bodies, and the provision of publicly funded legal services.

The most significant area of the Scottish civil justice system which is reserved to Westminster, aside from the new Supreme Court which opens in October 2009, is the majority of specialist tribunals that currently operate in Scotland. While some tribunals, such as children’s panels constituted under the children’s hearing system and the Lands Tribunal for Scotland, are within the remit of the Scottish Parliament, the operation of most tribunals is reserved to the UK Parliament. These include, for example, the employment tribunals.

Other dispute resolution bodies which operate in Scotland are likewise not wholly Scottish. While some bodies, such as the Scottish Legal Complaints Commission, operate only in Scotland, others such as the Financial Ombudsman Service serve the whole of the UK. Similarly, providers of services such as mediation or arbitration may operate on either or both sides of the border.

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1 The system of arbitration in Scotland is currently the subject of a Bill in the Scottish Parliament. For more information see the separate SPICe Briefing entitled Arbitration (Hough 2009).
USEFUL TERMINOLOGY RELATING TO THE SCOTTISH CIVIL COURT SYSTEM

The Scottish civil court system has its own terminology, which is distinct from the terminology of the Scottish criminal courts and, in many respects, from the court system in England and Wales. Some of the key terms are explained below.

REMEDIES

Civil court proceedings are undertaken to obtain a civil remedy. The most common civil remedies are:

- **damages**: an order to pay financial compensation for loss, for example, for negligently causing personal injury or damaging property or not carrying out work as contracted

- **payment**: an order to pay a sum of money such as a debt owed

- **specific implement**: an order to do something that was agreed in a contract other than pay money, for example, to keep premises open for business in accordance with a condition in a commercial lease

- **interdict**: an order stopping something, whether currently being done or planned, for example, carrying out an act which in law is classified as a nuisance, such as making excessive noise from residential premises

- **declarator**: a pronouncement that an individual or body has a specific right or duty, such as a ‘declarator of parentage’ which is a declarator pronouncing that a particular man is the father of a child

- **statutory remedies**: remedies that are competent under particular statutes in particular cases, for example, an application can be made by a local authority for an Antisocial Behaviour Order (an ‘ASBO’) against a named individual under the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8)

OTHER KEY DEFINITIONS

**Pursuer and defender**

The pursuer is the individual or body who initiates a civil action. The equivalent individual or body in England is known as the claimant (and was formerly called the plaintiff). The defender is the party against whom the civil action has been raised. The English equivalent is the defendant.

**Petitioner and respondent**

The petitioner is the equivalent of the pursuer in certain types of civil action which are required by law to be raised by way of ‘petition’. The object of a petition is to obtain from the court power
to do something, or to require something to be done, which the petitioner would otherwise have had no legal right to do or require, such as certain changes to the powers of a company.

If an individual or body resists the petition or makes representations to the court about it that individual or body is called the respondent (although there does not need to be, and commonly will not be, a respondent).

Perhaps confusingly, respondent is also a term used in all appeals in civil cases (including in relation to civil actions which were not commenced by way of a petition) where it refers to the party who is resisting the appeal.

**Judicial review**

One form of civil court action commenced by way of petition deserves particular mention and that is ‘judicial review’. Judicial review is the procedure under which the Court of Session exercises its ‘supervisory jurisdiction’ over government departments, local authorities and other ‘official’ decision-takers. It is not an appeal relating to the substance of the decision but a procedure whereby the court may quash the decision if it considers that the decision-taker has acted outside its powers, has not followed the proper procedure or has been irrational. Judicial review has become a powerful remedy against improper government action.

**The common law**

Many rules of civil law can be found in legislation. However, the common law is also an extremely important source of many types of civil law, eg contract law and the law of negligence. The common law is the law created, not in legislation, but through the decisions of courts which provide statements on the law in cases being considered by them.

**Fact and law**

A decision on a question of fact in a case is a decision by the court in the light of evidence resolving a factual dispute between the parties. On the other hand, a decision on a question of law is a decision as to whether a legal rule exists, what the content of a legal rule is, or whether a legal rule applies to the facts of the particular case.

The distinction between fact and law is important in the context of appeals. Sometimes it is possible to appeal a decision on a question of fact and a question of law; in other instances it is only possible to appeal a decision on a question of law.

**Upper and lower courts**

Upper courts have jurisdiction (ie the power to hear and determine a case) in respect of the whole of Scotland. Lower courts have jurisdiction only over a specified part of the country. Certain limited categories of case can be heard only in the upper courts.

In the civil justice system, the main upper courts are the House of Lords and the Court of Session. The lower courts are the sheriff courts.

Different legal personnel operate in the upper and lower courts. Solicitors, regulated by the Law Society of Scotland, typically represent parties in the lower courts. However, advocates, regulated by the Faculty of Advocates, and solicitor-advocates (a special category of solicitor who has been granted the right to appear in the upper courts) are the only legal professionals
who can represent parties in the upper courts. 

**Original and appellate jurisdiction**

A court is said to be exercising ‘original jurisdiction’ where it is hearing and determining a dispute for the first time. It is also then described as a ‘court of first instance’. A court is exercising ‘appellate jurisdiction’ where it is hearing disputes appealed from some other individual or court. It is often also referred to as an ‘appeal court’.

The sheriff courts and the Court of Session act as both courts of first instance and appeal courts, depending on circumstances. The House of Lords is fundamentally an appeal court.

**Limitation and prescription**

There are various procedural rules contained in statutes, including the Prescription and Limitation (Scotland) Act 1973 (c 52) (‘the 1973 Act’) (Part II), relating to the ‘limitation’ of certain types of court actions.

Broadly speaking, the effect of these rules on limitation is to bar an action from proceeding in court after the lapse of a specified period of time. It is for the defender in a court action to raise the defence that the action is ‘time-barred’, ie the requisite period of time the law allows has passed in a particular instance. If the defence is successfully pled, the court will not allow the action to proceed. Where an action is time-barred, however, the defender may choose to waive the limitation defence, in which case the action can proceed. In addition, where a rule on limitation exists, the court often has some discretion afforded by statute in applying it.

There is also the related, although distinct, area of the law called ‘negative prescription’ contained in Part I of the 1973 Act. The law of negative prescription provides that after a specified period of time has passed a legal obligation is extinguished altogether, unless a court action has been raised during that period of time or the subsistence of the obligation has been acknowledged (for example, by compliance with the obligation by the person subject to the obligation). The effect of the law of negative prescription is similar to the rules on limitation of court actions. However, after the specified period of time has passed there is no possibility of a court action based on the obligation proceeding, even where the defender is still willing for this to happen.

[this briefing continues on the next page]
THE SCOTTISH CIVIL COURT SYSTEM: THE DIFFERENT TYPES OF COURTS

Figure: The Civil Court System (simplified)

Judicial Committee of the Privy Council
Hears appeals from the Court of Session on ‘devolution issues’ only under the Scotland Act 1998. In October 2009 the new UK Supreme Court will take over this role.

House of Lords
Until 30 July 2009, heard appeals from the Court of Session. In October 2009 the new Supreme Court will take over this role.

Court of Session

Inner House
Hears appeals from the sheriff courts and the Outer House.

European Court of Justice
Gives rulings on interpretation and application of EC law which are binding on national courts.

European Court of Human Rights
Gives rulings on the ECHR which are not binding on the national courts but which they “must take into account”.

Court of Session

Outer House
Hears cases at first instance.

Sheriff court
Hears majority of civil cases in Scotland at first instance, eg family matters, small money claims.

Appeals from the sheriff are to the sheriff principal or the Inner House of the Court of Session.
SHERIFF COURTS

Sheriff courts are local courts with jurisdiction in respect of a wide range of civil and criminal matters. There is a sheriff court in every city and a number of towns, and sheriff courts deal with the bulk of civil court business. Thus it has been said that, for many purposes, sheriff courts are the most important courts in Scotland (White and Willock 2007, p 97). In relation to civil matters sheriff courts deal mostly with debt and divorce (see further below).

Organisational structure

Sheriff courts are organised into six ‘sherifffdoms’, based on the former local government regions. These are:

- Lothian and Borders
- South Strathclyde, Dumfries and Galloway
- Glasgow and Strathkelvin
- North Strathclyde
- Tayside, Central and Fife
- Grampian, Highland and Islands

Each sherifffdom (except Glasgow and Strathkelvin) is divided into sheriff court districts for administrative convenience, giving 49 sheriff court districts in all.

Personnel

The sheriff is the judge who hears cases at first instance. There are currently 142 sheriffs in post in Scotland. Busier courts may have more than one sheriff each. They may also have access to ‘floating sheriffs’ who may be directed to sit anywhere in Scotland to relieve the pressure of business.3 For example, Glasgow and Strathkelvin has 24 resident sheriffs and three floating sheriffs. Edinburgh has 24 resident sheriffs and two floating sheriffs. Each sherifffdom also has a sheriff principal. He or she has general responsibility for securing the speedy and efficient disposal of the business of courts in his or her sherifffdom, as well as hearing appeals in civil cases from individual sheriffs (see further below). Each sherifffdom also has a regional sheriff clerk and a sheriff clerk (and deputes if necessary) for each court, with responsibility for day-to-day administration.

Types of civil court procedure used in the sheriff court

There are three main types of court procedure used in the sheriff court:

- **ordinary cause procedure**: this type of procedure is mainly used in cases relating to divorce, children, property and claims for recovery of debt or damages exceeding £5,000

- **summary cause procedure**: this type of procedure is one which, if it relates to payment of money, is used where the value of the claim is over £3,000 and up to (and including) £5,000. It is mainly used for disputes involving rent arrears, delivery of goods and debts

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3 However, if a solicitor is appointed as a ‘floating sheriff’ he or she is not empowered to act in the district in which he or she has practised and appeared regularly in court. This rule does not apply to advocates appointed as floating sheriffs (Macphail 2006, para 1.17).
- **small claims procedure**: this type of procedure is one which is used where the value of the claim is up to (and including) £3,000. It is used for resolving minor disputes (mainly relating to debts). It is an informal procedure and small claims actions often proceed through the court without the involvement of a solicitor.

The small claims procedure does not require a legal practitioner to represent the pursuer. Instead, the pursuer in a small claims action can choose to, a) instruct a layperson to provide representation in court (as long as that person is not paid for providing that service); b) represent him or herself (as frequently occurs in practice); or c) instruct a legal practitioner to provide representation in court. This contrasts with other forms of civil court procedure where, subject to some limited exceptions, it is not possible for a layperson to represent a party in court and representation by a legal practitioner is the norm.\(^4\)

For more information on summary cause and small claims actions see the [Summary Cause Guidance Notes](#) and the [Small Claims Guidance Notes](#) produced by the Scottish Courts Service.

There are particular exceptions to the jurisdiction of the sheriff courts where only the Court of Session can hear and determine a case (eg actions for judicial review and actions relating to patents). In addition, some types of cases may be referred (‘remitted’) to the Court of Session where the Court of Session agrees or stipulates or the Lord Advocate (the chief Scottish law officer) requires it. This may occur, for example, where the case concerns an important question of law. The Lord Advocate’s power in this regard is not used very often.

Finally, various other types of case are excluded from the sheriff’s jurisdiction on account of being referred to a court of special jurisdiction or a statutory tribunal (see further below).

### Appeals from the sheriff courts

In an ordinary cause action, appeal is either, a) to the sheriff principal, and then to the Inner House of the Court of Session; or b) from the sheriff directly to the Inner House of the Court of Session. Finally, an appeal can be made to the House of Lords on a point of law only (as opposed to a question of fact) (Macphail 2006, para 18.99).

In summary cause actions, appeal is to the sheriff principal on a point of law only and then to the Inner House of the Court of Session, and then finally to the House of Lords (Law Society of Scotland 1987, paras 1333–1334). In small claims, appeal is to the sheriff principal on a point of law only (Law Society of Scotland, 1987, para 1348).

### COURT OF SESSION

The Court of Session has jurisdiction over most civil matters in Scotland. It sits only in Parliament House in Edinburgh.

It has extensive concurrent jurisdiction with the sheriff court (meaning actions can be raised in either court according to the pursuer’s choice) but there is also a range of proceedings which continue to be competent only in the Court of Session (eg actions of judicial review). There are

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\(^4\) The legal costs that awarded against the losing party by the court in favour of the winning party are also limited in small claims procedure, compared to in other types of court procedure, meaning that if an individual does employ a solicitor in a small claims procedure this is likely to be at a party’s own cost, even where they win.
also some types of proceedings which are not competent in the Court of Session at first instance (eg actions of a value not exceeding £5,000).

The Court of Session is divided into two parts – the Outer House and the Inner House:

**The Outer House**

The Outer House of the Court of Session is a court of first instance only. It is made up of 24 judges called Lords Ordinary who sit on their own.

There is a limited degree of specialisation among Court of Session judges. For instance, in judicial review cases and in intellectual property, commercial and patent cases there are special provisions to enable them to be dealt with quickly. Most cases, however, are debt and personal injury cases.

Occasionally, a judge will preside over a case which is heard by a jury of 12 (as opposed to a jury of 15 in a solemn criminal court). A jury can be involved in certain classes of case so long as they do not involve any particular legal complexity, eg uncomplicated actions for damages for personal injury or defamation.

**The Inner House**

The Inner House of the Court of Session is primarily a court of appeal from the Outer House, sheriff courts, certain tribunals and other bodies.\(^5\)

The Inner House consists of two divisions, the First and Second Divisions, each with equal importance and jurisdiction. The First Division is presided over by the Lord President and the Second Division is presided over by the Lord Justice Clerk. If there is sufficient business to justify it (as there frequently is nowadays) another division, called an Extra Division, can be established by the Lord President which includes judges who normally work in the Outer House. The litigant cannot choose which division hears his or her case. There are 11 Inner House judges, including the Lord President and the Lord Justice Clerk. The First Division has five judges and the Second Division has six judges.

A decision of a Division is by majority and three judges constitute a quorum. On occasion, if a case is particularly important or difficult, or if it is necessary to overrule a previous binding authority, a larger court of five or more judges may be convened.

**Appeals**

A party to a case determined in the Outer House always has the right to appeal to the Inner House (referred to as a ‘reclaiming motion’). Thereafter, any appeal is to the House of Lords. Such an appeal is allowed where it is from a final judgement of the Court of Session which disposes of the whole of the action (as opposed to a court ruling disposing of only part of the action). Alternatively it is allowed where the Court of Session judges were not unanimous in their decision, or the Inner House gives leave to appeal.

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\(^5\) As a court of first instance it hears ‘special cases’ ie ones in which the facts are agreed and only the law is disputed (eg the interpretation of a will) and certain petitions.
HOUSE OF LORDS

Until 30 July 2009, the final court of appeal from the Scottish civil courts was the House of Lords, although this jurisdiction was subject to the decisions of the European Court of Justice on Community Law.

The lay peers of the House of Lords did not take part in judicial proceedings. Instead judicial work of the House of Lords was mainly dealt with by its ‘Appellate Committee’ and carried out by Lords of Appeal in Ordinary (‘Law Lords’) who were professional judges of significant experience. For more information on the former judicial role of the House of Lords see the UK Parliament’s webpage.

The Civil Appeals (Scotland) Bill [SP Bill 77] was introduced in the Scottish Parliament, on 29 September 2006, by Adam Ingram MSP. It sought to end the possibility of appeal to the House of Lords in relation to Scottish civil cases. In doing so, it would also have prevented the possibility of appeal being transferred to the new Supreme Court of the United Kingdom once the latter is open for business (see further below). In his statement on the legislative competence of the Bill, the Parliament’s Presiding Officer identified a significant number of provisions of the Bill which he considered to be outwith the legislative competence of the Parliament. In light of this, the former Justice 2 Committee, as the lead parliamentary committee on the Bill, recommended to Parliament that the general principles of the Bill should not be agreed to. Following the Stage 1 parliamentary debate on the general principles of the Bill on 20 December 2006, the Parliament voted against the general principles of the Bill and, accordingly, the Bill fell.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Subject to the decisions of the European Court of Justice on Community Law, the Judicial Committee of the Privy Council is the final decision maker in relation to appeals determining ‘devolution issues’, ie whether the Scottish Government or Scottish Parliament has acted outside their powers (Scotland Act 1998 (c 46), s 98 and schedule 6).

In respect of proceedings in Scotland, a devolution issue may be raised by the Advocate General for Scotland (one of three UK law officers) or the Lord Advocate (the chief Scottish law officer). It may also be raised by any person adversely affected in any existing court proceedings. The court dealing with the case in which the devolution issue arises may decide the issue itself or refer it to the Inner House of the Court of Session (in relation to civil justice matters), from which it may be appealed to the Judicial Committee.

SUPREME COURT OF THE UNITED KINGDOM

The Constitutional Reform Act 2005 (c 4) includes provision for the creation of a new UK Supreme Court which will take over: 1) the appeals function of the Appellate Committee of the House of Lords; and 2) the jurisdiction of the Judicial Committee of the Privy Council in relation to questions about the powers of the devolved administrations. Thus, in relation to Scotland, the Supreme Court will take over the former role of the House of Lords as the final court of appeal in

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6 The recommendation was made under powers set out in Rule 9.14.18(b) of the Scottish Parliament’s Standing Orders.
7 In respect of proceedings in England and Wales, the Advocate General for Scotland can also raise a devolution issue.
civil cases and the current role of the Judicial Committee of the Privy Council in relation to devolution issues under the Scotland Act 1998 (c 46).

The Supreme Court will open for business in October 2009. Further information on the Supreme Court is set out in the Explanatory Notes to the Constitutional Reform Act 2005 (c 4) and on the Ministry of Justice’s webpage.

In December 2008, the Scottish Government asked Professor Neil Walker to conduct a review of the implications of the forthcoming changes for the distinctive Scottish legal system. Professor Walker is due to report on his findings in November 2009 (Scottish Government 2008b).

EUROPEAN COURT OF JUSTICE

The European Court of Justice (ECJ), which sits in Luxembourg, exists to ensure that European Community (EC) law is correctly interpreted and observed in member states. Under article 234 of the EC Treaty, a national court hearing a case involving the validity or interpretation of EC law can send that question (but not the rest of the dispute) to the ECJ for an authoritative ruling which binds that national court. The national court nevertheless decides all questions of fact and any questions of national law and gives the final judgement.

There are currently 27 judges in the ECJ, one of whom is elected as President. There are also eight Advocates General, an office for which there is no UK equivalent. Their role is to present to the judges a fully reasoned preliminary judgement. The ECJ may sit as a full court, in a Grand Chamber of 13 judges or in Chambers of three or five judges, depending on circumstances.

EUROPEAN COURT OF HUMAN RIGHTS

The ECJ is not to be confused with the European Court of Human Rights. The latter court was created to ensure that a country which is party to the European Convention on Human Rights (ECHR) complies with its obligations under the ECHR. The ECHR is an international treaty which is separate from the treaties which created the European Community. The European Court of Human Rights sits in Strasbourg and is often referred to in practice as ‘the Strasbourg Court’.

The Human Rights Act 1998 (c 42), together with the human rights provisions of the Scotland Act 1998 (c 46), gave an enhanced status in Scots law to the rights protected by the ECHR. Section 2 of the Human Rights Act requires that a Scottish court or tribunal, in determining a question which has arisen under that Act in connection with a right protected by the ECHR, “must take into account” the decisions and opinions of the Strasbourg court. Accordingly, the decisions of the Strasbourg Court, unlike those of the ECJ on EC Law, are not binding on Scottish courts and tribunals. However, in practice, the decisions of the Strasbourg Court are likely to be highly influential because of the direction given in section 2. Furthermore, if the Scottish courts move too far from the case law of the Strasbourg Court, there is the possibility that the Strasbourg Court could find the United Kingdom in breach of the ECHR if an individual takes a case against the United Kingdom to the latter court because he or she feels he or she has been denied a remedy under the ECHR (Ewing and Dale-Risk 2004, p 81).  

8 On the whole, the approach of the Scottish courts has been consistent with Strasbourg case law. However, the important case of Brown v Stott (2001 SC (PC) 43) has given rise to some controversy. That case concerned
COURTS OF SPECIAL JURISDICTION AND TRIBUNALS

Courts of special jurisdiction have authority to hear and determine cases in particular types of claim only. Examples include:

- the **Scottish Land Court** which deals with agricultural and crofting tenancies

- the Lands Valuation Appeal Court which hears appeals from the decisions of local valuation appeal committees on rateable values of commercial property

- the **Employment Appeal Tribunal**, which, despite its name, is declared to be a court by the legislation which created it. It has jurisdiction throughout the United Kingdom and hears appeals from employment tribunals

In addition, there are a number of tribunals, which as discussed above, are generally organised on a United Kingdom basis and reserved to the UK Parliament, although notable exceptions include the **children's hearing system** and the **Lands Tribunal for Scotland**. Tribunals deal with certain types of legal dispute but are not regarded as courts. Well-known examples of UK wide tribunals are the **employment tribunals** which determine disputes between employers and employees over employment rights.

Tribunals vary considerably in structure and personnel but, in general, are less formal than courts and litigants are often unrepresented by lawyers. There may be appeal from them to the courts, and, as with the courts, the possibility of a preliminary reference from them to the ECJ in relation to Community law.

In 2006, the **Tribunal Service** was set up as an Executive Agency of the UK Government’s Ministry of Justice. Its aim is to establish, for the first time, a unified administration for the tribunal system reserved to the UK Parliament. Furthermore, the Tribunals, Courts and Enforcement Act 2007 (c 15) (‘the 2007 Act’) provides for individual tribunals reserved to the UK Parliament to be brought together in the creation of a new, unified tribunal structure. Existing tribunals are being transferred into the new structure in phases, with the first phase having occurred on 3 November 2008. More details can be found on the Tribunal Service’s [webpage](#).

Since 1 November 2007, when the relevant provisions of the 2007 Act came into force, the **Scottish Committee of the Administrative Justice and Tribunals Council** has overseen the procedural workings of the UK-wide tribunals which sit in Scotland. This Committee took over the functions of the Scottish Committee of the Council on Tribunals.

The Administrative Justice Steering Group (‘AJSG’) was established in 2006 under the chairmanship of Lord Philip and has been looking at the administration of tribunals in Scotland, as well as the wider administrative justice system (which includes complaints handling by public bodies and ombudsmen). The AJSG’s final report was published on 25 June 2009 and concluded that the current system was not yet good enough to meet the needs of users (AJSG 2009a; AJSG 2009b). At the time of the report’s publication, the Scottish Government announced that it intends to take forward proposals for a Tribunals Service for Scotland and will be consulting shortly on how this will work in practice (Consumer Focus 2009).

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section 172 of the Road Traffic Act 1988 which makes it an offence for the vehicle owner not to give information to the police as to the driver’s identity if required to do so. The court decided that this provision did not violate article 6 of the ECHR. Some academics have argued that the court’s reasoning was not compatible with Strasbourg case law.
THE SCOTTISH CIVIL COURT SYSTEM: OTHER RELEVANT BODIES AND INDIVIDUALS

THE ORGANISATION AND ADMINISTRATION OF THE COURTS

The Judiciary and Courts (Scotland) Act 2008 (asp 6) (‘the 2008 Act’) reduced the involvement of central government in the day to day running of the court system and enhanced the role of the judiciary in relation to the governance of the courts. In particular, section 2 of the 2008 Act appointed the Lord President as the head of the Scottish judiciary with overall responsibility for making and maintaining arrangements for the efficient disposal of the business of all courts (ie including the sheriff courts) and gave the Lord President new statutory responsibilities in relation to judicial conduct, training, welfare and deployment.

Operational functions relating to the day to day administration of the courts are also carried out by the Scottish Court Service (‘the SCS’). The SCS has been in existence since 1995 and is currently an executive agency of the Scottish Government, with its Chief Executive responsible to Scottish Ministers and the Scottish Parliament for its effective operation. At present, the judiciary do not have formal authority over the governance of the SCS (although informal links between the SCS and the judiciary exist). The SCS is responsible for non-legal, practical matters, such as the proper accommodation and staffing of the courts, the pay and conditions of service of clerks of court and other officers who assist the judges in the running of the courts. It employs over 800 people. The 2008 Act provides for the SCS to become a statutory body corporate, chaired by the Lord President and with a majority of judicial members. When the sections of the 2008 Act relating to the SCS are brought into force, the functions of running the court service will be transferred from Scottish Ministers to this corporate body.

The First Minister has a number of specific duties in relation to the court which include those relating to the appointment of judges (see further below). However, judges are not subject to ministerial control and the independence of the courts has always been regarded as an important constitutional principle. Section 1 of the 2008 Act enshrined this principle in statute for the first time, by placing an obligation on the First Minister, the Lord Advocate, the Scottish Ministers, members of the Scottish Parliament and all others with responsibility for matters relating to the judiciary and the administration of justice, to uphold the continued independence of the judiciary.

The Court of Session enacts the rules governing its own procedures and those of the sheriff courts. The statutory Rules Council and the Sheriff Court Rules Council, consisting of judges and legal practitioners (and in the case of the Sheriff Court Rules Council, two lay people), advises the Court of Session on amendments to the rules.

JUDICIAL APPOINTMENTS AND THE JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

After the brief use of an ad hoc formal Selection Board, the Judicial Appointments Board for Scotland (‘the Board’), with its mixture of lay and legal members, was set up in 2002 on a non-statutory basis. Since 1 June 2009, when the relevant provisions of the 2008 Act came into force, the Board has been a statutory body (2008 Act, sections 9–18 and schedule 1). The introduction of the Board in 2001 marked a very big change in the method of appointment of judges. Previously, the appointment procedures for judges lacked transparency, and the Lord
Advocate (the chief Scottish law officer and a member of the Scottish Government) played an influential role.

The main function of the Board is to provide the First Minister with a list of candidates recommended for appointment for various judicial offices including the office of Court of Session judge, sheriff (including part-time sheriffs) or sheriff principal. However, the Board does not have responsibility for recommending candidates for the appointment of the Lord President and the Lord Justice Clerk (2008 Act, sections 9–11).

The current procedure is as follows: all Court of Session judges (apart from the Lord President and the Lord Justice Clerk) are appointed by the Queen on the recommendation of the First Minister and after consulting the Lord President and receiving recommendations from the Board. Sheriffs, including sheriffs principal, are appointed by the Queen on the nomination of the First Minister, after consultation with the Lord President of the Court of Session and a recommendation by the Board (Scotland Act 1998 (c 46), section 95; 2008 Act, sections 9–14).

There is a separate procedure for the appointment of the Lord President and the Lord Justice Clerk. Unlike the position with other Scottish judicial appointments, they are appointed by the Queen, on the recommendation of the UK Prime Minister. However, the Prime Minister must consult with the First Minister who, in turn, must consult with the current Lord President and the Lord Justice Clerk, unless the office is vacant (Scotland Act 1998 (c 46), section 95).

In 2005 when Lord Hamilton was appointed Scotland’s new Lord President, the First Minister established a four person panel to consider expressions of interest from suitably qualified people for the post and then made his nomination based on advice from the panel. The panel comprised two senior judicial figures and two lay professionals drawn from the Board. Sections 19 and 20 of the 2008 Act essentially formalise the process that was used in the appointment of Lord Hamilton in relation to the appointment of the Lord President and the Lord Justice Clerk.

THE JUDICIAL COMPLAINTS REVIEWER AND THE TRIBUNAL TO CONSIDER FITNESS FOR JUDICIAL OFFICE

The 2008 Act provides that the Lord President, as head of the Scottish judiciary, will have responsibility for dealing with issues of judicial conduct and, in particular, the merits of complaints against individual members of the judiciary (2008 Act, sections 28–29 and 34). However, the 2008 Act also provides for the creation of a ‘Judicial Complaints Reviewer’ who will be independent of both judiciary and government. He or she will have no powers to consider the merits or any complaint, or the disposal of that complaint. However, his or her role will be to ensure that the correct procedures have been followed in relation to consideration of that complaint (2008 Act, sections 30–33).

The 2008 Act also makes provision for the removal of judges and sheriffs and for standardising the arrangements for investigation into fitness for office of both judges and sheriffs. In particular, it provides that the First Minister, when requested to do so by the Lord President or otherwise when he thinks fit (having consulted with the Lord President), will constitute a tribunal to investigate and report on whether a person holding judicial office is unfit to hold office by reason of neglect of duty or misbehaviour (2008 Act, sections 35–40).

The provisions of the 2008 Act described above are not yet in force.
THE JUDICIAL STUDIES COMMITTEE

Until relatively recently, there was no formal system of continuing training or professional development for sheriffs or judges. Since 1997, the Judicial Studies Committee has provided this. The Committee comprises two judges, a sheriff principal and three sheriffs, an advocate, a solicitor and a civil servant from the Scottish Government. It organises induction courses for sheriffs and judges, refresher courses and seminars on specific topics and publishes an annual report.

Section 2(4) of the 2008 Act provides that the Lord President must require any judicial office holder to attend such training as he determines necessary.

THE JUDICIAL COUNCIL FOR SCOTLAND

The Judicial Council for Scotland was set up by the Lord President in 2007 and is a non-statutory body with a remit to provide the Lord President (who chairs the body) with a means to seek and obtain the views of Scottish judges at all levels. The work of the Council is intended to complement the work of other representative bodies such as the Sheriffs’ Association (the latter is, as its name suggests, the representative body for sheriffs). It also ties in with the Lord President’s broader role under the 2008 Act of laying before the Scottish Parliament written representations on matters that appear to the Head of the Scottish Judiciary to be matters of importance relating to the Scottish judiciary or the administration of justice (2008 Act, section 2(2)).

RECENT POLICY DEVELOPMENTS

FINANCIAL ELIGIBILITY THRESHOLD FOR CIVIL LEGAL AID INCREASED

In certain circumstances, financial assistance is available to parties pursuing a case in the civil courts. On 7 April 2009, the upper disposable income threshold in relation to eligibility for civil legal aid was increased from £10,306 to £25,000. This change followed a Scottish Government announcement in November 2008 intended to improve access to justice in the context of a tougher economic climate (Scottish Government 2008a; Scottish Government 2009).

The Scottish Government estimated that prior to 7 April 2009 around 42 per cent of people in Scotland were financially eligible for free or subsidised civil legal aid. The Scottish Government believes the increase in the disposable income threshold now means that three quarters of all Scots will be eligible for free or subsidised civil legal aid (Scottish Government 2009), although those with higher incomes will still be expected to make significant contributions to legal costs.

Financial eligibility is means-tested on the applicant's disposable income and capital assets. In addition to qualifying financially, applicants must meet two other statutory tests: they must have a legal basis for the case and it must be reasonable in the particular circumstances of the case that they should receive legal aid. More details about the civil legal aid system and the rules relating to financial eligibility can be found on the Scottish Legal Aid Board’s website.
REVIEW OF THE SCOTTISH CIVIL COURTS SYSTEM

In February 2007, the then Scottish Executive announced a wide-ranging review of Scotland’s civil courts and the way they work, headed up by Lord Justice Clerk, Lord Gill (Scottish Executive 2007a). At the same time, the then Executive (2007b) also published Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland, setting out its vision for civil law and civil justice in Scotland in the 21st Century.

The Review’s remit, membership and consultation paper published in November 2007 are all available on its website, as are responses to the consultation. It is anticipated that the final report of the Review will be published in the autumn of 2009. The separate SPICe Briefing Scottish Civil Courts Review (2008) discusses the Review’s on-going work in advance of the final report’s publication.

Issues being considered by the Review include the cost of litigation to parties and to the public purse; the need for the development of modern methods of communication and case management; and the need for specialisation of courts or procedures, including the relationship between the civil and criminal courts.
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