CIVIL APPEALS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Civil Appeals (Scotland) Bill introduced in the Scottish Parliament on 29 September 2006. It has been prepared by Adam Ingram MSP, the Member in Charge of the Bill to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 77–EN.

POLICY OBJECTIVES OF THE BILL

Overview

2. The Bill aims to abolish the right of appeal in Scottish civil cases to the House of Lords and to create a Civil Appeals Committee in the Court of Session as a final appeal procedure in Scotland.

Key objectives

3. The Bill has 3 key objectives, these are:

- To abolish the requirement for appeals in Scottish civil cases to be heard by the House of Lords;
- To reinstate the final civil appeal in Scottish cases in Scotland;
- To create a Civil Appeals Committee within the Court of Session to hear final civil appeals.

Why change the current system for final civil appeals?

4. Currently, the final appeal in Scottish civil cases lies to the House of Lords; by contrast the final appeal in criminal cases remains in Scotland.

5. The Scottish Executive’s stance on this matter has been somewhat inconsistent. In their response to the consultation on the Constitutional Reform Bill in 2003, they appear to support the status quo, stating that “the right of appeal to the House of Lords on civil matters has served the Scottish justice system well” and “has ensured valued and valuable
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Consistency throughout the UK”¹ with its decisions. However, in the same response they state that they do not “believe there is any need to modify current rights of appeal in relation to criminal matters to give the new UK Supreme Court jurisdiction in these respects simply for the sake of consistency”.²

6. In their consultation response, the Executive also emphasise the differences between the systems of criminal law in Scotland and England. However, there are considerable differences between many aspects of civil law in Scotland and England while, conversely, there are many similarities between aspects of criminal law. For example, many significant areas of criminal law, including misuse of drugs and road traffic law, are covered by UK wide legislation and reserved to Westminster under the Scotland Act.

7. Scotland and England have very different legal systems, and the historical anomaly of civil appeals lying to the House of Lords has had a negative impact on the administration and integrity of Scots law by introducing concepts of English law which are at odds with Scots law.

8. A recent example of this problem is the case of Sharp v Thompson 1997 SC(HL)66), which, revolved around a slight variant on the usual conveyancing procedure. The Court of Session both at first instance and appeal applied to the facts of Sharp the ordinary principles of Scottish property law. The case was then appealed to the House of Lords and overturned with reference to concepts familiar in English law but with no place in Scots law.

9. The outcome created much comment and controversy. The Scottish Law Commission, whilst recognising that the facts of the Sharp case highlight a problem within Scottish property law which needs to be solved, accepted that the solution adopted by the House of Lords is flawed and probably damaging. They proposed that the House of Lords decision be reversed by statute and the problem that the decision of the House of Lords was intended to solve be dealt with by legislation in the Scottish Parliament.

10. This Bill will prevent further problem cases caused by English interpretation overriding Scots law arising and create a distinctly Scottish final appeal mechanism in Scotland.

11. More recently, the case of Barker v Corus (UKHL20, 2006) again highlighted this problem. In this English case the House of Lords Appellate Committee ruled that, as a victim of asbestos-related disease had worked for more than one employer and none could be proved to be solely liable, compensation could only be awarded on a shared liability basis. This ruling made it even more difficult to secure adequate compensation where a number of employers had been involved, some of whom might no longer be in business. Given the short time for asbestos-related disease to prove fatal, this ruling made an already difficult situation for victims much worse.

12. In addition, the ruling was contrary to accepted principles of Scots Law, as set out in the published dissenting opinion of Lord Rodger of Earlsferry, in which he stated:

¹ Scottish Executive response to Constitutional Reform Consultation, 14 November 2003
² Ibid
By any reckoning, death brought on by mesothelioma is indivisible, indeed the classically indivisible injury. Viscount Dundedin once said scornfully of a hypothetical case where two dogs had worried a sheep to death, ‘Would we then have to hold that each dog had half killed the sheep…?’ . Arneil v Paterson [1931] AC 560,565. It is similarly unthinkable that the law would hold that, vis à vis the claimant, defendant A one-fifth killed the victim of mesothelioma, defendant B one-quarter killed him, defendant C forty per cent killed him and so forth.3

13. Lord Rodger went on to say:

Now the House is deciding that, in this particular enclave of the law, the risk of the insolvency of a wrongdoer or his insurer is to bypass the other wrongdoers and their insurers and to be shouldered entirely by the innocent claimant. As a result claimants will often end up with only a small proportion of the damages which would normally be payable for their loss. The desirability of the courts, rather than Parliament, throwing this lifeline to wrongdoers and their insurers at the expense of claimants is not obvious to me.4

14. The UK Government quickly announced plans to reverse the Law Lords decision and close the legal loophole the Lords created which threatened to prevent hundreds of Scottish victims from receiving payouts. Scottish Ministers acknowledged the problem of senior judges sitting in the Lords (and later the Supreme Court) having the final say in Scottish civil appeal cases in situations such as this:

“On this second point, Mr Henry [Hugh Henry, Deputy Justice Minister] said ministers would have to reflect on what the ruling meant, and whether a change in the law was needed to take account of the situation in Scotland. The difficulty might be that senior judges sitting in the Lords have the final say in Scottish civil appeal cases. This will remain the situation when the Supreme Court for the UK comes into being. Scrutinising the constitutional implications will probably result in further frustration for campaigners (on the question of liability). But that is no reason for making it less of a priority to try to find a satisfactory solution, especially as another delay is the last thing victims need or deserve. [Campaign on Asbestos, editorial comment, The Herald, 16 May 2006]”

15. The Compensation Act 2006 c.29 by allowing a full claim against a one responsible employer in mesothelioma case prevents that circumstances in the Barker case occurring again. The Act applies to Scotland as well as the rest of the UK. Its provisions apply to cases of delictual liability for personal injury in Scotland as well as tort cases in the rest of the UK.

16. In 2008, judicial functions of the House of Lords are set to transfer to a new UK Supreme Court under the Constitutional Reform Act 2005. The consultation carried out preceding the passing of that Act was at best partial; in particular it assumed that the Lords’ jurisdiction over Scottish civil appeals should automatically transfer to the new Supreme Court, without inviting alternative approaches. During debate on the Bill concerns over the adequacy of consultation in Scotland and whether implications for the

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4 Ibid.
Scottish legal system had been properly considered were raised. There remains a lack of consensus in Scottish legal circles in favour of the proposed changes.

17. Lord Cullen of Whitekirk, the then Lord President of the Court of Session, warned "The consultation paper [on the UK Supreme Court] says nothing explicitly about the effect of the establishment of a supreme court [on Scots law], but the implication may be that decisions of that court in civil appeals would be binding throughout the UK...Such a change would be retrograde and damaging to the separate identity of Scots law and we would oppose it". He suggested a need to expressly exclude decisions in English appeals from applying to Scots law which does not appear to have been included in the legislation.

18. During the Justice 2 Committee’s consideration of the Sewell motion on the Constitutional Reform Bill, Lord Cullen, the Law Society of Scotland and the Faculty of Advocates all agreed that the impact of the Supreme Court could over time dilute the separate identity of Scots law.

19. This Bill provides an alternative to the UK legislation that better fits the needs of the Scottish legal system and is a more appropriate reform taking account of the spirit of the devolution settlement.

Current position

20. At present appeals must first go through the Court of Session in Edinburgh and then on to the House of Lords in London before consideration can be given to taking them to the European Court of Human Rights in Strasbourg. Under this system, it could be argued that given the time required for appeals to be taken and heard in the House of Lords appeals are in danger of breaching Article 6 of the European Convention on Human Rights (ECHR) which states that everyone has the right to a fair hearing within a reasonable time. Additionally, the current system of appeals to the House of Lords represents additional hurdles for appellants and respondents in terms of cost constraints.

21. This Bill improves the position by potentially cutting the time taken to exhaust the whole appeals system and creating a direct route of appeal from Scotland to Strasbourg. Reinstituting the final civil appeal to the Court of Session in Edinburgh improves accessibility for parties. Edinburgh is closer in proximity for most Scottish residents than London and is likely to lead to lower travel costs in most cases, and the cost of general accommodation and subsistence is also lower for the duration of their stay.

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5 "Law Chief in Supreme Court warning", 10/12/2003, The Herald - Speaking on behalf of the Senators of the College of Justice at Constitutional Affairs Committee HoC.
BACKGROUND

The Scottish Civil Court System

22. Civil law defines the mutual rights and duties of persons and provides remedies where one person has failed to implement their duties to the other person.7 Examples of common types of civil actions include recovery of debts, damages for personal injuries, recovery of heritable property (repossession and eviction), divorce, contact, residence (formerly known as custody) and adoption.

23. The jurisdiction to determine whether or not a court action can be brought in relation to civil matters in Scotland is contained in the Civil Jurisdiction and Judgements Acts of 1982 and 1991. The basic determining factor is generally where the defender resides.

Sheriff Court

24. For legal purposes Scotland is split into six regions called Sheriffdoms. Each Sheriffdom has a Sheriff Principal who hears appeals in civil matters and is responsible for the conduct of the courts. There are 49 Sheriff Courts located throughout Scotland, where cases are heard by a Sheriff8. Part of the work of the Sheriff Court is to hear civil cases; they also hear criminal and commissary cases. The Sheriff Court is both a court of first instance9 and a court of appeal because in certain circumstances the decision of a Sheriff may be appealed to the Sheriff Principal.

Court of Session

25. The Court of Session is the superior Scottish civil court and has territorial jurisdiction over the whole of Scotland. It is made up of an Outer House and an Inner House.

The Outer House

26. The Outer House is almost exclusively a court of first instance, dealing with civil actions including divorce, contact, residence, adoption, actions for recovery of debt or heritable property, and damages for defamation and personal injury. It is made up of 24 judges known as Lords Ordinary who sit singly, very occasionally with, but usually without, a jury of 12, to determine cases.

27. It has an extensive jurisdiction, extending to all kinds of civil claims and in the most part shares jurisdiction (in terms of the type of cases heard10) with the Sheriff Court, unless the jurisdiction is expressly excluded by statute.

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7 D Walker, The Scottish Legal System, 2001
8 Scottish Courts Service – The Scottish Court Service a comprehensive guide
9 A court of first instance is a court which deals with cases that are being heard for the first time.
10 These types of case are classified as summary cause and ordinary cause. Summary proceedings are used in certain civil actions to secure payment of an outstanding debt that does not exceed the monetary limit set by the court and actions are divided into two categories: “small claims” for debts up to and including £750 and “summary cause” for debts over £750 up to £1500. An ordinary cause action is any civil action which is not a summary cause. A wide variety of actions are taken under ordinary cause procedures, including separation, divorce, damages, breach of
The Inner House

28. The Inner House is a court of first instance only in special cases. It generally acts as a court of appeal for decisions of the Outer House and for certain decisions from the sheriff courts and from statutory tribunals and courts, such as the Scottish Land Court and Employment Tribunals. The Inner House consists of two divisions, the First and Second divisions, each of equal importance and jurisdiction. The Lord President heads the First Division which comprises a maximum of four other senior judges and the Lord Justice Clerk heads the Second Division which also has a maximum of four other senior judges.

29. Three judges constitute a quorum and decision is by majority. In cases of particular importance and difficulty where it is necessary to reconsider afresh a point of law two Divisions may sit together as a court of five Judges or may even summon additional judges from the Outer House to make a fuller court.

The House of Lords

30. The House of Lords is essentially an appeal court. Judges appointed are known as Law Lords and at present there are 12. Law Lords are appointed by the Lord Chancellor, a member of the government, which has raised concerns about the impartiality of the process and long been a contentious issue.

31. These concerns were the catalyst for the Constitutional Reform Act 2005 which was intended to modernise the judicial system by facilitating the separation of powers between the judiciary and the legislature. The Lord Advocate Colin Boyd QC, in an address to the Law Society of Scotland Conference, said:

‘The principle of the separation of powers has been around for a long time. That our highest court should sit as part of the legislature has long been regarded as a somewhat quaint feature of the British constitution. Recent developments, however, have given impetus for change The reform of the House of Lords inevitably raised the question of the future of the Law Lords. But it is perhaps the passing of the Human Rights Act into domestic law which has encouraged a stricter view of the concepts of independence and impartiality.’

32. It is customary for two of these judges to be qualified Scottish lawyers, and for at least one Scottish Lord of Appeal who is a Senator of the College of Justice to sit on any Scottish appeal. As the Appellate Committee usually sits in panels of five, this would mean as an optimum that less than half the panel would be “Scottish Law Lords”. This is merely a convention and there is no requirement for a Scottish judge to hear a Scottish appeal.

33. The Appellate Committee hears appeals from decisions of the Court of Session but not from the High Court of Justiciary. There was thought to be an appeal to the House of Lords in criminal cases until Mackintosh v Lord Advocate (1876) 3.R (HL) 34 finally decided none existed. The absence of this appeal route has not had a negative impact on Scottish criminal justice and, interestingly, there has never been any notable debate on whether contract and actions for payment of sums of money over £1500.
there should be a final appeal to Westminster in criminal cases. The Claim of Right 1689 allowed civil cases to be heard by the king in Council. The practice of final appeals for civil cases being dealt with by the House of Lords began with The Treaty of Union 1707, which created the United Kingdom of Great Britain. Article 19 provided that no causes in Scotland should be cognisable by any court in Westminster Hall. Since the House of Lords did not answer that description appeals began to be heard there after the Union.

34. The Appellate Jurisdiction Act 1876 defines conditions under which an appeal can be made from the lower courts to the House of Lords. Section 3 of the Act states that an appeal shall lie to the House of Lords from “any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute”.

35. Section 5 of the 1876 Act requires that a quorum of three Lords of Appeal are present to hear and determine appeals, but does not specify that any of these need be Scottish in the case of Scottish appeals.

36. The Law Lords who hear appeals were formally constituted into an Appellate Committee in 1948.

Appeal procedures

37. Appeal is technically allowed on both the questions of law decided and the facts found in the decision of the lower court (except where the case originated in the sheriff court, where it is on points of law only). However appeals on matters of fact are only considered appropriate in exceptional situations.

38. Under Sheriff Court ordinary procedure appellants have the choice of appealing to the Court of Session or to the Sheriff Principal. A decision on appeal of the Sheriff Principal may be further appealed to the Inner House of the Court of Session. Ordinary cause actions are in general divorce, property disputes and claims for recovery of debts or damages exceeding £1500.

39. Under summary cause procedure, including small claims, appeals require in the first instance to be directed to the Sheriff Principal. A decision of the Sheriff Principal in relation to Summary Cause may, with his or her leave, be appealed to the Inner House of the Court of Session. The decision of the Sheriff Principal in relation to a small claims appeal is final.

40. Decisions from the Outer House can also be appealed to the Inner House.

41. An appeal to the House of Lords from the Inner House can only be made on a point of law.11

42. Leave to appeal is not normally required for civil cases from the Court of Session to the House of Lords which proceed directly to an Appellate Committee provided that two counsels have certified the reasonableness of the appeal.12

11 I D Macphail “Sheriff Court Practice” 1998, para 18.03
Civil Legal Aid

43. Prior to 1950, there was no government-funded legal aid, but solicitors and advocates voluntarily gave free assistance to people admitted to the “Poor’s Roll”, which came into being in 1424. An Act of the Scottish Parliament in 1587 gave all citizens the right to “provide himselfe of Advocates and Praeloqutoures, in competent numbers to defend his life, honour and land, against quhatsumever accusation” and this was accepted by the legal profession as a duty to poor prisoners.  

44. In the last 5 years, 32 appellants have applied for legal aid for House of Lords Appeals with 9 of these applications being granted legal aid.

45. Although it has long been a central feature of the justice system, providing access where parties may otherwise not have been able to afford it, legal aid was only formalised in the statute books relatively recently. The Legal Aid and Solicitors (Scotland) Act 1949 introduced civil legal aid schemes in the sheriff courts and the Court of Session, as well as criminal legal aid and the advice and assistance schemes (although these latter ones did not come about until some years later). The Legal Advice and Assistance Act 1972 later introduced a new, more comprehensive scheme of advice and assistance for Scots law.

46. The Legal Aid (Scotland) Act 1986 established the Scottish Legal Aid Board and the Scottish Legal Aid Fund. The Act allows civil legal aid to be provided in relation to civil proceedings in the House of Lords in appeals from the Court of Session. The Constitutional Reform Act 2005 amends that Act to allow it to be provided in relation to civil appeals from the Court of Session in the Supreme Court when established.

47. The Bill retains the same rights in relation to legal advice, assistance and aid as currently apply for Scottish civil appeals to the House of Lords. Therefore, it simply amends the 1986 Act to allow civil legal aid to be provided in a new court of appeal instead and disapplies the 2005 Act provision as regards Scotland.

Perceived problems with the current appeals procedure

Volume of Appeals

48. The appellate jurisdiction of the House of Lords is not intensively used by Scottish appellants, this could be due to the distance appellants would have to travel and the associated costs. The table below indicates the number of Scottish civil cases appealed since devolution.

<table>
<thead>
<tr>
<th>Calendar year</th>
<th>Appeals to the House of Lords</th>
</tr>
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<tbody>
<tr>
<td>1999</td>
<td>4</td>
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</tbody>
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12 House of Lords The Appellate Jurisdiction of the House of Lords LLN 2003/007
13 Scottish Legal Aid Board Online, http://www.slab.org.uk/about_us/what_we_do/history.htm
14 Ibid
15 Ibid
No requirement for Scottish Judges to hear Scottish cases

49. It is not mandatory for Scottish Judges to sit on Scottish cases heard in the House of Lords although there is a preference for two or more of the 12 appointed Law Lords to be Scots law practitioners. Therefore it could be that the judges considering the appeal may not have a good working knowledge of Scots Law.

Arrangements for a United Kingdom Supreme Court

50. The Constitutional Reform Act 2005 (the 2005 Act) received Royal Assent on 24 March 2005. Amongst other things, the Act creates the Supreme Court of the United Kingdom and abolishes the appellate jurisdiction of the House of Lords.\(^{17}\) This will transfer the final right of appeal in Scottish civil cases from the House of Lords to the new Supreme Court in October 2008.

51. Essentially, under the 2005 Act the current arrangements for appeals to the House of Lords remain the same with the existing 12 full-time Law Lords in the House of Lords forming the initial members of the new Court.

52. The types of appeal and grounds for appeal will remain unchanged, although the current convention that two Scottish Law Lords sit on Scottish appeal cases is not formalised in the new Supreme Court. The main difference is that the Court will be run by a Whitehall government department, the Department for Constitutional Affairs, a move intended to separate the judiciary from the legislature.

How the Bill will work

Abolition of the right of appeal to the House of Lords

53. The Bill prevents final Scottish civil appeals from being taken outwith Scotland by repealing legislative powers under which these appeals are currently heard by the House of Lords Appellate Committee.

Establishment of a Civil Appeals Committee in the Court of Session

54. In place of the final right of appeal to the House of Lords, the Bill requires a Civil Appeals Committee comprising a bench of five or more Court of Session judges to be established within the Court of Session to hear final appeals on civil court cases. Only cases determined by the Inner House of the Court of Session are eligible for further appeal.

\(^{17}\) Explanatory Notes to the Constitutional Reform Act 2005, 2005.
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55. The Court of Session Act 1988 specified the maximum number of judges appointed to the Court of Session as 24. There then followed a number of Maximum Number of Judges (Scotland) Orders that amended the 1988 Act to increase that number, in 1991 to 25; in 1993 to 27, in 1999 to 32 and most recently in 2004 to 34. These increases were made in response to increased workload and demands on the time of Court of Session judges over the years. This Bill is unlikely to necessitate further increases, as the number of final appeals is not expected to rise significantly. However, the power to increase the number of judges by Order will remain should this be required.

56. Five judges will constitute a quorum on the Civil Appeals Committee, and it is anticipated that in line with current practice none will have had any close involvement in any previous evidential hearings of a case. The Committee membership will be drawn from judges of the Inner House in the first instance, with the remainder being drawn from the Lords Ordinary of the Outer House where necessary. The Bill directs the Rules of the Court of Session to regulate the Civil Appeals Committee.

57. The Bill in effect replaces the current criteria for appeals substituting the House of Lords for the Civil Appeal Committee sitting in Edinburgh.

Case management

58. To ensure appeals are made on valid grounds, the Bill also imposes certain conditions on appeals to the Civil Appeals Committee by way of a provision requiring that the Rules of the Court of Session shall set out by way of Act of Sederunt the required procedure. The Rules must in particular provide for requirements on obtaining leave to appeal and giving security for costs.

CONSULTATION

59. The member prepared a consultation paper, The Civil Appeals (Scotland) Bill, which was consulted upon between June and September 2004. The main questions included:

- The benefits and disadvantages of having an appeal route to London;
- The composition of the proposed Civil Appeals Committee;
- Any financial impact of final civil appeals being heard by the Court of Session.

60. More detailed information on the first two areas appears earlier in the Memorandum, whilst the financial aspects are dealt with in the Financial Memorandum.

The Responses

61. Copies of the consultation were sent directly to 59 organisations including academic institutions, equal opportunities institutions, government bodies/agencies, justice and legal organisations, local government organisations (COSLA), police and voluntary organisations. The paper was also made available on the Scottish Parliament’s website via a hyperlink on the members’ bills page. In total nine responses were received. These included seven responses from legal organisations, one from a university and one from a human rights organisation.
62. One possible reason for the level of responses being low could have been due to the fact that the appeals process had previously been subject to widespread consultation in 2003 and 2004. The low response provided limited information on the level of support for the Bill. One respondent indicated clear support and one indicated clear opposition while the remainder were either unclear in their support or offered no comment thereon.

63. The Scottish Court Service, who run the Court of Session, considered that “the proposals as stated were unlikely to raise practical issues for the Court of Session if the number of appeals from the Outer House remain at recent/present numbers. If however, the numbers increased, this could add to delays in dealing with civil appellate business. There could also be practical difficulties in finding a suitable number of Judges, with no prior involvement in the case, if there were substantial numbers of appeals in cases dealt with by the Court of Session at first instance”. There is no indication that the number of appeals will rise. Those relating to devolution issues will continue to be taken by the Judicial Committee of the Privy Council.

64. The Scottish Legal Action Group (SCOLAG) opposed the proposed Bill on a number of grounds. These mainly relating to perceived problems within the existing civil justice system in Scotland and in particular within the Court of Session. In essence these relate to under-resourcing in terms of number of judges and resulting time delays, which, given the expected number of appeals, should not occur.

65. The University of Aberdeen School of Law, supported neither the abolition of the right of appeal to the House of Lords or its successor UK Supreme Court. They felt that the best course of action would be to abolish the right of appeal entirely as opposed to creating a Scottish “Supreme Court” or a second appeal in the Court of Session. Reasons given were that they felt a new Supreme Court in Scotland would prove unsustainable due to a lack of sufficient number of appeals arising from decisions of the Inner House of the Court of Session. The member carefully considered this suggestion which is further covered in paragraph 71 below.

ALTERNATIVE APPROACHES

66. The member has carefully considered three alternative approaches:

- Status Quo as envisaged with the Constitutional Reform Act 2005, which transfers the right of final appeals in Scottish civil cases from the House of Lords to a UK Supreme Court.
- Abolish the right of appeal to the House of Lords with no replacement:
- Establish a new Court independent from the Court of Session.

Constitutional Reform Act 2005 (the 2005 Act)

67. The Constitutional Reform Act 2005 creates the Supreme Court of the United Kingdom and abolishes the appellate jurisdiction of the House of Lords, i.e. transfers the final right appeal to the Supreme Court of the United Kingdom.
of appeal in Scottish civil cases from the House of Lords to the new Supreme Court.\footnote{The Judicial Work of the House of Lords, House of Lords Briefing, November 2005} However, as earlier indicated, the member feels that the Act’s primary aim of separating the judiciary from the legislature is not achieved because the new Supreme Court will continue to be run by a government department and presided over by the same 12 Law Lords.

68. Although the initial proposal for the 2005 Act was the catalyst for the proposal of the Civil Appeals (Scotland) Bill, the member considered the implications of that Act fully. The consultation document for the Constitutional Reform Bill omitted to seek any views on the appellate functions aspect of the legislation with regard to Scottish civil appeals. Furthermore, the new arrangements do nothing to stop the dilution of Scots law by the introduction of contradictory concepts of English law. The member is clear that the 2005 Act also does nothing to address prohibitive costs to appellants of bringing appeals to London or general access to justice issues.

**Abolish the right of appeal to the House of Lords with no replacement**

69. One route to achieving the Bill’s aims of reinstatement of the final appeal in Scottish civil cases to Scotland would be to abolish the right of appeal to the House of Lords and to its successor the UK Supreme Court. This would leave the Inner House of the Court of Session as the highest court of appeal in civil cases in Scotland.

70. The member having consulted on this option considered it was not the best course of action principally for two reasons. Firstly, criminal cases in Scotland have a final right of appeal in the High Court of Justiciary and it is desirable to have a similar final layer of appeal for civil cases. Secondly, by retaining this final layer of appeal, Scottish civil cases retain parity with civil cases in England and Wales in terms of the appeal opportunities afforded.

**Establish a new Court independent from the Court of Session**

71. Such a new Court would hear appeals from the Court of Session and might ultimately take the form of a Scottish Supreme Court to act as a final court for criminal cases as well as civil cases. The member consulted on this option and responses indicated that it is felt there was not enough business to sustain a court of this nature based on the volume of civil appeals that currently go the House of Lords. The financial cost of establishing a separate court would be disproportionate to any benefits accruing. Furthermore, if it were to be set up to handle criminal as well as civil cases this would involve a major overhaul of the current criminal justice system - a scope beyond a member’s Bill.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.
Equal opportunities

72. The Bill will have a beneficial effect on the equal opportunities of the people of Scotland. Cases being heard in Edinburgh improves access for all and assists in reducing overall costs.

Human rights

73. Under the European Convention on Human Rights. Article 6(1) of the Convention states:

“In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”

74. The arrangements substitute one set of arrangements for a final court of appeal for another set of arrangements. Additionally appropriate transitional provisions are made for cases currently before the House of Lords should the Bill become law. The Bill does not interfere with or diminish anyone’s rights under Article 6

75. The Constitutional Law Reform Act 2005 was intended to insure impartiality given that the current Law Lords were appointed by a Lord Chancellor, a member of the government, and sit within the UK legislature. The member is of the view that that the transfer of the Lords’ appellate functions to the UK Supreme Court still raised issues as the same Law Lords will be in a court operating under the auspices of a Government department.

76. This Bill on the other hand will ensure that final Scottish appeals are heard by independent and impartial judges, completely separate from the legislature and appointed via an established and well-respected public appointments procedure.

Island and rural communities

77. As indicated there will be a degree of improved accessibility for these areas but overall no detrimental effects on them will arise.

Local government

78. No effect.

Sustainable development

79. No effect.
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