European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Response questionnaire project group Timeliness

Judicial Council of Scotland

1. The Court System and Available Statistics

1.1 The court system in Scotland comprises a hierarchy of courts. At the top of the hierarchy is the Supreme Court of the United Kingdom, which is located in London. It has an appellate jurisdiction from the Scottish courts in civil matters and, since the devolution arrangement which was introduced in 1999, in human rights issues in relation to criminal matters. Until devolution, there was no right of appeal in criminal matters to London.

The senior courts in Scotland are the Court of Session (civil matters) and the High Court (criminal matters). Rather confusingly, as a result of practice before the Union of Scotland and England in 1707, they are known as the Supreme Courts of Scotland. Thus when we refer below to the Supreme Courts Programming Board, we are speaking of a Scottish rather than a UK body.

The Court of Session and the High Court have both a first instance and an appellate jurisdiction. The High Court has exclusive jurisdiction to hear cases involving certain serious crimes and its judges have a sentencing power which is considerably greater than that conferred on sheriffs, who cannot impose a sentence of imprisonment which is more than for five years.

At a local level there are sheriff courts, each of which has a defined geographical jurisdiction within Scotland. Sheriffs have jurisdiction in both civil and criminal matters. Almost all family cases are now heard in the sheriff court. Civil cases with a value of £5,000 or less must be heard in the sheriff court and cannot be raised in the Court of Session. As part of a proposed reform of the civil justice system the Scottish Government plans to raise that limit very significantly. The justice of the peace court deals with minor crimes only.

Many matters which might otherwise be adjudicated upon in the civil courts are heard by administrative tribunals. To name but a few, employment law disputes, claims for social security payments, tax disputes, and claims to live in the United Kingdom

under our immigration and asylum laws are dealt with by tribunals rather than the civil courts.

There are 34 judges of the Court of Session and High Court who have both a civil and a criminal jurisdiction. There are 6 Sheriffs Principal who have regional responsibility administrative responsibility for the sheriff courts within their sheriffdom and 141 sheriffs. There are also about 430 lay justices of the peace and 6 stipendiary magistrates in the justice of the peace courts.

1.2 The Scottish Court Service publishes statistics in its annual report and accounts. The latest report dated 11 August 2010 is for the year 2009/2010. The report records the numbers of civil actions, petitions and appeals and the numbers of High Court indictments, trial and appeals in each of the past three years. Similar figures are published for the sheriff court. See sections 5.2, 5.3 and 5.5 (pp.24, 26 and 27). It also records (on pp.20-21) over two years the waiting periods for the hearing of cases and appeals in both civil and criminal cases in each level of the court hierarchy. The link to the 2009/10 report is http://www.scotcourts.gov.uk/news/13october2010/SCS%Annual%20Report%and20Accounts%202009%202010.pdf
The Scottish Government publishes further statistical material on criminal justice at http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice

1.3 Recently, the Supreme Courts Programming Board has agreed a new performance framework which will be presented to the Scottish Courts Service and is likely to be adopted in the next financial year. In civil cases the indicators, which will be produced quarterly (four times per year) will measure:

(i) the time during which the court has control over the timetable of a case, namely the period during which the case is subjected to judicial case management or the time lapse between the parties having finalised their written pleadings and the first date which the court can offer for a substantive hearing; and

(ii) the end to end timescale, namely the average period from when the case is introduced into the court until its determination at first instance.

The reason for the distinction is that, in many of our civil procedures, the parties and their legal representatives determine the pace at which a case progresses as it is left to the parties to take the initiative in finalising their written pleadings and fixing hearings. In response to criticism from the European Court of Human Rights in *Anderson v United Kingdom*[1] that the Court of Session should not leave it to the parties to determine progress but should take steps to avoid unnecessary delay, the court has put in place measures to identify cases which parties have failed to progress. But it is frequently the case that parties will want their cases to be argued by counsel whom they have chosen and they will not take the first date which the court is able to offer but prefer to take a later date, when their counsel are available. As a result, the first indicator measures what the court can do and the second is an indicator of the performance of the justice system (including the legal profession) as a whole.

[1] [2010] ECHR 145

In cases where there are different forms of case management (i.e. personal injury actions and commercial actions) the Supreme Courts Programming Board has recommended modified performance indicators with the aim of showing essentially the same things.

In civil appeals the quarterly performance indicators are to be:

(i) the current waiting period for the earliest available non-urgent two day hearing; and

(ii) the average period from the presentation of an appeal until its final disposal on the merits.

In criminal cases there are statutory limits on the period of time between an accused person appearing in court on petition and the start of his trial. Different time limits are set depending on whether the accused person is at liberty or in custody before his trial:

	At liberty	In custody
From petition to the first preliminary hearing	11 months	110 days
From petition to start of trial	12 months	140 days

These limits can be extended only with the permission of the court. Because of difficulties which the prosecution service faces in preparing cases and the need for the defence to respond to the prosecutor's disclosure of his evidence with their own enquiries, it is not uncommon for the court to have to extend those time limits. When an accused person is not in custody, an extension causes no real harm. It is more serious when the 140 day limit has to be extended as the accused person remains in custody. In 2009/2010 the court granted such an extension in 31% of High Court cases.[2]

The Supreme Courts Programming Board has recommended the following performance indicators in criminal cases in the High Court on a quarterly basis:
First instance:

(i) The average number of preliminary hearings per case;

(ii) In relation to cases which do not proceed to trial – (a) the percentage of trial diets that are adjourned and (b) the percentage at which pleas of guilty are tendered;

(iii) In relation to cases which proceeded to trial, the average period between the date when the case was first cited to a preliminary hearing and the conclusion of the trial.

The proposed performance indicators for criminal appeals are:

(i) the current waiting period for an appeal hearing in respect of each type of criminal appeal; and

(ii) the average period from the date on which permission to appeal is granted until final disposal of the appeal in respect of each type of appeal.

[2] See SCS Annual Report and Accounts 2009/2010, p.21.

2. **Statistics, Requirements and Transparency**

2.1 In the Court of Session and the High Court, the Supreme Courts Programming Board examines quarterly the statistics referred to in 1.3 above and plans the allocation of resources in response to them.

2.2 Those statistics are provided to the Lord President (our senior judge), the senior court officials and the administrative judges who sit on the Supreme Courts Programming Board. It is likely that those statistics will replace the equivalent performance indicators which were used in the Scottish Court Service's Annual Report and Accounts to which we have referred. In addition, the commercial court judges see detailed statistics of the workload of the commercial court and senior court officials keep many other statistics for internal use.

In civil litigation, we have benchmarking of the time it takes to hold the substantive hearing in a personal injury case and in a commercial case and we are currently extending that to other cases.

2.3 We do not publish the processing time of individual cases but the court service has internal records in the computerised Case Management System ("CMS") which show each case. The administrative judges, senior officials and, if necessary, the Lord President, will have access to data on an individual case if a problem of timely delivery of a judgment arises. CMS will be used to present the new performance indicators.

2.4 There are targets in civil litigation for the processing of personal injury and commercial cases. There is also the target of twelve weeks for the production of written opinions in all civil cases. The latter target is administered by an administrative judge, who will interview the judge and, if needed, provide assistance, such as re-directing further work from the judge, to enable the completion of a delayed judgment.

As we have said, in criminal trials the time limits are laid down by statute. In the High Court a case must come to its first preliminary hearing within 11 months of the accused person appearing on petition if he remains at liberty or 110 days if he is in custody and the equivalent times from the petition to the start of the trial are 12 months and 140 days respectively.

2.5 In civil matters there are no direct consequences unless the delay was such as to breach a litigant's Article 6 rights. The Court of Session has taken steps recently to keep track of cases, including those which parties do not advance promptly, to ensure that an Article 6 challenge is avoided in future.

In criminal cases, the prosecutor cannot exceed the statutory time limits for the start of a trial unless the court grants an extension of those limits. The court will grant such an extension where there is a good reason, such as the preparedness of the defence to go to trial or the need for the prosecution to obtain further expert evidence in response to a line which the defence have taken. If the prosecutor or the court allowed too much time to pass before an accused person was brought to trial, that

person could mount an Article 6 challenge which, if successful, might prevent the prosecution from proceeding.

2.6 Yes. Interested parties can complain to the Judicial Office for Scotland, which is the body which assists the Lord President to perform his statutory duties as head of the judiciary, including his responsibility for the efficient conduct of the business in the courts. There is a published complaints procedure in relation to judicial conduct, which could include unreasonable delay on the part of a judge. Litigants may also write to the Judicial Office to express concern if the Court Service is not able to give them a court hearing within a reasonable time.

2.7 Yes. The Scottish Court Service has published annual user surveys.

3. **Reduction of Caseload and Facilitating Court Procedures**

3.1 The principal means of reducing the workload of the senior courts have been (i) to increase the competence of the subordinate courts and (ii) to require a party to obtain permission to appeal in certain cases. An example of (i) is the transfer in 2008 of all personal insolvencies to the sheriff court. We do not force parties to consider alternative dispute resolution in all cases, but judges sometimes recommend mediation in appropriate cases.

We have many administrative tribunals which deal with disputes concerning, for example, social security entitlements, employment law disputes, taxation, and immigration and asylum. Appeals from such tribunals are allowed only on points of law. The tribunal system in the United Kingdom has recently been reformed and further reforms of tribunals which operate in relation to devolved matters in Scotland are also being prepared. In the United Kingdom tribunal system, appeals to the Court of Session from the Upper Tribunal (itself an appeal tribunal) are allowed only on points of law and only with the permission of the Upper Tribunal or the Court. The criteria for granting such permission are (i) that the appeal must raise an important point of principle or practice or (ii) there is some other compelling reason why the appeal court should hear the appeal.

It is expected that the current reform of civil justice in Scotland (which we discuss in section 5 below) will include the requirement to obtain permission to appeal to the Supreme Court.

3.2 In the sheriff court there are simplified procedures, for example for small claims and for the recovery of possession of houses. In the Court of Session there is a case flow management system (which involves a fixed timetable with which the parties must comply) for personal injury cases, which has been extended to the sheriff court. In the commercial court there is an increasing use of sworn written testimony.

3.3 As mentioned above, written testimony is common in commercial actions. Evidence can also be taken by video link when that assists the prompt disposal of a case. In small claims cases and personal injury cases, among others, simplified written pleadings are allowed.

3.4 At present judicial case management exists principally in the commercial court, where the judges seek to control the pace of the parties' preparation of the case, to identify issues for determination which might help to resolve the case as a whole, and to decide the form in which evidence of fact may be taken. In personal injury cases in the Court of Session and the sheriff court, case flow management, by which the court sets a timetable for the case as soon as defences are produced in the action, enables the prompt processing of such claims. Most of those claims are settled before the date fixed for the court hearing which is currently about 12 months after the lodging of defences in the action. As defences are lodged within about 4 weeks, the diet of proof is scheduled to occur about 13 months after the action is raised.

In April 2010 the Court of Session introduced the case management of all civil appeals by a procedural judge.

4. **Increase of Capacity and Improvement of Processing**

4.1 In view of the financial difficulties facing the public sector in the United Kingdom, there is no prospect of increasing the number of judges. Increase in capacity has to come from the more efficient use of resources.

The Lord President, through the work of senior court officials, seeks to meet the demands on the Court of Session and the High Court by several techniques which have included:

- Reducing the number of judges who sit on appeals against sentencing in criminal cases.
- Obtaining the assistance of retired judges.
- Using able sheriffs and senior practitioners as part-time judges.
- Reallocating judges within the court on a day to day and week to week basis as some cases settle or trials do not proceed.

4.2 There is very little assistance of this nature in Scotland. Judicial assistants are available to the judiciary only in the criminal appeal court. They provide the appeal court judges with summaries of the legal and factual issues in certain appeals. Judges draft their own judgments.

4.3 Yes. We have specialised commercial judges in the Court of Session and in the sheriff court in Glasgow. We also have judges who are appointed to handle intellectual property cases and judges who are appointed to sit on the Upper Tribunal of the UK Tribunal system in tax cases and immigration and asylum cases. We have judicial case management in commercial cases as mentioned above.

In civil and criminal appeal hearings it is increasingly the practice to require written arguments and to restrict the duration of oral hearings.

In the Court of Session and in the High Court all oral evidence is digitally recorded and a record of ex tempore judgements can be obtained in that manner.

4.4 Only the Lord President and the Lord Justice Clerk in the Court of Session have individual secretarial assistance and also legal support. But there is a judicial typing pool which provides secretarial services to the other judges.

4.5 The use of case management is seen as the most important method to improve the capacity of the courts and the timeliness of the completion of cases. In the Court of Session the Lord President has delegated powers to four administrative judges (appeal court – civil and criminal, and first instance - civil and criminal) to ensure the efficient use of scarce resources. They co-operate with senior court officials and sit with them on the Supreme Courts Programming Board, which plans for the forthcoming year and allocates resources to meet demand.

A recent technological innovation has been the making and processing of motions (i.e. incidental applications) by email. In the commercial court, case management is facilitated by email communications between the court clerk and the legal representatives of the parties.

5. **Other Initiatives**

A committee under the chairmanship of Lord Gill (Scotland's second most senior judge) produced a report on the reform of civil justice in Scotland in 2009. The Scottish Government is proposing to implement most of the recommendations of that report. Those reforms will, if implemented, extend the operation of judicial case management to all civil cases in the Court of Session and the sheriff courts. It will radically increase (to over £100,000) the financial limit of cases which must be heard in the sheriff court rather than the Court of Session and it will create a third tier court (the District Court) to hear the simpler cases which currently fall within a sheriff's jurisdiction. If you wish to see more of Lord Gill's report, it can be accessed via the internet. The link is http://www.scotcourts.gov.uk/civil courts review/

The link to the recent response of the Scottish Government to that report is http://www.scotland.gov.uk/Publications/2010/11/09114610/0