



Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

JCC Circular 20 of 2014

Attachments: SPF response Courts Reform (Scotland) Bill;
SP Justice Committee Stage 1 Courts Reform (Scotland) Bill

Ref: CS/LS

12 May 2014

Dear Colleague

Courts Reform (Scotland) Bill - Information

The Scottish Parliament Justice Committee has recently completed its scrutiny of the Courts Reform (Scotland) Bill. A copy of their stage 1 report and the SPF response to the call for evidence are attached for your information

Whilst this circular is primarily for your information, should you have any comment on its content please notify them to me no later than 10 days after its date of publication.

Yours sincerely

Calum Steele
General Secretary

Justice Committee

Courts Reform (Scotland) Bill

Written submission from Scottish Police Federation

The Scottish Police Federation (SPF) represents 99% of Police Officers in Scotland and thanks you for inviting us to contribute to this consultation. The SPF response effectively falls into four areas; Health & Safety; Cost Limits; Capacity of the Sheriff Courts; and Section 69 of the Enterprise Act 2013. We are content for our response to be published.

Health & Safety

The SPF believes securing the ability for any worker to be able to pursue an employer for an accident, injury or disease for example should be a core consideration for any representative body. We also believe this is essential not only for the impact single events can have on individuals but also for the collective benefits that are introduced to a workplace or practice through greater awareness for Health and Safety. The Civil Court Review chaired by Lord Gill stated "In our view the Court of Session should deal only with the most complex and important cases". The SPF contends that workplace and working practice health & safety, especially for a body such as the police service whose actions (or inactions) can have a disproportionate impact on ordinary members of the public in addition to our members, are indeed squarely in the category of "important cases". It is also worth noting that important and complex may not necessarily mean very expensive.

The SPF also understands that remarkably few cases of health and safety breaches are prosecuted by the Health and Safety Executive and whilst this may be a by-product of a claim, restitution through the civil courts is an effective enforcement and 'policing' method in this area.

Cost Limits

The Bill proposes to increase the value of cases to be raised in the Court of Session from £5,000 to £150,000. We see no logic for this figure being applied. £150,000 represents a 3000% increase and is far in excess of the equivalent provisions in England, Wales and Northern Ireland.

This change will have a detrimental impact on our members' ability to access justice. Many of our member's cases involve complexities on both liability and quantum. Under the new proposal, these cases will be excluded from the Court of Session if the value is less than £150,000. The Court of Session is widely regarded as a centre of legal excellence, throughout the United Kingdom and further afield. It produces high quality and consistent decisions, and has promulgated a body of case law which is highly regarded and frequently referred to with approval throughout the UK Courts. Setting an entry threshold of £150,000, in our view, restricts access to this judicial forum unnecessarily.

The majority of actions pursued by members of the SPF are below the £150,000 threshold and will be directed through the Sheriff Courts. This will remove the automatic right to Counsel. Additionally, when pursuing action on behalf of our members, the SPF effectively pays as we go. Most defendants in civil claims invariably always instruct Counsel as they tend to have their fees underwritten by insurance. Should a Sheriff not sanction the use of Counsel that additional cost will be borne by the SPF whereas the defender will have the comfort of insurance. This places our members and organisation at a further disadvantage as the inevitable requirement arising from this reality would be an increase in individual member costs and increase in organisational risk.

Whilst permitting an automatic right for Counsel could be permitted, the SPF is unclear if this would address the increased risk of expenses liabilities not being full recovered even in the case of a “win”. This is particularly problematic as in our view one of the greatest influencers of a collaborative solution and settlement driven approach between both pursuer and defender is the potential of being left with all the legal fees should you lose.

Capacity of the Sheriff Courts

It is vital that the Sheriff Court infrastructure is adequately resourced to cope with this influx without noticeable delay. There must be sufficient allocation of resources, accommodation and Sheriffs to function in a similar manner to that operated via the Court of Session presently. At present the SPF is of the view this is often lacking. For example should a case require to proceed to a Proof, the Court of Session is able to provide consecutive days for the hearing. In contrast our experience is that a number of Sheriff Courts are simply not able to offer consecutive days for proof diets because of insufficiency of resources or personnel. Without sufficient resourcing allocated to an already stretched shrieval system we fail to see how it will cope with this proposal and prevent delay inevitably creeping into the process. We would argue that any significant transfer of business to the Sheriff Court should be deferred until such time as the shrieval system has the resources to cope with this level of work (whilst not diluting its ability to deal with current workload).

Section 69 of the Enterprise Act 2013

Section 69 of the 2013 Act makes it more difficult for workers to pursue employers for compensation following the sustaining of a workplace injury or disease. The SPF recognises it is not in the gift of the Scottish Parliament to repeal or overcome this provision but we do believe the current proposals would compound those difficulties and reduce access to justice. If the Scottish Government is a believer in the right for workers to be able to access justice in the event they sustain injury or disease as a consequence of a work place or working practice failure, this could be demonstrated by guaranteeing specialist Sheriffs could hear such cases in conjunction with a guaranteed right to Counsel in specialist courts.

Scottish Police Federation
18 March 2014



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

5th Report, 2014 (Session 4)

Stage 1 Report on the Courts Reform (Scotland) Bill

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The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

5th Report, 2014 (Session 4)

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The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

Remit and membership

Remit:

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Christian Allard
Roderick Campbell
John Finnie
Christine Grahame (Convener)
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
John Pentland
Sandra White

Committee Clerking Team:

Irene Fleming
Joanne Clinton
Neil Stewart
Christine Lambourne



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

5th Report, 2014 (Session 4)

Stage 1 Report on the Courts Reform (Scotland) Bill

The Committee reports to the Parliament as follows—

SUMMARY OF RECOMMENDATIONS

- 1. The Committee is broadly satisfied with the approach taken in this Bill to maintain existing arrangements for the structure of sheriff courts in Scotland and to streamline the process for altering sheriffdoms and sheriff court districts. Given the concerns around recent court closures, the Committee endorses the Delegated Powers and Law Reform Committee's recommendation that the power to create and alter sheriffdoms should be subject to affirmative procedure in future and welcomes the Scottish Government's commitment to bring forward an amendment at Stage 2 to introduce this procedural change.**
- 2. The Committee broadly supports the creation of a new judicial office of summary sheriff with a view to allowing sheriffs to concentrate on more complex civil work or serious crimes. However, we note witnesses' concerns that the references within the Policy Memorandum to summary sheriffs undertaking the more routine, low value civil cases, is unhelpful and could lead to the perception that cases dealt with by the summary sheriff are being downgraded and are of lesser importance. Some witnesses suggested that this may be particularly true of cases involving domestic abuse, forced marriage, and the custody of children, while others disagreed. The Committee asks the Scottish Government to respond to these concerns.**
- 3. The Committee notes that it will take around 10 years before the full complement of summary sheriffs is in place. We agree with witnesses that it need not make a difference whether a case is being dealt with by a sheriff or summary sheriff so long as they are trained and experienced in the particular areas for which they are responsible. We note that the Judicial Appointments Board for Scotland is considering carefully the breadth of specialist skills and assessment processes needed for the new position and that an implementation working group of the judicial structures project has been established to look at these and other issues. We would welcome regular updates on how this work is progressing.**

4. The Committee notes the recent announcement by the Lord President that judges sitting in the Inner House of the Court of Session will no longer wear robes and wigs when hearing civil appeals. We also note that summary sheriffs may also be employed on a part-time basis.

5. The Committee accepts that part-time sheriffs should be available to cover emergencies, absence and illness, particularly in the remote areas of Scotland. However, we agree with the Lord President that part-time sheriffs should not become a routine part of the day-to-day complement of the sheriff court. We therefore urge the Scottish Government to monitor closely the effects of removing the cap on the number of part-time sheriffs as provided for in the Bill.

6. The Committee notes the key role that honorary sheriffs play in dealing with urgent business in rural areas where a sheriff may not be available. While we agree with the policy intention of the Bill that the position of honorary sheriff should be abolished, with a view to ensuring that everywhere in Scotland has access to a legally qualified judiciary, we seek assurances that rural and remote areas will not be disadvantaged by this approach. We accept that abolition of honorary sheriffs cannot be achieved overnight as it will depend on alternative judicial arrangements and technological advancements being put in place, however, we seek an indication from the Scottish Government as to the expected timetable for their removal, including proposals related to their current workload.

7. The Committee supports the provisions in the Bill relating to sheriff specialisation and considers that it will, as expected, ensure a level of consistency in decision-making and more efficiency in the court process provided that the necessary training and resources are put in place. We note the Lord President's view that specialisms could be managed in such a way as to enable access in remote areas as well as in the major courts; however, we seek clarification as to how this might work in practice.

8. The Committee supports the proposal to increase the limit of privative jurisdiction of the sheriff court in order to free up the Court of Session to deal with the most complex and serious cases and to ensure that the civil court system works more efficiently and economically.

9. While we accept that this policy intention may only be achieved by a significant increase in the privative jurisdiction limit, we have some concerns regarding the robustness of the data on which the proposed limit of £150,000 is based, for example, references made to anonymous data is not satisfactory. The Committee notes the evidence on this point, which seemed anecdotal rather than empirical, and considers that it would be helpful for empirical evidence to be made available.

10. On balance, we consider that the proposed increase in the privative jurisdiction of the sheriff court from £5,000 to £150,000 may be too great a leap. We therefore recommend that the Scottish Government introduces a lower limit. We further note the limits in place elsewhere.

11. On the question of whether or not the privative jurisdiction of the sheriff court should be the same for commercial cases as for personal injury cases, the Committee notes the lack of empirical evidence with regard to commercial cases and is unable therefore to form a view on whether the limits should be identical. In the absence of a Scotland-wide specialist commercial court, this issue deserves more consideration.

12. The Committee considers that a lower limit for the privative jurisdiction of the sheriff court (as recommended earlier in this report) may alleviate many of the witnesses' concerns regarding access to justice and the impact on the independent bar in Scotland.

13. We also consider that the test for granting sanction for counsel to be key to ensuring access to justice for those parties who are involved in serious and complex cases below the privative jurisdiction threshold in ensuring they can receive the best legal representation. We would therefore be concerned if, as suggested by some witnesses, there was any move to apply the current test more stringently.

14. We also note the support of witnesses for Sheriff Principal Taylor's recommendation that the test for granting sanction for counsel should be expanded to include a general test of reasonableness and the need to have regard to the resources deployed by the other party to the case, i.e. 'equality of arms'. We welcome the Scottish Government's commitment to respond to Sheriff Principal Taylor's recommendations prior to Stage 2 proceedings on this Bill and recommend that it brings forward an amendment to the Bill to introduce the new test proposed.

15. The Committee notes that the Scottish Government is in discussions to establish whether there are any steps it can take to mitigate the effects of section 69 of the Enterprise and Regulatory Reform Act 2013 and welcomes this approach. We would welcome an update on progress with these discussions in due course.

16. The Committee considers that the test for remitting cases is a necessary safeguard in ensuring that, whatever the level of the sheriff court's privative jurisdiction, the most complex and serious cases can still be heard in the most appropriate court with the most appropriate level of legal representation. However, we heard compelling evidence that the test to be applied in the Bill is too high, and in particular the possibility that the provision to allow the court to take into account the business and operational needs of the court could be in breach of the ECHR. We find this concerning and therefore welcome the Scottish Government's decision to lodge an amendment at Stage 2 to remove the provision relating to business and operational needs from the Bill.

17. We consider it essential that the test for remit of cases is set at a level that does not unnecessarily prohibit complex cases from reaching the Court of Session. We therefore welcome the Scottish Government's commitment to reconsidering the test in the Bill, with a view to bringing forward amendments at Stage 2.

18. The Committee welcomes the proposal to establish a specialist personal injury court as part of a package of measures to ensure that cases are heard in the most appropriate courts. We do, however, note the concerns of some witnesses regarding the capacity of the new court. We therefore recommend that the personal injury court is established prior to the new level of privative jurisdiction being introduced to ensure that the court is fully equipped with the necessary electronic and administrative systems to ensure it can work effectively from day one.

19. The Committee notes that parties will still have the option of raising a claim in their local sheriff court or the new personal injury court and seeks further clarification as to how this will work in practice, along with an estimation of the number of cases expected to be raised in local sheriff courts and in the new court.

20. The Committee considers that the establishment of a nationwide Sheriff Appeal Court, with decisions binding on sheriffs and justices of the peace across Scotland, is a welcome step and may lead to greater efficiencies. The Committee does, however, note the opposition of the Faculty of Advocates to the establishment of this Court and calls on the Scottish Government to respond to the specific concerns about limited circumstances for appeal to the Inner House and the existence of two separate judicial structures.

21. The Committee calls on the Scottish Government to respond to the request of the Sheriffs' Association that criminal appeals in the Sheriff Appeal Court ought to be heard by sheriffs experienced in criminal work sitting alongside the sheriff principal.

22. The Committee notes the concerns expressed by the Association of Personal Injury Lawyers, and the view of the Scottish Civil Courts Review, about the judicial hierarchy of sheriffs hearing appeals. Whilst the Committee notes the comments of the Minister, it considers that, on balance, all appeals ought to be heard by sheriffs principal, as their judgment is binding Scotland-wide. We note that in more complex cases there would be three on the bench.

23. The Committee welcomes the Bill's provision to allow more than one sitting of the Sheriff Appeal Court to take place at the same time, and at different places. The Committee agrees with the Scottish Civil Courts Review that civil appeals should be heard in the sheriffdom from which they emanate.

24. The Committee notes the changes to civil appeals provided for in the Bill. While noting the concerns expressed about the limitations this places on appeals to the Court of Session and Supreme Court, the Committee broadly welcomes these reforms.

25. The Committee notes the petitioner's concern to correct what she perceives to be a flaw in the system in relation to appeals to the Supreme Court and considers that the provisions of section 111 of the Bill would

appear to put party litigants and those with legal representation on an equal footing.

26. The Committee notes the concerns of Justice Scotland about the appeal to proceed provisions in Part 5. The Committee draws these concerns to the Scottish Government's attention and invites it to reflect on whether section 113 should be amended to allow for more circumstances where the period for appealing can be extended.

27. The Committee welcomes the changes to civil and criminal appeals provided for in Parts 4 and 5 of the Bill.

28. The Committee is broadly content with the proposals in the Bill to continue allowing civil jury trials and for these to be extended to the personal injury court.

29. The Committee welcomes the proposals to replace summary cause and small claims procedures with one new simple procedure for cases under the value of £5,000 aimed at improving accessibility for users. We also support the intention set out in the Policy Memorandum that court rules for simple procedure will be based on a problem-solving or interventionist approach to assist parties in settling their disputes expeditiously.

30. The Committee notes the views of Which? that the monetary limit for simple procedure should be set at £10,000 in line with the small claims limit in England and Wales. However, we accept that the Scottish Government concluded that it would be premature to introduce a higher limit and welcome its commitment to keep the matter under review.

31. Given concerns raised in evidence by the Sheriffs Association, the Committee asks the Scottish Government to consider amending the wording at section 72(b) of the Bill to read 'facilitate negotiation between' rather than 'negotiate with' in order to maintain the independence of the judiciary.

32. The Committee notes the views of several witnesses that Scotland does not currently have the same issues in respect of volume of cases for judicial review as England and Wales and that the introduction of a three month time limit for bringing applications for judicial review may be overly restrictive.

33. The Committee also notes the view of the Lord President that three months is a reasonable time limit and that there are appropriate safeguards built into section 27A.

34. The Committee considers that those applying section 27A should do so with discretion and flexibility, balancing the rights of the party challenging decisions with the requirement for the public body to implement those decisions.

35. The Committee recognises that some concerns have been raised over the requirement for the Court to grant permission in judicial review cases, but considers that these concerns are interlinked with concerns over the

three month time limit. Whilst the Committee remains to be convinced that this additional stage is absolutely necessary, it welcomes the reassurances of the Lord President that its introduction is important to prevent petitions going forward that lack probable cause.

36. The Committee welcomes the codification of the test of “standing” in judicial review cases, set out in the Bill. The Committee also invites the Scottish Government to consider further the points made in evidence that guidance should be provided on the meaning of “real prospect of success”.¹

37. The Committee notes the concerns expressed by the Law Society of Scotland that the Scottish Legal Aid Board will use the reforms to make changes in practice to the granting of legal aid, but notes the Scottish Legal Aid Board’s assurances on the record that this will not be the case.

38. The Committee notes the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law. The Committee is sympathetic to calls for the introduction of an environmental tribunal for Scotland.

39. The Committee notes the views of some witnesses that the Bill does not go far enough in embedding alternative dispute resolution (ADR) within the civil court system. While we do not accept that parties should be mandated to undertake ADR, we consider that it plays an important role in facilitating the settlement of cases where appropriate. We believe that in-court advice and guidance on the use of ADR and how it may be accessed should be more available across Scotland. The Committee therefore seeks further information from the Scottish Government on the steps it is taking to promote use of ADR where appropriate to ensure that opportunities for non-court settlements are encouraged.

40. The Committee supports the proposal to merge the Scottish Court Service and Scottish Tribunals Service. While we welcome this attempt to increase the independence of tribunals from the Scottish Ministers, we recommend that the joint board of the Scottish Courts and Tribunals Service should include representation from the tribunal sector to ensure that the new organisation recognises the specialist nature of tribunals.

41. The Committee is persuaded that the proposals in the Bill should be adopted as a package in line with the recommendations of the Scottish Civil Courts Review.

42. The Committee notes the concerns of witnesses regarding the capacity of the personal injury court and sheriff courts to take on 2,700 cases from the Court of Session. While we accept that a large proportion of these cases will not go to proof, sufficient time and capacity will be required to deal with the settlement of such cases. We also question whether sufficient time has passed to assess the impact of recent and planned sheriff court closures on business in the sheriff court to provide confidence that further additional

¹ Axiom Advocates. Written submission, page 9.

business can be accommodated. We therefore seek further information on where capacity will be lost as a result of court closures and how that can be dealt with in the other local courts, as well as plans to ensure a further 3% capacity on top of this.

43. The Committee notes the concerns of witnesses that no new resources have been made available to implement the extensive reforms set out in the Bill. While we understand that the number of cases moving from the Court of Session to the sheriff court are expected to stay largely the same, we remain to be convinced that the new procedures will have no financial impact overall. We therefore recommend that the Scottish Government continues to monitor implementation of these reforms to ensure adequate resources are in place.

44. The Committee also notes the claim that, as a result of the reforms, significant savings will accrue to the Scottish Government rather than the Scottish Court Service, in terms of judicial salaries. We therefore seek clarification whether it is intended that those savings will be used to benefit the civil justice system or whether they will be used to fund spending in other departments.

45. We note the evidence from the Scottish Legal Aid Board that the expected savings on the amount spent by counsel will depend on the number of cases coming through. We invite the Scottish Government to respond to these comments.

46. The Committee seeks assurances that there will not be a substantial rise in the level of court fees to pay for the reforms in the Bill and will monitor closely the outcome of the next consultation on fees in 2015 and consequent statutory orders.

47. The Committee also asks the Scottish Government to reflect on the Scottish Civil Justice Council's suggestion that the Bill should be used to clarify the SCJC's functions in relation to the preparation of fees instruments.

48. The Committee supports the general principles of this Bill. Our recommendations aimed at improving certain aspects of the Bill are set out in the main body of this report.

INTRODUCTION

49. The Courts Reform (Scotland) Bill was introduced in the Scottish Parliament on 6 February 2014 by the Cabinet Secretary for Justice, Kenny MacAskill. The Parliamentary Bureau designated the Justice Committee as lead committee in consideration of the Bill at Stage 1 on 18 February 2014.

50. The Justice Committee issued a call for written evidence seeking views on the proposals contained in the Bill on 18 February. 71 written submissions and six supplementary submissions were received. The Committee took evidence on the Bill over five meetings between 18 March and 29 April, hearing from a range of

justice bodies, victims' groups, unions, and experts on human rights, personal injury, family law, immigration and environmental issues, as well as from the Lord President, Sheriff Principal James Taylor and the Minister for Community Safety and Legal Affairs.

51. The Finance Committee received 11 responses to its call for views in relation to the Financial Memorandum on the Bill. It also heard from the Faculty of Advocates, Association of Personal Injury Lawyers (APIL) and the Scottish Government's Bill Team on 26 March. The Finance Committee's report² on the Financial Memorandum was published on 7 April 2014. The Delegated Powers and Law Reform Committee published its report³ on the Delegated Powers Memorandum on the Bill on 23 April 2014.

BACKGROUND TO THE BILL

Civil Justice Advisory Group

52. In November 2005, the Civil Justice Advisory Group led by Lord Coulsfield recommended that a review of the civil justice system in Scotland be carried out to examine the following issues:

- the problem of disproportionate costs, particularly in relation to cases of relatively low financial value;
- the relationship between civil and criminal business and its impact on the organisation and administration of the courts;
- whether there was a need for specialisation among courts or judges and the manner in which specialisation might be organised;
- whether the conduct of court business could be improved by increasing the role of courts in case management;
- the way in which lawyers' remuneration is assessed and particularly its impact on the costs recoverable in litigation, and
- whether enforcement of court judgements can or should be left to the parties or whether there should be a public role in ensuring that judgements are observed.⁴

53. The first four of these issues were considered by the Scottish Civil Courts Review (see section below), the fifth was considered as part of the Review of the

² Scottish Parliament Finance Committee (2014). *Report on the Financial Memorandum of the Courts Reform (Scotland) Bill*. Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/75327.aspx>

³ Scottish Parliament Delegated Powers and Law Reform Committee. 29th Report, 2014 (Session 4). *Report on the Courts Reform (Scotland) Bill*. Available at:

http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/suR-14-29w.pdf

⁴ Courts Reform (Scotland) Bill. Policy Memorandum (SP Bill 46-PM), Session 4 (2014), paragraph 5. Available at:

[http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20\(Scotland\)%20Bill/b46s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-introd-pm.pdf)

Expenses and Funding of Civil Litigation in Scotland, and the final issue was taken forward in part through the Bankruptcy and Diligence (Scotland) Act 2007.⁵

Scottish Civil Courts Review

54. The Policy Memorandum states that “the policy objective of the Bill is to address the problems identified in the Scottish Civil Courts Review headed by Lord Gill, the then Lord Justice Clerk, and now the Lord President of the Court of Session”.⁶

55. The Scottish Civil Courts Review (SCCR) was established in February 2007 by the then Minister for Justice, Cathy Jamieson, with the following remit:

“To review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to:

- the cost of litigation to parties and to the public purse;
- the role of mediation and other methods of dispute resolution in relation to the court process;
- the development of modern methods of communication and case management, and
- the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts.

and to report within two years, making recommendations for changes with a view to improving access to civil justice in Scotland, promoting early resolution of disputes, making the best use of resources, and ensuring that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised.”⁷

56. A project board led by Lord Gill and comprising Lord McEwan, Sheriff Principal James Taylor and Sheriff Mhairi Stephen took forward the review, assisted by a policy group⁸ with particular knowledge and expertise in various aspects of civil justice.

57. The SCCR launched a consultation in November 2007 which received over 200 responses. The SCCR’s report published in September 2009 highlighted a number of themes emerging from the consultation responses, including:

- the pressure of criminal business and the impact this has on the quality of civil justice in terms of delay and judicial continuity;
- the need for a greater degree of judicial specialisation;
- the hierarchy of the courts and appropriate use of judicial resources;
- over reliance on temporary resources;

⁵ Policy Memorandum, paragraph 6.

⁶ Policy Memorandum, paragraph 2.

⁷ Policy Memorandum, paragraph 9.

⁸ The policy group was comprised of the Hon Lord Hodge, Sheriff Principal Edward Bowen QC, Sheriff Charles Stoddart, Dr Kirsty Hood, Nick Ellis QC, Robert Carr, Lindsay Montgomery, Sarah O’Neill, Ewan Malcolm, Norman McFadyen and David Forrester.

- the need for effective case management and reformed procedures;
- investment in information technology;
- party litigants and a new forum or method of dealing with lower value cases, and
- problems relating to the cost and funding of litigation.⁹

58. The report concluded that Scottish civil courts provide a service to the public that is “slow, inefficient and expensive” and that “minor modifications to the status quo are no longer an option”.¹⁰ All 206 recommendations were unanimously agreed by all members of the Review Board.¹¹ The report describes the recommendations as “a mixture of structural and functional reforms to address the problems we have identified”,¹² which include:

- raising the threshold below which most actions must be raised in the sheriff court (known as privative jurisdiction of that court) to £150,000, with the aim of ensuring that low value litigation is effectively removed from the Court of Session;
- creating a new national Sheriff Appeal Court to allow a consistent and coherent body of case law;
- establishing a specialist personal injury court with an all-Scotland jurisdiction in Edinburgh sheriff court, but with the continued right of any personal injury claimant to sue in any sheriff court having jurisdiction, and extending the right to a civil jury trial to proceedings in the new court;
- creating a new level of professional judicial officer in the sheriff court – the district judge – with jurisdiction to hear all actions with a value of £5,000 or less and a number of other cases, such as mortgage repossession actions and appeals and referrals from children’s hearings.¹³ Criminal cases dealt with by the district judge would be programmed as far as possible to be heard on days when civil business was not being heard;
- greater specialisation of sheriffs in crime, general civil, personal injury, family and commercial and increased powers for judges to fix the manner and timescales in which a case would be dealt with by the court, and
- increased support for party litigants through simpler court rules, better on-line information, in-court advice services and provision for lay representation and modernisation of court procedure to allow, for example, multi-party (or ‘class’) actions.

⁹ Scottish Civil Courts Review (2009). *Report of the Scottish Civil Courts Review, Volume 1*, paragraph 3. Available at: <http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=2>

¹⁰ Policy Memorandum, paragraph 2.

¹¹ Policy Memorandum, paragraph 10.

¹² Report of the Scottish Civil Courts Review, paragraph 29.

¹³ The district judge would have concurrent jurisdiction with the sheriff in relation to family actions.

Scottish Government consultation

59. On 27 February 2013, the Scottish Government published *'Making Justice Work – Courts Reform (Scotland) Bill – a consultation paper'*, which sought views on a draft Bill, noting that “the case for reform of the civil courts was already well established through the 2007 findings of the Civil Justice Advisory Group led by Lord Coulsfield and the 2009 Scottish Civil Courts Review led by Lord Gill”.¹⁴

60. The Scottish Government consultation received 115 responses. An analysis of the consultation responses found that “there was very clear majority support for almost all proposals and concepts detailed in the consultation”.¹⁵

Review of the Expenses and Funding of Civil Litigation in Scotland

61. In 2011, the Scottish Government asked Sheriff Principal James Taylor to undertake a review of the expenses and funding of civil litigation in Scotland. The remit was “to review the costs and funding of civil litigation in the Court of Session and Sheriff Court in the context of the recommendations of the Scottish Civil Courts Review, and the response to that review”.¹⁶ Sheriff Principal Taylor reported his findings in 2013, including that:

- solicitors in Scotland should be able to enter into “damages-based agreements” (also known as “contingency fees”) allowing them to take a percentage of a client’s damages award if the case was won (on the basis that no fee would be charged if the case was lost)¹⁷;
- “one way costs shifting” should operate in most circumstances in personal injury cases (including clinical negligence), meaning that the pursuer (usually an individual) would not be responsible for paying the defender’s legal costs if the pursuer lost but that the defender would remain liable for the pursuer’s legal costs if the defender lost;
- it should remain possible for solicitors in Scotland to pay referral fees to third parties for the referral of business (subject to regulation). This practice is banned in England and Wales;
- claims management companies operating in Scotland should be regulated;
- pilot schemes should be established to allow quicker and more realistic assessment of legal expenses in commercial cases and that judges’ case management powers should be used to actively manage expense at each stage of an action;
- a system of fixed fees (where the legal expenses that are recoverable are set at a fixed amount depending on the value of the claim) should be

¹⁴ Policy Memorandum, paragraph 14.

¹⁵ Policy Memorandum, paragraph 15.

¹⁶ Taylor Review (2013). *Review of Expenses and Funding of Civil Litigation in Scotland*, page 1.

Available at: <http://scotland.gov.uk/Resource/0043/00433831.pdf>.

¹⁷ Solicitors in Scotland can currently enter into “speculative fee arrangements”

introduced for the new ‘simplified’ procedure¹⁸ recommended by Lord Gill, and

- “protective expenses orders” (limiting a person or group’s liability for the other party’s legal expenses to a specific figure) should be available in cases raising a matter of public interest.¹⁹

62. The Committee notes that, at the time of writing this report, the Scottish Government has yet to respond to Sheriff Principal Taylor’s review. During an evidence session with the Minister for Community Safety and Legal Affairs which took place on 29 April, Cameron Stewart, Bill Team leader, confirmed that the response would be published prior to Stage 2 proceedings on the Bill.²⁰ It is essential that the response is available well in advance of Stage 2.

63. A number of witnesses commented on the overlap between some of Sheriff Principal Taylor’s recommendations and the provisions in this Bill and these comments are therefore explored under relevant sections of this report. It would clearly have been preferable for the Committee to have had the Scottish Government’s response during the Stage 1 process of the Bill.

Provisions in the Bill

64. The policy objective of the Bill is to “address the problems identified in the Scottish Civil Courts Review”. The Bill is in eight parts and its main provisions include:

- an increase in the jurisdiction of the sheriff court so that most cases with a value of £150,000 or less must be heard there rather than in the Court of Session;
- increased sheriff specialisation, both in the form of specialisation by individual sheriffs and specialist courts, including a specialist personal injury court;
- creation of a new judicial tier known as the “summary sheriff”, who will deal with less serious criminal cases and less complex civil matters;
- creation of a Sheriff Appeal Court to hear appeals from the decisions of sheriffs in civil and summary criminal matters;
- changes to judicial review procedure, including the introduction of a three month time limit for judicial review petitions, and

¹⁸ The ‘simplified procedure’ is for simpler, lower value claims. It is envisaged that this will cover those cases dealt with under small claims or summary cause procedure at the moment. It is called ‘simple procedure’ in the Bill.

¹⁹ Scottish Parliament Information Centre. (2014) *Courts Reform (Scotland) Bill*. SPICe Briefing 14/23, pages 10-11. Available at:

http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-23.pdf

²⁰ Scottish Parliament Justice Committee. *Official Report, 29 April 2014*, Col 4572.

- changes to court procedures including the creation of a new ‘simple procedure’ to replace small claims and summary cause procedure.

65. The Policy Memorandum suggests that the Bill will establish the framework for the civil courts in Scotland within which the detailed arrangements from the SCCR may be made by court rules.²¹ Some of the recommendations in the SCCR have already been implemented, including creation of a Scottish Civil Justice Council (SCJC) in 2013 which, the Scottish Government states, “now stands ready to draft and recommend the necessary rules of court to the Lord President as soon as the Bill is enacted”.²² The SCJC Rules Rewrite Group published an interim report²³ on 28 March 2014 setting out the vision and objectives of the new rules, how they should be drafted and priority areas for implementation, including some of the areas in this Bill.

SHERIFF COURTS

Sheriffdoms, sheriff court districts and sheriff courts

Overview of provisions

66. The policy objective of Chapter 1 of the Bill is to retain the existing structure of sheriff courts in Scotland.²⁴ The Policy Memorandum states that the Scottish Government “has accepted the view of the SCCR that there is merit in continuing to manage the business of the sheriff court on a regional basis with the administration of the business being directed by sheriffs principal”.²⁵ Section 1 therefore replicates present arrangements.

67. The current process for altering sheriffdoms and sheriff court districts involves consultation by the Scottish Court Service (SCS), the making of an order by the Scottish Ministers, and consent by the Lord President after further consultation with, for example, sheriffs principal. In the Explanatory Notes on the Bill, the Scottish Government argues that this process is “bureaucratic and not well sequenced”.²⁶ Section 2 of the Bill therefore proposes a streamlined process where the Scottish Government would consult interested parties before seeking the Lord President’s agreement to submit a proposal to the Scottish Ministers to make an order. The Scottish Government suggests that these provisions “endeavour to make the process more straightforward”.²⁷

68. In its report on the Delegated Powers Memorandum on the Bill, the Delegated Powers and Law Reform (DPLR) Committee highlighted that section 2 also enables Ministers to open new sheriff courts, change the location of sheriff courts and to close sheriff courts. It recommended therefore that, given the significant effect of court closures and other alterations on court users and the

²¹ Policy Memorandum, paragraph 3.

²² Policy Memorandum, paragraph 10.

²³ Scottish Civil Justice Council (2014). *Interim Report of the Rules Rewrite Group*, page 35.

Available at: <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-publications/rrwg-interim-report.pdf?sfvrsn=2>

²⁴ Policy Memorandum, paragraph 31.

²⁵ Policy Memorandum, paragraph 31.

²⁶ Explanatory Notes, paragraph 17.

²⁷ Courts Reform (Scotland) Bill. Explanatory Notes, paragraph 17.

implications for access to justice, the power to create and alter sheriffdoms should be subject to affirmative rather than negative procedure.²⁸ The Scottish Government accepted this recommendation and has committed to bring forward an amendment at Stage 2 to effect this procedural change.²⁹

Sheriffdoms, sheriff court districts and sheriff courts: recommendations

69. The Committee is broadly satisfied with the approach taken in this Bill to maintain existing arrangements for the structure of sheriff courts in Scotland and to streamline the process for altering sheriffdoms and sheriff court districts. Given the concerns around recent court closures, the Committee endorses the Delegated Powers and Law Reform Committee's recommendation that the power to create and alter sheriffdoms should be subject to affirmative procedure in future and welcomes the Scottish Government's commitment to bring forward an amendment at Stage 2 to introduce this procedural change.

Summary sheriffs

Overview of provisions

70. The SCCR recommended that, "to eliminate delay and interruptions to civil business in the sheriff court and to provide a more targeted service in lower value cases, there should be a new level of professional judicial officer in the sheriff court: the district judge".³⁰ It proposed that district judges would also have jurisdiction to deal with summary criminal business, ensuring that sheriffs could concentrate on more complex civil work and more serious crimes.³¹

71. Section 5 of the Bill introduces a new judicial office along the lines proposed by the SCCR, but uses the term 'summary sheriff' rather than 'district judge'. The Scottish Government states that "the name reflects at least part of the intended jurisdiction of the new judicial officers, including summary criminal and civil cases which were dealt with under summary cause procedure (as well as small claims)".³² The same rules on qualifications and appointments would apply to both sheriffs and summary sheriffs, i.e. candidates must be legally qualified for ten years and appointment is by Her Majesty on the recommendation of the First Minister (after consultation with the Lord President).

72. Summary sheriffs would have jurisdiction over civil matters listed in schedule 1 of the Bill, including:

- proceedings under the new 'simple procedure' (which is discussed later in this report);
- family proceedings;
- children's hearing proceedings;
- forced marriage proceedings;
- certain domestic abuse proceedings;

²⁸ Delegated Powers and Law Reform Committee Report on Courts Reform (Scotland) Bill, page 4.

²⁹ Delegated Powers and Law Reform Committee Report on Courts Reform (Scotland) Bill, page 4.

³⁰ Scottish Civil Courts Review report, paragraph 37.

³¹ Scottish Civil Courts Review report, paragraph 37.

³² Policy Memorandum, paragraph 40.

- adoption proceedings;
- warrants of citation (to appear in court) and interim orders;
- certain diligence proceedings (action taken to enforce the payment of debts), and
- proceedings in relation to time to pay directions/orders under sections 1 and 5 of the Debtors (Scotland) Act 1987 (allowing extra time to pay off a debt).

73. Summary sheriffs would also have jurisdiction to deal with criminal matters heard under summary procedure, which the Scottish Government estimates would constitute 70% of their work.³³ The Policy Memorandum suggests that sheriffs and summary sheriffs would have concurrent jurisdiction over the matters listed above, in particular because, in some rural areas, there may not be enough work for both a summary sheriff and sheriff to be deployed.³⁴ It would be for the sheriffs principal to allocate cases, and court rules would be drawn up under the powers in sections 96 and 97 of the Bill to allow for the transfer of cases between summary sheriffs and sheriffs, for example, where a case turns out to be more complex than it first appeared.³⁵

74. The Financial Memorandum (FM) indicates that there would be a phased introduction of summary sheriffs over a 10-year period, with one summary sheriff being appointed as each sheriff retires. Based on retirement profiles, around six sheriffs would be expected to leave the bench each year until a full complement of 60 summary sheriffs were in place in the 10th year. The FM concluded that the potential savings to the judicial salaries budget would increase by £0.2m each year, until the full complement of 60 is in place and savings “plateau” at around £2.0m per annum.³⁶

General views on summary sheriffs

75. There was general support for creation of a new judicial office as provided for in the Bill, for example, from the Faculty of Advocates³⁷ and Compass Chambers³⁸. A few, however, were completely opposed to the measure, for example, Keith Stewart QC suggested that “the creation of a new inferior form of sheriff ... multiplies the tiers of the court system in a manner which will cause appeals to proliferate, increasing delay and cost”. He added that “the suggestion that cases are dealt with inefficiently as a result of being heard by ‘over-qualified’

³³ Policy Memorandum, paragraph 114.

³⁴ SPICe briefing 14/23, page 22.

³⁵ SPICe briefing 14/23, page 22.

³⁶ Courts Reform (Scotland) Bill. Explanatory Notes (SP Bill 46, Session 4 (2014), paragraph 42.

Available at:

[http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20\(Scotland\)%20Bill/b46s4-intro-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-intro-en.pdf)

³⁷ Faculty of Advocates. Written submission, page 3.

³⁸ Compass Chambers. Written submission, page 3.

judges³⁹ ... is an odd concern: the more qualified a judge is, the better, at any level".⁴⁰

76. Other witnesses had concerns about particular aspects of the proposal and these are considered below.

The term 'summary sheriff'

77. There was some concern amongst witnesses regarding use of the term 'summary sheriff'. For example, the Law Society of Scotland argued that the term would be "misleading for the public and for those who work in the justice system", as it does not adequately reflect their jurisdiction over civil matters, as well as summary (criminal) business.⁴¹ Brian Heaney, an advocate, was also opposed to the term, suggesting that "the title 'summary sheriff' is clumsy and undignified [and] diminishes the office and office holder by emphasising what the holder is not – i.e. he or she is not a 'real' or 'full sheriff'".⁴²

78. Both respondents proposed alternatives, the Law Society arguing that the terms 'senior sheriff' and 'sheriff' would be less confusing⁴³, and Mr Heaney suggesting 'magistrate', 'magistrate judge' or 'baillie'.⁴⁴

Jurisdiction

79. A number of witnesses expressed concern regarding the references in the Policy Memorandum to summary sheriffs undertaking the more routine, low value civil cases⁴⁵ when in fact many of the cases to be dealt with by summary sheriffs may cover complex or serious issues. Cases involving children and divorce are not, according to Paul Brown of the Legal Services Agency, low value cases. He went on to argue that "I have no problem with saying that summary sheriffs could deal with them, providing that they have the training, specialism and professional background ... however, the vocabulary distorts the view with which one looks at those new posts, and that needs to be changed".⁴⁶

80. Other witnesses, such as Scottish Women's Aid (SWA), expressed concern regarding the actual competencies listed under schedule 1 and section 44. SWA argued that this approach is a "downgrading and de-prioritisation of how domestic abuse-related civil and criminal cases involving children are dealt with" and suggested that all summary criminal proceedings and civil proceedings involving domestic abuse, forced marriage, or children, should remain with sheriffs.⁴⁷ In oral evidence, Louise Johnson of SWA added that "doing what is referred to as 'lower-

³⁹ The Policy Memorandum refers to the SCCR conclusion that too many straightforward or low value cases are being considered too high up the system by judicial officers who are over-qualified to deal with them.

⁴⁰ Keith Stewart QC. Written submission, page 3.

⁴¹ Law Society of Scotland. Written submission, page 2.

⁴² Brian Heaney. Written submission, page 6.

⁴³ Law Society of Scotland. Written submission, page 2.

⁴⁴ Brian Heaney. Written submission, page 6.

⁴⁵ Policy Memorandum, paragraph 107.

⁴⁶ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4402.

⁴⁷ Scottish Women's Aid. Written submission, page 2.

value' cases would depreciate the public's and—more to the point—the litigants' and participants' views of such cases".⁴⁸

81. The Law Society of Scotland also questioned whether domestic abuse and forced marriage proceedings should be within the competence of summary sheriffs, and argued that adoption and permanence should be removed altogether from the family proceedings in schedule 1 as, "simply, these cases are too important to be dealt with at the lowest level".⁴⁹

82. When asked whether she would prefer a summary sheriff or sheriff to deal with family law cases, Karen Gibbons of the Family Law Association (FLA) told the Committee that "in fact it does not really matter whether they are summary sheriffs or sheriffs as long as they are experienced and have knowledge of family cases; that is the most important thing".⁵⁰

83. In its written submission, the Judicial Appointments Board for Scotland said that it "remains concerned about the distinctions between the two offices [of sheriff and summary sheriff]" and that it "will need to consider carefully the breadth of specialist skills and ensure that its assessment processes are revised as necessary". It has therefore agreed to join the implementation working group of the judicial structures project, which has been formed to assist the Lord President and sheriffs principal in introducing the new judicial tier and related changes.⁵¹

Timescale

84. Some witnesses suggested that the introduction of summary sheriffs should begin sooner than planned. For example, Lauren Wood of Citizens Advice Scotland argued that, "if [summary sheriffs] are recruited as sheriffs retire over a period of 10 years, there is a very real danger that people in different parts of the country will have quite different access to justice, depending on their postcode [and] that is to be avoided".⁵² Noting that it could take 10 years to have the right complement of sheriffs and summary sheriffs in place, Sheriff Lindsay Wood said he was "not quite sure how that will play out and the situation will vary from one court to the next"⁵³ He added that "I suppose one approach would be to offer packages to sheriffs to go early; that might accelerate things".⁵⁴

85. Eric McQueen of the Scottish Court Service confirmed that "the move to what we might see as the optimum level of summary sheriffs could take anywhere between five and 10 years [but] clearly, most of that will be dependent on the retirement profile of the existing sheriffs". He added that he expected a higher number in the first year as stipendiary magistrates transfer, but "after that, we expect a steady number—about 10 each year—to come in until we reach about 60 summary sheriffs".⁵⁵

⁴⁸ Scottish Parliament Justice Committee. *Official Report, 25 March 2014*, Col 4407.

⁴⁹ Law Society of Scotland. Written submission, pages 12-13.

⁵⁰ Scottish Parliament Justice Committee. *Official Report, 25 March 2014*, Col 4411.

⁵¹ Judicial Appointments Board for Scotland. Written submission, page 1.

⁵² Scottish Parliament Justice Committee. *Official Report, 18 March 2014*, Col 4362.

⁵³ Scottish Parliament Justice Committee. *Official Report, 18 March 2014*, Col 4376.

⁵⁴ Scottish Parliament Justice Committee. *Official Report, 18 March 2014*, Col 4382.

⁵⁵ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4476.

86. However, the Minister for Community Safety and Legal Affairs told the Committee that “the one-in, one-out description is slightly misleading”. She said that she “would not want people to think that we are automatically going to appoint a summary sheriff when a sheriff retires, as the situation will have to be looked at case by case”.⁵⁶ She added that, as it would take around 10 years for the full complement of summary sheriffs to be achieved, “we are not talking about a huge sudden influx”.⁵⁷

Accessibility

87. Citizens Advice Scotland (CAS) suggested that the creation of a new tier of judiciary “represents a huge opportunity to enhance accessibility for users of the civil court system”. It argued that “the design of the summary sheriff role should follow design principles with accessibility for users as the primary consideration, including: hearing civil business in non-court settings; separating civil from criminal business; requiring summary sheriffs to sit without wigs and gowns; and clear and simple processes which removes the need for lawyers from the outset”.⁵⁸ It would also like to see a working group established, comprised of judicial and consumer members to devise and monitor the operation and rules relating to summary sheriffs.⁵⁹

Stipendiary magistrates

88. Stipendiary magistrates have the same powers as those exercised by a sheriff dealing with summary criminal business. There is currently the equivalent of 4.9 full-time stipendiary magistrates in Scotland and all are based in Glasgow. The SCCR made no recommendations on stipendiary magistrates.

89. The Bill provides that any stipendiary magistrates in post on implementation of the legislation would become summary sheriffs and would automatically transfer unless they decline the appointment. Summary sheriffs will be able to sit in justice of the peace courts but would only be able to exercise the same summary criminal powers as the justice of the peace, whereas, when they sit in the sheriff court, they would be able to exercise the same powers as a sheriff in relation to summary criminal cases.⁶⁰

Summary sheriffs: recommendations

90. The Committee broadly supports the creation of a new judicial office of summary sheriff with a view to allowing sheriffs to concentrate on more complex civil work or serious crimes. However, we note witnesses’ concerns that the references within the Policy Memorandum to summary sheriffs undertaking the more routine, low value civil cases, is unhelpful and could lead to the perception that cases dealt with by the summary sheriff are being downgraded and are of lesser importance. Some witnesses suggested that this may be particularly true of cases involving domestic abuse, forced marriage, and the custody of children, while others disagreed. The Committee asks the Scottish Government to respond to these concerns.

⁵⁶ Scottish Parliament Justice Committee. *Official Report, 29 April 2014*, Col 4568.

⁵⁷ Scottish Parliament Justice Committee. *Official Report, 29 April 2014*, Col 4568.

⁵⁸ Citizens Advice Scotland. Written submission, page 3.

⁵⁹ Citizens Advice Scotland. Written submission, page 4.

⁶⁰ Policy Memorandum, paragraph 289.

91. The Committee notes that it will take around 10 years before the full complement of summary sheriffs is in place. We agree with witnesses that it need not make a difference whether a case is being dealt with by a sheriff or summary sheriff so long as they are trained and experienced in the particular areas for which they are responsible. We note that the Judicial Appointments Board for Scotland is considering carefully the breadth of specialist skills and assessment processes needed for the new position and that an implementation working group of the judicial structures project has been established to look at these and other issues. We would welcome regular updates on how this work is progressing.

92. The Committee notes the recent announcement by the Lord President that judges sitting in the Inner House of the Court of Session will no longer wear robes and wigs when hearing civil appeals. We also note that summary sheriffs may also be employed on a part-time basis.

Part-time sheriffs

Overview of provisions

93. The SCCR recommended that the use of part-time sheriffs should be reduced and restricted to cover for leave, illness and emergencies, arguing that they should be drawn from the ranks of retired sheriffs or retired practitioners. It highlighted concerns amongst respondents that the lack of experience of part-time sheriffs can lead to inconsistent decisions or inefficient case management. The SCCR did however acknowledge that it may not be possible to restrict the appointment of part-time sheriffs until the full complement of summary sheriffs is in place.⁶¹

94. The Bill (section 8) continues the role of part-time sheriffs and removes the current cap of 80 on the number of part-time sheriffs. The Policy Memorandum states that “although it is possible that the requirement for part-time judicial resources may lessen after sufficient numbers of summary sheriffs are appointed, the Government believes that there will continue to be a need for part-time sheriffs and part-time summary sheriffs for the foreseeable future”.⁶²

Use of part-time sheriffs

95. During evidence, the Lord President was asked to comment on the proposal in the Bill to remove the cap on the number of part-time sheriffs. He restated his view that “part-time sheriffs ought not to form part of the normal day-to-day complement of the sheriff court”. He said he expected that, over a period of around 10 years, part-time sheriffs would only be used in situations of “true emergency”.⁶³

96. The Minister for Community Safety and Legal Affairs told the Committee that “the cap is an artificial one” and the “intention is not to have loads of part-time sheriffs”. However, she stressed that “we need to retain the capacity to employ

⁶¹ Report of the Scottish Civil Courts Review, paragraph 42.

⁶² Policy Memorandum, paragraph 34.

⁶³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4533.

part-time sheriffs where and when necessary”, and make sure they are available throughout Scotland, particularly in rural areas.⁶⁴

Part-time sheriffs: recommendations

97. The Committee accepts that part-time sheriffs should be available to cover emergencies, absence and illness, particularly in remote areas of Scotland. However, we agree with the Lord President that part-time sheriffs should not become a routine part of the day-to-day complement of the sheriff court. We therefore urge the Scottish Government to monitor closely the effects of removing the cap on the number of part-time sheriffs as provided for in the Bill.

Honorary sheriffs

Overview of provisions

98. Honorary sheriffs are used in some courts to perform urgent shrieval functions (such as a custody court) in the absence (or possible illness) of the resident sheriff, particularly in rural, remote and island courts. They have the same power and competence as a ‘full’ sheriff, although they are unpaid and it is not necessary for them to be legally qualified. There are currently 300 honorary sheriffs in Scotland.

99. The SCCR did not make any recommendations relating to honorary sheriffs. However, the “policy of the Bill is to abolish the position of honorary sheriffs”⁶⁵ and section 26 of the Bill gives effect to this policy. The Policy Memorandum states that “it is desirable that Scotland should have a fully professional legally qualified judiciary” and that “the need for honorary sheriffs will reduce, and then disappear completely, due to the advent of new summary sheriffs and also as a result of the greater use of technology such as video links to remote locations”.⁶⁶ It adds that “abolition [of honorary sheriffs] is therefore being delayed until alternative judicial arrangements are put in place and this may take some time as it is envisaged that summary sheriffs will be introduced gradually”.⁶⁷

Removal of honorary sheriffs

100. Louise Johnson of SWA told the Committee that she supports the removal of honorary sheriffs because they are not required to be legally qualified while the Law Society said that it favoured the retention of those honorary sheriffs who are legally qualified.⁶⁸ Keith Stewart QC highlighted the valuable role played by lay people in the justice system and suggested that abolishing the voluntary position would further remove the justice system from the public.⁶⁹

101. Mr Stewart QC expressed concern regarding the potential implications of removing honorary sheriffs in rural, remote areas of Scotland where there may only be one permanent sheriff,⁷⁰ a view shared by the Law Society in its written

⁶⁴ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4569.

⁶⁵ Policy Memorandum, paragraph 42.

⁶⁶ Policy Memorandum, paragraph 44.

⁶⁷ Policy Memorandum, paragraph 44.

⁶⁸ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4400.

⁶⁹ Keith Stewart QC. Written submission, page 3.

⁷⁰ Law Society of Scotland. Written submission, page 2.

submission.⁷¹ Eric McQueen, Chief Executive of the Scottish Court Service (SCS), agreed that “honorary sheriffs play a valuable role in rural communities in dealing with immediate business ... if there is no sheriff in the area” and suggested that there was “no immediate rush to move honorary sheriffs out”.⁷²

102. The Lord President acknowledged that “there is value to be had from the services of honoraries in the outlying courts”, but restated the SCCR’s position that, “in a modern judicial system, all judicial work should, wherever possible, be done by professionally qualified and properly trained sheriffs”. He went on to explain that “over time, the need for those services will steadily diminish because, with the increased flexibility that we will have through the use of summary sheriffs, and the ability to deploy summary sheriffs over a wide area and between courts, the need to bring in honoraries at weekends, for example, should be so much less”.⁷³

Honorary sheriffs: recommendations

103. The Committee notes the key role that honorary sheriffs play in dealing with urgent business in rural areas where a sheriff may not be available. While we agree with the policy intention of the Bill that the position of honorary sheriff should be abolished, with a view to ensuring that everywhere in Scotland has access to a legally qualified judiciary, we seek assurances that rural and remote areas will not be disadvantaged by this approach. We accept that abolition of honorary sheriffs cannot be achieved overnight as it will depend on alternative judicial arrangements and technological advancements being put in place, however, we seek an indication from the Scottish Government as to the expected timetable for their removal, including proposals related to their current workload.

Sheriff specialisation

Overview of provisions

104. At present, there is a limited degree of specialisation in the sheriff courts and the Court of Session.⁷⁴ The SCCR found that, in addition to specialist sheriffs being required for the specialist personal injury court (see below), there was also a justified demand for further specialisation in family cases, commercial work and personal injury cases in the sheriff court generally.

105. The Bill gives effect to these recommendations. Section 34 makes provision for the Lord President to designate categories of cases suitable for specialisation, and section 35 allows sheriff principals to designate individual specialists in their sherrifdom. The Policy Memorandum indicates that the sheriff principal would not be required to designate a sheriff or summary sheriff as a specialist in every category nominated by the Lord President, but it is expected that each sherrifdom should have a specialist sheriff in personal injury and family cases.

⁷¹ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4389.

⁷² Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4486.

⁷³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4533.

⁷⁴ SPICe briefing 14/23, page 23.

Consistency and efficiency

106. There was widespread support amongst witnesses for sheriff specialisation.⁷⁵ CAS suggested that it would “aid consistency with decisions being made by a common core of decision makers who would have the ability to build closer networks for discussion within their specialism”,⁷⁶ while Zurich Insurance added that “specialism will aid efficiency of the court process as the sheriff will narrow the issues at an early stage due to their more specialised knowledge”.⁷⁷ The Scottish Legal Aid Board (SLAB) said that sheriff specialisation, along with effective rules and resource management in the court system “will benefit parties and provide savings to the public purse which funds a significant proportion of such cases”.⁷⁸

Categories of specialism

107. A number of witnesses proposed particular areas of specialisation for sheriffs, including family law.⁷⁹ CAS also argued that housing, debt, small claims and commercial actions should be included,⁸⁰ while SWA suggested domestic abuse, and the Law Society proposed that the areas of solemn crime, general civil and mental health⁸¹ should be added to the categories of specialisms.

108. The Policy Memorandum envisages that 70% of the work of summary sheriffs would be summary criminal cases.⁸² The Legal Services Agency (LSA) suggested that it could be difficult for summary sheriffs to specialise in any aspect of civil work if the majority of their time was spent on criminal work.⁸³ It went on to argue that, given the significant criminal caseload, it is likely that summary sheriffs would mainly be drawn from those with experience in criminal law and may not therefore have the skills and knowledge to specialise in a particular aspect of civil law, for example, family law. CAS and the Family Law Association (FLA) also highlighted that criminal business is currently “squeezing” civil business at sheriff court level and suggested that criminal and civil business should be formally separated.

109. Many witnesses stressed the importance of providing adequate training and resourcing for specialist sheriffs.⁸⁴ Louise Johnson of SWA went further in suggesting that “the success of specialist sheriffs is predicated on the sheriff’s interest in the work, on their commitment and on the training that goes towards supporting their appointment so that they have information and awareness of all the issues [around their specialism] ... otherwise we will be back at square one”.⁸⁵

⁷⁵ Support for sheriff specialisation came from the Law Society of Scotland; Relationships Scotland; Advocates Family Law Association; Zurich Insurance, Families Need Fathers, Scottish Legal Aid Board, Faculty of Advocates and Scottish Women’s Aid.

⁷⁶ Citizens Advice Scotland. Written submission, page 5.

⁷⁷ Zurich Insurance. Written submission, page 1.

⁷⁸ Scottish Legal Aid Board. Written submission, page 2.

⁷⁹ Support for specialisation came from Scottish Legal Aid Board, Advocates Family Law Association, Relationships Scotland.

⁸⁰ Citizens Advice Scotland. Written submission, page 5.

⁸¹ Law Society of Scotland. Written submission, page 3.

⁸² Policy Memorandum, paragraph 114.

⁸³ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Cols 4414-4415.

⁸⁴ Support for training and resourcing was provided by Citizens Advice Scotland, Advocates Family Law Association and Scottish Women’s Aid.

⁸⁵ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4413.

110. In written evidence to the Finance Committee, the Law Society argued that there would be significant one-off costs associated with creating a new training programme for specialist sheriffs. However, the Scottish Government Bill Team responded that specialist sheriffs would not require any more training than ordinary sheriffs.⁸⁶

Local access to specialisms

111. There was some concern as to whether access to specialisms would be available locally. For example, the FLA said it doubted whether there would be a genuine choice between local access to justice or travelling to a centre of specialisation in rural areas, particularly in relation to legally aided clients, where it questioned whether SLAB would be prepared to meet the associated travelling costs.⁸⁷

112. Eric McQueen of the SCS said he expected that “as we move towards more specialism, we can think more about clustering cases on particular days, especially in the more rural areas such as the Highlands; we can certainly look at that”.⁸⁸

113. The Lord President acknowledged that “specialisation will be heavily concentrated in the major courts in the cities—that is inevitable”. However, he suggested that “there is no reason why any of the outlying courts should not have access to the services of a special sheriff or a specialist summary sheriff”, adding “that is not a matter of policy; it is a management matter”. He continued that “it is for the sheriffs principal to devise arrangements that will ensure that that happens [and] I do not foresee the slightest difficulty in that”.⁸⁹

Sheriff specialisation: recommendations

114. The Committee supports the provisions in the Bill relating to sheriff specialisation and considers that it will, as expected, ensure a level of consistency in decision-making and more efficiency in the court process provided that the necessary training and resources are put in place. We note the Lord President’s view that specialisms could be managed in such a way as to enable access in remote areas as well as in the major courts; however, we seek clarification as to how this might work in practice.

Privative jurisdiction of the sheriff court (exclusive competence)

Overview of provisions

115. Currently, the sheriff court has privative jurisdiction (or exclusive competence) over actions with a value not exceeding £5,000 and these actions cannot be brought in the Court of Session. Otherwise, the jurisdictions of the Court of Session and the sheriff court overlap and, for many types of civil action, pursuers can choose whether to raise a case in either the sheriff court or in the Court of Session. Most family law matters can be brought in either court irrespective of the value of the claim. Comparatively, Northern Ireland county

⁸⁶ Finance Committee’s Report on the Financial Memorandum on the Courts Reform (Scotland) Bill, page 12.

⁸⁷ Family Law Association. Written submission, page 1-2.

⁸⁸ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4490.

⁸⁹ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Cols 4530-4531.

courts hear cases with a value up to £30,000, while cases cannot be raised in the High Court in England and Wales unless they have a value of £25,000 or more and £50,000 in relation to personal injury cases.

116. The SCCR stated that “the resources of the civil justice system should be allocated in the fairest and most effective way [and] this requires that cases are dealt with by a court of a level commensurate with the importance and value of the issues at stake”. It therefore recommended raising the privative jurisdiction to £150,000 and that the Court of Session should retain exclusive jurisdiction in relation to judicial review, trusts, more complex corporate matters, patents, Exchequer cases, actions under the Hague Convention and devolution issues. It also recommended that concurrent jurisdiction should continue in respect of family matters.

117. The Bill raises the sheriff court’s privative jurisdiction from £5,000 to £150,000 in line with the SCCR’s recommendations. The Policy Memorandum reiterates that “the objective of ensuring that cases are dealt with at the appropriate level in the court hierarchy and at proportionate cost can only be achieved if there is a significant increase in the exclusive jurisdiction of the sheriff court”.⁹⁰ It states that competence “is pitched at a level which is significantly higher than its present level to discourage claims being exaggerated simply to bring them within the competence of the Court of Session”, adding that “this will permit the Court of Session to return to its proper role of dealing with the most complex and important cases and the development of Scots law”.⁹¹

118. A significant proportion of the cases (76% of the cases lodged with the General Department) currently brought before the Court of Session are personal injury actions and a large number of these are for relatively small sums. The Policy Memorandum suggests that the main reason for the popularity of the Court of Session as a venue to litigate personal injury actions is Chapter 43 of the Rules of the Court of Session which are intended to promote early settlement of these cases. It goes on to argue that “the rules have proved so successful in this regard that some 98% of personal injury actions in the Court of Session now settle before proof (i.e. evidence taking) before a Lord Ordinary”.⁹² The Policy Memorandum further states that “some court users are being discouraged from using the Court of Session because they believe that the Court is so crammed with personal injury actions that other business will be delayed sometimes for months until a proof date may be found”.⁹³ Rules equivalent to the Chapter 43 rules were introduced into the sheriff court in November 2009. However, the Committee received evidence to suggest that these rules have not had the same impact as those applied in the Court of Session.⁹⁴

119. This section of the report on privative jurisdiction should be read in conjunction with the sections on access to counsel and creation of a specialist personal injury court as these are a package of interlocking measures.

⁹⁰ Policy Memorandum, paragraph 84.

⁹¹ Policy Memorandum, paragraph 86.

⁹² Policy Memorandum, paragraph 81.

⁹³ Policy Memorandum, paragraph 81.

⁹⁴ APIL. Written submission, page 2.

Proposed threshold of £150,000

120. While there was general support for raising the level of privative jurisdiction of the sheriff court, the majority of witnesses considered that £150,000 was too high. Only a small number of witnesses told the Committee that £150,000 was an appropriate level, including CAS⁹⁵ and Which?⁹⁶. The Association of British Insurers (ABI) was also supportive of the level of increase, arguing that it would “help to ensure the Scottish court system makes effective and efficient use of its resources [and] that claims are dealt with efficiently and at proportionate cost”. The ABI added that the proposed new limit would “redress the previous imbalance between the pursuer costs and that amount of compensation claimed”.⁹⁷

121. Many of those arguing that the proposed £150,000 threshold was too high suggested that a staged increase may be more appropriate. For example, the Faculty of Advocates argued that any increase should be relatively moderate with the possibility of reviewing the limit once the sheriff court reforms have progressed.⁹⁸ The Law Society referred to the increase as “a seismic change” and argued that an initial limit of £50,000 would be more appropriate with any subsequent increases being introduced in stages “in order to assess the impact of change”.⁹⁹ APIL proposed a lower threshold of £30,000, arguing that this would deliver the aims of the SCCR while also being in line with other domestic jurisdictions.¹⁰⁰ Macleod and MacCallum, a law firm, agreed that £30,000 would be an appropriate limit for “uncomplicated cases”.¹⁰¹

122. The Faculty of Advocates also suggested that “there are relevant differences between personal injury actions and other types of actions, and no reason why there should not be different levels of exclusive competence”. It stated, for example, that it would be detrimental to commercial litigants and to the development of law if commercial litigants could not choose to bring a case to the commercial court if the case includes a financial claim for less than £150,000”.¹⁰² The Faculty added that “to the extent that the underlying policy is driven by the position in relation to personal injury cases, these concerns do not justify compelling litigants in other types of cases to litigate in the sheriff courts when they would prefer to litigate in the Court of Session”. It again referred to commercial cases, arguing that it “is not aware that commercial litigants are choosing to litigate in the Court of Session inappropriately”.¹⁰³

123. Sheriff Principal Taylor told the Committee that “when [the SCCR] selected that figure [of £150,000], my approach was not to consider what percentage of cases should be moved from the Court of Session to the sheriff court; my starting point was to settle on a figure for cases that I consider to be appropriate for determination by a sheriff”, adding that “it is a judgment call”.¹⁰⁴ When asked

⁹⁵ Citizens Advice Scotland. Written submission, page 2.

⁹⁶ Which? Written submission, page 2.

⁹⁷ Association of British Insurers. Written submission, page 1.

⁹⁸ Faculty of Advocates. Written submission, page 2.

⁹⁹ Law Society of Scotland. Written submission, page 3.

¹⁰⁰ Association of Personal Injury Lawyers. Written submission, pages 1 and 3.

¹⁰¹ Macleod and MacCallum. Written submission, page 3.

¹⁰² Faculty of Advocates. Written submission, page 2.

¹⁰³ Faculty of Advocates. Written submission, pages 2-3.

¹⁰⁴ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4516.

whether he could see value in having a staged approach to increasing the level of privative jurisdiction, Sheriff Principal Taylor responded that “I do not see any need to have it staged, to be honest”.¹⁰⁵

124. In evidence to the Committee, the Lord President restated that “our considered judgment was that £150,000 was the appropriate limit, and I remain very much of that view”. He said that it “seems to be a startling figure, but it is large only because the present limit is so utterly ridiculous and so the base figure from which we are starting is preposterous”. He also disputed claims that a much lower limit could achieve the same results, arguing that “there would be an uneconomic use of public resources, because there would be a costly form of litigation that could equally well be dealt with competently and efficiently in the sheriff court at much lesser public cost”.¹⁰⁶ On the suggestion of staging the increase, the Lord President noted that “all that would happen would be that, when the time came to look at the next phased increase, we would go through all the trauma as has been going on for the past year or two, arguing about what the appropriate limit should be”.¹⁰⁷

125. The Minister told the Committee that the Scottish Government has “chosen this approach because we felt that it is the most sensible in terms of volume and complexity, but if you are asking me whether I would die in a ditch for the £150,000 limit, my response is that I am listening to everyone ... and we will continue to look at the matter as the Bill proceeds”. She added that “I am keeping as open a mind as I can on the limit”.¹⁰⁸

126. However, she had “less of an open mind on the proposal to stage [the increase]”. She told the Committee that, “if we start to phase in a limit, that gives a much more faltering, slow start to the personal injury court [and] would have the knock-on effect of holding back that court from developing its expertise and ability as quickly as it otherwise would”.¹⁰⁹

127. On the issue of differentiating between the limit in personal injury cases and commercial cases, the Minister said “I hear and understand the concerns” raised and “would be interested to know the Committee’s views on the matter”. She added that, “at this stage, I signal that I am still reasonably open minded on whether the limit for commercial cases should be different from the more general £150,000 limit”.¹¹⁰

Statistics

128. In arriving at the figure of £150,000, the SCCR considered statistical information about claims in the Court of Session. It acknowledged that the available data were “weak”, including a dataset supplied anonymously by one respondent. The footnote to this section of the report states that “though cases might have been scrupulously selected according to principles of scientific random sampling, there is no guarantee that the cases handled by this respondent’s firm

¹⁰⁵ Scottish Parliament Justice Committee. *Official Report, 29 April 2014*, Col 4568.

¹⁰⁶ Scottish Parliament Justice Committee. *Official Report, 22 April 2014*, Col 4536.

¹⁰⁷ Scottish Parliament Justice Committee. *Official Report, 22 April 2014*, Col 4535.

¹⁰⁸ Scottish Parliament Justice Committee. *Official Report, 29 April 2014*, Col 4563.

¹⁰⁹ Scottish Parliament Justice Committee. *Official Report, 29 April 2014*, Col 4563.

¹¹⁰ Scottish Parliament Justice Committee. *Official Report, 29 April 2014*, Col 4570.

are representative of the general population of personal injury actions proceeding in the Court of Session or sheriff court”.¹¹¹

129. Some witnesses questioned the robustness of the data and statistics used to justify the proposed increase. The Faculty, in particular, noted that the datasets in the SCCR were very small and that the SCCR assumed that the cases included in the various personal injury datasets were comparable and representative of personal injury cases in general. A similar argument is put forward by Compass Chambers in its written submission, which also highlighted weaknesses in the data used by the Gill Review to reach its conclusions, explaining that the basis of the sample is unknown and that the use of the sum sued for, as opposed to the value settled for, overvalues claims.¹¹²

130. Sheriff Principal Taylor acknowledged that “criticism has been made about the paucity of statistics that were available to us” and advised that he had obtained more extensive statistics for the purpose of his later review into the expenses and funding of civil litigation in Scotland. He indicated that the statistics used for his review and provided by the Forum of Scottish Claims Managers (FSCM), show that, in the 1,096 personal injury cases that were raised in the Court of Session in 2012, the average sum that was sued for was £153,319, although the average settlement figure was less than £47,000.¹¹³ However, the Committee notes that the Forum did not provide these statistics in evidence on this Bill and, therefore, they were not tested by the Committee.

Complexity of cases

131. The Committee heard that there was no direct link between the financial value of a case and its legal complexity or importance to the client. Ampersand Advocates suggested that “it is neither fair nor appropriate that such complex and demanding cases are transferred out of a court which has a proven record of dealing efficiently with them”.¹¹⁴

132. Clydeside Action on Asbestos (CAA) had particular concerns regarding asbestos-related disease compensation cases. Phyllis Craig of CAA told the Committee that in 95% of these cases the value of damages is lower than £150,000, but that they are among the most complex and important cases, as shown by the proportion that have been appealed to the Supreme Court. While she agreed with Lord Gill that only the most complex and most important cases should be heard in the Court of Session, she argued that “some cases valued at more than £150,000 are less complex than cases with a lower value”.¹¹⁵ She therefore argued that all asbestos-related disease cases should be heard in the Court of Session rather than at sheriff court level.

133. The Minister advised the Committee that the Cabinet Secretary for Justice had met with CAA in relation to this issue. She said that “we understand that the complexity of the cases is such that—I think that the Cabinet Secretary shares this view—they will probably continue to end up in the Court of Session” and indicated

¹¹¹ Report of the Scottish Civil Courts Review, chapter 4, footnote 19.

¹¹² Compass Chambers. Written submission, page 1.

¹¹³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4516.

¹¹⁴ Ampersand Advocates. Written submission, page 2.

¹¹⁵ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4509.

that she “would be wary of drawing an artificial line around a particular category of cases”.¹¹⁶

Opting to litigate in England

134. There was particular concern about the impact of the new limit on commercial cases. Some witnesses, such as James Wolffe QC of the Faculty of Advocates, said that there was a risk that, if commercial litigants with claims for £150,000 or less were required to litigate in the sheriff courts, they would instead opt to litigate in England (i.e. by drafting their commercial contracts under English law and stipulating that disputes be dealt with in the English courts).¹¹⁷ Ampersand Advocates argued that there would be a consequent loss to the Scottish economy if parties elected to take their litigation to England.¹¹⁸ However, Sheriff Principal Taylor suggested that, in fact, the Scottish economy was currently losing out but “the package in the Bill would go a long way towards stopping the current haemorrhaging of cases to England”. He explained that parties were litigating in English courts as currently there was a perception that criminal cases “get in the way of civil work and that the time to get to proof is longer in the Court of Session because there is such competition for judges’ time”.¹¹⁹

135. The Committee heard from some witnesses that parties should be encouraged to rather than deterred from litigating in Scotland. One such organisation was Terra Firma Chambers, which suggested that “the aim should be to encourage the Court of Session to be a place of choice for new international business rather than to impose an excessive barrier to litigation in Scotland as this Bill does”.¹²⁰ Dave Moxham of the STUC, however, told the Committee that he “would prefer us to nurture the centre of excellence that we have [in personal injury] and the reputational and other value that that provides for us rather than go on fishing expeditions for commercial work”.¹²¹

136. Sheriff Principal Taylor disputed these claims, stating that he “would be astonished if the £150,000 privative jurisdiction caused cases to be raised in England that might otherwise be raised in Scotland; it will not happen”. He went on to argue that “those who practise commercial law seem perfectly content to take to Glasgow sheriff court cases with a value well in excess of £150,000”, adding that he saw “no evidence to support the apocalyptic view that might have been expressed there”.¹²²

137. The Minister agreed with Sheriff Principal Taylor that there was “evidence that people were already using the English courts because of the inability of the Court of Session to function efficiently and quickly”. She explained that the reforms in the Bill “will ensure that cases that must go to the Court of Session—for whatever reason, whether it is because they are high-value cases or because they are incredibly complex—get through the Court of Session far more expeditiously than is the case”. She added that this is likely to “drive up confidence in the use of

¹¹⁶ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Cols 4575-76.

¹¹⁷ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4363.

¹¹⁸ Ampersand Advocates. Written submission, page 1.

¹¹⁹ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4526.

¹²⁰ Terra Firma Chambers. Written submission, page 3.

¹²¹ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4430.

¹²² Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4525.

the Court of Session” and, therefore, “those organisations that are currently defaulting to the English court system may review that once they see the Court of Session functioning a good deal more efficiently than it is currently”.¹²³

Developing the law

138. A number of eminent law professors agreed with witnesses who argued that the increase in privative jurisdiction was “to go too far too fast” and suggested that “it is bound to restrict, and may restrict to an unacceptable extent, the opportunities for the Court of Session to develop the law” as, under the Bill, many cases would be heard in the sheriff court.¹²⁴ The Faculty of Advocates¹²⁵ and Law Society¹²⁶ also raised concerns that the Court of Session will not deal with a sufficiently diverse selection of cases to maintain experience or to adequately develop the law of Scotland.

Efficiency of the Court of Session

139. Ampersand Advocates argued that the sheriff court is already overcrowded, highlighting that cases which are expected to last four days are rarely heard over consecutive days (as they are in the Court of Session) and can often take several months to complete.¹²⁷ Clydeside Action on Asbestos (CAA) stated that “the Court of Session serves our members sufficiently and justly [as] they are able to obtain a hearing within a couple of months of going to court, which will be of sufficient length, and have the best representation”.¹²⁸

140. The Faculty of Advocates argued that “litigants choose to litigate in the Court of Session for a number of reasons, including: (i) the skill, experience and reputation of the judges in the Court of Session; (ii) the right to instruct counsel in the Court of Session; (iii) the procedures of the Court of Session; (iv) deficiencies in the way the sheriff court handles contested civil litigation; and (v) the centralisation of business in one court with consequent efficiencies”.¹²⁹

141. Sheriff Principal Taylor also highlighted an aspect of the sheriff court that, in his view, needs to be changed – “the allocation of a one-day diet of proof when everyone accepts that more time than that will be required”.¹³⁰ The Lord President indicated that he “would regard it as a critical success of the proposals that they will ensure that civil actions can be dealt with in one diet, unless there is some special reason not to do that”, adding “that is doable and I am confident that it will be done”.¹³¹

Privative jurisdiction: recommendations

142. The Committee supports the proposal to increase the limit of privative jurisdiction of the sheriff court in order to free up the Court of Session to

¹²³ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4562.

¹²⁴ Professors James Chalmers, Pamela Ferguson, Kenneth Norrie, Roderick Paisley, and Kenneth Reid. Written submission, page 2.

¹²⁵ Faculty of Advocates. Written submission, page 9.

¹²⁶ Law Society of Scotland. Written submission, page 5.

¹²⁷ Ampersand Advocates. Written submission, page 1.

¹²⁸ Clydeside Action on Asbestos. Written submission, page 5.

¹²⁹ Faculty of Advocates. Written submission, page 5.

¹³⁰ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4529.

¹³¹ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4540.

deal with the most complex and serious cases and to ensure that the civil court system works more efficiently and economically.

143. While we accept that this policy intention may only be achieved by a significant increase in the privative jurisdiction limit, we have some concerns regarding the robustness of the data on which the proposed limit of £150,000 is based, for example, references made to anonymous data is not satisfactory. The Committee notes the evidence on this point, which seemed anecdotal rather than empirical, and considers that it would be helpful for empirical evidence to be made available.

144. On balance, we consider that the proposed increase in the privative jurisdiction of the sheriff court from £5,000 to £150,000 may be too great a leap. We therefore recommend that the Scottish Government introduces a lower limit. We further note the limits in place elsewhere.

145. On the question of whether or not the privative jurisdiction of the Sheriff Court should be the same for commercial cases as for personal injury cases, the Committee notes the lack of empirical evidence with regard to commercial cases and is unable therefore to form a view on whether the limits should be identical. In the absence of a Scotland-wide specialist commercial court, this issue deserves more consideration.

Access to counsel

Effect of increase in privative jurisdiction

146. Advocates or solicitor advocates are automatically employed to deal with cases in the Court of Session. The increase in privative jurisdiction proposed in the Bill would result in many of the cases currently raised in the Court of Session instead being raised in the sheriff court. While it is open for any party to use an advocate to argue their case in the sheriff court, the expenses associated with doing so cannot be claimed from the losing party unless the sheriff has granted 'sanction for counsel'.

147. The Scottish Government states in the Policy Memorandum that "it cannot be right that the costs of employing counsel are recoverable in all cases, including even low value or straightforward claims in the sheriff court".¹³² It goes on to confirm that "it will be for the sheriff to decide whether it is appropriate for counsel to be employed in the case, and accordingly for the fees to be recoverable".¹³³

148. A large number of those opposed to increasing the privative jurisdiction limit of the sheriff court raised particular concerns surrounding the removal of automatic access to counsel in cases of a value lower than £150,000, as these would move to the sheriff court. These issues are explored below.

Access to justice

149. The Policy Memorandum states that the Scottish Government does not believe that its proposals would interfere with access to justice, however, some

¹³² Policy Memorandum, paragraph 95.

¹³³ Policy Memorandum, paragraph 96.

witnesses disagreed.¹³⁴ The Faculty of Advocates and a number of trade unions argued that, by removing the automatic ability to employ counsel, the Bill would limit access to justice. The Faculty suggested that “unless the litigant is wealthy enough not to worry about whether counsel’s fees will be recoverable in the event of success, the requirement for sanction of counsel discourages litigants from instructing counsel”.¹³⁵

150. Trade unions further argued that insurers, especially those defending workplace accident cases, would routinely use advocates to the disadvantage of individuals and unions bringing the case.¹³⁶ However, the Forum of Scottish Claims Managers (FSCM) disputed the assertion that advocates are used in every case as a “myth”. Alan Rogerson of the FSCM told the Committee that “insurers are subject to market forces and it would be financially imprudent of them to instruct counsel in every single case in which the other side has a specialist personal injury solicitor acting on behalf of the claimant”.¹³⁷ He highlighted that “there would be no suggestion that either party would or should use counsel in low-level personal injury cases of whiplash, for example”.¹³⁸ Simpson and Marwick agreed that counsel should not be needed in every case, suggesting that the “plethora of specialist personal injury law firms in Scotland ... ought to be well capable of providing advice and representation for their clients in sheriff courts, without the necessity to instruct counsel”.¹³⁹

151. A number of witnesses argued that there should be automatic sanction to employ counsel for certain cases in the sheriff court and specialist personal injury court. For example, Thompsons Solicitors argued that there should be automatic sanction to employ counsel in: workplace injury cases before the specialist personal injury court; all fatal cases, and all other personal injury cases with a value exceeding £20,000.¹⁴⁰ Lawford Kidd, personal injury solicitors, suggested that the Bill should provide for automatic sanction for counsel in: all cases above the value of £50,000; all industrial disease cases; all clinical negligence cases; and all cases involving fatalities.¹⁴¹ It went on to argue that sanction for counsel should not be left to the discretion of the court because of the uncertainty for claimants and defenders and the amount of court time that would be required to deal with motions for sanction for counsel.¹⁴²

152. CAA suggested that the Bill should specify that advocates’ fees should be paid in all asbestos-related cases, adding that “people have told us on many occasions that the fees will definitely be met but, given that we cannot be sure of that, it must be set out in the Bill”.¹⁴³

¹³⁴ Policy Memorandum, paragraph 94.

¹³⁵ Faculty of Advocates. Written submission, page 5-6.

¹³⁶ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4419.

¹³⁷ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4420.

¹³⁸ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4420.

¹³⁹ Simpson and Marwick. Written submission, page 1.

¹⁴⁰ Thompsons Solicitors. Written submission, page 7.

¹⁴¹ Lawford Kidd. Written submission, page 1.

¹⁴² Lawford Kidd. Written submission, page 2.

¹⁴³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4512.

153. The STUC argued that “the cost of counsel can be controlled by the Rules setting parameters within which different levels of counsel may be used ... for example, the Rules may say that only junior counsel may be used in cases of a value of less than £50,000 ... , they could also provide that if the value is less than £5,000 Counsel may not be used”.¹⁴⁴ The Faculty of Advocates, in fact, highlighted that “advocates often accept instructions to act on behalf of pursuers in personal injury cases in the Court of Session on a speculative basis – i.e. on a ‘no win, no fee’ basis” and therefore “a relatively small proportion of personal injury cases are, today, funded by civil legal aid”. It went on to argue that “the willingness of advocates to act on a speculative basis in these cases secures access to justice for ordinary men and women of limited means who have claims which are important to them”.¹⁴⁵ Compass Chambers also highlighted that, as a result of this approach, “counsel offer exceptional value for money”.¹⁴⁶

154. Fred Tyler of the Law Society suggested that “it is almost automatic that sanction for counsel is applied for in the sheriff court for anything that is reasonably complex”.¹⁴⁷ Sheriff Principal Taylor agreed that when sanction for counsel is sought, it is rarely refused. He went on to argue that a decision to grant sanction for counsel should be dependent on the merits of each case. He also addressed points made by CAA, arguing that a complex asbestosis case will probably be remitted to the Court of Session, and even if it were to remain in the sheriff court, it would almost certainly merit sanction for counsel.¹⁴⁸

Impact on the Bar

155. Others highlighted the significant impact of the Bill’s provisions on the independent bar in Scotland. The Faculty of Advocates, for example, suggested that, if counsel were not able to follow cases to the sheriff court, “individual advocates are likely to have to leave the Bar”, with those specialising in personal injury work most affected.¹⁴⁹ The Faculty added that “over the long run, these proposals would prejudice the continuing ability of the system to produce the experienced and high skilled advocates who are needed for those higher value and complex cases”.¹⁵⁰

156. Some junior members of the Faculty highlighted in written evidence that the majority of the work that would be transferred out of the Court of Session is work traditionally undertaken by junior members of the Bar and that, “in the absence of this work, many skilled advocates will be forced to consider other careers [and] as such, there is likely to be a drain of talent from the profession”. They went on to argue that “moreover, the junior members who remain at the Bar will not get the same opportunities to develop their skills in the Court of Session before the most senior judges in Scotland”, and that “if these juniors are to become seniors of the future, we may see an overall decline in the quality of the Bar in the future”. Finally, they added that “this would be detrimental to the future development of Scots law as some of the most important cases in Scottish legal history have been

¹⁴⁴ Scottish Trades Union Congress. Written submission, page 4.

¹⁴⁵ Faculty of Advocates. Written submission, page 8.

¹⁴⁶ Compass Chambers. Written submission, page 3.

¹⁴⁷ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4368.

¹⁴⁸ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Cols 4527-4528.

¹⁴⁹ Faculty of Advocates. Written submission, page 13.

¹⁵⁰ Faculty of Advocates. Written submission, page 13.

reliant on the skill with which counsel have tackled novel and challenging issues before the court”.¹⁵¹

157. Macleod and MacCallum also indicated that advocates would be forced to leave Scotland as “setting the limit at £150,000 seems to be entirely out of kilter with other comparable jurisdictions and the inevitable, massive and sudden loss of demand for skilled advocates could, again, see a migration of talented professionals to those other jurisdictions”.¹⁵²

158. In evidence to the Committee, the Minister said “I do not think that we are talking about pushing the Faculty off a cliff, which is sometimes how the rhetoric comes across” and “there can be a tendency to slightly overstate the consequences of the proposed change”. She did however confirm that the Scottish Government was continuing its dialogue with the Faculty and others with concerns and advised that “if we believe that there is a genuine issue at the heart of some of the concerns, we will look very carefully at that”.¹⁵³

Role of advocates in the settlement of cases

159. The Policy Memorandum states that, “as up to 98% of personal injury cases settle in the Court of Session, the advocacy skills in court of counsel are rarely being deployed in these cases” and, in any case, “experienced solicitors are likely to be equally capable of conducting negotiations leading to a settlement as counsel”.¹⁵⁴

160. However, some witnesses argued that under current procedures in the Court of Session to deal with personal injury cases (‘Chapter 43’ procedure) advocates play an important role in bringing the parties together to facilitate settlement. Compass Chambers, for example, questioned whether the same results could be achieved in the sheriff court without advocates.¹⁵⁵ Dave Moxham of the STUC agreed that “it often takes the instruction of counsel before we can get the insurance industry to settle”, arguing “that is required in at least 80 per cent of cases”.¹⁵⁶

161. Sheriff Principal Taylor told the Committee that he had “no statistics whatever that suggest that rates of settlement are different in the Court of Session from in the sheriff court”, adding that he had “always understood that the two were about the same, and that 98 per cent of personal injury cases settle, regardless of which court they are in”. He did not think that it was necessarily the involvement of advocates that helped promote that settlement.¹⁵⁷

Test for granting sanction for counsel

162. The current test used by sheriffs to decide whether to grant sanction for counsel is ‘whether the employment of counsel is appropriate by reason of

¹⁵¹ Ross McClelland, David McLean, Ceit-Anna Macleod, Paul Reid and Usman Tariq, Advocates. Written submission, page 4.

¹⁵² Macleod and MacCallum. Written submission, page 3.

¹⁵³ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4564.

¹⁵⁴ Policy Memorandum, paragraph 94.

¹⁵⁵ Compass Chambers. Written submission, page 4.

¹⁵⁶ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4442.

¹⁵⁷ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4524.

circumstances of difficulty or complexity, or the importance or value of the claim'. The Policy Memorandum states that "the reforms proposed in the Bill are actually about making the system fairer for all those litigating and propose no changes to access to counsel; the aim is simply that cases should be dealt with at an appropriate level".¹⁵⁸

163. In his review, Sheriff Principal Taylor recommended that the existing test for sanction for counsel should be expanded to include a general test of reasonableness and the need to have regard to the resources deployed by the other party to the case, i.e. the so-called 'equality of arms' factor. A number of witnesses commented on these recommendations in light of the impact of the Bill's proposals on sanction for counsel.

164. There was support for the current test, including from the FSCM.¹⁵⁹ Dave Moxham of the STUC, however, questioned whether there was a need for a test at all, arguing that "the difficulty in having a subjective test for sanction for counsel [is that] what seems like an important matter to one sheriff might not be important to another, and the litigant does not know that until it is too late".¹⁶⁰

165. Other witnesses questioned whether the test would be applied in the same way under the new arrangements. Fred Tyler of the Law Society told the Committee that he had "gained the impression that the intention is to apply it far more stringently such that counsel will be sanctioned on fewer occasions".¹⁶¹ James Wolffe QC also suggested that the tone of the Policy Memorandum seemed to imply a higher test would be applied.¹⁶² Both therefore welcomed Sheriff Principal Taylor's recommendations on the test for sanction for counsel.

166. However, Sheriff Principal Taylor advised that "it was certainly not the intention of any of the members of the board of the Scottish Civil Courts Review that there should be a more stringent test for counsel".¹⁶³ He added that, "in the early days of the specialist injury court ... the normal stringent test for allowing leave to appeal [a decision not to grant sanction for counsel] should perhaps be watered down".¹⁶⁴

Enterprise and Regulatory Reform Act 2013

167. Section 69 of the Enterprise and Regulatory Reform Act 2013 removes the automatic assumption that a breach of health and safety law is a breach of the duty of care an employer has to employees for the purposes of the law of negligence. It is expected that legal claims will, as a result, become more complicated to argue as pursuers will need to prove negligence from common law principles in each case.

168. A number of trade unions argued in evidence to the Committee that lack of automatic access to counsel in cases below the value of £150,000 may compound

¹⁵⁸ Policy Memorandum, paragraph 97.

¹⁵⁹ Forum of Scottish Claims Managers. Written submission, page 3.

¹⁶⁰ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4437.

¹⁶¹ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4366.

¹⁶² Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4364.

¹⁶³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4518.

¹⁶⁴ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Cols 4529-4530.

the difficulties in such health and safety cases. USDAW, for example, explained that “more evidence will often be required and more complex arguments will be involved” in proving negligence in cases which would previously have been routine.¹⁶⁵ All trade unions responding to the Committee’s consultation made similar comments regarding section 69 of the 2013 Act and concluded that victims of every workplace injury and disease must therefore have automatic right to employ counsel.¹⁶⁶

169. The Minister advised the Committee that the Cabinet Secretary recently held discussions with the STUC on this issue and said that “we are going to continue discussions to consider whether there is anything we can do to mitigate the effects of [this] provision”.¹⁶⁷

Access to counsel: recommendations

170. The Committee considers that a lower limit for the privative jurisdiction of the sheriff court (as recommended earlier in this report) may alleviate many of the witnesses’ concerns regarding access to justice and the impact on the independent bar in Scotland.

171. We also consider that the test for granting sanction for counsel to be key to ensuring access to justice for those parties who are involved in serious and complex cases below the privative jurisdiction threshold in ensuring they can receive the best legal representation. We would therefore be concerned if, as suggested by some witnesses, there was any move to apply the current test more stringently.

172. We also note the support of witnesses for Sheriff Principal Taylor’s recommendation that the test for granting sanction for counsel should be expanded to include a general test of reasonableness and the need to have regard to the resources deployed by the other party to the case, i.e. ‘equality of arms’. We welcome the Scottish Government’s commitment to respond to Sheriff Principal Taylor’s recommendations prior to Stage 2 proceedings on this Bill and recommend that it brings forward an amendment to the Bill to introduce the new test proposed.

173. The Committee notes that the Scottish Government is in discussions to establish whether there are any steps it can take to mitigate the effects of section 69 of the Enterprise and Regulatory Reform Act 2013 and welcomes this approach. We would welcome an update on progress with these discussions in due course.

Remit of cases between courts

Overview of provisions

174. The Policy Memorandum on the Bill states that “it is accepted that there will occasionally be cases involving sums lower than £150,000 which will raise important points of law”.¹⁶⁸ For that reason, section 88 in Part 3 of the Bill provides

¹⁶⁵ USDAW. Written submission, page 2.

¹⁶⁶ NURMT. Written submission, page 1.

¹⁶⁷ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4566.

¹⁶⁸ Policy Memorandum, paragraph 89.

for a sheriff at any stage to request to remit proceedings to the Court of Session if the sheriff concludes that there are exceptional circumstances which justify such a remit. The Court of Session may accept a remit request if it is satisfied that there is 'special cause shown' for the case to be heard there.¹⁶⁹ It also allows the remit of cases from the Court of Session to an appropriate sheriff if it considers that the nature of proceedings make it appropriate to do so.

175. The Policy Memorandum indicates that provision to remit to the Court of Session "provides reassurance ... that complex, but lower value cases can receive attention of the expertise of Court of Session judges", and that "allowing remit from the Court of Session ensures that artificially inflated claims may be dealt with in the sheriff court".¹⁷⁰

176. The current test for remitting cases is "where the importance or difficulty of the cause make it appropriate to do so" (Sheriff Courts (Scotland) Act 1971, section 37). As referred to above, the Bill would replace this with a test requiring the sheriff to request a remit where he or she considers that there are 'exceptional circumstances justifying such a remit'. In considering the request, the Court of Session would, for the first time, be able to take into account its 'business and operational needs' as well as the interests of the parties in considering remits.¹⁷¹ The Policy Memorandum states that "the Scottish Government believes that the needs of the superior court must take precedence and concluded that there should be no provision for the business and other operational needs of the sheriff courts to be considered".¹⁷²

A necessary safeguard

177. There was general support for the proposal to remit cases between courts as a safeguard in ensuring that cases are heard in the most appropriate court. For example, Gilbert M Anderson stated that "the Bill contains sensible powers of remit from the sheriff court to the Court of Session and vice versa so as to further facilitate compliance with the principle of cases being heard at the appropriate hierarchical level relative to their value, complexity and importance".¹⁷³ Simpson and Marwick said that it shared the view that the ability to remit cases between courts was necessary.¹⁷⁴

178. Others, such as the Medical Protection Society, said that their support for the increase in privative jurisdiction was predicated on "unfettered judicial discretion to remit complex cases to the Court of Session since a lower value claim does not necessarily equate to lack of complexity".¹⁷⁵

Test for remitting cases

179. Some witnesses were, however, concerned that the test of 'exceptional circumstances' set out in the Bill was too high. The Faculty of Advocates

¹⁶⁹ Policy Memorandum, paragraph 89.

¹⁷⁰ Policy Memorandum, paragraph 190.

¹⁷¹ The SCCR did not make any recommendation about the business and operational needs of the sheriff court being taking into account.

¹⁷² Policy Memorandum, paragraph 193.

¹⁷³ Gilbert M Anderson. Written submission, page 3.

¹⁷⁴ Simpson and Marwick. Written submission, page 1.

¹⁷⁵ Medical Protection Society. Written submission, page 1.

suggested that it was “far too restrictive” and argued that “the power of the Court of Session to refuse to accept the remit of a case within the exclusive competence of the sheriff court should be sufficient safeguard against cases being remitted inappropriately”.¹⁷⁶ In their written submission, a group of law professors suggested that “the Bill actually closes down the opportunity for remitting cases to the Court of Session ... [as] to require ‘exceptional circumstances’ is to require too much”. They argued that “the decision ought to be reviewable by the Court of Session (as it is at present)”.¹⁷⁷ In addition, the Lord President, in evidence to the Committee, said that his personal view was that section 88(10) should be amended to allow appeals where a request to remit a case is refused.¹⁷⁸

180. Other witnesses were more concerned with the test that, in considering a request to remit a case, the Court may take into account the business and other operational needs of the court. The Forum of Insurance Lawyers argued that “discriminating between cases on the grounds of ‘operational needs’ may not achieve the stated aim of justice”, as it could lead to lack of consistency in the way in which similar cases are dealt with.¹⁷⁹ Fred Tyler of the Law Society sought clarification on how this test would work in practice, for example, “if the court was particularly busy one week, a case might not be remitted, whereas, if the court was quiet the next week, a similar case might be remitted”.¹⁸⁰

181. In a supplementary submission provided following his evidence session on the Bill, the Lord President stated that the test of ‘exceptional circumstances’ (section 88(4)) for the remit of a case having a value less than £150,000 is too high and argued that it should mirror the test for all other sheriff court cases that ‘the importance or difficulty of the proceedings makes it appropriate [to remit]’ (section 88(2)).¹⁸¹ He further noted that the test in section 88(5) of the Bill, which provides that the Court of Session may accept a remit ‘on special cause shown’ is too high and that the test of ‘cause shown’ would “adequately meet the situation”.¹⁸²

182. More significantly, the Lord President questioned the appropriateness of section 88(6) which would allow the Court of Session to refuse a remit, on account of ‘the business and other operational needs’ of the Court. He suggested that “under this provision the question would not be whether the appeal deserved to be heard but whether it suited the Court to hear it” and therefore the “provision would almost certainly be in breach of the European Convention on Human Rights [and] even if it was not, it would nevertheless be thoroughly undesirable, in my view”.¹⁸³

183. In a letter of 30 April 2014, the Minister responded to the Lord President’s views on the test for the remit of cases between courts. She advised that the Scottish Government had “reflected on these views and we believe that there is

¹⁷⁶ Faculty of Advocates. Written submission, page 11.

¹⁷⁷ Professors James Chalmers, Pamela Ferguson, Kenneth Norrie, Roderick Paisley, and Kenneth Reid. Written submission, page 2.

¹⁷⁸ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4543..

¹⁷⁹ Forum of Insurance Lawyers. Written submission, page 4.

¹⁸⁰ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4364.

¹⁸¹ Supplementary written submission. Lord President, paragraph 1.

¹⁸² Supplementary written submission. Lord President, paragraph 2.

¹⁸³ Supplementary written submission. Lord President, paragraph 3.

merit in reconsidering the level of test”, with a view to bringing forward amendments at Stage 2 “to amend or remove some of the stricter aspects of the test”.¹⁸⁴

Remit of cases between courts: recommendations

184. The Committee considers that the test for remitting cases is a necessary safeguard in ensuring that, whatever the level of the sheriff court’s privative jurisdiction, the most complex and serious cases can still be heard in the most appropriate court with the most appropriate level of legal representation. However, we heard compelling evidence that the test to be applied in the Bill is too high, and in particular the possibility that the provision to allow the court to take into account the business and operational needs of the court could be in breach of the ECHR. We find this concerning and therefore welcome the Scottish Government’s decision to lodge an amendment at Stage 2 to remove the provision relating to business and operational needs from the Bill.

185. We consider it essential that the test for remit of cases is set at a level that does not unnecessarily prohibit complex cases from reaching the Court of Session. We therefore welcome the Scottish Government’s commitment to reconsidering the test in the Bill, with a view to bringing forward amendments at Stage 2.

Power to confer all-Scotland jurisdiction

Overview of provisions

186. The SCCR anticipated that its recommendation to increase the privative jurisdiction of the sheriff court would result in the transfer of a significant part of the Court of Session’s current personal injury business to the sheriff courts. It therefore recommended the creation of a specialist personal injury court for Scotland based at Edinburgh Sheriff Court, with a view to reducing the pressure of business on the sheriff courts.¹⁸⁵ The SCCR expected that personal injury claimants would still have the right to sue in any sheriff court with jurisdiction.

187. Section 41 of the Bill makes provision for the Scottish Ministers, by secondary legislation, to give effect to the SCCR’s recommendation. However, the Bill is drafted in such a way as to allow for the establishment of a specialist personal injury court in Edinburgh and/or other locations, and for other types of specialist court to be created. It would also allow the pursuer in any action to choose to raise an action locally rather than at the specialist sheriff court. The Policy Memorandum estimates that two specialist sheriffs would be required to staff the new specialist personal injury court.¹⁸⁶

188. The DPLR Committee recommended that, where the power under section 41 is being exercised to create a specialist court other than the specialist injury court,

¹⁸⁴ Minister for Community Safety and Legal Affairs, letter to the Justice Committee, 30 April 2014. Available at:

http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20140430_MfCSLA_to_CG.pdf

¹⁸⁵ Through the proposed increase in privative jurisdiction of the sheriff court.

¹⁸⁶ Policy Memorandum, paragraph 104.

it should be subject to a consultation requirement, given that consultation on the draft Bill covered the personal injury court only.¹⁸⁷

General views on the creation of a personal injury court

189. This section of the report on creation of a personal injury court should be read together with the sections on privative jurisdiction and access to counsel as these are a package of interconnected measures.

190. There was widespread support for creation of a new all-Scotland personal injury court, including from CAS which suggested that this “specialism will allow for greater consistency in decisions, refinement in procedures and a better experience for users in earlier expectation management”.¹⁸⁸

Capacity

191. A number of specific concerns were raised in relation to the capacity of the new court. The Educational Institute of Scotland (EIS) questioned whether two specialist sheriffs would be able to deal with the volume of cases which would be raised in the sheriff court if the level of privative jurisdiction was raised to £150,000. The EIS added that “there is serious concern that members’ claims will be significantly prejudiced by delay and the expenses will increase if proofs require to be discharged due to the unavailability of one of the sheriffs”.¹⁸⁹ Fred Tyler of the Law Society also questioned whether two sheriffs would be able to cope with the volume of work that it would be expected to deal with and whether it would be able to replicate the current efficient system and consistency in the Court of Session.¹⁹⁰ James Wolffe QC endorsed these comments at an evidence session on 18 March.¹⁹¹

192. Justice Scotland also had concerns that two specialist sheriffs may be insufficient, suggesting that “in the new specialist court, it would only take a small number of cases to run to proof, or one lengthy clinical negligence case, for difficulties to arise”.¹⁹²

193. The Minister told the Committee that she had “every confidence that the specialist injury court will be successful”, adding that “hundreds of cases will not come into the specialist injury court all at once”; in fact between 25 and 30 cases were expected to go to proof in its first year.¹⁹³

Location

194. Other witnesses had concerns regarding the location of the new court. For example, Macleod and MacCallum, a law firm, argued that the provision in the Bill should be enacted “to ensure that, by relocating the specialist court to Edinburgh, inhabitants of the further away towns and regions are not unduly disadvantaged”, noting that injured people pursuing claims have particular difficulties in courts

¹⁸⁷ Delegated Powers and Law Reform Committee Report on the Courts Reform (Scotland) Bill, page 5.

¹⁸⁸ Citizens Advice Scotland. Written submission, page 4.

¹⁸⁹ Educational Institute for Scotland. Written submission, paragraph 3.

¹⁹⁰ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4360.

¹⁹¹ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4360.

¹⁹² Justice Scotland. Written submission, paragraph 36.

¹⁹³ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4577.

located a long distance from where they live. It went on to argue that technology should be used for routine or procedural hearings to be conducted remotely to minimise disruption to court users¹⁹⁴.

195. APIL argued that, in addition to the proposed specialist court in Edinburgh, there should be a further specialist court in Glasgow, “to ease the very real possibility of delays and strain on the Edinburgh court’s facilities”.¹⁹⁵ Fred Tyler of the Law Society highlighted that, although it had been suggested that the personal injury court may sit in Edinburgh or in Glasgow, it was still unclear as to how it would work in practice. He told the Committee that “we do not know, for example, whether solicitors in Aberdeen would prefer to use a centralised personal injury court or a specialist sheriff in their own court”, adding that “if there are specialist sheriffs dotted around the country, the predictability of outcome and consistency of decisions will not be the same as it currently is in the Court of Session”.¹⁹⁶ APIL also highlighted the uncertainty in relation to the number of cases that would be raised in local sheriff courts and in the specialist court, but suggested that “if it is to work properly, the specialist court should be used as much as possible to allow the sheriffs there to develop their specialist skills and develop the specialist court as a centre of excellence”.¹⁹⁷

196. The Minister confirmed that “people will still be able to choose to pursue their action in their local court if they so desire or to come to the court in Edinburgh” and that “the court in Edinburgh will develop a specialisation centred around much more complex cases”.¹⁹⁸

Electronic systems and administration

197. A number of witnesses also questioned whether the electronic systems and administrative procedure which is available in the Court of Session would also be made available in the personal injury court. APIL argued that significant improvement and investment was needed, including introducing systems enabling email to be used for most administrative work, and the e-motion procedure and electronic recording of evidence, which all work well in the Court of Session.¹⁹⁹ The Law Society expressed concerns that, “without investment in improved IT provision the idea that access to the correct documents at the right time will not be possible”.²⁰⁰ Justice Scotland had similar views, highlighting that currently, “administrative matters which take only a few days to resolve electronically in the Court of Session can take weeks in the sheriff court by way of paper”.²⁰¹

Timescale

198. Compass Chambers recommended that the specialist personal injury court is set up prior to the limit on the sheriff courts’ exclusive jurisdiction being raised to £150,000, to ensure that “the inadequacies of the current set-up”, including the

¹⁹⁴ Macleod and MacCallum. Written submission.

¹⁹⁵ APIL. Written submission, paragraph 20.

¹⁹⁶ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Cols 4370-4371.

¹⁹⁷ APIL. Written submission, paragraph 19.

¹⁹⁸ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4576.

¹⁹⁹ APIL. Written submission, paragraph 12.

²⁰⁰ Law Society. Written submission, page 5.

²⁰¹ Justice Scotland. Written submission, paragraph 37.

scheduling of cases, are resolved.²⁰² When asked whether this was the intention, Eric McQueen of the SCS responded “that would certainly make sense; it is certainly part of our plan that that will happen”.²⁰³

Power to confer all-Scotland jurisdiction: recommendations

199. **The Committee welcomes the proposal to establish a specialist personal injury court as part of a package of measures to ensure that cases are heard in the most appropriate courts. We do, however, note the concerns of some witnesses regarding the capacity of the new court. We therefore recommend that the personal injury court is established prior to the new level of privative jurisdiction being introduced to ensure that the court is fully equipped with the necessary electronic and administrative systems to ensure it can work effectively from day one.**

200. **The Committee notes that parties will still have the option of raising a claim in their local sheriff court or the new personal injury court and seeks further clarification as to how this will work in practice, along with an estimation of the number of cases expected to be raised in local sheriff courts and in the new court.**

APPEALS

Current position

Civil appeals

201. At present a civil case in the sheriff courts can be heard under “ordinary cause procedure”, “summary application procedure”, “summary cause procedure” or “small claims procedure”.

202. Civil appeals from sheriffs under ordinary cause procedure go to (a) the sheriff principal and then to the Inner House of the Court of Session (Inner House) or (b) the Inner House directly from the sheriff.²⁰⁴ An onwards appeal can be made to the UK Supreme Court on a point of law only, as opposed to a question of fact. The appeal route in summary applications varies according to the particular piece of legislation creating the remedy.²⁰⁵

203. In summary cause actions, appeal is to the sheriff principal on a point of law only and then to the Inner House on a point of law if the sheriff certifies the cause as suitable for such an appeal, and then finally to the UK Supreme Court. In small claims procedure, appeal is to the sheriff principal only, on a point of law.²⁰⁶

Criminal appeals

204. Criminal cases can be prosecuted under solemn procedure, which is used for the most serious criminal offences, and summary procedure, the procedure used

²⁰² Compass Chambers. Written submission, page 3.

²⁰³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4544.

²⁰⁴ The Inner House is, in essence the appeal court within the Court of Session. Further information is available here: <http://www.scotcourts.gov.uk/the-courts/court-of-session/about-the-court-of-session>

²⁰⁵ SPICe Briefing, Courts Reform (Scotland) Bill 14/23, 13 March 2014, page 25.

²⁰⁶ SPICe Briefing, Courts Reform (Scotland) Bill 14/23, 13 March 2014, pages 25-26.

for less serious offences (not to be confused with summary cause procedure in civil cases).²⁰⁷

205. Criminal cases prosecuted under the solemn procedure are heard in either (a) the sheriff court, with the possibility of an appeal to the High Court of Justiciary (High Court); or (b) the High Court. A jury sits with the judge in such cases. Criminal cases prosecuted under the summary procedure are heard in either the lay justice of the peace courts or the sheriff courts, with the possibility of an appeal to the High Court. The hearings involve a judge only.²⁰⁸

Sheriff Appeal Court

Overview of provisions

206. Part 2 of the Bill provides for the establishment of a Sheriff Appeal Court, its membership, its clerking arrangements and its rules of court. The jurisdiction of the Sheriff Appeal Court is determined by the courts whose decisions are appealable to the Court.²⁰⁹

207. Parts 4 and 5 of the Bill follow from the establishment of the Sheriff Appeal Court, and relate to civil and criminal appeals.

Background

208. The provision for the establishment of a Sheriff Appeal Court follows the SCCR's recommendation that such a court should be set up to deal with all civil appeals from the sheriff court as well as all summary criminal appeals by an accused on conviction or sentence, appeals by the Crown on acquittal or sentence, and bail appeals (emanating from the sheriff court or the justice of the peace court).²¹⁰

209. Section 47 of the Bill makes provision for the decision of the Sheriff Appeal Court on the application or interpretation of law to be binding on sheriffs and justices of the peace throughout Scotland (regardless of where in Scotland the decision is taken).²¹¹ This contrasts with the current position, whereby decisions of sheriffs principal are binding only in the sheriffdom in which the appeal is heard.

210. The Policy Memorandum states that currently almost one third of all civil appeals to the Inner House come from the sheriff courts.²¹² It also cites the Summary Justice Review Committee's report ("the McInnes Review") which noted that targets for disposal of criminal appeals were being missed by a substantial margin and commented that, if "summary justice is to be truly summary, appeals should ... be dealt with significantly more quickly than they are at present". The McInnes Review suggested that one way of assisting the High Court to achieve its

²⁰⁷ SPICe Briefing, Courts Reform (Scotland) Bill 14/23, 13 March 2014, page 26.

²⁰⁸ SPICe Briefing, Courts Reform (Scotland) Bill 14/23, 13 March 2014, page 26.

²⁰⁹ Explanatory Notes, page 16.

²¹⁰ Explanatory Notes, page 16.

²¹¹ SPICe Briefing, Courts Reform (Scotland) Bill 14/23, 13 March 2014, page 26.

²¹² Policy Memorandum, page 24.

targets would be for a new court to relieve it of much of the summary criminal appeal work.²¹³

211. The Policy Memorandum further states that there are “clearly problems in dealing with the volume of civil and criminal appeals in the Inner House and the High Court respectively and appeals are being delayed excessively”.²¹⁴

Sheriff Appeal Court: establishment and role

212. There was support for the establishment of the Sheriff Appeal Court from diverse bodies such as the Scottish Legal Aid Board (SLAB)²¹⁵, Compass Chambers²¹⁶, Justice Scotland²¹⁷ and the Forum of Scottish Claims Managers, who argued that it assisted in creating a proper framework for the delivery of the judicial system.²¹⁸

213. The Law Society of Scotland agreed that a national Sheriff Appeal Court should be established, on the basis that decisions would be binding on all Sheriff Courts in Scotland.²¹⁹ This was a view shared by Citizens Advice Scotland.²²⁰

214. The Sheriffs’ Association welcomed the proposals for a Sheriff Appeal Court, arguing that such a court is already in existence, through the sheriff principal. The Association did, however, advise that for criminal appeals there would be value in having one or two sheriffs experienced in criminal work sitting alongside the sheriff principal.²²¹

215. However, concern was expressed by the Faculty of Advocates, who asserted that, when combined with the proposed raising of the exclusive competence of the sheriff court, the new institution would have “undesirable structural effects”.²²² The Dean of the Faculty, James Wolffe QC, summed up the Faculty’s case in oral evidence—

“I suppose that one might ask whether it makes sense in a relatively small country such as Scotland to set up two parallel appeal structures rather than routing all appeals to the supreme court of Scotland—to the inner house.”²²³

216. The Faculty expressed specific concerns about the impact this would have on the breadth of experience available to Court of Session judges in shaping and developing Scots law and on the development of the law itself, and over the expectation that the majority of civil appeals will be heard by a single sheriff.²²⁴ Additionally, the Faculty warned that the effect of the proposals would be to limit

²¹³ Policy Memorandum, page 24 and Report of the Summary Justice Review Committee, p 221. Available at: <http://www.scotland.gov.uk/Resource/Doc/47171/0031637.pdf>

²¹⁴ Policy Memorandum, page 24.

²¹⁵ Scottish Legal Aid Board, Written submission, page 4.

²¹⁶ Compass Chambers. Written submission, page 5.

²¹⁷ Justice Scotland. Written submission, page 10.

²¹⁸ Forum of Scottish Claims Managers. Written submission, page 2.

²¹⁹ Law Society of Scotland. Written submission, page 6.

²²⁰ Citizens Advice Scotland. Written submission, page 5.

²²¹ Scottish Parliament Justice Committee. *Official Report 18 March 2014*, Col 4385-4386.

²²² Faculty of Advocates. Written submission, page 11.

²²³ Scottish Parliament Justice Committee. *Official Report, 18 March 2014*, Col 4373.

²²⁴ Faculty of Advocates. Written submission, pages 11-12.

the circumstances for appeal to the Inner House (as most cases in which a claim for value of up to £150,000 is advanced will have to be raised in the sheriff court).²²⁵

Establishment and role: recommendations

217. The Committee considers that the establishment of a nationwide Sheriff Appeal Court, with decisions binding on sheriffs and justices of the peace across Scotland, is a welcome step and may lead to greater efficiencies. The Committee does, however, note the opposition of the Faculty of Advocates to the establishment of this Court and calls on the Scottish Government to respond to the specific concerns about limited circumstances for appeal to the Inner House and the existence of two separate judicial structures.

218. The Committee calls on the Scottish Government to respond to the request of the Sheriffs' Association that criminal appeals in the Sheriff Appeal Court ought to be heard by sheriffs experienced in criminal work sitting alongside the sheriff principal.

Sheriff Appeal Court: composition

219. In relation to the composition of the Sheriff Appeal Court, two separate but related concerns arose in evidence.

220. The Bill provides for existing sheriffs of at least five years standing to be eligible for appointment as Appeal Sheriffs.²²⁶ The Bill also allows for the Sheriff Appeal Court to sit with one sheriff presiding over proceedings. Concern was expressed about both these provisions in evidence, as both differ from recommendations of the SCCR.²²⁷ The following two sections discuss these issues in more detail.

Appeal Sheriffs

221. As mentioned above, section 49 of the Bill provides for existing sheriffs of at least five years standing to be eligible for appointment as Appeal Sheriffs.

222. The SCCR considered the use of experienced sheriffs, as well as existing sheriffs principal, to hear appeals. It stated that sheriffs acting as Appeal Sheriffs might be reluctant to hear appeals of colleagues' decisions in their own sherrifdom, leading to difficulties in programming the business of the Sheriff Appeal Court efficiently.²²⁸ The Scottish Government considered, however, that the sensitivities around this "may be overstated".²²⁹ The Bill therefore provides for existing sheriffs principal to be Appeal Sheriffs (Section 48) but also for sheriffs of at least five years' standing to be eligible for appointment as Appeal Sheriffs (Section 49).

²²⁵ Faculty of Advocates. Written submission, pages 11-12.

²²⁶ SPICe Briefing, Courts Reform (Scotland) Bill 14/23, 13 March 2014, page 28.

²²⁷ Report of the Scottish Civil Courts Review. Volume 2, Recommendations 9 and 12.

²²⁸ Report of the Scottish Civil Courts Review. Volume 1, Chapter 4, page 63.

²²⁹ Making Justice Work: Courts Reform (Scotland) Bill – a consultation paper (Scottish Government, 2013). Available here: <http://www.scotland.gov.uk/Resource/0041/00415373.pdf> paragraph 92.

Responses to the Scottish Government's consultation were supportive of this measure.²³⁰

223. However, APIL expressed a similar view to the SCCR that it was inappropriate for sheriffs on the same level of hierarchy to be hearing appeals against the decision of a colleague.²³¹

224. In oral evidence, the Lord President accepted that a decision to allow first-instance sheriffs to handle appeals, had been taken on this matter. He rejected the view that first-instance sheriffs would be reluctant to hear appeals of colleagues' decisions.²³²

225. However, when pressed, he stated that his "personal view" would be to have at least one sheriff principal sitting, and not a sheriff, even when considering procedural matters.²³³

226. The Minister responded by stating that the Bill creates a new office and role of Appeal Sheriff²³⁴, adding that some sheriffs currently act as Temporary Sheriff Principals²³⁵, and that, in practice, it is no different to a sheriff who also sits as a temporary Court of Session judge.²³⁶

227. In respect of judgments of an Appeal Sheriff being binding across Scotland, the Minister warned of the danger of "postcode lotteries" if such judgments only applied within the same sheriffdom.²³⁷

Quorum

228. The Bill allows for the Sheriff Appeal Court to sit with one sheriff presiding over proceedings. The Policy Memorandum states—

"For the majority of civil appeals it is expected that the Sheriff Appeal Court will sit as a bench of one. This will replicate many of the benefits that are realised from the current situation of appeals being heard by a sheriff principal. However, there will be the flexibility for a larger bench to be used for appeals that are novel or complex. All of these matters will be set out in the rules of court that will be developed to establish the procedures in the Sheriff Appeal Court."²³⁸

229. The Financial Memorandum envisages that "around 5% of total civil appeals to the [Sheriff Appeal Court] are likely to warrant a bench of three Appeal Sheriffs".²³⁹

²³⁰ SPICe Briefing: *Courts Reform (Scotland) Bill*, 13 March 2014, 14/23, page 28.

²³¹ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4439.

²³² Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4532.

²³³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4534.

²³⁴ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4574.

²³⁵ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4574.

²³⁶ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4575.

²³⁷ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4575.

²³⁸ Policy Memorandum, page 25.

²³⁹ Financial Memorandum, page 72.

230. This provision differs from the recommendation of the SCCR that civil appeals from a sheriff should normally be heard within the sheriffdom from which they emanate by a bench of three, chaired by the sheriff principal of that sheriffdom.²⁴⁰

231. As referred to above, the Faculty of Advocates expressed concerns about the Sheriff Appeal Court sitting as a bench of one²⁴¹—

“one will in effect be writing the law for the whole of Scotland within the shrieval system. There will be a possibility of an onward appeal to the inner house, but it will be through a narrow gateway.”²⁴²

232. Ronnie Conway, representing APIL echoed this concern—

“It is really not at all satisfactory. To try to dress it up as an improvement in the civil justice system is an Orwellian use of language, quite frankly. In the civil court review, Lord Gill said that the appeal courts model with three sheriffs principal could be achieved with negligible expense. It is incomprehensible to me why that model has been departed from.”²⁴³

233. Mr Conway added that, under the current rules, an individual would find it “well-nigh impossible to get to the inner house of the Court of Session”²⁴⁴ as they would not have the grounds to get there, despite only having been heard by two single sheriffs. Mr Conway made clear that his concerns were specific to the Court sitting as a bench of one, as he saw advantages in having a nationwide Court.²⁴⁵

234. The Financial Memorandum makes clear that if a significant number of cases required a bench of three, there would be an impact on the costs associated with appeals.²⁴⁶

235. In oral evidence, the Lord President advised the Committee that he was content with the proposal for a single sheriff sitting in the Sheriff Appeal Court—

“I do not depart from a word of what was said in the civil courts review, but there you have it. The view has been taken that there should be the opportunity for those appeals to be dealt with by a single sheriff. The numbers do not tell the whole story, because in appellate work in the sheriff court the great bulk of the appeals are not appeals on the merits of the case at all, but procedural appeals against a refusal by a sheriff to allow a party to amend a case ... in numerical terms, the great bulk of appellate work in the sheriff court is about such minor procedural issues, which have traditionally always been dealt with by a sheriff principal sitting alone.”²⁴⁷

²⁴⁰ Report of the Scottish Civil Courts Review. Volume 2, page 22.

²⁴¹ Scottish Parliament Justice Committee. *Official Report, 18 March 2014*, Col 4373.

²⁴² Scottish Parliament Justice Committee. *Official Report, 18 March 2014*, Col 4373.

²⁴³ Scottish Parliament Justice Committee. *Official Report, 25 March 2014*, Col 4439.

²⁴⁴ Scottish Parliament Justice Committee. *Official Report, 25 March 2014*, Col 4431.

²⁴⁵ Scottish Parliament Justice Committee. *Official Report, 25 March 2014*, Cols 4431-4432.

²⁴⁶ Financial Memorandum, page 72.

²⁴⁷ Scottish Parliament Justice Committee. *Official Report, 22 April 2014*, Col 4534.

236. He added that, if the parties in a case wish for there to be a bench of three sheriffs principal, they are free to apply to the court to convene a bench of three sheriffs principal if they consider that the case warrants it.²⁴⁸ In her evidence session, and in a follow up letter to the Committee, the Minister clarified that the Bill does not state that the Sheriff Appeal Court is able to entertain such requests from parties, but that the Court of Session, using powers conferred under section 97 of the Bill, could make court rules which would ensure that such a request could be competently entertained.²⁴⁹

237. Responding to the general concerns raised about a bench of one, the Minister stated—

“The quorum is to be left to court rules. We have not constrained that. Sheriffs principal and experienced sheriffs will potentially be appeal sheriffs. Having the bench of one replicates the current system with the sheriff principal hearing the appeals. At present, the appeal is to the sheriff principal in such cases. In a sense, what we are doing is replicating the current system. We believe that it is proportionate and provides a lot of the benefits of the current system.”²⁵⁰

Sheriff Appeal Court: location

238. The SCCR envisaged appeals being heard within the sheriffdom from which they emanate.²⁵¹ In its consultation on the Bill, the Scottish Government agreed that, for criminal appeals, the Sheriff Appeal Court should be based in a central location, and that it was “open-minded” about the recommendation that civil appeals should be heard in the sheriffdom in which they originate.²⁵²

239. Section 55(2) of the Bill allows for, but does not prescribe, more than one sitting of the Court to take place at the same time and at different locations across Scotland.²⁵³

240. Although the Committee did not receive much evidence on this particular issue, organisations such as Which? argued that appeals should be heard within the sheriffdom in which they originated, rather than at a central location, to minimise delay and inconvenience to the parties.²⁵⁴

Sheriff Appeal Court: recommendations

241. The Committee notes the concerns expressed by the Association of Personal Injury Lawyers, and the view of the Scottish Civil Courts Review, about the judicial hierarchy of sheriffs hearing appeals. Whilst the Committee notes the comments of the Minister, it considers that, on balance, all appeals ought to be heard by sheriffs principal, as their

²⁴⁸ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4535.

²⁴⁹ Minister for Community Safety and Legal Affairs, letter to the Justice Committee, 30 April 2014. Available at:

http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20140430_MfCSLA_to_CG.pdf

²⁵⁰ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4573.

²⁵¹ Scottish Civil Courts Review. Volume 2, page 22 (recommendations 10 and 13).

²⁵² Making Justice Work: Courts Reform (Scotland) Bill – a consultation paper (Scottish Government, 2013). Available here: <http://www.scotland.gov.uk/Resource/0041/00415373.pdf>

²⁵³ Courts Reform (Scotland) Bill, section 55(2).

²⁵⁴ Which? Written submission, page 1.

judgment is binding Scotland-wide. We note that in more complex cases there would be three on the bench.

242. The Committee welcomes the Bill's provision to allow more than one sitting of the Sheriff Appeal Court to take place at the same time, and at different places. The Committee agrees with the Scottish Civil Courts Review that civil appeals should be heard in the sheriffdom from which they emanate.

Appeals from the sheriff

243. Due to the establishment of the Sheriff Appeal Court, the existing right of appeal to the sheriff principal of a sheriffdom in civil proceedings is abolished by the Bill. This only applies to general appeals from the sheriff to the sheriff principal and does not affect any specific appeal routes created in statute or applications to the sheriff principal from tribunals or other bodies.²⁵⁵

244. With certain exceptions set out in section 106 (if the Sheriff Appeal Court is satisfied that the appeal raises a complex or novel point of law), direct appeals from the sheriff court to the Court of Session will cease to be possible. All appeals would instead go to the Sheriff Appeal Court.²⁵⁶

Appeals to the Court of Session

245. As an appeal to the Sheriff Appeal Court is available as of right in most cases, the SCCR considered that the further right of appeal to the Court of Session should be subject to a more stringent test. Section 107 of the Bill therefore provides that the Sheriff Appeal Court or the Court of Session may only grant permission to appeal if the appeal raises an important point of principle or practice or if there is some other compelling reason for the Court of Session to hear it.²⁵⁷

246. The Advocates Family Law Association took the view that appeals in family law cases should remain competent in the Court of Session. In its view, requiring appeals to be made to the Sheriff Appeal Court before the Inner House would add to expense and delay, and would create additional uncertainty for children.²⁵⁸

247. On the other hand, SLAB, who favoured the establishment of the Sheriff Appeal Court, also welcomed Part 4 of the Bill, adding that "there will be welcome efficiencies and savings in respect of legal aid by the various arrangements suggested".²⁵⁹ Under this Part of the Bill, SLAB advised the Committee that there "could be potential for more effective and cost efficient processes, with concomitant savings for the Scottish Legal Aid Fund if there are both sift processes to filter out unmeritorious appeals, and fast-track or simplified processes for appeals of a more administrative and possibly uncontested nature, e.g. where a party has failed to meet a time limit".²⁶⁰

²⁵⁵ Policy Memorandum, page 44.

²⁵⁶ Policy Memorandum, page 45.

²⁵⁷ Policy Memorandum, page 45.

²⁵⁸ Advocates Family Law Association. Written submission, page 4.

²⁵⁹ Scottish Legal Aid Board. Written submission, page 8.

²⁶⁰ Scottish Legal Aid Board, written submission, page 8.

248. As mentioned above, the Faculty of Advocates expressed concern about these provisions, describing the possibility of onward appeal to the Court of Session as being a “narrow gateway”.²⁶¹

Appeals to the Supreme Court

249. Currently, under section 40 of the Court of Session Act 1988 it is competent to appeal to the Supreme Court against certain judgments without requiring leave from the Inner House provided the appeal is certified by two counsel as “reasonable”.²⁶²

250. Section 111 introduces the requirement for permission for appeals to be given by the Inner House, or by the Supreme Court. This follows recent Supreme Court judgments indicating the form of appeals it expects to consider.²⁶³

251. In oral evidence, Clydeside Action on Asbestos (CAA), expressed concern over the additional layer of appeal that this would build into the system²⁶⁴, thereby reducing the number of appeals that reach the Supreme Court and Court of Session. As referred to elsewhere, CAA argued that a special case should be made for asbestosis cases²⁶⁵.

Civil appeals: recommendation

252. The Committee notes the changes to civil appeals provided for in the Bill. While noting the concerns expressed about the limitations this places on appeals to the Court of Session and Supreme Court, the Committee broadly welcomes these reforms.

Petition PE1504

253. Petition PE1504, which has been referred to the Committee for consideration in the context of its scrutiny of this Bill, expressed concerns that, in order to progress an appeal from the Inner House to the Supreme Court, a party must currently have two advocates certify that the appeal is reasonable.²⁶⁶ The petitioner was a party litigant and was unable to fulfil this requirement. She has therefore petitioned the Parliament to amend this requirement.

254. As mentioned above, section 111 proposes that permission to make the appeal must be granted (in most cases) by the Court of Session or, where it refuses, the Supreme Court.

255. In oral evidence, a Scottish Government official clarified that the right of appeal to the Supreme Court under the Bill will not be affected by whether someone is a party litigant or is represented by counsel in the Court of Session

²⁶¹ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4373.

²⁶² Policy Memorandum, page 46.

²⁶³ See, for example, *Uprichard v Scottish Ministers* [2013] UKSC 21, paragraphs 58-61 (re-stating the judgment in House of Lords, in *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, 2228) Available at: http://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0034_Judgment.pdf

²⁶⁴ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4514.

²⁶⁵ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4512.

²⁶⁶ Petition PE1504. Available at:

<http://external.scottish.parliament.uk/GettingInvolved/Petitions/partylitigants>

adding that, it will be for the Court of Session to decide whether the case should go up.²⁶⁷

256. The Committee notes the petitioner’s concern to correct what she perceives to be a flaw in the system in relation to appeals to the Supreme Court and considers that the provisions of section 111 of the Bill would appear to put party litigants and those with legal representation on an equal footing.

Criminal Appeals

257. Part 5 of the Bill gives effect to the recommendations of the SCCR that the Sheriff Appeal Court should have jurisdiction to deal with all summary criminal appeals by an accused on conviction or sentence, appeals by the Crown on acquittal or sentence and bail appeals.²⁶⁸

258. The provisions of Part 5 were broadly welcomed by witnesses. Commenting on Part 5, the Law Society said it hoped that the introduction of the appeal court will facilitate appeal hearings within a shorter space of time.²⁶⁹ This was a view shared by Gilbert M Anderson.²⁷⁰

259. Whilst broadly welcoming Part 5, Justice Scotland expressed a specific concern about the timescale for permission being granted by the High Court for an appeal to succeed. Section 113 amends the Criminal Procedure (Scotland) Act 1995 to provide for appeal from the Sheriff Appeal Court to the High Court in certain circumstances. For an appeal to proceed, it must be made within 14 days of the date of the decision being made by the Sheriff Appeal Court, although the High Court can in “exceptional circumstances” extend this period if satisfied that this is justified. It was the contention of Justice Scotland that the test of “exceptional circumstances” was very high, and that a more appropriate test would be consideration of “the interests of justice” or “on cause shown”. Justice Scotland argued that this would ensure that deserving causes are not excluded.

Criminal Appeals: recommendations

260. The Committee notes the concerns of Justice Scotland about the appeal to proceed provisions in Part 5. The Committee draws these concerns to the Scottish Government’s attention and invites it to reflect on whether section 113 should be amended to allow for more circumstances where the period for appealing can be extended.

261. The Committee welcomes the changes to civil and criminal appeals provided for in Parts 4 and 5 of the Bill.

²⁶⁷ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4584.

²⁶⁸ Policy Memorandum, page 37.

²⁶⁹ Law Society of Scotland. Written submission, page 12.

²⁷⁰ Gilbert M Anderson. Written submission, page 2.

CIVIL PROCEDURE

Civil jury trials in an all-Scotland sheriff court

Overview of provisions

262. Currently, civil jury trials are only possible in certain cases raised in the Court of Session, and which fall within the categories listed in the Court of Session Act 1985, such as personal injury and defamation.²⁷¹ In practice, these cases only usually relate to personal injury.

263. The SCCR noted that damages awarded in legal systems where a judge alone made the decision tended to follow awards made in previous cases and, over time, fell below what was considered reasonable by the general public. It therefore concluded that the right to a jury trial in specific cases should continue because they perform an important role in ensuring that damages awards keep up with public expectations.²⁷² It also recommended that civil jury trials should be available in the new specialist injury court, but not in other sheriff courts.

264. The Scottish Government accepted these recommendations.²⁷³ The Bill therefore provides for jury trials in the types of cases specified in section 11 of the Court of Session Act 1988 in any sheriff court which is designated with an all-Scotland jurisdiction. It is anticipated that, at least for the foreseeable future, this would only apply to the specialist injury court.

Level and consistency of awards

265. A small number of witnesses who commented on this aspect of the Bill said that they support the use of juries in certain civil trials. The Law Society agreed that they should be available in the personal injury court.²⁷⁴ Ronnie Conway of APIL said that he was “in favour of civil jury trials because ... they bring people directly into the court and involve them in the quantification of damages”, adding that “it seems that over time—and it is not just me who says this—the judiciary tends to lose touch with the value of money”.²⁷⁵

266. Others opposed civil jury trials on the grounds that there is potential for inconsistency of awards. For example, Simpson and Marwick stated that inconsistencies between judicial and jury awards bring “confusion on the part of both pursuers and defenders when advising on the true value of a claim”.²⁷⁶ Gilbert M Anderson had similar concerns regarding the unpredictability and inconsistency of awards by civil juries.²⁷⁷

²⁷¹ Other categories of case in which civil jury trials may be heard in the Court of Session are: delinquency; quasi-delinquency where damages are the only remedy sought; and reduction (usually of a will or contract) on the basis of essential error, incapacity or force and fear.

²⁷² SPICe briefing, page 29.

²⁷³ Policy Memorandum, paragraph 147.

²⁷⁴ Law Society of Scotland. Written submission, page 6.

²⁷⁵ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4441.

²⁷⁶ Simpson and Marwick. Written submission, page 3.

²⁷⁷ Gilbert M Anderson. Written submission, page 4.

Cost and efficiency

267. Some witnesses highlighted concerns that civil juries can lead to additional costs and delay. Simpson and Marwick, for example, suggested that civil juries are “a significant imposition on the public in terms of time (and on the public purse) in terms of cost”²⁷⁸, while Alan Rogerson of FSCM said that he was “uncomfortable” with civil jury trials as they “detract from the efficiency and calibre of justice that you receive in the personal injury court”. He went on to argue that holding jury trials for low-level personal injury cases would be disproportionate and would add “complexity to something that the court should be looking at efficiently and quickly”.²⁷⁹

Civil juries: recommendations

268. The Committee is broadly content with the proposals in the Bill to continue allowing civil jury trials and for these to be extended to the personal injury court.

Simple procedure

Overview of provisions

269. The SCCR recommended that summary cause and small claims procedure be replaced with a new simplified procedure for all actions with a value of £5,000 or less, actions for recovery of residential tenancies and mortgage repossession actions. It proposed that this procedure should be designed with unrepresented litigants in mind and that the district judge (or summary sheriff as termed in the Bill) should take an interventionist approach to identify the issues and assist the parties to settle if possible, and to determine how the case progresses.

270. The Scottish Government accepted this recommendation. The Bill therefore creates a new procedure for cases under £5,000 to be dealt with primarily by summary sheriffs to be called ‘simple procedure’ rather than ‘simplified procedure’ as recommended by the SCCR. The Policy Memorandum explains that “the use of ‘simplified’ seems to imply that it is simpler than another procedure, where this is intended to be a new and straightforward approach to such low value casework”.²⁸⁰

271. Which?, CAS and the Law Society of Scotland were amongst those witnesses who said they support the proposals, each suggesting that the new procedure would be more accessible to the public. CAS and Which?, however, suggested that introduction of the new procedure provided an opportunity to design a system that was as user-friendly as possible. Lauren Wood of CAS highlighted, for example, that: the sheriffs dealing with simple procedure should sit without wigs and gowns; the rules for the procedure should be easy to follow; and the “assumption from the start should be that counsel is not involved and, indeed, that lawyers will not necessarily be involved”.²⁸¹

²⁷⁸ Simpson and Marwick. Written submission, page 3.

²⁷⁹ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4432.

²⁸⁰ Policy Memorandum, paragraph 156.

²⁸¹ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4357.

Value of cases

272. The Policy Memorandum explains that the Scottish Government considered whether the monetary limit for simple procedure should be set at £10,000, in line with the small claims limit in England and Wales. However, it concluded that it would be “premature” to recommend a higher limit for simple procedure, but that it would keep the limit under review.²⁸²

273. Which? argued that the Bill should set a level of £10,000, arguing that this is “a more appropriate amount for modern consumer-type claims, such as disputes over new kitchens, holidays, cars and other consumer areas”. It also highlighted the £10,000 limit in England and Wales, arguing that “Scots are disadvantaged by this lower ceiling and therefore arguably less able to access redress in Scotland than in other parts of the UK”.²⁸³ However, Money Advice Scotland suggested that there should be no financial limit and instead the simple procedure should apply to all consumer actions and housing cases regardless of the sum involved.²⁸⁴

274. Under the provisions in the Bill, personal injury cases worth less than £5,000 would be subject to the simple procedure and are therefore not eligible to be considered by the specialist personal injury court. APIL suggested that the simple procedure would not be suitable for personal injury cases, arguing that the value of the case did not reflect complexity.²⁸⁵ Similarly, the STUC stressed that it should always be open to the pursuer to pursue a case involving a workplace injury in the specialist personal injury court, regardless of value.²⁸⁶

Inquisitorial approach

275. In the Policy Memorandum, the Scottish Government said it believes that party litigants require more assistance from the bench. The rules for simple procedure to be made by rules of court under section 97 of the Bill would be based on “a problem-solving or interventionist approach, closer to the inquisitorial approach taken in some other jurisdictions”. The Policy Memorandum states the intention that the Court should be able to help the parties to settle the dispute and the procedure adopted should reflect the circumstances of the case.²⁸⁷

276. There was broad support amongst witnesses for adopting an inquisitorial approach, including from CAS and Which?, with each acknowledging that parties would benefit from more support from the bench.²⁸⁸ Gilbert M Anderson agreed that an inquisitorial approach would “bring about speedy, practical and economic resolution of disputes in cases where the value does not exceed £5,000”.²⁸⁹

277. However, Sheriff Pettigrew told the Committee that he was concerned about the wording in section 72(b) of the Bill which allows sheriffs to “negotiate with the parties with a view to securing a settlement”. He indicated that, while he had “no difficulty with assisting parties to present their case, in becoming interventionist or

²⁸² Policy Memorandum, paragraph 159.

²⁸³ Which? Written submission, page 3.

²⁸⁴ Money Advice Scotland. Written submission, page 5.

²⁸⁵ Association of Personal Injury Lawyers. Written submission, page 6.

²⁸⁶ Scottish Trades Union Congress. Written submission, page 2.

²⁸⁷ Policy Memorandum, paragraph 157.

²⁸⁸ Citizens Advice Scotland. Written submission, page 6.

²⁸⁹ Gilbert M Anderson. Written submission, page 3.

trying to identify the issues and then leaving the parties to tease them out [or] in asking difficult questions, ... I am not negotiating, because I have to maintain neutrality". He added that "there could be issues if the judge—were to negotiate, because a person who does not get the result that they want could then ask to what extent the judge was independent, and that could reveal a plethora of unnecessary appeals to the sheriff court".²⁹⁰ Sheriffs Pettigrew, Wood and Liddle agreed that it would be more appropriate if the term 'negotiate with' was amended to read 'facilitate negotiation between'.

Legal aid and expenses

278. The SCCR recommended that legal aid should be available in all simple procedure cases regardless of their value. However, the Scottish Government proposes to restrict legal aid to those cases with a monetary value of more than £3,000 in line with the current pattern of legal aid availability.

279. In its written submission, SLAB said that it presumed legal aid would be available principally for actions with a value of greater than £3,000 up to £5,000, as well as actions for recovery of heritable property. However, "as the procedure to be adopted in simple procedure cases has yet to be established, the Board would be keen to establish what the intended procedure is in this respect, as there is a corresponding need for the Scottish Government, with input from the Board, to establish an appropriate model for, and rates of, legal aid payment in simple procedure actions not excluded from legal aid".²⁹¹

280. Both the Law Society of Scotland and Simpson and Marwick²⁹² argued that provision should be made for the court to have discretion to restrict awards of expenses in simple procedure, in line with Sheriff Principal Taylor's recommendations.²⁹³

Simple procedure: recommendations

281. The Committee welcomes the proposals to replace summary cause and small claims procedures with one new simple procedure for cases under the value of £5,000 aimed at improving accessibility for users. We also support the intention set out in the Policy Memorandum that court rules for simple procedure will be based on a problem-solving or interventionist approach to assist parties in settling their disputes expeditiously.

282. The Committee notes the views of Which? that the monetary limit for simple procedure should be set at £10,000 in line with the small claims limit in England and Wales. However, we accept that the Scottish Government concluded that it would be premature to introduce a higher limit and welcome its commitment to keep the matter under review.

283. Given concerns raised in evidence by the Sheriffs Association, the Committee asks the Scottish Government to consider amending the wording at section 72(b) of the Bill to read 'facilitate negotiation between' rather than 'negotiate with' in order to maintain the independence of the judiciary.

²⁹⁰ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4384.

²⁹¹ Scottish Legal Aid Board. Written submission, page 5.

²⁹² Simpson and Marwick. Written submission, page 4.

²⁹³ Law Society of Scotland. Written submission, pages 6-7.

Judicial review

Overview of provisions

284. Section 85 of the Bill inserts new sections 27A to 27D into the Court of Session Act 1988 (“the 1988 Act”) which reform the procedures for petitions for judicial review in line with a recommendation in Chapter 12 of the SCCR.

Time limits for judicial review

285. At present, there are no statutory time limits within which an application for judicial review must be made, other than the challenge of “mora, taciturnity and acquiescence”. Broadly speaking, these three elements combine to describe excessive or unreasonable delay to speak out in respect of a known right or claim in circumstances likely to be relied upon by the respondent.²⁹⁴

286. Section 27A provides that a time limit of three months starting from the date that the grounds giving rise to the application for judicial review arose. This is subject to the exercise of the court’s discretion to permit an application to be made outwith that period, for example, if there is good reason for delay in making an application, or where the court is satisfied that injustice would result if an application presented outwith the time period is not allowed to proceed.²⁹⁵

287. This provision broadly implements recommendation 151 of the SCCR. The SCCR considered that a delay of three months in bring an application would be excessive^{296 297}.

288. A range of views were expressed to the Committee about time limits for judicial review, with some organisations supporting the three month limit and others opposing it. Organisations arguing that the limit would be overly restrictive or insufficient included Friends of the Earth Scotland²⁹⁸, Scottish Environment LINK²⁹⁹, the Law Society of Scotland³⁰⁰ and Justice Scotland³⁰¹. The Law Society warned that these proposals would limit access to justice³⁰² whilst Westwater Advocates were not convinced that some of the proposed changes were absolutely necessary³⁰³.

289. Also suggesting that the imposition of a three-month timescale was overly restrictive, Jonathan Mitchell QC stressed the importance of judicial review, describing it in the following terms—

²⁹⁴ A petitioner who delays in bringing an application may be met with a challenge of “mora, taciturnity and acquiescence”. More detail on this is available in SPICe Briefing: *Courts Reform (Scotland) Bill*, 13 March 2014, 14/23, page 30.

²⁹⁵ Explanatory Notes, page 25.

²⁹⁶ Report of the Scottish Civil Courts Review. Volume 2, page 30.

²⁹⁷ The Report of the Scottish Civil Courts Review added that as a general rule petitions for judicial review should be brought “promptly”. The requirement to bring a judicial review action “promptly” has been omitted from the Bill, as a similar rule applicable to England and Wales was held unenforceable by the courts for being too uncertain in scope. For further information see SPICe Briefing: *Courts Reform (Scotland) Bill*, 13 March 2014, 14/23, page 31.

²⁹⁸ Friends of the Earth and the Environmental Law Centre Scotland written submission, page 6.

²⁹⁹ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4460.

³⁰⁰ Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4374.

³⁰¹ Law Society of Scotland. Written submission, page 7.

³⁰² Law Society of Scotland. Written submission, page 7.

³⁰³ Westwater Advocates. Written submission, page 5.

“It is a fact that the citizen keeps the state in order through judicial review. In a sense, it is the civil equivalent of criminal prosecution. If you did a survey in Barlinnie on whether there should be a three-month time limit on prosecution for crime, you would get a massive vote in favour of that. What we have is a massive vote by public authorities that they want to be immune from legal action. That is the whole point of having a three-month time limit or, indeed, any time restriction. It is so that if I, as a citizen, see that the state or a local authority is breaking the law and do not do anything about it in a fairly short period of time, nothing can be done about it.”³⁰⁴

290. Tony Kelly, representing Justice Scotland, added that “it is difficult to understand why the period of three months was chosen. The only real reason that we can identify is that there has been a complete read-across from England and Wales, but we are in an entirely different situation”.³⁰⁵

291. The Law Society of Scotland’s written submission described those differences in the following terms—

“[England and Wales] is a jurisdiction ten times the size of Scotland, with many UK-wide and international campaigning organisations headquartered in London, and has a broader culture of public interest litigation overall and, crucially, judicial review procedure tends to take longer and be more expensive than Scotland.”³⁰⁶

292. Mr Kelly argued that the reason that time limits are stringent in England and Wales was due to “the volume of litigation that overran the administrative court down south”.³⁰⁷ He added that “We are nowhere near approaching a problem in relation to volume”.³⁰⁸

293. Section 27A(1)(b) provides the Court with flexibility to extend the three month period by as long as it considers equitable. When asked about this provision, Mr Kelly stated that—

“The problem is that three months is the headline time limit and will become the default—that is certainly what happened in England. Even a day beyond three months, we will have to come to court to persuade it to exercise its equitable discretion.”³⁰⁹

294. Both Mr Kelly and Lloyd Austin, representing Scottish Environment LINK, stated that, if pressed for a time limit, they would recommend one year.³¹⁰ Mr Austin added that there are “different circumstances in different types of judicial review”.³¹¹

³⁰⁴ Scottish Parliament, Justice Committee, 1 April 2014, Official Report, Col 4456.

³⁰⁵ Scottish Parliament, Justice Committee, 1 April 2014, Official Report, Col 4459.

³⁰⁶ Law Society of Scotland, written submission, page 8.

³⁰⁷ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4459.

³⁰⁸ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4459.

³⁰⁹ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4466.

³¹⁰ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Cols 4469-4472.

³¹¹ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4472.

295. Mr Mitchell QC suggested that, as the purpose of introducing a time limit was to protect proper public administration and the rights of third parties, an alternative solution would be a “written provision that said that when there is an unfair prejudice to public administration or to third parties that would be a bar to coming to court”.³¹²

296. The Committee also heard from organisations supporting the three month limit. For example, SLAB favoured these changes on the grounds of improved effectiveness and efficiency in the administration of legal aid, in addition to benefits to parties and the courts.³¹³ Businesses such as Asda argued in favour of even shorter time periods to decrease the impact of lost revenue and additional professional costs.³¹⁴

297. The Scottish Criminal Cases Review Commission stated that it was likely that, had the three month provision been in force during the most recent financial year, it could have saved tens of thousands of pounds in legal fees.³¹⁵

298. The Lord President, in oral evidence, stated that he believed the three month limit to be “more than reasonable”.³¹⁶ He reminded the Committee that the purpose of taking out judicial review is to rescind a decision by a public body. He advised that extending the limit could have an effect on other decisions taken by public bodies in the intervening period.³¹⁷ He added that subsection (1)(b) of the new section 27A could cover a “wide range of circumstances”³¹⁸ and described a scenario where this subsection could provide “another safety net so that there are no hard decisions”.³¹⁹

Time limits for judicial review: recommendations

299. The Committee notes the views of several witnesses that Scotland does not currently have the same issues in respect of volume of cases for judicial review as England and Wales and that the introduction of a three month time limit for bringing applications for judicial review may be overly restrictive.

300. The Committee also notes the view of the Lord President that three months is a reasonable time limit and that there are appropriate safeguards built into section 27A.

301. The Committee considers that those applying section 27A should do so with discretion and flexibility, balancing the rights of the party challenging decisions with the requirement for the public body to implement those decisions.

³¹² Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4460.

³¹³ Scottish Legal Aid Board, written submission, page 5.

³¹⁴ Asda Stores Ltd, written submission, pages 1-2.

³¹⁵ Scottish Criminal Cases Review Commission, written submission, page 1.

³¹⁶ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4546.

³¹⁷ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4546.

³¹⁸ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4546.

³¹⁹ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4547.

Introduction of a leave or permission stage

302. Implementing recommendations 152 and 153 of the SCCR^{320, 321} section 85 of the Bill inserts an additional provision to section 27 of the Court of Session Act 1988 requiring permission to be sought prior to judicial review proceedings being taken. The court may grant permission only if (a) the applicant can demonstrate “sufficient interest” in the subject matter of the application, and (b) the application has a real prospect of success.

303. The reference to “sufficient interest” in section 27B(2) was broadly welcomed in evidence to the Committee. Witnesses noted that it was simply codifying the new test of “standing” which has already been set out by the Supreme Court in the AXA case^{322, 323}. Axiom Advocates did, however, state that, if there is to be a requirement for leave, some guidance should be given as to the meaning of the phrase “real prospect of success”.³²⁴

304. Some concerns were expressed about the requirement for permission provisions contained in section 27B(1). For example, Tony Kelly was concerned about the practicalities around requiring permission to be sought when there is a three month time limit—

“the proposal seems to represent quite a big jump up to the imposition of a real bar. The problem is that it is linked to the three-month time limit. If people rush to get to court to beat the time bar, their applications might well not be as fully prepared and capable of being fully argued at that stage. That would leak into the higher test being applied to those applications that are not fully worked up.”³²⁵

305. He did state, however, that he did not have a problem with the principle of weeding out hopeless cases.³²⁶

306. Others, such as Professor Tom Mullen, argued that no evidence has been presented of the scale of the problem of unmeritorious cases being brought.³²⁷ Professor Mullen added that “there are also reasons to suppose that weak claims for judicial review may not in fact be numerous”, citing expenses involved in losing a claim as an already existing deterrent to unmeritorious cases being brought.

307. Jonathan Mitchell QC advised that he too did not have a problem with weeding out unmeritorious cases, but described legislating in this area as “a solution that is searching for a problem”.³²⁸ Ailsa Carmichael QC wondered:

³²⁰ Report of the Scottish Civil Courts Review. Volume 2, page 35 (Recommendations 152 and 153).

³²¹ Policy Memorandum, page 34.

³²² Scottish Parliament, Justice Committee, 1 April 2014, Official Report, Col 4461.

³²³ See Supreme Court decision by Lord Hope in *Axa General Insurance Ltd & Others v the Lord Advocate and Others* [2011] UK SC 46 (available here: http://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf)

³²⁴ Axiom Advocates. Written submission, page 9.

³²⁵ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4461.

³²⁶ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4461.

³²⁷ Professor Tom Mullen. Written submission, page 4.

³²⁸ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Col 4462.

“whether a sledgehammer is being used to crack a nut, and whether a permission stage is necessary in Scotland. Other means to root out weak petitions, such as early hearings on particular points of law, are already open to the court.”³²⁹

308. There was, however, support for the permission stage.³³⁰ For example, Lloyd Austin indicated that he could “see benefits in the proposal, subject to certain circumstances”.³³¹ The Scottish Criminal Cases Review Commission stated that it has, in recent years, found itself responding to an increasing volume of petitions for judicial review, some of which have been poorly conceived.³³² As mentioned above, had the provisions of the Bill been in force, the Commission argues that tens of thousands of pounds would have been saved in legal fees.³³³

309. In oral evidence, the Lord President made clear his view that the permission stage was, indeed, necessary, stating that the court had a duty to decide whether a challenge should be allowed to go ahead, to prevent petitions going forward that lack probable cause.³³⁴

Introduction of leave or permission stage: recommendations

310. The Committee recognises that some concerns have been raised over the requirement for the Court to grant permission in judicial review cases, but considers that these concerns are interlinked with concerns over the three month time limit. Whilst the Committee remains to be convinced that this additional stage is absolutely necessary, it welcomes the reassurances of the Lord President that its introduction is important to prevent petitions going forward that lack probable cause.

311. The Committee welcomes the codification of the test of “standing” in judicial review cases, set out in the Bill. The Committee also invites the Scottish Government to consider further the points made in evidence that guidance should be provided on the meaning of “real prospect of success”.³³⁵

Granting of legal aid

312. The Law Society expressed a specific concern that SLAB would use these reforms to make changes in practice to the granting of legal aid, warning that “there is a foreseeable risk that SLAB will not grant anyone full legal aid until a petition has got through the permission stage”.³³⁶

313. Lindsay Montgomery of SLAB addressed this point in oral evidence—

“I believe that someone said in evidence that we would wait until the petition stage, but I do not think so. If the application meets the statutory tests, we will

³²⁹Ailsa Carmichael QC. Written submission, page 4 .

³³⁰ For example: Gilbert M Anderson. Written submission, page 5.

³³¹ Scottish Parliament Justice Committee. *Official Report, 1 April 2014*, Cols 4462-3.

³³² Scottish Criminal Cases Review Commission, written submission, page 1.

³³³ Scottish Criminal Cases Review Commission, written submission, page 1.

³³⁴ Scottish Parliament Justice Committee. *Official Report, 22 April 2014*, Col 4546.

³³⁵ Axiom Advocates. Written submission, page 9.

³³⁶ Law Society of Scotland. Written submission, p9.

grant the legal aid. If a solicitor comes late in the three-month period or if we do not get enough information and have to go back to them, they will be able to take special urgency measures to get the petition into court and protect the client's interests."³³⁷

Granting of legal aid: recommendations

314. The Committee notes the concerns expressed by the Law Society of Scotland that the Scottish Legal Aid Board will use the reforms to make changes in practice to the granting of legal aid, but notes the Scottish Legal Aid Board's assurances on the record that this will not be the case.

Aarhus Convention

315. The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the "Aarhus Convention") was signed on 25 June 1998. The Convention grants the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on environmental matters. The UK Government is a signatory to the convention. The Convention is therefore binding in Scots law.

316. Paragraph 1 of Article 9 of the Aarhus Convention states—

"Each party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongly refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law."³³⁸

317. Paragraph 2 requires each signature Party to ensure that members of the public—

"(a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention."³³⁹

318. What constitutes a sufficient interest and impairment of a right is determined in accordance with the requirements of national law.

³³⁷ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4497.

³³⁸ The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, Article 9, paragraph 1. Available here: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

³³⁹ The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, Article 9, paragraph 2. Available here: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

319. Lloyd Austin described the Convention as providing a “means of providing citizens, communities and non-governmental organisations with the right to seek review of those decisions [made by governments or public bodies that affect the environment]”.³⁴⁰

320. Mr Austin outlined the conflict between the Aarhus Convention and current statutory provisions for judicial review in the following terms—

“the three tests that are mentioned in article 9 relate to issues of timing, the process not being prohibitively expensive and the merits of the case. The bill and the discussions about judicial review address issues to do with costs and with timing, but not issues to do with the substantiveness of the review. That is an interesting issue, because judicial review is not designed to examine the merits of a case. Therefore, there is a question about whether judicial review should be adapted to meet the requirements of the Aarhus convention or whether there should be a lower court or a tribunal on the environment to do that.”³⁴¹

321. He added that Scottish Environment LINK’s member bodies support the introduction of an environmental tribunal or court that could carry out substantive reviews.³⁴²

Aarhus Convention: recommendations

322. The Committee notes the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law. The Committee is sympathetic to calls for the introduction of an environmental tribunal for Scotland.

Alternative Dispute Resolution

Overview of provisions

323. The SCCR noted the valuable role that mediation and other forms of alternative dispute resolution (ADR) play in the civil justice system. It recommended that “the court should ensure that litigants and potential litigants are fully informed about the dispute resolution options available to them and should encourage parties, in appropriate cases, to consider ADR”.³⁴³

324. The Bill gives the Court of Session a power to consider and make rules that would encourage the use of methods of non-court dispute resolution in circumstances where it is felt that settlement might be achieved more effectively by court process.

Encouraging use of ADR

325. A number of witnesses expressed concern that the Bill does not go far enough in encouraging the use of ADR, including the Scottish Arbitration Centre³⁴⁴ (SAC), the Scottish Mediation Network (SMN) and the Money Advice Service

³⁴⁰ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4458.

³⁴¹ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4463.

³⁴² Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4463.

³⁴³ Report of the Scottish Civil Courts Review, pages 25-26.

³⁴⁴ Written submission. Scottish Arbitration Centre, page 1.

(MAS). Both SAC³⁴⁵ and SMN³⁴⁶ suggested that, although the Bill provides for rules to be made [under section 96 of the Bill], there is no guarantee that they will ever be made, and even if they are, that the changes would integrate and embed ADR more fully into the civil justice system. Both organisations argued that ADR, including mediation, should not just be encouraged by the Court, but should be an option provided to users.³⁴⁷

326. CAS also said it was “disappointed that there is not greater commitment to embedding ADR in the civil justice system on the face of the Bill” and asked that provision of information, advice and dispute resolution options, including alternatives to litigation should be provided for in the Bill.³⁴⁸ Families Need Fathers suggested that the Bill should be more robust and should at least require attendance at an assessment meeting before a writ can be lodged and that a judge be permitted to take into account a refusal to attend mediation (or some other form of ADR) in assessing that parent’s commitment to the best interests of their child.³⁴⁹ Relationships Scotland also said that it “would like to see the introduction of mandatory information meetings with a mediator, to find out more about the mediation process and how it might help, prior to hearing a family case in court”.³⁵⁰

327. Louise Johnson of SWA argued that there was no role for mediation in a family case involving domestic abuse as “domestic abuse is not a dispute ... it is a misuse of power and control in which one of the parties is clearly in fear, or is being coerced or threatened by the other”. She went on to explain that “it is unfair and quite dangerous and irresponsible to expect someone ... to undergo a process in which they have to discuss their safety and their children’s safety in a setting in which they are open to further abuse and coercion, whether tacit or overt”.³⁵¹

328. The Lord President advised the Committee that “our report recommended that [ADR] should be available in every sheriff court and that is very much my view ... however, it is not a matter that requires legislation; it is essentially an operational and managerial question”. He went on to state that he would like guidance and mediation services to be available in sheriff courts for, in particular, party litigants.³⁵²

329. The Minister told the Committee that, “as a Government, we have been very much in favour of the promotion of ADR, [but] the difficulty is that ... we cannot force people into mediation because, by definition, it simply would not work in those circumstances”.³⁵³ She went on to state that “the Bill recognises overtly that it

³⁴⁵ Scottish Arbitration Centre, Written submission, page 1.

³⁴⁶ Scottish Mediation Network. Written submission, page 4.

³⁴⁷ Scottish Mediation Network. Written submission, page 4.

³⁴⁸ Citizens Advice Scotland. Written submission, page 8.

³⁴⁹ Families Need Fathers Scotland. Written submission, pages 2-3.

³⁵⁰ Relationships Scotland. Written submission, page 4.

³⁵¹ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4408.

³⁵² Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Cols 4543-4544.

³⁵³ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4572.

should be encouraged in court rules, but we only go so far in that regard”, adding that “I think that ... it will be a generational change”.³⁵⁴

Alternative Dispute Resolution: recommendations

330. **The Committee notes the views of some witnesses that the Bill does not go far enough in embedding alternative dispute resolution within the civil court system. While we do not accept that parties should be mandated to undertake ADR, we consider that it plays an important role in facilitating the settlement of cases where appropriate. We believe that in-court advice and guidance on the use of ADR and how it may be accessed should be more available across Scotland. The Committee therefore seeks further information from the Scottish Government on the steps it is taking to promote use of ADR where appropriate to ensure that opportunities for non-court settlements are encouraged.**

SCOTTISH COURTS AND TRIBUNALS SERVICE

Overview of provisions

331. The Bill renames the Scottish Court Service as ‘the Scottish Courts and Tribunals Service’ (SCTS). Staff employed by the Scottish Ministers in the delivery unit of the Scottish Government known as ‘the Scottish Tribunals Service’ will be transferred to the SCTS along with any property and liabilities.³⁵⁵ The Policy Memorandum states that “it is intended that the proposals should be given effect to by April 2015 ahead of the wider reform of the Scottish courts made by this Bill.”³⁵⁶ The Policy Memorandum states that “one of the principal motivating factors for reform of tribunals in Scotland was the desire to increase the independence of the tribunals from the Scottish Ministers, particularly as a number of tribunals are required to review ministerial decisions, actions and omissions”.³⁵⁷

Impact on tribunals

332. Some witnesses expressed concern regarding the terminology used to describe the proposal. For example, CAS said it was concerned that the move was described as a ‘merger’ of the Scottish Court Service and Scottish Tribunals Service (in the Scottish Government consultation), but is now being referred to as a ‘transfer’ (in the Policy Memorandum). CAS argued that the SCS should not be the “dominant partner”, but instead there should be equality between the services. The Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC) also expressed concern that the culture and working practices of the SCS may dominate those of the STS, “leading to the dilution of the specialist nature and user-focus of tribunals”.³⁵⁸

333. Some, including the Law Society³⁵⁹, CAS³⁶⁰ and STAJAC³⁶¹, felt that this could be addressed by including representation of the tribunal sector on the joint board of the SCTS, which is currently not provided for in the Bill.

³⁵⁴ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4573.

³⁵⁵ Policy Memorandum, paragraph 302.

³⁵⁶ Policy Memorandum, paragraph 299.

³⁵⁷ Policy Memorandum, paragraph 296.

³⁵⁸ Scottish Tribunals and Administrative Justice Advisory Committee. Written submission, page 1.

³⁵⁹ Law Society of Scotland. Written submission, page 12.

Scottish Courts and Tribunal Service: recommendations

334. The Committee supports the proposal to merge the Scottish Court Service and Scottish Tribunals Service. While we welcome this attempt to increase the independence of tribunals from the Scottish Ministers, we recommend that the joint board of the Scottish Courts and Tribunals Service should include representation from the tribunal sector to ensure that the new organisation recognises the specialist nature of tribunals.

IMPLEMENTATION OF REFORMS

Pace of change

335. In his introduction to the SCCR report, Lord Gill stressed that “our proposals should not be seen as a series of good ideas, the easiest and cheapest of which can be cherry-picked for the purposes of legislation [as] that course would simply perpetuate the ad hoc approach that has obstructed true progress in civil justice for so long”. He added that “we put these proposals forward as an integrated solution”.³⁶²

336. The Policy Memorandum suggests that “an alternative approach would have been to retain the status quo and not implement the recommendations of the SCCR; ... however, such an approach would mean that the current state of the Scottish civil courts, which Lord Gill described as ‘slow, inefficient and expensive’ would remain”.³⁶³ It adds that “the Scottish Government agrees that to take forward the Review’s recommendations on a piecemeal, ad hoc basis would risk the leap of true progress envisaged in the Review [and is] persuaded of the benefits of implementing the recommendations as a package”.³⁶⁴

337. Some witnesses, however, questioned this approach. Keith Stewart QC, for example, suggested that “contrary to the views expressed in the Policy Memorandum, it is highly desirable that change to something as important as a legal system should proceed incrementally, allowing for the gradual testing of new measures to ensure they work as intended”.³⁶⁵

Pace of change: recommendations

338. The Committee is persuaded that the proposals in the Bill should be adopted as a package in line with the recommendations of the Scottish Civil Courts Review.

Capacity of the courts

339. The Financial Memorandum on the Bill (table 11 and paragraph 73) suggests that 2,700 cases will transfer from the Court of Session to the sheriff courts, representing 57% of the workload of the Court of Session and 3% of the workload of the sheriff courts (on 2011/12 figures). It also highlights that a significant

³⁶⁰ Citizens Advice Scotland. Written submission, page 2.

³⁶¹ Scottish Tribunals and Administrative Justice Advisory Committee. Written submission, page 1.

³⁶² Report of the Scottish Civil Courts Review, page x.

³⁶³ Policy Memorandum, paragraph 26.

³⁶⁴ Policy Memorandum, paragraph 27.

³⁶⁵ Keith Stewart QC. Written submission, page 1.

majority of these cases are expected to be heard by the new specialist personal injury court.

340. The Committee heard concerns from the Law Society and Faculty of Advocates regarding the existing capacity of the sheriff courts and their ability to absorb the new cases resulting from the provisions in the Bill.³⁶⁶ Ampersand Advocates highlighted that cases in the sheriff court “often take months to complete [and] the result is that parties become frustrated, while expenses continue to mount”.³⁶⁷ APIL suggested that “everyone who practises in the sheriff court knows the time pressures and constraints under which they currently operate” and argued that “the idea that a system already creaking can seamlessly accommodate another 2,770 cases is hopelessly optimistic”.³⁶⁸ Ronnie Conway expanded on APIL’s position by describing the existing system as being “in crisis”.³⁶⁹ Iain A J McKie added that “change introduced into an already struggling organisation can only serve to further destabilise it, lower the efficiency and morale of those working within it and undermine the potentially valuable intended reforms”.³⁷⁰ Witnesses, such as Ronnie Conway of APIL³⁷¹ and Lauren Wood of CAS³⁷², also highlighted concerns that the recent and planned court closures would place more pressure on the sheriff court.

341. However, Sheriff Principal Stephen told the Committee that the proposed reforms would allow the courts to work more efficiently, thus freeing up current resources.³⁷³ She also highlighted that, if the Bill is passed, “cases will start in the sheriff court and there will be a gradual build-up of the volume”, adding that “there will not be a tsunami of work descending on the sheriff court”.³⁷⁴

342. Eric McQueen of the SCS highlighted that, in fact, sheriff courts face less pressure today than two years ago due to a general downward trend in demand for civil court services.³⁷⁵ He said that “three or four years ago we were running more than 31,500 sitting days in the sheriff courts annually” but that the figure is now just under 29,000. He explained that “even if we allow for the courts that are now closing—which, to a certain extent, are supplemented by the capacity that is coming back from the High Court³⁷⁶—there are still more than 2,000 court sitting days that we were using in the past and are not using at the moment, so physical capacity is less of an issue”.³⁷⁷

343. The Lord President also told the Committee that he was “absolutely certain that the capacity exists in the sheriff courts to absorb all of the business, even with

³⁶⁶ See the submission from the Law Society of Scotland at page 4 and the submission from the Faculty of Advocates at page 5.

³⁶⁷ Ampersand Advocates. Written submission, paragraph 4.

³⁶⁸ APIL. Written submission, paragraph 10.

³⁶⁹ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4426.

³⁷⁰ Iain A J McKie. Written submission, page 1.

³⁷¹ Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4440.

³⁷² Scottish Parliament Justice Committee. *Official Report*, 18 March 2014, Col 4362.

³⁷³ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4475.

³⁷⁴ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4482.

³⁷⁵ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4482.

³⁷⁶ The High Court is currently using courts in Edinburgh Sheriff Court while refurbishment work is taking place.

³⁷⁷ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4475.

the closure of the outlying courts”.³⁷⁸ He also said that he was confident that the proposals would “ensure that civil actions could be dealt with in one diet, unless there is some special reason not to do that”.³⁷⁹

344. When this issue was raised during evidence at the Finance Committee, the Scottish Government Bill Team reiterated that around 98% of cases raised in the Court of Session do not come to proof and that 67% of all personal injury cases are already heard in the sheriff courts.³⁸⁰ However it should be noted that the 98% figure relates to personal injury cases. The Finance Committee highlighted the contradiction that, on the one hand the intention is to relieve a substantial part of the Court of Session’s business, yet, on the other hand, around 98% of cases do not come to proof and therefore, it is argued, do not generate significant work for the court.³⁸¹

345. In response to the Finance Committee’s observation, the Minister told this Committee that she did not see a contradiction between the Scottish Government’s assertion that removing 2,700 cases from the Court of Session would significantly increase efficiency and its claim that 98% of these cases are settled without a hearing. She explained that even cases that settle without proof involve proceedings and scheduling of time in the court, which “are part of the problem of clogging up the courts”³⁸², adding that, “if that business is lifted away from it, its other business will be able to proceed far more expeditiously”.³⁸³ The Minister also stressed that “we are not increasing the case load in the Scottish civil justice system at all; we are moving it [and] we believe that we are making it far more efficient than it currently is”.³⁸⁴

346. The Minister also confirmed that, “on capacity, the proposals will result in only 3 per cent increase in case load for the sheriff courts [and] in view of the drop in the level of civil business in the sheriff courts in the past five years, we believe that they are well placed to handle the business, particularly as most of the cases will now be raised in the new specialist personal injury court”.³⁸⁵

Capacity of the courts: recommendations

347. The Committee notes the concerns of witnesses regarding the capacity of the personal injury court and sheriff courts to take on 2,700 cases from the Court of Session. While we accept that a large proportion of these cases will not go to proof, sufficient time and capacity will be required to deal with the settlement of such cases. We also question whether sufficient time has passed to assess the impact of recent and planned sheriff court closures on business in the sheriff court to provide confidence that further additional business can be accommodated. We therefore seek further information on where capacity will be lost as a result of court closures and how that can be

³⁷⁸ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4541.

³⁷⁹ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4540.

³⁸⁰ Finance Committee Report on the Financial Memorandum on the Courts Reform (Scotland) Bill, page 7.

³⁸¹ Finance Committee Report, paragraph 45.

³⁸² Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Cols 4579-80.

³⁸³ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4580.

³⁸⁴ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4581.

³⁸⁵ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4560.

dealt with in the other local courts, as well as plans to ensure a further 3% capacity on top of this.

Resources

348. The Financial Memorandum (FM) on the Bill does not identify any new Scottish Government funding for the proposals (except in relation to the merger of the SCS and the STS). Short-term expenditure is identified in a number of areas, which will mainly fall on the SCS. It is currently envisaged that this will be met through increased court fees. It is expected that there will be savings in the short to medium term, although these will accrue to the Scottish Government rather than the SCS.³⁸⁶

349. The FM suggests that the Scottish Legal Aid Board (SLAB) “expects that the expenditure on counsel will reduce over time and estimates that there could be savings up to 50% of expenditure on counsel (based on the 2012-13 level that would be a saving of £1.2m) as not all cases will require the expertise of counsel in the sheriff court”.³⁸⁷ However, Lindsay Montgomery, Chief Executive of SLAB, told the Committee that “the levels of savings will be in the order of £800,000 to £1.2 million, depending on the population of cases that come through”.³⁸⁸

350. It is intended that there will be phased introduction of summary sheriffs over a ten-year period, with one summary sheriff being appointed as each sheriff retires.³⁸⁹ It is envisaged that the staffing requirement for both the specialist personal injury court and the Sheriff Appeal Court will be met from the current complement of sheriffs. A number of witnesses told the Committee that additional investment would be needed in the sheriff courts to ensure they are able to provide an adequate level of service. The Law Society, for example, argued that “the swift resolution of these cases and, in particular, commercial disputes will only be achieved if the sheriff courts across Scotland are adequately resourced to deal with much higher volumes allowing court time for interlocutory matters, hearings and decision-making”.³⁹⁰

351. A number of witnesses, including CAS and APIL, raised particular concerns in relation to investment in the IT infrastructure of the sheriff courts, which are considered to lag behind the Court of Session. APIL suggested that email, e-motion procedure, and electronic recording of evidence, which are effective in the Court of Session, should be available in the sheriff courts and specialist personal injury court.³⁹¹ It further questioned whether the £10,000 to be set aside for the SCS to make “minor updates to one of its IT systems” would be sufficient to make these necessary changes.

352. Eric McQueen of the SCS told the Committee that “cost is always a concern ... but we are confident and comfortable that, within the funding that we have in our allocations from the Government, and given the plans for the future and the

³⁸⁶ SPICe briefing 14/23. page 13.

³⁸⁷ Financial Memorandum, paragraph 97.

³⁸⁸ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4483.

³⁸⁹ Financial Memorandum, paragraph 42.

³⁹⁰ Law Society of Scotland. Written submission, page 4.

³⁹¹ APIL. Written submission, paragraph 12.

investment in technology, we have sufficient funds to implement and facilitate the civil court reforms”.³⁹² He explained that the reforms were part of long-term planning, stating that “to a large extent, the spending review protected our revenue budget for the next two years [and that] we were also allocated an additional £3 million this year and £3.5 million next year in capital expenditure over and above what was planned, so big investment is going into the organisation this year and next year, particularly in information and communications technology”.³⁹³ He advised that “the ICT costs in the Financial Memorandum are only the very small amounts that are specific to the Bill [and] the major part of the investment is already underway; it has been agreed by the Scottish Court Service Board and it is in budgets for the next two years”.³⁹⁴

353. More generally on the issue of resources, the Lord President told the Committee that “the present system is a failure; it is inefficient and needlessly expensive and, as a result, at a time when resources are scarce, public money is being inefficiently spent”. He added that “the whole thinking behind the Bill concerns not so much the financial effects on the profession but the effects on the public purse”.³⁹⁵

354. The Minister confirmed that it was possible for the reforms to be implemented without any additional resources because “we are not increasing the number of cases overall but shifting them within the system, and that comes from within the same overall set of resources”. She added that “arguably, given the benefits for it, the Court of Session might be able to make considerable savings because it will be able to work far more efficiently than it is currently able to do”.³⁹⁶

Resources: recommendations

355. The Committee notes the concerns of witnesses that no new resources have been made available to implement the extensive reforms set out in the Bill. While we understand that the number of cases moving from the Court of Session to the Sheriff Court are expected to stay largely the same, we remain to be convinced that the new procedures will have no financial impact overall. We therefore recommend that the Scottish Government continues to monitor implementation of these reforms to ensure adequate resources are in place.

356. The Committee also notes the claim that, as a result of the reforms, significant savings will accrue to the Scottish Government rather than the Scottish Court Service, in terms of judicial salaries. We therefore seek clarification whether it is intended that those savings will be used to benefit the civil justice system or whether they will be used to fund spending in other departments.

357. We note the evidence from the Scottish Legal Aid Board that the expected savings on the amount spent by counsel would depend on the

³⁹² Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4537.

³⁹³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4537.

³⁹⁴ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Col 4478.

³⁹⁵ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4549.

³⁹⁶ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4581.

number of cases coming through. We invite the Scottish Government to respond to these comments.

Court rules

358. Much of what the SCCR envisaged in terms of active case management by judges, modern court procedures and increased accessibility will actually be delivered through changes to the procedural rules under which the civil courts are run. This work falls to the SCJC. The Financial Memorandum (paragraph 163) states that it is expected this will take 10 years (although most of the work will be carried out in 2014/15 and 2015/16) and cost around £2 million.³⁹⁷

359. The Bill provides for the Court of Session to have wide-ranging rule making powers in order to ensure the SCJC can carry out its task effectively. Sections 96 and 97 of the Bill create a general power enabling the Court of Session to regulate procedure, as well as specific examples, including consideration of alternative dispute resolution.

360. The SCJC's submission focuses on whether these powers are adequate to implement everything envisaged in the SCCR. Although broadly content, it raises concerns about their powers in a number of areas, including: to recommend rules controlling offers of settlement made during litigation; to control the fees of those providing litigation services, and whether it will be possible to regulate fees of advocates.

361. The SCJC Rules Rewrite Working Group published an interim report on 29 March 2014 setting out the vision and objectives of the new rules, how they should be drafted and priority areas for implementation, including some of the areas in the Bill.³⁹⁸

Court fees

362. The Financial Memorandum states that, "as civil actions are generally about resolving disputes between two private individuals, the general principle is that the parties rather than the state should bear the cost of civil actions [and] this is done through the setting of court fees".³⁹⁹ It indicates that the Scottish Government expects the SCS to be able to fully fund the reform programme through the level of future fee income⁴⁰⁰, but acknowledges that any substantial reduction in fee income could have an effect on implementation of some of the reforms.⁴⁰¹

363. APIL suggested that there could be a £1 million shortfall in the court fees if, as proposed in the Bill, cases are to move from the Court of Session to the sheriff courts.⁴⁰² However, Eric McQueen advised the Committee that "when the fee increase went through in 2012, there was an above-inflation element, which

³⁹⁷ Financial Memorandum, paragraph 163.

³⁹⁸ Interim Report of the Rules Rewrite Group, page 35.

³⁹⁹ Court fees are paid to the court at the start of proceedings to cover outlays, for example, for filing an action.

⁴⁰⁰ Financial Memorandum, paragraph 26.

⁴⁰¹ Financial Memorandum, paragraph 31.

⁴⁰² Scottish Parliament Justice Committee. *Official Report*, 25 March 2014, Col 4429.

generated about £1.6 million of additional funding for the Scottish Court Service”.⁴⁰³ He said that “over the next 18 months we will start to think about whether the reforms will have a knock-on effect on the level of court fees”, but confirmed that he did not expect to see a large overall increase in the total amount of fees that are recovered for the cost of civil business.⁴⁰⁴ Lindsay Montgomery of SLAB suggested that court fees “is an area of discussion between us and the Government in early course [as] the Bill will require a number of changes to fees, including for summary sheriff business”.⁴⁰⁵

364. In its written submission, the Scottish Civil Justice Council highlighted Sheriff Principal Taylor’s recommendation that the SCJC form a sub-committee to deal with the level of fees for litigation which may be recovered as expenses. The SCJC argued that the Bill should be used clarify the SCJC’s functions in relation to the preparation of fees instruments to allow it to begin work on this recommendation in early course.⁴⁰⁶

365. The Minister told the Committee that “there will be a consultation in 2014-15, and orders will be laid in Parliament for scrutiny [therefore] if the Committee has any concerns, it can keep its eye out for those orders coming through after next year’s consultation”.⁴⁰⁷

Resources: recommendations

366. The Committee seeks assurances that there will not be a substantial rise in the level of court fees to pay for the reforms in the Bill and will monitor closely the outcome of the next consultation on fees in 2015 and consequent statutory orders.

367. The Committee also asks the Scottish Government to reflect on the Scottish Civil Justice Council’s suggestion that the Bill should be used to clarify its functions in relation to the preparation of fees instruments.

POLICY AND FINANCIAL MEMORANDUMS

368. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the Policy Memorandum which accompanies the Bill. The level of detail provided in the Policy Memorandum on the policy intention behind the provisions in the Bill and why alternative approaches were not favoured was extremely useful in assisting the Committee in our scrutiny of the Bill. The Committee was also content with the level of detail provided in relation to the Scottish Civil Courts Review, which forms the basis of the Bill, and concerning the consultation on the draft Courts Reform (Scotland) Bill conducted by the Scottish Government prior to introduction of this Bill.

369. The same rule requires the lead committee to report on the Financial Memorandum (FM). The Committee notes the issues raised by the Finance

⁴⁰³ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4537.

⁴⁰⁴ Scottish Parliament Justice Committee. *Official Report*, 22 April 2014, Col 4538.

⁴⁰⁵ Scottish Parliament Justice Committee. *Official Report*, 1 April 2014, Cols 4490-91.

⁴⁰⁶ Scottish Civil Justice Council. Written submission, page 3.

⁴⁰⁷ Scottish Parliament Justice Committee. *Official Report*, 29 April 2014, Col 4579.

Committee in its report on the FM and has sought to reflect these throughout the report, including in a dedicated section of the report on resources.

GENERAL PRINCIPLES

370. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.

371. The Committee supports the general principles of this Bill. Our recommendations aimed at improving certain aspects of the Bill are set out in the main body of this report.

ANNEXE A: REPORTS FROM OTHER COMMITTEES

Finance Committee consideration

The Finance Committee's Report on the Financial Memorandum of the Courts Reform (Scotland) Bill is available at:

http://www.scottish.parliament.uk/S4_FinanceCommittee/Reports/fiR14-courtsreform.pdf

Delegated Powers and Law Reform Committee consideration

The Delegated Powers and Law Reform Committee's 29th Report 2014 (Session 4): Courts Reform (Scotland) Bill is available at:

http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/suR-14-29w.pdf

ANNEXE B: EXTRACTS FROM THE MINUTES

6th Meeting, 2014 (Session 4) Tuesday 18 February 2014

Courts Reform (Scotland) Bill: The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed: (a) the proposed timetable for its scrutiny of the Bill; (b) to issue a call for written evidence; (c) proposed witnesses for its meeting on 18 March; and (d) to consider proposed witnesses for its meetings on 25 March, 1 and 22 April at a later date.

7th Meeting, 2014 (Session 4) Tuesday 4 March 2014

Work programme (in private): The Committee considered its work programme and agreed: (a) proposed witnesses for its Stage 1 evidence sessions on 25 March, 1 and 22 April on the Courts Reform (Scotland) Bill; [. . .].

9th Meeting, 2014 (Session 4) Tuesday 18 March 2014

Courts Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Fred Tyler, Member of the Civil Justice Committee, Law Society of Scotland;
James Wolffe QC, Dean, Faculty of Advocates;
Julia Clarke, Principal Advocate, Which?;
Lauren Wood, Policy Manager, Citizens Advice Scotland;
Sheriff Gordon Liddle, Sheriff Lindsay Wood, and Sheriff Colin William Pettigrew, Sheriffs' Association.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

Work programme (in private): The Committee considered its work programme and agreed to: [. . .] (b) invite Sheriff Principal Taylor to give evidence on the Courts Reform (Scotland) Bill at its meeting on 22 April 2014; [. . .].

10th Meeting, 2014 (Session 4) Tuesday 25 March 2014

Courts Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid;
Paul Brown, Principal Solicitor/Chief Executive, Legal Services Agency;
Sally Swinney, Chair, and Karen Gibbons, Vice Chair, Family Law Association;
Alan Rogerson, Forum of Scottish Claims Managers;
Dave Moxham, Deputy General Secretary, Scottish Trades Union Congress;
Ronnie Conway, Co-ordinator in Scotland, Association of Personal Injury Lawyers;
Robert Milligan QC, Compass Chambers.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

Courts Reform (Scotland) Bill (in private): The Committee agreed not to invite any additional witnesses at Stage 1 of the Bill.

11th Meeting, 2014 (Session 4) Tuesday 1 April 2014

Courts Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Jonathan Mitchell QC;
Tony Kelly, Chair, Justice Scotland;
Lloyd Austin, Convener, Governance Forum, Scottish Environment Link;
Eric McQueen, Chief Executive, Scottish Court Service;
Lindsay Montgomery, Chief Executive, Scottish Legal Aid Board;
Sheriff Principal Mhairi Stephen, Member, Scottish Civil Justice Council.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

12th Meeting, 2014 (Session 4) Tuesday 22 April 2014

Courts Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Phyllis Craig MBE, Senior Welfare Rights Officer, Clydeside Action on Asbestos;
Sheriff Principal James Taylor;
Rt Hon Lord Gill, Lord President of the Court of Session;
Eric McQueen, Chief Executive, Scottish Court Service.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

13th Meeting, 2014 (Session 4) Tuesday 29 April 2014

Courts Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Roseanna Cunningham, Minister for Community Safety and Legal Affairs,
Cameron Stewart, Bill Team Leader, and Nicholas Duffy, Solicitor, Legal Directorate, Scottish Government.

The Minister indicated that she is a non-practising member of the Faculty of Advocates. Roderick Campbell indicated that he is a member of the Faculty of Advocates.

14th Meeting, 2014 (Session 4) Tuesday 6 May 2014

Courts Reform (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.

ANNEXE C: INDEX OF ORAL EVIDENCE

[9th Meeting, 2014 \(Session 4\) Tuesday 18 March 2014](#)

Fred Tyler, Member of the Civil Justice Committee, Law Society of Scotland
James Wolffe QC, Dean, Faculty of Advocates
Julia Clarke, Principal Advocate, Which?
Lauren Wood, Policy Manager, Citizens Advice Scotland
Sheriff Gordon Liddle, Sheriff Lindsay Wood, and Sheriff Colin William Pettigrew,
Sheriffs' Association

[10th Meeting, 2014 \(Session 4\) Tuesday 25 March 2014](#)

Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid
Paul Brown, Principal Solicitor/Chief Executive, Legal Services Agency
Sally Swinney, Chair, and Karen Gibbons, Vice Chair, Family Law Association
Alan Rogerson, Forum of Scottish Claims Managers
Dave Moxham, Deputy General Secretary, Scottish Trades Union Congress
Ronnie Conway, Co-ordinator in Scotland, Association of Personal Injury Lawyers
Robert Milligan QC, Compass Chambers

[11th Meeting, 2014 \(Session 4\) Tuesday 1 April 2014](#)

Jonathan Mitchell QC
Tony Kelly, Chair, Justice Scotland
Lloyd Austin, Convener, Governance Forum, Scottish Environment Link
Eric McQueen, Chief Executive, Scottish Court Service
Lindsay Montgomery, Chief Executive, Scottish Legal Aid Board
Sheriff Principal Mhairi Stephen, Member, Scottish Civil Justice Council

[12th Meeting, 2014 \(Session 4\) Tuesday 22 April 2014](#)

Phyllis Craig MBE, Senior Welfare Rights Officer, Clydeside Action on Asbestos
Sheriff Principal James Taylor
Rt Hon Lord Gill, Lord President of the Court of Session
Eric McQueen, Chief Executive, Scottish Court Service

[13th Meeting, 2014 \(Session 4\) Tuesday 29 April 2014](#)

Roseanna Cunningham, Minister for Community Safety and Legal Affairs,
Cameron Stewart, Bill Team Leader, and Nicholas Duffy, Solicitor, Legal
Directorate, Scottish Government

ANNEXE D: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

Submissions received on the Courts Reform (Scotland) Bill

[Advocates Family Law Association \(153KB pdf\)](#)
[Ampersand Advocates \(186KB pdf\)](#)
[Anderson, Gilbert M \(166KB pdf\)](#)
[Asda Stores Ltd \(155KB pdf\)](#)
[Associated Society of Locomotive Engineers and Firemen \(147KB pdf\)](#)
[Association of British Insurers \(134KB pdf\)](#)
[Association of Personal Injury Lawyers \(366KB pdf\)](#)
[Association of Personal Injury Lawyers \(supplementary submission\) \(466KB pdf\)](#)
[Axiom Advocates \(131KB pdf\)](#)
[Bartos, David, Advocate \(188KB pdf\)](#)
[Caldwell, Marion, QC \(6KB pdf\)](#)
[Carmichael, Ailsa, QC \(181KB pdf\)](#)
[Chalmers, James; Ferguson, Pamela; Norrie, Kenneth; Paisley, Roderick; and Reid, Kenneth\(79KB pdf\)](#)
[Chartered Society of Physiotherapy Scotland \(199KB pdf\)](#)
[Children's Hearings Scotland \(142KB pdf\)](#)
[Citizens Advice Scotland \(304KB pdf\)](#)
[Citizens Advice Scotland \(supplementary submission\) 336KB pdf\)](#)
[Clan Childlaw \(325KB pdf\)](#)
[Clydeside Action on Asbestos \(204KB pdf\)](#)
[Compass Chambers \(147KB pdf\)](#)
[Educational Institute of Scotland \(108KB pdf\)](#)
[Faculty of Advocates \(297KB pdf\)](#)
[Faculty of Advocates \(supplementary submission\) \(386KB pdf\)](#)
[Families Need Fathers Scotland \(216KB pdf\)](#)
[Family Law Association \(126KB pdf\)](#)
[Fitzpatrick, Brian, Advocate \(204KB pdf\)](#)
[Forum of Insurance Lawyers \(141KB pdf\)](#)
[Forum of Scottish Claims Managers \(105KB pdf\)](#)
[Friends of the Earth Scotland and Environmental Law Centre Scotland \(157KB pdf\)](#)
[Gretton, Professor George L, University of Edinburgh \(64KB pdf\)](#)
[Group of Devils, Faculty of Advocates \(151KB pdf\)](#)
[Heaney, Bryan, Advocate \(158KB pdf\)](#)
[Judicial Appointments Board for Scotland \(284KB pdf\)](#)
[Justice Scotland \(217KB pdf\)](#)
[Justice Scotland \(supplementary submission\) \(273KB pdf\)](#)
[Law Society of Scotland \(331KB pdf\)](#)
[Lawford Kidd, Personal Injury Solicitors \(74KB pdf\)](#)
[Logan, Angus S, Solicitor \(74KB pdf\)](#)
[Lord President of the Court of Session \(167KB pdf\)](#)
[Lord President of the Court of Session \(supplementary submission\) \(207KB pdf\)](#)
[Mackay Ian, QC \(236KB pdf\)](#)
[Macleod and MacCallum \(210KB pdf\)](#)

[McKie, Iain A J \(134KB pdf\)](#)
[Medical Protection Society \(77KB pdf\)](#)
[Money Advice Scotland \(333KB pdf\)](#)
[Motor Accident Solicitors' Society \(133KB pdf\)](#)
[Mullen, Professor Tom, University of Glasgow \(340KB pdf\)](#)
[Name withheld \(130KB pdf\)](#)
[National Union of Rail, Maritime and Transport Workers \(113KB pdf\)](#)
[Part Time Sheriffs' Association \(121KB pdf\)](#)
[Police Scotland \(6KB pdf\)](#)
[Relationships Scotland \(108KB pdf\)](#)
[Scottish Arbitration Centre \(102KB pdf\)](#)
[Scottish Children's Reporter Administration \(196KB pdf\)](#)
[Scottish Civil Justice Council \(231KB pdf\)](#)
[Scottish Criminal Cases Review Commission \(68KB pdf\)](#)
[Scottish Legal Aid Board \(239KB pdf\)](#)
[Scottish Mediation Network \(111KB pdf\)](#)
[Scottish Police Federation \(77KB pdf\)](#)
[Scottish Trades Union Congress \(89KB pdf\)](#)
[Scottish Tribunals and Administrative Justice Advisory Committee \(162KB pdf\)](#)
[Scottish Women's Aid \(274KB pdf\)](#)
[Shelter Scotland \(158KB pdf\)](#)
[Simpson and Marwick \(161KB pdf\)](#)
[Society of Solicitor Advocates \(147KB pdf\)](#)
[Stewart, Kevin, QC \(144KB pdf\)](#)
[Tariq, Usman; McClelland, Ross; McLean, David; MacLeod, Ceit-Anna; and Reid, Paul; \(members of the Faculty of Advocates\) \(249KB pdf\)](#)
[Terra Firma Chambers \(135KB pdf\)](#)
[Thompsons Solicitors and Solicitor Advocates \(715KB pdf\)](#)
[Thompsons Solicitors and Solicitor Advocates \(supplementary submission\) \(134KB pdf\)](#)
[Union of Shop, Distributive and Allied Workers \(29KB pdf\)](#)
[Unison Scotland \(112KB pdf\)](#)
[Unite the Union \(222KB pdf\)](#)
[Westwater Advocates, Edinburgh \(142KB pdf\)](#)
[Which? \(120KB pdf\)](#)
[Zurich Insurance \(75KB pdf\)](#)

Other written evidence

[Letter from the Minister for Community Safety and Legal Affairs to the Convener \(30 April 2014\) \(136KB pdf\)](#)

Written submissions are also published (in the order received) on the Committee's webpage at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/74192.aspx>

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