FINANCE COMMITTEE CALL FOR EVIDENCE

COURTS REFORM (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM FACULTY OF ADVOCATES

Introduction
1. The Faculty offers the following comments on the Financial Memorandum to the Courts Reform (Scotland) Bill.

Overview
2. In relation to paragraph 9, we question whether greater efficiency will in fact be achieved given that the involvement of counsel is often central to early and efficient settlement of cases. Removing Counsel from cases and assuming the same efficient settlement will be achieved is not a proposition supported by any evidence from any respondent to the consultation.

3. Unlike criminal cases, civil litigation is predominantly privately funded. It would accordingly be an error to see the principal benefit of these reforms as saving money to the public purse. The greatest saving, at least in the context of personal injury litigation, will be to insurance companies.

4. Paragraphs 18 and 155 of the Financial Memorandum are inaccurate and misleading. These state:

“In addition, the Faculty of Advocates have also expressed concern due to the reduction in cases in the Court of Session and the High Court as a result of these reforms, as advocates have exclusive rights of audience in these courts.

5. This statement is inaccurate and misleading in at least two respects:

- Advocates do not have exclusive rights of audience in the Court of Session and the High Court. Solicitors with higher court rights of audience also have rights of audience in those courts.

- The Faculty of Advocates has expressed concern about two features of the Bill: the increase in the exclusive competence of the sheriff court and the creation of a sheriff appeal court. Although those features of the Bill will have a direct impact on the Faculty of Advocates and its members and the Faculty is legitimately concerned about those impacts on behalf of its members, the Faculty’s concerns are primarily based on other considerations.

6. Insofar as the Faculty's concerns relate to the impact on its members and on the bar as a whole, those concerns are based on a conviction that the continued existence and health of the independent bar is a public good, which is of benefit to the people of Scotland. Advocacy is a specialist professional skill, in which members of the Faculty of Advocates are trained. Litigants, in any court or tribunal, with serious claims which matter to them, require to be effectively represented. This is not the view only of the Faculty of Advocates. It is echoed in submissions to the Justice
Committee from Clydeside Action on Asbestosis, USDAW, the RMT Union, the EIS, the Chartered Society of Physiotherapy Scotland and Unison Scotland.

7. The impact on advocates of these proposals will be marked. The Policy Memorandum estimates that the proposals will remove almost half of the cases currently heard in the Court of Session. The precise effect will depend on the extent to which counsel may follow the cases. Although, even under the current rules applied in the sheriff court, advocates will continue to be instructed in some cases, the extent to which that will be so is impossible to predict. All areas of the bar are likely to be affected, but the effect is not likely to be uniform. In particular, advocates who specialize in personal injury work and advocates in the early years of practice are likely to be most affected. It seems inevitable that advocates will leave the bar and that our already small bar will become even smaller. There will also be an adverse impact on the opportunities for advocates to acquire the experience in the early years of practice which will equip them to handle the more difficult and complex cases in the future.

Funding the reforms
8. The Faculty notes that at paragraph 26, “the general principle” is stated that parties should bear the cost of civil actions through the setting of court fees at a level which recovers the costs to public funds of providing the services of the courts. This is a “principle” to which the Faculty takes exception. The availability of public courts to determine disputes according to law is a public good. It secures the rule of law. It is also one of the essential underpinnings of a successful economy: see Regulatory Policy Institute, “Assessing the economic significance of the professional legal services sector in the European Union”, August 2012. The administration of justice, like the provision of public healthcare or education services, is essential to the long term wellbeing of society. Like healthcare and education, the administration of justice should be supported by society as a whole.

Personal injury court
9. We note at paragraph 65 and 68 that there is a markedly changed picture since the Civil Courts Review was commissioned in 2007. The table produced shows a reduction from 2009/10 to 2011/12 of 6034 cases initiated in the Outer House to 4613 cases. The proposed reforms should be considered against that already significantly changed landscape.

10. An assumption is made (paragraph 73) that cases displaced from the Court of Session would necessarily be raised in the National Personal Injury Court as opposed to local Sheriff Courts around the country. Unless the National Personal Injury Court successfully replicates the reasons for the success of Chapter 43 procedure in the Court of Session, this might not be the case.

11. Paragraph 79 proceeds on the basis that the National Personal Injury Court will continue to offer the same benefits as at present are available under Chapter 43 in the Court of Session and will remain attractive to those seeking to use the courts. The sheriff court rules offer the same procedures as Chapter 43, yet the Court of Session has remained an attractive forum. One reason for that is the availability of counsel.
12. Paragraph 83 identifies savings of £57,000 which are envisaged from using sheriffs rather than Outer House judges for sitting days. The Faculty does not understand there to be any intention to make Court of Session judges redundant, so it is not clear that this is a real saving. Separately, the involvement of counsel can facilitate settlement of cases; and it is possible that more cases will, in fact, run to proof if counsel are less frequently used.

13. In paragraph 85 it is said that any savings by reason of the non-instruction of counsel would accrue to those who fund their cases personally. In the personal injury context, such cases are extremely rare – the pursuer is ordinarily funded speculatively on a ‘no win, no fee’ basis and the defender routinely supported by a policy of insurance.

14. The estimated impact on the Legal Aid board (paras 94-97) is unlikely to be accurate. As the Financial Memorandum indicates, at present straightforward cases with a high chance of success proceed on a speculative basis and SLAB receives applications for legal aid only in the more difficult cases. By their nature, the more difficult cases are likely to require the instruction of counsel (which appears to be where the savings are envisaged).

15. The Faculty notes that the savings to the public purse of the move of non-personal injury cases to the sheriff court are “expected to be marginal”: para. 98. That, in our submission, is a very important piece of evidence. If that is the case, it is not clear what public interest is served by compelling these litigants, who currently decide to proceed in the Court of Session, to proceed in the sheriff court when that court is admittedly in need of reform.

**Sheriff Appeal Court**

16. The estimate of sitting days for the Sheriff Appeal Court (para. 109) is based on the planning assumption that all appeals from the sheriff court to the Inner House are straightforward cases. This is an unreliable assumption. Some such appeals may be. But others are not, and one would expect that the cases which are appealed directly to the Inner House or which are appealed from the sheriff principal to the Inner House will include the more complex appeals from the lower courts.

17. It is said that the savings will be realized through the different in salaries paid to the judges of the Inner House and sheriffs principal and appeal sheriffs. It is not clear how there can be any saving in the salaries of judges in the Inner House unless the number of judges in the Inner House is to be reduced. Even if there is a longer term intention to reduce the complement of judges in the Court of Session, it seems unlikely that the number of judges in the Inner House could be reduced.