The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and out with the solicitor profession.

The Law Society of Scotland’s Civil Justice committee welcomes the opportunity to consider the call for written evidence from the Finance Committee on the financial memorandum to the Courts Reform (Scotland) Bill. We have also consulted with our Access to Justice, Criminal Law and Legal Aid committees around this written response.

We believe that the financial aspects of the Bill merit consideration in a number of areas:

- The number of cases, civil and criminal, post-reform is uncertain and it is difficult to assess whether maintaining 140 FTE (full time equivalent) judicial office-holders at Sheriff Court level is sufficient;
- The level of training required to allow for judicial specialisation in areas such as family, crime and commercial will likely incur additional expenditure;
- Clarification on the level of savings to the Legal Aid Fund would be helpful, particularly whether this includes recoupments from judicial expenses, legal aid contributions and clawback.

The main saving from the reform of judicial structures and the introduction of the new tier of summary sheriff is in judicial salaries and associated on-costs. The financial memorandum suggests that a complement of around 60 summary sheriffs will be recruited and on a 1:1 replacement basis as existing sheriffs retire. The assumptions are that around six sheriffs will retire each year over a decade and that summary sheriffs will be remunerated at 80% of the current salary of sheriffs: therefore, savings will increase by around £0.2m per annum, reaching £2m by the end of the ten year period.

We agree with the conclusions of these overall assumptions; it is outside our remit to comment on the remuneration of this new judicial tier. There are two broad
areas in which we believe that there may be cost implications: first, around whether
the existing FTE judicial office-holders at the Sheriff Court level, at around 140, will
be sufficient; second, a possible increase in expenditure on judicial training as a
result of the move towards greater judicial specialisation.

RESOURCING

7. The financial memorandum recognises “an uncertain future mix of business
coming before the courts in a post-reform environment” (paragraph 40). The broad
scheme for the deployment of judicial office-holders, however, remains static at 140
FTE judicial office-holders, around 40% of these being summary sheriffs and 60%
being sheriffs (paragraph 42). We do not believe that such widespread changes to
the civil courts system in Scotland, and also the criminal courts system, can be easily
predicted.

8. The number of court rooms available across the Scottish Court Service (SCS)
estate offers a nominal cap, though the use of part-time sheriffs and honorary
sheriffs to date suggests that judicial resource may need to be flexible to uncertain
demands ahead. The Gill Review, for instance, noted that 19% of sitting days in
2008-09 and 20% of sitting days in the first quarter of 2009-10 were conducted by
part-time sheriffs.¹

9. There are a number of reforms to the justice system currently underway. The
proposed abolition of the requirement for corroboration in criminal cases, currently
being considered as part of the Criminal Justice (Scotland) Bill, would see an
increase in the number of criminal cases brought. SCS has estimated a 6% increase
in the number of prosecutions through solemn procedure.² Our research suggests
that the number of cases moving to the Sheriff Courts as a result of the change to
the privative jurisdiction limit for the Court of Session will also be substantial: from
6152 initiated at the Court of Session in 2009-10 to around 150.³ The financial
memorandum suggests a lesser shift of 57%, of which around 2,000 would be
personal injury cases (paragraphs 72, 73).

10. Research across comparative jurisdictions suggests that the incidence of
litigation follows broadly with the economic cycle (in inverse to recourse to publicly
funded legal assistance). The financial memorandum notes that the number of cases
heard at first instance at Sheriff Court level has decreased by 36% between 2008-09
and 2011-12 (paragraph 65). Though there has been a decrease in the number of
civil and criminal cases in recent years, we anticipate that the combination of the
reforms, both legislative and non-legislative, implemented from the Gill Review, the
move of work to Sheriff Court level as a result of the change to the privative
jurisdiction level at the Court of Session and the changing economic climate will see
increasing business at the Sheriff Court level.

¹ Scottish Civil Courts Review, 2009, chapter 4, paragraph 16
² Shaping Scotland’s Court Services, Scottish Court Service, September 2012, paragraph 1.29
³ Courts Reform (Scotland) Bill: A Consultation Paper, The Law Society of Scotland’s response, May
2013
11. Judicial specialism may allow for greater scrutiny of issues in specialist proceedings, or may allow for these to be resolved at an earlier stage that currently with generalist sheriffs. A cap on the number of judicial office-holders offers certainty in expenditure on salaries and other on-costs, but may not serve court users or the justice system well.

TRAINING

12. Many jurisdictions face challenges with the resourcing of judicial training. It can be a significant overhead for justice sector budgets at a time of fiscal austerity and an additional demand for already busy judges. The Bill allows for greater judicial specialisation at the Sheriff Court level, at sections 34 to 37, and we broadly welcome this approach.

13. The financial memorandum notes that for summary sheriffs, “the replacement policy means that training costs for the new posts will be handled as per current budgets as the training will be based on what is currently used for new sheriffs” (paragraph 55). As summary sheriffs will have a similarly generalist jurisdiction to existing sheriffs, it does not appear that additional costs will arise initially. However, as the number of office-holders in this tier increases, it is envisaged that there will be an element of specialisation and we do not believe that this has been accurately captured.

14. The introduction of this new generalist judicial tier allows for the existing role of sheriff to offer specialisation in a number of different areas, such as family, crime, and commercial. In previous consultation responses around the Gill Review, and the draft Bill, we have also suggested that areas such as adults with incapacity may merit consideration. The transition from a generalist sheriff to a specialist role is likely to have financial implications.

15. There is no guarantee that applicants for judicial appointment will have the appropriate skill, experience and expertise in the kinds of casework and areas of law that they will be expected to deal with as specialist sheriffs. Therefore, training will be important and there will be a cost involved.

16. The financial memorandum suggests ‘one off’ costs of £10,000 and £20,000, for instance, for the design and set up of the personal injury court and the sheriff appeal court respectively, developing the process, creating the training programme for appeal sheriffs and staff and confirming the operating model (paragraphs 138, 139). We believe that there will be significant ‘one off’ costs in creating a new training programme for specialist sheriffs, and continuing costs to train specialist sheriffs in their areas of expertise.

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4 For instance, Review of Judicial Training and Education in Other Jurisdictions, Cheryl Thomas, May 2006
PERSONAL INJURY COURT

17. The financial memorandum establishes a number of savings from the introduction of a new personal injury court, as a number of personal injury cases are expected to be heard at Sheriff Court rather than at Court of Session level. It is estimated that there will be savings of around £57,000 in judicial salaries and £7,000 in clerks’ salaries and a saving of up to £1.2m to the Legal Aid Fund per annum following this change (paragraph 97).

JUDICIAL SALARIES

18. We are unclear about how the stated salary savings for the new personal injury court will be achieved. The memorandum considers the ways in which similar savings can be made with the introduction of the sheriff appeal court, noting that there will be short-term savings in time, as judicial office-holders can be deployed elsewhere, though in the medium to long term “to reduce the complement of judges and realise the cash savings to the judicial salaries budget” (paragraph 147). We have discussed the overall number of office-holders at Sheriff Court level, and restate that it is important that there is a clear discussion around the level of judicial resourcing.

LEGAL AID

19. We believe that there will be a saving to the Legal Aid Fund from the move of personal injury cases to the new specialist court. The number of medical negligence and reparation cases at the Court of Session paid under the legal aid scheme is small. Expenditure on these cases in 2012-13 was as follows:5

<table>
<thead>
<tr>
<th></th>
<th>Current year cost</th>
<th>Actual cost</th>
<th>case</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td>Solicitor (£000)</td>
<td>Advocate (£000)</td>
</tr>
<tr>
<td>Medical negligence</td>
<td>62</td>
<td>765</td>
<td>798</td>
</tr>
<tr>
<td>Reparation</td>
<td>86</td>
<td>868</td>
<td>1,302</td>
</tr>
</tbody>
</table>

5 Scottish Legal Aid Board Annual Report 2012-13, Annex 3, section 3.19 (costs expressed in £ unless otherwise stated)
20. The number of publicly funded medical negligence and reparation cases is small and there is a high level of variation year-on-year. For instance, there is a marked difference in expenditure for publicly funded reparation cases between 2011-12 and 2012-13: on a current year cost basis, the total paid in 2011-12 was £5.3m, while in 2012-13, £2.7m and average case costs were £42,668 and £31,871 for the same periods; on an actual case cost basis, the average case cost in 2011-12 was £42,048 in 2011-12 and £30,068 in 2012-13, with median case costs of £10,161 and £7,576 for the same periods.

21. It will also be difficult to predict the number of cases that are settled or proceed to court following these reforms. An advantage of the Court of Session is the high level of predictability in judgement.

22. The Scottish Legal Aid Board is funder of last resort: costs otherwise come from client contributions, which can be up to 100% of the costs incurred, ‘clawback’ of legal aid from any property preserved or recovered; and judicial expenses. For instance, in 2012-13, £2.2m was recovered from legally aided parties, £8.5m from expenses, and £1.2m from ‘clawback’.

23. The financial memorandum notes that the success rate in publicly funded reparation cases is around 85% (paragraph 95) and therefore, in the vast majority of these cases, there is no cost to the taxpayer, as the legally aided fees from the case are met by judicial expenses, clawback or client contributions. Around a third of the savings estimated in the financial memorandum from the Bill are predicated on the reduction in the use of counsel at the personal injury court for publicly funded legal assistance (paragraph 13). It is unclear whether these savings include the recoupment from clawback, contributions and judicial expenses or not and we believe that it would be helpful to clarify this.

24. The recommendations of the Taylor Review around personal injury litigation, if implemented, are also likely to impact on the overall publicly funded expenditure on publicly funded reparation cases. In line with the financial memorandum, we believe that the mix of cases at Court of Session, Sheriff Court and the new personal injury court are uncertain. For these reasons, we believe that it is difficult to anticipate the savings around publicly funded legal assistance (which are, we understand, the significant minority of the cases progressed currently at the Court of Session).

25. We also note that, with the lower use of counsel at Sheriff Court level, it may be helpful to reflect on the savings to other public bodies as a result. For instance, the NHS meets the expenses of successful pursuers in medical negligence cases. It is estimated that costs and compensation in these cases is around £700m across the UK. The effect of this Bill and the recommendations of the Taylor Review, if implemented, are likely to have an effect on the NHS in Scotland and other public bodies, for instance, local authorities.

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6 Scottish Legal Aid Board Annual Report 2012-13, Annex 3, section 3.20  
7 Price of Suing the NHS Too High, Guardian, 29 March 2011
SHERIFF APPEAL COURT

26. We note the savings anticipated from the introduction of the sheriff appeal court and believe that these are a reasonable estimate. As with the savings from judicial salaries for the personal injury court, these will not be realisable in the short-term.

RULES REWRITE

27. We believe that the costs for this area of work have been adequately captured.

SCOTTISH COURTS AND TRIBUNAL SERVICE

28. The costs from the merger of Scottish Court Service and Scottish Tribunal Service are significant, though we support the merger of these two organisations, provided that there remains a distinct character to both elements of the new organisation. We believe that there may be potential in the medium or long-term to realise efficiencies as a result of the merger.