Justice Committee  
Courts Reform (Scotland) Bill  
Written submission from Terra Firma Chambers

1. Introduction

1.1. This Submission is from Terra Firma Chambers and represents our collective views. We were formed in January 2008 and have increased our membership from 30 to 47. All members of Terra Firma Chambers practise as counsel on an independent referral basis as members of the Faculty of Advocates. Our instructions come from solicitors and others who are able to instruct directly on behalf of a very diverse client base ranging from central and local government, businesses of all types and scale and private individuals. We specialise in commercial, planning, property and administrative law.

1.2. The specialist representation and advice that we provide enable both solicitors and those able to instruct directly, including small local firms, to give expert services to their clients which they would otherwise not be in a position to do. As a result, these firms can compete effectively against much larger ones and thereby provide a local, convenient and cost effective service. Our work is obtained on an open and competitive basis.

1.3. A number of our members have substantial experience in criminal prosecution work; some members undertake part time judicial duties at all levels. Our membership includes the largest number of members of Faculty who also practise in England and Wales and internationally.

1.4. We have a strong commitment to giving young people every possible opportunity to advance their careers and job opportunities. In a typical year, approximately 10 people will undertake a week’s programme of work experience with us tailored to their particular needs and circumstances.

1.5. Our admission process adopts the practice of the Judicial Appointments Board for Scotland.

1.6. Three of our members have attained Judicial Office at Court of Session, Sheriff Court and Tribunal levels.

2. Policy objective of the Bill

2.1. The stated policy objective of this Bill and the accompanying policy document is to create a fundamentally new court structure for civil justice in Scotland. This is intended to address the concerns of the Scottish Civil Courts Review of 2009 chaired by Lord Gill, now the Lord President. The stated aim is to provide for a more efficient and economical structure both for litigants and the state. Any such reform that has such a laudable objective, if properly supported by evidence, should be welcomed.
2.2. The Bill provides for a new three Tier judicial system consisting of a summary sheriff, sheriff and court of session judge with two levels of appeal court namely a sheriff appeal court and the current Inner House of the Court of Session. The current system is, of course, a two tier one comprising the Sheriff Court and the Inner House of the Court of Session with appeal provision from the Sheriff to the Sheriff Principal and from both tiers to the Inner House of the Court of Session.

2.3. What is lacking is any economic analysis and explanation of what reduction in costs both to litigants and to the state that will be achieved once the scheme is enacted and in operation.

2.4. Furthermore, there is no explanation or disclosure as to what the new structure will actually be comprised of. In particular, whilst Section 2 of the Bill enables the Lord President of the Court of Session to make a proposal for a new Sheriff Court structure, it is surely reasonable for a proper plan to be disclosed now as to how it is envisaged that the new three tier system will actually operate in practice. It is an essential part of any successful economy that commercial and property rights are capable of being asserted and established quickly and efficiently. The Sheriff courts do not currently achieve that. In most Sheriff Courts, the pressure of criminal and family business means that only 1 day is given to non-family law proofs in the first instance. Many proofs will involve 3, 4 or even more attendances at court over a period of months before there is a resolution. This results in considerable additional expense for the parties and delayed justice for litigants. It makes the role of the Sheriff harder to exercise effectively. It makes the results less certain. Most Sheriffs do not gain expertise in commercial matters and this is a particular reality outwith the central belt. The Commercial Court in the Court of Session has been a boon for Scottish business. To undermine it by imposing a limit of £150,000 on its jurisdiction, would be a mistake: see also 3.2 below.

2.5. In the proposed new structure, how many summary sheriffs and sheriffs are envisaged and where will they operate from? If the focus is to be on increased judicial specialisation, how will this operate in practice? If the proposals in the Bill are deemed essential in the interests of efficiency and modernisation, then it is reasonable to expect that a proper plan outlining what is to happen is available for consideration by the Committee and thereafter Parliament itself prior to enactment.

2.6. The proposed provision to govern appeals from the Sheriff Appeal Court to the Inner House of the Court of Session is far too restrictive. For example, an error of law by the Sheriff Appeal Court would not be appealable ordinarily as they should be. The effect of enactment will be to hinder or even preclude the Inner House from exercising its critical function in clarifying and explaining Scots law: see also 3.1 below.

3. Proposed exclusive jurisdiction in the Sheriff Court and the essential role of the Court of Session

3.1. The proposed exclusive jurisdiction in monetary claim is £150,000. It is our view that this figure is grossly excessive. It is 3 times the equivalent in England and Wales and 5 times that which applies in Northern Ireland. Litigants in Scotland therefore are faced with a system whereby access to the higher court will not be
available in Scotland as it is elsewhere. There is no substantial explanation or justification as to why this should happen. The stated basis for this proposal rests on the volume of personal injury cases raised for or determined at relatively modest levels. There is, in our submission, no supporting evidence that judicial or other resources are being wasted relative to such cases. Most such cases are raised and settled, often with the involvement of counsel, on an efficient basis as envisaged by the Coulsfield Report. If the Court of Session is to continue to thrive, it requires to have a proper volume of suitable cases to be determined by the judges of that Court both at first instance and on appeal (see 2.6 above). If this proposal is enacted, it is our view that the Court of Session, as the long established centre of excellence for the interpretation and development of Scots law as a distinct and separate jurisdiction, will be damaged materially or at serious risk.

3.2. At present, the Court of Session has a highly regarded and successful commercial court consisting of specialist judges who provide a critical service to the business community of Scotland at all levels. The aim should be to encourage that jurisdiction 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.

3.3. Many commercial cases currently dealt with by that Court will fall below the proposed exclusive jurisdiction of the Sheriff Court. Such cases are often complex involving expert evidence and difficult factual and legal issues. Such a case which is determined or settled at a level of, for example, £50,000 will usually be critical to the survival of a small business of whatever type. In our view, there is no merit in forcing such cases to be brought at a local level or there may be no specialist judicial resources dedicated to deal with such matters and where the costs incurred could be greater than at present due to logistics and geography.

3.4. Any reform requires to ensure that the Court of Session in the words of the late Lord Rodger of Earlsferry, former Lord President, Law Lord and Supreme Court Justice:

"should continue to be a first instance court to which people can take their case in the expectation that it will be dealt with straightaway, by a judge who is one of the best legal minds.” (Lecture 20.6.2008: Delivering Excellence in Scotland’s Civil Justice System)

The proposed sheriff court exclusive jurisdiction and restricted appeal regime combined, at best, put at serious risk Lord Rodger’s analysis and vision.

4. **Availability of the Independent Referral Bar to litigants**

4.1. Scotland, although a small jurisdiction, continues to have a thriving referral Bar which enables independent specialist advisory and advocacy services to be provided for the benefit of the public whether on a privately paid for basis, with the benefit of legal aid or where counsel acts on a speculative basis. Advocates are available to be instructed by every solicitor anywhere in Scotland and this means that specialist advice and representation is provided where it is needed and without the necessary expertise becoming concentrated in a smaller number of most likely city-based large solicitors’ firms.
4.2. In our view, one of the consequences of making the exclusive jurisdiction of the Sheriff Court in monetary cases so high, is that both the Judiciary and the public will be disadvantaged in not having the benefit of counsel both to advise and to conduct litigation.

4.3 At present, parties are entitled to be represented in the sheriff court by an advocate but the employment of counsel by a successful party requires to be sanctioned by the sheriff as having been justified before the expenses of instructing the advocate can be recovered from the losing party. This situation is unique in the United Kingdom. In other parts of the United Kingdom, parties are free to instruct either a solicitor or counsel in the lower civil courts and to recover the costs in the event of success so long as these are reasonable.

4.4 In the initial consultation paper which preceded the Bill, it was suggested that the sanctioning of the employment of counsel in the sheriff court would be only in exceptional circumstances. This would be even more extreme and restrictive than exists at present, and when taken along with the significant rise in the exclusive jurisdiction, would have led to significant disadvantage to parties in the sheriff court who in effect would be prevented from instructing counsel. Although the Explanatory Memorandum on the Bill suggests that a lower threshold for the sanctioning of counsel will now be applied, it does not appear to be reasonable that even that threshold is appropriate where the result of the raising of the exclusive jurisdiction will be to prevent parties from pursuing actions in the Court of Session where they would have the right to instruct an advocate and to recover the expenses of that.

4.5 Solicitors and advocates are competitors for work in the sheriff court and litigants ought to be free to choose by whom they wish to be represented. The expenses of such representation ought to be recoverable in the event of success, subject always to taxation and upon the basis the amounts sought are reasonable. The existence of a system of sanctioning in Scotland distorts competition between solicitors and advocates and ought to be discontinued. This is particularly so in a situation where it is proposed to raise the exclusive jurisdiction of the sheriff court to an amount three or five times higher than exists anywhere else in United Kingdom and where in the remainder of the United Kingdom no sanction is required to employ either a solicitor or a barrister to provide representation in the lower courts.

5. **Conclusions**

5.1. Overall, we submit that this Bill requires scrutiny on the issues we have discussed above and subsequent amendment to take our concerns and observations into account.

5.2. We are quite willing to answer any questions that the Committee may have for us and to provide witness evidence if asked to do so.

Terra Firma Chambers
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