Justice Committee
Courts Reform (Scotland) Bill
Written submission from Axiom Advocates

SUMMARY

- The choice facing the Parliament is not between the current proposals and doing nothing. There is scope to make changes which will fully address the concerns that exist.
- The Bill takes away from litigants rights that they have at present.
- The current proposals will produce a justice system that will be perceived by persons intending to raise proceedings as inferior to that of neighbouring jurisdictions.
- The likely result is that, where possible, they will choose to litigate elsewhere.
- The proposal to limit jurisdiction of the Court of Session to cases in which sums over £150,000 are claimed does not take account of the realities of commercial litigation as opposed to claims for personal injury.
- The concern that the costs of litigating may be disproportionate to what is at stake is valid. A change in the law is justified. However, this concern could be better address by judicial control of expenses.
- To address the problem in a way that removes the right to instruct and recover expenses for counsel discriminates between litigants on an unfair basis. It has a disproportionate effect on classes of litigant who are dependent on being able to recover their expenses – individuals and small businesses.
- Some litigants – most commonly the corporate defender – will be able to instruct counsel without being concerned as to the ability to recover costs. The proposals in the Bill will create a situation where the pursuer litigating against such a party is put at a significant disadvantage.
- It is important to have procedures that ensure litigants are able to have access to expert advice on specialist areas and that they are not deterred from doing so by the fear that they cannot recover the costs. This may prevent individuals or small businesses from vindicating their rights.
- While ‘Which?’ said they supported the reforms that are presently proposed, their support appears to be based on a misconception. The effect of the Bill is to take options away from consumers rather than to give them more.
- The proposals would produce a situation in Scotland that compares unfavourably with that in England. There, even where a case must be brought in the County Court, it is open to a party to use counsel. The corollary of this, however, is that the court determines what may be recovered by way of counsel’s fees.
- The Bill seeks to give a person raising proceedings in Scotland less choice than exists in England. They will be restricted as to the choice of court and the choice of representative. Why should a potential litigant in Scotland be denied a choice that would be open to them in these other jurisdictions? Why should the Scottish litigant be placed in a less advantageous position as to representation for their case?
- This disparity is likely to mean that where parties – including Scottish businesses - have a choice where to litigate, they will choose England over Scotland. It would...
be a very poor reflection on the Scottish legal system that business in the country prefer to litigate elsewhere. This outcome is inconsistent with the stated objective of attracting high quality business to the Court of Session (Policy Memorandum paragraphs 86 and 87).

- As a result of pressures of business and the competing interests of hearing cases involving children, litigating in the Sheriff Court often results in considerable delay and expense. This could have a materially adverse effect on an SME forced to litigate there to vindicate its entitlement to a sum of £140,000.
- As it is presently worded, Clause 39 of the Bill will produce unfortunate and presumably unintended effects.
- In relation to the proposal to introduce a time limit for bringing applications for judicial review, the time limit should run from the date on which the petitioner becomes aware of the basis of challenge or could reasonably have become aware. Special provision is requires for immigration and asylum cases, environmental case and situations in which the challenge is to legislation.
- The meaning of “real prospect of success” for the purposes of seeking leave to raise judicial review proceedings should be clarified.
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Introduction

1. We welcome a review of civil justice in Scotland and would endorse the need for changes to ensure that it meets the needs of litigants and prospective litigants. In particular, we agree that there is considerable scope for changes which would provide a more efficient means of resolving disputes and that it is necessary that there are controls in place to ensure that the expenses incurred in a case are not disproportionate to the underlying subject matter.

2. We are concerned, however, that the current proposals will not have the desired effect and will instead provide a justice system that will be perceived as inferior to that of neighbouring jurisdictions with the result that litigants will, where possible, choose to litigate elsewhere. We consider that it would be a significant failing to make changes to the courts system to produce this result. We agree that in view of the acknowledged problems with civil justice in Scotland, it would not be acceptable to do nothing. However, the choice is not between the current proposals and doing nothing. There is scope to make changes which will fully address the concerns that exist. Some will be procedural, some structural and some related to ancillary questions of expenses. By ensuring that the measures chosen achieve the desired objectives without damaging the attractiveness of Scotland as a forum in which to litigate, individuals and companies can be provided with the civil justice system that they should have.

Axiom Advocates

3. It may be useful to explain who we are. Axiom Advocates is a stable of 44 advocates practising in Scotland. The areas of law in which they work are predominantly commercial law and public law. Members of the stable appear in a wide range of tribunals, courts and inquiries. In particular, they have extensive experience of appearance in both the Court of Session and Sheriff Court. Within the stable there are members who also have experience of litigating in England.

Effect of the Bill

4. The Bill restricts the choice presently available to a party considering raising an action to decide in which court they wish to vindicate their rights. In relation to the majority of cases there is a choice at present between the Sheriff Court and the Court of Session. Litigants are in many cases choosing the Court of Session. What is the basis for restricting their choice?

5. One view is that the resource of the Court of Session simply ought not to be made available for certain classes of dispute including those of a low value. We do not seek to defend the current limit of privative jurisdiction of £5,000. We do not consider, however, that any proper justification has been put forward for a thirty-fold
increase to £150,000. It may be that this limit has been chosen having in mind that in cases seeking damages for personal injury, the sum sought may be far in excess of the true worth of the case and greater than the sum for which it is ultimately resolved. On this approach it might be thought that by setting the limit at £150,000 in terms of the sums being sought, the true value of claims that is being excluded from the Court of Session is really much less than this. If so, that reasoning cannot be applied to commercial disputes. Many of these are for payments sought under a contract. This does not make them a matter of “debt collection” as there can be substantial issues as to whether a liability has arisen under the agreement between the parties. Even where damages are sought the sums claimed – while they may exceed those ultimately awarded – are more likely to be in line with the true value.

6. In view of the above it is significant that we do not understand it to be suggested that cases are being raised under the commercial procedure of the Court of Session that “ought not to be there”.

What is the real concern?

7. In terms of the Policy Memorandum the proposal to restrict access to the Court of Session is a means to an end rather than an end in itself. It is therefore useful to identify the end to be achieved, consider the adverse effects of the proposal and evaluate whether there is a better means of achieving the desired end.

8. The principal concern noted in the Policy Memorandum accompanying the draft Bill is the issue of the cost of litigation. There appears to be an assumption that if litigation takes place in a forum where counsel might be instructed this will result in additional expense. The concern that expense may arise that is disproportionate to the subject matter of the case is fuelled by the decision in Marshall v Fife Health Board, [2013] CSOH 140. The approach in that case means that once counsel are engaged, there need be no correlation between their charges and the subject matter of the cause. This creates a situation in which there is a loss of control of expenses as soon as counsel are instructed. This is undesirable and we suggest that the ruling in that case should be overturned in any reform. However, if the purpose of restricting the freedom of litigants to choose is to control costs it would be better to have measures aimed directly at that issue rather than the blunt instrument of dictating what forum may be used. Such a properly focused approach already exists in England and is considered below. To attempt to address the problem by means of moving cases where there is no right to recover fees for counsel in the absence of sanction discriminates between litigants on an unfair basis. It has a disproportionate effect on classes of litigant who are dependent on being able to recover their expenses – individuals and small businesses.

Restriction on access to advice and expertise

9. The proposed reform not only controls the choice of court but, by this means, seeks to impede the freedom of a litigant to choose counsel to represent them. This has consequences for access to expert specialist advice and, in consequence, access to justice. This was a matter addressed in the response by the Faculty of Advocates to the 2007 Super Complaint to the Office of Fair Trading by the Consumers Association trading as “Which?”. This noted, Outwith the conurbations of
the Central Belt, Scotland has a relatively dispersed population. The issue of access to legal services in rural areas is one of particular salience in Scotland. The local “full service” legal firm is, in our view, critical in securing access to justice across the range of legal services. The existence of advocates who are all available to all of these firms on an equal basis has a particular role in enabling small firms to offer a quality service to their clients. It is submitted that this remains the case. In a small jurisdiction such as Scotland expertise will inevitably be centralised. It is important to have procedures that ensure litigants are able to have access to expert advice on specialist areas and that they are not deterred from doing so by the fear that they cannot recover the costs. Without this possibility, it may be impossible for prospective pursuers to vindicate their rights. This would include rights conferred by statutes with the specific intention of providing them with protections.

10. Experience on the part of all parties concerned is necessary to ensure speedy, effective and correct decision making. In a small jurisdiction it will not be practicable to provide it in all courts. Why then is it assumed that commercial cases for just under £150,000 should be determined in all sheriff courts? We recognise that some Sheriff Courts have established and operate their own forms of commercial procedure and that these are effective. It is a non sequitur, however, to jump from this to an assertion that the same can be done in every sheriff court. Commercial Procedure in the Sheriff Courts of Aberdeen, Glasgow and Edinburgh works precisely because the concentration of work provides sufficient expertise and caseload. Again, this harks back to the point noted in the Response to the Super-Complaint.

Creating inequality between parties

11. Some litigants – most commonly the corporate defender – will be able to instruct counsel without being concerned as to the ability to recover costs. The proposals in the Bill will create a situation where the pursuer litigating against such a party is put at a significant disadvantage.

Misconceptions as to the present position

12. While ‘Which?’ said they supported the reforms that are presently proposed, their support appears to be based on a misconception. They said the reform would mean more people would seek redress for faulty goods and services. It is not clear why this is the case. The frustrated consumer already is able to raise proceedings in the court of their choice and if that is to be the sheriff court, there is presently no impediment to them doing so. If they consider the sheriff court is quicker and cheaper, they will use it – as the person making the claim, the choice of which court to use is theirs. However, if the consumer has a large claim – say a luxury car is defective – they might exercise their choice in favour of bringing the case in the Court of Session. The effect of the Bill is to take options away from consumers rather than to give them more.

The position in England

13. It is useful in this context to look to the position in England. The proposals would produce a situation in Scotland that compares unfavourably with that in
England. There, even where a case must be brought in the County Court, it is open to a party to use counsel. The corollary of this, however, is that the court determines what may be recovered by way of counsel’s fees. Adopting such a solution in Scotland would meet the objectives of the Government as to expenses of litigation while preserving access to justice. The objectives of Government would be met as the involvement of the Court in determining recoverable expenses would ensure that the costs to an unsuccessful party are not disproportionate to the subject matter of the case.

14. Provided that recoverable costs could be kept in proportion by the introduction in Scotland of some means of judicial control, this approach would entitle litigants to have the representation of their choice. It would enable them to take advantage of the specialism and skill that the Bar has to offer which can be of particular importance in a smaller jurisdiction. It would at the same time ensure that the expenses of an action do not become disproportionate to what is at stake.

**Failure to attract business**

15. The comparison with England and Northern Ireland is relevant in other ways. The Bill seeks to give a person raising proceedings in Scotland less choice than exists in England. They will be restricted as to the choice of court and the choice of representative. Why should a potential litigant in Scotland be denied a choice that would be open to them in these other jurisdictions? Why should the Scottish litigant be placed in a less advantageous position as to representation for their case?

16. This comparison between the two is not merely academic. When the need to litigate arises in commercial matters, it is not uncommon for there to be a choice as to whether this should be in England or Scotland. Obviously, the choice is that of the person bringing the claim. In a commercial court symposium a few years ago solicitors indicated that they found that clients preferred to litigate in England because they were likely to have far lower irrecoverable costs as the percentage recovered in England is generally higher. This is an example of how commercial undertakings will turn away from the Scottish legal system if it places them at a disadvantage compared to how they will fare in England. If the reforms are put into effect in their current form, a prospective pursuer will have to be told that if litigating in Scotland their claim for contract payments of £125,000 must be brought in the sheriff court and that it may not be possible to recover the expense of counsel if used. On the other hand, if they can establish jurisdiction in England, they can litigate in the Country Court or the High Court and in either will be able to recover the expenses of the representatives they choose. It is easy to see that Scotland will be offering an inferior service or ‘product’.

17. Why should the government of Scotland wish to produce a civil justice system which incentivises businesses to use courts in neighbouring countries? It is inconsistent with the stated objective of attracting high quality business to the Court of Session (Policy Memorandum paragraphs 86 and 87).

18. It is possible that the restriction on availability of courts may have an effect on choice of jurisdiction clauses. Commercial parties could avoid the provisions of the Bill by choosing to litigate in England. This will favour large businesses with the
ability to dictate standard terms of their contracts. A few years ago, before improvements to commercial procedure in the Court of Session, a Scottish bank became frustrated by the position and, as a result, gave serious consideration to inserting clauses in their contracts prorogating jurisdiction of the High Court in London. This shows that commercial litigants are aware that they have a choice and will exercise it. The proposals create a very real risk that this will happen on a wider scale. We will create a justice system which compares unfavourably with others that are available to commercial litigants.

**Practice in the Sheriff Courts**

19. The above consideration applies simply on the basis of the element of loss of choice. It is necessary also to consider the current practice in relation to litigation in the Sheriff Courts. It is necessary to test the assertion that procedure for contested hearings is quicker and cheaper there. In order to have a useful comparison it is necessary that the cases being considered are of equivalent levels of complexity and detail. Averages are misleading because of the proportion of cases in the Sheriff Court in which little or no substantive issue is raised by the defenders.

20. When litigating in the Sheriff Court it is common to turn up for proof diets and be turned away because other business takes priority. This routinely happens on more than one occasion before a proof or debate gets started. Each wasted day means further delay and considerable wasted expense. The other business vying for court time may involve children or matrimonial issues. We recognise that there is urgency in these matters and that they are of great importance. However, a system which, as a matter of course, places other business behind these matters is not securing justice for the litigant routinely allocated second place.

21. In other situations in the Sheriff Court, cases are postponed simply because there is too much business set down for the day in question. Again, such postponements increase delay and expense. Even once a proof does start, the common practice is for it be set down only for one day or maybe two days with further days commonly being allocated in blocks of two or three days over a period of months. This is inefficient, slow, expensive and can lead to injustice. The delay caused is obvious. The inefficiency and expense arise from the need of parties’ representatives and the sheriff to familiarise themselves before each hearing with the issues and the evidence heard to date. In addition, proceeding in this way can cause great inconvenience to witnesses. It prolongs the period of the proof and there is a danger that evidence of forgotten and important issues of a witness’s demeanour are lost. A transcript of the evidence may have to be prepared which causes further delay and cost. Even in debates, there is evidence of them spanning over many more days than would be the case in the Court of Session and days being lost to pressure of other business. In addition to the courts noted above, we are aware that a commercial procedure has been or was established in Inverness Sheriff Court. However, hearings of cases in such procedure were subject to the same issues of double booking and cancellation. This demonstrates that it is not enough merely to set up a sub-group of procedures in the absence of resources to meet the commitment to litigants.
22. The delay in getting cases determined could be very material to commercial litigants. The government proposals recognise the interests of individuals with claims for damages for personal injury and make special provision for a court in order to address their requirements. No such accommodation is given to a commercial litigant. The cases they choose to bring, or must defend, will be flung into all courts without any real consideration of how they can adequately be managed and determined. For the reasons outlined above, proofs can take over a year to complete in the sheriff courts. An SME claiming £140,000 may suffer adverse effects on the finances of its business if it is unable to have its entitlement to these sums resolved speedily.

23. Members of Axiom have experience of parties litigating in the sheriff court and being required to proceed a few days at a time, stating that had they known this would be the case they would not have chosen to litigate in Scotland.

**Terms of the Bill**

24. Clause 39 is not happily worded. It suggests that wherever there is a claim for less than £150,000, the action may only be raised in the Sheriff Court. This would mean that if there were two claims of, say, £1m and £1.5m and an incidental claim (such as for accrued interest) of £10,000, the action could not be raised in the Court of Session. A party could have to hive off the £10,000 claim into another action. Alternatively if a party claims a number of instalments of a payment, they may wish to have several different conclusions for the purposes of claiming interest. The aggregate principal sum may be well over £150,000 but because there are separate conclusions, the result is that the jurisdiction of the Court of Session is excluded. It is recognised in this regard, however, that Clause 39(7) provides for acts of sederunt to determine how the value of a claim is ascertained. While this might address the anomalies noted here, it is submitted that they concern important issues of principle and ought not to be left to subsidiary legislation.

**Public law / Judicial Review**

25. Much of this response has focussed on the changes that the Bill seeks to make to private law. In relation to the areas of public law, while the introduction of a time limit for applications for judicial review may be considered desirable, there are a number of factors which require to be taken into account but are not yet reflected in the Bill.

(a) A high proportion of judicial review petitions presented to the Court of Session are Immigration and asylum cases. In their paper on reform of judicial review in England the Ministry of Justice have recognised that these are a special case. Here, Practice Note 1 of 2012 requires that there is correspondence with the UK Borders Agency. This is intended to encourage discussions or negotiations with a view to avoiding a requirement for proceedings. A three month time limit would have the effect of undermining these procedures.

(b) It will be necessary to have clarity as to when the time period starts running. It would be appropriate to state that it starts only when the applicant was aware of the decision in question or ought to have been aware rather than when the grounds of challenge first arose. In relation
to environmental cases, the Aarhus Convention Compliance Committee has found that this is a requirement (Port of Tyne Case, Final Decision, September 2010, ACCC/C/2008/33, paragraph 138). Although public procurement challenges are not, in general, made by means of judicial review, it is relevant that the CJEU has determined that the period of notice specified in the directive should run from the period when the claimant knew or ought to have known of the infringement of the rules (Uniplex (UK) Ltd v NHS Business Services Authority, Case C-406/08). By analogy it is to be expected that they would apply the same rule to other substantive rights conferred by EU law. The position in England as to the relevance of knowledge is not uniform.

(c) Particular difficulty may arise when the challenge is not to a decision which affects a particular individual but is to legislation (primary or secondary). At the time that the legislation is passed, a party may not be aware of it and, indeed, may not be affected by it. The necessity to make a challenge may not arise for some time. Review ought not to be excluded in these circumstances.

(d) Both the Human Rights Act 1998, section 7, and the Scotland Act 1998, section 100(3B), impose a 1 year time limit for challenges.

26. The introduction of a requirement to seek leave introduces an additional procedural step and therefore additional expense in any application that does proceed. The various provisions in the Bill for oral hearings and appeal indicate that the use of Court time and the expense would be material. An issue arises as to whether the current situation discloses a sufficient problem to justify this additional expense. We suggest it does not. The number of petitions for judicial review in Scotland is far fewer than the number in England and is not indicative of there being a problem of unmeritorious applications “clogging up” the court system. However, if there is to be a requirement for leave, some guidance should be given as to the phrase “real prospect of success”. Similar expressions in the context of the Rules of the Court of Session 1994, Rule 58A, have been construed as meaning “an arguable case” (Carroll v Scottish Borders Council, [2014] CSIH 30, paragraph [14]. If that is what is intended, it should be stated expressly. If it is not what is intended, this too should be made clear.

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