1. I have been a practising member of the Faculty of Advocates since 1993. I am also a part-time sheriff and a legally qualified member of the Mental Health Tribunal for Scotland. I have a particular interest in the encouragement of diversity in the pool of persons available for judicial appointment. I was formerly the Faculty’s representative on the Diversity Steering Group of the Judicial Appointments Board for Scotland, and I continue to work on related topics within the Faculty. Much of my practice is in the field of judicial review.

2. The views I express here are entirely my own and should not be thought to reflect the views of the Faculty or any other body.

3. I have sought to respect the guidance given as to length of submissions, so have not commented on every provision in respect of which I have a view.

Part 1 – Sheriff Courts

Clause 9

4. I question how the compliance of Sheriffs Principal with the obligation in Cl9(6)(a) is to be secured and monitored. In what way will the Sheriffs Principal work together to this end? My own recent experience as a part-time sheriff is that I am allocated perhaps 2 days per month, and then one or both days are often cancelled, sometimes at short notice. It is important that part-time sheriffs do sit for an adequate number of days per year in order to maintain and improve their skills as judges.

Clause 19

5. I recognise that it will normally be appropriate for a sheriff to reside within reasonable travelling distance of her court. In practice at the moment, where a residence requirement is imposed, that is interpreted as meaning within one hour’s car journey. What I am concerned about is the scope provided by the very broad power for the inflexible application of the requirement, particularly in a context where this is interpreted in the way that it currently is. In my view there should be provision limiting the imposition of a residence requirement to situations where there are exceptional circumstances justifying it, and provision requiring the Lord President to take into account, in determining what is an appropriate place of residence, the nature and extent to which information technology may avoid the need for travel for emergency out of hours work.

6. As counsel, and as a part-time sheriff, I frequently travel to courts considerably more than an hour away from my home by car without seeking accommodation, unless weather conditions are particularly difficult. I do not see that there is any justification for a residence requirement on the basis that a sheriff must
be not less than one hour’s travel from court. If a sheriff wishes to attend her court by undertaking rather greater travelling times than one hour, that should not be prohibited.

7. Sheriffs do need to be reasonably available for out of hours work. Given what can be achieved by the use of technology, I question whether a residence requirement is necessary to achieve that. Emergency hearings or applications for warrants could be conducted by video link or Skype, reducing the need for police, social workers and sheriffs to travel. Such legislation as there is that currently requires particular acts to be done in particular places could be amended. There could, for example, be provision for electronic signatures for warrants.

8. At paragraph 54, the Policy Memorandum states that it is important that a judicial officer should be aware of local circumstances in the area where the court is situated and any special factors which may have a bearing on business. This is an unconvincing explanation for a residence requirement. One might live in, for example, St Andrews, or Falkirk, and fulfil the “one hour” requirement for Perth Sheriff Court. Residence in either location is unlikely to tell a sheriff much about what is going on in Perth. It would be unrealistic and unduly restrictive to expect a sheriff to reside in a particular location (rather than one based on travelling distance). There may be very good reasons, in terms of avoiding associations likely to give rise to a conflict of interest, for a sheriff not to live in too close proximity to her court. Sitting in a particular sheriff court regularly provides a sheriff with a wealth of information about the problems that arise in the relevant locality.

9. The reason why I consider that residence requirements should be kept to a minimum is that they (among a number of other factors) discourage diversity in applications for sheriff positions. The majority of the pool for appointment lives in the central belt. The need to uproot and move “normal residence” to fulfil a residence requirement is particularly daunting for those with responsibility for caring for children (who may be settled in school) or elderly relatives, still disproportionately women. As discussed below, partners may simply be unable to follow.

10. There will be people of merit of both genders who are put off by a requirement of this sort. The notion of a residence requirement seems rooted in a conception of family life whereby the whole family will simply follow a single main breadwinner. That is not the reality of modern professional life. Very many of those eligible for appointment will have husbands, wives or partners with established working lives which cannot easily accommodate a move to satisfy a residence requirement. This matter, among others, was the subject of discussion at a conference on 11 March 2014, *Merit and Diversity – Compatible Aspirations in Judicial Appointments*, put on jointly by the Judicial Appointments Board for Scotland, the Faculty of Advocates, and the Law Society of Scotland Parliament may wish to pay particular attention to the forthcoming report of the proceedings of the conference, which was designed to engage stakeholders to discuss potential barriers preventing greater diversity in applications for appointment.

11. In the recent appointment process for Sheriffs Principal, the residence requirement is interpreted as meaning that the Sheriff Principal must reside not only within one hour of base court, but within her sheriffdom. It is difficult to think what
possible basis there could be for saying that, for example, a Sheriff Principal who lived in Airdrie or Newton Mearns could not fulfil duties properly as Sheriff Principal of Glasgow, or, indeed Edinburgh. n applicant might be able to satisfy a requirement for Tayside, Central and Fife by moving from South Queensferry to North Queensferry. It is not at all obvious why she should be required to do so. Sheriffs Principal in the past have operated efficiently without the imposition of a requirement of this sort.

Clause 39

12. The effect of this provision will be to deny individual litigants access to counsel. It raises the privative jurisdiction of the sheriff court from £5,000 to £150,000. In the context of personal injuries cases, employers are still likely to instruct counsel. It will be difficult for employees to do so without the comfort of knowing that if they are successful the cost of their counsel will be recoverable. While it is true that there are many competent solicitors practise in this field, it is wrong to say that they can simply be substituted for counsel. Although many cases settle, all negotiations and preparations must be conducted on the basis that the case may run. The lawyer involved in the case has to be one who is court-ready in the event that negotiations fail. It remains the case that the training of advocates in written pleading and oral court room skills exceeds vastly in duration and sophistication that supplied even to solicitor advocates, quite apart from solicitors without higher rights of audience.

13. The provision will impact not just on personal injury cases but on commercial cases and ordinary actions where litigants currently choose to use the Court of Session. There is plainly a market for the services of the Court of Session in cases with a value below £150,000, and it is not obvious why there should be interference in this market, which seems to work well.

14. The new lower limit is very considerably in excess of that in place in either England or Northern Ireland, and it is not clear what objective justification there is for a change to such a high level.

Clauses 43 and 44/schedule 1

15. I am not convinced that the work involved in the categories of cases identified in these provisions is of such limited complexity as to merit the creation of a lower tier of judiciary. In my experience some of the most demanding civil work is that involving the management and resolution of cases involving party litigants in small claims and summary causes. Such work requires the sheriff, without the assistance of professional lawyers, to identify the real grounds, if any, of action. The management of hearings in this context is more demanding than where professional lawyers appear. It is not easy to see why work of this type will be allocated to a lower tier.

Clause 49

16. Clause 49(3) is indirectly discriminatory against women and other groups with protected characteristics. It requires that appointment to the office of Appeal Sheriff
be of a person who has served as a sheriff for at least 5 years. There are presently 31 women sheriffs and 112 men. That is not broken down further by reference to how many are recent appointments and would not currently fulfil the 5 year criterion. The number of sheriffs with a minority ethnic background of any kind is vanishingly small. Many fewer women than men can fulfil the requirement in Cl49(3). There is no proper justification for the discriminatory effect of this requirement. The pool could be broadened by making the position available to those applying direct from practice, and disapplying the 5 year qualification to serving sheriffs. Many Sheriffs Principal who have served with distinction have been appointed directly from practice. Other appellate judicial bodies, such the Upper Tribunal, which is a court of record, appoint members directly from practice.

Clause 85

17. My practice has tended to involve principally judicial review since about 2000. I formerly held the view that a time limit and leave provisions would be desirable. I am much less convinced now that that is the case. The absolute numbers of judicial review petitions are small. It is not my impression that the court is overwhelmed with unmeritorious or late applications.

18. So far as the time limit is concerned, many petitions are brought in the context of immigration decisions. There may be a recent decision to remove an individual, based on an older decision on the substantive merits of the case, with inaction on the part of the state in the intervening period. It may be unjust to dismiss a petition on the basis that the older decision is more than three months old. It is not clear how new section 27A(1)(a) will fall to be construed in this context. While there is a discretion to extend the period, it would be unfortunate if there were to be a lot of court time expended on arguing preliminary issues of this sort rather than simply determining the case on the merits, which may be possible in fairly short order.

19. A better solution to late petitions in my view would be to use legislation to modernise the existing plea of mora, taciturnity and acquiescence, by disapplying it in judicial review proceedings and introducing a more flexible plea that a petition should be dismissed if delay in bringing it has been detrimental to good administration.

20. So far as the permission provisions are concerned, again, I wonder 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. A decision of a Lord Ordinary on a point determinative of the petition at an early stage may be a more efficient means of dealing with a weak petition than repeated Outer House applications for permission followed by an application to the Inner House.

21. The limitation on appeal expressed in new section 27C(6) is an excessive restriction. It excludes from appellate scrutiny an important category of decision insofar as it relates to a refusal of request for an oral review.

22. I suggest that Parliament may be interested in research carried out by the Public Law Project into decision making in analogous permission applications in
England and Wales, and that Parliament might be interested in evidence from the authors of that research.

23. If the permission provisions are enacted, it is essential that there is proper remuneration available by way of legal aid to enable these applications to be set out as fully as is necessary, given the importance of the subject matter of petitions of this sort, which hold the state and other public authorities to account, and are crucial in maintaining respect for the rule of law. In the asylum context they may involve matters of life and death.

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