

**Justice Committee**  
**Courts Reform (Scotland) Bill**

**Written submission from the Faculty of Advocates**

**SUMMARY OF EVIDENCE**

1. The Faculty of Advocates supports proposals to improve the delivery of civil justice in the sheriff courts. In particular, the Faculty supports the proposals: (i) to create a new judicial office, the summary sheriff; and (ii) to support shrieval specialization.

2. The Faculty does not support the proposals: (a) to increase the exclusive competence of the sheriff court to £150,000; and (b) to create a new sheriff appeal court.

3. The proposal to increase the exclusive competence of the sheriff court to £150,000:-

- represents an increase of 3000%
- is five times the equivalent limit in Northern Ireland and three times the equivalent limit for personal injury claims in England and Wales
- will remove choice from litigants;
- will have the practical effect of undermining the right of litigants to instruct counsel; and
- will have a significant adverse effect on the independent bar in Scotland.

4. The Court of Session is, generally speaking, an effective forum for civil litigation. In particular the personal injury procedure operates well, with a minimum of judicial involvement and commercial litigants have available to them the Commercial Court. The increase in the exclusive competence of the sheriff court will remove from litigants across the board the choice of litigating in the Court of Session if they advance a financial claim for less than £150,000.

5. Pursuers in personal injury actions in the Court of Session are often represented by counsel on a “no win no fee” basis. Those litigants obtain skilled representation at no charge to them. The involvement of counsel is one of the ingredients which has made the personal injury procedure in the Court of Session a success.

6. The Faculty recognises the case for the creation of a national personal injury court in Edinburgh Sheriff Court but considers that the exclusive competence of that court proposed in the Bill is far too high. If the intention is to replicate the success of the personal injury procedure in the Court of Session, it will be essential that counsel can continue to be instructed by litigants on the same basis in the personal injury court.

7. The key policy drivers for the proposed increase in the exclusive competence of the sheriff court relate to personal injury cases. There are relevant differences between personal injury actions and other types of action, and no reason why there

should not be different levels of exclusive competence. For example, it would be detrimental both to commercial litigants and to the development of the law if commercial litigants could not choose to bring a case to the Commercial Court if the case includes a financial claim for less than £150,000.

8. The Scottish Court Service anticipates that sheriff court reform will be progressively introduced over a period ten years and will require capital investment. That suggests that it would be good policy to make a relatively modest increase in the exclusive competence of the sheriff court at this time and to review the position once sheriff court reform has progressed further.

9. The creation of a sheriff appeal court along with the increase in the exclusive competence of the sheriff court will have undesirable structural consequences. In effect, there will be two national appeal courts. Significant classes of business will be dealt with almost exclusively within the sheriff court system.

## **EVIDENCE**

### **The Faculty of Advocates**

1. The Faculty of Advocates is Scotland's independent referral bar. It is also one of Scotland's great national institutions. Before and since 1707, the Faculty has been central in developing and preserving Scots law as an independent legal system. Its members (including Sir Walter Scott and Robert Louis Stevenson) have contributed significantly to the Scottish Enlightenment and to Scottish culture generally. It was thanks to the donation by the Faculty of some 750,000 books that the National Library of Scotland was established in 1925.

2. Today's Faculty of Advocates is a centre of legal expertise and of excellence in advocacy. Advocates are available to give specialist legal advice to anyone who may require it, and to represent accused persons and litigants in any court or tribunal in Scotland. The existence of an independent bar accessible to every citizen is a key element of our constitutional democracy. Specifically it:-

- promotes equal access to justice for all the people of Scotland;
- allows access to a central Scottish bar for all Scots, regardless of where they live;
- secures the quality of justice delivered in Scotland's courts; and
- enhances the reputation of Scotland and of Scots law abroad.

3. The quality of the representation which litigants and accused persons have is no less important, in securing justice in the civil and criminal courts, than the quality of the judiciary. Judges can only adjudicate on the basis of the evidence led and the legal submissions made to them. If clients are to receive justice, they need to be represented by advocates who are trained and skilled in analysing the issues, in marshaling and presenting the evidence, and in advancing legal submissions. If the courts are to apply the law accurately to the facts, they need the assistance of skilled advocates, who have the time, skill and facilities to analyse the case fully and to undertake the necessary legal research.

4. The work of the professional advocate is not confined to appearing in Court. Typically, an advocate may be called upon to advise a pursuer or a defender on the potential merits of a claim, to identify the possible legal grounds of any action or defence, and to advise on the lines of inquiry and investigation which should be pursued in order to advance or resist the claim, as well as to appear in court to examine and cross-examine witnesses or to make legal submissions. Effective advocacy – and success or failure in a litigation - depends as much on all these steps as on the “day in court”. And advocates may also be instructed to give advice on matters which do not involved litigation.

5. Advocacy is a specialist professional skill. To be equipped to represent a client effectively, a lawyer requires specialist training and the opportunity to build on that training with practical experience. The Faculty has led the way in specialist advocacy skills training. Lawyers who wish to become advocates undergo an intensive course of study and training specifically directed to the requirements of professional advocacy. Practice at the independent referral bar enables advocates throughout their professional career to build on that training, devoting themselves to the practical demands of the profession of advocacy.

6. Every advocate is – by reason of the cab-rank rule - available to be instructed by any litigant or accused person in any court or tribunal. Small firms of solicitors throughout Scotland can enhance the service which they provide to their clients by reason of their access to all the diverse talent at the bar. The most skilled and experienced advocate is available to be instructed on behalf of any client.

### **The need for reform of the sheriff court**

7. Reform of the delivery of civil justice in the sheriff court is necessary. The sheriff court is often, at present, an unsatisfactory forum for contested cases of any complexity. Proceedings may be relatively “slow, inefficient, and expensive”. Parties may turn up for proof diets and be turned away because other business takes priority. Hearings may be set down for only one or two days and then have to be adjourned, sometimes more than once, with consequent inefficiencies and additional expense to the parties.

8. The Faculty accordingly supports much of the Bill, including:

- (a) the proposal to create a new tier of judge to deal with summary cases; and
- (b) the proposals which are directed to creating a degree of shrieval specialism.

9. The Faculty does not, however, support:

- (a) the proposal to increase the exclusive competence of the sheriff court to £150,000; or
- (b) the proposal to create a sheriff appeal court.

10. The Scottish Court Service has stated that the proposed changes to the organization of the sheriff courts will be progressively introduced over a period of ten

years, being dependent on the process of retirement and recruitment of sheriffs and summary sheriffs, sufficient court capacity and the like<sup>1</sup>. The Court Service also recognizes that achievement of its longer terms vision for the sheriff courts will require significant future investment<sup>2</sup>. The proposal to increase the exclusive competence of the sheriff court to £150,000 - which will compel litigants who would currently prefer to litigate in the Court of Session to bring their cases in the sheriff court - should be assessed against a background: (i) that the sheriff court requires reform; but (ii) that reform is going to take a significant period of time. These considerations would suggest that any increase in the exclusive competence should initially be a relatively moderate one, with the possibility of reviewing the limit once the sheriff court reforms have progressed (albeit that, if those reforms work, litigants may vote with their feet).

### **The proposal to increase the exclusive competence of the sheriff court to £150,000**

11. The Faculty does not support this proposal. It represents a 3000% increase in the exclusive competence of the sheriff court. It would be five times the equivalent figure which applies in Northern Ireland<sup>3</sup>. It would be three times the equivalent figure which applies to personal injury claims in England and Wales<sup>4</sup>.

12. The proposal would deprive litigants of choice. It would, for example, deprive businesses of the ability to raise proceedings in Scotland's national Commercial Court wherever the action includes a "claim of value" of up to £150,000<sup>5</sup>. It would, in practical terms, undermine the right of litigants to instruct counsel, favouring litigants who can afford to instruct counsel irrespective of the recoverability of counsel's fees.

13. The principal driver for the proposal relates to personal injury claims. The Faculty recognises the case for a national personal injury court in the sheriff court, but considers that the proposed exclusive competence of that court of £150,000 is far too high; and that the public interest strongly supports the continuing right of those who pursue such claims to instruct counsel.

14. To the extent that the underlying policy is driven by the position in relation to personal injury cases, those concerns do not justify compelling litigants in other

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<sup>1</sup> *Shaping Scotland's Court Services*, April 2013, p. 11.

<sup>2</sup> *Ibid*, p. 5.

<sup>3</sup> In Northern Ireland, claims for less than £30,000 must be brought in the County Court; but, on the other hand, claims for more than £30,000 must be brought in the High Court.

<sup>4</sup> As the Faculty understands it, the basic rule in England and Wales is that the County Court has exclusive jurisdiction in cases worth less than £25,000, but this is subject to exceptions. In the case of personal injury claims, the figure is £50,000. In other classes of case, where a claim for between £25,000 and £50,000 is raised in the High Court, that claim will be remitted to the County Court unless the case falls within a specialist list, such as a commercial case, a technology and construction case, a chancery case or an admiralty case.

<sup>5</sup> Clause 39, as currently drafted, would mean that any action with which the sheriff can deal and which includes a "claim of value" of up to £150,000 would have to be brought in the sheriff court even if it also includes other non-pecuniary claims. That is illogical. If a pursuer seeks only a non-financial order, the claim can be brought in the Court of Session. If the pursuer combines the same non-financial order but also has a financial claim of up to £150,000, the action must be brought in the sheriff court. It is not unusual for actions to include both non-financial and financial claims. Sometimes the non-financial claim is the principal purpose of the action.

types of case to litigate in the sheriff court when they would prefer to litigate in the Court of Session. There is, for example, no evidence so far as the Faculty is aware that commercial litigants are choosing to litigate in the Court of Session inappropriately.

15. The Faculty does not accept that financial claims of up to £150,000 are “low value” claims<sup>6</sup>. £150,000 is a substantial multiple of average annual earnings in Scotland. For most of the population of Scotland, and SMEs, a sum very much less than £150,000 would be regarded as a really significant sum. For most personal injury claimants, the prospect of an award of £15,000, let alone other sums up to £150,000, would be significant. For many SMEs, claims very much lower than £150,000 may be crucial for cash flow or other reasons.

***Loss of choice: the Court of Session is an effective forum***

16. Many litigants exercise the choice which is currently available to them to litigate in the Court of Session notwithstanding that they could also proceed in the sheriff court. They do so for a number of reasons, including: (i) the skill, experience and reputation of the judges of the Court of Session; (ii) the right to instruct counsel in the Court of Session; (iii) the procedures of the Court of Session; (iv) deficiencies in the way the sheriff court handles contested civil litigation; and (v) the centralization of business in one court, with consequent efficiencies.

17. The Court of Session is, generally speaking, an effective forum. For example, as will be explained further below:-

- (a) Personal injury cases are dealt with effectively and efficiently under Chapter 43 procedure, with a minimum of active judicial involvement.
- (b) Commercial cases are dealt with effectively and efficiently in Scotland’s national Commercial Court. The judges of that Court are experienced in commercial cases, and apply procedures which are adapted to commercial needs.

The success of these procedures in the Court of Session is, in significant part, attributable to the involvement of skilled advocates.

18. If litigants who currently litigate in the Court of Session are compelled to litigate in the sheriff court, then under the current rules this would have a direct practical impact on the right of those litigants to instruct counsel. A litigant in the Court of Session has the right to instruct counsel and, in the event of success, will generally recover the costs of doing so as part of an award of expenses. By contrast, in the sheriff court, although any litigant is free to instruct counsel, counsel’s fee will not be recoverable as part of an award of expenses unless the sheriff sanctions the instruction of counsel. This is a state of affairs which inhibits the instruction of counsel in the sheriff court. In a practical sense, unless the litigant is wealthy enough not to worry about whether counsel’s fees will be recoverable in the event of

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<sup>6</sup> Cf Policy Memorandum, para. 86.

success, the requirement for sanction of counsel discourages litigants from instructing counsel<sup>7</sup>.

19. It is evident that key policy drivers for the proposal to increase the exclusive competence of the sheriff court relate to personal injury actions. There is a high volume of personal injury actions in the Court of Session at the lower end of the value scale. There are other important differences between personal injury actions and others: for example, in commercial actions whether in the Commercial Court or raised by ordinary procedure, a financial claim may be only one of several claims made in a single action<sup>8</sup>. Personal injury litigants are to have a national personal injury court. In these circumstances it would be appropriate to address personal injury actions separately from other classes of action.

### ***Personal injury litigation***

20. The pursuer in a personal injury case is typically an individual who has sustained an injury, whether at work or in other circumstances. He or she may have suffered and continue to suffer pain and suffering, discomfort and disability, and loss of earnings. The personal injury action is, in a well-founded case, that individual's one chance to obtain appropriate redress for a wrong suffered. Skilled representation is required from the outset of the case: to identify the lines of investigation; to formulate the basis of the claim; and to conduct settlement negotiations<sup>9</sup>. It may be noted that the pursuer bears the onus of establishing legal fault on the part of the defender<sup>10</sup> and of evidencing his or her loss.

21. Advocates often accept instructions to act on behalf of pursuers in personal injury cases in the Court of Session on a speculative basis – ie on a “no win, no fee” basis. A relatively small proportion of personal injury cases are, today, funded by civil legal aid. The willingness of advocates to act on a speculative basis in these cases secures access to justice for ordinary men and women of limited means who have claims which are important to them.

22. If the advocate is acting speculatively, the pursuer has the benefit of representation by skilled counsel effectively for nothing – and at no cost to the public purse. If the pursuer is unsuccessful, he or she does not require to pay the advocate. If the pursuer is successful, the advocate's fee will normally be met (along with the pursuer's other expenses) by the defender or the defender's insurer.

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<sup>7</sup> Sheriff Principal Taylor has proposed in his Review of Expenses that decisions on sanction should be made at an early stage, rather than (as at present) at the end of a case. This would be an improvement. But the requirement for sanction in itself would remain an effective inhibition on the instruction of counsel in the sheriff court.

<sup>8</sup> On the current wording of the Bill, a case in which there were several separate financial claims would apparently be excluded from the Court of Session if one of them was less than that exclusive competence limit. This cannot be intended.

<sup>9</sup> Paragraph 94 of the Policy Memorandum states that, because 98% of personal injury cases settle in the Court of Session, the advocacy skills of counsel are rarely being deployed in those cases. This betrays a misunderstanding of the role of counsel.

<sup>10</sup> Section 69 of the Enterprise and Regulatory Reform Act 2010 has abolished strict statutory liability for breach of health and safety regulations. This will make it harder for an employee who suffers an accident at work to establish liability against his or her employer. In every case, an employee injured at work now requires to establish negligence if he or she is to obtain compensation.

23. The defender (or insurer) will only require to meet the pursuer's advocate's fee insofar as: (i) the defender is liable (or at least accepts that the claim has sufficient merit to justify settlement); and (ii) the case has not been settled at a sufficiently early stage prior to litigation. Steps, such as the use and enforcement of pre-action protocols, can be taken to promote early settlement. If a case has not settled early, that should be because there is some issue of difficulty in the case – such as is liable to justify the involvement of counsel.

24. Cases brought under the personal injury procedure in the Court of Session proceed according to a case-flow management model which minimizes the involvement of the Court to the extent necessary. The case will only call before a judge if an issue arises which requires the attention of the Court. Most cases proceed to the pre-trial meeting without any hearing before a judge being required, and settle either at the pre-trial meeting or before proof. The involvement of experienced counsel on both sides of many cases is one reason for the efficiency with which the present system works.

25. The Government acknowledges that: “it is important for Scotland to retain a central court of expertise around which there is a professional cluster of expert practitioners and associated infrastructure”<sup>11</sup>. The Government accordingly proposes to establish a national personal injury court within the sheriff court. It is evident that the aim is to replicate in the national personal injury court the effective way in which personal injury cases are currently dealt with in the Court of Session under Chapter 43 of the Rules of Court. If that is to be achieved: (i) the new Court will require to be adequately resourced; and (ii) the rules on sanction for counsel should be changed so that the parties can continue to be represented by counsel. Unless the rules on sanction for counsel in the sheriff court are changed, the practical effect of the proposal to displace these cases into the sheriff court will be to remove a key element in that “professional cluster of expert practitioners” – namely, the ability of ordinary men and women who pursue personal injury claims to be represented by skilled counsel.

26. Data which have been made available to the Faculty indicate that some 70% of personal injury actions in the Court of Session settle for £20,000 or less and some 53% of personal injury actions settle for £10,000 or less. This indicates the scale of the shift of personal injury cases to the sheriff court which could be achieved at very much lower exclusive competence limits than £150,000. If the measures designed to discourage litigants from raising in the Court of Session cases which are in fact worth less than the exclusive competence limit prove to be effective, then a shift equivalent to that predicted by the Civil Courts Review (64%) could be achieved with an exclusive competence figure of between £10,000 and £20,000. If it were to be thought appropriate to build in an additional margin, the Northern Ireland figure of £30,000 would provide an appropriate point of comparison<sup>12</sup>. The Faculty amplifies on these points as follows:

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<sup>11</sup> Para. 101 of the Policy Memorandum.

<sup>12</sup> The Faculty recognizes that in the small dataset used for the purposes of the Civil Courts Review, for cases where £150,000 or less was sought, the average value of settlement to sum sought was reported to be 28% or less. It might be suggested that the identified settlement values should be multiplied by reference to this figure (or some other appropriate figure to reflect the potential difference between sum sued for and award or settlement value) in order to identify a figure by way of the sum sued for which would shift the requisite cases from the Court of Session to the sheriff court.

26.1. The key dataset upon which the Civil Courts Review proceeded was a very small one. The Review had a sample of 93 Court of Session cases between 2004 and 2007<sup>13</sup>. As the Review itself acknowledged, inferences drawn from that very small sample will not necessarily be a good reflection of the whole population of cases over that period<sup>14</sup>. The data upon which the Civil Courts Review relied is also now somewhat historic: for example, the overall volume of civil litigation has declined in recent years.

26.2. The Faculty has been given access to a larger dataset comprising the settlement amounts in 1001 cases raised by a firm of personal injury solicitors in 2011 and 2012. If all cases in that dataset which settled for £10,000 or less had been excluded from the Court of Session, 53% of the cases would remain in that Court; if all cases which settled for £20,000 or less had been excluded from the Court of Session, 30% of the cases would remain in that Court; if all cases which settled for £50,000 or less had been excluded from the Court of Session, 19% of the cases would remain in that Court; if all cases which settled for £100,000 or less had been excluded from the Court of Session, 13% of the cases would remain in that Court; and if all cases which settled for £150,000 or less had been excluded from the Court of Session, 7% of the cases would remain in that Court. These figures may be cross-checked with figures provided to the Government Consultation by APIL, which (albeit on the basis of a small sample of 53 cases) estimated that 96% of cases would be removed with a £150,000 privative limit and 88% of cases would be removed with a £50,000 privative limit.

26.3. The proposed reforms will include provisions which are designed to discourage litigants from bringing in the Court of Session claims which are worth less than the exclusive competence limit. Under clause 89 of the Bill, if, at any stage the Court of Session considers that despite the value of any order sought the value of any order likely to be granted is likely to be less than the exclusive competence figure<sup>15</sup>, the Court must remit the case to the sheriff court unless it considers that there are special reasons for not doing so. The Report of the Civil Courts Review explains that: "Under the active judicial case management model that we propose, it would be for the judge at the first or any subsequent judicial case management hearing to consider whether the value of the case was likely to be less than the privative limit and, if so, whether there were any special features that would justify the retention of the case in the Court of Session. If there were not, the case would be remitted to the sheriff court ..."<sup>16</sup>. It is also proposed that if the pursuer is awarded a sum less than the privative limit, expenses should be awarded on the sheriff court scale unless the pursuer can show cause why it was necessary or appropriate for the case to be raised in the Court of Session<sup>17</sup>.

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But to do this would be to assume that the measures contained in clause 89 of the Bill and the deterrent effect of a firm application of the expenses rule would be ineffective.

<sup>13</sup> Vol 1, para. 107.

<sup>14</sup> Vol I, page 70, fn 19.

<sup>15</sup> The Court is, though, obliged to assume that liability will be established and that there will be no deduction for contributory negligence.

<sup>16</sup> Vol 1, para. 126.

<sup>17</sup> Vol 1, para. 128.

27. In relation to disproportionate cost, the Government's Consultation Document, which preceded the Bill, stated<sup>18</sup>: "in relation to low value claims (where the sum sued for is less than £10,000) the pursuers' recovered expenses exceeded the damages awarded in 81% of cases in the Court of Session". This suggests that the concern is with claims which are at the low end of the value scale, and not with claims up to as much as £150,000.

28. The Policy Memorandum reports a desire by some solicitors to conduct more personal injury litigation themselves. It is reported that: "These practitioners feel that they have the expertise and the experience to conduct even catastrophic personal injury case in the sheriff court before a specialist sheriff"<sup>19</sup>. At present, there is nothing to prevent any solicitor, who considers it in the interests of the client to do so, from raising a personal injury claim in the sheriff court and conducting the case himself – or, indeed, if the solicitor has acquired rights of audience in the Court of Session, from dealing with the claim in that Court. In fact, it is the Faculty's impression that in catastrophic injury cases, counsel is almost invariably instructed.

### ***Other classes of case***

29. For the reasons mentioned above, personal injury actions can and should be addressed separately from other classes of action. In particular, litigants in personal injury actions are to have a national personal injury court. Litigants in other classes of action who would currently wish to bring their disputes to the Court of Session will require to raise proceedings in whichever sheriff court which has jurisdiction over the case. When sheriff court reform is going to be a process which will take a period of years to implement, it is not in the interests of those litigants, or of the administration of justice, to compel litigants with claims of up to £150,000 to proceed in the sheriff court. These considerations support a more modest increase in the exclusive competence of the sheriff court at this time, with a power to review that limit. If sheriff court reform is effective, litigants may, in any event, be expected to vote with their feet. The Northern Ireland figure would be an appropriate comparison – it would represent a six-fold increase in the current exclusive competence figure.

30. It is important that the Court of Session retains a sufficiently volume of cases, and a sufficiently rich diet of cases, to allow it to perform its function of developing the law in Scotland. An increase in the exclusive competence of the sheriff court to £150,000 coupled with the proposed sheriff appeal court could well effectively take whole classes of case out of the Court of Session. For example, defamation, privacy and breach of confidence cases may be for relatively small monetary values (often around £20,000), but can involve highly sensitive judgments about the balance between freedom of expression (particularly for the media) and the interests of individuals, such as to justify the attention of Court of Session judges. Yet, it is believed that, with the exception of one case (currently under appeal) no case in the history of Scottish defamation law has involved an award of over £150,000.

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<sup>18</sup> Para. 30.

<sup>19</sup> Para. 91

### **Commercial cases**

31. At present, commercial litigants in Scotland have a choice of forum: they may choose to litigate in the appropriate sheriff court or in the Commercial Court in the Court of Session<sup>20</sup>. That is a valuable choice. The judges of the Commercial Court are experienced in dealing with this class of action. They typically had experience of such cases when in practice and have maintained that expertise while on the bench. They command the confidence of the commercial community. The Commercial Court uses procedures adapted to the needs of commercial litigation. In the Commercial Court, both parties will ordinarily be represented by counsel with expertise in commercial work and experience of the Commercial Court – and an award of expenses will include counsel’s fees.

32. Commercial actions in the Court of Session include a wide range of different types of case. Many involve SMEs on one side or the other, or on both sides. The Civil Courts Review estimated that about a quarter of cases raised in the Commercial Court at that time would be excluded if the sheriff court had an exclusive competence of £150,000. The Faculty is not aware of any evidence to the effect that commercial litigants exercise the choice currently available to them inappropriately. Financial claims for less than £150,000 may involve legal or factual complexity which makes them appropriate for the Commercial Court. Furthermore a financial claim may be associated with other claims – e.g. to enforce a contract, or for interdict – which may, in fact, be the principal issues in the action<sup>21</sup>.

33. It would not be in the interests of commercial litigants who currently choose (for good reasons) to bring claims in the Commercial Court to compel them to bring their cases in the sheriff court. Reform of the sheriff court is a process which is going to take some time and capital investment. A commercial litigant in Scotland will require to bring a case which falls within the exclusive competence of the sheriff court in the local sheriff court which has jurisdiction where the sheriff may or may not have appropriate expertise. This consideration, along with the potential inhibitions on the ability to instruct counsel in the sheriff court and limits on the recoverability of counsel’s fees in that court may deter commercial litigants – and may, indeed, exacerbate the export of commercial litigation from the Scottish courts.

### ***The provisions on remit***

34. The Scottish Government recognizes that the complexity, difficulty and importance of a case is not necessarily associated with the value of the claim. In securing that cases are dealt with at the “appropriate level”, heavy reliance is placed on the power of sheriffs to remit cases to the Court of Session<sup>22</sup>. But for claims which fall within the exclusive competence of the sheriff court, the power to remit in the Bill is heavily circumscribed.

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<sup>20</sup> In practice, commercial litigants are often able to choose whether or not to litigate in Scotland at all: it is open to them in their commercial contracts to agree where the dispute will be litigated.

<sup>21</sup> Such non-financial claims may, depending on the circumstances, be more difficult and complex than the financial element of the action. But clause 39 of the Bill would preclude them being raised in the Commercial Court if “an order of value” is sought which does not exceed £150,000.

<sup>22</sup> The Policy Memorandum, para. 190, describes this as “an important safeguard”.

35. The ordinary rule in relation to remits is to be that the sheriff may remit proceedings to the Court of Session if the sheriff considers that the importance or difficulty of the claim makes it appropriate to do so<sup>23</sup>. But in a case within the exclusive competence of the sheriff court (ie where an order of value of less than £150,000 is sought), the sheriff is only to be permitted to request the Court of Session to allow the remit of a case if the sheriff considers that there are “exceptional circumstances justifying such a remit”<sup>24</sup>.

36. It would appear to follow that, in such a case, a sheriff might consider that the importance and difficulty of a claim would make a remit to the Court of Session appropriate, but would nevertheless be unable to make a remit because there are no “exceptional circumstances”. This is far too restrictive a test. The power of the Court of Session to refuse to accept the remit of a case within the exclusive competence of the sheriff court should be sufficient safeguard against cases being remitted inappropriately.

37. Separately, the Court of Session should be given power to “call in” cases. One of the disadvantages of a system which provides for remit from the lower court to the higher court is that a judge in the lower court may, for a variety of reasons, refuse an application to remit a case even if a remit is justified. The refusal of a remit would be a difficult to appeal. But the consequences could be significant for the litigant: the case would, if the provisions in relation to the sheriff appeal court are also enacted, would not only be decided by the sheriff at first instance, but by the sheriff appeal court on appeal, with any further appeal highly constrained.

### **The Sheriff Appeal Court**

38. The Bill proposes to establish a new national Court of Appeal in addition to the existing national courts of appeal in criminal matters (the Court of Criminal Appeal) and in civil matters (the Inner House of the Court of Session). All civil appeals from the sheriff and all summary criminal appeals will be taken to the new Sheriff Appeal Court. There will be a very limited onward appeal to the Inner House in civil matters and to the High Court in criminal matters.

39. The creation of this new institution, when combined with the proposed exclusive competence of the sheriff court, will have undesirable structural effects:-

39.1. There will, in effect, be two national appeal courts.

39.2. For practical purposes, there will be a sharp demarcation between cases in the sheriff court, which will be appealed only to the Sheriff Appeal Court (with very limited onward appeal), and cases in the Court of Session, which will be appealable to the Inner House.

39.3. The Bill proposes that virtually all cases in which a claim for value of up to £150,000 is advanced will have to be raised in the sheriff court. The potential for remit to the Court of Session are very tightly confined. An appeal

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<sup>23</sup> Clause 39(2).

<sup>24</sup> Clause 39(4).

will lie only to the Sheriff Appeal Court. A further appeal to the Inner House is available only in extremely limited circumstances.

39.4. The practical consequence is that there will be effectively two entirely separate judicial structures. Significant classes of business may never, or may rarely, be dealt with in the Court of Session. This would have a significant impact on the breadth of experience available to Court of Session judges and, accordingly, not only on the ability of the Court of Session to shape and develop Scots law, but also the development of the law itself.

39.5. It is anticipated that for the majority of civil appeals, the Sheriff Appeal Court will sit as a bench of one<sup>25</sup>. This perpetuates the anomalous position that an appeal from a single sheriff may be taken to a single judge, the sheriff principal. The ordinary principle is that an appeal should lie to a larger bench; otherwise the appeal is simply exchanging the view of one single judge for another single judge.

40. The principal justification for the creation of the new institution is the proposition that: “There have been long delays in waiting periods for appeals to be heard in the Inner House with the SCS targets being exceeded by a considerable margin”<sup>26</sup>. The data provided is historic and the Policy Memorandum acknowledges that “at present ... the delays are not quite as long as they were”<sup>27</sup>. The Policy Memorandum suggests that this may be attributable to the drop in civil business before the courts. It is the perception of practitioners that waiting times in the Inner House have improved substantially, largely because of procedural reforms which have been introduced following Lord Penrose’s recommendations for improving Inner House business.

41. If a Sheriff Appeal Court is to be established, it will be essential that appellants and respondents before that Court have an automatic and effective right to instruct counsel.

### **Counsel should be able to follow the cases**

42. If there is to be a significant structural shift of cases from the Court of Session to the sheriff court, where they will be dealt with by sheriffs rather than by Court of Session judges, it will be important that the parties continue to be able to instruct skilled advocates. This is particularly so, given that, if the exclusive competence limit is set at £150,000, whole classes of business may be dealt with almost exclusively in the sheriff court, with the consequence that decisions of sheriffs and the sheriff appeal court are likely to have a much greater significance for the development of the law. If there is to be a structural shift of cases into the sheriff court, the long-term health of the legal system, as well as the interests of individual litigants, requires that counsel should be able to follow the cases.

43. It should not be assumed that the instruction of counsel involves duplication of effort. Necessarily, the work which the advocate does in relation to a case has to be

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<sup>25</sup> Para. 131, Policy Memorandum.

<sup>26</sup> Para. 120, Policy Memorandum.

<sup>27</sup> Para. 123.

done by someone. The reality is that solicitor and counsel perform complementary roles; and, today, solicitors may, if they consider it appropriate to do so, instruct an advocate on the basis that the advocate will appear without the instructing solicitor having to be present in court.

44. It is anomalous for the Court to be put in a position of, effectively, restricting the litigant's choice of legal representative – and it is, on one view, surprising that the court should be in the position of effectively restricting the use of professional advocates, whose professional training and expertise peculiarly fits them to represent clients in court. The other jurisdictions of the United Kingdom and Ireland do not, so far as the Faculty is aware, apply a rule which allows the recoverability of counsel's fee only if the court sanctions the use of counsel, but rather proceed on the basis that litigants should generally be free to instruct a barrister at all levels and to recover the cost of doing so as part of an award of costs. The starting point in those jurisdictions is – as it should be – a recognition that advocacy is a specialist professional skill, that it is in the interests of litigants as well as the administration of justice, that a litigant should have the right to instruct a professional advocate and that accordingly an award of costs carries with it the fee of counsel.

### **The impact on the bar**

45. The two proposals in the Bill referred to above will have a direct and adverse impact on the independent bar in Scotland. Almost half of the cases currently heard in the Court of Session would be transferred to the sheriff court, all civil appeals from the sheriff would be removed from the Inner House, and all summary criminal appeals from the Court of Criminal Appeal.

46. The impact of these changes on the bar will depend on whether counsel are able to follow the cases. If they are not, the changes will bear on all parts of the bar, but will bear particularly hard on those who specialize in personal injury work and on those at the younger end of the profession. Individual advocates are likely to have to leave the bar. Scotland already has a small bar relative to its population. That small bar would become even smaller. This would diminish the choice and quality of representation available to litigants throughout Scotland.

47. There is an additional, potentially significant, long-term systemic effect for the future health of the Scottish legal profession. There are, today, far fewer opportunities for advocates to appear in court early in their careers than was formerly the case. One of the purposes of the Bill is to remove from the Court of Session "low value" cases of all classes. By the nature of things, it may be in relatively straightforward cases at the lower value end of the spectrum that advocates can obtain the experience early in their careers which equips them, as their careers develop, to undertake higher value complex litigation. Over the long run, then, these proposals would prejudice the continuing ability of the system to produce the experienced and highly skilled advocates who are needed for those higher value and complex cases.

Faculty of Advocates  
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