Citizens Advice Scotland and its member bureaux form Scotland’s largest independent advice network. CAB advice services are delivered using nearly 250 service points throughout Scotland, from the islands to city centres.

The Citizens Advice Service in Scotland undertakes essential work within almost all elements of the civil justice system. The preventative work of the Service – helping clients to address problems before the need for court – is invaluable in solving problems at an early stage and avoiding escalation to formal legal processes.

In 2012/2013, bureaux provided representation in over 11,000 civil court and tribunal cases including actions in housing, debt, small claims and employment.

Key Points

Citizens Advice Scotland (CAS) welcomes the opportunity to comment on the Courts Reform (Scotland) Bill (the Bill). The coming years will see significant changes to the way civil justice is accessed and administered in Scotland and this Bill is foundational to achieving those changes in a progressive and positive way.

- The Bill has an overwhelming focus on courts but CAS strongly believes in a whole system approach in which courts are the forum of last resort. More preventative work with a focus on early resolution, and greater availability and accessibility of ADR will have a significantly positive impact on solving disputes earlier and in a more proportionate way.
- CAS agree with the increase in the privative jurisdiction
- CAS agree with the creation of a new judicial office of ‘Summary Sheriff’ but only if this represents a new type of judge whose practice is characterised by accessibility of users as its primary concern. This should include:
  - specialist judges who are ‘ticketed’ as specialists in certain topics
  - no assumption that these judges should necessarily sit within a court building – instead sharing premises with the tribunal service for example
  - sitting without wigs and gowns
- CAS agree with the creation of a specialist Personal Injury court
- CAS keenly advocate judicial specialisation
- We agree that there should be a Sheriff Appeal Court whose decisions should be binding across Scotland’s Sheriffldoms
- CAS agree with the intention to provide a unified set of rules for cases up to a certain value known as Simple Procedure
- We welcome the increase in the limit for cases to be heard under Simple Procedure but think that £5,000 is conservative and would recommend the limit to be £10,000
- CAS would strongly recommend that, parallel to these changes, there is clear and planned development of public legal education, self-help services and resources, in-court advice services and lay representatives
• CAS believe that the creation of the Scottish Courts and Tribunals Service could be positive but the distinctive nature of tribunals must be maintained
• In the establishment of the Scottish Courts and Tribunals Service, CAS recommends that the joint Board must include members representing tribunals at an operational and administrative level, as well as representation of the consumer interest.

Call for Evidence

Privative Jurisdiction

1. CAS agree with the proposed increase in the privative jurisdiction. We agree with the policy intention of achieving the aim of cases falling before the most appropriate and proportionate jurisdiction – both in terms of proportionality of cost and of procedures. We also support s88 of the Bill which outlines cases may be remitted in exceptional circumstances but feel that the use of remittance should be monitored to ensure its use is as intended. We would also recommend that this monitoring is reported upon publically to achieve transparency.

2. CAS also believe that this level of exclusive competence will help to strengthen the specialist Personal Injury court to be established. With many personal injury cases to fall within Sheriff Court jurisdiction by virtue of the limit, the new PI court will be enabled to develop a greater depth of expertise by dealing with the greatest range of business. If cases coming before the new personal injury court are limited, the specialism of the court will be undermined.

3. We do recognise that the financial shift will have a significant impact on the Profession. Cases heard at a different level of the system will have an impact on the relevant type of representation and the numbers of cases before courts. However, for the vast majority of users, the court process by which their problem will be addressed is new to them. They do not enter a process with clear ideas of which court their case will fall before, what rules they will have to follow, or who will represent them. The impact of the value change on users will not be as apparent as users do not preconceive a process.

4. The main concerns in relation to users are the availability of proportionate representation (both numbers of available representatives and cost of those representatives) and the burden of increased caseloads on court waiting times. Cases being heard in the Sheriff Court should mean a decreased need for Counsel. An unintended consequence of the reforms could be a rise in Counsel before the Sheriff Court and this should be avoided.

5. The cases before all courts should be monitored and performance measures instigated to be publically reported on. Indicators should include the time a case takes to be heard and the representation in that case. These indicators should be measured against pre-determined standards and the opportunity to quickly instigate measures to improve poor performance should be built in to the system. The role of the Scottish Civil Justice Council is critical to this.
The Office of Summary Sheriff

6. The creation of a new tier of the judiciary represents a huge opportunity to enhance accessibility for users of the civil court system. Court can be a daunting experience for users of the civil justice system: the court building, the court rooms, the processes, language and formality are – for many – a different world. Going to court can cause real fear and anxiety, as found by Consumer Focus Scotland/Scottish Legal Aid Board research ‘The Views and Experiences of Civil Sheriff Court Users’ from 2009.¹ One defender in a rent arrears case said, for example:

‘I was actually shaking to be quite honest with you….What was going to happen to me, was I going to go to jail?... I was sitting outside the court room and I was biting my nails…and I was actually crying…. Nobody had said what would happen to me’.

7. This unfamiliar and unknown environment can act as a deterrent to users from raising actions. Negative experiences such as this are not uncommon but can be learned from. The opportunity to improve the experience of civil process for users should be harnessed, and Summary Sheriffs are instrumental in this.

8. CAS believes the establishment of a new judicial tier is a rare opportunity to design a forum which understands and acknowledges the needs of users. CAS agrees with and supports the principles set out at s72 which provide a framework for Summary Sheriffs to adopt an inquisitorial role. We firmly believe that this can be best achieved through the specialisation of Summary Sheriffs: specialists should know the right questions to ask and be able to appreciate the context of the answers that they are given.

9. In operational terms, CAS believes that the design of Summary Sheriff role should follow design principles with accessibility for users as the primary consideration:

- **Hearing civil business in non-court settings** which would:
  - fully align the inquisitorial approach with the needs and expectations of users who find court buildings extremely daunting
  - reduce the squeeze on civil business within the Sheriff Court setting thus avoiding delay waiting for the accommodation needed to hear a case
  - foster the easy promotion of peripatetic Summary Sheriffs – an approach which would significantly increase proximate access to justice in rural areas and make best use of specialism. This approach is similar to that taken by many tribunals and some Westminster and Holyrood Committees

- **Separating civil from criminal business**, preferably by hearing civil business in non-court settings or the use of weekend and evening courts so that business is separated by virtue of timing, and achieving separation

through specialisation which means civil and criminal business is not heard by the same judge

- **Requiring Summary Sheriffs to sit without wigs and gowns** which will make this tier of the judiciary accessible to users and enhance the inquisitorial role. This was the original intention of the small claims process when introduced in the 80’s but in the practice of small claims courts this was not widely implemented.

- **Clear and simple process which removes the need for lawyers from the outset.** Lessons can be learned from employment tribunals or small claims – both forums were designed to be accessible for citizens without the assistance of a lawyer, but this intention has been lost over time and the need for a lawyer has escalated into an expectation with an accompanying rise in cost. Clear information and easily accessible toolkits which would allow a confident user to prepare their own case should be developed. There should also be a robust network of registered lay representatives to support vulnerable users.

10. CAS seeks assurance that the design of Summary Sheriff practise will achieve the fullest possible innovation and in doing so will achieve the best possible forum for consumers to bring their disputes. We are fully supportive of the intention that Summary Sheriffs represent a new type of judge based on the design principles outlined above.

11. We would like to see a working group comprised of judicial and consumer members to devise and monitor the operation and rules relating to Summary Sheriffs. This could take the form of a Committee overseen by the new Scottish Civil Justice Council and no Summary Sheriffs should be recruited or appointed until there is a clear idea of how the role will function. Once the appointment process begins, we would recommend there should be a member of the recruitment panel who represents the consumer interest.

12. CAS would also like the assurance of an independent, external audit of the operation of Summary Sheriffs (in terms of administration, jurisdiction and consumer experience) to be undertaken and reported to the Scottish Parliament annually for the first 5 years and on a 3 yearly basis after that. This will ensure the design of the third tier is absolutely right as the forum for which it was intended.

**Establishing a Personal Injury Court**

13. CAS is supportive of the establishment of a specialist Scotland-wide personal injury (PI) court. Specialism will allow for greater consistency in decisions, refinement in procedures and a better experience for users in easier expectation management.

14. However, this specialist court should not operate in isolation from the wider system. It is essential that best practice is shared with other civil courts of the same tier, and communication is maintained.
Judicial Specialisation

15. CAS keenly advocates judicial specialisation. There is much merit for users in appearing before a specialist Sheriff who is familiar with the law of the area before them but importantly also familiar with contexts which commonly call for that law to be applied. For example in cases of rent arrears a familiarity with welfare benefits is highly beneficial, or in situations of domestic abuse specialisation would allow for the appropriate handling of the case.

16. Specialisation would also aid consistency with decisions being made by a common core of decision makers who would have the ability to build closer networks for discussion within their specialism. In addition, there would be efficiencies in case management borne of the experience judges would build through their specialist experience. Active case management is a positive development and complements the specialist approach to achieve a better experience in proceedings.

17. CAS would recommend that housing, debt, small claims, family and commercial actions would be useful categories under which the relevant judiciary may be characterised. Depending on need and experience it may be practical that some judges are designated to be specialists in more than one civil area. However, CAS would not support the cross-specialisation of the judiciary in both civil and criminal business with the possible exception of cases involving domestic abuse.

18. We would expect that this approach should be supported by a full programme of training – both initial and ongoing – which involved training from other agencies who may be able to assist in providing background context to cases. For example, the Citizens Advice Service in Scotland could provide training on welfare benefits in the context of housing actions. We also see that this training is a positive opportunity to bring together tribunal members and court judges to undertake training together in areas of mutual impact. Again, welfare benefits is a good example of a background element which impacts on many users of both systems.

Creating a Sheriff Appeal Court

19. Citizens Advice Scotland agree with the creation of a new Sheriff Appeal Court. We agree that this fits with the aim of achieving proportionality and we particularly welcome that decisions will be applicable throughout Scotland and not only within the Sheriffdom in which the appeal is raised.

Simple Procedure

20. CAS agrees with the intention that cases up to a certain value should be administered under a unified set of rules to be known as Simple Procedure. We agree with the outline of the intended approach at s71 with those hearing a simple procedure taking an inquisitorial approach which is appropriate to the instant case. In conjunction with the requirement on the Scottish Civil Justice Council to ensure rules are written clearly (in plain English), this should help to ensure an accessible forum for the resolution of civil disputes.
21. The current situation for users can be very confusing. There are different forms, different fees, different timescales and different processes for actions which can, to a consumer, seem the same. For example, this difference exists for a user who raises an action for the repayment of their deposit depending on whether the landlord has paid the deposit into the Tenancy Deposit Scheme or not.

22. In cases where the landlord has paid into the scheme, a Small Claims action may be raised. The client can be supported in making the application by a lay representative and costs £71 to lodge the claim (if the claim is above £200) with an £11 fee for a Sheriff Officer to serve a small claims summons.

23. In cases where a landlord has not paid a deposit into the Tenancy Deposit Scheme and a tenant seeks to recover their deposit, the case is brought under Summary Application procedure. Lodging the initial writ to commence a summary application with the court costs £85.00 – this writ may only be completed by the client themselves or a solicitor (who will charge a fee). The writ must then be served on the landlord by way of a solicitor or a sheriff officer. A sheriff officer will charge £25.35 for this service, plus the recorded delivery cost. A solicitor is likely to charge even more. If the landlord disputes the action and a proof hearing is required, then there is a further cost of £48.00 to fix a date for the hearing, and the hearing itself will cost £201.00 for each day or part of a day needed to run it. This means that a tenant could have to pay up to £359.35 just to have their case heard by a sheriff.

24. Although cases of this nature will move to tribunal under the Housing (Scotland) Bill which is currently before Parliament, the example demonstrates well the confusion a client may face.

25. As well as a unified set of rules, we also welcome an increase in the value of cases which can be heard under this procedure. We think the proposed limit of £5,000 is conservative and we would recommend that there is potential to review the limit upward to £10,000 after a 1-3year review period. The accessibility of processes, language and cost which the Bill dictates Simple Procedure should offer users easy access to this forum. However, under no circumstances should this assume legal aid will not be available. Legal aid is essential in supporting some of the most vulnerable users in society and application for legal aid should not be restricted by process alone.

26. CAS would strongly recommend that, parallel to these changes, there is clear and planned development of public legal education, self-help services and resources, in-court advice services and lay representatives. This is in line with recommendations made in the Gill review to improve access to justice.

27. Confident consumers should be empowered through this information by toolkits to demonstrate the appropriate drafting of forms as well as through resources such as videos to outline how the hearings may develop – this should include basic information such as the layout of the room and how to address the judge. For users who are less confident, there should be a funded programme of advice and support made available in much the same way as in-court advice projects which operate across the Citizens Advice Service.
The Scottish Courts and Tribunals Service

28. In the late 2013 consultation on the proposed establishment of the Scottish Courts and Tribunals Service, CAS were broadly supportive. In that consultation, the move was described as a ‘merger’ of the Scottish Court Service and the Scottish Tribunal Service and so we are concerned that the terminology in current consideration has changed to ‘transfer.’

29. In our previous response, we were clear that we do not believe the Court Service should be the dominant partner but there should be equality between the services. Although the numbers before Scottish Tribunals are not currently high, there is a real possibility that in coming years further devolution of jurisdictions such as employment will exponentially increase numbers. It is therefore key that tribunal-administered justice is respected as an equally valid and valued outlet of the civil justice system. This equality should be present from the outset of the new Scottish Courts and Tribunals Service.

30. We previously argued and still firmly believe that an important step in achieving this is in achieving a balance on the Board of the organisation. The Board of the merged service will be a key statement of intent signalling the standing of tribunals, courts and users in assuring access to a cohesive structure of justice. The Board should represent the nature of the changed organisation as well as the changing civil justice landscape.

31. To simply amend the current Board does not send a message of the coming together of justice organisations but rather the absorption of the Scottish Tribunal Service into the Scottish Court Service. A more fundamental review of the Board structure is necessary to avoid the implication that the SCS is the dominant and leading body.

32. In principle, the membership should represent the civil justice system, criminal justice system and the tribunal system equally. There will be obvious relationships between civil courts and tribunals which do not extend to criminal matters, and discussions which impact on the hearing of civil/criminal matters in shared premises and so it may be beneficial to set up cross-justice committees at the same time as the reviewed Board is established. These could be used to discuss matters in relevant forums (for example a committee for civil/administrative justice and a committee for civil/criminal court administration) which could then be reported back to an overarching Board.

33. A fundamental review of a desirable Board structure also raises questions about the current level of consumer (user) representation on the SCS Board. At present, although there is potential for appointment as a ‘member from outside the justice system,’ there is no consumer voice on the SCS Board. Those who are not legal professionals are drawn from the business and community justice sectors.

34. The recognition of the importance of consumer representation in justice policy is clear and most recently visible in the specific requirement for consumer members on the Scottish Civil Justice Council. In the current period of change to the civil justice landscape, and particularly with the loss of oversight of tribunals by the
abolition of the Administrative Justice and Tribunals Council, consumer involvement is crucial.

35. Our recommendation of relative equality between civil, criminal and tribunal administered justice also extends to recommending that an appreciation for the nature of tribunal practise and procedure should be upheld. Tribunals should maintain their distinctive nature and it should be acknowledged that in terms of IT and user-focus there are fundamental lessons which the civil justice system could learn from tribunals.

36. It is particularly important that the nature of tribunals is maintained through the writing of rules. This is particularly so when the rule making function transfers to the Scottish Civil Justice Council who will have far wider functions and powers in relation to civil justice than they will in relation to tribunals.

37. In creating the SCTS, tribunals take a step away from wider administrative justice and towards the court system. This is not necessarily a negative step, but it is not a step which is reflected in the oversight of justice bodies where the Scottish Civil Justice Council will have oversight for courts alone and the oversight of tribunals will sit alongside administrative justice. This confusion of boundaries makes it difficult to see how tribunals will be safeguarded in practice.

Alternative Dispute Resolution (ADR)

38. CAS are disappointed that there is not greater commitment to embedding ADR in the civil justice system on the face of the Bill. In the singular focus on courts, this Bill does not acknowledge the courts as an element of the delivery of justice in Scotland but puts much emphasis on courts as the sole outlet. As discussed above however, people do not typically identify with their problems as being ‘legal’ and so legal processes can ultimately present a barrier to justice.

39. Along with Money Advice Scotland, Which, the Scottish Mediation Network and the Scottish Arbitration Centre, CAS strongly advocate a whole system approach. In better understanding a person’s motivations for seeking resolution to their problem, CAS believes there is a positive opportunity to align services to an individual’s pursuit of justice. At an early stage of a dispute, advice and negotiation could produce the desired outcome, where parties are willing to come together mediation may be the right route and where parties simply want a decision, arbitration should be available.

40. In providing services locally for alternative dispute resolution, many cases (especially small claims) may be resolved in a satisfactory way before the need for a case to be heard before a Sheriff or Summary Sheriff. The ability to opt for mediation, including telephone mediation, at an early stage (possibly before preliminary hearings if both parties agree and subject to the sheriff's power to order an oral hearing where appropriate) is an option which should be positively considered in any review of court services. As should the option for an arbitration court where all submissions are submitted via an online portal.
41. We do not believe that parties should be compelled to use ADR, but if awareness improves, use, knowledge and expectation will also improve where there has been positive experience. The cycle of awareness – use – knowledge – expectation should be thought of as a whole. Public awareness and uptake require an efficient and accessible system from the start to ensure positive experience and in turn positive communication of that experience by consumers. Word of mouth is a powerful tool.

42. This cannot happen without signposting however. Parties must be encouraged to access resolution which is proportionate to their dispute and this involves belief in the whole system: judicial process should not scorn advice and ADR just as advice and ADR should acknowledge the appropriateness of judicial process as a forum for many cases which they cannot resolve.

43. Facilitating a user’s choice can be aided by the availability of accessible information and advice which promotes all forms of dispute resolution from early negotiation, to ADR, to courts. Therefore, we would like the Scottish Government to ensure that provision is made in the Bill for a new justice system that provides such information and advice and embeds within it dispute resolution options, including alternatives to litigation.

Additional comments

Complaints About Judges

44. CAS recommends that this Bill would be a good opportunity to review the situation for enabling users of the civil court system to raise a judicial complaint. Consideration to improve the process for making judicial complaints and strengthening the role of the Judicial Complaints Reviewer under Chapter 2 of the Bill.

IT

45. There are significant improvements to IT systems which are needed to fully support this Bill and the provisions it contains. This is in relation to both operational aspects and the oversight of the civil court system. Case management, submission of documents, video conferencing and access to information are key operational issues where improved IT will signal vast improvements. In terms of oversight, improvements to IT systems should enable more structured analysis of case types, representation type (lay rep/solicitor/party litigant) and the route which has led a user to the court – ie have they sought advice/been referred?

46. CAS appreciate that much of this work is being taken forward by the Scottish Government in the Justice Digital Strategy but we would stress the importance of this strategy as strategically key in the development of the best civil justice system possible.

Lauren Wood, Policy Officer
14 March 2014