Justice Committee

Courts Reform (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Civil Justice Committee, Access to Justice Committee and Criminal Law Committee. These committees are comprised of senior and specialist lawyers as well as lay members.

We welcome the opportunity to consider and respond to the call for written evidence on the Courts Reform (Scotland) Bill and have the following comments.

General Comments

We have been consistently engaged with the court review process, fully participated in Lord Gill’s Scottish Civil Courts Review and the Scottish Government’s consultation on the draft Courts Reform (Scotland) Bill in 2013 and attended stakeholder events with a view to contributing positively to court reform in Scotland.

While we accept that there is a requirement to deliver more efficient and effective court structures in Scotland, we are concerned about some proposals, including the exclusive competence of the Sheriff Court (moving from £5,000 to £150,000) and imposition of a three month time limit within which a judicial review should be brought to the Court of Session. We suggest that this latter proposal, for instance, will have the unintended consequence of limiting access to effective justice for individuals and communities who seek to ensure that the administrative decisions of public bodies which affect their lives are taken reasonably and lawfully.

Part 1 – Sheriff Courts

Chapter 2 - Judiciary of the Sherifffdoms

Section 5 - Summary Sheriffs

We suggest that both tiers should use the designation “Sheriff”. With regard to criminal procedure, we do not agree that the term “Summary Sheriff” adequately reflects the new tier and its jurisdiction. Given that “Summary Sheriffs” will have to carry out non-summary business the term “Summary Sheriff” will be misleading for both the public and for those who work within the justice system. The term also has little meaning in civil procedure.
We suggest that the terms “Senior Sheriff” and “Sheriff” should be used to avoid confusion, particularly given a summary Sheriff’s jurisdiction to adjourn diets in solemn criminal proceedings in terms of section 44(3)(a) of the Bill.

Section 9 - Reappointment of part-time Sheriffs
We note that part-time Sheriffs will be reappointed unless, in terms of section 9(1)(b), a Sheriff Principal has made a recommendation to Scottish Ministers against reappointment. We welcome clarity on the process of such a recommendation and the right of a part-time Sheriff to make a challenge.

Section 26 - Abolition of the office of Honorary Sheriff
We are concerned that the office of Honorary Sheriff is to be abolished.

We note from paragraph 44 of the policy memorandum accompanying the Bill that their use was criticised in some consultation responses. Their abolition was supported by some stakeholders who considered that non-solicitor Honorary Sheriffs should not be allowed to preside, particularly in cases relating to children, protective orders and domestic abuse.

While it is appreciated that there may not be a great demand for Honorary Sheriffs in urban areas where a Sheriff can almost always be available, we note that, despite the advent of Summary Sheriffs and a greater use of video links to remote locations, there may well remain a need in rural areas of Scotland and in particular Sheriff Court districts where there is only one permanent Sheriff.

We understand that there is no cost involved with Honorary Sheriffs and therefore no financial justification for the abolition of the post. We therefore suggest that consideration be given to allowing only advocates and solicitors of five years’ standing to serve as Honorary Sheriffs.

We also note that the draft Bill, which the Scottish Government consulted on in 2013, contained very different provisions, namely:

“44 Honorary Sheriff: civil competence and jurisdiction
(1) An honorary Sheriff may, in relation to civil proceedings in the Sheriff court, exercise all the jurisdiction and powers that attach to the office of Sheriff, but only in relation to the proceedings and other matters listed in schedule 2.
(2) This section does not affect the competence of a Sheriff in relation to the proceedings and other matters listed in schedule 2.”

We would, therefore, question why there has now been this marked change with regard to the role of Honorary Sheriff without further consultation.

Chapter 3 – Organisation of business
Sections 34 to 37 – Judicial specialisation
These sections permit the Lord President to decide which categories of cases may be heard by specialist Sheriffs. Historically there has been, with a few exceptions, been an absence of specialisation by Sheriffs. We support the proposal that, within each Sheriffdom, some Sheriffs should be designated as specialists in particular
areas of practice, including solemn crime, general civil, personal injury, family, mental health and commercial.

In this regard, we identify the requirement for training and resourcing to be provided to both Sheriff and Summary Sheriffs.

Chapter 4 – Competence and Jurisdiction

Section 39 - Exclusive Competence
This section of the Bill seeks to increase the exclusive competence of a Sheriff to £150,000. We welcome reform in this area and recognise that costs are lower where disputes are litigated at the most appropriate level. We are very concerned that such a seismic change, from £5,000 to £150,000, will be contrary to the public interest and will adversely affect access to justice.

On this issue, we have previously expressed detailed views; for instance, in our response to the Scottish Civil Courts Review, published in November 2010. ¹ On the basis of this evidence we have argued for an exclusive competence for a Sheriff of £50,000. The sum sued for is the basis for the pursuer’s solicitor’s choice of where the case should be raised; however, the value is of more relevance because this is the figure on which any dispute about the choice of court is based. A pursuer’s solicitor has the original choice of forum based on the sum sued for, but he or she will be severely punished in costs if the wrong court has been chosen when looked at against the actual sum awarded or settled.

For the vast majority of private individuals £50,000 is a life-changing amount of money. We suggest that any alteration to exclusive competence should be to an initial limit of £50,000 and that thereafter any increases should be introduced in stages in order to assess the impact of the change.

In the response to the Scottish Civil Courts Review we previously expressed concern that the Scottish Government has failed to carry out any statistical analysis on the impact that this proposed reform would have on business in the Court of Session.

We have conducted research which was included in our response to the draft Bill. Although this research took place in 2010, we do not believe that that data has changed significantly in the last 4 years. ² On the basis of our research, we maintain that if the exclusive competence of the Court of Session were to be raised to £150,000, only 9% of personal injury actions would continue to be raised in that court.

The Policy Memorandum which accompanies the Bill states (at paragraph 81) that the main reason for the popularity of the Court of Session as a venue to litigate personal injury actions is Chapter 43 of the Rules of the Court of Session. The Memorandum goes on to explain that equivalent Rules have now been introduced in

¹ Available online at: http://www.lawscot.org.uk/media/208878/civ_scottish_civil_court_review.pdf
² Available online at: http://www.lawscot.org.uk/media/618143/courts_reform_(scotland)_bill_consultation_response_final.pdf
the Sheriff Court. We agree that Chapter 43 works well in the Court of Session and we welcomed comparable Rules being introduced in the Sheriff Court.

Chapter 43 Rules are not however the sole reason for personal injury actions being raised in the Court of Session. We suggest that cases are raised there and, settlement is frequently achieved, on the basis that all pursuers and defenders benefit from the predictability of outcome. This predictability in personal injury actions does not exist in the Sheriff Court.

Currently all the personal injury actions which are raised in the Court of Session require assistance of counsel or a solicitor-advocate. Sheriff Principal Taylor suggested there should be no automatic sanction for the use of counsel in the new personal injury court. Immediately following the alteration of the exclusive competence of Sheriffs the public will have no automatic access to counsel.

Solicitors in Scotland are and will be very capable of presenting cases in the Sheriff Court. However, if there is no opportunity to use Counsel, in the short term there will be a shortage of specialist pleading and advocacy skills. Business models will have to change but skills take time to develop. IT will also require to be improved as the Sheriff Courts do not currently have any capacity for the electronic lodging of motions which is currently seen in the Court of Session.

A change management programme of this scale adequate support and resourcing or there is a real risk that the courts will no longer provide an adequate service to the public. Generally speaking, the public only seek recourse to the courts at a time in their lives when they are subject to a degree of vulnerability.

In addition to personal injury claims, cases in relation to damages (including defamation), debt, professional negligence and commercial actions will also be excluded from the Court of Session.

To date, there has been only one case in Scotland in which damages for defamation have exceeded £150,000. The expertise in relation to defamation claims, which exists in the Court of Session, will not be available in the Sheriff Court.

The swift resolution of these cases and, in particular, commercial disputes will only be achieved if the Sheriff courts, across Scotland are adequately resourced to deal with much higher volumes allowing court time for interlocutory matters, hearings and decision making.

There has not been any concession that complicated medical negligence cases should be remitted to the Court of Session. If they are to be heard in the specialist personal injury court they could potentially occupy a single Sheriff for several weeks of evidence. This would have a significant impact on the running of the court unless adequate resourcing is provided.

The financial memorandum, which accompanies this Bill, assumes that the likely grading for Summary Sheriffs will be benchmarked by reference to the current post of District Judge in England and Wales. District Judges sit in County Courts where the jurisdiction limit is set according to the sum sued for being less than £50,000 in
personal injury cases. In relation to other cases, the limit is £25,000. Similarly, the county courts in Northern Ireland have recently seen changes to the general civil jurisdiction, increasing from £15,000 to £30,000. The proposed change to the privative jurisdiction limits in Scotland as a result of these reforms would be entirely disproportionate with the rest of the UK.

Looking to the wider view of the world’s perception of the Scottish legal system, the reputation of the Court of Session as a centre of excellence can only be maintained if a reasonable number of cases are litigated and decided by that court. Developments in the law arise through the experience of practitioners, and having a sufficient volume of cases which give rise to that experience and also bring to the fore the circumstances which encourage new ways of thinking. By reducing the caseload of the Court of Session, this will reduce the prospect of Scotland having a dynamic and thriving legal culture capable of developing the law.

We are pleased to note from section 39(3) of the Bill that family proceedings can continue to be raised in the Court of Session.

We have concerns about the separation of aliment and reserving actions for aliment only to the exclusive competence of the Sheriff court. The reasons for this are:

- High value and complex cases arise in the sphere of aliment as well as financial provision on divorce;
- This will prevent amendment of an aliment case by insertion of other craves, if the case is not suitable to continue in the Sheriff Court;
- Child aliment is only litigable in exceptional cases in any event as the Child Support Act 1991 precludes a claim save for high value ‘top up’ claims, claims to meet the cost of child disability or educational support claims;
- In EU cases if the 2007 Hague Protocol comes to be excepted with associated benefits for enforcement, the court will require to apply non-Scots law, presenting a challenge to the Sheriff Court.

Section 41 - Power to confer all Scotland Jurisdiction for specified cases

We welcome section 41 which provides the power to confer all-Scotland jurisdiction for specified cases.

The Bill permits a specialist personal injury court to sit across Scotland to be created by order of Scottish Ministers. We recognise that, with a substantial increase in resourcing, the court could sit anywhere in Scotland and in so doing increasing public access to specialist Sheriffs. However, we are concerned that without investment in improved IT provision the idea that access to the correct documents at the right time will not be possible.

We note the power to confer all-Scotland jurisdiction for specified cases is only envisaged for Sheriffs and not Summary Sheriffs. Section 80 provides that a Sheriff will have competence to grant an interdict, which can have effect in more than one Sherifffdom.

The Society has been in discussion with Police Scotland in relation to the protection of vulnerable adults and in particular the operation of the power of arrest which can be attached to an interdict application.
We recognise the benefit of a power of arrest being granted with an all-Scotland jurisdiction. We suggest that the power to confer all-Scotland jurisdiction for specified cases should be used to enable both Sheriffs and Summary Sheriffs to grant a Scotland-wide power of arrest when faced with the appropriate interdict crave.

**Part 2 – The Sheriff Appeal Court**

*Chapter 1 – Establishment and Role*

*Sections 45-47*

We agree that a national Sheriff Appeal Court should be established on the basis that decisions will be binding on all Sheriff Courts in Scotland. This should also facilitate appeal hearings within a shorter period of time.

**Part 3 – Civil Procedure**

*Chapter 1 – Sheriff Court*

*Sections 61-69 – Civil jury trials*

Sections 61 to 69 provide for civil jury trials in certain Sheriff Courts. On the assumption that the exclusive competency of a Sheriff will be £150,000 and that the specialist personal injury court will have an all Scotland jurisdiction, we agree that civil jury trials should be available in that court.

*Section 71- Proceedings for aliment of small amounts under simple procedure*

We suggest that the simple procedure for small amounts (section 71) may be unworkable. The measure does not take account of the exceptional nature of children’s claims, nor the international maintenance considerations under the Maintenance Orders (Reciprocal Enforcement) Act 1972.

*Section 77- Expenses in Simple Procedure cases*

We agree that it is unnecessary for there to be two different sets of procedures for cases with a value of £5000 or less and agree that there is however a need for a distinct procedure for low value claims. We agree with the aim that the simple procedure should be accessible to party litigants with clear straightforward rules and that the summary Sheriffs should assist parties in reaching agreement.

Section 77(1) of the Bill states that the Scottish Ministers may provide that, in certain categories of simple procedure cases, no award of expenses may be made, or any expenses awarded may not exceed a prescribed sum. Section 77(5)(a) provides that an order under subsection (1) does not apply to cases in which the defender (i) has not stated a defence; (ii) having stated a defence, has not proceeded with it, or (iii) having stated a defence, has not acted in good faith as to its merits.

The provision of section 77(5)(a)(iii) has the effect that when a defender states a defence, whether that be on liability or quantum, and subsequently offers settlement of the claim, he is unable to rely on the provision restricting the award of expenses. This can discourage settlement of claims as it may be in the defender’s interest to run a defence at proof, rather than settle a claim. It might also be in the defender’s
interest to allow decree to pass rather than to enter a defence on quantum and be subject to an adverse finding in expenses.

The provisions proposed are the same as those which currently exist for the treatment of expenses in small claim cases. In his report on the Review of Expenses and Funding of Civil Litigation in Scotland, Sheriff Principal Taylor recommended that the court should have a discretion to restrict recoverable expenses in a small claim in cases where a defendant, having stated a defence, has decided not to proceed with it. He recommended (at chapter 4, paragraph 21) that this should be reflected in the rules for the new simple procedure. The proposed rules do not allow for the discretion recommended by Sheriff Principal Taylor.

We believe that in order to avoid the difficulties currently encountered by defenders who have stated a defence in a small claim but choose not to proceed with it, it is in the interests of both justice and efficiency to make provision for the court to have discretion to restrict awards of expenses in simple procedure, in line with Sheriff Principal Taylor’s recommendation.

Chapter 2 – Court of Session

Section 85 - Judicial review

Judicial review offers a vital remedy to individuals and communities, ensuring that public bodies exercise their decision-making powers and functions reasonably and lawfully. It is a crucial safeguard in the relations between citizen and state and a mainstay of the rule of law. It is also a remedy of last resort, reflected in the small number of judicial reviews brought in Scotland (overall and also by comparison to other jurisdictions).

We believe that the proposals for the reform of judicial review will limit access to justice. A number of comparable jurisdictions have time limits for challenging decisions of public authorities and others have considered the same. The experience from these legal systems and the feedback from our members suggest that there will be challenges for all participants in the judicial review process as a result of such short timescales:

- Applicants will find it difficult to determine whether proceedings could be brought within three months, particularly if it is unclear when a challengeable action took place: for instance, it may not be apparent at which stage in lengthy correspondence with a public body when a decision took place. It is also unclear when there has been a series of decisions taken by a public body.  

- In addition to determining whether there are grounds for proceedings, applicants will need to establish whether funding can be secured. Individuals eligible for legal aid will need to resolve their applications to the Scottish Legal Aid Board and community groups may look to fundraise, both of which would create significant time pressures. Unlike in England and Wales, community groups cannot access legal aid.  

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3 McAllister v. Scottish Legal Aid Board, [2010] CSOH 112
4 Public Interest and Legal Aid, Frances McCartney, S.L.T. 2010, 37, 201-204
The short time period may not allow public bodies to consider alternative courses of action, such as internal complaint or review processes, and any subsequent complaint to the Scottish Public Services Ombudsman, negotiating an outcome with a potential pursuer, or considering other means to resolve issues, such as alternative dispute resolution.

The court may find adjudication and case management difficult in judicial review proceedings in which the legal arguments and the evidence that supports them may not be fully developed, requiring a more interventionist approach.

The introduction of a permission stage for judicial review may reinforce the access to justice challenge of the three month time period: the time pressure around bringing proceedings within the time limit may contribute to the prospect of an application being refused permission.

There may be a number of unintended consequences from the reduction in the time period. The Gill Review noted the example of one organisation that brings judicial review proceedings in England and Wales for matters affecting Scotland; though the effect of the Bill would bring Scots procedure broadly into line with elsewhere in the UK, there is far broader scale and funding of public interest litigation in England and Wales.

The Gill Review considered, at length, the procedure for and reform of judicial review in England and Wales. The proposals in section 85 of the Bill seek to put into effect the proposals of the Gill Review. The Gill Review drew heavily on the experiences of judicial review in England and Wales. The Gill Review did not take account of a number of key differences between England and Wales and Scotland: the former is a jurisdiction ten times the size of Scotland, with many UK-wide and international campaigning organisations headquartered in London, and has a broader culture of public interest litigation overall and, crucially, judicial review procedure tends to take longer and be more expensive than in Scotland.

Neither the Gill Review nor the Scottish Government’s consultation produced any evidence for the proposition that there was a problem in the Court of Session with unmeritorious cases. The limited statistical evidence referred to in the Gill Review showed how relatively few judicial reviews were brought in Scotland. The introduction of a three month time limit will shift the burden of justifying the raising of any proceedings after that time period onto the petitioner, as opposed to the respondent having to show why they are prejudiced by a longer period of time. Although the courts may allow a longer period where it is ‘equitable’, research in England and Wales as to the granting of permission would indicate that the process can be subjective, depending on the particular judge hearing the case (see for example The Dynamics of Judicial Review, (Chapter 4) Bondy & Sunkin, Public Law Project 2009; and the differing outcomes between Outer House and Inner House in Portobello Park Action Group v Edinburgh City Council).

It is believed that a significant proportion of the time pressures that arise at the moment can be attributed to delays in receiving awards of legal aid. In addition, clients and solicitors are working under time constraints which mean that they can also make mistakes in providing information. This can result in either information

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5 2012 SLT 944 (Outer House); 2013 SC 184 (Inner House).
from clients being misunderstood or not properly presented. Clients lacking in education or skills, or with chaotic lifestyles (i.e., the most vulnerable clients) have the greatest difficulty in providing information required, or in the manner that is most relevant, or within a short timescale. SLAB has said that applications brought after the three months will be unlikely to obtain legal aid. The requirement for legal aid funding in practice reduces the amount of time available to a client to instruct a solicitor, take advice, conduct any further investigations required and submit an application for funding before any application can be prepared. If counsel is instructed counsel also has to consider the papers, and may have their own views as to what is required by way of information in order to draft a petition that will pass the test of “real prospects of success”.

There is a real risk that SLAB would use these reforms to make changes in practice to the granting of legal aid. As well as refusing applications for challenges outwith three months (and requiring therefore a further challenge to SLAB before being able to proceed, and therefore causing further prejudice and delay to a petitioner), there is foreseeable risk that SLAB will not grant anyone full legal aid until a petition has got through the permission stage. The result of that is that virtually no investigation or preparation work can be undertaken prior to bringing applications for judicial review.

This will impede prospects of being successful in any case requiring any preparation or research over and above an analysis of reasons set out in a single decision letter. The Judiciary in England and Wales described a proposal to not provide legal aid until permission was granted as having a “chilling effect”. Although the position in Scotland would be different from the proposals in England and Wales, the uncertainty caused by the delay in deciding whether or not to grant legal aid would inevitably have a detrimental effect in the proper preparation of cases, and could lead to cases not being brought solely due to questions about legal aid funding.

A further consequence of the introduction of a time limit is that all petitioners who are utilizing public funds will run the risk of an award of expenses against them. A petitioner on the emergency legal aid provisions is not an ‘assisted person’ for the purpose of the Legal Aid (Scotland) Act 1986, and cannot therefore ask the court to modify any liability for expenses. There are few litigants who would be prepared to raise proceedings under emergency legal aid to meet the timescales, but in the knowledge that they are unprotected (other than the court’s general discretion) in relation to expenses should permission be refused.

The experience in Scotland is that it does not have as well-developed a legal advice and services infrastructure for challenging public authorities as exists in England and Wales. As the Gill Review stated, there are a number of jurisdictions where there is no time limit (New Zealand, some Canadian provinces), or where the time limit is longer (such as six months in Australia). There is no actual evidence of a need for such a time limit to be introduced in Scotland. The introduction of a time limit will create barriers for the most vulnerable members of society. It requires additional front loading of case preparation, without any suggestion that this would be funded

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where legal aid was required. It runs the risk that the permission stage turns into a mini-trial of the main issues.

Chapter 3 - Remit of Cases between Courts

Section 88- Remit of case to the Court of Session

We refer to our comments above on section 39 of the Bill.

We welcome the introduction of these provisions at section 88 of the Bill which allow any civil proceedings to be remitted to the Court of Session which are not subject to exclusive competence under section 39.

We also note, however, that proceedings which are subject to section 39 can be remitted if both the Sheriff court considers that there are exceptional circumstances on either parties’ application and the Court of Session allows this on special cause shown.

In family law proceedings in which the only order sought is a payment of aliment and therefore subject to section 39, we consider the exceptional circumstances test in these types of cases to be too restrictive.

Circumstances may change very quickly in such a case and become more complicated after proceedings have commenced in the Sheriff Court, yet may not be exceptional and therefore capable of being remitted to the Court of Session.

We are concerned that the Court of Session may take into account its “business and other operational needs” in terms of considering a request to remit a case that’s subject to section 39. Application of such a test could mean that a case which the Sheriff considers is exceptional may be subject to the how busy the Court of Session is at any given point. This could result in a case being remitted where the Court of Session has limited business, yet a more exceptional case is not remitted as the Court of Session is busy. We consider that the test to be applied at section 88(6) of the Bill discriminates on the grounds of operational needs of the Court of Session and therefore will not achieve its intended aim of access to justice.

Chapter 4 - Lay Representation for Non-Natural Persons

Sections 91-94

We have considered the proposals for lay representation of non-natural parties, contained in sections 91 to 95 of the Bill. We understand the policy reasons for this change, particularly the discussion around lay representation in the Apollo Engineering case. 8

We believe that the safeguards contained in the Bill should be sufficient to ensure that lay representatives are sufficiently independent of the issues involved in proceedings. We believe that the procedure established by the Bill should provide

8 Apollo Engineering Ltd v James Scott Ltd, [2013] All ER (D) 116 (Jun)
access to justice for non-natural persons in situations in which regulated professionals could not be afforded.

Chapter 5 - Jury Service

Section 95
We agree with the provisions on jury service, contained in section 95 of the Bill. Though the section makes minor changes to the exemptions for jurors in civil cases, we consider that an opportunity has been missed to reconsider the overall exemptions available for jury service including, for instance, updating these to ensure that individuals with an ownership interest in a law firm (as permitted by the Legal Services (Scotland) Act 2010) are considered exempt.

Chapter 6 – Regulation of Procedure and Fees

Sections 96 and 97 – Power to regulate procedure etc. in the Court of Session, the Sheriff Court and the Sheriff Appeal Court
The Bill contains provisions allowing for rules to be made for the Court of Session and the Sheriff Court. There is no requirement for any rules to be laid, simply that there is the power to do so. We understand that the Rules Rewrite Working Group of the Scottish Civil Justice Council is developing a “rules rewrite methodology” for future amendments to rules in Scottish courts.

However, we believe that the Bill misses the opportunity to place court users at the center of the rule-making process and indeed the overall operation of the courts. Rather than the factors which may be considered in rule-making detailed in sections 96 and 97 of the Bill, we believe that this legislation has the opportunity to establish the overriding objective that the civil procedure in Scotland should adopt. This would be similar to the approach taken by the Woolf Review in England and Wales.

We believe that a principle-led approach such as this would be more effective for court users and without unduly fettering the discretion of the rule-making powers. Such an approach would also encourage the consideration of alternative dispute resolution which, in appropriate circumstances, can provide an efficient and cost-effective means for parties.

Chapter 7 - Vexatious Proceedings

Section 102- Power to make orders in relation to vexatious behaviour
Though the Gill Review did not recommend that the procedure for vexatious proceedings be modified, the government views such proceedings as a growing challenge for the administration of justice in Scotland. The proposals in the Bill, contained in sections 100 to 102, largely replicate the process available for dealing with vexatious proceedings in England and Wales, including the deployment of civil restraint orders or CROs. We believe the government should demonstrate that vexatious litigants are an increasing problem, and that the existing measures are not sufficient to deal with this aspect of litigation.
Part 5 – Criminal Appeals

Sections 112-115 – Criminal Sheriff Appeal Court
We agree that a national Sheriff Appeal Court should be created: we do so, on the basis that the decisions of the appeal court would be binding on all Sheriffs in Scotland.
In relation to criminal appeals the appeal court would hear appeals from justices of the peace, summary Sheriffs and Sheriffs. We agree that the “judges” in the appeal court should be at the same level as Sheriffs Principal. We hope that the introduction of this appeal court will facilitate appeal hearings within a shorter space of time.

Part 6 – Justice of the Peace courts

Section 118 - Abolition of the office of stipendiary magistrate
We note that, upon abolition of this office, that full time stipendiary magistrates will be appointed as summary Sheriffs and part-time stipendiary magistrates will be appointed part-time summary Sheriffs unless the appointment is declined.
On the basis that these new appointments will now also have a civil competence as envisaged by the McInnes Review, we welcome clarification as to how training will operate in practice to allow this transition.

Part 7 – The Scottish Courts and Tribunals Service

Part 7 of the Bill will make provision effectively for union of Scottish Court Service and Scottish Tribunal Service in a Scottish Courts and Tribunals Service. We offered comments in August 2013 to Scottish Government to the consultation then current in relation to such a proposed merger, and noted that there was no clear case made out in the consultation for the merger. We indicated that we are not, in principle, opposed to such a merger. Our concerns were directed towards the propositions that the experience in England and Wales of a similar merger did not suggest that there would be no consequences for users.

The Tribunals (Scotland) Bill passed Stage 3 on 11 March. It makes no provision for a Scottish Tribunals Service which exists as an administrative arm of the Scottish Ministers.

It does not appear that there will be any significant adjustment of SCS Board to accommodate the incoming Tribunal business. That may well be a cause for concern, given our comments in August last year about the need to address the expertise issues.

Schedule 1 – Civil proceedings etc. in relation to which summary Sheriff has competence

The areas in which a Summary Sheriff has competence are detailed in Schedule 1. It appears that the aim is to create a generalist judicial tier, with more complex or higher value cases being heard at a higher level. However, a number of the areas specified can be extremely challenging or complex, including domestic abuse and forced marriage proceedings and we question whether it is appropriate for these to be considered by this judicial tier.
We also suggest that adoption and permanence should be removed from the list of family proceedings in Schedule 1 that can be dealt with by summary Sheriffs: simply, these cases are too important to be dealt with at the lowest level. Further it is essential that there is clear provision to allow summary Sheriffs to remit to a Sheriff, or even the Court of Session, in appropriate cases.

Law Society of Scotland
14 March 2014