Summary

The Courts Reform (Scotland) Bill provides an enormous opportunity to create a better civil justice system for Scotland and radically improve access to justice.

The legislation should ensure that Scottish courts deliver improved access to redress that is proportionate and accessible.

The legislation should deliver:

- **Proportionality** - We support the movement of civil business of £150k or less from the Court of Session to the Sheriff Court. People are more likely to appropriately pursue redress if access to courts is proportionately organised.

- **An inquisitorial system for smaller claims** - The new Simple Procedure in particular must deliver a climate change in civil justice with a more appropriate inquisitorial approach. However we wish to see the Simple Procedure ceiling raised to £10,000- and not £5,000 as currently in the Bill- to allow more people to access proportionate and cost effective consumer redress.

- **More specialisation** - more specialisation needs to be introduced, including new summary sheriffs who develop specialisms, who are drawn from a wider background, and the introduction of a new specialist personal injury court

- **ADR integrated into the civil justice system** - We also wish to see ADR available when a dispute first arises, and a central and trustworthy source of internet advice on this service available to the public. We recommend the provision of a virtual toolkit that would enable them to settle their dispute without necessarily ending up in court.

- **The creation of a new sheriff appeal court** - Appeals should be heard in the shirifdom in which they originated to minimise delay and inconvenience. Decisions should be binding in all sheriff courts throughout Scotland.

- **Scotland-wide enforcement of interdict and interim orders** - An order for interdict should be capable of being enforced at any sheriff court in Scotland to allow easier operation for trading standards officers.

- **New IT pathways to civil justice** - in view of recent court closures, we would like to see additional investment in IT services to allow access to justice without always having to attend court in person- but support for those who do.
Introduction

There are many challenges facing Scotland’s civil justice system to allow better access to justice for people pursuing redress. Many people currently choose not to pursue their rights because the system appears difficult and expensive to navigate; often the less well-informed, educated or affluent.

This in turn means the minority of rogue traders are not called to account and their behaviour is not addressed. As well as being detrimental to the public at large, there may be detriment to other traders who are working to a fair and acceptable standard and competition is impaired.

We would prefer to see more separation of civil and criminal cases than is suggested, but note that where the resident judicial officer is a summary sheriff, specific days or half days should be set aside for civil or family actions. It is to be hoped that this will lead to greater separation of civil and criminal cases.

Rules of court are to play a key role in modernising court services and we would prefer more information and guidance to be provided within the Bill. For instance we welcome the proposal for greater case management, as litigants understandably find difficulty in dealing with this issue, and improved judicial continuity will be extremely helpful.

Similarly ADR should be integrated into the system in order to keep costs and processes proportionate, but again the Bill leaves this to Rules of Court. We do not agree that this is the best way of dealing with ADR, as it should be contained within the Bill. Most people do not wish to go to court if there is another option available, and where they do decide to pursue their rights in court it is important that they are able to do so proportionately, at the lowest cost and in the most effective way. Many consumer cases are appropriate for ADR and this needs to be embedded into the pre-court protocol.

A strong civil justice courts system will encourage consumer redress and fairer trading, as more people will be able to pursue their rights if necessary. As a result the public will be less reluctant to pursue redress for poor goods and services, but will do so at the most appropriate level and cost.

Proportionality

Increasing the exclusive competence of the Sheriff Court from £5,000 to £150,000 will be of considerable benefit to litigants, especially those with lower value claims. It will reduce their legal expenses as the cost of litigation in the Sheriff Court is much lower than in the Court of Session. It will often be of benefit in allowing litigation closer to the residence of at least one party.

It is inappropriate that low value claims should be routinely heard in the Court of Session. The principle of proportionality should apply, so that only those cases which raise novel points of law or which are particularly complex should be remitted to the Court of Session. As there is scope within the legislation for this to happen, we
believe this sufficiently addresses concerns that complex or difficult cases will not be fairly or appropriately heard.

The cost of raising a three day proof in the Court of Session was estimated by one practitioner at £30,000-£40,000, whereas a three day proof in the sheriff court would cost around £10,000. The Scottish Courts Review estimated that increasing the exclusive competence of the sheriff court to £150,000 would reduce the number of actions raised in the General Department of the Court of Session by 64%. This would reduce the high level of small value claims in the Court of Session to a level where higher level and more complex cases could be dealt with more easily by suitably qualified judiciary.

At present the amount paid to the lawyers on both sides of a low value claim in the Court of Session almost always exceeds the settlement figure of a claim or the amount awarded by the Court. Many potential litigants are aware this could be the case and are subsequently likely to be dissuaded from pursuing their rights.

An inquisitorial system for smaller claims - Simple Procedure

Which?’s main focus relates to simple procedure; the successor to small claims procedure. We are very much in favour of the introduction of simple procedure, and support the level being raised to £10k, rather than the £5,000 being suggested, as this is a more appropriate amount for modern consumer-type claims, such as disputes over new kitchens, holidays, cars and other consumer areas.

We note that the Government believes it is premature to raise the level to £10,000 now, because the £3,000 limit was only raised from £750 in 2008. However the current level in England and Wales is £10,000, and consumers in Scotland pay the same price for goods and services overall, and need to pursue the same levels of redress, so on their behalf we wish to press for an increase to £10,000. Scots are disadvantaged by this lower ceiling and therefore arguably less able to access redress in Scotland than in other parts of the UK. If the more reasonable ceiling of £10,000 cannot be achieved in the Bill, we would like a strong commitment for the level to be reviewed within two years.

Additionally, although provision does need to be made for a Summary Sheriff to transfer out of simple procedure, we do not want to see cases transferred out without good reason ie because of their complexity. Which? does not want any unintended loopholes which could result in cases being made more expensive and difficult than is necessary. Legislative escalation must be avoided and simple procedure cases dealt with as proportionately and cost-effectively as possible.

In the past we have experience of members of the public unable to pursue redress in the small claims system in Scotland because of the low ceiling, and an unwillingness or inability to afford the help of a lawyer, or risk the award of costs against them should they lose. This has prevented some consumers pursuing redress for faulty goods and services and allowed some perpetrators to continue unchallenged.

Straightforward consumer cases should be heard as Simple Procedures and treated by the Summary Sheriff in an inquisitorial manner, in order to resolve them efficiently.
and effectively. Litigants should be encouraged to represent themselves in a simple, understandable process. We welcome the proposal that new Rules for simple procedure should be based on problem-solving or be interventionist, closer to the inquisitorial approach taken in other jurisdictions, with the court identifying the issues and specifying what it wishes to see by way of evidence or argument. We welcome the fundamental shift away from the adversarial approach and the focus on dispute settlement, reflecting the circumstances of the case.

This should lead to more litigants able to represent themselves and developing confidence that this is the norm. This would free up court time, cost less, be less traumatic and threatening for litigants and separate the process from the criminal work of the court.

There is still more progress to be made, for instance these cases could also be heard using modern IT, through the use of videoconferencing for instance, which would be useful for people who cannot physically get to the court because of age or health reasons, or because of work or childcare responsibilities, or because of the distance from court.

We believe the Government is seeking to take some of these ideas forward, and would urge consideration in the Bill for guidance on these issues and on the possibility of peripatetic summary sheriffs who could hear cases in different locales. Consideration should be given to a range of possible settings; whether local police stations or other appropriate public buildings. Our experience as a consumer organisation is that the public wants justice to be delivered effectively and as quickly and cost effectively as possible. They are unlikely to consider that they have received second rate justice merely because it was made convenient for them and easier to access.

We note that legal aid is not currently available for Small Claims, but is available for cases between £3,000-£5,000 which currently fall to summary cause, therefore the removal of legal aid could leave some litigants more vulnerable unless their case is handled by a summary sheriff with expertise in the area of their complaint, and/or with sufficient support from an in-court adviser or other support.

For instance, if a litigant is relying on a particular law, they may well not understand which law, and be unable to specify, so it is important that they are able to rely on advice on this and other matters.

We would suggest that a review of how this measure is working be conducted once the measures are bedded in, to ensure that party litigants are receiving enough support and are not disadvantaged by the loss of legal aid.

Overall we welcome the empowerment of party litigants and would like more information on how they will receive guidance, where this support will come from and what training will be given to summary sheriffs to bed in the inquisitorial role.
More specialisation

Specialisation will improve the quality of civil justice, bringing better decision making and more consistency. It will save time and money.

We support the introduction of summary sheriffs. Most legal jurisdictions have three judicial tiers and too many straightforward and low value cases in Scotland are being heard too high up the system. We do not believe that there will be any diminution of justice from the introduction of summary sheriffs.

Legal practitioners are no longer generalist and judges cannot be expected to be expert in all areas either. We note that it is intended that the Lord President is to designate categories of specialisation.

The creation of a personal injury court will remove the 76% of cases currently raised in the General Department of the Court of Session which are personal injury actions; many of them for relatively small sums.

Although we acknowledge concerns that there is no automatic right to counsel in the sheriff court as there is in the Court of Session, we do not believe that people will be denied access to justice as a result.

As 98% of these settle before proof it is hard to justify a need for them to be heard in the Court of Session, as the advocacy skills in court of counsel are rarely used in these cases. The introduction of specialist sheriffs should be viewed positively and experienced solicitors should be equally capable of conducting negotiations leading to settlement as counsel.

Parties may still instruct counsel in the sheriff court but we see no reason why the successful party should routinely recover counsel’s fees, except in the instance of the most complex cases, which may be the case in some personal injury cases.

We note that jury trials will still be available in the personal injury court, and are pleased that there will be guidance from the trial judge on the issue of awards. We also note that personal injury cases under £5,000 will in future be dealt with under Simple Procedure, but will not be subject to the limits on expenses.

New Sheriff Appeal Court

A new national Sheriff Appeal Court will reduce the number of civil appeals being heard in the Inner House but it is appropriate that the most complex or novel cases should be remitted to the Court of Session. The higher ‘second appeals’ test will prevent the Sheriff Appeal Court becoming just an intermediate stage of appeal.

We agree with Lord Gill that appeals should be heard in the sheriffdom in which they originated, as centralising them would add significantly to the cost of parties and would result in delay and inconvenience. The court will still be a national court and the new appeal court’s decisions should be binding in all sheriff courts throughout Scotland.
An integrated ADR system

The Bill provides for rules of court including matters relating to encouraging the settlement of disputes and the use of alternative dispute resolution and action to be taken before proceedings are commenced in court. This will allow the Court to make rules relating to pre-action protocols. The Scottish Civil Justice Council will make recommendations on such court rules, but we would like to see clear guidance within the Bill that there will be an integrated ADR system. This is a vital and integral part of a well-functioning civil justice system.

ADR needs to be considered when a dispute first arises and not merely when the parties have raised an action. It is often too late then; attitudes have often become entrenched and a good deal of animosity may have been generated. If an action has been raised, attempts to divert the dispute to ADR procedures may only prolong matters and add to expense. That might not matter so much with big commercial disputes but with small value claims it could be much more detrimental.

ADR needs to be seen in the context of a system-wide approach. There needs to be facilities for allowing those who believe that they have a problem to see how it might be resolved. We know from research such as that of Genn and Patterson in Paths to Justice Scotland that most people with a consumer problem will try to resolve it by discussion with the trader and that often works.

If it does not, a lot give up and very few persevere to some sort of dispute resolution procedure. What they need at this point is better information about their options, which could be one of the ombudsman schemes that various industries run, or the new simple procedure in the sheriff court. Better integrated advice and information services are necessary. We support the idea of a central website offering advice, available to the public.

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