Justice Committee
Courts Reform (Scotland) Bill

Written submission from Gilbert M Anderson, Solicitor

1. Brief relevant background

1.1
- Senior Partner of DAC Beachcroft Scotland LLP (this followed merger between Andersons and DAC Beachcroft in September 2012).
- Dean of Royal Faculty of Procurators in Glasgow (RFPG) and Regional Representative for Scotland, Forum of Insurance Lawyers (FOIL) 2007-09. This coincided with the work of the Scottish Civil Courts Review (SCCR) under chairmanship of Lord Gill.
- Co-ordinated response of RFPG and FOIL to consultations carried out by SCCR during 2007-09.

1.2 Wide civil litigation experience over many years. Main current area of practice – advising and representing insurers and their policyholders in defence of claims arising out of motor, employers, public and product liability.

1.3 Accredited by Law Society of Scotland as specialist in personal injury law.

1.4 Member of Civil Justice Committee, Law Society of Scotland.

2. Overview

2.1 The Bill incorporates most of the main radical recommendations of SCCR and should be viewed against the implementation of what was perhaps the single most important recommendation, namely, the creation of a Scottish Civil Justice Council. The Council is of course now fully functional following the coming into force of the Scottish Civil Justice Council and Criminal Legal Aid Assistance Act 2013. It is important to emphasise that the Council will ensure ongoing review of the Scottish Civil Justice System and that appropriate changes to court procedures and working methods are introduced without the need for further primary legislation.

2.2 I support the key radical reforms in the Bill which will transform the present court structure by having cases heard at the level of the court hierarchy relative to their value, complexity and importance.

2.3 I have concerns over the introduction of civil juries into the proposed all Scotland personal injury sheriff court, and indeed retention of civil juries for personal injury cases in the Court of Session.

2.4 The footnotes refer to the Bill as introduced in the Scottish Parliament on 6th February, 2014.
3. Increase in exclusive jurisdiction of sheriff court/specialisation/summary sheriff.

The very substantial increase in the level of exclusive jurisdiction of the sheriff court from £5,000 to £150,000\(^1\) along with the introduction of sheriffs and summary sheriffs (with summary sheriffs\(^2\) applying the new simple procedure\(^3\) for cases up to a value of £5,000) specialising in different categories of case such as personal injury and family\(^4\) ought to ensure that cases are dealt with and concluded timeously and at proportionate cost.

4. Sheriff Appeal Court

The introduction of the Sheriff Appeal Court\(^5\) to handle all civil appeals from sheriffs\(^6\) and summary criminal appeals will further free up Senators of the College of Justice to concentrate their valuable time and wisdom on civil cases of high value, importance and complexity, along with appeals from the Sheriff Appeal Court\(^7\) and criminal appeals\(^8\). Frequently such appeals have little merit and do not raise novel or important issues. Dealing with such cases is not a proper use of the valuable time of Senators.

5. Challenges and opportunities for sheriffs, solicitors and the Faculty of Advocates

5.1 The Bill, if passed, will have the effect of many cases which are currently raised in the Court of Session, particularly personal injury cases of relatively low value, being raised in the sheriff court and heard by specialist sheriffs. This will create both challenges and opportunities for solicitors to handle all aspects of these cases without the need to instruct a solicitor advocate or counsel. The experience of handling such cases will enhance the quality and skills of sheriffs and solicitors alike.

5.2 It is apposite to highlight the ruling of the Dean of the Faculty of Advocates in August of last year which was approved by the Lord President and which came into effect on 24\(^{th}\) September, 2013. This ruling means that where it is considered appropriate counsel will be able to appear in the sheriff court without an instructing solicitor being present. These changes will undoubtedly reduce expense and will improve standards in the sheriff court while providing newly qualified advocates with valuable experience, especially advocates who have recently qualified. These benefits will also of course accrue to litigants through expense reduction while preserving quality of representation.

6. Challenges and opportunities – Court of Session

The Bill will create real opportunities for the Court of Session to become a centre of

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\(^{1}\) s39  
\(^{2}\) s5, s43 and sch1  
\(^{3}\) s70 to s79  
\(^{4}\) s34 and s35  
\(^{5}\) s45  
\(^{6}\) s103 and s104  
\(^{7}\) s107  
\(^{8}\) s112 and s113
excellence. The Court of Session ought to ensure that the solid and yet flexible principles of Scots law are applied through fair procedures and developed in a way which will ensure that the reputation of our legal system can flourish for the benefit of our people, business and commerce. This will encourage more legal persons to submit to the jurisdiction of the Scottish courts and attract businesses outwith Scotland to have their disputes resolved in this jurisdiction. These worthy aims should not be viewed as a pipe dream but as realistic, achievable objectives in years ahead.

7. **Simple Procedure**

7.1 I support the proposal to have a simplified procedure for most actions where the sum sued for or the value of the subject matter of the case does not exceed £5,000 (exclusive of interest and expenses). The proposed simple procedure is also entirely consistent with the objective of having a system of dispute resolution which will avoid the generation of disproportionate expense. An interventionist/problem solving approach with limited awards of expenses will essentially balance the formal application of pure justice with expediency so as to bring about speedy, practical and economic resolution of disputes in cases where the value of the case does not exceed £5,000.

7.2 The provisions in the Bill permitting transfer to/from simple procedure ought to provide necessary flexibility so as to accommodate a party's preference to have their case taken out of simple procedure as well as parties who agree to have their cases dealt with under simple procedure.

8. **Wide powers of remit**

The Bill contains sensible powers of remit from the sheriff court to the Court of Session and vice versa so as to further facilitate compliance with the principle of cases being heard at the appropriate hierarchical level relative to their value, complexity and importance.

9. **Cautionary note**

9.1 On a cautionary note care will be required to ensure, so far as possible, that the new structures and procedures are effectively introduced.

9.2 The Financial Memorandum accompanying the Bill appears to envisage a phased introduction of summary sheriffs over a period of 10 years (see paragraph 42 of the Memorandum). The jurisdiction of summary sheriffs is extremely wide and covers a considerable spectrum of work. It may be wise that changes are introduced gradually, perhaps in specific sheriffdoms/sheriff court districts in the first instance. The flexible mechanisms in the Bill for appointing specialist sheriffs/summary sheriffs, part time sheriffs/summary sheriffs and conferring all

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9 s70 to s79
10 s75 and s76
11 s88 to s90
12 s43 and sch1
13 s34, s35, s36, s37 and s41
Scotland jurisdiction on sheriffs for specific types of civil proceedings should prove helpful in achieving a smooth introduction of the new regime.

10. Civil Juries and the proposed All Scotland Sheriff Court

10.1 This is undoubtedly a time of austerity for the country. It is essential that resources are used wisely. Resource waste continues to exist in our system. This has been articulated very clearly in the report of SCCR. Delays and unnecessary court attendances by lawyers, parties, and witnesses (frequently experts), cause vast unnecessary expense. The Scottish Parliament could further save valuable resources while at the same time further improving our civil justice system by deleting those provisions in the Bill which introduce civil juries into an all Scotland sheriff court. Indeed, the Courts Reform (Scotland) Bill is the ideal opportunity for the Scottish Parliament to remove this form of trial from our civil justice system.

10.2 The unpredictability and inconsistency of awards by civil juries for non-patrimonial loss in personal injury cases makes it extremely difficult for legal advisers to provide their clients with meaningful advice as to what claims for such loss are worth. This in turn discourages settlements and therefore encourages litigation with all the associated additional expenses which that entails.

10.3 Civil juries do not need to give reasons for their awards. By way of contrast awards by judges for broadly similar injuries are consistent. This means that defenders/their advisers would know what to offer and claimants/their advisers will know what to accept. And in turn such a situation will encourage fair and reasonable settlements.

10.4 As was said by the late Lord Rodger of Earlsferry (when Lord President of the Court of Session) in McLeod v. British Railways Board 2001 SC 534 (IH) –

"A legal system which regards as legally justifiable two wholly different awards of damages for the same injury, depending purely on the procedure adopted, lacks the element of consistency which is one of the hallmarks of a mature system. While, therefore, that lack of consistency does not point to a breach of the parties’ Convention rights, it does suggest that there may be a need for re-examination and reform, as Lord Hope observed indeed more than three years ago in Girvan (at p22)".

10.5 The Jury Trials (Scotland) Act 1815 introduced a model of civil juries into Scotland essentially based on the then established model in England and Wales. This is essentially the model we have in Scotland today. Ironically following concerns expressed by the Court of Appeal in the 1960’s jury trial in personal injury cases has in essence been abolished for many years in that jurisdiction.

10.6 In Scotland civil jury trials were abolished in the sheriff court many years ago. As the proposals to re-introduce civil jury trial into an all Scotland personal injury sheriff court are brought into effect (with the consequence that the presumption would be that all personal injury cases would be tried by jury) that court could be

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14 s61
15 s61(2)
littered with civil jury trials for low value cases, eg whiplash injuries arising out of road traffic accidents. Not only would that compound the problem of unpredictable and inconsistent awards for broadly similar injuries but it would also generate vast disproportionate expense relative to the value of the case. This would cause a complete reversal of the benefits of proportionate expense which the Bill otherwise achieves.

10.7 Abolition of civil jury trial in personal injury cases in Scotland will also of course save valuable administrative and other resources in maintaining/reviewing juror lists, citing jurors, and compensating them for loss of earnings, travel and subsistence. It would of course also avoid general inconvenience to jurors and the loss of production/services by those jurors in employment. Furthermore, abolition of civil juries for personal injury cases would restrict the need for having civil courts available to accommodate jurors.

10.8 I would also refer to my detailed comments in my answer to Question 17 in the Scottish Government's Consultation last year on the draft Courts Reform (Scotland) Bill. This can be found in the following link http://www.scotland.gov.uk/Resource/0042/00425290.pdf.

10.9 In summary I would urge the Justice Committee to carefully review the retention of civil juries in Scotland for cases involving personal injury and to decide that such mode of trial in these cases should be abolished.

11 Judicial Review

11.1 While my experience of judicial review is limited I agree with the recommendations of SCCR as applied by the Bill that applications to the supervisory jurisdiction of the court should remain with the Court of Session, and that for such applications to progress they will require to have realistic prospects of success. Furthermore, I agree that such applications will require to be made within 3 months from the date the grounds for review arose.

11.2 I also agree with the proposal in the Bill to reinforce Scots law quoad sufficiency of interest as set out by Lords Hope and Reed in the Supreme Court in the "AXA" case.

12 The Scottish Courts & Tribunal Service

I agree with the principle behind the proposals in the Bill to provide administrative support to administrative tribunals via the Scottish Court Service which is to be renamed the "Scottish Courts & Tribunal Service". This should better demonstrate the independence of tribunals from Scottish Ministers.

13 Conclusion

I firmly support the key elements in the Bill for increasing the privative jurisdiction of the sheriff court along with the introduction of specialist sheriffs and summary sheriffs. I also support the creation of a sheriff appeal court. I have major concerns about the retention of civil juries and the introduction of civil juries into all Scotland
personal injury sheriff court. I believe that the time has come for civil juries in personal injury cases to be abolished in Scotland. Subject to these concerns I believe that the Bill will create a structure which when fully operational will serve the people of Scotland well. And I also believe that allied to the work of the Scottish Civil Justice Council the new structure will provide real opportunities for our legal system in Scotland to flourish and in due course for Scotland to become a jurisdiction of choice for dispute resolution.

I shall be happy to clarify/expand on any of the points made in this response. I shall also be happy to give evidence in person to the Justice Committee and to generally assist the Committee in its consideration of the Bill.

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Solicitor
13 March, 2013