Justice Committee
Courts Reform (Scotland) Bill
Written submission from Brian Heaney, Advocate

My background and experience

1. I am an Advocate of 14 years’ experience at the Scots Bar. I have been an Advocate long enough, and have a diverse enough practice, for my career—I hope—to survive the enactment and implementation of the Bill (even in its present form). That being so, I hope that my comments can be viewed as relatively disinterested.

Implementation of the Bill will destroy distinctive Scottish centres of excellence

2. The Bill, if enacted in its present form:
   • Will create inequality between litigants in many kinds of case and thus injustice.
   • Will seriously damage two centres of excellence which are important, historical pillars of Scottish Civic Society.
   • Will seriously damage or destroy the independent referral bar.
   • Will create layers of unnecessary and expensive bureaucracy.

3. What is proposed is the dismantling of efficient, distinctively Scottish, institutions appropriate to a small jurisdiction. This is to be done based on anecdote and outdated perception rather than on solid evidence. There is no doubt that the delivery of civil justice can be improved. But the major proposals in the Bill are not the solution.

A centre of excellence exists at the Court of Session

4. One of the arguments for sheriff court closures was centralisation of services in centres of excellence. The proposals in this Bill would serve to move business from an existing centre of excellence into courts that do not have the expertise or capacity to deal with the work.

My experience as member of the independent referral bar

5. So far in the consultation process, cogent and compelling arguments have been made by the Faculty of Advocates in opposition to many of the proposals. The Faculty has also made various suggestions. So far, those arguments and suggestions have been dismissed. I am very concerned that these arguments are being dismissed as coming from “toffs” and vested interests.

6. I would like to counter an old-fashioned perception of the Faculty of Advocates by explaining my viewpoint. I do not come from a privileged Edinburgh private school background. I was educated at St Patrick’s High School in Dumbarton. It was located in an area of serious and multiple deprivation.
7. My view is that the people of places like Dumbarton need access to the independent referral bar to enable their rights to be vindicated, against the state when they are accused of crime, and against big business and insurance companies when they make claims.

8. I note that the Faculty’s position agrees with that of the Trade Unions. The Unions too are concerned about access to justice.

**The alternative to the Bill need not be the status quo**

9. The premise on which the Bill is presented is false. The Policy Memorandum states:

   “26. An alternative approach would have been to retain the status quo and not implement the recommendations of the Scottish Civil Courts Review. However, such an approach would mean that the current state of the Scottish civil courts, which Lord Gill described as “slow, inefficient and expensive” would remain.”

10. The Review, does not explain, by reference to evidence, what is meant by “slow” and “inefficient” and “expensive”. Figures are not presented and comparisons with system in other small jurisdictions, or even England and Wales, are not provided.

11. As a matter of fact, the assertions about speed and efficiency are inconsistent with the evidence. After reforms to the Personal Injuries rules in the Court of Session there is a 98% settlement rate. Waiting time for hearings in non-urgent Court of Session cases is down to less than 20 weeks (for a four day hearing). Judicial case management of more complicated cases has been introduced and is likely to cut down on the need for long hearings in those cases. The reforms of the Inner House rules have cut down on the waiting time for hearings and the length of hearings has also been greatly reduced. As things stand, and without deploying much by way of additional resources, there have been great improvement in efficiency. There is still scope for further efficiencies without radical and costly changes to the court structure.

12. Historically, the Court of Session has dealt with all kinds of work from across Scotland. It is a national centre of excellence within about two hours travel of the majority of the population. It delivers consistent justice of a high standard. Edinburgh is well linked to the rest of the country. The Court of Session facilities have recently been refurbished at great, but justifiable, expense. Using the Court of Session eliminates local variation in approach. Solicitors choose to bring cases in the Court of Session rather than local sheriff courts where, even as things stand, the cases could be brought. That so many cases that could be raised in the sheriff court are raised in the Court of Session tells its own story.

13. Before any more business is sent to the sheriff court, research is needed into the way that it works. Particularly outside the major centres, it seems to be slow and inefficient in its disposal of civil business. The court timetables are heavily biased, as they must be where resources are limited, towards the disposal of criminal and family law cases, and against other kinds of civil work.
Value is not synonymous with importance or complexity

14. The idea that cases valued at less than £150,000 do not warrant the attention of the Court of Session is wrong. Value is no test of importance to the parties and is no indication of complexity. A £30,000 claim by a worker who breaks her leg because of her employer’s negligence is far more important to her than a half-million pound contract dispute between multinationals is to them. The worker’s claim may turn on the implementation of EU health and safety law. The law in the multinationals’ case might be straightforward.

15. There is no evidence that, when the cases with a value of less than £150,000 are removed from the Court of Session, that the judges will be dealing with “better quality” work. There will simply be less work. As well as removing the few small personal injury cases that are not settled and run to proof, the proposed changes would also remove many, if not most, commercial cases to the sheriff court. The likely consequence is that the sheriffs who presently sit in the High Court of Justiciary as temporary judges will to go back to the sheriff court to deal with the influx of civil work and the underemployed Court of Session judges will go and sit in the High Court of Justiciary.

16. A further shift in the work of Senators of the College of Justice towards criminal work—where the judge is referee rather than decision maker—is likely to deter the best and brightest from wanting to be judges. The result will be an overall reduction in quality in the senior judiciary.

17. The proposals would also seem likely to result in a reduction in numbers amongst the higher judiciary. Opportunities to join the higher judiciary would be reduced and diversity would be likely to suffer. The legal profession would also suffer because opportunities at the Scottish Bar would disappear. I would not have been able to become an advocate if the system had been that proposed in the Bill.

The litigation process in the sheriff court

18. The proposals assume that the sheriff court operates like the Court of Session but in a different physical location. In fact, the practices and culture are a world apart. This will not be altered or improved by flooding the sheriff court with cases.

19. In the sheriff court, unlike the Court of Session, it is common not to start a hearing on the assigned day. There are also serious difficulties getting a case heard on consecutive days. Hearing days in a case are often weeks or months apart. This leads to difficulties for witnesses, whose evidence can be split, the lawyers, who have to incur the time and expense of preparing over and over again, and for the sheriff, who has to take time to refresh her memory about the case. It also leads to the cost—the surprisingly high cost—of having shorthand notes of evidence transcribed. The proposals do not seem to consider these matters.
20. Two recent sheriff court cases appealed to the Supreme Court have highlighted the inefficiencies: *B v G* [2012] UKSC 21, 2012 SC (UKSC) 293; and *Davies (t/a All Stars Nursery) v Scottish Commission for the Regulation of Care* [2013] UKSC 12, 2013 SC (UKSC) 186. Both cases, one about adoption of a child and the other about child care facilities, dawdled through the sheriff court.

**With a settlement rate of 98% in the Court of Session, with minimal judicial intervention, what reason could there be to send personal injury cases elsewhere?**

21. To use the settlement rate of 98% as a reason for moving cases away from the Court of Session to a different forum is bordering on bizarre. Most litigation is about bringing parties to a position where they can settle their differences. The Court of Session personal injury and commercial court procedures have reached the peak of efficiency in narrowing the issues and facilitating settlement. In personal injury work this is achieved with minimal judicial intervention.

22. Whether the right settlement is reached depends on the each side having effective expert representation in order to assess the strengths and weaknesses of the case. It also depends on the outcome of litigation being relatively predictable.

23. When cases do come on for a proof in the Court of Session they are dealt with expeditiously and efficiently. Although Court of Session judges are not specialist PI judges they are the cream of the legal profession and, when provided with good quality submissions from expert advocates, reach robust, consistent decisions in personal injury cases.

24. In reality, not much time of Court of Session judges is taken up hearing low value personal injury cases. Sometimes a case worth less than £10,000 or less cannot be settled. When this happens, the Court of Session deals with the case promptly and authoritatively. This conduces to the settlement of other cases.

**Settlement rates and pursuer’s settlement sums will be likely to suffer if the system is changed**

25. Settlement of cases depends on predicting, through experience, what is likely to happen in court. The system which is proposed, where pursuers will be represented by inexperienced and non-specialist litigators, before sheriffs whose decisions are less predictable, will be likely to decrease the settlement rate.

26. And without counsel on the pursuers’ side, there will be an imbalance between the solicitors representing the insurance companies, who are generally repeat players, and the inexperienced solicitors representing pursuers. This is likely to lead to reduced settlements for deserving pursuers.
A thriving independent referral bar is necessary in a small jurisdiction

27. Even in systems where, in theory, all lawyers may appear in all courts, advocacy is considered a specialist skill. An independent referral bar makes specialist advocates available to all litigants in all parts of Scotland. Advocates often work in Legal Aid cases or on a no-win, no-fee cases. This makes their services widely available. Solicitors, especially in rural areas, whose caseloads are mixed, can turn to the Bar when specialist help is needed. But to build careers, advocates need litigation, and to provide services on a no-win, no-fee basis, counsel’s fees must be recoverable from the losing side in a litigation. I will address this in the next section of my submission.

28. An independent referral bar, bound by the cab-rank rule, is able to provide its expert services, in all kinds of cases, to all kinds of litigants. A thriving bar gives choice for litigants who need its services. The bar provides opportunities to people of all backgrounds with the appropriate education and skills.

Cutting the cost of litigation and reforming sanction for counsel

29. It must be acknowledged that there is a problem, pointed out in paragraph 83 of the Policy Memorandum, with disproportionate costs. Counsel’s fees play a part in this.

30. Counsel’s fees are recoverable against the losing party in all Court of Session cases. In the sheriff court, counsel’s fees are only recoverable if the sheriff grants “sanction for counsel”. In both courts, all that may be recovered is what is allowed by the Auditor of Court. The fees that are allowed by the Auditor are sometimes disproportionate to the value, complexity and importance of the case. That practice must end because it cannot be justified.

31. Better representation at a more reasonable cost would be achieved by abolishing the present system of sanction for counsel and permitting an advocacy fee to be recovered in all cases, the fee for counsel (or a solicitor appearing as advocate) to be proportionate to the value, importance and complexity of the work. The value of counsel’s service should be assessed by the sheriff or judge there and then at the end of the case (subject to referral to the Auditor of Court, whose practice will have to change). A scale of fees could be introduced. Large fees should not be allowed against the losing party in small cases. A system of this kind would allow specialist advocates to appear at all levels of the judicial system and maintain a strong referral bar. This would benefit litigants and the courts. It would be similar to the system in England and Wales where sanction for counsel is not required.

The creation of National Sheriff Appeal Court would be to put an expensive fifth wheel on the wagon

32. The present appeals system is not broken but could be improved by introducing leave to appeal to the Court of Session to weed-out hopeless appeals and divert certain appeals to the sheriff principals. Scotland is a small jurisdiction with relatively few cases. To develop the law, the higher courts must have cases to deal with. As even the Policy Memorandum concedes, the time waiting for a hearing in the appeal
courts, civil and criminal, is coming down. With a leave requirement and better scheduling it would come down yet further.

33. At present the sheriff principal provides a local, cost-effective means of appealing. There is no need for National Sheriff Appeal Court with its own staff and bureaucracy replicating the work that is already done with great efficiency by the Offices of the Court of Session and the Justiciary Office.

34. The sheriffs principal and experienced sheriffs are already involved in appeal work by sitting in the Inner House or High Court of Justiciary as temporary judges. This system could be formalised. If the case has not been before the local sheriff principal he could sit in an Inner House appeal from his sheriffdom. The costs of cases of low value could be capped by making the recoverable lawyers fees proportionate to the value of the case and complexity of the issues.

**The Title “Summary Sheriff” is clumsy and undignified**

35. It disappointing that the title chosen for this necessary judicial office is anodyne and pays no regard to tradition. The title diminishes the office and office holder by emphasising what the holder is not—ie he or she is not a “real” or full sheriff.

36. Suitable alternatives would be “Magistrate”, “Magistrate Judge” or “Baillie”. “Baillie” has a particular and appropriate Scottish historical provenance having formerly been the title of the chief magistrate of a part of a Scottish county (according to Chambers Dictionary). “Magistrate” is a pan-European title that spans both professional and lay judges.

In the United States federal system, the inferior federal judge is the “Magistrate Judge”.

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