Amidst a great deal which is admirable in the Courts Reform (Scotland) Bill there is one topic on which we would wish to express some reservations. Section 39 of the Bill increases the privative or exclusive jurisdiction of the sheriff court from £5,000 to £150,000. This would mean that, in the future, the Court of Session could not normally hear cases in which the sum sued for was £150,000 or less.

The reason for the change is explained in the Policy Memorandum in this way (para 79):

The raising of the privative jurisdiction, now to be called the exclusive competence, of the sheriff court from £5,000 to £150,000 is in many ways the critical reform recommended by the Scottish Civil Courts Review and now to be provided for in the Bill. As noted above, the policy objective of the Bill is to ensure that cases are heard at an appropriate level in the court structure – the right cases in the right courts. Too many straightforward, low value cases are being considered too high up the system by judicial officers who are over-qualified to deal with them. Those judicial officers should be hearing more complex cases which are currently being held up by straightforward, low value cases. Part of this problem will be addressed by the introduction of summary sheriffs, and part by the introduction of the specialist personal injury court, but the main trigger is the raising of the exclusive competence of the sheriff court.

Freed of low-value cases, it is said, the Court of Session will be able “to return to its proper role of dealing with the most complex and important cases and the development of Scots law” (para 86).

We take no issue with these policy objectives. On the contrary, we would emphasise how vital it is that complex and important cases continue to be heard by the Court of Session. That is essential for the parties involved, of course. But it is also essential, as the Policy Memorandum says, for “the development of Scots law”. As law professors in various of the Scottish universities we have a professional concern with the development of the law. Viewed in legal terms, Scotland is a small jurisdiction and one which, for many years, has failed to generate sufficient significant cases for the Court of Session to decide. In consequence, there are too many areas in which the law of Scotland is unclear or out of date, and so fails to serve its citizens. It is important that the Bill does not make matters worse.

We accept, as the Scottish Civil Courts Review concluded (chapter 4 paras 118-120), that allocating the right cases to the right courts could not readily be achieved by a central gate-keeping system such as procedural judges might provide. We further accept that, in the absence of such a system, “the simplest mechanism to administer and apply” is “a monetary threshold”. Yet it is self-evident, as both the Review and the Policy Memorandum acknowledge (para 121 of the former and para 89 of the latter), that “there is no necessary relationship between the value and the
complexity of an action”. It is a challenging task, therefore, to devise a system which corrals low-grade cases in the sheriff court while at the same time ensuring that cases of complexity and legal importance are reserved to the Court of Session. We do not think that this challenge is sufficiently addressed by the Bill. In particular, the current provisions will remove from Scotland’s supreme court cases which it ought to decide. The long-term effect on the development of the law is likely to be serious.

5. There are no perfect solutions to the difficult issues which the Bill attempts to solve. But we have two suggestions which would, we think, improve matters to a significant degree.

First, we think that to increase the figure for the exclusive jurisdiction of the sheriff court from £5,000 to £150,000 is to go too far too fast. It is bound to restrict, and may restrict to an unacceptable extent, the opportunities for the Court of Session to develop the law. At present, a great deal of important law is generated by first-instance decisions in the Court of Session (ie cases decided by a single judge and not thereafter appealed to the Inner House). Under the Bill, many such cases would be heard in the sheriff court, and could reach the Court of Session only if (i) one of the parties were willing to appeal twice (ie first to the new Sheriff Appeal Court and from there to the Inner House of the Court of Session) and (ii) the threshold requirements for the appeal to the Court of Session set out in s 107(2) were satisfied. Few cases will surmount this obstacle course; the others will be lost to the Court of Session. Our suggestion, therefore, is that the new threshold should initially be set much lower than is currently proposed (perhaps at £50,000). The position should then be reviewed after a year or two. If, in the light of experience, the overall aims of the Scottish Civil Courts Review are not being achieved, the figure can be increased, without the need for primary legislation, using the power conferred by s 39(5) of the Bill. In a matter as difficult and unpredictable as this it seems only sensible to proceed one step at a time.

6. Secondly, whatever figure is finally decided on, there will always be cases below that figure which, because of their complexity and importance, ought to be decided by the Court of Session. That is why the current law allows cases to be remitted from the sheriff court to the Court of Session “where the importance or difficulty of the cause make it appropriate to do so” (Sheriff Courts (Scotland) Act 1971 s 37(1)(b)). Yet, despite the enormous increase now proposed in the figure for exclusive jurisdiction, the Bill actually closes down the opportunity for remitting cases to the Court of Session, allowing this only “if the sheriff considers that there are exceptional circumstances justifying such a remit” (s 88(4)). In our view, to require “exceptional circumstances” is to require too much. We also consider that the decision of the sheriff ought to be reviewable by the Court of Session (as it is at present). Both points would be met by reinstating the current rules or something like them.

Professor James Chalmers (Regius Professor of Law, University of Glasgow)
Professor Pamela Ferguson (Professor of Scots Law, University of Dundee)
Professor Kenneth Norrie (Professor of Law, University of Strathclyde)
Professor Roderick Paisley (Professor of Scots Law, University of Aberdeen)
Professor Kenneth Reid (Professor of Scots Law, University of Edinburgh)

12 March 2014