Summary of main points

- While we welcome the intention of making court processes more accessible and understandable for users, we are extremely disappointed that, rather than taking a holistic, system-wide approach, the provisions in the bill suggest that there are likely to be some relatively minor tweaks to the existing system.

- Changes to legislation and court rules alone will not result in a more accessible and user-friendly system. Unless a number of practical changes focused on users’ needs are implemented, we have real concerns that, for those who are not legally represented, the experience of going to court is unlikely to be significantly different to that under the present system.

- We are disappointed that no clear provision is made in the bill for the integration of ADR into the civil justice system.

- We are concerned that summary sheriffs will spend most of their time dealing with summary criminal cases. This is likely to replicate the current problems in the sheriff court, where criminal cases squeeze out civil business.

- Summary sheriffs should have specialist knowledge and experience of the types of civil action they are likely to be dealing with.

- We do not believe that defining the types of cases that can be dealt with under simple procedure by applying a financial limit is the best approach. We consider that simple procedure should apply to all consumer actions and all housing cases, regardless of the sum involved.

- We are unhappy with the label ‘simple procedure’. We consider that this could be perceived as condescending, and suspect that it will not be as simple to use as intended.

- We do not understand why specific detail about simple procedure appears on the face of the bill, rather than being left to the rule making bodies to decide. We have some concerns as to how some of these detailed provisions may impact on unrepresented parties in practice.

- The reforms provide an opportunity to clarify and harmonise the complex and confusing variety of different rules on lay representation for individuals in different sheriff court procedures.

- We are concerned that the culture and working practices of the Scottish Court Service will dominate the new Scottish Courts and Tribunals Service, which could have a negative impact on the ethos and processes within tribunals.
Introduction

1. Money Advice Scotland is the national umbrella organisation in Scotland which promotes and champions the development of free, independent, impartial, confidential money advice and financial inclusion.

2. Our members include many experienced money advisers, with significant experience of representing clients throughout the court process, primarily in relation to small claims, debt, rent arrears, mortgage repossessions and sequestration cases. We are particularly concerned with the impact which the changes will have on individual users, who are not generally legally represented, and may only come into contact with the courts once or twice in their lives. They may be pursuers - for example in small claims cases, but are also very often defenders - in debt cases, mortgage repossession or rent arrears cases, for example. Regardless of whether they are pursuing or defending a case, the vast majority are reluctant court users, and the system must be as straightforward as possible for them to navigate.

3. Money Advice Scotland welcomes the opportunity to submit written evidence to the Justice Committee on the general principles of the Courts Reform (Scotland) Bill. This evidence summarises our main concerns regarding the bill. It focuses primarily on those aspects of the bill which are likely to be of most relevance to advisers and unrepresented court users, particularly summary sheriffs and simple procedure. We raised most of these concerns in our response to the consultation on the draft bill, where they are discussed in greater detail.\(^1\) We are disappointed that the majority of these concerns have not been taken on board in the published bill.

General comments

4. We welcome the intention of modernising Scotland’s courts and making court processes more accessible and understandable for users. Such reform is long overdue- we know that the public perceive the courts as intimidating, formal and complex, and that this plays a role in deterring them from going to court.\(^2\) We would hope that moving away from the current system, with four different types of sheriff court procedure and a myriad of complex rules will help to make the system less confusing and intimidating for users. Given the huge amount of time and effort that went into the civil courts review and the related work done by others (such as the Civil Justice Advisory Group chaired by Lord Coulsfield), however, we had hoped to see a major overhaul of the current system. We are therefore extremely disappointed that, rather than taking a holistic, system-wide approach, the provisions on the face of the bill suggest that instead there are likely to be some relatively minor tweaks to the existing system.

5. While the bill sets out some key structural changes, the detail will be in the court rules, which will be largely determined by the Scottish Civil Justice Council (SCJC). The approach taken by the SCJC will therefore be crucial if real change is to be achieved.

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\(^1\) MAS Response - Courts Reform Bill Consultation (May 2013)
The bill sets the context for the rules, however, and the SCJC will be constrained by its provisions. The provisions on simple procedure, for example, are very prescriptive and appear to be based on the provisions for summary cause procedure under the existing legislation, rather than taking a new approach.

6. It must be recognised in any case that changes to legislation and court rules alone will not result in a more accessible and user-friendly system. The starting point for reform must be a clear recognition that the civil justice system provides a vital public service. Like any other public service, it should be focused on the needs of its users, rather than those working within the system. If the courts are to become truly user-focused, a radical culture change will be required. Serious consideration must be given to approaching court business in new and different ways. These include: finding practical ways of separating civil and criminal business; considering alternative ways to bring local justice to parties, such as the use of local buildings other than the courts; greater use of IT; changing current court processes to reduce the number of court hearings and the associated travel; holding court hearings at times convenient for parties, including evenings and weekends; and introducing an appointments system for hearing times.3

7. Unless such innovative changes are implemented, we have real concerns that, for those who are not legally represented, the experience of going to court is unlikely to be significantly different to that under the present system.

Alternative dispute resolution

8. Research evidence shows that those involved in disputes are more interested in finding a resolution to their problem, and getting on with their lives, than necessarily enforcing their legal rights.4 We also know that people would generally prefer to avoid becoming involved in legal and court processes. We believe that, rather than focusing on the courts, a system-wide approach should be taken to civil justice, as recommended by the Civil Justice Advisory Group chaired by Lord Coulsfield.5 The courts should be viewed as a last resort, and the use of alternative or appropriate dispute resolution (ADR) processes, such as mediation, should be encouraged. This would help to increase access to justice, as well as reducing the potential impact resulting from the loss of local courts. It is particularly important that provision is made for the potential use of ADR before a court action is raised, in order to avoid the stress and expense of a court process where possible.

9. We are therefore disappointed that no clear provision is made in the bill for the integration of ADR into the civil justice system. While the policy memorandum states that Lord Gill’s review did not recommend promoting ADR through primary legislation,6 it should be noted that the remit for that review was specifically focused on the courts (including the role of ADR in relation to court process), rather than the wider civil justice system. While the Court of Session has specific powers under sections 96 and 97 of the

3 A more detailed discussion of these issues can be found in our response to the consultation on the draft bill- see Note 1.
5 Consumer Focus Scotland (2011) Ensuring effective access to appropriate and affordable dispute resolution: the final report of the Civil Justice Advisory Group, Glasgow: Consumer Focus Scotland
6 At para 224
bill to make provision about encouraging settlement of disputes and the use of alternative dispute resolution procedures, we do not consider that these go far enough. These are powers only, and there is no requirement for any rules of this nature to be made.

10. We therefore share the view of Citizens’ Advice Scotland, Which?, the Scottish Arbitration Centre and the Scottish Mediation Network that stronger statutory provision should be made to ensure integration of ADR into the civil justice system.

**Part 1- Sheriff courts**

*Section 5 - summary sheriffs*

11. We welcome the proposal that summary sheriffs may be appointed on a part-time basis. We think that this will over time contribute to increasing the diversity of the judiciary, helping to ensure that it better reflects the public which it serves. We are, however, very concerned that, despite the intention that summary sheriffs should specialise in certain civil cases including those under simple procedure, they will spend an estimated 70-80% of their time on summary criminal cases.\(^7\) We think this is likely to replicate the current problems in the sheriff court, where criminal cases take precedence, squeezing out civil business. Court closures may further exacerbate this, leaving even less court time for civil cases.

12. It will be important that summary sheriffs are familiar with, and have experience of, the types of civil action they are likely to be dealing with. With regard to debt cases, for example, summary sheriffs should have specialist knowledge of debt law, and an understanding of the underlying issues which result in people getting into debt, and which need to be addressed in order to deal with such cases effectively. It will also be important that summary sheriffs are aware of the new consumer credit enforcement regime from 1 April 2014, when the Financial Conduct Authority takes over responsibility from the Office of Fair Trading. We anticipate that this could lead to an increase in the number of debtors raising a court action under the unfair relationship provisions of the Consumer Credit Act. We are also conscious that at present creditors are largely complying with the legislation as a result of the recession, and we are concerned that there may be an increase in non-compliance when the economy picks up.

13. We hope, therefore, that summary sheriffs will be designated as specialists in particular areas of civil work so far as is possible within the constraints on the courts, particularly in the bigger and busier courts.

14. We consider that the proposed concurrent jurisdiction with sheriffs in relation to family actions\(^8\) may lead to confusion, particularly given the proposed overlap with the jurisdiction of the Court of Session in such cases. In particular, we are not clear what would happen if a case which appeared straightforward turned out to be more complex at a later stage. We would in particular question what would happen if the case involved

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\(^7\) Scottish Government (2010) Response to the Report and Recommendations of the Scottish Civil Courts Review, Edinburgh: Scottish Government. Note: this refers to ‘district judges’ rather than summary sheriffs - the terminology used by the Scottish civil courts review, but the role they will perform is essentially the same.

\(^8\) Section 43 (1) and Schedule 1
unrepresented parties, given the intention that the summary sheriff should take a more interventionist, problem solving approach than that of the sheriff or the Court of Session. Section 42 - jurisdiction over persons, etc

15. We note that no specific mention is made of consumer contracts, which are likely to make up a considerable proportion of simple procedure cases. The rules of jurisdiction in consumer contracts differ from those in other types of contract, as the pursuer can bring proceedings in either the sheriff court for the area where s/he is domiciled or the sheriff court for the area where the other party to the contract is domiciled. This is often misunderstood by parties, advisers and even sheriffs. While it is recognised in this section that jurisdiction rules are subject to the Civil Jurisdiction and Judgments Act 1982\(^9\), we would prefer to see the relevant provisions of the 1982 Act\(^10\) replicated on the face of the bill. This would be in keeping with the overall thrust of the proposals in making the rules as clear and understandable as possible, rather than requiring parties to read the 1982 Act.

Part 3- Civil procedure

Sections 70-79: simple procedure

16. We have long had concerns about the adversarial approach followed in the courts, which clearly disadvantages unrepresented parties. We therefore welcome the approach to rule making set out in section 72, which envisages a more interventionist, problem-solving approach for simple procedure cases. We would, however, again stress the need to change the overall culture and approach of the courts, rather than just the rules. Previous attempts at such an approach, such as the 2002 changes to the small claim rules, have not always been successful in practice. We hope that this new approach will be reflected in court rules, judicial training and then in practice.

17. We have real concerns about the provisions in relation to the proposed simple procedure. Firstly, we do not believe that defining the types of cases that can be dealt with under the procedure by applying a financial limit is the best approach. Moreover, in light of the proposed increase in the exclusive competence of the sheriff court to £150,000, we do not consider that a £5000 limit is sufficient. Many consumer contracts involve much larger sums than this, and the small claims limit in England and Wales has recently been increased to £10,000. While there is provision in section 70 (9) for the limit to be increased, this does not allow for the limit to be uprated in line with inflation, and there is no requirement to review it at regular intervals. Past experience suggests that this approach can result in a system which lags well behind inflation for many years. The small claims limit of £750 introduced in 1988 remained at that level for 20 years until it was finally increased to £3000 in 2008, after many years of campaigning by consumer organisations.

18. We would suggest that a better approach would be to specify the categories of case which must be dealt with under the simple procedure. Given the intention that it should be used by unrepresented parties, we think it should apply to all consumer cases (including consumer credit) and all housing cases,\(^{11}\) regardless of the amount of money involved. If this approach were taken, there would be other issues to consider, including the availability of legal aid. This is not currently available for representation in small

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\(^9\) Section 42 (3) (b)
\(^10\) Schedule 8 Rule 3
\(^11\) Other than cases within the jurisdiction of the proposed private rented housing tribunal
claims cases, and it would be necessary to review how and when legal aid might be made available in relation to simple procedure cases.

19. In relation to consumer cases, we would suggest that these should be defined by reference to the comprehensive definition contained in the Civil Jurisdiction and Judgments Act 1982. In keeping with the intention to simplify the rules, it would be preferable to replicate this in the bill. Debt actions involving overdrafts, which are not included within the definition of a regulated agreement under the Consumer Credit Act 1974, should also come under simple procedure. We would also point out that at present, a time order may be applied for in relation to a regulated agreement, regardless of the amount of money involved.

20. We welcome the proposed private rented housing tribunal included in the current Housing (Scotland) Bill. We consider that all housing cases, including social rented sector and mortgage repossession cases, would best be dealt with in this specialist forum, rather than the courts. If mortgage repossession cases remain with the courts, however, these should be dealt with under the same procedure as rent arrears cases, regardless of the amount owed. Cases under the Homeowner and Debtor Protection (Scotland) Act 2010 are challenging for lay representatives, as they fall under the more complex summary application procedure, which requires various forms to be lodged in court. A repossession action can also be more costly than a rent arrears case: there can be significant costs involved for the homeowner, in lodging a minute for recall or notice of intention to defend, for example. It would be important, however, that legal aid continued to be available for repossession cases.

21. Secondly, we are unhappy with the label ‘simple procedure’. We consider that this could be perceived as condescending in tone, and also suspect on the basis of past experience, that it will not be as simple to use as intended. One possible alternative might be ‘inquisitorial procedure’, although ‘small claims’ is perhaps the most universally recognised name that could be used.

22. Thirdly, given the general wide powers and discretion of the Court of Session under section 97, in consultation with the SCJC, we do not understand why specific detail about issues such as transfer between procedures and expenses appears on the face of the bill, rather than being left to the rule making bodies to decide. We cannot see the rationale for this when there is no such detail in the bill with regard to any other types of procedure within the new system. Much of the wording used appears to be very similar to that which currently appears in the Sheriff Courts (Scotland) Act 1971. We are concerned that this suggests that any new procedures will not be markedly different to the existing procedures, despite the stated intention to take a new, more flexible approach.

23. With regard to expenses, we have a number of concerns, as set out in more detail in our response to the draft bill consultation. The wording of section 77 (2) could, for example, allow for the continuing differentiation of expenses according to current small claims and summary cause levels, which will be confusing for parties, and is not conducive to making the system simpler.

24. We also have concerns about how the provisions in sections 77 (5) and (6), which allow the summary sheriff to alter the level of expenses awarded where s/he considers

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12 Schedule 8 Rule 3
13 See Note 1
that a difficult question of law or fact is involved, might be applied in practice. This has the potential to land party litigants with significant expenses, which may deter them from making or defending a claim. We have already seen cases where small claims relating to unfair bank charges have been remitted to ordinary cause procedure, with exposure to much higher expenses, should a party be unsuccessful.

25. We are very concerned that this provision could be applied to whole categories of cases, such as bank charges claims, removing the cap on expenses because they involve complex legal issues. This could exacerbate the difficulties faced by people who are already vulnerable, potentially leaving them in an even more difficult situation. While we appreciate that some lower value cases can be complex, we would not wish to see those involved in such cases being deterred from exercising their rights.

26. The provisions about transfer of cases to and from simple procedure\textsuperscript{14} also raise some important issues of principle. By providing that a transfer to simple procedure can be made by joint application only, section 75 departs from the current approach to remit of cases between procedures, where the sheriff has discretion and may also grant remit on the motion of one party.\textsuperscript{15} For transfers from simple procedure (s76), however, an application can be made by only one party. This raises the bank charges scenario mentioned above, where the more powerful party can apply to have the case transferred to a higher procedure, exposing the individual to potentially greater expenses and a more complex procedure. This draft provision has potentially major implications for parties, in terms of issues such as expenses, representation and the availability of legal aid, and should therefore be considered carefully.

\textit{Chapter 4 - lay representation for non-natural persons}

27. We note the new provisions allowing for businesses to be represented by lay representatives, which were not included in the draft bill. We welcome these provisions, which will make it much easier for small businesses to take cases to court. We believe that the reforms also provide an opportunity to clarify and harmonise the current complex and confusing variety of different rules on lay representation for individuals in different sheriff court procedures.\textsuperscript{16}

\textbf{Part 7 – The Scottish Courts and Tribunals Service}

28. While we understand the rationale behind the proposed merger, and recognise its potential benefits, we have a number of concerns about this, as discussed in more detail in our response to last year’s Scottish Government consultation on the proposed merger.\textsuperscript{17} In particular, we are concerned that the culture and working practices of the much larger Scottish Court Service (SCS) will dominate, which could have a negative impact on the more user-friendly ethos and processes within tribunals, particularly given the large volumes of criminal business in the courts.

29. We also consider that there should be provision for representation of both users and appropriate advice organisations on the SCTS board, to ensure that their voices are

\textsuperscript{14} Sections 75 and 76
\textsuperscript{15} Section 37 Sheriff Courts (Scotland) Act 1971
\textsuperscript{16} A more detailed discussion of this issue can be found in our response to the consultation on the draft bill- see Note 1.
\textsuperscript{17} MAS Response - STS and SCS Merger Consultation Response (September 2013)
heard at the highest level. Finally, we have concerns about the timing of the proposed merger, given all the other organisational changes which the SCS has undergone in recent years, together with the impact of impending court closures and the reforms under the present bill, and the ongoing reforms to the tribunal structure.

Money Advice Scotland
18 March 2014