Introduction

1. This response is written by five junior members of the Faculty of Advocates. We called to the Bar in 2011 and 2012. We have experience of appearing at all levels of the court system in Scotland – tribunals, sheriff courts and the Court of Session. We have taken different paths to the Bar – some have worked as solicitors and solicitor-advocates for a number of years and others have joined the Bar at the beginning of their careers. We also have different areas of practice at the Bar – these include commercial law, personal injury, professional negligence, family law and public law. These diverse experiences and backgrounds offer us a broad perspective of conducting litigation in Scotland both as solicitors and Advocates.

2. We welcome the objectives of this Bill. We agree with a number of its proposals, including the creation of summary sheriffs, judicial specialisation and the simple procedure for cases for £5,000 or less. However, we disagree with the increase of the exclusive competence of the sheriff court from £5,000 to £150,000. In our view, this proposal fails to meet the objectives of the Bill. This proposal, if implemented, will have a detrimental effect on:

- the public’s access to justice;
- the Scottish business community;
- the future of the Scots Bar; and
- the development of Scots law.

3. We believe that this proposal has been fuelled by several misconceptions, including:

i. The belief that the value of the claim reflects the complexity of the factual and legal issues in the case. We disagree. There are claims under the value of £150,000 that have sufficient complexity of fact or law that they ought to be raised in the Court of Session; likewise there are claims in excess of £150,000 that are relatively straightforward and ought to be raised in the sheriff courts. At present, a pursuer has the choice to raise an action at the appropriate level of the court system. This proposal removes that choice from the hands of the pursuer. If implemented, it would bar litigants from Scotland’s highest civil court where litigants with the same claim in the other jurisdictions of the United Kingdom would have access to their highest first instance court.

ii. The belief that litigating in the sheriff courts is inevitably faster, more efficient and cheaper. We disagree. Our experiences – both as solicitors prior to coming to the Bar and as Advocates who appear in sheriff courts across Scotland – do not support that view. It is common for substantive hearings in the sheriff courts to be discharged because of a lack of court time or be heard in short sittings over non-consecutive days spread over a number of months.
All of this increases cost: lawyers and sheriffs have to re-familiarise themselves with cases, and witnesses and clients have to take more time off work. These problems will get worse if all cases worth up to £150,000 have to be raised in the sheriff court. Cases in that value bracket often need a substantial amount of court time. They will place an extra burden on an already over-burdened sheriff court.

iii. The belief that instructing an Advocate in a case of £150,000 or less is an excessive outlay for the litigant that is not reflected in corresponding benefits for litigants and the courts. We disagree. In the course of this response, we will discuss the value of instructing an Advocate and the prejudice to the public if, in practical terms, they are deprived of access to counsel in cases with a value of £150,000 or less due to a lack of automatic sanction.

The Public’s Access to Justice

4. There appears to be a view that cases worth £150,000 or less are unworthy of the Court of Session. Awards of sums far less than £150,000 can be life-changing for litigants. This is a substantial sum of money for all but a privileged few. Most disputes involving ordinary members of the public will be worth less than £150,000. The consequence of this proposal will be that litigating in the Court of Session – with the corresponding access to counsel and the most senior judges in Scotland – will become the exclusive preserve of the privileged few. In practical terms, this would close the doors of the Court of Session to the majority of Scotland’s citizens and small businesses.

5. The proposal as it stands would deprive the public of automatic access to counsel in cases with a value of £150,000 or less. The Bill proposes the transfer of cases from the Court of Session in which counsel may be instructed to the sheriff courts where litigants may not always be able to rely on the services of counsel. In its Advocates, Scotland has a pool of specialist expertise in litigation and dispute resolution. We firmly believe that Advocates make litigation more efficient and less expensive overall. Their specialist expertise can speed up decision-making, help a client decide how best to spend limited resources, and stop wastage on issues that do not really matter. Advocates do not just do oral advocacy in court. Much of their work is done behind the scenes, focusing the investigation of a case, drafting written pleadings, advising on settlement options and negotiating resolutions. It is here, often hidden from public view, that the skills of counsel come to the fore. There are, of course, specialist litigation solicitors with these skills. Scotland’s citizens are free to instruct them. But Scotland only has a limited supply of these skills, and much of it is to be found at the Bar. Scotland’s solicitors know that, which is why so many of them instruct Advocates. Scotland’s citizens, its civil justice system, and the public purse, will be poorer if access to counsel is denied.

6. At present, a litigant who raises such a case in the Court of Session and wins is generally entitled to recover his legal fees (for his solicitors and Advocates) from his opponent. In the sheriff court, whilst solicitors’ fees may be recovered in this way, counsel’s fees may only be recovered if the court has granted sanction for the instruction of counsel. This imbalance means some litigants – especially those with limited resources – will consider the instruction of counsel to be an option closed to them. This inequality of arms will be particularly stark when the opponent is well
resourced – for example, an insurance company, the government, a health board or a large company. Those parties are much less likely to be put off instructing counsel by a lack of sanction. Moreover, there is a common misconception that it is expensive to instruct an advocate. In fact, it can be considerably less expensive to have a piece of work done by counsel than by a solicitor. This is one reason why solicitors advise their clients to instruct counsel. Both the solicitor and counsel have defined roles in the conduct of the case and the instruction of counsel invariably lessens the workload of the solicitor. Furthermore, the effect of the recent Dean’s ruling allowing counsel to appear (in appropriate cases) without an instructing agent further reduces the costs associated with instructing counsel. We believe that depriving litigants of access to the skills and expertise of counsel in cases with a value of £150,000 or less will be to the detriment of Scotland’s citizens and create an inequality of arms in many cases.

7. We are struck by the misconception which appears to exist among consumer and trade groups about this proposal. Which? is reported as having said that the proposed change “will mean more consumers can seek redress for poor services or faulty goods”. The Federation of Small Businesses is reported to have said that “[p]ursuing a debt through the courts can be prohibitively lengthy, uncertain, and expensive” and that “[i]t therefore makes perfect sense for all cases with a value of up to £150,000 to be dealt with at the sheriff court – not shunted off to the costly Court of Session”. These comments share two features: (i) both envisage the consumer or small business as the pursuer; and (ii) both miss the point that the pursuer chooses whether to sue in the sheriff court or the Court of Session. The proposal will remove that choice for actions worth less than £150,000; and by increasing the workload of the sheriff court risks making litigation there slower and more expensive.

The Impact of the Proposal on Businesses

8. In recent years, Scotland has built up considerable expertise in commercial litigation. Much of that expertise has built up around the specialist commercial court procedure in the Court of Session. This service is popular with the business community for its efficient and high-quality decision-making.

9. Those gains are placed at risk by the proposal to refuse businesses access to the Court of Session for actions worth less than £150,000. Businesses with claims below that limit will have to go to the sheriff court. Moreover, whilst some sheriff courts such as Aberdeen, Glasgow and Edinburgh offer specialist commercial procedures tailored to the needs of such litigants, the great majority do not. That is not presently a problem because litigants have the option to go to the Court of Session commercial court if they need that expertise.

10. The Bill would remove that choice for all actions worth less than £150,000. Businesses will be forced to pursue claims – which may be of great importance to them – in courts which lack the specialist expertise currently available. They may not receive the service they have come to expect. Our concern is two-fold. First, it is a backward step to deprive the business community of expertise that it presently enjoys. Second, having been deprived of that expertise, businesses may take their commercial litigation away from Scotland to other jurisdictions such as England. Scottish businesses may find that when they do business with English companies, those English companies will insist on English jurisdiction clauses in their contracts covering all disputes, not simply those worth less than £150,000.
11. In our view, a substantially more modest limit should regulate access to the Court of Session for commercial cases. We do not understand it to be suggested that actions of inappropriate simplicity are being raised in the commercial court. In our experience, solicitors, clients and Advocates exercise sound judgment on which commercial cases need the Court of Session’s expertise and which do not. We also do not think resources are being wasted, and we note that the government does not expect savings to be made by transferring commercial litigation out of the Court of Session (Financial Memorandum, para. 98). In these circumstances, there is no good reason to transfer commercial cases out of the Court of Session commercial court.

The Impact of the Proposal on the Bar

12. As junior members of the Bar, we are stakeholders in the future of the profession. The proposal, in its current form, will lead to a 47% reduction of cases in the Court of Session (Policy Memorandum, para. 88). These cases will be transferred to the sheriff courts with, at present, no automatic right of sanction for counsel. This proposal will inevitably reduce the number of cases coming to the Bar and, as such, we are affected by the proposal.

13. However, putting self-interest aside, we are concerned about the implications of this Bill on the future of the Bar. There are approximately 460 practising Advocates in Scotland of whom one-fifth are Queen’s Counsel. The senior members of the Bar usually appear in high value and complex cases. The proposal ought not to affect the type of work routinely undertaken by these senior members of the Bar. However, junior members of the Bar will be more directly affected. These are Advocates who are cutting their teeth in cases in the Court of Session often with a value of less than £150,000. The majority of the work that will be transferred out of the Court of Session is the work that is traditionally undertaken by junior members of the Bar. In the absence of this work, many skilled Advocates will be forced to consider other careers. As such, there is likely to be a drain of talent from the profession. Moreover, the junior members who remain at the Bar will not get the same opportunities to develop their skills in the Court of Session before the most senior judges in Scotland. If these juniors are to become the seniors of the future, we may see an overall decline in the quality of the Bar in the future. This would be detrimental to the future development of Scots law as some of the most important cases in Scottish legal history have been reliant on the skill with which counsel have tackled novel and challenging issues before the court.

14. There is another concern. In recent years, the Bar has become a more diverse and inclusive environment. There are more female and minority group members than ever before. In the event that the proposal leads to a reduction of work at the Bar, there is a risk that those members from “non-traditional” backgrounds will suffer most. The period of training to become an Advocate (known as “devilling”) is nine months in which the devil is not paid. The initial years at the Bar are also challenging. A new Advocate seeks to establish his or her reputation and build a steady stream of work. The consequence of reducing the work coming into the Bar at the junior end is that it will increase the barriers to entry into the profession – in other words, it will become more difficult to make a living from a career at the Bar in the initial years. If that is so, there is a risk that the Bar becomes a career for the privileged few who have substantial independent financial resources. We are ultimately of the view that in the long-term the pool of legal talent in Scotland is likely to shrink if the proposal in the Bill is implemented.
and much of the progress made in recent years to widen access to the profession will be reversed.

The Impact of the Proposal on Scots Law – the remit provisions

15. The effect of the proposals in the Bill will be that cases raising complex or novel legal issues but under the value of £150,000 will no longer be decided by the most senior judges in Scotland, the Senators of the College of Justice. We consider that this could have significant negative consequences for the future development of Scots law. There is a great jurisprudential advantage in the most difficult legal issues being resolved by Scotland’s most senior judges, particularly in a small legal jurisdiction like Scotland.

16. The Bill seeks to tackle this issue with its remit proposals. However, we consider that the proposals to remit cases from the sheriff court to the Court of Session are convoluted. Clause 88(2) of the Bill proposes that a sheriff may remit a case to the Court of Session “if the sheriff considers that the importance or difficulty of the proceedings makes it appropriate to do so” in cases above its exclusive competence. We agree with this test. It is consistent with the test in section 37 of the Sheriff Courts (Scotland) Act 1971. It should be applied to all cases, irrespective of value, thereby ensuring that complex cases are heard in the appropriate court. However, clause 88(4) complicates matters for complex cases that fall within the exclusive competence of the sheriff court. In terms of this provision, a sheriff may request the Court of Session to allow proceedings to be remitted to that Court if the sheriff considers that there are “exceptional circumstances” justifying the remit. However, section 88(5) then requires the Court of Session to consider whether there is “special cause shown” in accepting the remit. These provisions would appear to be unnecessarily stringent. A litigant seeking to use them would need the approval of two judges applying different tests. We are of the view that the test in clause 88(2), and not the more stringent test in clause 88(4), would be appropriate in all cases if complex and important cases are to be resolved by Scotland’s most senior judges.

17. We note that the Court of Session is permitted to consider its business and operational needs in determining whether to accept a remit from the sheriff court even where “exceptional circumstances” have been established (Policy Memorandum, para. 193). However, there is no scope for the Court of Session to consider the operational and business demands placed on the sheriff court – a sheriff may be of the view that the complexity of the case makes it difficult for his or her court to deal with the issues in an expeditious and considered manner. For example, the sheriff court may be unable to fix consecutive days to deal with a complex proof with the consequence that evidence and arguments might be staggered over non-consecutive days over a number of months. In these circumstances, a sheriff may take the view that the Court of Session could deal with the case in a more appropriate manner. However, this will be an irrelevant consideration for the Court of Session to take into account in determining whether to accept the remit. This is a weakness in the current proposal.

18. We note that, in terms of clause 88(10), a decision by the sheriff pursuant to clause 88(4) is final. It cannot be appealed. We are of the view that the Court of Session should have the power to “call in” cases where appropriate, on the application of one or more of the parties. This power could be used where a sheriff refuses to remit a case
which would more appropriately be considered by the Court of Session – for example, where the legal jurisprudence is inconsistent or lacking clarity.

Conclusions

19. We disagree with the proposal to increase the exclusive competence of the sheriff court from £5,000 to £150,000. We accept that the exclusive competence needs to be increased. A figure consistent with other jurisdictions of the United Kingdom would, in our view, be appropriate.

20. In the event that the exclusive competence of the sheriff court is substantially increased, we believe that provision must be made for the recovery of legal expenses without discriminating between sums paid to solicitors and sums paid to Advocates. The focus of the system should be on ensuring that a litigant recovers his reasonable costs – whether they have been spent on solicitors, counsel or any other expert that has been retained to assist with the litigation. We understand that removing the requirement for the court to sanction the employment of counsel would bring Scotland into line with the other jurisdictions of the United Kingdom.

21. In the event that a value restriction is imposed on actions being raised in the Court of Session commercial court and placed into the sheriff courts, we see considerable merit in establishing two or three all-Scotland commercial courts (in, for example, Edinburgh, Glasgow and Aberdeen) pursuant to clause 41(1) of the Bill. This would allow expertise to develop in a cost-effective way. The new specialist all-Scotland personal injury court “goes hand in hand” with the increase in the exclusive competence (Policy Memorandum, para. 105). That being so, a specialist all-Scotland jurisdiction to service the needs of Scotland’s business community in cases with a value under the new exclusive competence limit would seem essential. However, we would repeat our primary position that a dramatically increased financial limit should not be imposed on access to the Court of Session commercial court.

22. To ensure that the most important and difficult cases can be resolved by Scotland’s senior judges, we consider that the test to transfer such cases from the sheriff court to the Court of Session should not be so restrictive, and that it would be logical for the Court of Session to have the power to “call in” cases. If the aim of the courts reform is to allow cases to be litigated at an appropriate level then parties should be allowed to put their case for remit direct to the senior court.

23. We understand that the long-term vision for improving civil justice in the sheriff courts envisages reforms over a period of ten years. In the event that the exclusive competence of the sheriff court is substantially increased and there is an automatic transfer of cases from the Court of Session, care must be taken to ensure that the sheriff courts are able to cope with the increase of business. The consequence of rushing in these reforms would be to impede the public’s access to justice and make the system more inefficient in the short-term. We are accordingly of the view that any reforms in the Bill must be implemented in stages over a number of years to ensure a seamless transition of business. In particular, any significant increase in the exclusive competence of the sheriff court should be introduced on a phased basis.
24. The views expressed in this response are shared by the authors and made in their personal capacities. These views do not necessarily reflect the position of the Faculty of Advocates or the authors’ respective stables.

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