1. This response is written on behalf of the Ampersand Stable which consists of 57 practicing advocates, including both senior and junior counsel. Our members are drawn from the varying economic and social strata of Scottish life. They have chosen to become advocates out of a liking for the law, and a desire to serve the people of Scotland. Many of our most senior and experienced members routinely act in speculative actions, where they receive no payment unless and until the action is won. They have enormous experience of civil practice in all major areas, including those which will be greatly affected by the proposed changes.

2. While there is much in the Bill to be welcomed, we have very serious concerns about the exclusive competence provisions of the Bill. Advocates would plainly be affected by the proposed changes and to that extent have an interest. However, the concerns set out in this response are not driven by that interest. On the contrary. We are concerned at the likely effect of the proposed changes on access to justice. The obvious effect of the proposed changes would be to prevent ordinary Scottish people and businesses from raising cases in the Court of Session, and force them to litigate in the Sheriff Courts. We think it unlikely that this will save money. Moreover, the practical effect will be to deny many people and businesses access to the best legal representation.

3. The role of an advocate extends beyond presenting cases in court. Advocates are skilled in all aspects of litigation, from the preparation of documents for court to the negotiation of agreed settlements. Advocates provide advice on investigations, preparations and strategy throughout the course of litigation. The cost of instructing counsel is not routinely recoverable, even by a successful party, in the Sheriff Court. At the moment that does not cause a great deal of difficulty, since a party who wishes to instruct counsel has the option – other than in cases of low value – to litigate in the Court of Session, where the cost of instructing counsel is routinely recoverable by the successful party. Thus, if the Bill were to pass in its current form, the ability of ordinary people to access this valuable resource of knowledge and skill would be seriously impaired.

4. The Sheriff Court is already overcrowded. Cases which are expected to last, say, four days are rarely heard – as they are in the Court of Session - over consecutive days. They often therefore take many months to complete. The result is that parties become frustrated, while expenses continue to mount. We do not understand how the transfer of 47% of Court of Session cases to the Sheriff Court can do other than exacerbate this situation.¹ Unable to litigate in the Court of Session due to the £150,000 threshold, there is a risk of parties who have the choice electing to take their litigation to an English court, with consequent loss to the Scottish economy.

5. The Policy Memorandum that accompanies the Bill states that “the policy

¹ Policy Memorandum, para. 88.
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\textsuperscript{2}. We do not see how this will be achieved through raising the exclusive competence threshold to £150,000. As has been pointed out, this represents a thirty-fold increase on the existing threshold, and is far in excess of the corresponding figures for England and Wales and Northern Ireland.

6. While it is accepted that there are sound reasons for preventing cases of very modest value from being raised in the Court of Session, figures far short of £150,000 are of major importance to ordinary people and small businesses. Moreover, there is no direct link between, on the one hand, the financial value of a case and, on the other, its legal complexity or importance to the client. By way of illustration, medical negligence cases are almost always difficult, involving complex expert evidence. They are also, for obvious reasons, usually of great personal importance to the parties. Yet the sum sued for is often less than £150,000 (for example, where the death of a newborn child is involved). Under the Bill, such cases would have to be dealt with in the Sheriff Court. We respectfully submit that it is neither fair nor appropriate that such complex and demanding cases are transferred out of a court (the Court of Session) which has a proven track record of dealing efficiently with them.

7. It is difficult to see the logic of creating a Scotland-wide personal injury court at Sheriff Court level. In effect, such a court already exists in the Court of Session. As we said in our response to the 2013 Consultation Paper, that procedure works extremely efficiently. That has been widely acknowledged. The Lord President observed in an April 2013 Practice Note (No 1 of 2013) that there was much to commend about the usefulness of that procedure.

8. As matters stand, a party which instructs counsel in the Sheriff Court has to apply for sanction for counsel in order to be allowed to recover the costs in the event of success. That is usually done at the end of a case. The results are unpredictable. The effect of the proposed changes will be to transfer to the Sheriff Courts large numbers of cases in which parties – for good reason – generally instruct counsel. That will place parties – notably accident victims and small business – in an invidious position in deciding whether or not to instruct counsel, since they will be unable to predict whether the costs will ultimately be recoverable. For reasons set out above, Ampersand considers that the proposed exclusive competence provisions would be a mistake. If, however, the proposals are enacted in their current – or similar – form, provision should be made for sanction for counsel being granted in the Sheriff Court in order to protect the rights of ordinary Scottish people and businesses to have access to the best quality legal advice.

Ampersand Advocates
11 March 2014

\textsuperscript{2} Para. 79.