



**JUSTICE**  
Scotland

## **Making Justice Work: Courts Reform (Scotland) Bill**

### **Response to Consultation**

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## Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance access to justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland.
2. We welcome the opportunity to provide a response to the consultation document and draft Bill. We would like to make some preliminary points before proceeding to address the particular questions set out in the document.
3. The Report of the Scottish Civil Courts Review<sup>1</sup> made it clear that any reform of the civil court structure in Scotland would, of necessity, require a similar reassessment of how the criminal courts operate. We wholeheartedly agree with that analysis. It is with that in mind that we feel it is essential that in considering the proposed reforms account must be taken of the impending changes to both the structure of the overall court system as set out in the Shaping Scotland's Court Services<sup>2</sup> document as well as considering the impact of changes to the criminal justice system, and the current approach in prosecuting criminal cases.
4. We agree with the principles set out in paragraph 3 of the consultation document, and the projects comprising the Making Justice Work programme, on the face of it, have appropriate aims at their heart. The benefits identified at paragraph 23 are uncontroversial though perhaps set a benchmark for assessing the proposed reforms.
5. However, we consider that detailed analysis of the proposed reforms is required, and in particular, consideration of precisely how they will be implemented.

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<sup>1</sup> Lord Gill (2009), available at <http://scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review>

<sup>2</sup> Scottish Court Service (2013), available at [http://www.scotcourts.gov.uk/docs/default-source/scs-consultation-court-structures/response\\_to\\_the\\_consultation\\_and\\_recommendationspdf.pdf%20](http://www.scotcourts.gov.uk/docs/default-source/scs-consultation-court-structures/response_to_the_consultation_and_recommendationspdf.pdf%20)

6. We agree with the over-arching principle that cases require to be dealt with at the appropriate level. However, the scale of the proposed reforms should not be underestimated. The Sheriff Court will be required to adapt significantly to cope with the additional business that will inevitably result.
7. We have concerns about the capacity of the Sheriff Court to absorb the likely volume of both criminal and civil business that is likely to result not just from the Court Reform Bill proposals but following implementation of the court closures programme as well as the proposed reforms to the criminal justice system, notably the abolition of corroboration. There will be a considerable increase in the workload of Sheriff Courts as a result of the foregoing proposed changes.
8. It is already the experience of our members who specialise in criminal work that more cases, which once would have been prosecuted in the High Court, are now dealt with in the Sheriff Court. This increase in solemn sheriff court business has a significant effect on current court capacity. For example, we understand that it is not unusual for 5 or 6 cases to be adjourned due to pressure of court business at each sheriff and jury sitting at Edinburgh Sheriff Court and other courts have similar difficulties.
9. The closure of a number of courts will lead to additional business in certain courts. We have concerns about certain aspects of this transfer of business. It will result in all court users having to travel further to attend court, and thus will have expense implications; There are concerns about complainer, witness and accused all travelling together on the same bus or train to court; There have been concerns expressed by family practitioners that the increased distances for travel will lead to difficulties with child care for clients. We appreciate that the proposed use of video technology for court appearances may address some of these concerns but we take the view that in many cases, such use is not appropriate, particularly in criminal cases. It is imperative that accused persons are able to appear before a court in order to raise any concerns regarding their detention conditions, as well as to effectively put forward their defence.
10. We appreciate that the Scottish Court Service has considered the capacity of the courts, which will be required to deal with the transfer in business.

However the actual physical capacity is only one aspect. The availability of court clerks and fiscals also requires to be taken into account, which are just as important factors in looking at whether a court can deal with the business. There appear to be difficulties at the moment for the Crown in trying to staff all the courts under the current workload. We are also aware that there continue to be many cases at summary level where trials are often adjourned, due to pressure of business, causing inconvenience to witnesses. There are certain courts where this is especially experienced in domestic abuse cases.

## **Chapter 1 – Moving civil business from the Court of Session to the sheriff courts**

### **Q.1**

11. There is no doubt that raising the privative limit to £150,000 will lead to a significant amount of business moving into the Sheriff Court. We agree with the principle that cases ought to be dealt with at the appropriate level. However to ensure that there is a consistency of justice, there requires to be an appropriate level of resource provided.
12. The bulk of first instance cases in the Court of Session are personal injury cases, which account for around 75% of the total<sup>3</sup>. The proposed limit will lead to over 90% of those cases going into the Sheriff Court. This will be around 2000-2250 cases. It remains to be seen whether these cases will be litigated in the new specialist personal injury court, or whether they will be raised in the local sheriff court. As we point out later in the response, we agree that the proposed specialist Personal Injury Court could be a success. However, to be so, it will require to have sufficient resource, technology, and shrieval capacity.
13. Around 150 commercial cases are raised in the Court of Session each year. Half of these seek sums less than the proposed new limit, and of course the relevant figure is the sum the case settles for or that awarded by the court. It is estimated that at least 75-100 of these cases will require to be raised in the

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<sup>3</sup> Civil law statistics in Scotland (2011-12), p 3 available at <http://www.scotland.gov.uk/Publications/2012/12/9263/3>

Sheriff Court. While there are specialist commercial courts in Aberdeen and Glasgow, commercial cases of a value up to £150,000 and with jurisdiction outside those two cities, will require to be litigated in local sheriff courts. It is appreciated that the Government plans to introduce sheriff and jury centres which would have jurisdiction to hear civil claims in those centres. The introduction of the specialist commercial courts was instigated by the demands of commercial practitioners and their clients, and similar provisions to those currently in place, such as specialist sheriffs. A case-management model of procedure, must be considered to ensure a similar level of justice being maintained.

## **Q.2**

14. It would appear that there are around 150 Family actions per year in the Court of Session<sup>4</sup>. We suspect the bulk of these will relate to disputes about financial provision on divorce. A significant constraint in family cases is funding and in practice it may well be that the current level of family cases in the Court of Session is maintained. However, if the same overall principle is applied, cases where the financial sums involved are less than £150,000 ought to be raised in the Sheriff Court. In our view, these should be dealt with by specialist sheriffs.

## **Q.3**

15. If the overall aim is to have cases dealt with at an appropriate level, it would seem sensible to restrict the type of case where there would be concurrent jurisdiction to as few as possible. The ability to remit a case, in suitable circumstances, ought to be safeguarded.

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<sup>4</sup> *Ibid*, p 5, available at <http://www.scotland.gov.uk/Publications/2012/12/9263/5#table8>

## Chapter 2 – Creating a new judicial tier within the sheriff court

### Q.5

16. The term 'summary sheriff' seems appropriate. However we feel that the term is of less importance than the jurisdiction and type of case that the postholders will be required to deal with. The range of cases is wide, from criminal cases, through the whole spectrum of family matters, housing, children's hearings appeals and referrals to all cases of a value under £5000. This causes potential concern as what may seem like a low value case can in fact be rather more complex than the value suggests. We are in favour of specialisation amongst the judiciary and we note that the Government considered but rejected the idea that some summary sheriffs sit only in civil cases. We would suggest that that be reconsidered and indeed thought be given to appointing specialists within the ranks of summary sheriffs to deal with specific types of civil disputes, e.g. housing, family, and personal injury. If 80% of anticipated summary business will be criminal work, then it is likely that the majority of summary sheriffs will come from a criminal background and be too inexperienced in the wide range of civil business to ensure the necessary expertise is exercised in maintaining procedures that conform to the rule of law.
17. The proposed rules in relation to the simple procedure suggest that a practical approach is to be taken. This may not be possible in all cases and while there is provision for the transfer of cases out of that procedure, we feel that more benefit to the court and parties would be gained from specialists dealing with particular types of case.
18. In particular, with the proposed introduction of the Specialist Personal Injury Court, it would seem sensible to allow that court to deal with cases with a value of under £5000. Complex cases, e.g. industrial disease, or workplace accidents can have a relatively low value but involve detailed consideration of legal issues. The obligation to ensure fairness and the development of the jurisprudence of the specialist court would benefit from the court dealing with all personal injury cases, regardless of value. We would submit that in addition to the specialist court being able to deal with cases under £5000, if such cases are raised in a local sheriff court, the current specialised

procedure is retained. The case-flow model has been successful and would assist in the resolution of cases.

**Q.6**

19. Yes.

**Q.7**

20. The range of family matters is wide, including divorce, separation, declarators of parentage, and non-parentage, declarators of marriage and nullity of marriage, dissolution of a civil partnership. This emphasises the need for specialisation.

**Q.8**

21. Yes, subject to the issue of specialisation.

**Q.9**

22. This question does raise the issue of what the difference will be in criminal matters. If a summary sheriff can deal with a Petition matter or a Judicial Examination, is there any basis to say that sheriff could not hear a jury trial? It is important that clear and logical separation of powers be set out and explained.

**Q.10**

23. The relevant Sheriff Principal will probably be best placed to assess how cases should be allocated.

**Q. 11**

24. Not applicable

### **Chapter 3 – Creating a new Sheriff Appeal Court**

#### **Q.12**

25. Our understanding is that summary criminal appeals take up two days per week – one day for conviction appeals and one day for sentence appeals. The feeling of our members is that there is a consistency of the administration of justice from the High Court which may not be replicated in the proposed sheriff appeal court, and that it potentially adds an extra layer of bureaucracy as appeals will still be made to the High Court, albeit these would only be made on a point of law and would require leave. There may also be difficulties in keeping up with opinions and decisions being issued from more than one appeal court. Would they for instance have different binding or persuasive effects on different levels of court? This matter must be considered prior to instigation.
26. In our view, a single national appeal court is preferable on the grounds of consistency and certainty.

#### **Q.13**

27. The location of the civil appeal court should depend on availability and capacity.

#### **Q.14**

28. We agree.

#### **Q. 15**

29. Not applicable

## Chapter 4 – Creating a specialist personal injury court

### Q.16

30. In principle we agree with the introduction of a specialist personal injury court. The success of the Coulsfield reforms in the Court of Session have shown that the case-flow model of dealing with personal injury cases has worked very well. Cases settle earlier, fewer cases go to proof or trial, and there have been significant savings in court time. The substantial majority of cases do not need to call at all, at any stage of the case, in court, and while we appreciate there are administrative responsibilities on the part of court clerks, the system developed within the Court of Session has been very effective, and has produced a centre of excellence, with specialist practitioners, often using specialist counsel, achieving proper resolution of cases.
31. The current position in the Sheriff Court is more variable. While the same case-flow model operates, there are a number of significant differences. One of the main factors behind the high level of settlement in the Court of Session is the certainty that if a case does not settle beforehand, it will go to proof or trial on the date allocated in the court timetable. That certainty shapes behaviour on both sides. The situation in the Sheriff Court is markedly different. It is not unusual for a proof diet not to go ahead on the date allocated due to pressure of other business, often criminal business. It is highly unusual to be allocated consecutive days for a proof, even if this is identified at an early stage of the proceedings. Consequently many cases that do go to proof are heard over several days over a period of weeks, if not months. These factors lead to different behaviour with parties expecting cases not to run, even if settlement can't be agreed, and so the focus on resolving the case is often very different.
32. The specialist court will require to replicate the factors which shape this behaviour. We do have a concern whether two specialist sheriffs will be sufficient. Currently, in the Court of Session around 80-90 personal injury cases are set down for proof each week. The vast majority settle and often there are weeks where no proofs run. Occasionally, more than two cases do proceed though there is the capacity to deal with that, if necessary. In the new

specialist court, it would only take a small number of cases to run to proof for difficulties to arise.

33. On the assumption that the specialist court will be located in Edinburgh, we also note that in *Shaping Scotland's Court Services*, which has been approved by the Scottish Government, the recommended closure of Haddington Sheriff Court is to proceed, with business being transferred to Edinburgh Sheriff Court. There is no mention in the document of the impact on Edinburgh Sheriff Court of the introduction of the specialist personal injury court. It is likely that a good proportion of the 2,000 or so cases, having previously being dealt with under Chapter 43, will be dealt with in the new court.
34. It may well be that a proportion of the cases will be litigated in local sheriff courts, and while we acknowledge the proposals to have civil business concentrated in the new sheriff and jury centres, we repeat the need to ensure sufficient resource and personnel be available to deal with these cases.
35. The draft Bill allows for the creation of a specialist court in any part of Scotland, and if, as is expected, the first court is located in Edinburgh, we would suggest that consideration be given to also setting up a court in Glasgow.
36. One of the most successful aspects of the Chapter 43 procedure in the Court of Session has been the compulsory Pre-Trial Meeting. Many cases, if not settled prior to this point, will do so at or shortly after the meeting. An important feature of the success rate has been the requirement to have an actual physical meeting. The equivalent provision in the sheriff court procedure is simply to have a pre-proof conference which is often conducted by telephone. These are markedly less successful in achieving settlement of cases, as often there has been little if any proper preparation for the conference and there is not the same imperative to resolve the case where the clients are not physically present, nor are the lawyers facing each other in person.

37. Another important feature of Chapter 43 is the use of technology, in particular the use of the e-motion procedure. This is simply not available in the sheriff court. Administrative matters which take only a few days to resolve electronically in the Court of Session, can take weeks in the sheriff court by way of paper. There is also the issue of the recording of evidence, which given the increase in complex cases being dealt with within the sheriff court, will be of importance. Each sheriff court will require to have the technological capacity installed, and this would apply to all types of case.
38. As stated in our response to Chapter 2, with regard to personal injury cases with a value of under £5,000, certain of these cases can involve complex matters of law. While we appreciate that there is a power of remit set out in the draft Bill, we would suggest that the specialist court be empowered to deal with these cases as the benefits of specialisation ought to be open to all parties, regardless of the value. The current Summary Cause procedure, again based on a case-flow model, has shown us that there are good reasons to have all cases dealt with on the same basis.
39. It is also worth noting the potential impact of the Enterprise and Regulatory Reform Act 2013, which has recently received Royal Assent. Amongst its provisions is the removal of civil liability for breach of statutory health and safety regulations. Those who have workplace accidents will be required to rely on the common law of negligence to pursue a claim. This will undoubtedly add complexity to many cases, with the likelihood that more cases will run to proof, and take longer, given the evidence that will require to be led.
40. We note from the consultation document that it is envisaged that it would be only in 'exceptional' cases that sanction for counsel would be granted. We consider that the current test ought to be retained, namely that where the court feels that a case is suitable for the sanction of counsel, it has the power to grant same. The complexity of a case may be significant though the value is not. There are equality of arms issues, particularly in situations where the resources of a defender, invariably through insurance, are significantly greater than that available to the vast majority of pursuers. The instruction of counsel does assist with the efficient resolution of many cases, and the

decision to grant sanction ought to remain within the discretion of the sheriff in each individual case. .

**Q.17**

41. We agree that civil jury trials be retained within the specialist personal injury court. They are an important element in ensuring that the court maintains an awareness of what society views as being appropriate recompense for injury or the loss of a relative. The decision of the five judge bench in *Hamilton v Ferguson Transport (Spean Bridge) Ltd and Thomson v Denis Thomson Builders Ltd* [2012] CSIH 52 and subsequent decision of Lord Drummond-Young in *Catherine McGee & Ors v RJK Building Services Ltd* [2013] CSOH 10 emphasise the importance of this aspect.

**Chapter 5 – Improving judicial review procedure in the Court of Session**

**Q.19**

42. We have concerns about the introduction of a three month time limit. We feel that it will restrict access to justice. We appreciate that such a limit exists in England and Wales. However, there are a substantially higher number of judicial review proceedings in that jurisdiction and we do not think that the constraints experienced in England and Wales are the same in Scotland. While it is in everyone's interests that proceedings are brought timeously, there are often good reasons as to why certain cases take longer to commence than others. We take the view that the current test in relation to the timing of bringing proceedings is well understood and applied in appropriate circumstances. We do not understand there to be any significant strength of feeling for the introduction of a formal time limit. The Scottish Government is very often the respondent in judicial review cases and it seems iniquitous that one of the principal beneficiaries of the proposed change would be its proponents.

**Q.20**

43. The Court already has the power to refuse a first order for intimation and service and it is understood that such a power has been exercised in the past.

The number of general Judicial Reviews (as aside from immigration) has decreased over recent years. It does not seem to be suggested that the Judicial Review procedure generally has created an unnecessary and inappropriate burden on the judicial system with Petitions that did not stand a reasonable prospect of success. The reality is that to bring a general Judicial Review requires either public funding or deep pockets and accordingly there already exists in our view a significant limitation on access to justice.

44. To further restrict that access by adopting a requirement for leave across the whole field of Judicial Review would at first blush appear to add to that restriction. If there is a concern in a specific area of Judicial Review then perhaps a test, which is properly reasoned and justified, could be introduced in that particular area.
45. We also note that the proposed test on the issue of leave will be that the applicant must demonstrate sufficient interest and a real prospect of success. The first test is one that exists in any event and of course is now defined by the AXA decision<sup>5</sup>. The test of a real prospect of success is a higher one than that put in place by the Legal Aid Board when granting public funding. Therefore a dilemma could arise where public funding is granted with an acceptance that the public purse considers it appropriate to make a grant, but leave is refused. To give consistency and a degree of certainty, if such a test were to be imposed, it should be adopted with specific criteria identifying what amounts to a 'real prospect' to enable an objective assessment of the application of any such test.
46. As a side issue we raise the query as to how a "hybrid" Judicial Review is to be dealt with i.e. one seeking declarator and damages? This is not addressed in the consultation.

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<sup>5</sup> *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46

## **Chapter 6 – Facilitating the modernisation of procedures in the Court of Session and Sheriff Courts**

### **Q.23 & 24**

47. Simplification if it is to the benefit of those seeking access to the Court and for all those who use the Court is to be welcomed. However, the ability to include all types of actions under the same framework and umbrella will require detailed analysis with perhaps referral to a specialist committee for that purpose.
48. The proposed rule-making powers are wide-ranging. The creation of the Scottish Civil Justice Council should assist in improving the delivery of civil procedure reforms. However, it is necessary that consideration of both the criminal and civil workload of the court system needs to be continually undertaken to ensure that a holistic approach is adopted, ensuring fairness across both systems.

### **Q.26**

49. We agree with the proposal that a single judge should be able to consider the grounds of an appeal or motion subject to the safeguards identified in the paper.

### **Q.28**

50. On the face of it the distinctions between Ordinary and Petition procedures are clear, well defined and well used. The potential upside is simplification but whether or not that is possible depends very much on the wholesale re-drafting and re-focussing to ensure confusion does not arise. One difficulty that may arise at present is where a Petition procedure is commenced where an ordinary procedure would be more appropriate. If the rules made clear that it was appropriate not to dismiss such an action in such a situation then that may address any concern about technical dismissals.

**Q.29**

51. Unification could lead to confusion and potential lack of clarity as to exactly what was being sought. For example a Petition by Judicial Review would fall within the general procedure. It would therefore then be possible that if any test for leave was to be applied in such a situation, cases may fall through the net and inconsistent approaches will be taken.

**Q.31**

52. The new procedure is to be welcomed given the considerable problems to the Court and to public/organisations that are subjected to such actions by vexatious litigants. We note the potential power of the Court of Session to require leave in relation to any civil proceedings begun by a party in the Scottish Court. In doing so it may be helpful if any such Judge had details of all actions involving such an individual as there is an awareness that on occasions at present when such applications for leave come before a Judge they are not necessarily aware of all actions in the Court of Session aside from those in outlying Courts.

**Q.33**

53. We agree that an order for interdict should be capable of being enforced at any Sheriff Court. One area requiring consideration and flowing from this will be the Sheriff Court Caveat system which will require to be reviewed.

**Q.34**

54. We agree.

## Chapter 7 – Alternative Dispute Resolution

### Q.36

55. We take the view that ADR ought to be one of the options open to parties but should not be promoted in favour of other options. We agree with the views set out by Dame Hazel Genn. Much depends on the nature of the dispute. In commercial cases, for example, there are clear benefits to the case-management model, where the real issues in dispute between the parties are focused at an early stage, and while ADR is always an option, the nature of the particular procedure encourages as early a resolution as possible. Similarly in personal injury cases, there are pre-action protocols, which should be made compulsory, and which assist in the resolution of many cases. Even in litigated cases, the nature of the procedure is such that resolution will generally occur, without the need for court time to be utilised.
56. We do accept that in an occasional case, a form of ADR may be appropriate. We have concerns however about parties being compelled to consider ADR in each case, and there being possible consequences in costs and expenses should the option not be taken. The economic benefits of mediation or other methods of ADR are not clear. Who is responsible for the costs? Are parties expected to bear their own costs?

JUSTICE Scotland

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