



JUSTICE  
Scotland

## **Courts Reform (Scotland) Bill**

### **Justice Committee**

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## **Introduction**

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland.

## **Summary**

2. **The Courts Reform (Scotland) Bill will introduce important procedural limitations to the process of judicial review in Scotland. Judicial review allows individual citizens to seek a remedy for the unlawful conduct of public authorities and decision makers. In a country without a written constitution which governs the relationship between the individual and the State, its function is all the more important. These statutory changes will regulate all future judicial reviews applications. Close scrutiny will be required to ensure that the remedy remains effective and accessible in practice.**
3. **The wider proposed reforms in the Bill will lead to a significant amount of additional business for the Sheriff Court. We are concerned that the Sheriff Court may not have the capacity to cope with the likely volume of cases that will result not just from these reforms, but from the implementation of the court closures programme, the amount of criminal business that is already transferring from the High Court, and the effect of the proposed abolition of corroboration.**
4. **Our primary concern is that of resource. The Financial Memorandum to the Bill makes it clear that the reforms are intended to be self-funding. There is no provision for further judicial capacity. The additional business will require to be dealt with by the existing complement of sheriff clerks, and fiscals in criminal matters. The IT budgets appear extremely low. The savings are not clear.**
5. **The Bill places a significant level of responsibility and increase in power upon the office of Lord President. The Committee may wish to consider whether the Bill has provided an appropriate system of checks and**

**balances in relation to the exercise of those powers to ensure their accountability.**

### **Judicial Review (Section 85)**

6. Section 85 of the Bill would implement two changes to the procedure for judicial review in Scotland. Firstly, the Government proposes to introduce a three month limitation period for any review (with discretion to extend when the Court considers it “equitable having regard to the circumstances). Secondly, applicants will require the leave of the Court of Session before a claim may proceed. Permission will only be granted where the applicants have standing (“a sufficient interest”) and a “real prospect of success”. In respect of each of these proposals, the changes are modelled on existing practice in England and Wales (we refer therefore, in this section, to developments before the courts in that jurisdiction).<sup>1</sup>

#### *The constitutional function of judicial review*

7. The importance of a properly functioning system of judicial review is part and parcel of a system which respects the rule of law. This has recently been restated in a number of Scottish cases before the Supreme Court:

“Judicial review under the common law is based upon an understanding of the respective constitutional responsibilities of public authorities and the courts. The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law.” *AXA General Insurance Ltd v HM Advocate*, [2011] UKSC 46; [2012] 1 AC 868 at paragraph 142 (Lord Reed)

“There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review.” *R (Cart) v Upper Tribunal* [2011] UKSC 2; [2012] 1 AC, 663 at paragraph 122 (Lord Dyson)

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<sup>1</sup> Similar tests also apply in Northern Ireland.

8. While it must be open to both Parliament and the Executive to consider the function of judicial review, reform must be approached with caution.<sup>2</sup> We are concerned that the evidence produced to support the Government's case for change should be subject to close scrutiny.

9. The Consultation implies that judicial review is being used to frustrate the policies of Government:

“...it is not in the interest of the courts or the wider public interest if judicial review become (sic) a tactical device to frustrate or delay proper public policy decisions, or a vehicle to articulate what are essentially political arguments in the judicial sphere.”

10. This neatly echoes the language being used in the context of Westminster consultations on judicial review. However, no evidence has been provided to support this view, which seems designed to caricature applicants and the judicial review process, and undermine its constitutional function.

11. The statistics simply do not support the picture being painted. As Lord Gill explained in his report: “Petitions for judicial review have never comprised more than 19% of all actions initiated by petition over the past six years, and comprised just 7% of petitions in 2006” (Lord Gill accepted that the proportion of time spent in sitting days attributable to judicial review was likely to be as a result of those applications being more likely to be opposed than others). The figures for judicial review claims in Scotland show that relatively few cases are brought. For example, in 2011 there were 304 claims, in 2012 there were 275 and in 2013, 287. However, the bulk of these were immigration cases, with year on year figures: 242, 217 and 213 respectively (74% of all cases in 2013).<sup>3</sup> Importantly, immigration cases will be transferred from the Court to the Upper Tribunal pursuant to the Borders, Citizenship and Immigration Act 2009.

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<sup>2</sup> Fuller information about JUSTICE's historical work on the development of judicial review and on the development of the jurisdiction in England and Wales can be found in our recent response to the Ministry of Justice consultation *Judicial Review: Proposals for further reform*. See <http://www.justice.org.uk/data/files/resources/359/Judicial-Review-Further-Reforms-JUSTICE-Response-FINAL-Nov-2013.pdf>

<sup>3</sup> These statistics are taken from figures cited by Lord Hodge, addressing the Scottish Public Law Group on 7 March 2014.

12. We recognise the attractiveness – particularly for respondent Departments and public authorities – of introducing new procedural limitations, with associated predictability, into the process of review. However, the introduction of these new procedural hurdles in Scotland is not necessitated by any immediate difficulty facing our Courts, and yet they may create particular difficulties for Scots applicants. If the changes are to be implemented, it will be important that the statutory language and any associated guidance is drafted to ensure that the hurdles in place do not inadvertently lead to a higher hurdle for Scots applicants seeking to challenge public decision making than claimants in the other jurisdictions of the UK. We highlight a number of specific concerns, below.

*Time limits: 3 months*

13. We are concerned that the case for the introduction of a three month time-limit in Scotland has not been properly examined. This tight timescale may inhibit the pursuit of judicial review in Scotland and could act as a significant barrier in practice to the oversight of Government and public authorities by our courts. If a new time limit is adopted, Parliament should consider whether there are practical reasons why three months may be an unduly onerous restriction in Scotland.<sup>4</sup>

14. The case for the introduction of the proposed time limit is principally based on legal certainty for decision makers and the users of public services. It is designed to bring: “a necessary element of discipline to the conduct of the parties and allows for a degree of certainty and public policy”.<sup>5</sup>

15. The Government argues that if cases are brought promptly to the Court this may lead to speedy and efficient resolution.<sup>6</sup> While it is not difficult to see the attraction of cases being brought promptly – for respondents and for the wider public interest – what is being proposed is a new limitation on the right of access to the Court. Commentary in England and Wales makes clear that the three month period which operates in the Administrative Court is a “very tight” deadline for individual claimants.<sup>7</sup> In order to get a claim off the ground, an individual

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<sup>4</sup> Although no formal time limits currently apply, respondents to judicial review in Scotland can apply to have a petition set aside where there has been excessive and unreasonable delay (by making a plea of mora, taciturnity and acquiescence).

<sup>5</sup> Consultation, para 172

<sup>6</sup> Ibid, para 132

<sup>7</sup> See for example, Bingham Centre for the Rule of Law, *Response to Ministry of Justice Consultation Paper CP25/2012, Judicial Review: Proposals for Reform*, January 2013, para 36.

applicant will have to first identify that they have grounds for review. In most cases this will involve securing legal advice from an experienced public lawyer and, in many, securing legal aid to pursue the claim. In order to narrow the scope of the claim, an applicant's solicitor is likely to enter into correspondence with the relevant authority and seek disclosure of relevant information on the likely response to the claim. In fact, many of these stages are required by the detailed Pre-action Protocol which operates in England and Wales. There are limited sources of public law advice available in Scotland. Difficulties in securing legal aid speedily from the Scottish Legal Aid Board are well documented. Yet, there is nothing in the policy documents accompanying the Bill or in the Consultation to illustrate that the Government has taken steps to ensure that individuals will not be significantly hindered in their pursuit of claims against administrative bodies by the introduction of a new and untested three month guillotine.

16. Time pressures may lead incomplete claims to be lodged (with associated difficulties at permission stage, below) or for claims to be lodged which are not necessarily fully argued, necessitating later applications for amendment, with associated drains on court time. Some claimants which might have avoided court entirely might be forced to issue proceedings in order to preserve the respective positions of the parties at the three month mark.<sup>8</sup>
17. Both the Faculty of Advocates and the Law Society of Scotland have expressed concerns that the three month period is inappropriate for Scotland. Ministers must explain how the impact of these measures has been assessed and whether any alternative to three months has been considered. Similar public law remedies are pursued under the Human Rights Act 1998 and the Scotland Act. Yet, the time limit in those cases, clearly set some time after the three month deadline was introduced in England and Wales, is 12 months. It would be regrettable if the introduction of a tighter timescale for judicial review lead claimants to question whether their public law claim might instead be framed as an ordinary claim for damages or cast in a human rights mould.<sup>9</sup>

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<sup>8</sup> See for example, Bondy & Sunkin, *Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse*, UK Constitutional Law Blog, 10 January 2013

<sup>9</sup> In the Consultation, the Government expressed its concern about the manipulation of procedures to avoid technical difficulties in some claims. This reflects the Court of Session's clear indication of the importance of litigants following the correct procedural route. See *Sidey Ltd v. Clackmannanshire Council* 2010 SLT 607 and in *Ruddy v Rae, Chief Constable Strathclyde Police* 2011 SLT 387

18. Notwithstanding our above concerns, we consider that two procedural aspects must be considered to ensure that the time limit operates fairly. First, it is imperative that the Court have an equitable jurisdiction to waive the time limit if the circumstances demand flexibility. This is not provided in the Bill. In England and Wales, the Administrative Court is generally slow to extend time and such extensions are exceptional, and no doubt a similar cautionary approach would be followed by Scots judges.<sup>10</sup> Without a provision in legislation, there may be limited scope for addressing any particular challenges facing Scottish claimants in the *ad hoc* discretion of the Court to extend time. The Bill and the associated Rules of Court must – in practice - provide sufficient flexibility for individual judges to implement any new limit fairly.
19. Second, the Bill provides that time must be rigidly calculated from the date when the event giving rise to the grounds for judicial review “first arise”. It is intended that this should reflect the test in the Civil Procedure Rules in England and Wales (promptly or “*not later than 3 months after the grounds to make the claim first arose*”).<sup>11</sup> On its face, the test will apply regardless of the knowledge of the claimant of the relevant grounds, the impact of the relevant decision or whether the grounds for review are continuing. Years of precedent apply in England and Wales to determine the scope of the limitation period, and the factors which may be relevant to the extension of time.<sup>12</sup>
20. It may be arbitrary to base the time limit for judicial review in cases of ongoing and continuing illegality on the first trigger for the continuing maladministration, regardless of the impact of the decisions on those affected by the problem.<sup>13</sup> Notably, the administration in Whitehall has recently dropped a proposal to

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<sup>10</sup> See for example, *R v Institute of Chartered Accountants in England and Wales ex p Andreou* (1996) Admin LR 557.

<sup>11</sup> See CPR 54(5).

<sup>12</sup> For example, while it is unclear whether a lack of knowledge will stop time running (compare *R v Department of Transport ex p Presvac Engineering Ltd* (1992) 4 Admin LR 121 and *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36 at [28]), it has been treated as clearly relevant to the decision to extend time. See *R v Licensing Authority ex p Novartis Pharmaceuticals Ltd* [2000] COD 232 and *R v Secretary of State for the Home Department ex p Ruddock* [1987] 1 WLR 1482.

<sup>13</sup> See for example, cases in England and Wales involving continuing illegality or multiple decisions over a period of time which might be susceptible to review, e.g. *R v Eastleigh Borough Council ex p Betts* [1983] 2 AC 613 (a continuing duty to house the applicant), *R v SS for Foreign and Commonwealth Affairs ex p Ross-Clunis* [1991] 2 AC 439 (continuing failure to recognise citizenship) or *R v Hammersmith and Fulham Borough Council ex p Burkett* [2002] UKHL 23. Importantly, in cases involving EU or Convention Rights, the High Court has given the following guidance: “There is no doubt about the principle, particularly in European [Union] law but obviously extendable to Human Rights legislation, in many authorities that where there is a continuing obligation, a continuing state of affairs, which continue not to be put right by the Defendant, time does not run at least until that state of affairs has come to an end”, *R (C) v Secretary of State for Justice* [2010] EWHC 3407.

impose a requirement for the rigid calculation of time from the *first occurrence* of any incident giving rise to a claim for judicial review, after significant opposition.<sup>14</sup> There is nothing in the Explanatory Notes or the Policy Memorandum which explains the Scottish Government's view on the calculation of time. This detail may be left to the Rules of Court or to the discretion of the Court. However, in light of the significant implications for potential claimants, and the utility of judicial review, it is important that the statutory language provides sufficient flexibility to allow the Court to develop the jurisdiction equitably. Parliamentarians may wish to ask Ministers to confirm that there is no intention that the language reflect current practice in England and Wales, nor the more restrictive practice recently proposed by the Westminster consultation.

#### *Requirement for permission*

21. JUSTICE Scotland considers that there are more sound reasons for introducing a leave filter to allow the Court of Session to more closely control its jurisdiction. If the primary motivation for change is to preserve judicial review for cases where there is a case to answer, giving the Court the jurisdiction to identify hopeless or abusive claims at an early stage is preferable to the creation of procedural or practical barriers for claimants.
22. However, we remain concerned that, in introducing this mechanism to the jurisdiction for the first time, steps must be taken to maintain the constitutional function of judicial review as an effective remedy for individuals who seek to hold public authorities to account. The test adopted in the Bill requires individuals to show a "real prospect of success" and that their case raises "important point of principle" or some other "compelling reason" for judicial review. We are concerned that these statutory tests set too high a preliminary hurdle and may ultimately increase the costs and time associated with any effective judicial review claim.
23. The substantive tests applied by the Administrative Court in England and Wales at permission stage are not set in stone in statute or in the Civil Procedure Rules

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<sup>14</sup> See JUSTICE Response, Judicial Review: Proposals for reform, December 2012, pages 12-13, here: <http://www.justice.org.uk/data/files/resources/341/Microsoft-Word-Judicial-Review-Consultation-JUSTICE-Response-FINAL-Jan-2013.pdf>



but have evolved from precedent and practice.<sup>15</sup> As the Ministry of Justice explained in *Judicial Review: Proposals for reform*:

“The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the Court is satisfied that there is an arguable case fit for further consideration.”<sup>16</sup>

24. The Explanatory Notes to this Bill explain the Government’s intention that this section should reflect the Gill Review recommendations, which were broadly to import the test applied by the Administrative Court:

“In addressing whether or not to grant permission, the court will assess not whether the case is merely potentially arguable but whether it has a realistic prospect of success, subject to the important qualification that arguability cannot be judged without reference to the nature and gravity of the issue to be argued.”

25. We have a number of concerns with this approach. First, we are concerned that the analysis of the England and Wales case law in the Gill review – used to support the test in the Bill – places too great an emphasis on “real prospects of success”. The case law itself has evolved to address flexibly in a whole range of public law cases. The starting point in all cases is whether the case is properly arguable. While there are cases where a heightened threshold has been applied in the Administrative Court’s understanding of whether a case should have leave, the routine test applied is not generally accepted to require the Court to conduct a detailed review of the substantive prospects of success in all cases. The language used by judges in these cases varies from case to case.<sup>17</sup>

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<sup>15</sup> Notably, when the codification of the test was last considered, by the Bowman review, it proposed that “arguable” be the standard applied. See Bowman Review, Recommendation 33.

<sup>16</sup> Ministry of Justice, *Judicial Review: Proposals for Reform*, December 2012, Cm 8515, para 69.

<sup>17</sup> A full review of the case law on permission is given in Michael Fordham, *Judicial Review Handbook, 6<sup>th</sup> Edition* (Hart Publishing) at 21.1.7 – 21.1.9. He uses the term “enhanced arguability” to describe those cases where a higher threshold has been applied. See Lightman J: “The orthodox approach is to give permission to apply for judicial review if the claimant shows an arguable case. But the court in the exercise of its discretion whether to give permission may impose a higher hurdle if the circumstances require this. Factors of substantial importance in this context include the nature of the issue, the urgency of the resolution of the dispute and how detailed and complete is the argument before the court on the application for permission” *R (Federation of Technological Industries) v Commissioners of Customs and Excise* [2004] EWHC 254 (Admin) at 8, CA at [2004] EWCA Civ 1020. Notably, Fordham refers to the court’s acknowledgement of this test as the “modified test for permission”. See

26. JUSTICE Scotland is concerned that adopting the requirement that a “real prospect of success” is evidenced in every case (together with the additional requirements in the Bill) will inadvertently lead to the Court in Scotland applying a routinely higher, and less flexible threshold in practice. This test will require a fuller analysis of the substance of a case at permission stage and will likely increase the costs associated with this stage of the proceedings.
27. Second, it is, in any event, unclear why the Government considers it appropriate to limit the jurisdiction of the Court further by requiring that a case raise an “important point of principle” – or that there be such other “compelling” reason for review. This would be a significant statutory restriction for which there is no clear equivalent operating in the other parts of the United Kingdom in relation to judicial review.<sup>18</sup> Such a test would prevent individuals with grounds and an arguable case pursuing a remedy at all. By contrast, judicial review remedies in England and Wales are discretionary and will be withheld where the Court considers that there is no substantive reason to grant a particular remedy. Similarly, in cases where an issue has become academic, the Court may refuse permission for a case to be heard. However, there is no express requirement that a case be especially “compelling” or principled before it may be considered. Moreover, the Administrative Court has recently adopted a more rigorous approach for the handling of cases “totally without merit” (allowing unmeritorious cases to be dealt with quickly).
28. If the Government intends the Court of Session to adopt a more rigorous test in all cases, we consider this approach to be misguided. A higher hurdle at a preliminary stage is likely to rule out claims which are meritorious together with those which are frivolous. In light of the short time limit envisaged for pursuing proceedings, the likelihood that this approach will disadvantage claimants in practice is high. Moreover, the application of this kind of expanded substantive test as routine at the preliminary stage is likely to create significant additional costs for the Court, with mini-trials likely at permission stage. JUSTICE Scotland considers that the language of the Bill must be amended to ensure that the permission stage is used as a proper preliminary tool to allow the Court to identify

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for example, *R (Johnson) v Professional Conduct Committee of Nursing and Midwifery Council* [2008] EWHC 885 (Admin at [124]).

<sup>18</sup> It does appear to be modelled on tests which currently apply for some routes of appeal.

and refuse to hear hopeless claims. It should not be allowed to become a largely unsurmountable hurdle designed to put all but the most straightforward claims out of the bounds of proper judicial consideration.

### **Increase in Privative Jurisdiction/Exclusive Competence (Section 39)**

29. The Bill seeks to increase the exclusive competence of the Court of Session from £5000 to £150,000. We agree that cases ought to be dealt with at the appropriate level. That requires an appropriate level of resource.

30. The bulk of first instance cases in the Court of Session are personal injury cases. The proposed limit will lead to over 90% of those cases going into the Sheriff Court. A specialist Personal Injury Court may be successful, but to be so it will require sufficient resources, technology and capacity.

31. We note there is no specific provision made for clinical negligence cases. There are strong arguments for the Court of Session to retain jurisdiction over all such cases. Invariably, they involve complex issues, a higher percentage of proofs run, and many cases do last several weeks. There is a high level of experience within the Court of Session judiciary as well as specific court rules relating to clinical negligence cases, which lead to the efficient disposal of cases. Even one such case running in the Sheriff Court on the planned resource will create significant problems.

32. The increase in limit will also affect commercial cases. Many commercial actions have a value of less than £150,000. While there are specialist commercial courts in Aberdeen and Glasgow, cases outwith the jurisdiction of those two cities will need to be litigated in local sheriff courts. It may also result in business being lost to England, which has been an active concern of the Commercial Court in the Court of Session for a number of years and its procedures were improved to allow quick and effective determination of cases. That cannot be guaranteed in the Sheriff Court.

### **Establishment of Personal Injury Court (Section 41)**

33. The Bill allows for specified types of civil proceedings to be dealt with by a specified sheriff court with all-Scotland jurisdiction. The intention is that initially

this would be applied to personal injury cases. 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 in court while the case is progressing and settle before the final allocated hearing, and while we appreciate that there are administrative responsibilities on 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.

34. We would point out that personal injury cases generate more the £2m per year by way of court fees for the Court of Session. This represents around one half of the total fee income of the Court, and given the small number of cases that actually proceed to proof or trial, demonstrates that personal injury cases effectively subsidise other areas of the Court's work.
  
35. 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. If the workload of the Sherriff Court increases without significant further investment, it will be difficult to change these practices to increase greater efficiency. It will also increase costs.
  
36. The specialist court will be required to replicate the factors which shape this behaviour. We are concerned that two specialist Sheriffs may be insufficient. 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, or one lengthy clinical negligence case, for difficulties to arise.

37. Another important feature of the Court of Session procedure 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 the installation of new technology, and this would apply to all types of case. The proposed budget of £10,000 set within the Financial Memorandum seems to be extremely low.

### **Equality of arms/Sanction of Counsel**

38. We wish to raise the issue of sanction for counsel. We strongly believe that the current test ought to be retained and endorse Sheriff Principal Taylor's recommendations in his report on expenses and funding of litigation.<sup>19</sup> He recommended that the test remain the same with the court taking into account the question of equality of arms. The complexity of a case may be significant though the value is not. There are real 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 resolution of many cases, and the decision to grant sanction ought to be within the discretion of the sheriff in each individual case.

### **Judicial Specialisation (Sections 34 & 35)**

39. The Bill enables the Lord President to designate categories of specialisation, and for Sheriffs and Summary Sheriffs to be appointed as Specialist Sheriffs. We note that the creation of judicial specialists at Sheriff Court level is central to the

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<sup>19</sup> *Review of Expenses and Funding of Civil Litigation* – Report by Sh Pr James Taylor – Sept 2013 Ch 3 paras 8-9

successful implementation of the Scottish Civil Courts Review and has been adopted in the Bill. JUSTICE Scotland supports the appointment of Specialist Sheriffs in the areas recommended in the Policy Memorandum (family, personal injury, commercial).

40. We are also of the view that it is imperative that recognition should be given to the need for specialism in the area of sexual crime alone and that rather than “crime” being one designated area of specialisation, cases involving the prosecution of sexual crime should be seen as a distinct part of the Sheriff’s work, and one that requires in-depth practical experience and specialist training. This is in recognition that the prosecution of sexual crime raises particularly difficult challenges and that the attitude, knowledge and skills of the judiciary are critical to the success of any specialist court hearing this type of case. The adoption of specialised sheriffs and specialised practices may also attract those to the work who have experience, and are interested in working in the field of sexual crime. We envisage that this is an important step in building a judiciary, who can drive reform and promote attitudinal change within the system.
41. The idea that judges trying cases involving sexual crime should be required to have particular expertise and experience is nothing new. In England and Wales, Crown court judges require a “sex ticket” before they are able to preside at sexual offence trials. This requires that the judge is considered suitable to conduct such trials and also has attended a three-day specialist training course. The course is designed to make judges aware not only of relevant law and sentencing guidelines but also of wider issues such as the effects of serious sexual crime upon victims and the perception of complainers as to how their complaints are handled by the criminal justice system as a whole.
42. The move to specialisation is a profound shift from the Scottish tradition of a generalist sheriff, and this change will have significant implications for judicial appointments and training. It is essential therefore that there is sufficient funding and all other necessary resources are made available to ensure that a genuinely specialist judiciary can be created. It is also essential that the process of judicial appointment takes sufficient account of the breadth of specialist skills required in each Sheriffdom.

## **Sheriff Appeal Court and Appeals to the Supreme Court (Section 45)**

43. The Bill provides that there will be a new Sheriff Appeal Court, which will hear all summary criminal appeals, and civil appeals from the Sheriff Court. We are broadly in favour of the establishment of the Sheriff Appeal Court. The provisions within the Bill seem sensible. We have comment to make in respect of two areas.

44. Section 113 of the Bill seeks to regulate appeals from the Sheriff Appeal Court to the High Court in summary criminal proceedings. Permission will be required from the High Court for an appeal to proceed. That permission requires to be sought within a period of 14 days. There is provision to seek an extension of that period, but this requires “exceptional circumstances” to be shown. This is a very high test, and we would consider that the appropriate test is one which would consider “the interests of justice” or “on cause shown” to ensure that deserving cases are not excluded from consideration, which may lead to a miscarriage of justice.

45. In relation to appeals to the Supreme Court we think there is merit in considering the introduction of provisions for “leapfrog appeals” equivalent to Part II of the Administration of Justice Act 1969. This statutory provision allows a first instance judge to certify a civil case as suitable for appeal direct to the UKSC when the case raises a point of law of general public importance which either concerns the construction of an enactment, or is one in respect of which the judge is bound by a fully reasoned judgment of the Court of Appeal or Supreme Court. The introduction in Scotland of a provision similar to the “leapfrog appeal” provision would be in line with the policy behind the Bill which is to implement the proportional allocation of judicial resources, reduce the costs of litigation and improve access to justice.

**JUSTICE Scotland**  
**March 2014**