CONSULTATION QUESTIONS

CHAPTER 1
Moving civil business from the Court of Session to the sheriff courts

Q1. Do you agree that the provisions in the Bill raising the exclusive competence and providing powers of remit will help achieve the aim of ensuring that cases are heard at the appropriate level?

Yes ☐ No x

Summary

1. The proposals in the Bill would increase the exclusive jurisdiction of the sheriff court by 3000%, to a level five times the equivalent figure in Northern Ireland, and three times the equivalent figure in England and Wales.

2. If implemented, this would deprive litigants of access to Scotland’s national court, the Court of Session, for any case which is not worth £150,000 or more. £150,000 is not a “low value” claim. The Faculty does not accept the assertion in the Consultation Paper that claims below this financial level are not worthy of the attention of Scotland’s national court.

3. These proposals must be seen in the context of the proposals which specifically seek to remove from those seeking redress in the courts the automatic sanction for counsel (which applies for cases presently initiated in the Court of Session). For those cases compulsorily displaced into the sheriff court, what is proposed is that the employment of counsel should become an ‘exceptional’ event.

At paragraph 42 of the Consultation Paper, the proposal is explicitly stated in the following terms

“It should still be possible to be granted sanction for counsel in the Sheriff court, but not all cases (and particularly low value,
straightforward disputes) will merit the employment of counsel and this should only be available exceptionally, where the subject matter of the case is truly complex."

The effect of these combined measures will, in the view of the Faculty, fundamentally undermine both access to justice and equality of representation.

4. Litigants choose to bring cases in the Court of Session notwithstanding that they could, as the law currently stands, bring them in the sheriff court. They do so because the Court of Session provides a better forum for resolution of their disputes. These proposals would deprive litigants of that choice, and of the benefits of litigating in the Court of Session, unless the claim is worth more than £150,000.

5. When combined with the very restrictive approach signaled in the Consultation Paper to sanction for counsel in the sheriff court, the proposal would, in effect, deprive individuals on low and moderate incomes and SMEs, with serious cases, of the right and ability to instruct an advocate. This aspect of the proposals would favour wealthy and corporate litigants, who can afford to instruct counsel, over ordinary people and would create inequality in the justice system.

6. The requirement to obtain sanction from the Court for the use of counsel in the sheriff court before counsel’s fee can be a recoverable expense is anomalous. Litigants should, as a general rule, be entitled to the skills of a professional advocate. The only relevant question, in relation to the recoverability of counsel’s fee as part of an award of expenses, should be whether or not the fee in question was an expense reasonably incurred in the conduct of the litigation. To restrict sanction to “exceptional cases” will operate against the interests of litigants and of small firms of solicitors.
7. The proposed reforms of the sheriff courts are to be implemented over a protracted period, and are dependent on a variety of contingencies. Yet the proposals in the Bill would immediately and compulsorily displace a significant number of cases into the sheriff court before those reforms have had a chance to improve the provision of civil justice in the sheriff courts.

8. There is a real basis for apprehension that, if this proposal were to be implemented, the workload of the Court of Session would simply dwindle, that the complement of judges would be reduced and that the standing of the Court would be diminished. The future integrity and independence of the Scottish legal system is at stake.

9. When combined with the approach indicated to sanction for counsel, the proposal would have a serious impact on the independent bar in Scotland, with knock on adverse effects for the choice and quality of representation of litigants in Scotland, on the quality of decision making in Scotland’s courts and on the reputation of the Scottish legal system abroad.

10. Neither the limited data available nor the policy aims identified in the Consultation Paper support these proposals. The “impact assessment” in the Consultation Paper contains no quantitative assessment of the impact and makes a series of unvouched and inaccurate assertions.

Point 9 is amplified in answer to Q4 below. The other points are amplified in the following paragraphs. The answers to these two questions should be read together.
11. The exclusive competence of the sheriff court was increased as recently as 2007. At that time the limit was raised from £1,500 to £5,000. The proposal now to raise it to £150,000 would represent a 3000% increase. Such an increase is unwarranted and is not justified on the data available. It would have serious adverse consequences, which are described further below.

12. The policy objectives identified in the Consultation Paper would be met by raising the exclusive competence of the sheriff court to a figure between £10,000 and £20,000. At paragraph 30, the Consultation Paper states that “In relation to low value claims (where the sum sued for is less than £10,000) the pursuers’ recovered expenses exceeded the damages awarded in 81% of cases in the Court of Session”. Even if the costs in such “low value claims” would be materially lower in the sheriff court (and that is not evidenced), this issue could be dealt with by simply increasing the exclusive competence of the sheriff court to, say, £10,000. An increase in the exclusive jurisdiction of the sheriff court to a figure between £10,000 and £20,000 would remove a significant proportion of personal injury cases from the Court of Session.

13. The Faculty takes issue with the proposition, implicit in the proposal, that any claim which is not worth more than £150,000 is a “low value” claim. For most of the population of Scotland a sum very much less than £150,000 would be regarded as a really significant sum. For most personal injury claimants (many of whom will have sustained an injury causing pain and suffering, disability and disadvantage), for example, the prospect of an award of £15,000, let alone other sums up to £150,000, could have a transformative effect. Likewise, for many SMEs (the lifeblood of the Scottish economy), claims much lower than £150,000 may be crucial for cash flow or other reasons. In any event, the importance of the claim to either party, or indeed the
complexity of the case, is by no means related to its absolute monetary value.

14. The equivalent figure in Northern Ireland was recently (in February 2013) raised from £15,000 to £30,000. Indeed, as the Faculty understands it, in that jurisdiction any case worth more than £30,000 must be brought in the High Court. The equivalent figure in England and Wales is £50,000. By reason of its character and population, Northern Ireland is a more relevant comparison than England and Wales. On what basis is it suggested that a litigant in Scotland with a claim worth £35,000 should be excluded from Scotland’s national court, when a litigant with the same claim in Northern Ireland would have the benefit of litigating in the High Court in Belfast?

15. Absent from the consultation paper is any recognition that advocacy is a specialist skill, which is acquired by a combination of training, application, aptitude and experience. The quality of the training which advocates in Scotland receive is recognized internationally. Advocates who have undergone that training – including advocates who formerly practiced as solicitors – comment on its value. The nature of their practice provides advocates with the opportunity to develop their advocacy skills to a high level. Practice at the referral bar frees the advocate from the demands of managing a practice and handling the administration of the case to focus on advocacy – on what is required to represent the client’s interests in court. A combination of the proposed increase in the privative jurisdiction and the proposed restrictive approach to sanction for counsel will effectively remove from very many clients the opportunity to instruct an advocate with the skills appropriate to represent them in court.

Litigants choose the Court of Session

16. At present, any pursuer whose claim is worth more than £5,000 is
entitled to pursue that claim in the Court of Session or in the sheriff court. Many litigants choose to bring their cases in the Court of Session notwithstanding the availability of the sheriff court. They do so for a number of reasons, but amongst those reasons are these:

(i) the skill and reputation of the judges of the Court of Session;

(ii) the advantages of representation by advocates;

(iii) the procedures of the Court of Session, which often provide a speedier or more effective route to justice; and

(iv) the centralization of business in one court, with consequent efficiencies.

17. By reason of a number of relatively recent procedural reforms, the Court of Session provides a good service to litigants:

(i) The Court of Session has a special personal injury procedure which works well and with the minimum of judicial involvement. Because the case is in the Court of Session, the pursuer often gets the benefit of representation by counsel free of charge.

(ii) The Court of Session has a special commercial procedure which, likewise, works well and provides a service attractive to businesses.

(iii) Recent reforms to Inner House business have substantially improved the speed and efficiency of disposal of appeals.

If the Court of Session did not provide a good service, litigants would today be free to vote with their feet and to take any case worth more than £5,000 to the sheriff court. The present proposal would remove
that choice, and would compel litigants who currently choose to litigate in the Court of Session to go, instead, to the sheriff court.

18. The Faculty wishes to elaborate on these points, since it is important to appreciate the procedural benefits currently available to litigants who choose to litigate in the Court of Session. This proposal would deprive many litigants of those benefits.

*Personal injury procedure*

19. The pursuer in a personal injury action is typically an individual who has sustained an injury, whether at work or in other circumstances. He or she may have suffered (and continue to suffer) pain and suffering, discomfort and disability – all to the detriment of his or her quality of life, and ability to earn a living. Often, the personal injury action is that individual’s one chance to obtain redress for a wrong suffered and to secure life-transforming financial compensation. The Faculty does not accept that these personal injury claims are not “properly worthy of the highest civil court in Scotland” (cf Consultation Paper, para. 38).

20. Such an individual – who most often has no experience of litigation – needs skilled and experienced representation, if he or she is to achieve a just outcome against often sophisticated and practiced defenders and their insurers. It is just as important that such a person has expert and effective representation at the pre-trial stage – in the preparation of the case and the negotiations which may lead to a settlement – as at the trial or proof itself.

21. Advocates often accept instructions to act on behalf of pursuers in personal injury cases in the Court of Session on a speculative basis – i.e. on the basis that a fee will be paid only in the event of success. This gives the pursuer the benefit of the skilled representation of an advocate free of charge. If she is unsuccessful, she does not pay her
advocate anything. If she is successful, her advocate’s fee will be met (like her other expenses) by the defender – usually a corporate entity or its insurer. In such cases, the involvement of an advocate has no impact on the public purse. The willingness of advocates to act on a speculative basis secures access to justice, and also equality of representation before the courts.

22. Absent from the Consultation Paper is any recognition of the reality that it is much harder to pursue a personal injury case than it is to defend one. The pursuer must prove the case – the defender need prove nothing. The pursuer (usually an ordinary working individual) has to establish that her injury was caused by legal fault on the part of the wrongdoer (often a large employer). Investigation and recovery of evidence requires careful direction. The regulatory landscape may be complex. Difficult decisions may require to be made as to whether to bring a case against one or more potential wrongdoer. It is essential that skilled and experienced counsel should be available to pursuers for these claims notwithstanding that they may be worth very much less than £150,000.

23. Cases brought under the personal injury procedure in the Court of Session proceed according to a case-flow management model, which minimizes the involvement of the Court to the extent absolutely necessary. Once raised, the case proceeds according to a timetable fixed by the Court and orders are made automatically for the recovery of documents and adjustment of pleadings, the lodging of statements and valuations of the claim, exchange of lists of witnesses and a compulsory pre-trial meeting. The case will only call before a judge if an issue arises which requires the attention of the court. Most cases proceed to the pre-trial meeting without any hearing being required. The overwhelming majority of cases settle before proof. The system works well because it is operated by skilled practitioners, both solicitors and advocates, with specialist experience and expertise in this type of case.
24. The Faculty estimates that over 90% of the personal injury cases currently brought in the Court of Session would, if the exclusive competence of the sheriff court were to be raised to £150,000, have to be brought in the sheriff court. A personal injury pursuer who is forced by this proposal to raise her claim in the sheriff court would:-

(i) lose the benefit of representation by an advocate free of charge;

(ii) lose the benefit of the efficient and effective personal injury procedure available in the Court of Session; and

(iii) lose the benefit of the quality of representation and decision making available in the Court of Session should the case require to be decided by a judge.

25. In relation to personal injury actions, the proposal will be to the detriment of pursuers – many of whom are ordinary people on low or moderate incomes. It will favour defenders and their insurers, who will, no doubt, continue to instruct counsel when it suits them. It will thereby not only reduce the likelihood that ordinary people will get justice, but will introduce inequality into the system.

Commercial actions

26. Commercial actions in the Court of Session include a wide range of different types of case. Many involve SMEs, the lifeblood of Scotland’s economy, on one side or the other, or on both sides. Success or failure in the action may be of critical importance to the future of the business. Sums well below £150,000 may be significant to the cashflow of a SME. The Faculty does not accept that such claims are not “properly worthy of the highest civil court in Scotland”
27. The judges of the Commercial Court – Scotland’s national Commercial Court - are experienced in dealing with this class of action. They are typically judges who had long experience of dealing with such cases when in practice and who have maintained their expertise while on the bench. They command the confidence of the commercial community. The cases are actively case managed so that the real issues in dispute are focused and the case resolved effectively.

28. On the limited dataset examined for the purposes of the Civil Court Review, about a quarter of commercial actions would, if this proposal were to be implemented, be compulsorily displaced to the sheriff court. All of these are actions which the pursuer could, currently, raise in the sheriff court if it chose to do so. In a small country like Scotland, why should SMEs be excluded from bringing their commercial disputes before Scotland’s national commercial court if they choose to do so? The very fact that the case has been raised in the Commercial Court is likely to indicate that the pursuer considers it to be of sufficient significance to justify that course and, in particular, to justify the instruction of counsel.

29. The Consultation Paper states that there is “some evidence of a reluctance among a number of businesses to litigate in the Court of Session at present because they believe that it is congested with low value, run of the mill casework”: para. 43. This assertion is not vouched. Nor is any attempt made to assess whether or not the belief reported is valid. In fact, the Commercial Court is staffed by full time commercial judges, whose time is devoted exclusively to dealing with commercial cases. It is, accordingly, difficult to understand the basis for the view that the service which that Court offers businesses is affected by any “congestion” of the Court with low value, “run of the mill” casework. If there is a belief to that effect, this should be
addressed by the dissemination of accurate information. It does not justify excluding businesses who wish to use Scotland’s Commercial Court from the benefits of that Court.

30. In the Commercial Court, each party has the right to instruct counsel. A SME is accordingly on the same footing as a large multinational. If the SME is successful, it will recover its counsel’s fees. On the other hand, if the SME is forced to proceed in the sheriff court, it might well – given the restrictive approach proposed to sanction for counsel - be put at a disadvantage compared to the multinational, which would no doubt bear the cost of the best representation available. Again, the proposal would favour the rich and powerful.

Inner House appeals

31. Until fairly recently, there was a problem with delays in dealing with appeals in the Inner House. It is the impression of practitioners that recent procedural reforms in Inner House business have transformed the situation – and they are still bedding in. This is a good illustration of the way that changes in practice and procedure can improve the service provided by the courts without the need for radical structural change.

Sheriff Court procedure

32. The Faculty recognizes that the aspiration of the Scottish Government and the Scottish Court Service is that the sheriff court should provide a more effective service than it currently does. At present, the organisation of civil justice in the sheriff court is often inefficient. Hearings not infrequently take place over more than one diet rather than continuously. Sheriffs vary in the level and nature of their experience. The Faculty has the impression that the quality of
advocacy is patchy and often poor. Solicitors do not receive the training in advocacy which is required for qualification as an advocate. It is not unusual, where a case has been badly pled or inadequately prepared, for an advocate to be instructed to “pick up the pieces”. Of course, if the sheriff court were indeed, by reason of reform, to become a more attractive alternative forum, cases would be attracted away from the Court of Session, without the need for compulsion. But until the sheriff court is reformed, the compulsory displacement of a significant number of cases into the sheriff court would not serve the ends of justice.

33. The Scottish Court Service has stated that proposed changes to the organization of the sheriff courts – which are at the heart of the proposals to improve civil justice in the sheriff courts - “would be progressively introduced over a period of ten years, being dependent on the deployment of sheriffs and summary sheriffs, sufficient court capacity and the development of the use of video and other communications technology in court proceedings and are subject to any opportunity emerging to realize our longer term vision of purpose built justice centres” ([Shaping Scotland’s Court Services](#), April 2013, p. 11). The Court Service also, rightly, recognizes that achievement of its longer term vision “requires significant future investment” (ibid, p. 5). Notwithstanding the long-term and contingent nature of the proposal to reform the sheriff courts, it is proposed immediately to displace compulsorily a very large number of cases into the sheriff courts. This would not be in the interests of those litigants (who currently, for good reason, have chosen the Court of Session).

34. Even in the event of reform of the sheriff court, a personal injury pursuer who is compelled to raise an action there instead of in the Court of Session will (at least under the proposed arrangements for sanction for counsel in the sheriff court) lose the benefit of being able to instruct an advocate effectively free of charge. The Faculty recognizes that there is nothing to prevent an advocate from
agreeing to act on a speculative basis in the sheriff court. But in the sheriff court, unless the Court sanctions the use of counsel, the advocate’s fee will not be recoverable from the other party even in the event of success. The consequence will be that any pursuer who wishes to instruct an advocate in the sheriff court will (unless sanction is given for the use of counsel) have to meet the advocate’s fee out of any sum awarded. The practical effect will be to diminish the quality of representation of vulnerable injured persons, and to increase the risk of injustice. The only beneficiaries will be defenders and their insurers, who will, no doubt, continue to instruct counsel when it suits them to do so. The creation of this inequality of representation – between insurers who may instruct counsel when they choose to and pursuers who cannot afford to do so – would run contrary to principles of fairness and equality of arms. The Faculty does not believe that this is a consequence which the Scottish Government intends.

Justifications advanced for the proposal

35. The principal justification advanced for the proposal is that it is said that the current arrangements do not reflect a “proper hierarchy” of civil courts: paras. 27-28, 34. It is said that “In a proper hierarchy the litigant should not have a choice of two courts of equal jurisdiction”: para. 28. The current arrangements offer litigants the benefit of choice - of litigating in a local court or in Scotland’s national court. There is – contrary to the suggestion in the Consultation Paper (para. 24) - no evidence that these arrangements cause any lack of understanding about how the system works. It might be suggested that, if the aim is a “proper hierarchy”, the Court of Session should be given exclusive jurisdiction for all cases above the relevant figure, as is the position in Northern Ireland.

36. It is said that the Court of Session is “congested” with low value
claims. In fact, the caseload of the Court of Session has been declining markedly. Between 2009-10 and 2011-12 the number of ordinary actions registered in the Court of Session declined from 4346 to 3294 (SCS Annual Report, p. 56) – a decline of almost one quarter in the number of actions registered in a two year period. At the same time the number of civil petitions registered declined from 1675 to 1364 (ibid). This raises a serious issue for the future development of the law in Scotland, which is one of the responsibilities of the Court of Session. A case-based system of law such as ours depends on a sufficient body of case law to enable the courts to articulate and develop the law appropriately. Scots law already suffers from a low incidence of litigation compared with other jurisdictions, and a low volume of cases in the higher courts. If the present proposal were implemented, the position would be worse. The ability of the Court of Session to maintain the integrity and independence of Scots law would be diminished and the reputation of Scots law adversely affected.

37. Part of the justification for the proposal set out in the Consultation Paper is the disproportion between costs and what is at stake in “low value” claims. Paragraph 30 states that “In relation to low value claims (where the sum sued for is less than £10,000) the pursuers’ recovered expenses exceeded the damages awarded in 81% of cases in the Court of Session”. Even if the costs in such “low value claims” would be materially lower in the sheriff court (and that is not evidenced), that particular issue could be dealt with by simply increasing the privative jurisdiction to, say, £10,000. It would not justify a 3000% increase in the privative jurisdiction to £150,000.

38. At paragraph 31 the Consultation Paper states that the cost of a three day proof in the sheriff court will typically be in the region of £7,000 to £10,000 while the cost of conducting “the same case” in the Court of Session is more likely to be in the region of £30,000 to £40,000. The basis for these figures is not disclosed by the
Consultation Paper. It cannot be assumed that a case which has been raised in the sheriff court is “the same case” as a case which is raised in the Court of Session. A case which runs to proof in the Court of Session is likely to involve some particular issue of difficulty or controversy such that the parties (represented, as they would be in the Court of Session, by advocates) have been unable to settle the case between them.

The right to instruct counsel

39. The combination of the proposed increase in the privative jurisdiction and the indication that sanction will be given for the use of counsel in the sheriff court only in “exceptional” cases will remove from very many litigants the right, which they currently enjoy if the case is raised in the Court of Session, to instruct counsel. The indication that sanction should be given for the use of counsel in the sheriff court only in “exceptional” cases is, in any event and irrespective of any change in the privative jurisdiction, open to objection.

40. The starting point should, in the Faculty’s view, be that any litigant is and should be entitled to the skilled representation which an advocate can provide, at least for any case which is not raised as a small claim or summary cause. If the litigant is successful, the only question, in the context of the recoverability of counsel’s fee as part of an award of expenses, should be whether the fee was a reasonable one in the context of the litigation in question.

41. It is anomalous for the Court to be put in a position of, effectively, restricting the litigant’s choice of legal representative – and it is, on one view, quite surprising that the Court should be put in a position of effectively restricting the use of professional advocates, whose professional training and expertise peculiarly fits them to represent clients at court.
42. So far as the Faculty is aware, none of the other three jurisdictions in these islands has a rule under which, in courts equivalent to the sheriff court, the recoverability of the expense of instructing counsel is dependent on certification or sanction of the use of counsel by the court (although certification or sanction may be required where a second counsel is instructed, and an exception may be made for small claims). The position is, the Faculty understands, similar in Australia. The starting point in those jurisdictions is - as it should be - a recognition that advocacy is a specialist skill, that it is in the interests of litigants, as well as of the administration of justice, that a litigant should have the right to instruct a professional advocate, and that, accordingly, an award of costs carries with it the fee of counsel (subject of course to assessment or taxation of the fee).

43. The Faculty accordingly proposes that the law should be changed to remove any requirement for the sanction or certification of counsel as a condition of the recoverability of counsel’s fees. If, however, a rule involving sanction for counsel is to be retained, the proposition that sanction should be available only “exceptionally” would be contrary to the interests of litigants and would be disadvantageous to solicitors, in particular those practising in small firms. It may be entirely reasonable – indeed professionally proper – for a solicitor to instruct counsel to represent a client, not because the case is exceptional, but simply because the advocate, as a professional trained and skilled in advocacy, will provide the client with the best and most appropriate representation. The bar provides a flexible resource – in the shape of a pool of advocates, offering a wide range of expertise - upon which all solicitors, throughout Scotland, can draw. All firms, large or small, and wherever they are located, can access, on behalf of all their clients, the full range of expertise at the bar. They are thereby enabled to provide a better service to their clients. For example, the ability to instruct counsel allows small firms (so important particularly in rural areas of Scotland) to serve their clients
effectively, and to compete with large firms. The approach to sanction for counsel proposed in the Consultation Paper would prevent clients from choosing the best and most appropriate representative for them.

The impact of the proposal

44. The Consultation Paper contains five paragraphs under the heading “Expected impact”. In fact, these paragraphs make no attempt to quantify the impact of the proposed change. No figures are given for the number and type of cases which will compulsorily be moved from the Court of Session to the sheriff court. Unvouched and unsubstantiated assertions are made. These paragraphs do not provide an adequate basis upon which to found a radical change in the civil justice system in Scotland, a change which is liable to have a significant adverse effect on the quality of justice available to very many litigants.

45. The data available from which to assess the quantitative impact of the proposal is limited. The Civil Courts Review relied on three very small data sets:

(i) an audit of all actions initiated by summons in the General Department of the Court of Session over two one-week periods in 2007 (para. 104);

(ii) an audit of all actions raised between 1 January and 30 June 2008 focused specifically on commercial actions (para. 105);

(iii) information provided by an un-named respondent about the sum sued for and the value of the settlement in 93 personal injury actions in the Court of Session and 94 actions that proceeded in the sheriff court between 2004 and 2007 (para.
The Civil Courts Review relied on comparisons between the Court of Session and sheriff court actions in this data set, on the assumption (which cannot, on the information available, be tested) that the cases in each group were in relevant respects comparable and that the very small number of cases in this sample was representative of the very large number of personal injury cases (undoubtedly measured in the thousands) raised in the two courts between 2004 and 2007. The conclusion derived in the Civil Courts Review from this very small dataset that 36% of the cases currently pursued in the Court of Session would continue in that court is open to question on methodological grounds. The figure is likely to be very much lower.

46. The Consultation Paper makes no attempt to address the impact which the compulsory transfer of a very significant number of cases would have on the business of the sheriff court. The Faculty recognizes that the Consultation Paper also contains proposals which should improve the civil justice system in the sheriff court and the Faculty would applaud any such proposals. It would be prudent to effect those changes and to give them a chance to “bed in” before consideration is given to radical change in the exclusive competence of that court – particularly when the Court Service recognizes that the proposed changes can only be brought in over a long time span and are dependent on a variety of contingencies.

47. The Consultation Paper makes no serious attempt made to assess the impact on the quality of justice provided to litigants displaced by this proposal into the sheriff court. Rather, it makes a series of unfounded and unjustified statements. It states that in the sheriff court “high quality advocacy is provided by experienced solicitors who have expertise in a wide range of cases”: para. 41. The basis for this assertion is not stated: the Faculty’s impression is that the quality of advocacy in the sheriff court is patchy and often poor. Solicitors do
not receive the training in advocacy which is required for qualification as an advocate. It is not unusual, where a sheriff court case has been badly prepared and poorly pled, for an advocate to be instructed to seek to retrieve the case.

48. The Consultation Paper also states that: “Many solicitors feel that they have the expertise and experience to conduct even the most complex cases, for example personal injury cases involving catastrophic injury”: para. 42. The basis for this assertion is, likewise, not stated; nor is any attempt made to assess whether the “feeling” reported is, in fact, well-founded. Catastrophic injury cases are among the most difficult and sensitive cases. If any solicitor does believe that he or she has the expertise and experience to conduct any case, it is open to that solicitor to do so – there is no upper financial limit on the jurisdiction of the sheriff court. In fact – and contrary to the assertion in the Consultation Paper - solicitors – rightly - choose to bring such cases in the Court of Session and to instruct counsel skilled and experienced in this field of law.

49. The Consultation Paper expresses the hope that the proposal would “free up” the Court of Session to deal with the most important, legally complex, civil cases, and that its greater capacity should make it more attractive as a potential venue for dispute resolution: paras. 40, 44. No evidence is provided that the removal of a very significant volume of business from the Court of Session would result in other cases filling the void. In any event: (i) the caseload of the Court of Session is already declining; and (ii) improvements in the sheriff court could reasonably be expected to draw a proportion of cases away from the Court of Session without any change to the privative jurisdiction of the sheriff court. There is a real basis for apprehension that, if the exclusive competence of the sheriff court were to be increased to £150,000, the workload of the Court of Session would simply dwindle, the complement of judges would be reduced and the standing of the Court would be diminished rather than enhanced.
These effects, along with the effects on the independent bar, which are set out in answer to Q4 have serious implications for the long-term integrity and independence of Scots law, and thus (since the rule of law is integral to a successful economy and to a fair and just society) for Scotland itself.

Q2. Do you think that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim?

Yes x No □

The value of any financial claim is a particularly poor indicator of the significance or otherwise of a family case. Most family cases are already
brought in the sheriff court, but some family cases are brought in the Court of Session - not only because of the financial value or complexity of the claim, but because the case involves a figure in public life, the individuals concerned prefer not to litigate in a local court, the case has an international dimension, or because the case involves an important point of law. In any event, financial value cannot be determined by reference to a sum sued for. The Consultation Paper presents no evidence that the existing arrangements do not operate appropriately or well.

Q3. Do you think that the Court of Session should retain concurrent jurisdiction in any other areas?

Yes ☐ No ☐

Superseded by the Faculty’s response to Q1.

Q4. What impact do you think these proposals will have on you or your organisation?

For the reasons set out in the Faculty’s response to Q1, the increase in the exclusive competence of the sheriff court would compel many litigants who currently choose to bring their cases in the Court of Session to resort to the sheriff court. The restrictive approach to sanction for counsel in the sheriff court which is indicated in the Consultation Paper would effectively withdraw from many litigants the right and ability to instruct counsel. The effects on the independent bar cannot be predicted with certainty, but it is very likely to diminish the ability of the Faculty of Advocates to continue to serve the people of Scotland as it currently does.

The Faculty of Advocates is the independent bar in Scotland. It is committed to a fair and efficient civil justice system. Its members have unrivalled experience of litigation in the civil and criminal courts. The Faculty does not exist for its own benefit, or for the benefit of its members, but to serve the public interest by securing to the people of Scotland the benefits of an independent referral bar. The Faculty has existed, as the independent bar in Scotland, almost since the foundation of the Court of Session in the sixteenth century. After 1707, the Faculty played a significant role in
maintaining Scotland’s national identity. Its members have included not only Scotland’s greatest lawyers, but also cultural figures such as Walter Scott and Robert Louis Stevenson.

Advocates provide skilled representation to litigants – including individuals who require to vindicate their rights in the civil courts as well as those who are accused of crime. The Faculty provides a training in advocacy which is widely admired across the world. The nature of their practice enables advocates to specialize in advocacy, to develop their skills to the highest level and to provide objective and informed advice to all who wish it. Using all the benefits of modern technology, advocates provide a flexible and responsive service to clients.

Today’s Faculty includes within its ranks, advocates of diverse talents and skills. Many advocates are recognized, both in Scotland and elsewhere, as experts in their fields. The Faculty and its members contribute significantly to the reputation of the Scottish legal profession abroad. They also contribute materially to the reputation and standing of the Scottish courts, since the quality of justice administered in Scotland’s courts depends not only on the quality of its judges, but also on the quality and skill of the advocates who represent clients in those courts. Advocates contribute to the development of the law, principally through the arguments which they advance in court, but also through participation in law reform in other ways.

The Faculty, as an institution and through the professional work of its members, promotes access to justice and equality of representation before the Courts and underpins the rule of law in Scotland. Advocates are available to give specialist advice and skilled representation in any court in Scotland (as well as in the Supreme Court, the Courts of the European Union and the European Court of Human Rights). The most experienced and skilled QC is available to be instructed on behalf of any client - individuals as well as big corporations or public authorities. The cab-rank rule – which requires an advocate to act for any client who tenders a reasonable fee - ensures that no-one, however unattractive or unpopular,
will be refused representation. In personal injury actions, as explained in
response to Q1, advocates are often prepared to act on behalf of pursuers
(who are always individuals who claim to have been – and often have been
– injured) on a speculative basis. The Faculty Free Legal Services Unit
enables individuals and organisations in deserving cases which cannot
obtain funding from any other source to obtain advice and representation
from the independent bar.

The bar in Scotland is already small by international comparisons. It
comprises some 460 practising advocates serving a population of some 5.3
million. By contrast the Bar of Northern Ireland (a jurisdiction with a
population of some 1.8 million) comprises some 580 practising barristers
and the Bar of Ireland (a jurisdiction with a population of some 4.6 million)
comprises over 2000 practising barristers, and there are some 15,000
barristers in England and Wales serving a population of some 55 million.
Notwithstanding its small size, the Faculty punches significantly above its
weight internationally. The availability of an independent referral bar of
skilled advocates is a key component of the “offer” of the Scottish legal
system and the Faculty plays an active role in initiatives such as the Project
for Growth, which aims to seek to attract legal business to Scotland.

The proposals are likely to have a particularly hard effect on the junior bar. It
is highly likely that, if these proposals were to be implemented advocates
will be forced to leave the profession and that the bar may cease to be an
attractive career to able young lawyers who aspire to a career in advocacy.
It is essential to the future of Scots law that the most able and ambitious
young lawyers interested in advocacy should continue to aspire to a career
at the bar, where they will have the opportunity to develop their skills to the
maximum possible extent. It is not implausible that, if the Scottish bar
ceases to be an attractive and financially viable career, the most able will
opt for the attractions of practice at the English bar or elsewhere. Indeed, if
the proposals in relation to personal injury work (which is, for many young
advocates, their bread and butter) were to be implemented, a career at the
bar might well be open only to those with independent means. The
profession would suffer not only in terms of numbers but also in terms of social diversity.

Put shortly, if no case worth less than £150,000 is litigated in the Court of Session and if sanction for counsel is to be available in the sheriff court only in “exceptional” cases, it is hard to see how junior counsel will be able to gain the experience which is necessary if the bar is to continue to provide a high quality service to the people of Scotland. On the other hand, a recognition that an award of expenses in the sheriff court should carry with it the

A material diminution in the number and quality of advocates practising at the Scottish bar: (i) would adversely affect the choice available to those who require legal advice and representation in Scotland; (ii) would diminish the reputation of the Scottish legal profession abroad; (iii) would compromise the ability of the bar to play its historic role in the development and maintenance of Scots law as a living independent system of law; and (iv) would affect the ability of the bar to continue to serve the people of Scotland as it has hitherto.

The Faculty makes these points out of a real conviction that the continued existence and vibrancy of the independent referral bar: (i) is an essential part of the effective and just functioning of the justice system in Scotland, (ii) is a guarantor of access to justice and equality of representation for all; (iii) is of great importance to the reputation of the Scottish legal profession abroad; and (iv) is a key component in the ability of the system to provide an effective and high quality service to all those who wish to see justice done in Scotland. Throughout its history, the Faculty has played a central role in the preservation and development of Scots law as a modern, independent and distinctive legal system. It would be a bitter irony if, at this time in Scotland’s history, the Faculty’s ability to continue to fulfil that historic function were to be undermined.
CHAPTER 2
Creating a new judicial tier within the sheriff court

Q5. Do you think that the term "summary sheriff" adequately reflects the new tier and its jurisdiction?

Yes x No □

Comments

Q6. Do you agree with the proposal that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff?

Yes x No □

The mere fact that a case is a summary case does not mean that it is unimportant to the parties, or that the issues involved may not have a degree of complexity in fact or in law.

Q7. Do you agree with the proposed competence of summary sheriffs in family cases?

Yes x No □

The Faculty would support the deployment of specialist sheriffs in family law. It is, however, essential that sheriffs (whether summary sheriffs or ordinary sheriffs) hearing family cases should truly have the skill, training and experience to deal with these cases. It goes without saying that such cases are often the most anxious cases for the parties involved, including any children of the family, and may involve sensitive judgments to be made. It will be essential that a sheriff who does not have family law experience or training can remit the case to a sheriff who does (whether in the summary court or in the ordinary court).

Q8. Do you agree that summary sheriffs should deal with referrals from children's hearings?

Yes x No □

The comments made in answer to Q7 above are applicable to this question
Q9. Do you think that in addition to summary crime, summary sheriffs should have powers in other areas of criminal jurisdiction?

Yes ☐ No x

Q10. Do you agree that the allocation of cases where there is concurrent competence between sheriffs and summary sheriffs should be an administrative matter for the relevant Sheriff Principal?

Yes x No ☐

Q11. What impact do you think these proposals will have on you or your organisation?

It is unlikely that these proposals will affect the Faculty of Advocates.

CHAPTER 3
Creating a new sheriff appeal court

Q12. Do you agree that criminal appeals should be held in a centralised national appeal court?

Yes x No ☐

The Faculty agrees that criminal appeals should be held in a centralised national appeal court. There is already such an appeal court – namely, the Criminal Appeal Court.

The Faculty does not support the proposed creation of a new Sheriff Appeal Court which, it is proposed, will hear all civil appeals from the sheriff court and all summary criminal appeals. Scotland already has national civil and criminal appeal courts, namely the Inner House of the Court of Session and the Criminal Appeal Court.

The proposal appears to be driven, at least so far as civil appeals are concerned, by the fact that the decisions of a sheriff principal, on appeal, currently only applies in his or her sheriffdom. On that basis, a wholly new
institution is to be created, with its own administration. But the proposal is not simply to substitute the new Sheriff Appeal Court for the current appeal to the sheriff principal. The legislation makes clear that litigants, disappointed with a decision of the sheriff, are to be deprived of the choice which they currently have to take an appeal directly to the Inner House of the Court of Session rather than to the sheriff principal.

The legislation provides for a further appeal to the Inner House from the Sheriff Appeal Court, but only in very restricted circumstances. So, for most purposes, a case raised in the sheriff court may be appealed to the Sheriff Appeal Court and no further. On the other hand, a case raised at first instance in the Court of Session can be appealed to the Inner House. There is the prospect of two distinct bodies of case law developing. For those cases which are appealed from the Sheriff Appeal Court to the Inner House there will be a further appeal to the UK Supreme Court – three appeals in all.

No provision is made for the right to instruct counsel in the Sheriff Appeal Court. This is a serious deficiency. At present, parties to a civil appeal in the Inner House or to a criminal appeal have the right to instruct counsel. These rights are, in effect, being taken away by this proposal. This will adversely affect those involved, who will be deprived of skilled representation. Moreover, good quality appellate advocacy is an important factor in determining the quality of court decisions. The failure to provide for the right to instruct counsel in the Sheriff Appeal Court will adversely affect the quality of decisionmaking in that court.

The true anomaly in the present system is the existence of an appeal to the sheriff principal. A “proper hierarchy” would simply direct all civil appeals to the Inner House, as the national civil appeal court. Scotland is a relatively small country. The existence of a single appeal court promotes the coherent development of the law. The creation of, effectively, separate hierarchies of appeal for sheriff court cases and Court of Session cases would, by contrast, result in fragmentation. It might well result in the Court of Session
judges having limited or minimal experience of certain types of case, which would, in the long run, diminish its ability to fulfill its responsibility of developing the law of Scotland and would reduce its standing as Scotland’s Supreme Court.

If there is currently a problem of appeals being brought from the sheriff court to the Inner House where there are no reasonable prospects of success, this can be dealt with, proportionately, by giving a single judge the power to sift out appeals - as is recommended in the Consultation Paper – and does not require or justify the creation of a wholly separate new institution, with its own administrative structures.

Q13. Do you think that civil appeals should be heard in the sheriff appeal court sitting in the sheriffdom in which they originated?

Yes ☐ No x

Reference is made to the Faculty’s response to Q12.

Q14. Do you agree that the sheriff appeal court should be composed of appeal sheriffs who are Sheriffs Principal and sheriffs of at least five years experience?

Yes ☐ No x

This question is superseded by the answer to Q12.

The Faculty would not, however, favour the restriction of appointment as Appeal Sheriffs to Sheriffs Principal and sheriffs of at least five years experience. Sheriffs Principal may be appointed directly from the profession (see clause 15), and the same criteria should apply to Appeal Sheriffs.

Given the proposed wide jurisdiction of the Sheriff Appeal Court it is anomalous that the appointments of the President and Vice President of the Sheriff Appeal Court and the appointment of Appeal Sheriffs should not be on the recommendation of the Judicial Appointments Board.
Q15. What impact do you think these proposals will have on you or your organisation?

The proposal to create a Sheriff Appeal Court, with no right to counsel, but which will take all civil appeals and all summary criminal appeals from the sheriff court is one of a package of measures in this Consultation Paper which, if implemented, would have a serious adverse impact on the independent bar in Scotland and on the quality of representation available to litigants. The Faculty refers to its answer to Q4.
Q16. Do you agree that establishment of a specialist personal injury court?

Yes ☐ No ☐

Depending on the Government’s response to the Faculty’s response on Q1 (increase of the exclusive competence of the sheriff court), the creation of a specialist personal injury court in the sheriff court would arguably be unnecessary. There would, nonetheless, still be a case for the creation of such a court, on the basis that it could be an attractive forum for the truly low value claims which, on the Faculty’s analysis might reasonably be transferred from the Court of Session, and perhaps an attractive alternative forum for some higher value personal injury cases. If such a court were to be established and to prove to be attractive, litigants would no doubt choose to bring their cases there.

The key deficiency in the proposals relating to the national personal injury court is the limited scope indicated in the Consultation Paper for sanction of counsel. The effect of this will be that, in all but exceptional cases (see para. 42 of the Consultation Paper), injured claimants will no longer be able to access the specialist services of an advocate in a manner which is free to them. If they wish to instruct an advocate, they will have to meet the advocate’s fee (even if the advocate is willing to act speculatively and the action is successful) from the damages awarded. This will reduce the quality of the representation which such claimants receive and accordingly adversely affect access to justice and the equality of representation before the courts. If this aspect of the proposal benefits anyone, it will benefit defenders (who are typically corporations) and their insurers.

Q17. Do you agree that civil jury trials should be available in the specialist personal injury court?

Yes ☑ No ☐

If a specialist personal injury court is created civil jury trials should be
Q18. What impact do you think these proposals will have on you or your organisation?

The proposal, with limited sanction for counsel, is part of a package of measures in this Consultation Paper which, if implemented, would have a serious adverse impact on the independent bar in Scotland, and on the quality of representation available to litigants. The Faculty refers to its answer to Q4.
CHAPTER 5
Improving judicial review procedure in the Court of Session

Q19. Do you agree with the three month time limit for judicial review claims to be brought?

Yes  No

The Faculty accepts that there is a case for a time limit to be introduced in respect of judicial review petitions, though: (i) views differ as to whether the appropriate period for any time limit which should be introduced should be three months or a longer period; and (iii) it will be essential that any time limit should be coupled with the proposed open-ended power to dispense with the time limit where this would be equitable in all the circumstances. Unless the dispensing power is applied generously, there is a real risk that injustices will not be corrected.

At present, delay in bringing a judicial review petition is controlled only by the common law doctrine of mora, taciturnity and acquiescence. This is a doctrine developed in the context of private law cases. It is not readily applicable in the public law context, where public bodies act in pursuit of what they conceive to be the proper exercise of their statutory functions and not in reliance on silence on the part of possible protesters. The scope of the plea is uncertain, and its application is unpredictable. It is moreover treated as a plea to the merits and is not deployed as a preliminary plea which is taken before the merits are addressed. On the footing that delay in bringing a petition should, at least in some cases, be capable of resulting, without more, in it being refused, the most appropriate way to deal with the passage of time is by the introduction of a time limit with an appropriately open-ended power of dispensation.

It will be critical that the power of dispensation is appropriately applied. Cases can arise – particularly cases concerning public works – where unwarranted delay in bringing a petition could be seriously detrimental to good administration (e.g. where major public expenditure has been incurred and is being incurred), and where strict adherence to the time limit might normally be expected. There are other cases – immigration and asylum
cases will typically fall into this category – where delay in bringing the petition has no impact on good administration, but to refuse it could result in serious injustice.

Q20. Do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?

Yes  No

The Faculty does not accept that there is any significant problem with unmeritorious cases being raised by way of judicial review. Most judicial review petitions in the Court of Session are immigration and asylum cases against the Home Secretary. In 2009, of 158 petitions in that field, 76 resulted in an award of expenses (which is a useful proxy for success) against the Advocate General. In 2010, of 201 petitions, 101 resulted in an award of expenses against the Advocate General. This may be regarded as quite a high success rate. And the mere fact that a petition is unsuccessful does not imply that it was either unarguable or without merit.

The position in Scotland is quite different from the position in England and Wales, and any perceptions based on the experience in that jurisdiction that there is a large volume of judicial review applications, many of them unmeritorious would be unfounded. On one view, the real issue in relation to judicial review in Scotland is the low incidence of petitions, particularly outside the immigration and asylum field, as compared with the position in comparable jurisdictions. The reasons for this are obscure, but it may reflect
badly on the rule of law in Scotland and indicate a level of unmet legal need. Generally speaking, the requirement in Scotland that a petition be drafted by counsel or a solicitor with rights of audience should weed out the wholly unmeritorious cases. Views differ on the question of whether a leave provision would add value (as compared with, say, the efficient disposal of the case at first hearing) or simply add an additional layer of expense.

Q21. Do you agree that these proposals to amend the judicial review procedure will maintain access to justice?

Yes ☐ No ☐

Comments

Q22. What impact do you think these proposals will have on you or your organisation?

These proposals are unlikely to have a significant impact on the Faculty of Advocates unless their introduction results in a significant diminution in the volume of judicial review work in the Court of Session. Any such diminution might be worrying for other reasons.
CHAPTER 6
Facilitating the modernisation of procedures in the Court of Session and sheriff courts

Replace the existing rule making powers with more general and generic powers

Q23. Do you agree that the new rule making provisions in sections 85 and 86 of the draft Bill will help improve the civil procedure in the Court of Session and sheriff courts?

Yes ☐ No ☐

The rule-making provisions in sections 85 and 85 will not, of themselves, improve civil procedure. But they provide extensive powers which will enable the Court to implement proposals of the Scottish Civil Justice Council directed to the improvement of civil procedure. The Faculty would suggest that the urgent need is for the practices and procedures of the sheriff court to be examined.

Q24. Are there any deficiencies in the rule making provisions that would restrict the ability of the Court of Session to improve civil procedure in the Court of Session and sheriff courts?

Yes ☐ No ☐

The Faculty has not identified any deficiencies. Indeed, the rule-making power arguably goes further than the current rule-making power of the Court, extending for example to include amendment of the substantive law of evidence. The power of the Court to legislate by act of sederunt is not subject to the same Parliamentary scrutiny as other delegated legislation.

Q25. What impact do you think these proposals will have on you or your organisation?

The Faculty does not consider that these proposals will have any relevant impact on it.

The creation of new powers in the Inner House of the Court of Session to sift and dispose of appeals with no reasonable prospects of success.

Q26. Do you agree that a single judge of the Inner House should be able to consider the grounds of an appeal or motion?
The Faculty will support any proposal which will improve the fair and efficient operation of the Courts. This proposal could be a useful supplement to the powers of the procedural judge in the Inner House. The introduction of reform to Inner House procedure is a good example of the way that reforms to practice and procedure (rather than structural upheaval) can produce major benefits.

Q27. What impact do you think these proposals will have on you or your organisation?

The Faculty does not consider that these proposals will have any relevant impact on it.

The abolition of the distinction between ordinary and petition procedure in the Court of Session.

Q28. Do you agree that the distinction between ordinary and petition procedure should be abolished?

Yes x No

There is an analytical distinction between actions which seek to vindicate rights and petitions which invoke a power which the Court has: see Axa General Insurance Company v Lord Advocate 2012 SC (UKSC) 46, paras. 161-162 per Lord Reed. The object of a summons is to enforce the pursuer's legal right against a defender who resists it, or to protect a legal right which the defender is infringing. Reflecting its nature, a summons is addressed to the defender and is served as of right. If defences are not lodged within the time allowed, decree is normally granted as a matter of course. A petition, on the other hand, is an ex parte application addressed to the court, requesting it to exercise the jurisdiction invoked by the petitioner. It can only be served on other persons if the court grants a
warrant to do so. In general, the petitioner is expected to seek a warrant for service on all persons who may have an interest in the matter, and a first order is then granted authorising such service, and allowing those persons, and any other persons having an interest, to lodge answers. Even if the petition is unopposed, it will not be granted unless the court is satisfied that it is appropriate for it to exercise the relevant power in the manner requested. The decision on a petition is liable to involve the exercise of a discretion rather than the vindication of a right. Petitions are often capable of being dealt with relatively expeditiously (though some raise complex questions of fact and law which require proper inquiry).

The distinction made between petitions and actions can, however, lead to cases which are raised using the wrong procedure being dismissed simply on that ground: e.g. Sidey v. Clackmannanshire Council 2010 SLT 607; Joint Administrators of Prestonpans Trading Ltd, Petitioners 2013 SLT 138. One approach would be to provide for a case which has been raised by way of the wrong procedure to be remitted to the appropriate procedure. Nevertheless, the Faculty is inclined to favour the introduction of a single initiating procedure. This would however require to be coupled with significant consequential reform of the Rules of Court, to ensure: (a) that applications are served on the appropriate parties; and (b) that subsequent procedure will be sufficiently flexible to deal appropriately with applications of different types. There is also some risk that the introduction of a single procedure will obscure real substantive differences between different types of application as was highlighted by Lord Reed in Axa.

Q29. Do you foresee any unintended consequences for this change?

Yes x No □

Unless the subsequent procedure is capable of handling all different types of application appropriately, there is a risk that cases will not be handled appropriately.

There is a risk that, unless handled with care, the introduction of a single
procedure will obscure real substantive differences between different types of application.

Q30. What impact do you think these proposals will have on you or your organisation?

The Faculty has not identified any impacts on it.

New procedures for dealing with vexatious litigants.

Q31. Do you agree that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants?

Yes    No

The Faculty welcomes this proposal. The current legislation on vexatious litigants in Scotland is inadequate and does not provide the same range of orders which can be deployed by the English courts. The limited civil restraint order could be made more flexible by giving the Court power to restrain a particular application or classes of application as well as any application in particular proceedings.

Q32. What impact do you think these proposals will have on you or your organisation?

The Faculty does not consider that this proposal will have any impact on it.

Scotland-wide enforcement of interdict and interim orders

Q33. Do you agree that an order for interdict should be capable of being enforced at any sheriff court in Scotland?

Yes    No

Yes – provided that the sheriff court before which the application is made has jurisdiction. The problem which has been identified, as the Faculty understands it, is that an interdict granted against a defender who is within the jurisdiction of the sheriff may, it is thought, cease to be enforceable against him if he leaves that sheriffdom. It would not be appropriate to create a situation in which an application could be made to a sheriff court with no legally relevant jurisdictional connection to the defender or the circumstances of the case.
Q34. Should interim orders and warrants have similar all-Scotland effect and be capable of enforcement at any sheriff court?

**Yes** ✗ **No** □

On the same proviso

Q35. What impact do you think that these proposals will have on you or your organisation?

The Faculty does not consider that this proposal would have any relevant impact on it.
CHAPTER 7: THE PROPOSALS: Alternative Dispute Resolution

Q36. Do you think that ADR should be promoted by means of court rules?

Yes ☐ No ☐

The Faculty supports the appropriate use of ADR. The Faculty has recently established a Dispute Resolution Service. Many advocates have experience of using different forms of ADR. Advocates routinely seek to settle cases, by negotiation or by using ADR mechanisms, with a view to securing the best outcome for their clients.

The following points require to be made:

(i) Parties have the right to have their disputes determined by the court in accordance with law. That is a fundamental feature of the rule of law, entrenched in Article 6 of the European Convention on Human Rights. It is what the courts are for. Further, litigation can have important external effects, since it can provide the opportunity for the court to articulate and develop the law. This is particularly important in a small jurisdiction like Scotland, where the volume of caselaw is already small.

(ii) ADR is most effective when it takes place in circumstances where either party has the right at any time to insist that the dispute be resolved in court, by procedures which can be expected to produce a determination within a reasonable time and at reasonable cost. Not only does that provide the most effective encouragement to the parties to seek to settle their dispute extra-judicially. It also reduces the possibility that ADR will result in an outcome which simply reflects the power relationship between the parties without regard to their legal rights and obligations.

(iii) Requiring unwilling parties to engage in an ADR process when
they wish to resolve their dispute by litigation simply adds cost to the process.

(iv) For these reasons, the Faculty would not favour any provisions which would compel parties to engage in ADR, whether by means of: (i) an explicit rule which would bar access to the Court to parties who had not engaged in ADR; (ii) a power of the Court to compel parties to engage in ADR; or (iii) provision to penalize in the award of expenses a party which has not engaged in ADR. The real problem with a power to penalize a party which has declined to engage in ADR is that parties have a right to invoke the jurisdiction of the Court to determine their legal disputes.

ADR should, accordingly, be encouraged by the provision of information, and by other non-compulsory means, and by the improvement of the efficiency of court procedures – which would be the best encouragement to parties to seek to settle their disputes (whether through the use of ADR or otherwise) in a manner which respects their legal rights and obligations.

Q37. What impact do you think these proposals will have on you or your organisation?
The Faculty supports the appropriate use of ADR.
ASSESSING IMPACT

Equality

Q38. Please tell us about any potential impacts, either positive or negative, you feel any or all of the proposals in this consultation may have on a particular group or groups of people.

1. The proposals to increase the exclusive competence of the sheriff court, coupled with the restrictive approach to sanction for counsel in the sheriff court, will have a serious adverse effect on pursuers in personal injury actions who will no longer have the benefit of representation by counsel free of charge. These proposals will also have an adverse effect on SMEs who are no longer able to access their national Commercial Court.

2. These proposals will have a serious adverse impact on the independent bar. It is likely to operate particularly harshly on the junior bar. It is likely that advocates will leave the profession. This will diminish the choice and quality of representation available to litigants throughout Scotland. In the long run, if these proposals are implemented, it is difficult to see how junior advocates will obtain the experience necessary if the bar is to continue to provide a high quality service to the people of Scotland.

Business and Regulatory

Q39. Please tell us about any potential economic or regulatory impacts, either positive or negative, you feel any or all of the proposals in this consultation may have.

The rule of law is an important contributor to economic success. It is essential that economic actors have access to public courts in which they can have confidence, and which will decide cases efficiently, fairly and in accordance with the law. It is further essential that the law is reasonably predictable, and that it is developed and applied by the courts in a manner consistent with social and economic changes. The proposals to deprive
SMEs of access to their national Commercial Court run counter to that principle. More generally, the proposals will deprive the Court of Session of a significant body of caselaw, with a likely diminution in its ability to fulfil its role in maintaining the integrity and independence of Scots law.

An effective and independent legal profession is, likewise, a major contributor to economic success. Not only is this an essential component of the rule of law, on which economic success depends, but the provision of legal services is a major earner for the UK (and Scotland aspires to obtain a share of those earnings). The independent referral bar plays a major role in promoting access to justice and the rule of law in Scotland. It is a key component of the Scottish legal system's “offer”. The Faculty is playing an active part in the Project for Growth initiative which seeks to attract business in the legal sector to Scotland. All of this is liable to be adversely affected by the proposals, by reason of the adverse impact which they will have on the independent referral bar.

The proposals will have a direct adverse impact on the independent bar. They are likely to operate particularly harshly on the junior bar. It is likely that advocates will leave the profession and the profession will become less attractive to able young lawyers. It is not fanciful to anticipate that the most able will choose to work in London or elsewhere. The effect on the bar will diminish the choice and quality of representation available to litigants throughout Scotland and competition within the profession. A material diminution in the number of advocates practising at the Scottish bar: (i) would diminish the reputation of the Scottish legal profession abroad; (ii) would compromise the ability of the bar to play its role in the development and maintenance of Scots law as a living independent system of law; and (iii) would affect the ability of the bar to continue to serve the people of Scotland as it has hitherto.

Legislation
Q40. Please give any comments on the legislation as set out in the Draft Bill. Are there any omissions or areas you think have not been covered.

Given the significance attached in the Civil Courts Review to remit between courts as the mechanism for making sure that cases are dealt with at the appropriate level, it is surprising that the Court of Session is not given a power to “call in” cases from the sheriff court.