Courts Reform (Scotland) Bill

Analysis Of Consultation Responses

The Scottish Government
Riaghaltas na h-Alba

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Riaghaltas na h-Alba

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Ministerial Foreword

I am delighted to publish this independent analysis report of the consultation on the draft Courts Reform (Scotland) Bill.

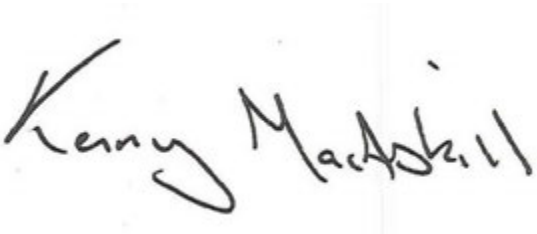
The case for reform of the civil courts has been well established by the Scottish Civil Courts Review (SCCR). Since the Review, we have implemented many of the SCCR recommendations including modernising arrangements for safeguarders, passing the Legal Services (Scotland) Act, and passing legislation to establish the Scottish Civil Justice Council (SCJC) which held its first meeting in June 2013.

Lord Gill was unequivocal in the SCCR that 'minor modifications to the status quo are no longer an option'. The report set out how it envisaged changes could be made to the civil justice system to enable a number of benefits: an efficient and flexible courts system; ensuring that the right cases are heard in the right courts at the right costs; and reducing unnecessary delays and costs for users.

The draft Bill that we have just consulted on will deliver many of the improvements that the SCCR envisaged. We are grateful to those who responded to our consultation—it is important for us to understand the views of those who are closely involved with the courts system, whether as members of the judiciary, legal profession, advocacy groups, court users, or others. We will consider these comments carefully as we work to finalise the Bill which will be introduced to the Scottish Parliament in 2014.

I am committed to driving forward the SCCR's proposals to release benefits for court users.

Lastly, I am grateful to Why Research for preparing this report.



KENNY MACASKILL

COURTS REFORM (SCOTLAND) BILL

ANALYSIS OF CONSULTATION RESPONSES

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Scottish Government Social Research
2013

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EXECUTIVE SUMMARY

Background

1.1 The consultation paper 'Making Justice Work: Courts Reform (Scotland) Bill' set out proposals and reforms and invited views on proposals to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland. It included a draft Courts Reform (Scotland) Bill that is intended to modernise and improve the Scottish court system and will form a legislative framework that will implement many proposals emerging from the 2009 Scottish Civil Courts Review (SCCR). The policy proposals on the main measures included in the consultation paper have been summarised as follows:

- Move civil business from the Court of Session to the sheriff courts by raising the privative limit (which the Scottish Government propose to call 'exclusive competence') of the sheriff court to £150,000.
- Create a new judicial tier within the sheriff court ('summary sheriffs'), with jurisdiction in certain civil cases and in summary criminal cases.
- Create a new Sheriff Appeal Court with an all-Scotland jurisdiction to hear civil appeals from the sheriff courts and summary criminal appeals.
- Create a specialist personal injury court with an all-Scotland jurisdiction.
- Improve procedures for judicial review within the Court of Session.
- Facilitate the modernisation of procedures in the Court of Session and sheriff courts.
- Alternative dispute resolution (promotion of ADR through court rules).

1.2 The consultation response form comprised 40 questions under 7 chapter headings, reflecting the measures listed above. A large majority of these questions asked respondents to indicate agreement or disagreement by ticking a 'yes' or 'no' box; however, all questions offered an opportunity for more detailed comments.

1.3 One hundred and fifteen responses were received, 16 from individuals and 99 from organisations.

Overview of responses

1.4 There was a very clear majority support for almost all proposals and concepts detailed in the consultation. The numbers indicating a clear 'yes' or 'no'[1] at each question are summarised under relevant chapter headings below.

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

- 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 (40 answered 'yes' and 22 answered 'no')
- That the Court of Session should retain concurrent jurisdiction for all family cases (28 answered 'yes' and 11 answered 'no')

[1] Answers that were determined as a 'qualified yes', or very occasionally a 'qualified no' have not been included in the counts summarised here; however, they are detailed in the summary tables in the main body of the report.

- That the Court of Session should retain concurrent jurisdiction in some other area(s) (30 answered 'yes' and 14 answered 'no')

Creating a new judicial tier within the sheriff court

- That the term 'summary sheriff' adequately reflects the new tier and its jurisdiction (45 answered 'yes' and 16 answered 'no')
- That the qualifications for appointment as a summary sheriff should be the same as that for a sheriff (63 answered 'yes' and 2 answered 'no')
- The proposed competence of summary sheriffs in family cases (30 answered 'yes' and 7 answered 'no')
- That summary sheriffs should deal with referrals from children's hearings (27 answered 'yes' and 7 answered 'no')
- 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 (44 answered 'yes' and 8 answered 'no')
- Views were more mixed as to whether summary sheriffs should have powers in other areas of criminal jurisdiction, in addition to summary crime (15 answered 'yes' and 13 answered 'no')

Creating a new Sheriff Appeal Court

- That criminal appeals should be held in a centralised national appeal court (26 answered 'yes' and 4 answered 'no')
- That civil appeals should be held in the Sheriff Appeal Court sitting in the sheriffdom in which they originated (31 answered 'yes' and 21 answered 'no')
- That the Sheriff Appeal Court should be composed of appeal sheriffs who are sheriffs principal and sheriffs of at least five years' experience (42 answered 'yes' and 7 answered 'no')

Creating a specialist personal injury court

- The establishment of a specialist personal injury court experience (35 answered 'yes' and 8 answered 'no')
- That civil jury trials should be available in the specialist personal injury court (29 answered 'yes' and 19 answered 'no')

Improving judicial review procedure in the Court of Session

- There was slightly less clear majority support for the three month time limit for judicial review claims to be brought, than for other measures (28 answered 'yes' and 25 answered 'no')
- That the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases (43 answered 'yes' and 6 answered 'no')
- That these proposals to amend the judicial review procedure will maintain access to justice (32 answered 'yes' and 13 answered 'no')

Facilitating the modernisation of procedures in the Court of Session and sheriff courts

- 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 (30 answered 'yes' and 4 answered 'no')

- That there are 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 (39 answered 'no' and only 3 answered 'yes')
- That a single judge of the Inner House should be able to consider the grounds of an appeal or motion (35 answered 'yes' and 3 answered 'no')
- That the distinction between ordinary and petition procedure should be abolished (25 answered 'yes' and 5 answered 'no')
- That foresee any unintended consequences for this change (22 answered 'no' and only 7 answered 'yes')
- That the new procedure will ensure that courts are able to deal appropriately with vexatious litigants (50 answered 'yes' and only one answered 'no')
- That an order for interdict should be capable of being enforced at any sheriff court in Scotland (53 answered 'yes' and only one answered 'no')
- Whether interim orders and warrants should have similar all-Scotland effect and be capable of enforcement at any sheriff court (53 answered 'yes' and only 2 answered 'no')

Alternative Dispute Resolution

- Whether alternative dispute resolution (ADR) should be promoted by means of court rules (28 answered 'yes' and 18 answered 'no')

1.5 The following paragraphs highlight the main themes that emerged in detailed comments in relation to each chapter in the consultation document.

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

1.6 There were common themes in this chapter, particularly linked to raising the exclusive competence of the sheriff court. Respondents emphasised that value does not always equate to either the complexity or importance of cases and that also access to specialists is important. The difficulties in assessing the value of certain cases were also commonly cited.

1.7 Whilst there was common agreement that it is appropriate to raise the exclusive competence of the sheriff court there was limited consensus as to whether £150,000 was an appropriate level. The possibility for remit from sheriff court to Court of Session and vice-versa was highlighted as being extremely important.

1.8 The other consistent theme emerging in this chapter related to the potential impact on the independent bar in Scotland if the anticipated volume of cases moves to the sheriff court and there is no access to automatic sanction for counsel[2].

[2] In the Court of Session there is an automatic right to employ advocates and QCs, and this will remain the case. In the sheriff court people will still be able to seek sanction for employment of counsel in individual cases and it will continue to be for the sheriff to decide whether it is appropriate for counsel to be employed and for their fees to be recoverable.

Creating a new judicial tier within the sheriff court

1.9 As previously noted, there are high levels of agreement that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff. A key theme in this chapter is that there should be no perception of implied downgrading linked to the term summary sheriff.

1.10 A sub-theme that ran throughout this chapter is the difficulty of determining the extent of powers for summary sheriffs and ensuring appropriate and improving access to specialists, particularly in early stages. Several respondents, from across different groups, cautioned against over-extending the powers of summary sheriffs in the early stages of implementing the proposals and suggested keeping this under review.

1.11 The importance of quick, efficient and consistent allocation of cases was highlighted and the need for clear guidelines was also mentioned. There were also comments relating to resourcing in remote and rural areas.

Creating a new Sheriff Appeal Court

1.12 Support for a centralised national appeal court came from almost all groups. A key theme was that this would be an efficient and economic route to adopt, facilitating appeal hearings in a short timescale, providing a single source of guidance and offering efficiencies without compromising on the quality of decisions taken.

1.13 There were some requests for further clarity on specific aspects of the creation of a Sheriff Appeal Court. Additionally, there were some queries as to the need for a centralised national appeal court when there already exists a specialist personal injury court where decisions are taken by experienced personal injury sheriffs. There were some concerns over equality of access to justice in terms of entitlement of direct appeal to the Inner House and a right to instruct counsel.

1.14 Respondents commented on the need for access to justice for all, while ensuring best use of resources and fair and efficient disposal on a proportionate costs basis. A key advantage of a centralised national appeal court is that it would allow for consistent practice across sheriffdoms, albeit there were requests for flexibility to hold the appeal in the most practical location.

1.15 Most respondents agreed that the Sheriff Appeal Court should be composed of appeal sheriffs who are sheriffs principal and sheriffs of at least five years' experience; primarily on the grounds that this would allow for an appropriate level of experience and expertise.

Creating a specialist personal injury court

1.16 Support for a specialist personal injury court came from almost all groups. A key comment was that this would ensure this specialist area is given more focus and that processes would be more efficient and decision making more consistent. A key concern related to the issue of allowing access to automatic sanction for counsel, with some requests for this right in all cases. Once again, the location of the specialist personal injury court was mentioned, with requests for one in Glasgow as well as Edinburgh.

1.17 There were some concerns over the resourcing of this court in terms of the number of specialist sheriffs who would be needed because of the potential for increased workloads. Allied to this, there were suggestions for greater use of technology and specialist training and recruitment of specialist sheriffs.

1.18 Support for civil jury trials came from most groups, with the exception of the insurance group (where there was no agreement), primarily because it would be unfair for litigants to be deprived of their entitlement to a jury trial. However, there were requests for access to automatic sanction for counsel, given the lack of experience most solicitors will have had in conducting civil jury trials.

Improving judicial review procedure in the Court of Session

1.19 Views on the imposition of a three month time limit for judicial claims to be brought were relatively polarised. There were much higher levels of support that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases and that these proposals to amend the judicial review procedure will maintain access to justice.

1.20 A three month time limit was perceived by some as resulting in efficient and effective remedies for individuals or that this would provide greater certainty in outcomes. For those in disagreement with this proposal, a key issue was that this period is too short to resolve issues before bringing a claim and thus could restrict access to justice. It was also felt that this would impact proportionately worse on some specific groups of individuals such as community groups or vulnerable groups. There were some suggestions for a longer time period and a number of requests for clarification over when 'the clock starts ticking'.

1.21 The introduction of a leave to proceed with an application for judicial review was perceived by some as helping to filter out unmeritorious cases and ensuring that the safeguards put in place (including the right to an oral hearing and the leave to appeals stage) are sufficient. There were requests for the sifting process to be open, transparent and accountable and with safeguards in place to ensure that claims that should be allowed to proceed are not filtered out.

1.22 There was agreement that proposals to amend the judicial review procedure will maintain access to justice, that this process appears to be sensible or appropriate or that this will maintain access to justice, providing the appropriate safeguards are in place. However, once again, there were some concerns that the time limit is insufficient and it may serve to limit access to justice for some individuals.

Facilitating the modernisation of procedures in the Court of Session and sheriff courts

1.23 Most respondents agreed 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 and saw no 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.

1.24 Most respondents agreed that a single judge of the Inner House should be able to consider the grounds of an appeal or motion. Most also agreed that the distinction between ordinary and petition procedure should be abolished and did not foresee any unintended consequences for this change. However, there was some concern that this may not be suitable for judicial review procedures.

1.25 Most respondents agreed that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants.

1.26 Most respondents also agreed that an order for interdict should be capable of being enforced at any sheriff court in Scotland and that that interim orders and warrants should have similar all-Scotland effect and be capable of enforcement at any sheriff court.

Alternative Dispute Resolution

1.27 A significant number of respondents were supportive of this proposal and noted their support for promoting a policy of ADR without recourse to litigation where possible or the encouragement of ADR as a legitimate attempt to setting a case. There were some calls for ADR to be used as early as possible in the dispute process.

1.28 Over half of those in agreement noted that ADR should not be compulsory or mandatory and / or that there should not be sanctions to compel individuals to make use of ADR

Impacts

1.29 Perhaps not surprisingly, the impacts of some of these proposals vary according to different respondent groups. There is a relatively consistent and recurring theme in early chapters related to potentially adverse impacts on the independent bar in Scotland. For some respondents there is felt to be a related impact of inequality of arms; for others many proposals are expected to facilitate quicker and less cost prohibitive access to justice on a consistent basis.

1.30 Almost all impacts linked to facilitating the modernisation of procedures in the Court of Session and sheriff courts were thought to be positive.

2 INTRODUCTION

Background

2.1 In 2009, the SCCR led by Lord Gill concluded that our civil courts have changed very little in the last 100 years and are in need of reform, both in their structure and their procedures. The review made 206 recommendations for change, the majority of which have been accepted by the Scottish Government.

2.2 In 2010, the Scottish Government established a four year reform programme called 'Making Justice Work'. This programme covers both criminal and civil justice and includes five projects:

- Delivering efficient and effective court structures;
- Improving procedures and case management;
- Enabling access to justice;
- Co-ordinating information technology and management Information;
- Establishing a Scottish Tribunals Service.

2.3 Between February 27 and 24 May 2013, the Scottish Government ran a consultation 'Making Justice Work: Courts Reform (Scotland) Bill'. This consultation is part of the wider programme and invited views on proposals to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland.

2.4 The consultation included a draft Courts Reform (Scotland) Bill aimed at modernising and improving the Scottish court system, implementing many of the SCCR's proposals. The Bill will repeal the Sheriff Courts (Scotland) Act 1971, and most of the provisions of the Sheriff Courts (Scotland) Act 1907.

2.5 The consultation covered a range of areas:

- Moving civil business from the Court of Session to the sheriff courts by raising the privative limit ('exclusive competence') of the sheriff court to £150,000.
- Creating a new judicial tier within the sheriff court ('summary sheriffs'), with a jurisdiction in certain civil cases and in summary criminal cases.
- Creating a new Sheriff Appeal Court with an all-Scotland jurisdiction to hear civil appeals from the sheriff courts and summary criminal appeals.
- Creating a specialist personal injury court with an all-Scotland jurisdiction.
- Improving procedures for judicial review within the Court of Session.
- Facilitating the modernisation of procedures in the Court of Session and sheriff courts.
- Alternative dispute resolution.

Overview of responses

2.6 Responses were submitted by email or in hard copy. In total, 115 responses were received; 16 from individuals and 99 from organisations. As part of the analysis process, responses were assigned to groups. This enabled analysis of whether differences, or commonalities, appeared across the various different types of organisations and/or individuals that responded.

2.7 The following table shows the numbers of responses in each group.

Table 1.1 Consultation responses

Respondent group		Number
	Individual Legal	12
	Other Individual	4
Total Individuals		(16)
	Advocacy / Advice	15
	Arbitration / Mediation	5
	Business	6
	Insurance / Insurer groups	6
	Judiciary and Judicial Bodies	6
	Local authorities	7
	Public Bodies	5
	Solicitors, groups representing or providing access to Solicitors	24
	Stables or groups representing Advocates	9
	Unions	7
	Other organisation*	9
Total Organisations		(99)
Total		**115**

*members of this group are referred to as 'another organisation' throughout this report

2.8 A list of all those organisations who submitted a response to the consultation is included in Appendix 1.

Analysis and reporting

2.9 Comments given at each open question were examined and main themes, similar issues raised or comments made in a number of responses, were identified. In addition, we looked for sub-themes such as reasons for opinions, specific examples or explanations, alternative suggestions or other related comments.

2.10 Some questions contained yes/no tick box options to allow respondents to indicate whether or not they agreed with a particular point. Results from these tick box questions are presented in table format at each relevant question. Wherever relevant, an additional column has been added to show where respondents agreed but added qualifications to their response ('Yes Qualified' or 'No Qualified'). The 'Other' column is used to show any respondents who commented on an issue but did not give a definitive agree or disagree. Respondents counted in the 'No Response' column did not address the question. This protocol is followed for all tables throughout this report.

2.11 Where respondents did not use the questionnaire format for their response but indicated within their text that they agreed or disagreed with a point, these have been included in the yes/no counts.

2.12 The main themes were looked at in relation to respondent groups to ascertain whether any particular theme was specific to one particular group, or whether it appeared in responses across groups. When looking at group differences however, it must be also borne in mind that where a specific opinion has been identified in relation to a particular group or groups, this does not indicate that other groups do not share this opinion, but rather that they have simply not commented on that particular point.

2.13 Where a theme is described without being associated with a particular group, it can be assumed that this type of comment was found in responses from a range of different groups.

2.14 While the consultation gave all those who wished to comment an opportunity to do so, given the self-selecting nature of this type of exercise, any figures quoted here cannot be extrapolated to a wider population outwith the respondent sample.

2.15 The following chapters document the substance of the analysis and present the main views expressed in responses. These chapters follow the ordering of the sections in the consultation document.

2.16 Appropriate verbatim comments, from those who gave permission for their responses to be made public, are used throughout the report to illustrate themes or to provide extra detail for some specific points.

3 MOVING CIVIL BUSINESS FROM THE COURT OF SESSION TO SHERIFF COURTS

3.1 The consultation paper explained the SCCR's vision that the court system 'should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and value of the issues at stake; and it should have regard to the effective and efficient application of the resources of others'. It went on to provide information on the SCCR's assessment of the existing courts structures as well as its evidence and comment on the cost of litigation, particularly in the Court of Session.

3.2 The SCCR concluded that it would only be feasible for cases to be dealt with at the appropriate level of the court hierarchy if 'there is a significant increase in the jurisdiction of the sheriff court'. Linked to this, a key recommendation of SCCR was to increase the 'private jurisdiction' limit of the sheriff court to £150,000.

3.3 The consultation paper also explained the Scottish Government' s agreement that there should be a 'proper hierarchy', outlined the options that had been considered and their expected impact and went on to detail the Scottish Government's proposals:

- Raising the exclusive competence of the sheriff court to £150,000.
- Give the Court of Session and sheriff court sufficient powers of remit to ensure cases are considered by the level in the court hierarchy appropriate to deal with them.
- Court of Session to retain concurrent jurisdiction for family actions regardless of the value of the claim.

Raising the exclusive competence and providing powers of remit

3.4 The first question in the consultation asked: '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?'

3.5 As the table below shows, almost twice as many respondents agreed as disagreed that the provisions will help achieve the aim of ensuring that cases are heard at the appropriate level. However, the balance of opinion was very different amongst unions and stables or groups representing advocates; in these two categories there were no respondents in agreement.

Table 3.1 Whether 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

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	5	-	3	2	2
Other Individual (4)	1	-	1	-	2
Advocacy / Advice (15)	5	-	1	4	5
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	2	-	-	-	4
Insurance / Insurer groups (6)	6	-	-	-	-
Judiciary and Judicial Bodies (6)	3	-	-	1	2
Local authorities (7)	4	1	1	-	1
Public Bodies (5)	1	-	-	-	4
Solicitors, groups representing or providing access to Solicitors (24)	12	-	6	4	2
Stables or groups representing Advocates (9)	-	-	6	1	2
Unions (7)	-	-	4	1	2
Other organisations (9)	1	-	-	-	8
Total (115)	**40**	**1**	**22**	**13**	**39**

3.6 Sixty-six respondents provided comments at this question; many of these responses were extremely lengthy and detailed. A relatively large number focused mainly or exclusively on personal injury cases because of an expectation that they would represent a very significant number and proportion of cases that would move to the sheriff court from the Court of Session. These responses often included data from wide ranging sources relating to the number and value of personal injury cases currently heard in the Court of Session, costs associated with cases, proportions settled and the impact of these proposals on the number of cases that would be heard in the Court of Session in the future.

3.7 A small number of respondents commented specifically that the Chapter 43 procedure already effectively reduces unnecessary wastage of judicial time. One respondent in the solicitors group commented: “Currently in the Court of Session the proportion of personal injury cases is 78% of the court’s work. In 2012, 2653 personal injury actions were registered out of a total number of actions of 3367. The number of personal injury cases in which a proof started was 27. This shows that the current Chapter 43 procedure in the court is both efficient and successful in avoiding unnecessary judicial time spent resolving disputes”.

3.8 The most significant themes emerging from the comments of both those agreeing and disagreeing related to the proposal to raise the exclusive competence of the sheriff court to £150,000, the volume of cases that might be dealt with by sheriff courts as a consequence of this increase and access to counsel.

3.9 There was widespread agreement that there should be an increase to the exclusive competence of the sheriff court from the current threshold of £5,000. However, views on the specific threshold level that would be appropriate were equivocal and wide ranging. Some respondent organisations representing the views of many individuals commented that opinions were mixed even within their own organisation.

3.10 There was some support expressed for the proposed increase to £150,000 specifically and a range of suggestions was made for alternative threshold figures between £5,000 and £150,000. Some respondents questioned the data and methodology used in the SCCR report to reach a suggested figure of £150,000 in terms of its reliability and validity.

3.11 Several respondents commented that the value of a case might not reflect its legal complexity and for that reason there was widespread comment that provision for the sheriff court to remit cases to the Court of Session is a necessary and important tool. Some respondents identified specific types of case that they felt would always justify remit to the Court of Session, or remit at a much lower value, because of their complexity and importance. Examples included clinical negligence, defamation and asbestos cases.

3.12 One judiciary respondent commented however: “an application to remit a case is an uncertain remedy and can take up considerable time and expense”.

3.13 There was a suggestion from another respondent in the judiciary group that there should be a right to appeal a refusal to the Court of Session or make a fresh application to the Court of Session for a remit if an application in the sheriff court or Sheriff Appeal Court is refused. The respondent commented that this would provide a safety net in any instance where a remit was refused without apparently sound reason.

3.14 The issue of calculating value was mentioned by a small number of respondents who, whilst recognising that Section 38(7) of the Bill provides that rules of court will determine how the value is to be calculated, felt more explanation should have been provided in the consultation paper. Some of these respondents expressed concerns that linking the value to the sum sued for would not be realistic or appropriate.

3.15 The raising of the privative jurisdiction level to the level of £150,000 without access to automatic sanction for counsel[3] attracted a great deal of comment, predominantly although not exclusively from the advocates group and from individual-legal respondents. Many of these comments suggested this will result in 'inequality of arms' in litigation. Concerns were expressed that individuals and businesses who cannot afford to fund the cost of counsel due to uncertainty as to whether they can recover that cost even if they are successful, will be at a disadvantage compared to, for example, insurers and other large businesses.

3.16 There were mixed opinions as to whether there are sufficient solicitors with the necessary expertise and experience to provide appropriate and equal representation to that which might be available from counsel. It was also noted that solicitors currently have the choice to appoint counsel available to them.

3.17 A very small number of respondents provided suggestions for new or alternative models of sanction for counsel that they felt would better balance the right to equality of representation with the costs incurred.

3.18 Many respondents who agreed that the provisions in the Bill will help ensure that cases are heard at the appropriate level, and insurers particularly, commented that these measures will help to maintain proportionate costs and speed up processes.

3.19 Conversely, a small number of respondents noted concerns regarding the volume of cases that will move to the sheriff court and the implications for resources. In some comments, there was specific reference to a perceived conflict between court closures and an increasing volume of cases.

3.20 Other specific themes emerging in comments from very small numbers of respondents included:

- The suggestion that summary sheriffs with specific expertise in civil cases should deal with those types of case and, recognising the need for effective allocation of resources and full geographic coverage, a proposal that consideration is given to at least a part-time civil summary sheriff in each sheriff court district.
- The need for effective case management to manage consumers' expectations and "have consumers' views taken into account in realising the most appropriate path to the resolution of their dispute whether that be in a court or otherwise through ADR".
- Support for the proposal that all personal injury business is heard by specialist sheriffs with the relevant knowledge and expertise.
- Comment on the importance of providing accessible information to all people in Scotland about decisions taken and any resulting changes and their implications.

[3] In the Court of Session there is an automatic right to employ advocates and QCs, and this will remain the case. In the sheriff court people will still be able to seek sanction for employment of counsel in individual cases and it will continue to be for the sheriff to decide whether it is appropriate for counsel to be employed and for their fees to be recoverable.

Court of Session - concurrent jurisdiction for all family cases

3.21 Question 2 asked: 'Do you think that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim?'

3.22 As the following table shows, many more respondents agreed than disagreed that the Court of Session should retain concurrent jurisdiction for all family cases.

Table 3.2 Whether agree that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim

Respondent group	Yes	No	Other	No response
Individual Legal (12)	8	1	-	3
Other Individual (4)	1	1	-	2
Advocacy / Advice (15)	3	-	3	9
Arbitration / Mediation (5)	-	-	-	5
Business (6)	1	-	-	5
Insurance / Insurer groups (6)	-	1	-	5
Judiciary and Judicial Bodies (6)	2	1	-	3
Local authorities (7)	2	2	-	3
Public Bodies (5)	-	-	1	4
Solicitors, groups representing or providing access to Solicitors (24)	7	3	1	13
Stables or groups representing Advocates (9)	4	1	1	3
Unions (7)	-	-	-	7
Other organisations (9)	-	1	-	8
Total (115)	**28**	**11**	**6**	**70**

3.23 Thirty-three respondents provided comments at this question. The most common theme in responses was that the value of claims in some family cases might be relatively small, or significantly lower than £150,000, but that the complexity and importance of the cases may be high. Another common theme related to difficulty in attributing a value to some family cases. As one respondent in the solicitors group commented:

> "It would be inappropriate to remove from the Court of Session concurrent jurisdiction in some family cases on the basis of the value of the claim. The nature of many family cases mean that they cannot easily be quantified and there may be complexities which make the Court of Session the most appropriate forum for litigation. For example, if there are jurisdictional issues and a decree is to be enforced overseas, then it is preferable to have a decree from the highest civil court in Scotland."

3.24 Some respondents who did not support the retention of concurrent jurisdiction regardless of value noted the importance of the possibility for remit.

3.25 Several respondents, particularly in the advocacy and solicitors groups, commented that in the context of concurrent jurisdiction an effective case management system is important.

> "Robust and active judicial management of cases to ensure that cases which are more properly suited to the sheriff court are remitted there at an early stage is likely to be a more effective means of achieving the objective of the reforms."
>
> (solicitors)

3.26 A number of respondents commented that all family actions involving children should be dealt with in the sheriff court. One specifically noted that there is no provision in the Court of Session rules for child welfare hearings and felt that all family actions involving children should be dealt with in the sheriff court unless provision is made in this respect. However, an individual-legal respondent commented:

> "While the sheriff court is generally speaking the obvious choice for matters involving children, there may be occasional cases where the financial aspects are so substantial as to make the Court of Session appropriate. There are also some children's cases which have to go to the Court of Session. International child custody disputes and adoptions involving children in more than one sheriffdom spring to mind."

3.27 One respondent commented that a specialist court to deal with family cases might be more appropriate than concurrent jurisdiction and another commented:

> "A significant constraint in family cases is funding and in practice it may well be that the current level of family cases in the Court of Session is maintained. However, if the same overall principle is applied, cases where the financial sums involved are less than £150,000 ought to be raised in the sheriff court. In our view, these should be dealt with by specialist sheriffs."
>
> (advocacy or advice)

3.28 A respondent in the solicitors group expressed concern that the sheriff court might have exclusive competence in family proceedings where the only order sought was an order for the payment of aliment. The respondent commented: "There can be extremely high value family actions, where a divorce will be litigated in the Court of Session, but where actions for aliment and interim aliment require to be raised prior to grounds for divorce having been established. In those circumstances it would be more appropriate for the Court of Session to retain jurisdiction to deal with aliment actions, as it will be the court which later deals with the divorce".

Court of Session - concurrent jurisdiction in other areas

3.29 Question 3 asked: 'Do you think that the Court of Session should retain concurrent jurisdiction in any other areas? '

3.30 As the following table shows, a large majority of respondents answering this question felt the Court of Session should retain concurrent jurisdiction in some other area or areas. However, all of the respondents in the insurance or insurer group answered this question and all respondents in this category disagreed.

Table 3.3 Whether agree that the Court of Session should retain concurrent jurisdiction in any other areas

Respondent group	Yes	No	Other	No response
Individual Legal (12)	6	3	-	3
Other Individual (4)	-	1	-	3
Advocacy / Advice (15)	-	2	3	10
Arbitration / Mediation (5)	-	-	-	5
Business (6)	-	1	-	5
Insurance / Insurer groups (6)	-	6	-	-
Judiciary and Judicial Bodies (6)	3	-	-	3
Local authorities (7)	2	-	-	5
Public Bodies (5)	-	-	1	4
Solicitors, groups representing or providing access to Solicitors (24)	12	1	1	10
Stables or groups representing Advocates (9)	4	-	1	4
Unions (7)	3	-	1	3
Other organisations (9)	-	-	-	9
Total (115)	**30**	**14**	**7**	**64**

3.31 Forty-three respondents provided comments at this question. Some of these respondents took the opportunity to highlight areas they felt should always be limited to the Court of Session, rather than concurrent jurisdiction per se.

3.32 A wide variety of areas were each cited by small numbers of respondents for concurrent jurisdiction or, in some cases, reserved to the Court of Session. These included:

- Actions of proving the tenor
- Reduction
- Declaratory actions of significance
- Asbestos cases (cited particularly by advocacy respondents and unions)
- Personal injury
- Fatal cases
- Cases involving catastrophic injury
- Occupational disease cases
- Medical negligence
- Professional negligence
- Defamation
- Privacy
- Human rights
- Intellectual property
- Patent law
- Land disputes
- Commercial cases
- Complex company matters
- Exchequer cases
- Actions under the Hague Convention
- Certain devolution issues

- Legislation enacted to meet the requirements of European Directives e.g. in respect of procurement.
- "Matters of great importance such as, for example, actions in relation to probity of political elections."
- Areas of particular complexity or legal importance

3.33 Several respondents in the insurance group specifically commented that personal injury should not be an area of concurrent jurisdiction.

Impact

3.34 Question 4 asked: 'What impact do you think these proposals will have on you or your organisation?' Sixty-seven respondents made comments.

3.35 The most significant and consistent theme within these comments related to an expectation of far greater volumes of cases in sheriff courts and a reduction of cases for the Court of Session. Opinions were then varied as to whether the effects of such a change would be positive, negative or mixed for the respondent's organisation or their stakeholders. A number of sub-themes were either unique or very common to particular respondent groups.

3.36 A key theme that was strongly evident in comments from the advocates group was that the proposals would adversely affect their flow of work and potentially impact on the future of the independent bar in Scotland. As one advocate respondent commented: "…. 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 the right of access to automatic 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".

3.37 Conversely, a number of respondents, mainly in the solicitors group, commented that there would be new opportunities for solicitors as a result of these measures. One respondent, from the individual-legal group, gave the following example:

> "In terms of the development of our solicitors there are likely to be far more opportunities for solicitors in our Scottish practice to gain valuable experience in representing clients in the sheriff court. In particular there ought to be many more opportunities for developing advocacy skills in that court."

3.38 Whilst many respondents from across different respondent groups identified benefits in terms of cost savings or ensuring proportionate costs, others held a different view. A number of respondents in the unions category commented that: “the personal injury service we provide requires to be tightly controlled financially and to be self-funding, which is to say that, our solicitors’ fees are restricted to what is recovered from the other side. It is therefore essential that we continue to be able to litigate all of our personal injury cases in one central forum to take advantage of the economies of scale that such a model allows”.

3.39 Several respondents in the insurance category commented that the changes would afford “greater certainty of route to Justice” for all parties.

3.40 Commenting on potential benefits to litigants, a respondent from the advocacy or advice group said:

> “This reform is long overdue. Increasing the exclusive jurisdiction of the sheriff court will be a benefit to litigants, especially those with lower value claims. It will reduce their legal expenses as the cost of litigation in the sheriff court is much lower than in the Court of Session. It will often be of benefit in allowing litigation to be conducted closer to the residence of at least one party.”

3.41 Many respondents, particularly from the solicitors, unions and local authority groups, commented on potential issues with capacity and resources in the sheriff court. Some also referred to a perceived conflict between increased demand and planned court closures.

3.42 A number of respondents, notably local authorities and individual-legal respondents, felt the proposals would have either very little or no impact on their organisation.

3.43 Other impacts noted in comments from very small numbers included:

- An enhancement to the reputation of the Scottish legal system.
- A reduction in insurance claim costs that may help avoid increasing premiums.
- Discouragement of candidates from a career at the bar.
- Facilitation of greater access to specialised decision makers through freeing up Court of Session judges.
- A need for separate buildings for civil and criminal cases, as is currently the case in Hamilton.
- The need for high standards of training in specialist areas.
- Potential impacts on workloads and job security of PCS members and others.

In summary, there were high levels of support 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. In addition, many more respondents agreed than disagreed that the Court of Session should retain concurrent jurisdiction for all family cases and a large majority of respondents who answered felt the Court of Session should retain concurrent jurisdiction in some other area or areas.

Common themes amongst comments across all questions in this chapter were that value does not necessarily equate to either the complexity or importance of cases and that access to specialists is important. The difficulties in assessing the value of certain cases was also commonly cited and whilst there was common agreement that it is appropriate to raise the exclusive competence of the sheriff court there was limited consensus as to whether £150,000 was an appropriate level.

For all these reasons, the possibility for remit from sheriff court to Court of Session and vice-versa was highlighted as being extremely important.

The other consistent theme emerging in this chapter related to the potential impact on the independent bar in Scotland if the anticipated volume of cases moves to the sheriff court and there is no access to automatic sanction for counsel.

4 CREATING A NEW JUDICIAL TIER WITHIN THE SHERIFF COURT

4.1 The consultation paper explained that Scotland is unusual in having a first tier court in which the judges hear both civil and criminal business, whereas in most jurisdictions minor offences and smaller value claims are heard by a separate court or a more junior judge. It went on to outline the SCCR recommendation that a new judicial tier be created, to sit in the sheriff court, who should have civil jurisdiction for certain defined actions and deal with summary criminal cases.

4.2 The paper then explained the options considered by the Scottish Government and detailed the following specific proposals:

- A new tier of judiciary ('summary sheriff') to be created.
- Summary sheriffs will require to have been legally qualified for at least 10 years.
- Summary sheriffs should have both a criminal and civil jurisdiction. They will not have an exclusive jurisdiction in any area, but will share concurrent jurisdiction in a number of areas with sheriffs.
- That cases with concurrent jurisdiction will be allocated by the sheriff principal.
- Current stipendiary magistrates will become summary sheriffs.

Summary sheriffs

4.3 Question 5 of the consultation asked: 'Do you think that the term 'summary sheriff' adequately reflects the new tier and its jurisdiction?'

4.4 As the following table shows, many more respondents agreed than disagreed that the term 'summary sheriff' adequately reflects the new tier and jurisdiction. The highest incidence of disagreement was expressed amongst individual-legal respondents and solicitors.

Table 4.1 Whether think that the term 'summary sheriff' adequately reflects the new tier and its jurisdiction

Respondent group	Yes	No	Other	No response
Individual Legal (12)	4	4	1	3
Other Individual (4)	2	-	-	2
Advocacy / Advice (15)	6	2	2	5
Arbitration / Mediation (5)	-	-	-	5
Business (6)	2	1	-	3
Insurance / Insurer groups (6)	6	-	-	-
Judiciary and Judicial Bodies (6)	2	2	2	-
Local authorities (7)	4	1	-	2
Public Bodies (5)	1		2	2
Solicitors, groups representing or providing access to Solicitors (24)	12	5	4	3
Stables or groups representing Advocates (9)	5	-	2	2
Unions (7)	-	-	3	4
Other organisations (9)	1	1	-	7
Total (115)	**45**	**16**	**16**	**38**

4.5 Sixty-five respondents made comments at this question. A number of those commenting simply reiterated that they felt the term 'summary sheriff' accurately reflects the new tier and its jurisdiction. Several respondents also commented that 'summary sheriff' was more appropriate than 'district judge' although the opposite view was also expressed by a minority.

4.6 A common theme in responses was that 'summary sheriff' implies some downgrading or at least creates potential for confusion as to the distinction between a 'normal' sheriff and a 'summary' sheriff, when both posts have the same requirements by way of experience. For these reasons, some respondents believe that just sheriff would be a preferable term. Additional concerns that were expressed in relation to 'summary' were that the term may not be understood by the public and that summary does not encompass civil court work.

4.7 There were several comments related to the importance of children's hearings specifically and the training and skills that these require. In this context, one respondent in the solicitors group commented:

> "We are concerned that the term 'summary sheriff' creates the impression that family actions, children's hearings referrals and cases involving domestic abuse (as set out in Schedule 1, paras. 1, 2 and 3 of the Draft Courts Reform (Scotland) Bill), are of lesser importance than other civil cases. Such a term may well be appropriate for sheriffs dealing with summary criminal cases. However, we would much prefer to see the term "specialist sheriff" for family actions, children's hearings referrals and cases involving domestic abuse."

4.8 A wide range of alternative terms were each suggested by single respondents or small numbers of respondents and these included summary judge, summary and family sheriff, magistrate, magistrate judge, Baillie and first tier sheriff.

4.9 A small number of respondents commented at length at this question on the proposals to create a three tier sheriff court per se, or the remit of the new tier, rather than on the term 'summary sheriff'.

Summary sheriffs - qualifications for appointment

4.10 Question 6 asked: 'Do you agree with the proposal that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff?'

4.11 As the following tables shows, a very large majority of respondents agreed that the qualifications for appointment as summary sheriff should be the same as that for sheriff.

Table 4.2 Whether agree with the proposal that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff

Respondent group	Yes	No	Other	No response
Individual Legal (12)	8	1	-	3
Other Individual (4)	1	-	-	3
Advocacy / Advice (15)	6	-	3	6
Arbitration / Mediation (5)		-	-	5
Business (6)	3	-	-	3
Insurance / Insurer groups (6)	6	-	-	-
Judiciary and Judicial Bodies (6)	5	-	-	1
Local authorities (7)	6	1	-	-
Public Bodies (5)	1	-	2	2
Solicitors, groups representing or providing access to Solicitors (24)	20	-	-	4
Stables or groups representing Advocates (9)	5	-	1	3
Unions (7)	-	-	-	7
Other organisations (9)	2	-	-	7
Total (115)	**63**	**2**	**6**	**44**

4.12 Fifty-five respondents made comments at this question. A common theme in these responses was that since the value of a claim does not necessarily reflect its complexity or importance, there would be no reason for appointing those with any less experience. Further, some respondents felt this to be in the interest of justice. Some respondents linked these comments to earlier remarks that the term 'summary sheriff' might imply a downgrading of experience.

4.13 There was also some suggestion, notably from advocacy respondents, that 'summary sheriffs' should be more specialised than sheriffs in relevant areas, not necessarily in terms of length of experience but type and breadth of experience. Other respondents also commented on the need for specialist training of all sheriffs in, for example, the field of family actions, children's hearings referrals and cases involving domestic abuse.

4.14 A minority of respondents felt that the status of summary sheriffs would not and should not be the same. As one individual-legal respondent commented:

> "The fact that sheriffs will be permitted to do work usually carried out by summary sheriffs but not the other way round reinforces the existence of a hierarchy. It is dishonest to the public to suggest that the two types of sheriff are equal in status."

4.15 A judiciary respondent observed: "The important qualifications for appointment will be the detailed criteria set and assessed by the Judicial Appointment Board".

4.16 A small number of respondents specifically commented that they welcomed consideration that summary sheriffs might be appointed on a part-time basis. One public body noted: "it is most important that the option of salaried part-time working be explored along with the removal of any statutory and associated impediments. The absence of this option at present is probably a significant inhibitor for those with caring responsibilities, most of whom are women".

4.17 Several respondents commented on the importance of career progression opportunities for summary sheriffs and felt that common qualifications would help to enable clear career paths. There was also a comment, from within the solicitors group, that payment terms for 'summary sheriffs' should be commensurate with those for sheriffs.

4.18 As noted in the following comment, a small number of respondents suggested that "employment judge" should be included amongst Judicial Offices specified in the Bill.

> "The [respondent organisation] believes that consideration should be given to widening opportunities for judicial career progression and flexible employment of appropriately qualified and experienced Judicial Resource, by including amongst the Judicial Offices specified in Sec 15 of the Bill, which of Scottish qualified 'employment judge'."
>
> (judiciary or judicial)

Summary sheriffs - the proposed competence in family cases

4.19 Question 7 asked: 'Do you agree with the proposed competence of summary sheriffs in family cases?' As the following table shows, many more respondents agreed than disagreed with the proposed competence of summary sheriffs in family cases.

Table 4.3 Whether agree with the proposed competence of summary sheriffs in family cases

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	6	1	1	-	4
Other Individual (4)	1	-	-	-	3
Advocacy / Advice (15)	4	-	-	1	10
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	1	-	-	-	5
Insurance / Insurer groups (6)	2	-	-	-	4
Judiciary and Judicial Bodies (6)	3	-	1	-	2
Local authorities (7)	3	-	1	-	3
Public Bodies (5)	-	-	1	1	3
Solicitors, groups representing or providing access to Solicitors (24)	6	-	3	1	14
Stables or groups representing Advocates (9)	3	-	-	2	4
Unions (7)	-	-	-	-	7
Other organisations (9)	1	-	-	-	8
Total (115)	**30**	**1**	**7**	**5**	**72**

4.20 Twenty-nine respondents made comments at this question. The most common theme in these responses related to the need for specialism in dealing with family actions. For many of these respondents the idea of drawing summary sheriffs from areas of expertise and bringing specialist knowledge and practical experience was seen to be beneficial. One advocacy respondent commented:

> "On balance we believe the new tier creates an opportunity to bring in a new generation to the bench and accelerate a culture change. We anticipate this may represent the first rung of a judicial career for experienced family law practitioners."

4.21 Conversely, a small number of respondents expressed concern that family actions are perceived as being downgraded. One local authority respondent commented that this might result in an increase in challenges to court's decisions.

4.22 A small number of respondents noted the importance of appropriate gatekeeping to ensure cases are heard at an appropriate level. There was a suggestion from one individual-legal respondent that: "family cases should be dealt with by a specialist family court that has the flexibility to sit at locations other than the sheriff court building, and could potentially change locations during a case (for example if the parties live in different places)".

Summary sheriffs - referrals from children's hearings

4.23 Question 8 asked: 'Do you agree that summary sheriffs should deal with referrals from children's hearings?'

4.24 As the following table shows, many more respondents agreed than disagreed that summary sheriffs should deal with referrals from children's hearings.

Table 4.4 Whether agree that summary sheriffs should deal with referrals from children's hearings

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	5	-	3	-	4
Other Individual (4)	1	-	-	-	3
Advocacy / Advice (15)	3	1	1	1	9
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	1	-	-	-	5
Insurance / Insurer groups (6)	1	-	-	-	5
Judiciary and Judicial Bodies (6)	3	-	-	-	3
Local authorities (7)	4	-	1	-	2
Public Bodies (5)	1	-	-	-	4
Solicitors, groups representing or providing access to Solicitors (24)	5	1	2	1	15
Stables or groups representing Advocates (9)	2	-	-	-	7
Unions (7)	-	-	-	-	7
Other organisations (9)	1	-	-	-	8
Total (115)	**27**	**2**	**7**	**2**	**77**

4.25 Twenty-eight respondents made comments at this question. Many of the comments reflected a similar pattern of views to those expressed at Question 7 with regard to family cases.

4.26 Once again, the need for specialisation was a common theme and concerns were expressed by some respondents regarding the ability of 'summary sheriffs' to deal with more complex cases. An advocacy respondent commented that: "In cases of particular difficulty, such as those involving death of a sibling, serious sexual offences and serious assaults we consider that it should be possible to remit to the Court of Session".

4.27 A small number of respondents commented on difficulties created in situations where families may be involved in multiple processes. One advocacy respondent noted, for example, the need for clarification concerning the relationship between decisions of children's hearings and decisions in court in relation to child contact.

4.28 The possibility that there might be swifter resolution for children and families was cited as a benefit by one local authority:

> "It is important for children and families that these matters are dealt with swiftly. If it will assist to allow summary sheriffs to have a wide remit including referrals from children's hearings then this would appear to be preferable."

Summary sheriffs - powers in other areas

4.29 Question 9 asked: 'Do you think that in addition to summary crime, summary sheriffs should have powers in other areas of criminal jurisdiction?'

Table 4.5 Whether think that in addition to summary crime, summary sheriffs should have powers in other areas of criminal jurisdiction

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	4	1	2	1	4
Other Individual (4)	1	-	-	-	3
Advocacy / Advice (15)	-	-	2	3	10
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	-	-	1	-	5
Insurance / Insurer groups (6)	1	-	-	-	5
Judiciary and Judicial Bodies (6)	2	-	1	2	1
Local authorities (7)	3	-	-	-	4
Public Bodies (5)	2	-	-	1	2
Solicitors, groups representing or providing access to Solicitors (24)	2	1	5	-	16
Stables or groups representing Advocates (9)	-	-	2	-	7
Unions (7)	-	-	-	1	6
Other organisations (9)	-	-	-	-	9
Total (115)	**15**	**2**	**13**	**8**	**77**

4.30 As shown in the table above, views were extremely mixed as to whether summary sheriffs should have powers in other areas of criminal jurisdiction, in addition to summary crime. More respondents in the solicitors, advocates and advocacy groups disagreed than agreed that summary sheriffs should have powers in other areas.

4.31 Thirty-one respondents made comments at this question. Several of these respondents, from across different groups, cautioned against over-extending the powers of summary sheriffs in the early stages of implementing the proposals and suggested keep this under review. As one individual-legal respondent commented:

> "Rather than deciding to widen the remit at this stage, it may be preferable to build flexibility into the Act by allowing the minister to make provisions for adding to the jurisdiction of the summary sheriff if it later becomes appropriate".

4.32 There were also comments that further powers would be useful if they enable the Court to deal with matters more quickly, efficient or effectively and some respondents reiterated earlier points that if summary sheriffs are to have the same qualifications as sheriffs they should deal with the same matters in criminal jurisdiction.

4.33 There were contradictory views expressed on specific matters such as solemn procedure, with some respondents suggesting that solemn procedure is distinct and should remain with sheriffs and others presenting a different viewpoint.

> "The [respondent's organisation] believes that the lower tier judge should deal with all means enquiries courts, new custodies and undertakings, and bail matters in solemn matters (not least because that forms a percentage of the workload in most custodies and undertakings courts)."
>
> (judiciary or judicial)

4.34 One or two respondents noted the importance of clarity being provided. A respondent in the advocacy or advice group said: "This question does raise the issue of what the difference will be in criminal matters. If a summary sheriff can deal with a petition matter or a judicial examination, is there any basis to say that sheriff could not hear a jury trial? It is important that clear and logical separation of powers be set out and explained".

4.35 There was some comment that attention should be given as to how these proposals would work in remoter courts where availability of sheriffs may be limited and more general concerns about management of workload. One respondent expressed concern that criminal cases would be prioritised over civil actions.

Allocation of cases

4.36 Question 10 asked: '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?'

4.37 As the following table shows, many more respondents agreed than disagreed 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.

Table 4.6 Whether 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

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	7	-	1	-	4
Other Individual (4)	-	-	1	-	3
Advocacy / Advice (15)	4	-	-	2	9
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	2	-	-	-	4
Insurance / Insurer groups (6)	6	-	-	-	-
Judiciary and Judicial Bodies (6)	3	-	-	2	1
Local authorities (7)	3	1	1	1	1
Public Bodies (5)	2	-	-	-	3
Solicitors, groups representing or providing access to Solicitors (24)	14	-	5	-	5
Stables or groups representing Advocates (9)	3	-	-	1	5
Unions (7)	-	-	-	1	6
Other organisations (9)	-	-	-	-	9
Total (115)	**44**	**1**	**8**	**7**	**55**

4.38 Thirty-seven respondents made comments at this question. Many responses reiterated support for allocation of cases falling to the relevant sheriff principal and emphasised that it should not be for parties or pursuers to decide; others expressed the opposite view. One respondent in the solicitors group commented: "[respondent's organisation] supports the SCCR recommendation that choice should lie with the parties and in particular that specialist sheriffs should be appointed across the sheriffdoms".

4.39 The need for a consistent approach to case allocation was a common theme within responses and it was suggested by some respondents that clear guidelines should be provided.

4.40 A small number of respondents, particularly local authorities, commented on the importance of cases being allocated and dealt with quickly and without avoidable delays. In this context, there were suggestions that the task of allocation might be delegated, although one judiciary commented: "….but we see no need for that possibility to be enshrined in legislation".

4.41 Several of the respondents commented on general concerns regarding workloads and some of these expressed particular concern in the context of court closures. In addition, some respondents noted the need to consider summary sheriffs in remoter locations and there was a suggestion that a peripatetic element should be incorporated.

Impact

4.42 Question 11 asked: 'What impact do you think these proposals will have on you or your organisation?' Sixty respondents provided comments of which a small proportion felt there would be little or no impact on their organisation.

4.43 A key theme in terms of impacts relates to minimising delays. There was some comment that proposals covered in this chapter may help to reduce delays but there was also some concern that there must be smooth and prompt allocation of cases and that resourcing issues must be addressed.

4.44 Another recurring theme in terms of impacts was that costs incurred by pursuers should be more proportionate as a result of these proposals and that there will be improved access to justice. For example, a respondent from the insurance group commented: "Cases will be dealt with more efficiently and effectively and there will be more consistency in decisions made. The costs incurred by pursuers in bringing claims should be more proportionate to the values of claims."

4.45 There was also comment that specialist sheriffs may improve consistency of decisions although some respondents, particularly in the advocacy or advice group express concerns as to whether all areas of specialism can be properly resourced. The issue of determining job descriptions, including the legal knowledge, skills and competence and the judicial and personal skills required, is also noted.

4.46 Some respondents, most notably those in the solicitors group, commented that the reforms may increase training opportunities and the volume of advocacy work for solicitors working in private practice.

4.47 The need to provide user friendly information regarding the new system was cited by some advocacy respondents. A small number of respondents suggest again here that there will be a poorer perception of access to justice due to an apparent downgrading of how certain cases are dealt with.

4.48 For sheriffs specifically, there was comment that there will be fewer sheriffs dealing with work of greater importance and value and that sheriffs may need to move around more than they do at present. This is expected to create difficulties for courts in rural areas.

In summary, there were high levels of support that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff. A key theme in this chapter is that there should be no perception of implied downgrading linked to the term summary sheriff.

A sub-theme related to the difficulty of determining the extent of powers for summary sheriffs and ensuring appropriate and improving access to specialists, particularly in early stages. Several respondents, from across different groups, cautioned against over-extending the powers of summary sheriffs in the early stages of implementing the proposals and suggested keeping this under review.

The importance of quick, efficient and consistent allocation of cases was highlighted and the need for clear guidelines was also mentioned. There were also comments relating to resourcing in remote and rural areas.

5 CREATING A NEW SHERIFF APPEAL COURT

5.1 The Scottish Government proposes to create a new Sheriff Appeal Court with a national jurisdiction over civil appeals and summary criminal appeals from the sheriff and justice of the peace courts, as recommended in Chapter 4 of the SCCR.

5.2 The SCCR recommended the creation of a national Sheriff Appeal Court whose decisions would be binding on all sheriffs in Scotland. In terms of its jurisdiction, the SCCR recommended the court would hear summary criminal appeals from justices of the peace, from summary sheriffs and sheriffs. It also recommended the court would hear civil appeals from summary sheriffs and sheriffs.

5.3 The SCCR heard views from respondents that some sheriffs might be sensitive about dealing with a colleague's appeals in the Sheriff Appeal Court and be particularly reluctant to sit on appeals from their own sheriffdom. The SCCR therefore considered that it would be inappropriate for the new appeal court to consist of members of the same level of judicial hierarchy. So, they recommended that the new judges should be at the same level as sheriffs principal.

5.4 The Scottish Government agrees with the SCCR's recommendation that criminal appeals should be administered centrally. For civil appeals, the SCCR recommended that they would be administered and heard in the sheriffdom from which they originate.

Whether there should be a Sheriff Appeal Court

5.5 The Scottish Government has considered whether, in principle, there should be a national Sheriff Appeal Court for both civil and summary criminal appeals. Under the current system for civil appeals, decisions of sheriffs principal currently only apply in their sheriffdom. The Scottish Government consider that a national civil appeal court would afford more opportunity for the legal system to evolve and develop from cases appealed in any part of Scotland, rather than simply applying within the sheriffdom. Additionally, practice could be aligned across sheriffdoms.

5.6 Question 12 of the consultation asked: 'Do you agree that criminal appeals should be held in a centralised national appeal court?'

5.7 As the following table shows, of those responding at this question, many more were in support of the proposal than were not. However, a number of those agreeing with this proposal also qualified their response in some way.

Table 5.1: Whether criminal appeals should be held in a centralised national appeal court

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	3	1	2	1	5
Other individual (4)	1	-	-	1	2
Advocacy / Advice (15)	1	-	-	2	12
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	1	-	-	-	5
Insurance / Insurer groups (6)	5	1	-	-	-
Judiciary and Judicial Bodies (6)	3	1	1	-	1
Local authorities (7)	1	-	1	1	4
Public Bodies (5)	1	1	-	-	3
Solicitors, groups representing or providing access to Solicitors (24)	9	2	-	2	11
Stables or groups representing Advocates (9)	1	4	-	-	4
Unions (7)	-	-	-	2	5
Other organisations (9)	-	-	-	1	8
Total (115)	**26**	**10**	**4**	**10**	**65**

5.8 Thirty respondents provided additional comments at this question. The key theme to emerge, across a number of groups, was that a centralised national appeal court would be an efficient and economic route to take. For example, one public body commented: "A central criminal appeal court could, if bail appeals are to call before it, deal with large numbers of appeals with economies of scale being made."

5.9 Other advantages cited by small numbers of respondents were that this would facilitate appeal hearings within a short timescale, that it would provide a single source of guidance and interpretation or that it would offer efficiencies without compromising on the quality of decisions taken.

5.10 That said, while there was broad support for this proposal, almost half of the respondents providing additional commentary, also made qualifying comments in relation to the structure of the centralised national appeal court or asked for further clarification of specific details of the proposal. For example, another respondent noted they were unsure as to how the new Sheriff Appeal Court would sit within the existing appeal court structure and how decisions of this court would be appealed.

5.11 An insurance or insurer group who were positive about the proposal but provided a qualified response said:

> "[We] do not think the location of the Sheriff Appeal Court is relevant – it is the quality and consistency of decision making within that forum which is of greatest relevance to justice. However we do agree that a centralised appeal court will bring claims into one location which will be efficient."

5.12 Of the small number who were not supportive of this proposal, there were some concerns that this would add another layer of bureaucracy to the system which could in turn lead to delays or possible confusion or backlogs of work. A small number also noted that there exists a specialist personal injury court to ensure that personal injury cases are determined by specialist personal injury sheriffs at first instance and that it would not make sense for these civil appeals to go to more generalist sheriffs at appeal in the Sheriff Appeal Court who will lack experience of personal injury cases. These respondents also noted that civil appeals from a specialist personal injury court should go to the appellate jurisdiction of the Court of Session (the Inner House). These respondents were primarily from unions or advocacy organisations. One advocacy organisation, while noting that a single national appeal court is preferable on the grounds of consistency and certainty, commented:

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

5.13 There were one or two concerns expressed about the need for litigants to have equal access to justice and their entitlement to direct appeal to the Inner House and a right to instruct counsel, which would be lost under this proposal. As one individual within the legal arena noted: "the overriding objective should be efficient and fair disposal at proportionate cost". These concerns were primarily from unions, advocacy organisations and local authorities.

Location of the Sheriff Appeal Court

5.14 The consultation paper noted that section 55 of the draft Bill allows for a Sheriff Appeal Court to be able to be held at any place where a sheriff court may be held. The court may sit simultaneously in different locations, thereby allowing it to deal with more than one case at a time. The President of the Sheriff Appeal Court will set out in practice where the court is to sit, although this power will come under the general jurisdiction of the Lord President in the same way as the administrative functions of the sheriff principal do at present.

5.15 The consultation paper also noted that the Scottish Government agrees with the SCCR's recommendation that criminal appeals should be administered centrally and that civil appeals would be administered and heard in the sheriffdom from which they originate. The Bill has been drafted to allow as much flexibility around location as possible.

5.16 Question 13 of the consultation went onto ask: 'Do you think that civil appeals should be heard in the Sheriff Appeal Court sitting in the sheriffdom in which they originated?' Of those responding at this question, higher numbers were supportive of this proposal than were not, albeit that once again there were some qualified responses from respondents who were generally supportive of this proposal.

5.17 Greatest opposition for this proposal came from those within the insurance sector where all those responding at this question disagreed. There was also disagreement from the advocate group and individuals within the legal sector.

Table 5.2: Whether civil appeals should be held in the Sheriff Appeal Court sitting in the sheriffdom in which they originated

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	2	3	3	1	3
Other individual (4)	1	-	1	-	2
Advocacy / Advice (15)	5	3	-	1	6
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	2	-	-	1	3
Insurance / Insurer groups (6)	-	-	6	-	-
Judiciary and Judicial Bodies (6)	1	1	2	1	1
Local authorities (7)	5	2	-	-	-
Public Bodies (5)	-	-	1	1	3
Solicitors, groups representing or providing access to Solicitors (24)	12	2	4	2	4
Stables or groups representing Advocates (9)	1	-	4	1	3
Unions (7)	-	-	-	-	7
Other organisations (9)	2	-	-	-	7
Total (115)	**31**	**11**	**21**	**8**	**44**

5.18 Fifty-four respondents provided further commentary on their response at this question.

5.19 The key reasons for supporting this proposal related to the need for access to justice, and a desire to make best use of resources in the public interest and ensure efficient and fair disposal on a proportionate cost basis, with costs minimised as far as possible.

5.20 A small number of those within the solicitors group referred specifically to the principle of access to justice that requires the national Sheriff Appeal Court should sit at locations across Scotland. One or two local authorities simply commented that it would be more convenient for parties and agents if an appeal is heard in the sheriffdom in which the case originated. A respondent from the solicitors group explained the situation in relation to their clients:

> "Many of our clients are children or vulnerable young adults who already find it difficult to travel to courts even within the sheriffdom. We often have to help them to find the right bus, and they often need assistance from the local authority with bus fares. We would have significant concerns about any move to have civil appeals heard in a centralised national court, as this would make it even more difficult for our client group to access justice."

5.21 A number of respondents, primarily from the solicitors group, noted that this would allow for more consistent practice across sheriffdoms, in that decisions in civil appeals to sheriffs principal would create precedents for Scotland and not simply just for sheriffs in the relevant sheriffdom. A small number of solicitors also referred to the need for flexibility and noted that Section 55 allows the appeal court to determine where the court will sit. As a member of the solicitors group noted, decisions should create binding precedents for the whole of Scotland:

> "We agree that the development of a national appeal court would allow the legal system to evolve from cases appealed in any part of Scotland, and allow more consistent practice across sheriffdoms. To ensure that the national appeal court achieves this goal, it is important that the decisions in civil appeals to the sheriff principal should create binding precedents for the whole of Scotland, not just for the sheriffs in the relevant sheriffdom."

5.22 A small number of respondents qualified their response by noting that there is no particular need for an appeal court to sit in the sheriffdom in which the case originated and that there is a need for flexibility to hold the appeal elsewhere if practical. For example, a judicial body commented:

> "[We] agree in principle with this proposal. There may be circumstances in which it is not practicable to hold the appeal in a court in the sheriffdom concerned. There needs to be flexibility to hold the appeal elsewhere in the event of such impracticality."

5.23 Of those disagreeing with this proposal – largely insurance companies – the greatest number commented that civil appeals should be heard by a centralised national appeal court as this would bring greater consistency and efficiency savings.

5.24 A few respondents also commented that the existing system works well; for example, that appeals in family law cases should remain competent in the Court of Session or that the Inner House provides guidance on the interpretation and application of family law. There were also one or two concerns over the number of sheriffs principal and sheriffs available to sit or that there could be logistical issues in organising three sheriffs to attend appeals in more remote sheriffdoms. One advocates group member said:

> "The rationale provided in the consultation paper for having the appeal court sit in the sheriffdoms from which individual cases originate, is that this will allow the appeal court to sit in more than one case at a time (para 88). However, there is no shortage of courtrooms in Edinburgh and this will be particularly true once most first instance work has been moved out of the Court of Session. The ability of the Sheriff Appeal Court to hear appeals simultaneously will depend on the number of sheriffs principal and sheriffs available to sit, rather than the question of where the court is located. It is likely that the sheriffs and sheriffs principal will have greater availability to hear appeals if they do not have to spend time travelling between sheriffdoms."

Appeal sheriffs

5.25 There are no provisions in the Bill outlining the required quorum of appeal sheriffs sitting in the Sheriff Appeal Court and the Scottish Government is proposing that this is fixed by rules of court to allow for maximum flexibility.

5.26 The Scottish Government is proposing that the Sheriff Appeal Court should comprise the six sheriffs principal and sheriffs of at least 5 years' experience, with the number to be determined by the Lord President. Although the SCCR's original recommendation had been that all civil cases should generally be heard by a bench of three, due to less delays in civil appeals being heard and the nature of these civil appeals, the Scottish Government feels that this recommendation is now less relevant at this point in time.

5.27 Question 14 went onto ask: '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?' As Table 5.3 demonstrates, there is a high level of support for this proposal, with only a very small number of respondents disagreeing. Support came from most of the groups, with highest levels of support coming from those within the advocacy or advice group, businesses, insurance groups, public bodies and other organisations; in each of these groups, there was no disagreement with the proposal.

5.28 That said, there was also significant support from the solicitors group, local authorities and the judiciary. The advocates group was the only group where there was a higher level of opposition than support.

Table 5.3: Whether the Sheriff Appeal Court should be composed of appeal sheriffs who are sheriffs principal and sheriffs of at least five years' experience

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	4	1	2	1	4
Other individual (4)	1	1	-	-	2
Advocacy / Advice (15)	5	-	-	-	10
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	2	-	-	-	4
Insurance / Insurer groups (6)	6	-	-	-	-
Judiciary and Judicial Bodies (6)	2	2	-	1	1
Local authorities (7)	4	1	1	1	-
Public Bodies (5)	1	-	-	1	3
Solicitors, groups representing or providing access to Solicitors (24)	15	2	2	-	5
Stables or groups representing Advocates (9)	-	1	2	2	4
Unions (7)	-	-	-	-	7
Other organisations (9)	2	-	-	-	7
Total (115)	**42**	**8**	**7**	**6**	**52**

5.29 Thirty-nine respondents also provided commentary to explain their agreement or disagreement with the proposal.

5.30 Most of those responding positively to this proposal simply confirmed that the Sheriff Appeal Court should be composed of appeal sheriffs who are sheriff principal and sheriffs of at least five years' experience; or that five years' experience will be necessary. There were also a small number of comments that the appropriate level of expertise is necessary (and five years is seen to be appropriate) or that this will allow for the Sheriff Appeal Court to have the correct level of specialist and expertise experience. There were also one or two comments that the Sheriff Appeal Court should be composed of appeal sheriffs with a variety of specialisms and that this needs to include experienced senior sheriffs.

5.31 In terms of respondents providing a qualified response, most were working within the legal arena and their concerns included:

- A flexible and proportionate quorum could lead to instances where the Bench could comprise less than three members, which could lead to inconsistencies and a lack of certainty over decision-making.
- There needs to be wider opportunities for judicial career progression.

5.32 For example, one group of advocates commented:

> "We agree that it is essential that members of the appeal court should be sheriffs principal or have at least five years of experience as sheriffs. However, apart from the level and experience of the members of the court, the number of decision-makers on the bench is also a relevant factor. We are concerned by the suggestion at paragraph 96 of the consultation paper that the bench might comprise less than three members. It is intended that decisions of the new Sheriff Appeal Court should be binding on all sheriffs (whereas at present, the decisions of sheriffs principal are only binding within the sheriffdom). It is also envisaged that leave will be required for an appeal from the Sheriff Appeal Court to the Court of Session. For these reasons it is essential that decisions of the Sheriff Appeal Court are well-reasoned and of the highest possible quality. The involvement of a minimum of three decision-makers should go some way to ensuring this."

5.33 There were also comments from a small number opposed to this proposal that posts should be open to members of the profession who have not previously been sheriffs.

5.34 Further comments from those working within the legal arena were that there is a need to set out the period of appointment within legislation; with appointment to the Sheriff Appeal Court being for a fixed, renewable, period of years and where each judicial office holder receives the same level of remuneration for carrying out the same judicial function.

Impact

5.35 In the final question in this chapter of the consultation paper, respondents were asked: 'What impact do you think that these proposals will have on you or your organisation?' and thirty-nine respondents commented.

5.36 Around half of these respondents noted that there would be a positive impact if these proposals were introduced, either on their business or in general. Many of these respondents commented that this would reinforce consistency of justice and improve consistency in application of the law in Scotland, as well as allowing for greater clarification for both pursuers and defenders because there would be consistency in decision-making. A number of these respondents also felt these proposals would lead to greater efficiency. These comments came from a range of groups, and particularly from insurance companies. An advocacy or advice group organisation commented:

"Having one Sheriff Appeal Court – rather than the current system of sheriff principals – would be beneficial to us, and our clients. This would be advantageous to our clients as decision-making in the sheriff courts is more likely to be more consistent across Scotland. Currently, it is unclear how a sheriff principal's decision applies across Scotland. Sometimes sheriff principal decisions are followed in some sheriffdoms, but not others. For example it has been hard to say how recent mortgage repossession cases will be interpreted across Scotland. This has made it difficult to advise clients of their prospect for success. If a centralised national appeals court were to be created this would help clients decide what to do."

5.37 One key issue emerging at this question, and primarily cited by members of the advocates group, was a concern that the loss of access to automatic sanction for counsel could effectively deny representation and impact on the workloads of advocates. One or two respondents outwith the advocates group commented that there may still need to be referral to the Court of Session for some cases. As noted by one group of advocates:

"Removing the right to representation by a solicitor advocate or an advocate in summary criminal appeals is likely to have an adverse impact on the administration of justice, give rise to an inequality of arms and reduce the amount of work available for specialist pleaders."

5.38 A small number of respondents felt that this would have none, little or no significant impact on their business; and one or two respondents noted that it is difficult to predict the impact on their business at this point in time.

5.39 Finally, a small number of respondents chose to make general comments about this section of the consultation paper, rather than respond to specific questions. Respondents from the solicitors and union groups commented that there is a need to regard personal injury cases differently as it is far more logical for these to go to the Inner House of the Court of Session. A small number of respondents also used the example of a specific medical condition to state their concerns over the potential for delay if these proposals go ahead.

In summary, there were high levels of support for the creation of a Sheriff Appeal Court, and for this to be composed of appeal sheriffs who are sheriffs principal and sheriffs of at least five years standing. While there was still majority support for criminal appeals to be held in a centralised national appeal court, there was also a significant minority opposed to this. The key themes emerging in this chapter of the consultation paper were:

Centralised national criminal appeal court
Support for this came from almost all groups. A key comment was that this would be an efficient and economic route to adopt, facilitating appeal hearings in a short timescale, providing a single source of guidance and offering efficiencies without compromising on the quality of decisions taken.

However, there were some requests for further clarity on specific aspects of the creation of a Sheriff Appeal Court.

Location of the civil Sheriff Appeal Court
Support for civil appeals to be administered and heard in the sheriffdom from which they originated-came from most groups, with the exception of insurance groups (where there was no agreement) and advocates group where more respondents disagreed than agreed.

A number of respondents commented on the need for access to justice for all, while ensuring best use of resources and fair and efficient disposal on a proportionate costs basis. A key advantage of a national civil appeal court is that it would allow for consistent practice across sheriffdoms, albeit there were requests for flexibility to hold the appeal in the most practical location. Insurance companies argued for a centralised national civil Sheriff Appeal Court on the grounds that this would bring greater consistency and efficiency savings. Additionally, there were some queries as to the need for a new civil appeal court when there already exists a specialist personal injury court where decisions are taken by experienced personal injury sheriffs. There were some concerns over equality of access to justice in terms of entitlement of direct appeal to the Inner House and a right to instruct counsel.

Appeal sheriffs
Most respondents agreed that the Sheriff Appeal Court should be composed of appeal sheriffs who are sheriffs principal and sheriffs of at least five years' experience; primarily on the grounds that this would allow for an appropriate level of experience and expertise.

Impact
The key positive impact of these proposals is perceived to be consistency of justice, consistency in application of the law, and consistency in decision-making. The key perceived drawback is a loss of access to automatic sanction for counsel.

6 CREATING A SPECIALIST PERSONAL INJURY COURT

6.1 The Scottish Civil Courts Review (SCCR) recommended that a specialist personal injury court should be set up with a Scotland wide jurisdiction and that civil jury trial should be extended to this personal injury court but not to those actions that are litigated in other sheriff courts.

6.2 The consultation paper noted that the Scottish Government has considered whether, following the increase in the exclusive competence of the sheriff court, personal injury litigation might be subsumed within the sheriff courts, with no specific provision being made. However, the Scottish Government is persuaded that there are efficiencies of scale and convenience and benefits to some litigants, in raising actions in a single central court where there is particular expertise.

6.3 The Scottish Government agrees in principle with the SCCR's recommendation that there should be a specialised personal injury court and the provisions in the draft Bill will allow for this to be in any sheriff court and will also permit any sheriff court to be given all-Scotland jurisdiction in specified types of proceedings. Section 40 of the draft Bill provides for the creation of the new specialist court.

6.4 Question 16 asked: 'Do you agree with the establishment of a specialist personal injury court?'

6.5 As the following summary table shows, many more respondents were supportive of the establishment of a specialist personal injury court than were not, albeit that again some of these respondents qualified their response. Of those responding, there was universal support from the business, insurance and solicitors groups, unions, other organisations and other individuals.

Table 6.1: Agreement with the establishment of a specialist personal injury court

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	4	1	2	1	4
Other individual (4)	2	-	-	-	2
Advocacy / Advice (15)	2	1	1	-	11
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	2	-	-	-	4
Insurance / Insurer groups (6)	6	-	-	-	-
Judiciary and Judicial Bodies (6)	2	1	1	-	2
Local authorities (7)	2	1	2	-	2
Public Bodies (5)	-	-	-	1	4
Solicitors, groups representing or providing access to Solicitors (24)	13	5	-	-	6
Stables or groups representing Advocates (9)	1	3	2	1	2
Unions (7)	-	3	-	1	3
Other organisations (9)	1	-	-	1	7
Total (115)	**35**	**15**	**8**	**5**	**52**

6.6 Of these respondents, fifty-two opted to provide additional commentary in support of their response.

6.7 The key themes, from those supportive of this proposal, to emerge at this question was that a specialist personal injury court would ensure this specialist area is given more focus, that processes would be more efficient, that decision making would be consistent, that this would increase access to justice or that the system will benefit from sheriffs with more specialist knowledge. For example, a respondent from the insurers group said:

> "As this is such a specialist area, and with claims becoming more and more complex, a specialist personal injury court will enable cases to be dealt with in the most efficient manner, for the benefit of all parties alike. Furthermore, centralisation would ensure personal injury litigation could be heard at any time, rather than simply on dedicated sitting days only in various sheriffdoms."

6.8 One or two respondents also noted that specialisation is a good aim in the development of the Scottish civil justice system overall or were supportive of the creation of sheriffs with specialist expertise. These respondents came primarily from those within the legal arena (solicitors, advocates and individuals with legal expertise) and insurance companies.

6.9 However, there were a number of concerns expressed by respondents. A significant number of respondents referred to the location of the specialist personal injury court, with comments primarily focusing on the need to have a specialist court in Glasgow as well as Edinburgh or for multiple specialist personal injury courts across major Scottish cities. As noted by a member of the solicitors group:

> "So far as the specialist personal injury court itself is concerned we consider that there is a case to be made for it being sited in Glasgow or at least sited in both Glasgow and Edinburgh. Glasgow and the West of Scotland is a significantly larger population centre and has always generated a significant part of the originating business of the Court of Session. It has at least a similar number of legal firms and accredited specialists in personal injury. We can also foresee as part of that wider debate arguments that it should be a collegiate body with seats throughout Scotland."

6.10 There were also suggestions from one or two from the solicitors group that this needs to be a collegiate body with seats throughout Scotland.

6.11 There were also concerns from a number of respondents about the resourcing of the specialist personal injury court, and these comments came primarily from respondents within the legal sector. Their concerns covered a number of different areas. First, the proposal to have only two specialist sheriffs, particularly if the exclusive jurisdiction is to be raised to £150,000. Second, and linked to this first point, some respondents felt that workloads for these specialist sheriffs are likely to increase substantially and that two sheriffs would be insufficient in number to deal with the likely increases in business.

6.12 Third, another resourcing issue noted by a number of respondents (again, primarily from within the legal sector) was the need to make greater use of technology and forms of electronic communication. There were some comments that the Court of Session currently works well in terms of using technology and cited the examples of e-motion procedure and recording of evidence. A few respondents noted that greater use of technology in the court might go some way to deflecting their concerns over the location of the specialist personal injury court.

6.13 Allied to this, there were some requests that a specialist personal injury court replicates features from the current system in order to maximise efficiency. An example of a feature that is seen to work well was compulsory pre-trial meetings. There were also a small number of requests for training and recruitment of specialist sheriffs.

6.14 A number of respondents referred to the need to allow for counsel, with some of these asking for access to automatic sanction for counsel for all cases. Linked to this, there were also comments that not allowing access to automatic sanction for counsel would mean that access to justice would not be universal. An advocate group also noted other benefits to the continued use of counsel in personal injury cases:

> "Counsel offer exceptional value for money that has meant the costs of litigating personal injuries cases in Scotland has been significantly lower than in England …. Counsel also offer an important role in weeding out weak cases, since they have an obvious self interest in avoiding litigation for which they are unlikely to get paid."

6.15 Of the small number of respondents who did not agree with the establishment of a specialist personal injury court, most comments related to the current system working well or that the Court of Session has the experience and expertise to deal with personal injury cases and there is no need to create a specialist personal injury court. One or two respondents commented that continued use of the Court of Session for personal injury cases would offer greater certainty in outcomes.

6.16 Finally, at this question, one respondent from the solicitors group commented that paragraph 112 of the consultation paper is too vague and that confirmation needs to be provided on how specialism will be achieved and in what timeframe.

Civil jury trials

6.17 The consultation paper noted that personal injury actions with a value of up to and including £150,000 which would previously have been eligible for trial by jury in the Court of Session will now have to be raised in the sheriff court due to the increase in the exclusive competence of the sheriff court. These actions will be raised either in the specialist personal injury court or a local sheriff court. In order to mirror the procedure for personal injury actions in the new specialist personal injury court, the consultation paper proposes that civil jury trials should be available in the specialist personal injury court but not in other sheriff courts.

6.18 The consultation paper went onto say that when Scottish Ministers specify a sheriff court under section 40 as having an all-Scotland jurisdiction for personal injury actions, civil jury trial will then be competent in actions for damages for personal injury raised in that court. Parties who wish to raise personal injury actions in their local sheriff court will still be able to do so, although cases where a civil jury is sought will require to be raised in the specialist court. So, claimants will have a choice between the central specialist court or their local sheriff court. Under the SCCR proposals for greater specialisation among sheriffs in the sheriff court, there may be at least one sheriff in each sheriffdom who specialises in personal injury actions, so it may not be necessary for actions to be raised in the specialist court to access a specialist sheriff.

6.19 Question 17 of the consultation asked: 'Do you agree that civil jury trials should be available in the specialist personal injury court?' As demonstrated in Table 6.2, a higher number of respondents agreed that civil jury trials should be available in the specialist personal injury court, than did not, albeit that this difference is not as marked as in the previous question.

6.20 Of those responding, those within advocacy or advice organisations, unions and public bodies all agreed with the proposition. All those within the insurance group and other individuals disagreed with the proposition. In other groups, there was a mixture of those agreeing and disagreeing, although higher numbers generally agreed than disagreed.

Table 6.2: Agreement that civil jury trials should be available in the specialist personal injury court

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	5	2	1	1	3
Other individual (4)	-	-	2	-	2
Advocacy / Advice (15)	2	-	-	1	12
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	1	-	1	-	4
Insurance / Insurer groups (6)	-	-	6	-	-
Judiciary and Judicial Bodies (6)	2	1	1	-	2
Local authorities (7)	2	-	1	1	3
Public Bodies (5)	1	-	-	1	3
Solicitors, groups representing or providing access to Solicitors (24)	7	4	5	1	7
Stables or groups representing Advocates (9)	5	-	2	-	2
Unions (7)	3	-	-	-	4
Other organisations (9)	1	-	-	-	8
Total (115)	**29**	**7**	**19**	**5**	**55**

6.21 Forty-seven of these respondents went onto make additional comments at this question.

6.22 A number of reasons were provided as to why civil jury trials should be available in the specialist personal injury court and key was that it would be unfair for litigants to be deprived of their entitlement to a jury trial or that they should not lose their right to a jury trial if they can no longer litigate within the Court of Session.

6.23 A small number of respondents commented that the objections that previously existed in relation to the use of civil juries have been resolved by the decision of the Inner House in Hamilton v Ferguson Transport (Spean Bridge) Ltd 2012 SC 486 which means that greater guidance can now be provided to juries in assessing the level of damages to be awarded. These respondents came primarily from the legal arena.

6.24 Another key issue, cited by those within the legal world and unions, was that there should be access to automatic sanction for counsel in all civil jury trials in the personal injury court; one respondent from the advocates group added "and indeed in any sheriff court in which such an action is raised". A key reason for this was that most solicitors will have had no experience of conducting civil jury trials and it will be unfair on litigants to find themselves represented by solicitors without this experience. There were one or two suggestions for a financial threshold to be set so that the costs of running a trial would remain proportionate to the value of the case. So, for example, one respondent suggested that any case under the value of £5,000 should not be entitled to a civil jury trial; another that sanction should be available for all claims valued at £20,000 or more.

6.25 Once again, some respondents within the legal sector made qualifying statements if civil jury trials are to go ahead and these included suggestions for:

- Jury trials should apply only in the enumerated causes in section 11 of the Court of Session Act 1988 (cited by those in the legal world).
- More guidance – along the lines of the procedure as introduced by the Hamilton v Ferguson Transport (Spean Bridge) Ltd 2012 SC 486 case – should be given to juries on assessing awards for damages.
- Jurors to be required to give reasons for making a specific award (which they are not currently required to do).
- The appeal process to be revised to allow sheriffs or judges opportunities to correct decisions that are inappropriate.
- Parties to be able to argue that particular actions are not suitable for civil jury trial.

6.26 Many of the reasons for disagreement with this proposition came from organisations within the insurance sector, albeit that some also came from solicitors and advocates groups. The key reasons given by respondents were that jury trials create financial and administrative burdens on the courts, and that damages awarded by juries are inconsistent and cannot be held to judicial scrutiny on appeal. Some of these respondents used the case of Hamilton v Ferguson Transport (Spean Bridge) Ltd 2012 SC 486 to argue this point, noting that whilst this allows for the judge to provide guidance on the level of damages to be awarded, this is only guidance and can be ignored by the civil jury. A small number of respondents simply noted that jury trials are not an appropriate forum for personal injury actions.

6.27 A small number of respondents made specific comments on the Bill and these included:

- A need to define the type of case to be covered by the specialist court in relation to jury trials.
- Section (66) (4) should also contain a further option so that sheriff can indicate to jury that they can be allowed further time to reach a verdict.
- Section 67 (5) is a helpful addition.
- Sections 68 (2) and (4): the repetition of the refusal provisions is clumsy and could be better drafted.
- A lack of proposals within the Bill in relation to the introduction of a system of predictive costs.
- Those seeking a jury trial should need to opt in to that procedure rather than opt out.
- The sheriff court rules will have to be carefully thought out and appropriate provisions added to cover various procedural matters not covered in the Bill but peculiar to jury trial practice.

Impact

6.28 The final question in this chapter asked: 'What impact do you think these proposals will have on your or your organisation?' and forty-two respondents provided commentary.

6.29 The key positive impact respondents noted was in relation to clients and likely reductions in costs, and more prompt resolution of cases. For example, a respondent from the insurers group said: "We believe if properly implemented a specialist personal injury court would deal with cases more proportionately, efficiently and with greater consistency. Such a specialist court will provide pursuers and defenders alike with faster access to justice." There were also a small number of mentions, from the solicitors group, that this would increase their capacity for providing more focused advice to clients on how their case is likely to be dealt with.

6.30 Perhaps, not surprisingly there were concerns from respondents from the advocates group that this is likely to result in less personal injury work for advocates, unless they are instructed for and granted sanction to conduct cases in the new specialist personal injury court.

6.31 There were also some concern that this could result in a loss of good quality advocacy skills for clients for whom counsel would previously have appeared. One respondent, from the solicitors group, felt a loss of access to automatic sanction for counsel would affect equality to justice and that there would be an inequality of arms. Furthermore, there were also one or two concerns over an increase in applications for jury trials which were felt could lead to excessive awards for damages.

6.32 Some of the unions responding to this consultation noted that they would not be able to support members' cases with a value of less than £5,000 or that union members could be at a significant disadvantage as insurers would continue to instruct counsel.

6.33 A number of respondents commented on the implementation of these proposals. For example, a number of respondents from the insurance group noted: "if these proposals are implemented properly, with a supported and managed framework, a specialist personal injury court would be able to deal with cases more proportionately, efficiently and with greater consistency and transparency". However, these insurance companies also noted concerns if civil jury trials are implemented as they felt these could hinder effective implementation and lead to a two tier justice system with excessive costs being awarded by a civil jury.

6.34 A small number of respondents noted concerns over the resourcing of a specialist personal injury court or queried some of the figures provided in the consultation document – most notably they had concerns over how the Scottish Government had reached figures for the transferral of cases from the Court of Session.

6.35 A small number of respondents from the solicitors group referred to current processes within the Court of Session and suggested,

> "Currently the Court of Session PI procedure works with the assignment of a court timetable and a proof diet is allocated at the outset of the timetable. In practice, all parties know when the case is due to call in court and there is a focus and an incentive to drive cases to resolution- this is beneficial to clients, defenders and indeed to the efficient working of the system itself. Consideration should be given to extending the practice of issuing a Court timetable with a proof diet assigned at the outset of a case to all PI cases."

6.36 A number of unions commented that if there is access to automatic sanction for counsel and personal injury cases are excluded from summary sheriffs, the impact would be manageable, although they also commented: "if there is no automatic sanction or if personal injury cases with a value of less than £5,000 required to be heard in the new summary sheriff tier, the impact on the union and our members would be profound".

6.37 A small number of respondents, primarily local authorities, reiterated points made in previous questions about the location of a specialist personal injury court and the need for this to be in Glasgow as well as Edinburgh.

6.38 Finally, in this chapter, a small number of respondents noted that this would have little or no impact on their organisation.

In summary, there were high levels of support for the establishment of a specialist personal injury court, although there were lower levels of agreement that civil jury trials should be available in the specialist personal injury court. The key themes emerging in this chapter of the consultation paper were:

Establishment of a specialist personal injury court
Support for this came from almost all groups. A key comment was that this would ensure this specialist area is given more focus and that processes would be more efficient and decision making more consistent.

A key concern related to the issue of allowing access to automatic sanction for counsel, with some requests for access to automatic sanction for counsel in all cases. One again, the location of the specialist personal injury court was noted, with requests for one in Glasgow as well as Edinburgh. There were also some concerns over the resourcing of this court in terms of the number of specialist sheriffs who would be needed because of the potential for increased workloads. Allied to this, there were suggestions for greater use of technology and specialist training and recruitment of specialist sheriffs.

Some respondents felt that the current system works well or that the Court of Session has the experience and expertise to deal with personal injury cases.

Civil jury trials
Support for this came from most groups, with the exception of the insurance group (where there was no agreement). That said, there was less support for this proposal than seen for the establishment of a specialist personal injury court.

Support for this proposal was primarily because it would be unfair for litigants to be deprived of their entitlement to a jury trial. However, there were requests for access to automatic sanction for counsel, given the lack of experience most solicitors will have had in conducting civil jury trials.

There was also some discussion over the level at which a case should be entitled to a civil jury trial.

The key reason for opposition to this proposal was that jury trials create financial and administrative burdens on the courts and that damages awarded by juries are inconsistent and cannot be held to judicial scrutiny on appeal.

Impact
The key positive impact of these proposals was a likely reduction in costs and more prompt resolution of cases. There was concern from respondents from the advocates group that this would result in less personal injury work if they are not instructed for, and granted automatic sanction, to conduct cases in the new specialist personal injury court. Again, there were some references to a loss of equality to justice and an inequality of arms because of a loss of a capacity to sanction counsel. Finally, there were some concerns over the inconsistent award of damages by jury trials.

7 IMPROVING JUDICIAL REVIEW PROCEDURE IN THE COURT OF SESSION

7.1 In response to the recommendations of the Scottish Civil Courts Review (SCCR), the Scottish Government has proposals to improve judicial review procedure.

Introduction of a time bar for judicial review

7.2 The consultation paper noted that the SCCR recommended the introduction of a time bar for bringing a judicial review; they recommended that petitions should be brought promptly and, in any event, within a period of three months, subject to the exercise of the court's discretion to permit a petition outwith that period. However, there has been a subsequent decision that the use of the word 'promptly' was too uncertain.

7.3 That said, the Scottish Government is concerned to ensure that judicial review claims are brought timeously and ideally as soon as possible. The advantage of this proposal is that applications should be resolved more swiftly and efficiently. A disadvantage may be that there will be more unmeritorious cases as those wishing to apply for judicial review will have less time to consider the application. However, the Scottish Government considers that three months is enough time to make an application and if an application genuinely needs longer, there is provision for the court to have discretion as to the time-limit.

7.4 Question 19 asked: Do you agree with the three month time limit for judicial review claims to be brought?

Table 7.1: Agreement with the three month time limit for judicial claims to be brought

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	4	1	3	1	3
Other individual (4)	2	-	-	-	2
Advocacy / Advice (15)	2	-	5	-	8
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	3	-	2	-	1
Insurance / Insurer groups (6)	5	-	-	-	1
Judiciary and Judicial Bodies (6)	1	-	-	-	5
Local authorities (7)	6	1	-	-	-
Public Bodies (5)	1	1	-	-	3
Solicitors, groups representing or providing access to Solicitors (24)	2	3	7	2	10
Stables or groups representing Advocates (9)	1	-	5	1	2
Unions (7)	-	-	-	-	7
Other organisations (9)	1	1	3	1	3
Total (115)	**28**	**7**	**25**	**5**	**50**

7.5 As shown in the table above, more respondents were positive about this proposal than were not. Whilst support came from most groups, this support was universal for those responding from the insurance group, local authorities, public bodies, judiciary and other individuals. Conversely, a higher number from the solicitors group, advocates group and advocacy or advice group were opposed to this proposal than supported it.

7.6 Fifty-eight respondents made comments at this question. Among those in support of the proposal, a key theme was that it is necessary to have the proviso that the court can have discretion as regards the time limit; this was noted, primarily by respondents within the legal sector.

7.7 Other positive comments were that a three month time limit should result in efficient and effective remedies for individuals or that this would provide greater certainty and, to an extent, cost effectiveness in providing public services. These comments came primarily from local authorities.

7.8 Of the respondents opposed to this time limit, a key theme was that this period is too short to resolve issues before bringing a claim and consequently could restrict access to justice. Respondents noting this particular point came primarily from within the legal sector or advocacy and advice organisations. A number of these respondents highlighted specific groups of individuals on whom this would impact, and these included community groups and vulnerable individuals. Some other respondents noted specific areas where a longer timescale is required and these included housing and welfare, immigration and asylum cases and cases using legal aid.

7.9 Allied to this point, it was also noted by a number of respondents – primarily within the legal sector – that this shorter time period could bring about more litigation and thereby pressure on court time because the time to explore alternative options is too limited.

7.10 A number of respondents commented that there was no need for such a time limit for judicial reviews because there is no current issue with delay in judicial review proceedings. Some of these also felt that the existing test of mora, taciturnity and acquiescence is more certain than that being proposed.

7.11 There were suggestions from a number of respondents for alternative time periods. While a small number of businesses suggested a reduced time period for judicial review for planning decisions from three months to six weeks and for procurement decisions from three months to thirty days; most respondents suggested a longer time period. These included,

- Six months, but still with an option to extend the time limit to allow exploration of other non-litigious methods of resolution.
- One year.

7.12 As noted by a respondent from the solicitors group:

> "We recognise that there may be a public interest in challenges being made promptly and resolved quickly. However, in our view such interest must be weighed against the interests of the individual who needs recourse to the courts to seek resolution. We consider a time limit of a minimum of one year is necessary to maintain a fair balance of the public and individual interests, allowing vulnerable citizens access to justice."

7.13 A significant number of respondents; again, primarily within the legal sector, also noted that if a fixed time limit is to be introduced, there will need to be clarification on when the 'clock starts ticking'. There were some suggestions that this could start when the petitioners becomes (or might reasonably have been expected to become) aware of the grounds of the review.

7.14 Finally, at this question a number of respondents made specific suggestions for this Bill and these included:

- A change to the use of the word 'promptly' as this is regarded as too uncertain.
- A need for clarity for the instances in which an extension of the time limit would be granted.
- The need for a mechanism to deal with exceptional cases where a time limit is required.
- The introduction of a process whereby petitioners can indicated their intention to apply for judicial review within three months, with the court granting a specific extension period.
- Although Section 84(1)b of the draft Bill gives the court discretion to extend the time limit, the wording suggests this is likely to be in exceptional circumstances and only rarely granted.

The introduction of a leave to proceed with an application for judicial review

7.15 At present, there is no mechanism to sift out unmeritorious applications for judicial review. In England and Wales, a permission stage has been introduced and permission is refused in a relatively high proportion of cases; only in a small minority of cases is there then an appeal against refusal of permission. The SCCR recommended a mechanism to sift out applications that have no realistic prospect of success. The consultation paper noted that the Scottish Government agrees with this and is proposing to introduce the leave to proceed with an application for judicial review on the grounds that this will serve to filter out unmeritorious cases.

7.16 Question 20 of the consultation asked: 'Do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?' As shown in Table 7.2, there was a high level of support for this proposal.

Table 7.2: Agreement that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	6	1	1	1	3
Other individual (4)	2	-	-	-	2
Advocacy / Advice (15)	2	-	1	2	10
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	4	-	-	-	2
Insurance / Insurer groups (6)	5	-	-	-	1
Judiciary and Judicial Bodies (6)	2	-	-	-	4
Local authorities (7)	7	-	-	-	-
Public Bodies (5)	1	-	-	1	3
Solicitors, groups representing or providing access to Solicitors (24)	8	-	3	2	11
Stables or groups representing Advocates (9)	4	-	1	2	2
Unions (7)	-	-	-	-	7
Other organisations (9)	2	-	-	4	3
Total (115)	**43**	**1**	**6**	**12**	**53**

7.17 Forty-two respondents opted to provide further commentary to expand upon their answer.

7.18 Most respondents agreeing with this proposal simply noted that the introduction of the leave to proceed with an application for judicial review will help to filter out unmeritorious cases or that this is an appropriate route to take. These responses came primarily from local authorities and insurance companies. There was also a perception from some of these respondents that the safeguards put in place, including the right to an oral hearing and the leave to appeals stage, would be sufficient.

7.19 That said, some of these respondents made qualifying comments. For example, the sifting process will need to be open, transparent and accountable to court users; there should be safeguards in place to ensure that claims that should be allowed to proceed are not filtered out; or that applications for leave to proceed must be dealt with in a fair and consistent manner.

7.20 A small number of respondents noted that the current procedure works effectively, with no apparent issue over excessive court time being taken up by these cases in Scotland; and questioned the need to make these changes. One or two respondents suggested consideration of the Ministry of Justice's consultation 'Judicial Review: proposals for reform (2012)' as they felt this could help provide guidance to the Scottish Government.

7.21 For those respondents opposed to this proposal, the key concern was that there is no hard evidence that the Court is burdened with large numbers of unmeritorious cases and that there is no cause to justify this change. One or two respondents within the legal arena raised concerns that this would raise more unmeritorious cases or that it would introduce delay and more costs into the proceedings.

7.22 A small number of respondents felt this could create more work upfront in that it will be necessary to front load work involved in the hearing in order that arguments can be as fully developed as possible.

7.23 There were also concerns about how the leave provisions would work with the procedures under the new Practice Note.

7.24 One or two respondents suggested alternative approaches. These included

- Making provision for a hearing to be held on preliminary issues such as sufficient interest or relevancy in advance of the substantive hearing.
- Inclusion of a PAP (Pre-action protocol procedure) which is a component of the approach in England and Wales.
- Serving the application for permission to proceed with judicial review on the respondent and all interested parties; again which is an element in England and Wales.
- Ensuring respondents have a right of response and make representations in relation to an application for leave.
- Having a clear 'legitimate interest' test that ensures Aarhus compliance.

Access to justice

7.25 The Scottish Government considers that introducing a leave to appeal mechanism and a time bar for judicial review, will meet their desire to ensure the earliest date of bringing a judicial review whilst giving parties enough time to present their case to ensure access to justice. Question 21 of the consultation paper asked: 'Do you agree that these proposals to amend the judicial review procedure will maintain access to justice?'

Table 7.3: Agreement that these proposals to amend the judicial review procedure will maintain access to justice

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	3	1	2	1	5
Other individual (4)	2	-	-	-	2
Advocacy / Advice (15)	1	-	2	1	11
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	4	1	-	-	1
Insurance / Insurer groups (6)	5	-	-	-	1
Judiciary and Judicial Bodies (6)	-	1	-	-	5
Local authorities (7)	7	-	-	-	-
Public Bodies (5)	2	-	-	-	3
Solicitors, groups representing or providing access to Solicitors (24)	5	1	4	2	12
Stables or groups representing Advocates (9)	1	1	3	1	3
Unions (7)	-	-	-	-	7
Other organisations (9)	2	-	2	1	4
Total (115)	**32**	**5**	**13**	**6**	**59**

7.26 As shown in Table 7.3, above, a significant number of respondents agreed with this proposal. Once again, of those responding at this question, support was greatest from businesses, those in the insurance sector and local authorities, where there was no disagreement with this question. Views were more split amongst other groups of respondents, most of whom were in the legal sector.

7.27 A total of 38 respondents also provided additional commentary at this question. Most of those agreeing with this question simply reiterated that this process appears to be sensible or appropriate (all insurance companies) or that this will maintain access to justice. A small number of respondents did however, note that this would provide access to justice in the majority of cases but that it could occasionally lead to injustice.

7.28 A number of respondents, primarily within the legal field, also commented that these proposals would provide access to justice providing the appropriate safeguards are in place or that the test for the extension of the time period and for leave are set and applied at the right level. There were one or two comments that time limits will need to be applied appropriately or that criteria for unmeritorious cases are clearly specified.

7.29 Of those opposing these proposals, a key issue was that the time limit is insufficient and that individuals within more vulnerable groups will be restricted to access to justice. The issue of legal aid was specified by a couple of respondents, one of whom noted that the time limit is insufficient to go through the procedure to obtain legal aid. There were also a small number of comments that this would increase the expense for individuals or bring about delays in the process.

7.30 Once again, there were concerns from a small number of organisations that these proposals will not make Scotland fully compliant under Aarhus, and that access to justice for environmental cases specifically can be prohibitively expensive. There was also a suggestion that consideration should be given to the findings of the consultation in England[4].

Impact

7.31 Finally, in this chapter of the consultation paper, respondents were asked: 'What impact do you think these proposals will have on your or your organisation?'

7.32 Forty respondents made comments at this question, some of which reiterated points made to earlier questions in this chapter. A significant number commented that these proposals would have little or no impact on them.

7.33 A number of organisations – primarily local authorities – noted that there would be a saving of time and money as there would be a reduction in the number of judicial reviews raised against them. Some also went onto note that this would give them greater confidence in implementing decisions or that this would give them a greater certainty of the organisation's position.

[4] Ministry of Justice's consultation 'Judicial Review: proposals for reform (2012)

7.34 Another key theme from a significant number of respondents was simply that these proposals would avoid wasting time and resources on unmeritorious claims. A local authority outlined potential benefits: “This will save council staff from getting tied up in litigation over decisions that were made some time ago and over (some) vexatious claims. It will also allow us to provide certainty to third parties and customers who rely on the decisions which are made by us, yet which can be left as possibly being subject to challenge for some time.”

7.35 While most respondents providing any commentary at this question were largely positive about these provisions, there were still some who had concerns that this would increase costs for their clients or offer less scope to pursue non-litigious options to resolve issues before proceedings have to be brought. One or two respondents referred once again to the issue of legal aid and that few petitions would be raised because of the difficulty of obtaining legal aid within a three month time frame. A small number of respondents also commented that they were opposed to the three month time limit.

In summary, views on the imposition of a three month time limit for judicial claims to be brought were relatively polarised. There were much higher levels of support that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases and that these proposals to amend the judicial review procedure will maintain access to justice. Support for each proposal was universal across insurance groups and local authorities. The key themes emerging in this chapter of the consultation paper were:

Introduction of a time bar for judicial review
A three month time limit was perceived by some as resulting in efficient and effective remedies for individuals or that this would provide greater certainty in outcomes.

Of those in disagreement with this proposal, a key issue was that this period is too short to resolve issues before bringing a claim and thus could restrict access to justice. It was also felt that this would impact proportionately worse on some specific groups of individuals such as community groups or vulnerable groups. There were some suggestions for a longer time period. Furthermore, there were a number of requests for clarification over when 'the clock starts ticking'.

The introduction of a leave to proceed with an application for judicial review
Most respondents in agreement with this proposal commented that its introduction will help to filter out unmeritorious cases and that the safeguards put in place (including the right to an oral hearing and the leave to appeals stage) are sufficient.

However, there were also requests for the sifting process to be open, transparent and accountable and with safeguards in place to ensure that claims that should be allowed to proceed are not filtered out. There were some comments that there is no hard evidence that the Court is currently burdened with large numbers of unmeritorious cases or that the current procedure works well.

Access to justice
There was agreement that this process appears to be sensible or appropriate or that this will maintain access to justice, providing the appropriate safeguards are in place. However, once again, there were some concerns that the time limit is insufficient and it may serve to limit access to justice for some individuals.

Impact
A significant number of respondents noted that these proposals will have little impact on them or their organisation. There were some comments that there would be cost and time efficiencies and enable organisations to have more confidence in implementing decisions (primarily local authorities).

There were some concerns that this could increase costs to clients or offer less scope to pursue non-litigious options.

8 FACILITATING THE MODERNISATION OF PROCEDURES IN THE COURT OF SESSION AND SHERIFF COURTS

8.1 The consultation document details proposals based on the Scottish Government's consideration of recommendations made by the SCCR. These proposals are intended to help improve procedures in the Court of Session and the sheriff courts. They relate to:

- The improvement of civil procedure generally in the Court of Session and sheriff courts.
- 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.
- The abolition of the distinction between ordinary and petition procedure in the Court of Session.
- New procedures for dealing with vexatious litigants.
- Scotland-wide enforcement of interdict and interim orders.

8.2 The consultation document noted that the Scottish Government sees the Scottish Civil Justice Council as best placed to attend to much of the detail in these areas: 'The Court of Session will be able to go into greater detail and provide more flexibility for the judiciary in court rules than would be possible for Parliament through primary legislation'. It then detailed the provisions that are set out in the draft Bill.

The improvement of civil procedure generally in the Court of Session and sheriff courts.

8.3 The Scottish Government propose to replace existing rule making powers with more general and generic powers. Section 85 of the draft Bill sets out provisions for the Court of Session while section 86 relates to the sheriff courts, including the new Sheriff Appeal Court. The consultation document explained:

'The intention is to put beyond doubt the legal basis to provide for the matters which may be prescribed in rules of court, but avoiding setting out all the detailed, particular cases mentioned in the existing powers (especially in section 32 of the 1971 Act). This approach means that the current references to specific pieces of legislation will be removed.'

8.4 There were three questions in relation to civil procedure in the Court of Session and sheriff courts. The first of these, Question 23, asked: '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?'

8.5 As shown in the table below, most of those who gave an answer agreed; 30 agreed while a further ten agreed but with qualifications. Four respondents did not agree and nine did not give a definitive reply but made other comments. The remainder (62) did not address this question.

Table 8.1 Whether 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

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	3	1	1	-	7
Other Individual (4)	1	-	-	-	3
Advocacy / Advice (15)	1	1	1	3	9
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	1	1	-	-	4
Insurance / Insurer groups (6)	6	-	-	-	-
Judiciary and Judicial Bodies (6)	4	-	-	1	1
Local authorities (7)	1	1	-	1	4
Public Bodies (5)	-	-	-	-	5
Solicitors, groups representing or providing access to Solicitors (24)	12	4	1	2	5
Stables or groups representing Advocates (9)	1	1	1	2	4
Unions (7)	-	-	-	-	7
Other organisations (9)	-	1	-	-	8
Total (115)	**30**	**10**	**4**	**9**	**62**

8.6 Forty respondents commented further at this question.

8.7 Many of the comments from those who agreed 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 simply restated their agreement. A number of these respondents also added comments such as their belief that the provisions will allow flexibility to improve civil procedures, that the current procedures are too slow, or requests that the new provisions be introduced as soon as possible.

8.8 There were also a number of comments in support of the creation of the Civil Justice Council for Scotland (SCJC). Several respondents from the solicitors group made similar comments, for example: "We support the implementation of the Civil Justice Council with the necessary powers to regulate, monitor and alter procedure when appropriate". Additional points made in responses included:

- That the SCJC should include a practitioner member from the field of motor accident claims.
- That each area of civil justice is different and so decisions made by the SCJC may not apply to all; and that there is, therefore, a need for a sub-committee to deal with issues relating to personal injury procedure.
- The need for more details and for clarity for all users of the courts system.
- The need to ensure fairness for all.

8.9 A number of respondents wanted to see consultation take place with representation from all court users and stakeholders before the rules are drafted. For example, another organisation said:

> "Developing the detail through court rules is appropriate solution, however, it is important that there is due consideration of different interests as rules are developed. We feel there needs to be an effective means of consultation or consideration of stakeholder views on court rules to ensure it is not done in isolation."

8.10 An advocates respondent felt that: "Changes to the Rules of the Court of Session should explicitly have been the subject of consultation with the Scottish Civil Justice Council". The need to ensure that those making the rules have the relevant, specialist or court experience was raised in a number of responses. In particular, there was a request that the current Coulsfield Rules remain unchanged and that the experience of lawyers involved through the Personal Injuries User Group and the Rules Council should not be lost.

8.11 One local authority respondent felt that courts should not be entirely self-regulating adding: "While the courts' rule making powers should be flexible, we are of the view that they should not be too broad and that a balance must be struck".

8.12 A small number of respondents voiced concern over, or disagreement with, these proposals. There was a concern, from a respondent from the solicitors group, that courts will develop different procedures and a concern that the body making the rules may move beyond secondary legislation into areas of primary legislation.

8.13 In relation to domestic abuse cases, a respondent from the advocacy or advice group felt that there would be an issue of access to justice in relation to the paragraph in section 86 on 'encouraging settlement of disputes and the use of alternative dispute resolution procedures'. This respondent said:

> "… non-court dispute resolution in circumstances 'where it is felt that settlement might be achieved quicker than by court process' has the potential to cause harm to women, children and young people experiencing domestic abuse if that power is used without a clear understanding of the dynamics of domestic abuse and that these cases are not appropriate for mediation."

8.14 A range of other comments were made by respondents. A small number made similar suggestions to the following from a respondent in the advocates group:

> "… the urgent need is for the practices and procedures of the sheriff court to be examined."

8.15 There were comments that the Court of Session already has the power to regulate its procedures, and that this power is used efficiently.

8.16 Advocacy or advice group respondents suggested that more use be made of IT, such as a move away from paper based systems or the use of video conferencing for civil cases "which would be useful for people who cannot physically get to the court because of age or physical disability, or because of work or childcare responsibilities, or because of the distance from court". One of these respondents stressed that rules should be future-proofed, adding:

> "This opportunity to modernise our civil courts must not be missed, or we risk again playing 'catchup' with civil justice in Scotland."

8.17 Another advocacy or advice group respondent focussed on ADR. Acknowledging that the draft Bill does allow courts to encourage the use of ADR, they felt that this did not go far enough and that there should be consistent rules for courts. However, they also stressed that "courts should be the forum of last resort for the resolution of most civil disputes. This rationale should underpin the new civil justice system from the outset. While flexibility may benefit rule making powers in some situations, this should not be to the detriment of achieving a 'whole system' approach which respects ADR as an equally valid forum of resolution to courts."

8.18 The consultation went on to ask, at Question 24: '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?'

Table 8.2 Whether there are 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

Respondent group	Yes	No	Other	No response
Individual Legal (12)	-	5	-	7
Other Individual (4)	-	-	-	4
Advocacy / Advice (15)	1	1	1	12
Arbitration / Mediation (5)	-	-	-	5
Business (6)	1	1	-	4
Insurance / Insurer groups (6)	-	6	-	-
Judiciary and Judicial Bodies (6)	-	4	1	1
Local authorities (7)	1	2	-	4
Public Bodies (5)	-	-	-	5
Solicitors, groups representing or providing access to Solicitors (24)	-	14	-	10
Stables or groups representing Advocates (9)	-	6	-	3
Unions (7)	-	-	-	7
Other organisations (9)	-	-	-	9
Total (115)	**3**	**39**	**2**	**71**

8.19 The table above shows that most of those who gave an answer saw no deficiencies (39 respondents). Three said yes, there are deficiencies. Two respondents did not give a definitive reply but made other comments. The remainder (71) did not address this question.

8.20 Most of those who commented further simply said they could see no deficiencies.

8.21 The three respondents who said yes, they could see deficiencies, identified these as:

- That there is no requirement for rules to be made. A respondent from the advocacy or advice group commented: "A programme of desirable outcomes should be established each year to guide the development of rules in areas of identified need. This need could be identified through the policy function of the SCJC."
- The need for the judiciary to implement the provisions and to overcome any opposition.
- A local authority said: "There is provision for consultation with the Scottish Civil Justice Council but there is no requirement to take reasonable cognisance of representations made."

8.22 Other comments included a comment from the judiciary group on the need to "consider whether the rule making powers in sections 85 and 86 are sufficiently wide to ensure that they are capable of enabling the recommendations of the SCCR to be implemented in full".

8.23 The consultation then asked, at Question 25: 'What impact do you think these proposals will have on you or your organisation?' and 34 respondents from across groups commented.

8.24 Several respondents simply said that they had not identified any impact, while several others referred back to points made in the previous questions in this section.

8.25 Respondents, across respondent groups, commented on general positive impacts such as a more efficient civil justice system with the flexibility to adapt to change and for cases to be settled more quickly.

8.26 However, several respondents cautioned that the proposals will need to be implemented and managed correctly for this to happen. The need for consultation and to involve stakeholders, perhaps through sub-committees, was again mentioned as was the need to ensure consistency across courts.

8.27 Specific positive impacts included:

- Reduced demand on resources, for the courts and for organisations.
- Savings to the Legal Aid fund, one public body said: "not least through the avoidance of postponed hearings due to lack of court time".

8.28 A respondent from the judiciary group commented: "Depending on the nature of the difference from the current sheriff court rules, the impact could be far-reaching".

8.29 One respondent from the solicitors group, however, was concerned that "if the new rule making process is used to 're-invent wheels' or 'fix things which aren't broken' or to introduce obstacles to a tried and tested rule structure which has worked well for the victims of accidents and industrial diseases then there is the obvious risk of an adverse impact".

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.

8.30 The consultation did not include any draft provisions on sift and disposal of appeals but asked for views from respondents on the SCCR's recommendation. Question 26 asked: 'Do you agree that a single judge of the Inner House should be able to consider the grounds of an appeal or motion?'

8.31 As shown in the table below, most of those who gave an answer agreed; 35 agreed while a further 13 agreed but with qualifications. Three respondents did not agree and two did not give a definitive reply but made other comments. The remainder (62) did not address this question.

Table 8.3 Whether agree that a single judge of the Inner House should be able to consider the grounds of an appeal or motion

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	5	-	1	-	6
Other Individual (4)	1	1	-	-	2
Advocacy / Advice (15)	1	2	-	-	12
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	2	1	-	-	3
Insurance / Insurer groups (6)	4	2	-	-	-
Judiciary and Judicial Bodies (6)	2	-	-	1	3
Local authorities (7)	3	1	-	-	3
Public Bodies (5)	2	-	-	-	3
Solicitors, groups representing or providing access to Solicitors (24)	9	5	2	1	7
Stables or groups representing Advocates (9)	6	1	-	-	2
Unions (7)	-	-	-	-	7
Other organisations (9)	-	-	-	-	9
Total (115)	**35**	**13**	**3**	**2**	**62**

8.32 Thirty-three respondents commented on the question of whether a single judge of the Inner House should be able to consider the grounds of an appeal or motion. A large number of these simply reaffirmed their support for the proposal. Where reasons were given the main theme centred around savings to time and resources. For example:

> "In the majority of cases, one right of appeal is sufficient and this proposal would avoid unnecessary appeals and wasted resources."
>
> (solicitor)

> "It is imperative to sift out unarguable appeals to speed up the appeals procedures and timescales, subject to the necessary cheques and balances which the proposals ensure."
>
> (solicitor)

8.33 Several respondents, across many groups, qualified their support. The main points made related to a potential risk of injustice and the need to allow leave to appeal to the Inner House; allowing the Inner House to review the single judge's determination. A local authority respondent commented:

> "In principal, subject to there being satisfactory safeguards for review by the Inner House in appropriate circumstances this proposal would be acceptable in general terms."

8.34 A very small number, from the solicitor and an individual-legal groups, opposed this proposal. Reasons given were that: this is unnecessary; that the Inner House already functions efficiently; and a concern over access to justice.

8.35 Two other comments were made; a respondent from the solicitors group reported that their members were divided on this issue. The other, from the judiciary group, said:

> "We offer no view in relation to the Court of Session but if such a provision is introduced then we think it could with advantage also be introduced in the Sheriff Appeal Court."

8.36 Question 27 asked: 'What impact do you think these proposals will have on you or your organisation?' and 36 respondents commented. Several simply said that there would be no, or minimal, impact.

8.37 Reports of potential positive impacts came from respondents, mainly from outwith the legal groups. Two main positive impacts were identified; that proceedings will proceed more quickly, with the potential for faster resolution of cases that do have merit, and that the number of vexatious claims may be dismissed at an earlier point or may even decrease. Respondents felt the proposals could save their organisations both time and money. There were also comments that these proposals will lead to less court time and resources being wasted and a comment on potential savings to the Legal Aid fund.

8.38 One respondent from the solicitors group said: “We support a consistent, fair and accountable decision making process and would hope these proposals reduce delay which currently exist in the process and thus improve access to justice in Scotland for injured persons”.

8.39 However, a small number, from the individual-legal and solicitors groups, commented on the potential of a negative impact in litigants being denied access to justice. There were calls to retain a bench of three judges rather than having a single judge make substantive decisions.

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

8.40 The Scottish Government has not offered draft provisions in relation to the SCCR recommendation that procedure in the Court of Session should be streamlined nor on the proposal to abolish the distinction between ordinary and petition procedure. The consultation asked for views on abolishing the distinction and on any practical considerations or consequences that need to be considered in relation to abolishing the distinction.

8.41 Question 28 asked respondents: ‘Do you agree that the distinction between ordinary and petition procedure should be abolished?’

Table 8.4 Whether agree that the distinction between ordinary and petition procedure should be abolished

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	5	-	1	-	6
Other Individual (4)	1	-	1	-	2
Advocacy / Advice (15)	1	1	-	-	13
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	3	-	-	-	3
Insurance / Insurer groups (6)	1	-	-	-	5
Judiciary and Judicial Bodies (6)	1	1	-	-	4
Local authorities (7)	1	-	1	-	5
Public Bodies (5)	-	1	-	1	3
Solicitors, groups representing or providing access to Solicitors (24)	10	1	2	2	9
Stables or groups representing Advocates (9)	2	2	-	1	4
Unions (7)	-	-	-	-	7
Other organisations (9)	-	-	-	-	9
Total (115)	**25**	**6**	**5**	**4**	**75**

8.42 As shown in the table above, most of those who gave an answer agreed that it should; 25 agreed while a further six agreed but with qualifications. Five respondents did not agree and four did not give a definitive reply but made other comments. The remainder (75) did not address this question.

8.43 Comments were noted in 27 responses. Many, those who agreed that the distinction should be abolished, said that this was a positive step or said that they welcome the standardisation and simplification of procedure which, respondents felt, would help bring clarity and consistency in court rules. There were also comments that this would increase efficiency in the courts. A number of respondents felt that the distinction is anachronistic. The following comment, from a respondent from the advocates group, is a typical example:

> "We agree that the abolition of the distinction between ordinary and petition procedure is overdue. This change should remove technical and formalistic complications of procedure which have no place in modern practice."

8.44 A business respondent asked for the use of plain English in this, and in all other claim forms and pleadings.

8.45 A small number of respondents, mainly from the legal groups, added qualification to their support. These included the need to eliminate technical barriers where cases are dismissed purely due to the wrong type of process being used. There were also comments on the need to ensure that court rules are sufficient to deal with all types of actions. For example, a respondent from the advocates group commented:

> "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."

8.46 A respondent from the judiciary group suggested:

> "In our view the wisest course if for the Court of Session to promulgate an Act of Sederunt designed to ensure that an appropriate form of procedure is available for the myriad and diverse types of applications raised and remedies sought, but without creating purely technical barriers to the efficient resolution of them."

8.47 Other suggestions included technical issues around clarifying the basis of the claim and around service.

8.48 There was also a concern that the expertise of Court of Session staff currently dealing with petitions may be lost should all cases move to the sheriff court.

8.49 A small number of respondents did not want to see the distinction abolished at all. The main reason given was that the two procedures are used for different reasons. Respondents felt that the distinction should remain and a number pointed out that the introduction of Rule of Court 58.12 now allows transfer between Petition Actions and Ordinary Actions. This, these respondents felt, means that the reasoning behind abolishing the distinction no longer exists.

8.50 Other comments included the need to retain the advantages of petition procedure, especially flexibility, few rules and fixed steps, following any merger of the procedures. There was also a request for consultation on the detail of these proposals. A respondent from the solicitors group reported that their members had mixed views and suggested:

> "It may be that the solution is not to abolish the distinction, but to introduce an entirely new procedure which allows for all remedies to be sought in a single form of process."

8.51 The consultation went on to ask, at Question 29: 'Do you foresee any unintended consequences for this change?'

8.52 The table below shows that most of those who gave an answer did not foresee any unintended consequences. Twenty-two said no; a further two said no with qualifications. Seven respondents, across various groups, said that they did foresee unintended consequences and one did not give a definitive reply but made other comments. The remainder (83) did not address this question.

Table 8.5 Whether foresee any unintended consequences for this change

Respondent group	Yes	No	No Qualified	Other	No response
Individual Legal (12)	1	4	-	-	7
Other Individual (4)	1	1	-	-	2
Advocacy / Advice (15)	1	1	-	-	13
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	-	2	-	-	4
Insurance / Insurer groups (6)	-	1	-	-	5
Judiciary and Judicial Bodies (6)	-	1	-	-	5
Local authorities (7)	1	1	-	-	5
Public Bodies (5)	-	-	-	-	5
Solicitors, groups representing or providing access to Solicitors (24)	1	9	2	-	12
Stables or groups representing Advocates (9)	2	2	-	1	4
Unions (7)	-	-	-	-	7
Other organisations (9)	-	-	-	-	9
Total (115)	**7**	**22**	**2**	**1**	**83**

8.53 Eleven respondents, many from one of the legal groups, commented.

8.54 Amongst those who did foresee unintended consequences, several respondents commented that this may not be suitable for judicial review procedures. An advocacy or advice group respondent commented:

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

8.55 The need for detailed analysis of current uses and procedures was seen as essential in ensuring no unintended consequence as was the need for the rules to be drafted very carefully.

8.56 There were suggestions that the work involved, both before and following any changes, would lead to a significant workload for the Civil Justice Council; this would need to be adequately resourced.

8.57 The consultation then asked, at Question 30: 'What impact do you think these proposals will have on you or your organisation?' and 24 commented. Many said that there would be no, or minimal, impact.

8.58 Several respondents anticipated positive impacts; these were identified mainly as potential savings in time and costs due to increased efficiency. There were also comments that the proposals would simplify the procedures making things more straightforward for all involved. An individual-legal respondent commented: "This is yet another example of a contribution to a more streamlined system which ought to facilitate greater use of standard documents with consequential saving of time and therefore expense."

8.59 The small number who identified negative impacts included a Local authority respondent who felt cases involving judicial review might suffer delays. A respondent from the Advocates group commented that there will be "work involved in updating procedural knowledge once the changes are in place".

New procedures for dealing with vexatious litigants.

8.60 The SCCR recommended that: '…the civil courts should have powers similar to those in England and Wales in relation to civil restraint orders which would provide for a graduated system of orders regulating the behaviour of parties who persist in conduct which amounts to an abuse of process.'

8.61 The Scottish Government proposes to introduce a new procedure to replace the Vexatious Litigants Act 1898. This procedure will give the Court of Session and sheriff courts power to grant a civil order regulating the behaviour of parties where their conduct is seen as abuse of process by the Court.

8.62 Question 31 in the consultation asked respondents: 'Do you agree that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants?'

Table 8.6 Whether agree that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	3	2	-	1	6
Other Individual (4)	2	-	-	-	2
Advocacy / Advice (15)	2	1	-	1	11
Arbitration / Mediation (5)	-	-	-	-	5
Business (6)	2	1	-	-	3
Insurance / Insurer groups (6)	5	1	-	-	-
Judiciary and Judicial Bodies (6)	5	-	-	-	1
Local authorities (7)	4	1	-	1	1
Public Bodies (5)	3	-	-	-	2
Solicitors, groups representing or providing access to Solicitors (24)	18	-	1	-	5
Stables or groups representing Advocates (9)	5	-	-	1	3
Unions (7)	-	-	-	-	7
Other organisations (9)	1	-	-	-	8
Total (115)	**50**	**6**	**1**	**4**	**54**

8.63 As shown in the table above, almost all of those who gave an answer agreed that it should; 50 agreed outright while a further six agreed with qualifications. Four respondents did not give a definitive reply but made other comments. The remainder (54) did not address this question.

8.64 One respondent, from the solicitors group, implied disagreement in their response, commenting that they see no need for the proposals: "Unless there is a significant rise in party litigants who turn out also to be genuinely vexatious we consider the current law to be sufficient for the Courts' purposes."

8.65 There were additional comments in a further 38 responses; most from those who agreed that the new procedure would ensure that courts are able to deal appropriately with vexatious litigants. Several of these respondents simply repeated their agreement or commented that the proposals will improve on the current situation. For example:

> "We consider that the courts would better equipped to deal with vexatious litigants as well as at a reduced cost."
>
> (other)

> "We are of the view that any extension of the ability to restrict unnecessary and vexatious litigation by vexatious litigants is of benefit to those with genuine disputes who wish to use the Scottish court system."
>
> (public body)

8.66 A small number, mainly from the solicitors group, also commented on their support for the proposal that the court should be able to take into account active or historic proceedings in other jurisdictions.

8.67 A number of respondents, mainly from the solicitors group, commented that the proposals will be beneficial as the number of cases involving party litigants is increasing.

8.68 A respondent from the advocates group made the following suggestion:

> "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."

8.69 Some respondents who agreed that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants also voiced some concerns. There was concern that the success of these proposals would depend on the judiciary being willing to use the new powers.

8.70 Several respondents commented on the need to ensure access to advice and representation and the need for an appeals process. The need to ensure that any changes are compatible with Article 6 of the ECHR was raised by one individual-legal respondent.

8.71 There was also a suggestion that the reasons behind why litigants bring a vexatious claim should be considered.

8.72 Respondents who did not give a specific response commented that they were unable to do so as there insufficient detail and/or there are no draft clauses to comment on.

8.73 Thirty-seven respondents answered the final question, Question 32, in relation to vexatious litigants which asked: 'What impact do you think these proposals will have on you or your organisation?' Several of these respondents said that there would be no, or minimal, impact.

8.74 Most other respondents who commented said that there would be a positive impact, either in general or for specific areas of their work. These areas included reduced expenditure for organisations who are faced with defending against vexatious claims. As one local authority respondent put it:

> "The implementation of these proposals would save our organisation money, ensuring that we spend resources defending actions which are in the public interest. Time would be saved from dealing with vexatious litigants."

8.75 Many respondents highlighted the benefits to the courts system in terms of a reduction in administration and consequent savings in time and other resources. Others commented on the benefits to the business of the courts as well as to defenders and to other court users. For example:

> "If vexatious litigants are restricted earlier, this means the whole court system will be speeded up."
>
> (solicitor)

> "We think that these new procedures will enable us to concentrate fully upon appropriate cases, rather than being side-tracked by vexatious litigants."
>
> (insurance or insurer group)

8.76 Two respondents, from the judiciary and individual-legal groups, commented that the proposals do not appear to benefit Employment Tribunals.

Scotland-wide enforcement of interdict and interim orders.

8.77 At present, sheriff court orders granting interim interdict are enforceable only in the sheriffdom in which they are granted. The Scottish Government agree with the SCCR that 'an interdict or other interim order granted in one sheriff court shall be enforceable throughout Scotland'.

8.78 The consultation asked for views on enforcement and also on how the same Scotland-wide enforcement could also be applied to interim orders and warrants. Question 33 asked: 'Do you think that an order for interdict should be capable of being enforced at any sheriff court in Scotland?'

8.79 As shown in the table below, almost all of those who gave an answer agreed that it should; 53 agreed while a further eight agreed with qualifications. One respondent indicated that they did not support this proposal. The remainder (53) did not address the question.

Table 8.7 Whether think that an order for interdict should be capable of being enforced at any sheriff court in Scotland

Respondent group	Yes	Yes Qualified	No	No response
Individual Legal (12)	4	1	-	7
Other Individual (4)	2	-	-	2
Advocacy / Advice (15)	5	1	-	9
Arbitration / Mediation (5)	-	-	-	5
Business (6)	2	-	-	4
Insurance / Insurer groups (6)	6	-	-	-
Judiciary and Judicial Bodies (6)	5	-	-	1
Local authorities (7)	6	-	-	1
Public Bodies (5)	1	1	1	2
Solicitors, groups representing or providing access to Solicitors (24)	15	3	-	6
Stables or groups representing Advocates (9)	5	2	-	2
Unions (7)	-	-	-	7
Other organisations (9)	2	-	-	7
Total (115)	**53**	**8**	**1**	**53**

8.80 Further comments were noted in 22 responses; a small number of these simply restated their support for the proposals.

8.81 Most of the other respondents who replied at this question gave their reasons for saying that an order for interdict should be capable of being enforced at any sheriff court in Scotland. A number of respondents commented that this would be a simpler, more convenient, sensible and efficient way if enforcing orders. A respondent from the judicial group felt that: "The appropriate court for enforcement, such as an action for breach of interdict, should be the court in whose jurisdiction the alleged breach or need for enforcement has arisen."

8.82 Respondents also felt it would give more certainty that interdicts could be enforced. Responses, from some in the solicitors group, highlighted that domestic abuse cases in particular would benefit from this proposal:

> "Ours is a small geographical jurisdiction and families are ever more mobile particularly in difficult economic times or in relationship breakdown. Accordingly the ability to enforce interim orders throughout Scotland can only enhance the beneficial or protective nature of the order."

8.83 A small number of respondents from legal groups cautioned that the sheriff court before which the application is made must have jurisdiction. There was a request that the legal basis for sheriffs accepting jurisdiction be clearly laid out. There was also a suggestion in relation to the caveat system (offering protection when one party tries to gain an interdict against the party in whose name the caveat is lodged) for caveats to be allowed to be filed Scotland-wide.

8.84 An organisation from the public bodies group implied that they did not support this proposal, saying:

> "It could be suggested that giving all sheriffs the power, on cause shown, to grant an interdict over a geographical area wider than their own sheriffdom could be of assistance in certain cases. There is no concomitant need to extend the number of courts that can then deal with court orders in that case. The power to deal with that interdict should remain with the originating court unless and until a change in circumstances make it more appropriate to transfer the matter to another court and this can be done adequately under existing arrangements."

8.85 Respondents were then asked: 'Should interim orders and warrants have similar all-Scotland effect and be capable of enforcement at any sheriff court?' (Question 34).

8.86 The table below shows that most of those who gave an answer agreed; 53 agreed while a further five agreed but with qualifications. Two respondents did not agree. The remainder (55) did not address this question.

Table 8.8 Whether interim orders and warrants should have similar all-Scotland effect and be capable of enforcement at any sheriff court

Respondent group	Yes	Yes Qualified	No	No response
Individual Legal (12)	5	-	1	6
Other Individual (4)	1	1	-	2
Advocacy / Advice (15)	5	-	-	10
Arbitration / Mediation (5)	-	-	-	5
Business (6)	2	-	-	4
Insurance / Insurer groups (6)	6	-	-	-
Judiciary and Judicial Bodies (6)	5	-	-	1
Local authorities (7)	6	-	-	1
Public Bodies (5)	-	1	1	3
Solicitors, groups representing or providing access to Solicitors (24)	15	2	-	7
Stables or groups representing Advocates (9)	6	1	-	2
Unions (7)	-	-	-	7
Other organisations (9)	2	-	-	7
Total (115)	**53**	**5**	**2**	**55**

8.87 Twenty-five respondents commented further at this question; again, a small number of these simply restated their agreement. Most other respondents simply referred to or repeated their comments from the previous question.

8.88 Finally in this section, Question 35 asked: 'What impact do you think these proposals will have on you or your organisation?' and 35 respondents commented; several said that there would be no or minimal impact.

8.89 Most other comments were positive. Again, many respondents commented that the proposals will save court time and resources. Cost savings to businesses were also identified, these might include seeking orders from the sheriff court rather than the Court of Session.

8.90 Others suggested that the proposals would simplify the system or make it more efficient One local authority respondent felt that: "… the implementation of the proposals would increase the impact and effectiveness of Interim Orders, which would be beneficial to this organisation."

8.91 Once again, cases involving domestic abuse were highlighted with an advocacy or advice group respondent commenting that this proposal will benefit those experiencing domestic abuse.

8.92 A respondent from the solicitors group discussed the benefit to any persons requiring interdicts; these proposals would "greatly enhance the protection available to them". In addition, this respondent said the proposals "will also avoid unnecessary costs in raising proceedings in different sheriffdoms and will provide a cost effective way for those seeking the protection of the Law in obtaining the relevant protective orders". Another, from the same group, felt it would help their clients in that they would face less travel if enforcement could happen locally.

8.93 Commenting on potential savings to the Legal Aid fund, a public body said that if the proposals led to fewer cases in the Court of Session then there would be savings "as Court of Session protective orders cost more than sheriff court orders with the relevant figures from 2011/12 being £4,046 for a Court of Session protective order as compared to £1,335 for a sheriff court protective order".

8.94 One local authority respondent anticipated the need for "greater co-operation and information sharing across local authorities to ensure that knowledge of the existence of such orders is appropriately held and can be acted upon if necessary".

8.95 The need for specific detail to be set out before any Scotland-wide orders are introduced was stressed by a respondent from the solicitors group. They outlined a potential negative impact for specialist areas in that not all sheriffs have specialist expertise.

In summary, views on the proposals in this section were mainly positive.

The improvement of civil procedure generally in the Court of Session and sheriff courts.
Most respondents giving an answer agreed 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.

Most respondents saw no 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.

Many respondents noted that these proposals will have little impact on them or their organisation. There were also comments on general positive impacts such as a more efficient civil justice system. There was some concern that the proposals will need to be implemented and managed correctly for this to happen. The need for consultation and to involve stakeholders was also mentioned.

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.
Most respondents giving an answer agreed that a single judge of the Inner House should be able to consider the grounds of an appeal or motion. Respondents identified savings in costs and time that, they felt, would result from this proposal.

Most impacts identified by respondents were positive and these included that proceedings will proceed more quickly and that the number of vexatious claims may be dismissed at an earlier point.

The abolition of the distinction between ordinary and petition procedure in the Court of Session.
Most respondents giving an answer agreed that the distinction between ordinary and petition procedure should be abolished.

Respondents did not foresee any unintended consequences for this change. However, there was some concern that this may not be suitable for judicial review procedures.

Most impacts identified by respondents were positive, these were mainly the potential for savings in time and costs.

New procedures for dealing with vexatious litigants.
Most respondents giving an answer agreed that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants. There was concern from a small number of respondents that the success of these proposals would depend on the judiciary being willing to use the new powers

Most impacts identified by respondents were positive; respondents commented on reduced expenditure for organisations who are faced with defending against vexatious claims.

Scotland-wide enforcement of interdict and interim orders.
Most respondents giving an answer thought that an order for interdict should be capable of being enforced at any sheriff court in Scotland. Respondents commented that this would be a simpler, more convenient, sensible and efficient way if enforcing orders and that it would give greater certainty that interdicts could be enforced. There were comments that domestic abuse cases in particular would benefit from this proposal.

Most respondents giving an answer said that interim orders and warrants should have similar all-Scotland effect and be capable of enforcement at any sheriff court.

Again, most impacts identified by respondents were positive with respondents anticipating savings in court time and resources as well as cost savings to businesses.

9 ALTERNATIVE DISPUTE RESOLUTION

9.1 The consultation paper notes that ADR covers methods of resolution of disputes that do not involve going to court. The advantages of this approach can be that it avoids the delay, stress and expense of litigation. Mediation and arbitration are the two best known methods of dispute resolution in Scotland.

9.2 The SCCR perceived ADR to be 'a valuable complement to the work of the courts' although the Review did not recommend that primary legislation might be used to promote ADR. In January 2011, the final report of the Civil Justice Advisory Group recommended that 'Court rules should be introduced which would encourage, but not compel, parties to seek to resolve their dispute by mediation or another form of alternative dispute resolution, prior to raising a court action'.

9.3 The Scottish Government is supportive of the use of ADR in appropriate cases and sections 85 and 86 of the draft Bill make clear that the Court of Session will have an unambiguous, clear power to consider and make rules which will encourage the use of ADR in circumstances where it is felt that settlement might be achieved quicker than by court process. It is intended this will apply to both cases where court action has already been instigated and cases where proceedings are still being considered.

9.4 Question 36 asked: 'Do you think that ADR should be promoted by means of court rules?' As the following summary table shows, higher numbers of respondents were positive about the promotion of ADR by means of court rules than were not. There was agreement across most groups, with the exception of unions and individuals. The group showing less overall agreement was the solicitors group where almost as many disagreed as agreed. A significant number of respondents qualified their support.

Table 9.1 Whether ADR should be promoted by means of court rules

Respondent group	Yes	Yes Qualified	No	Other	No response
Individual Legal (12)	4	3	1	-	4
Other individual (4)	-	-	-	-	4
Advocacy / Advice (15)	1	6	1	-	7
Arbitration / Mediation (5)	4	1	-	-	-
Business (6)	2	-	1	-	3
Insurance / Insurer groups (6)	4	2	-	-	-
Judiciary and Judicial Bodies (6)	1	2	1	-	2
Local authorities (7)	5	-	-	-	2
Public Bodies (5)	2	-	-	-	3
Solicitors, groups representing or providing access to Solicitors (24)	4	7	9	1	3
Stables or groups representing Advocates (9)	-	3	4	-	2
Unions (7)	-	-	1	-	6
Other organisations (9)	1	1	-	1	6
Total (115)	**28**	**23**	**18**	**2**	**42**

9.5 Sixty-seven respondents provided further commentary at this question. A significant number of respondents were supportive of this proposal and noted their support for promoting a policy of ADR without recourse to litigation where possible or the encouragement of ADR as a legitimate attempt to setting a case. There were some calls for ADR to be used as early as possible in the dispute process. Another organisation commented:

> "We agree ADR should be promoted. The [respondent] promotes ADR by strongly recommending mediation and other techniques. We recommend as not only is it quicker and less costly but such approaches produce greater perception of ownership and fairness around outcomes. Hopefully ADR would make the system less adversarial which in turn could positively lead to a reduction in complaints".

9.6 Importantly, over half of those in agreement noted that ADR should not be compulsory or mandatory and/or that there should not be sanctions to compel individuals to make use of ADR. There were also a small number of comments that if ADR became mandatory, it could be questionable under the terms of the European Union Convention on Human Rights. Many of these respondents were within the legal or advocacy arenas. As noted by one advocacy / advice organisation,

> "We believe that court rules should be introduced as soon as possible which would encourage, but not compel, parties to seek to resolve their dispute by mediation or another form of alternative dispute resolution, prior to raising a court action."

9.7 A significant number of respondents noted that ADR is not appropriate in some types of cases and personal injury cases received the most recognition by these respondents. A few respondents noted that in personal injury cases there is already use of a pre-action protocol, a statement of values of claim within the Court Rules and pre-trial meetings, thus negating the need for an additional layer of administration and expense which would be created by ADR.

9.8 While a number of respondents were against the potential for financial sanctions to be imposed, a smaller number noted the potential for the imposition of costs sanctions on a party who is seen to unreasonably decline mediation.

9.9 A few respondents referred to the Sheriff Court Rules Council which proposed this in 2007 or to the introduction of mandatory pre-action protocols as recommended by Lord Gill in his review. There was also mention of a recent Consumer Focus Scotland report: 'Facing up to Legal Problems' which was perceived to be of direct relevance to this proposal.

9.10 Other issues raised by small numbers of respondents at this question included:

- People need better information about their options early on through better integrated advice and information services
- There should be respect for a party who wishes to litigate;
- That ADR should not be promoted within the rules governing court procedure;
- The courts are not necessarily best placed to decide if a dispute is suitable for ADR;
- A desire for the Scottish Government to ensure provisions are made in the Bill for a new justice system providing information and advice embedded within dispute resolution options including alternative to litigation;
- Mediation can be costly and add an additional layer of expense to the process of making a claim.

9.11 Finally, in this chapter, Question 37 asked: 'What impact do you think these proposals will have on your or your organisation?' Forty-eight respondents provided further comment.

9.12 Many of these respondents reiterated points made at Question 36. Two key impacts of these proposals were perceived to be that it is a more cost effective approach to adopt and that it enables quicker resolution of matters than through litigation. These comments were made primarily by respondents within the insurance and legal sectors. Smaller number of respondents also referred to this as an improvement for parties to obtain access to justice, although again reiterating that this should not be compulsory.

9.13 A small number of respondents also noted that use of ADR would be of benefit to courts who will be freed up to deal with disputes that are not suited to ADR or that there will be increased opportunities for solicitors to become involved in ADR work.

9.14 Once again, a few respondents noted that ADR should not be used in personal injury cases or cases involving domestic abuse.

9.15 Some respondents noted this would have no or little impact on them or their organisation. These were primarily from within the legal sector.

In summary, higher numbers of respondents were positive about the promotion of ADR by means of court rules than were not.

A significant number of respondents qualified their support with many noting that ADR should not be compulsory or mandatory and/or that there should not be sanctions to compel individuals to make use of ADR.

A significant number of respondents noted that ADR is not appropriate in some types of cases, especially personal injury cases.

Impacts identified by respondents were that this is a cost effective approach that enables resolution of matters more quickly than litigation.

10 ASSESSING IMPACT

10.1 A final section of the consultation invited respondents to highlight any potential impacts of the proposals as a whole and any broader equality or economic issues as well as comments on the legislation itself.

10.2 Forty-three respondents made comments related to equalities; additionally a small number of respondents noted that they saw no impacts in this respect. Some comments related solely or mainly to positive impacts. Others referenced concerns expressed in individual earlier chapters.

10.3 Reiterating themes from earlier chapters a number of respondents commented that the approach to access to automatic sanction for counsel in the sheriff court will adversely impact on certain pursuers and on advocates.

10.4 There was a suggestion that increased use of Mediation would impact positively on the public and the public purse through quicker and less costly resolution of family disputes.

10.5 Geographical accessibility was cited as an issue that may impact adversely, particularly in relation to a personal injury court. Further, one individual-legal respondent commented “People who are disabled, elderly or living in Rural Scotland will be adversely affected unless the summary sheriff has a peripatetic role”.

10.6 A number of respondents commented that there is no evidence of a Children’s Rights Impact Assessment having been undertaken for the proposals and the need to do so.

10.7 One respondent commented that there may be issues under the European Convention of Human Rights (ECHR) relating to the impact of these proposals on the rights of women, children and young people experiencing domestic abuse under Article 2 (Right to Life), Article 3 (Prohibition of torture), Article 6 (Right to a fair trial) and Article 8 (Right to respect for private and family life). This respondent, and others, identified the need for the Scottish Government to carry out and publish an assessment of the combined impact of reforms to avoid unforeseen and unintended adverse impact on access to justice and those vulnerable people whom the reforms are intended to benefit.

10.8 Another advocacy organisation noted that, at present, the court system is not ‘fit for purpose’ for deaf people.

10.9 Twenty-seven respondents made comments related to economic impacts, including three respondents who noted that they saw no impacts in this respect. Some comments related solely or mainly to positive impacts and, as with equalities, others referenced concerns expressed in individual earlier chapters. Key positive impacts mentioned were the reduction of costs or making costs more proportionate.

10.10 One respondent in the judiciary group commented that the consultation did not appear to include financial assessments and detailed cost analysis and highlighted the importance of such results being made available before the proposals are further considered and progressed.

10.11 A respondent in the solicitors group highlighted concerns that the introduction of the third tier may result in a reduction of fees to solicitors who are undertaking Family Law work. The respondent commented: "It is imperative that legal aid rates are not reduced as this could result in difficulties with access to justice as many solicitors may then not be able to undertake such work and clients would then not be able to access solicitors who can provide legal aid".

10.12 Similarly, a respondent in the arbitration/mediation group commented: "There will require to be clarity in connection with how Mediators fees are paid and what rates are suitable for the payment of Mediators who undertake Mediation on a Legal Aid basis."

10.13 Some concern was expressed over increased costs to courts, particularly in smaller courts, if a summary sheriff were to deal with certain types of cases, and a sheriff to deal with others, more judges might be required to cover each court. A small number of respondents anticipated that on balance there might be cost savings to local authorities.

10.14 Thirty respondents offered comments on legislation, including four who answered "none" and some reiteration of earlier points. Some comments were extremely lengthy and detailed and some of the main points included related to:

- Placing an obligation on the Court to make rules, rather than Sections 85 and 86 of the draft Bill which provide that the Court of Session may make, by Act of Sederunt, provision to "encourage settlement of disputes and the use of alternative dispute resolution procedures".
- Considering introduction of a clear 'legitimate interest' test that ensures Aarhus compliance.
- Considering appointment of a Commission to explore and establish the best model for a specialised environmental tribunal in Scotland.
- Reviewing costs and potential methods for minimising costs in Aarhus cases.
- Ensuring Aarhus (and PPD) compliance by introducing one way cost shifting for all environmental cases where there is a public law point to be answered.
- Removal of Regulation 15, and the introduction of a mechanism to enable community groups to access legal aid to facilitate Aarhus – and Public Participation Directive – compliance.
- Giving consideration to setting up a panel of approved senior planning QCs who can be drawn upon to sit as deputy judges, deciding permission applications, when other judicial resources are unavailable.
- Raising the simple procedure ceiling to £10,000.
- Reviewing the proposal to give statutory content to the function of honorary sheriff.
- Ensuring that the process for appointment of honorary sheriffs is transparent and objective.

- Consideration that the Court of Session is given a power to “call in” cases from the sheriff court.
- Reviewing whether each provision in the Bill should be a matter for parliament or for the rule-making power of the Court.
- Reviewing the introduction of a three month time bar on judicial review cases.
- Creating certainty that 'commercial' will be a specialist category for the sheriff court cases.
- Ensuring that part-time or retired individuals receive the same remuneration as full time colleagues for carrying out the same judicial function.
- Giving consideration that, in section 61 of the Bill, the right to jury trial should be restricted to the causes in section 11 of the Court of Session Act 1988.
- Regarding Section 86 (Power to regulate procedure etc. in the sheriff court and Sheriff Appeal Court) give consideration that other than the most straightforward of appeals on procedural points, and/or where parties are in agreement as to disposal, the quorum should exceed that of a single judge.
- Consider referrals to the Children’s Hearing System where parents are not promoting the needs of children to have ongoing and meaningful relationships with both parents post-separation.
- Re section 74(1) of the draft bill, review the proposal to exclude the existing law relating to admissibility from simple procedure.
- Providing further guidance on implementation of changes.
- Providing clarification on section 86 (l) that gives the Court of Session power to provide for the representation of parties by non-lawyers.

11 OTHER COMMENTS

11.1 Forty-four respondents provided additional comments in their consultation response.

11.2 Many of these organisations included background information on their organisation to help set the context in which they were responding. Some noted that they were focusing on a specific part of the consultation paper in their response.

11.3 There were some comments in support of the proposals and some respondents welcomed the opportunity to respond to the consultation.

11.4 Many of these organisations also reiterated points covered within their consultation response and these included references to:

- Concern over how the proposals would be introduced, how they would be implemented or requests for more detailed analysis;
- Access to justice and an inequality of arms of representation;
- Personal injury cases with a value of less than £5,000 should go before the proposed specialist personal injury court and individuals should be entitled to representation by counsel;
- A need for more of a focus on ADR or a commitment to a whole system approach, with access to fully integrated advice and with a person-centred approach to solving legal problems;
- A system that is user-friendly; with a culture change within the system to help bring that about;
- Concern over court closures, particularly for those living in rural areas;
- Concern over a potential increase in workloads;
- Summary sheriffs should have specialism in specific areas or that designated sheriffs should be appointed;
- Concern over the proposed three month time limit for judicial review.

11.5 A small number of respondents noted they had consulted with members in preparing their response to this consultation. A small number also made reference to other Reviews that have been carried out; or other documentation they felt was of relevance to their submission.

11.6 Other comments made by small numbers of respondents were as follows:

- The consultation does not address the areas of administrative justice and tribunals;
- The consultation paper does not tackle the issue of substantive review;
- Concern that the proposals within the consultation paper are insufficient to bring about compliance with the Aarhus Convention.

12 SUMMARY

12.1 There were 115 responses to the consultation; this included 16 individuals and 99 organisations.

12.2 There was a very clear majority support for almost all proposals and concepts detailed in the consultation.

12.3 Most respondents who answered agreed:

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

- 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
- That the Court of Session should retain concurrent jurisdiction for all family cases
- That the Court of Session should retain concurrent jurisdiction in some other area(s)

Creating a new judicial tier within the sheriff court

- That the term 'summary sheriff' adequately reflects the new tier and its jurisdiction
- That the qualifications for appointment as a summary sheriff should be the same as that for a sheriff
- The proposed competence of summary sheriffs in family cases
- That summary sheriffs should deal with referrals from children's hearings
- 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

Creating a new Sheriff Appeal Court

- That criminal appeals should be held in a centralised national appeal court
- That civil appeals should be held in the Sheriff Appeal Court sitting in the sheriffdom in which they originated
- That the Sheriff Appeal Court should be composed of appeal sheriffs who are sheriffs principal and sheriffs of at least five years' experience

Creating a specialist personal injury court

- The establishment of a specialist personal injury court experience
- That civil jury trials should be available in the specialist personal injury court

Improving judicial review procedure in the Court of Session

- That the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases
- That these proposals to amend the judicial review procedure will maintain access to justice

Facilitating the modernisation of procedures in the Court of Session and sheriff courts

- 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
- That there are no 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
- That a single judge of the Inner House should be able to consider the grounds of an appeal or motion
- That the distinction between ordinary and petition procedure should be abolished
- That they do not foresee any unintended consequences for this change
- That the new procedure will ensure that courts are able to deal appropriately with vexatious litigants
- That an order for interdict should be capable of being enforced at any sheriff court in Scotland
- That interim orders and warrants should have similar all-Scotland effect and be capable of enforcement at any sheriff court

Alternative Dispute Resolution

- That ADR should be promoted by means of court rules

12.4 Views were mixed in relation to the following:

Improving judicial review procedure in the Court of Session

- The three month time limit for judicial review claims to be brought

Creating a new judicial tier within the sheriff court

- Whether summary sheriffs should have powers in other areas of criminal jurisdiction, in addition to summary crime

12.5 The impacts of some of these proposals vary according to different respondent groups. There is a relatively consistent and recurring theme in early chapters related to potentially adverse impacts on the independent bar in Scotland. For some respondents there is felt to be a related impact of inequality of arms; for others many proposals are expected to facilitate quicker and less cost prohibitive access to justice on a consistent basis.

12.6 Almost all impacts linked to facilitating the modernisation of procedures in the Court of Session and sheriff courts were thought to be positive.

APPENDIX

APPENDIX 1: LIST OF ORGANISATIONS

Organisation name
Advocacy / advice organisations
Castlemilk Law and Money Advice Centre
Citizens Advice Scotland
Clydesdale Action on Asbestos
Families Need Fathers Scotland
Homeless Action Scotland
JUSTICE Scotland
Money Advice Scotland
Scottish Action on Asbestos
Scottish Child Law Centre
Scottish Council on Deafness
Scottish Women's Aid
Shelter Scotland
Stepchange Debt Charity Scotland
Victim Support Scotland
Which?
Arbitration / mediation organisations
CALM
Core Solutions Group Ltd
Scottish Arbitration Centre
Scottish Family Law Arbitration Group
Scottish Mediation Network
Businesses
Asda
Federation of Small Businesses
Gladman Developments
Network Rail Infrastructure
Royal Bank of Scotland
SSE
Insurance / insurer groups
Association of British Insurers
Aviva Insurance
AXA Insurance
esure Group
Forum of Scottish Claims Managers
LV=

Judiciary and judicial bodies
Part-time Sheriffs' Association
Scottish Committee of the Administrative Justice and Tribunals Council (AJTC)
Senators of the College of Justice
Sheriffs' Association
Sheriffs Principal
The Council of Employment Judges
Local authorities
East Lothian Council
Falkirk Council
Glasgow City Council
Highland Council
North Ayrshire Council
North Lanarkshire Council
Stirling Council
Public bodies
HMRC
Judicial Appointments Board for Scotland
Scottish Children's Reporter Administration
Scottish Court Service
Scottish Legal Aid Board
Solicitors/ groups representing or providing access to solicitors
Association of Personal Injury Lawyers (APIL)
Brodies LLP
cl@n Childlaw
Davidson Chalmers LLP
Digby Brown LLP
Drummond Miller LLP
DWF Biggart Baillie
Family Law Association in Scotland
FOIL (The Forum of Insurance Lawyers)
Irwin Mitchell Scotland LLP
Lawford Kidd Personal Injury Solicitors
MDDUS
Medical Protection Society
Morisons LLP
Morton Fraser LLP
Motor Accident Solicitors Society (MASS)
Paisley Faculty of Procurators
Pinsent Masons LLP
Royal Faculty of Procurators in Glasgow

Simpson and Marwick
SKO Family Ltd
The Law Society of Scotland
Thomsons Solicitors
Thorntons Law
Stables / groups representing advocates
Advocates Family Law Association
Ampersand Stable of Advocates
Axiom Advocates
Compass Chambers
Society of Solicitor Advocates
The Faculty of Advocates
The Hastie Stable, Faculty of Advocates
The Murray Stable, Immigration Practitioners Group
Westwater Advocates
Unions
PCS Union: Scottish Courts Branch
Public and Commercial Services Union (PCS)
STUC
The National Union of Rail, Maritime and Transport Workers (RMT)
UNISON Scotland
Unite
USDAW
Other organisations
Centre for Excellence for Looked after Children in Scotland (CELCIS)
Friends of the Earth Scotland
RICS
RSPB Scotland
Royal Town Planning Institute Scotland
Scottish Legal Complaints Commission
Society of Messengers at Arms and Sheriff Officers
Scotland's Commissioner for Children and Young People
The Scottish Human Rights Commission

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