

Justice Committee
Courts Reform (Scotland) Bill

Written submission from the Advocates Family Law Association

The Advocates Family Law Association is composed of counsel who regularly practise in the area of family law in the Court of Session and the sheriff court. The Association provided a response document, dated 30 April 2013, to the Court Reform consultation paper. It remains the view of the Association that it is critically important to retain the Court of Session's jurisdiction in family proceedings. Any restriction in the jurisdiction of the Court of Session would have the effect of limiting access to justice in an area of law which involves vulnerable adults and children. It would affect access to justice and limit choice for all citizens in relation to sensitive areas of their private life at a time of distress. The existing system works well, with most cases raised at sheriff court level. Examples of cases which are appropriately raised in the Court of Session and which should continue to competently be raised there include the following:

- cases involving important points of law (e.g. where an authoritative interpretation of legislation or uncertain precedent is required)
- high value cases (such cases cannot necessarily be determined from the "sum sued for")
- cases involving complex commercial valuations (many Court of Session cases involve forensic accountancy in relation to business entities worth many millions of pounds)
- international cases i.e. cases where the spouses are in different countries and/or there is property in several countries
- cases involving figures in public life
- cases where a local connection may lead to embarrassment for parties
- where the Court of Session is the only court with jurisdiction to hear the case (i.e. where no sheriff court has jurisdiction to hear the case, such as where neither party is resident in Scotland)

The comments made below are subject to the Association's primary position that the Court of Session retains unlimited jurisdiction in family law proceedings.

Against that background, the Association makes the following comment in respect of particular sections of the Bill:

Section 34 - Judicial Specialism

- The Association agrees in principle that judicial specialism is a positive reform. We are of the view that family law would be an appropriate subject matter for judicial specialism, providing that any specialists are fully and continuously trained. We do, however, have concerns about the width of the provision and in particular the lack of specification inherent in the words "value or such other criteria" upon which the Lord President may determine the categories of specialism (section 34(2)) further to the actual subject matter of a case.

Section 39 - Exclusive Competence

- The approach in the Bill, which excepts all family proceedings from the exclusive competence of the sheriff court (section 39(3)), is welcome for the reasons explained above and should prevail.
- We respectfully ask that the exception in section 39(3) that leaves aliment within the exclusive competence of the sheriff be reconsidered. It is our view that the treatment of aliment differently to other family law proceedings in this respect is misguided. Council Regulation (EC) No 4/2009 applies to jurisdiction and enforcement in matters of maintenance. Complex issues of international private law may arise in relation to jurisdiction, and as to the relationship between the autonomous European concept of “maintenance” (which can include broader aspects of financial provision) and aliment. Further, the UK has not, as yet, accepted the 2007 Hague Protocol, leaving Scottish orders at a disadvantage in respect of enforcement elsewhere. If the UK does ratify the Protocol then the court determining maintenance may have to decide on and apply foreign law. The Bill as drafted has the potential to leave matters in lower courts that will not be well placed to deal with the exigencies of international cases.
- There are in any event high value and very complex cases relating to aliment. These may, for example, in our experience involve detailed considerations in the field of forensic accountancy to make findings in relation to resources.
- There are also cases where an action for aliment is raised first, with a crave or conclusion for divorce being amended in when further information is available. The inclusion of aliment in the exclusive jurisdiction bracket may, in our view, push people into having to raise two separate actions or raising divorce proceedings prematurely in order to be able to raise complex or high value actions in the Court of Session.
- The Bill has not taken into account that the courts will not consider child aliment at all, save in exceptional cases. The Child Support Act 1991, section 8(3) generally excludes the jurisdiction of the court, save for those cases where a parent has exceptional wealth justifying payment over and above the maximum child support, or cases where extra provision has to be made for a child with disability (which may involve complex medical evidence) or cases where educational expenses are sought. The 1991 Act does not apply where a parent is resident overseas, which means there may be complex international considerations. These are all cases where it should be open to parties to litigate in the Court of Session.
- We note that the inclusion of aliment in section 39(3) is subject to section 39(4) which allows a remit in exceptional circumstances in terms of section 88(8). We query whether this intends to be a reference to section 88(4) instead of section 88(8). We consider the “exceptional circumstances” test in section 88(4) inappropriately severe, as discussed below.

Section 71 – Proceedings for aliment for small amounts

- We are concerned that section 71, and in particular section 71(2)(a) of the Bill fails to take account of the effect of the Child Support Act 1991. The amount sought may be less than £35 per week, but this may represent a “top up” over

and above child support such that the total sums involved may be very much more. See section 8(5) - 8(7) of the 1991 Act and our comments above. The proposed measure is also insufficiently flexible. In our experience claims for aliment are regularly increased when more information about needs and resources become available in the course of proceedings. There may also be cases where claims are small, but international considerations arise, making them unsuitable for “simple procedure”. We have in mind the various procedures set out in the Maintenance Orders (Reciprocal Enforcement) Act 1972. Simple procedure is unlikely to be suitable for a provisional maintenance order made under section 3 of the 1972 Act. There is scope for international embarrassment were Convention requirements not observed.

Section 124 – List of Family proceedings

- It is our view that adoption and permanence order cases should be removed from the list of family proceedings which can competently be dealt with by summary sheriffs. The potential effect of adoption and permanence order proceedings is too severe to be suitable to be dealt with at this level.
- A new tier of sheriffs with particular skills in family law is welcome, provided that steps are taken to ensure that such sheriffs have the skill, experience and continuous training to deal with family cases and are afforded sufficient time to enable them to deal with family cases expeditiously, especially proofs which should run from day to day until concluded. At present, throughout Scotland, there is insufficient capacity in the sheriff courts (both in terms of court personnel and accommodation and even in those courts who have introduced dedicated family sheriffs) to deal with family cases timeously and in accordance with the requirements of Article 6 of the European Convention on Human Rights.
- We remain of the view that summary sheriffs with skills as criminal trial judges will not generally be the same persons as those equipped to deal with family law.
- If a family case is being dealt with by a summary sheriff it is critical that there is a mechanism allowing the summary sheriff to remit the case to a sheriff or a specialist sheriff, if it is appropriate that the case be heard at a more senior or specialised level.
- In general, whether the system will work or not depends on the specialism of the courts in family law and the facility for the more complex cases to be remitted to the Court of Session.

Section 88 - Remit of cases to the Court of Session

- The Association is of the view that it is critical to have a comprehensive system for remit of cases from the sheriff court to the Court of Session.
- We are of the view that the test of “exceptional circumstances” in section 88(4) is too high a test in relation to aliment. This may be a reflection of our general position on aliment, but as with other family proceedings the true complexity of cases often emerges after they have been raised. This may be because more information becomes available as a result of, or in the course of, the proceedings. Further, unlike many other types of action, family cases will rarely relate simply to the past. Most are dynamic. They may not be

difficult when raised, but may become so. For these reasons the test of importance and difficulty should apply, as for other cases, and there should be the possibility of appeal.

- If the Court of Session is to take responsibility for the most important and difficult cases then it would be logical for that Court to have the power to “call in” any family law case. In our experience sheriffs can be reluctant to recognise that there are complex or high value family cases that are beyond the experience and expertise of the sheriff court. If the aim of the courts reform is to allow cases to be litigated at an appropriate level then parties should be allowed to put their case for remit to the senior court.

Sections 104, 106 and 107 – Appeals

- It is our view that appeals in family law cases should remain competent in the Court of Session. The option of an appeal direct to Inner House should be preserved where a matter of law or interpretation is in issue. Cases would otherwise have to be appealed to the Sheriff Appeal Court before the Inner House, adding to expense and delay. Such delays may be hugely detrimental, for example, to children burdened with uncertainty for long periods.

Advocates Family Law Association
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