

LAY REPRESENTATION IN THE COURT OF SESSION AND THE SHERIFF COURT

Introduction

1. Sections 126 and 127 of the Legal Services (Scotland) Act 2010 amend the Court of Session's rulemaking powers so as to enable rules to be made permitting a lay representative to make oral submissions to the court on behalf of a party to the cause in any proceedings in the civil courts. The provisions arise from a recommendation of the Civil Courts Review. They are [here](#).

2. The provisions come into force on 1 September 2011.

3. It is necessary for the Court now to give consideration to whether to exercise these new powers. To this end, the Lord President has established a working group to devise an appropriate policy. This working group is chaired by Lord Pentland. Its members are drawn from the Court of Session and Sheriff Court Rules Councils and the Scottish Government. Its aim is to present policy proposals, accompanied by suitable amendments of the rules of court, to the councils by the end of October. This is with a view to amendments of the rules being made as early as possible in 2012.

4. The group has now met and reached some initial views on what the policy should be. In order that its final proposals are as well-informed as they can be, views are sought on the initial policy proposal. That is the purpose of this document.

Background

5. The existing position in the two Courts differs somewhat. The present arrangements (enabled by section 36(1) of the Sheriff Courts (Scotland) Act 1971) permit lay representatives to conduct litigation, including appearing, in summary causes and small claims in the Sheriff Court. In addition, section 7

of the Home Owner and Debtor Protection (Scotland) Act 2010 makes provision for approved lay representatives to represent debtors in repossession cases in the Sheriff Court.

6. The two Courts also take slightly different approaches to the concept of “lay assistance” (that is, the concept of a person who may assist a party litigant in court but not speak on his or her behalf). Chapter 12A of the Rules of the Court of Session requires the completion of a form containing certain statements and declarations before a person may be permitted to act as a lay assistant, whereas the amendments of the Sheriff Court rules (see rule 1.3A of the ordinary cause rules) do not. Furthermore, the Rules of the Court of Session require an application for the approval of a lay assistant to be made by motion; the Sheriff Court rules merely require a “request”.

7. The group’s aim is to make recommendations which take due account of the different circumstances of the two courts whilst maintaining, where possible, consistency of overall approach.

Analysis of the new provisions

8. The new provisions only permit the making of an oral submission by a lay person. They do not facilitate any wider ability for a non-lawyer to represent a party, such as is permitted by section 36(1) of the 1971 Act in relation to summary causes. It is noted, accordingly, that the submission of documents in support of an oral submission, such as supporting written submissions or a rule 22 note in ordinary actions in the Sheriff Court, will still require formally to be performed by the litigant. (This does not of course preclude the litigant from submitting a document prepared by the intended lay representative, although it would be the litigant who has responsibility for its terms).

9. The group also notes that the new provisions do not afford any scope for a lay person to engage in the examination of witnesses. This falls beyond the concept of an oral submission.

10. The group observes that the new provisions permit a lay person to make submissions only “when appearing at a hearing...along with a party to the cause”. Given that only natural persons can appear as parties, it is clear that the new provisions do not extend to permitting the making of an oral submission on behalf of a company or other non-natural person. The position in respect of such persons remains as recently analysed by the Second Division of the Inner House of the Court of Session in *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* [2010] CSIH 80.

11. The group considers that a lay representative must be regarded as distinct from a person affording lay assistance under the new rules recently made to that end (Chapter 12A of the Rules of the Court of Session and rule 1.3A of the Ordinary Cause Rules). In some cases a lay assistant might also be considered suitable to be a lay representative, but this would depend on the particular circumstances.

Discussion

12. Taking these points into consideration, the group discussed the policy aim of sections 126 and 127. The group took as its starting point the fact that the sections had evidently been devised to implement the recommendations in Chapter 11 of the Civil Courts Review. In particular, it was noted that the Review considered (para 51 of that chapter) that “there may be exceptional circumstances in which it would be appropriate to permit a McKenzie friend to assist a party litigant and, with the court’s permission, to address the court. The law at present is unclear and it would be desirable to clarify this for the small number of cases where such representation would help the court.” The limited nature of this reform was emphasised by the following paragraph, which said that “[t]his is not to say that parties would have a right to be represented by a McKenzie friend. Assistance and representation would be subject to the control and discretion of the court and permission would be given only if the court was satisfied that this would help. The court would

have to be satisfied as to the character and conduct of the proposed representative and would be at liberty to withdraw permission for that person to act for the party. In particular, the court would wish to be satisfied that the McKenzie friend was not offering his services for financial reward.”

13. The group was of the view that the Court should take its lead from the Review and introduce limited and controlled reform in line with the recommendations.

14. Accordingly, the group favoured adopting the test which the Review recommended, namely that the test for granting an application should be that it would “assist the court”. This differed from the test in relation to granting an application for lay assistance, which was that it should be refused “only if it would be contrary to the efficient administration of justice to grant it”. That test is appropriate given the particular role of the lay assistant. But in relation to lay representation, the test should be a somewhat tighter and more focussed one.

15. The group also favoured applying the same requirement of suitability that applies to lay assistance.

16. After discussion, the group favoured including in the rules a requirement that an application for lay representation should be made in advance of the hearing concerned. It was felt that the interests of the other party or parties needed to be protected. It was also felt that such an approach was warranted by the need for the efficient disposal of business as well as ensuring that the person was a suitable person to make an oral submission.

17. However, the possibility of an application being made on the day should not be precluded as there might be exceptional circumstances in which this was warranted. An obvious example might be where the litigant became unwell on the day of the hearing.

18. The group discussed the form which the application should take in the ordinary case where it was made in advance of the hearing. There was some resistance to the suggestion that a written motion should be required in the Sheriff Court on the basis that this would give rise to a fee, though it was difficult to see how the application could be made without a motion. It was noted that it would be open to the Scottish Government to amend the fees order if the view was taken that charging a fee was inappropriate. In the Court of Session, the model of Chapter 12A should be followed – that is, that there would require to be a motion accompanied by a suitable form.

19. The group discussed whether it would be possible in the rules to allow a standing authorisation for a lay representative in relation to all hearings in a case; or for representatives from a certain organisation in all cases. However, it was noted that it was not the intention of the power conferred by sections 126 and 127 to create a class of authorised lay representatives; and the question of whether the making of a submission by a particular person in a particular hearing would assist the court required to be judged according to the circumstances of the hearing itself.

20. The group agreed that it was appropriate for the rules to prohibit the lay representative from receiving remuneration, directly or indirectly, from the litigant. This was consistent with the position reached in relation to lay assistance. This was not intended to operate as a barrier to representation by remunerated members of advice agencies.

21. As with lay assistance, the group was of the view that:

- (a) permission to make an oral submission should be automatically withdrawn in the event of the litigant obtaining legal representation;
- (b) the court should be able to withdraw permission in the event that it considered that the test for permitting it was no longer met or that the person was no longer suitable (though this would not of course apply once the submission had commenced);

- (c) where permission was granted:
 - (i) the litigant would be permitted to show the representative any document (including a court document);
 - (ii) the litigant would be permitted to impart to the representative information without contravening prohibitions on its disclosure but the representative would then be subject to the same prohibitions;
- (d) any expenses incurred by the litigant as a result of the representation were not to be recoverable expenses in the proceedings.

Submission of views

22. Views are sought on the initial policy proposal and on any other matter which is considered relevant. Views should be directed, in writing, not later than **31 August 2011** to:

The Lord President's Private Office
Parliament House
Edinburgh EH1 1RQ

or by email to: lppo@scotcourts.gov.uk.

23. Responses will be made available to the members of the working group and also to the members of the Rules Councils. They may also in due course be published. Please indicate in your response if you do not wish it to be published.