



Scottish
Civil Justice
Council

Access to Justice Literature Review: Party Litigants, and the support available to them

This report and the materials referred to are correct as at July 2014. The Access to Justice Committee continues to review research and developments in the area of access to justice and party litigants.

Contents

1 INTRODUCTION	3
Addressing the difficulties	6
Relevant Research and Reports.....	7
Recent Developments	8
Developments in Scotland.....	8
Developments in England and Wales	10
Developments in the European Union	13
2. PARTY LITIGANTS: LEGAL CAPABILITY/ PUBLIC LEGAL EDUCATION.....	15
Relevant research and commentary	16
After the SCCR	19
Current developments.....	21
Developments in England and Wales	23
Other jurisdictions.....	24
3. PARTY LITIGANTS: SELF-HELP	25
Guidance Available to Party Litigants	27
Other jurisdictions	29
4. PARTY LITIGANTS: ADVICE AND SUPPORT SERVICES	31
In-court advice/ lay supports	31
The current landscape of advice and support services in Scotland	36
The court rules.....	39
England and Wales.....	39
5. PARTY LITIGANTS: LAY REPRESENTATION AND MCKENZIE FRIENDS.....	40
The Court of Session Rules.....	42
The Sheriff Court Rules.....	44
Provisions in the Courts Reform (Sc) Bill relating to the Court of Session and sheriff court.....	45
Lay Representation in other jurisdictions	45
England and Wales	45

Other jurisdictions	48
6. PARTY LITIGANTS: CASE MANAGEMENT	50
The SCCR Recommendations	50
Judicial case management in the Employment Tribunal (Scotland).....	51
Judicial Mediation as a case management tool in the Employment Tribunal (Scotland).....	54
Scottish Government Response to the SCCR Recommendations	55
Current developments of the SCJC	56
Case management	57
Enhanced case management.....	57
The Courts Reform (Sc) Bill	57
7. SOURCES AND BIBLIOGRAPHY	58
ANNEX A.....	63
Data on Party Litigants in the Court of Session 2011 – 2014 (end of April)	63
ANNEX B.....	64
Extracts, Report of the Civil Courts Review, Recommendations (p. 131-158).....	64
ANNEX C	67
Scottish Government Response to the Scottish Civil Courts Review.....	67
ANNEX D	69
A summary of the recommendations of the Civil Justice Council in its paper: <i>Access to Justice for Litigants in Person (or self-represented litigants)</i>	69
ANNEX E	71
PARTY LITIGANTS IN THE COURT OF SESSION: Statement of Service Standards.....	71
ANNEX F	78
CONSULTATION NOTE: Lay representation in the Court of Session and the sheriff court.....	78

1 Introduction

1. This report seeks to gain a better understanding of the problems faced by party litigants in Scotland, along with the support and advice which is available to them. People may conduct their own cases in the civil courts in Scotland without any legal representation. Those who do represent themselves, called party litigants in Scotland,¹ by nature are unlikely to be familiar with courts and court procedure and can find the prospect of conducting their case, including representing themselves before a judge, daunting and confusing. The reasons why individuals end up in court with no representation are many and varied. Litigants may choose to represent themselves or may have been forced by circumstances such as; being unaware of the help that is available, being unable to identify appropriate sources of help, no access to a lay representative, they cannot afford to pay for representation by a solicitor, have not been granted legal aid, or, after having sought legal help have being advised that there is no merit to their case.

2. The Equal Treatment Bench Book, guidance for the Judiciary in Scotland,² explains some of the general difficulties faced by party litigants and the extent of the general duty on judges and clerks of court to assist party litigants whenever it is appropriate and reasonable to do so. Most importantly, it is stated that party litigants are likely to suffer serious disadvantages compared with parties who are represented by counsel or by a solicitor. Thus, there may be major implications on the principle of access to justice when a person represents themselves in court. The general difficulties faced by party litigants is discussed in the guidance and can be summarised as follows:

- Little or no knowledge of procedure covering things like where to sit and stand and how to address the judge.
- Little or no knowledge of the law in order to formulate a claim or a defence which they may be entitled to seek.
- The court service is unable to offer legal advice or keep party litigants advised on the progress of their cases.
- They may not be skilled at expressing themselves either orally or in writing.
- They are unlikely to have any understanding of how to present evidence by the examination and cross-examination of witnesses or an understanding of the desirability of expert testimony.

3. Beyond these general difficulties which can have consequences on access to justice, there are also statutory hurdles which must be overcome by the party litigant.

¹ In England, the term is 'litigants in person'

² Judicial Institute for Scotland, [Equal Treatment Bench Book](#), (2014), Ch. 12

Statutory hurdles in the Court of Session

4. In the Court of Session, many initiating documents may only be signed by counsel, a person having a right of audience or by an agent, and may not be signed by a party litigant. Leave to proceed must first be sought from the Lord Ordinary so that the party litigant may sign the document instead.³ The decision of the Lord Ordinary is final and not subject to review. The Scottish Court Service has provided some statistical information on party litigants in the Court of Session which is included at Annex A. The number of applications made to the Lord Ordinary for leave to proceed is on average 63 per year, with 19% on average being granted. It should be noted here that there are serious limitations as to the conclusions which may be drawn from the data at Annex A, as it does not accurately reflect the number of party litigants acting in the Court of Session at any given time. The data presents the number of applications made to the Lord Ordinary to commence an action as a party litigant only and does not take into account any changes in representation thereafter. It could be that a litigant employs legal representation in order to circumvent the requirement to apply for leave to proceed and then later choose to drop their legal representative in favour of representing themselves. Conversely, a party litigant at the commencement of an action may later choose to employ legal representation.

5. In the Court of Session, party litigants are liable for the expenses and fees of witnesses that they cite.⁴ Thus, in order to cite witnesses for a proof or jury trial, a party litigant must, not later than 12 weeks before the assigned diet, apply to the court to fix caution for the expenses of witnesses.⁵

Statutory hurdles in the sheriff court

6. In the sheriff court there is no restriction on a party litigant being able to sign an initial writ.⁶ There is, however, a restriction on the borrowing of parts of process which may only be done with leave of the sheriff.⁷ With regard to the citation of witnesses and the expenses incurred, similar rules to that contained in the Court of Session Rules provide for application to the sheriff to fix caution.⁸ The summary cause and small claim procedures do not, with the exception of borrowing of productions or parts of process, impose any restriction on party litigants which would not also be imposed on litigants who are represented. Currently, there are no statistics available as to the numbers of party litigants in the sheriff court as these are not recorded by the Scottish Court Service.

³ Rules of the Court of Session 1994, r. 4.2 (1)-(6)

⁴ Rules of the Court of Session 1994, r. 36.2(4) (proofs) and r. 37.4 (jury trials)

⁵ Rules of the Court of Session 1994, r. 36.2(5) (proofs) and r. 37.4 (jury trials)

⁶ The Ordinary Cause Rules expressly provide that a party litigant may sign an initial writ – OCR 1993, R.3.1(7)

⁷ *Ibid.* r. 11.3(3)(a)

⁸ *Ibid.* r. 29.8

7. The Equal Treatment Bench Book⁹ states that it is important that those disadvantaged should be well understood by the judiciary, and that all reasonable steps should be taken in order to minimise the consequences of those disadvantages, so far as is practicable. However, this should not mean that a party litigant should be given advantages which would not be available to a litigant who was professionally represented. It will be a matter of judgement in each case, the degree to which the judge should assist the party litigant to develop and express their case.¹⁰

8. The extent to which a judge has a duty to assist a party litigant in civil proceedings was recently commented on in *Martin Wilson v North Lanarkshire Council & The Board of Management of Motherwell College*,¹¹ whereby a party litigant appealed to the Inner House, complaining that the judge “had not shown enough sympathy towards him”. The party litigant also said that the judge should have excused his failures to comply with the rules of court and the laws of evidence because he was a party litigant.

9. The appeal court said that the party litigant’s arguments demonstrated a “misunderstanding” of the role of a judge at first instance in civil proceedings in which a party is without legal representation. The appeal judges considered that it would be “... wrong for a judge to favour one party... simply because the party is not legally represented” and that “... a judge must be careful not to be perceived as favouring a party just because that party is not legally represented.” The appeal judges also made a number of observations as to the “proper expectations” of a party litigant conducting proceedings at first instance, although they were confined to the particular circumstances of that case and were not intended to be interpreted as general guidance to all parties in all circumstances:

- The role of a judge when hearing evidence or dealing with motions made by parties in the course of a proof is not generally a proactive one.
- It is not his function to give advice to a party as to how that party should present his case or what procedural steps he should seek to take.
- The main role of a judge during the course of a proof is to listen to and note the evidence of the witnesses called by the parties and assess that evidence and to deal with any procedural matters which may arise in a generally impartial and fair way.
- It is not the role of a judge to try to find facts to support a party’s case when the party does not seek to advance and rely on such facts.

⁹ Judicial Institute for Scotland, [Equal Treatment Bench Book](#), (2014), Ch. 12

¹⁰ *Ibid.* Ch. 12, para. 28

¹¹ [2014] CHIS 26

- The concept of equality of arms does not operate to enable a judge to join forces with the weaker army, in order to make the battle more evenly balanced.
- It is not open to a judge at first instance to overlook the laws of evidence, which can be complex, in order to support or bolster an unrepresented party's case.
- It is not part of a judge's function to carry out investigations into academic or professional articles in learned journals which are not properly party of the evidence before him.

10. It is clear that there is a balance to be struck, and limitations on, the extent to which a judge (and by inference a clerk of court) may assist a party litigant.

Addressing the difficulties

11. Reporting in 2009, the Scottish Civil Courts Review¹² (SCCR) stated in its consultation document that there had been significant growth in the number of party litigants appearing in the courts of Scotland. Recognising that there are circumstances where litigants will either choose, or be forced by circumstance, to represent themselves in court and the difficulties which arise it was recommended that there should be changes to court practice and procedure so that party litigants are able to "...enter and navigate their way through the court process effectively."¹³ Particularly, in cases of low monetary value where the costs of legal representation would be disproportionate.

12. It was considered that "public legal education, self-help services, in-court advice services and lay representatives and McKenzie friends"¹⁴ would all have a role to play in supporting the litigant who does not have a lawyer and must represent themselves.

13. Those recommendations of the SCCR which are of particular relevance to the Access to Justice Committee are provided at Annex B and the Scottish Government Response¹⁵ to those recommendations is provided at Annex C.

14. Accordingly, this paper will in turn focus on the following topics: public legal education, self-help services and advice and representation services. Judicial case management will also be discussed given that the role of the judge is particularly relevant in

¹² Report of the Scottish Civil Courts Review, Ch. 11

¹³ *Ibid*, Ch. 11., para. 2

¹⁴ *Ibid*.

¹⁵ Scottish Government, [Response to the Report and Recommendations of the Scottish Civil Courts Review](#), (2010)

helping to address the difficulties faced by party litigants, as noted by the Equal Treatment Bench Book.

Relevant Research and Reports

15. The SCCR recommendations were preceded by an earlier report published by Consumer Focus Scotland in 2009, which sought to obtain the views and experiences of civil court users.¹⁶ The report aimed to strengthen the evidence base on court users' experiences and to provide useful evidence to the SCCR. The study was qualitative, interviewing 35 civil litigants.

16. Thereafter, and following publication of the SCCR, the Civil Justice Advisory Group (CJAG) reconvened, under the chairmanship of Lord Coulsfield, to consider the recommendations of the SCCR. The CJAG provided a report¹⁷ to the Scottish Government in order to support implementation of the SCCR proposals on civil justice. Particular emphasis was placed on those proposals which would impact more directly on individual users of the courts and including those designed to improve access to justice such as: self-help, public legal education, 'McKenzie Friends' (lay representation) and in-court advice.

17. The final report noted that since publication of the SCCR, the public spending climate of Scotland had substantially changed and that this may have had an affect on the assessment of the practicalities of the review's recommendations.¹⁸ The CJAG was, however, unable to estimate the cost implication of many of the recommendations it had made. It was noted that not only would an unfavourable economic climate have an impact on individual litigants, but, at the same time, consequent reductions in central and local government finances were likely to place financial constraints on organisations which provide advice to individuals.

18. In all, fifteen recommendations were made, including the following:

- A system-wide user-focused approach should be taken to future civil justice reforms, looking beyond the courts to the wider civil justice system.
- The civil justice system should be designed to permit a 'triage' approach to help inform and guide individuals in identifying the most appropriate route to dealing with civil justice problems at each stage of the 'user's journey'.
- The principle of 'getting it right first time' should be encouraged wherever possible.

¹⁶ Ipsos MORI, *The views and experiences of civil sheriff court users*, (2009)

¹⁷ Civil Justice Advisory Group, *Ensuring Effective access to appropriate and affordable dispute resolution: The final report of the Civil Justice Advisory Group*, (2011)

¹⁸ Although, it is stated that the CJAG was unable to comment definitively on questions of cost, the availability of premises or staffing issues involved in setting up new court structures.

- A web-based system should be created, bringing together information on rights, responsibilities, sources of self-help and advice and options for dispute resolution, which would guide people through the dispute resolution process.
- The Scottish Government should ensure that its digital strategy includes consideration of the use of IT in delivering justice services.
- Funding should be made available to pilot more proactive public legal education initiatives to build legal capability amongst particular population groups.
- In-court advice services should be rolled out nationally, although these need not necessarily be based within individual courts.

19. The CJAG was particularly interested in the Australian application of the concept of ‘triage’ (where a system-wide approach to civil justice reform is also being taken) which informed the approach of its report. The aim of the triage approach is to help inform and guide individuals in identifying the most appropriate route to dealing with civil justice problems at each stage of entering the civil justice system.

Recent Developments

Developments in Scotland

Making Justice Work

20. The Scottish Government’s *Making Justice Work (MJW)* project 3, “Enabling Access to Justice”, is underway and aims to take a co-ordinated system-wide approach, in order to:-

“...develop mechanisms which will support and empower citizens to avoid or resolve informally disputes and problems wherever possible, and to ensure they have access to appropriate and proportionate advice, and to a full range of methods of dispute resolution, including courts and tribunals where necessary, and appropriate alternatives.”¹⁹

21. The project contains five strands of work:

- Strategic planning and co-ordination of publicly funded legal advice (SLAB lead)
- Legal capability (SG lead)
- Costs and funding of litigation (SG lead)
- Alternative dispute resolution (SLAB lead)

¹⁹ Scottish Government *Making Justice Work* programme:

<http://www.scotland.gov.uk/Topics/Justice/legal/mjw>

- Family justice (SG lead)

22. SLAB is managing MJW project 3 on behalf of the Scottish Government, with lead responsibility for the delivery of the sub-projects split between the two.

Monitoring the availability and accessibility of legal services

23. Under the Legal Services (Sc) Act 2010 (the 2010 Act) The Scottish Legal Aid Board (SLAB) have responsibility for monitoring of the availability and accessibility of legal services in Scotland (section 141(a)) and to give the Scottish Ministers such advice as it may consider appropriate (141(b)).

24. SLAB has recently produced its second monitoring report²⁰ which aims to identify problems arising from the availability and accessibility of legal services provided by solicitors and advocates. The report found that for some specific areas of law, advisers other than solicitors and advocates may be the most prominent source of assistance, but, that there is no clear evidence of their being systematic access problems. It should be noted that the latest report covers the period between 1 April 2011 and 31 March 2012 and so may not reflect current circumstances.

25. It may be of interest to note that in its first monitoring report, SLAB set out its intention not to establish benchmarks for the 'adequacy' of any particular level of availability or accessibility, as it was considered not to be practically possible, based on previous research conducted by other organisations on the matter.

26. An Access to Justice Reference Group has been set up with a dual role of assisting SLAB with its monitoring function under the 2010 Act, and to assist both SLAB and the Scottish Government to gather stakeholder views on work relating to the MJW 3 project. The role of the Reference Group is to help define the scope of legal service, provide information and insight into access to legal services, to review data prepared and gathered by the Board and others on these matters and to comment on implementation plans for the MJW 3 project.

Courts Reform (Sc) Bill

27. The Courts Reform (Scotland) Bill ("the Bill") was introduced into Parliament on 6 February 2014. It aims to modernise and enhance the efficiency of the Scottish civil justice system and takes forward many of the recommendations from the SCCR. Key provisions to note in terms of this review are those in relation to: a new category of sheriff (summary

²⁰ Scottish Legal Aid Board, [Monitoring of availability and accessibility of legal services Second Report](#), (2014)

sheriff), the introduction of a new simple procedure for lower value claims (to replace small claims and summary cause procedure for claims under £5,000) which is to be designed with party litigants in mind, provisions for lay representation of non-natural persons and provisions for vexatious litigants. Those provisions in relation to lay representation will be discussed later in this paper.

28. The Bill would enable court rules to make different provision for different types of simple procedure cases.²¹ Sections 75 and 76 of the Bill provide respectively for the transfer of cases to and from simple procedure.

29. Specific provision is made in relation to the Court of Session's power to make rules relating to the simple procedure, specifying that the power must be exercised with a view to ensuring, amongst other things, that the sheriff hearing a simple procedure case (summary sheriff) may assist parties in reaching settlement (including negotiating with parties) and may adopt a procedure appropriate to the particular circumstances of the case.

30. Sections 100-102 of the Bill make provision for the making of vexatious litigation orders (replacing and updating the Vexatious Actions (Scotland) Act 1898) and orders relating to vexatious behaviour. Under the provisions, a vexatious litigation order may be made by the Inner House, in certain specified circumstances, with the effect that a vexatious litigant may only institute civil proceedings with permission, and/or that that person may take a specified step in specified civil proceedings. Section 102 allows Ministers (having consulted the Lord President) to make regulations to enable the courts to deal with vexatious behavior. The Scottish Government has indicated that these provisions are modeled on the system of Civil Restraint Orders used in England and Wales, whereby a litigant must gain permission from the court before making applications in a particular case or cases.

Developments in England and Wales

31. In November 2011, the Civil Justice Council's (CJC) Working Group reported a series of recommendations in relation to access to justice for litigants in person.²² One of the overarching aims of the Working Group was to make recommendations which would not require material additional financial resources, in light of the economic climate at that time. The recommendations may be found in Annex D.

32. Thereafter, in December 2012, a Judicial Working Group on Litigants in Person was formed in response to an expected rise in the number of litigants in person. The rise in numbers was expected as a result of the Government's proposed Legal Aid reforms which were to come into force the following April. The Working Group consisted mainly of judges and it chose to focus on 'judicial preparedness' for the forthcoming changes, in light of the

²¹ Sections 70(2) and 97

²² Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants)*, (2011)

previous CJC Working Group's report which sought to emphasise that the judiciary would have a pivotal role to play in meeting the challenges posed by a substantial increase in the number of litigants in person.

33. Thus, the terms of reference for the Judicial Working Group were as follows:

- define the main issues facing the judiciary;
- make recommendations as to whether there is a requirement for new court rules;
- review the rules and conventions on whom a court can hear (including McKenzie Friends²³);
- make recommendations to the Judicial College for the development of training and guidance on dealing with litigants in person; and
- to oversee the provision of an accessible resource for all judicial office-holders containing information and guidance on dealing the litigants in person and information on the availability of support and advice for litigants in person.

34. The Working Group reported in July 2013²⁴ and was keen to emphasise the economic context at the time of writing; given that, according to the Government's own figures, 623,000 of the one million people who at that time would benefit from Legal Aid would be denied access from 1 April 2013. The importance of a positive approach to litigants in person was stressed throughout the report. It was considered that litigants in person are not in themselves a problem, but rather the system itself which had developed with no focus or regard given to unrepresented litigants.

35. The report outlined some of the key issues that courts (and tribunals) face in dealing with litigants in person, as follows:

- They can struggle to understand basic procedural requirements, which is exasperated by the use of technical terminology.
- They are less likely to comply with procedural requirements; partly because of a difficulty in understanding and partly because they do not necessarily understand that court orders are more than aspirational.
- Difficulty in understanding the concept of evidence and the need for it to prove a factual matter.
- A lack of skill in presenting their case articulately, or use of inappropriate questions when examining witnesses; especially if they are nervous, anxious or emotionally involved in the case.

²³ The equivalent of a lay supporter or lay representative in Scotland.

²⁴ Judiciary of England and Wales, *The Judicial Working Group on Litigants in Person Report*, (2013)

- Difficulty in understanding the concept of a cause of action.
- Difficulty in identifying and focusing on the determinative issues in the case.
- They can be guarded against the notion of settlement or mediation; perceiving this as a sign of weakness, or simply wanting to 'have their day in court'. They may also be wary of forming a working relationship with an opposing party's representative.
- They are more likely to lodge legally misconceived applications and appeals.
- They are more likely to complain about judges, usually on the basis that they disagree with the findings and conclusions that the judge has properly reached.

36. Practical issues were also identified which have the potential to slow down and drive up the cost of proceedings and to take up judges' time. Issues around expert evidence and interpreters were found to have the potential for justice being denied or delayed.

37. It is explained that litigants in person can more effectively represent themselves when judges adopt a flexible and interventionist approach to proceedings. However, that this has the potential to place the judge in the uncomfortable situation of balancing the need to give legitimate assistance to a party litigant whilst remaining impartial.²⁵

38. In the recommendations emphasis was placed on the need for litigants in person, irrespective of the nature of the proceedings they are involved in, to be fully informed in a clear and straightforward manner about: the process, what is required of them, the consequences of a failure to comply and the proper role of the judge.

39. It was thought that the Ministry of Justice/HM Court Service should be responsible and there were particular recommendations for the production of audiovisual material, such as online videos, and the need for comprehensive and up to date online information. These recommendations are still to be actioned.

40. The necessity of training and guidance for the Judicial College was highlighted and it was recommended that judges should be encouraged to deal proactively and robustly with vexatious litigants, by declaring appropriate claims/applications as being without merit and through the use of orders restraining individuals from issuing and pursuing claims.

41. In terms of procedural rules, the Judicial Office was urged to assess the merits of three proposals to rule changes including:

- a dedicated rule which makes specific modifications to other rules,

²⁵ *Ibid*, para 3.23.

- a specific power for the court to conduct a more inquisitorial form of process, and
- a specific general Practice Direction or new Civil Procedural Rule that would, without creating a fully inquisitorial form of procedure, address the needs of litigants in person.

42. The Judicial Office was also urged to review lay assistants and the value in formally introducing court rules in terms of lay assistance and lay representation.

43. There are no new court rules brought into force as yet in response to these recommendations. Although, the CJC have recently produced its own guidance for Litigants in Person for small claims.²⁶

44. In 2011, the Ministry of Justice prepared a literature review²⁷ considering the published research evidence on civil and family litigants in person, in order to inform an assessment of the potential impact of the proposed legal aid reforms on the number of litigants in person and their potential impact on the court process. The review covered the following:

- How many litigants in person are there, and what types of cases do they bring?
- Who are litigants in person?
- Why are people unrepresented? What are their motivations?
- What are the impacts on the court of unrepresented litigants?
- Impact on case outcomes
- What action works in assisting litigants in person?

Developments in the European Union

45. In 2007, Regulation 861/2007²⁸ established a European Small Claims procedure with the aim of enhancing access to justice by simplifying and speeding up cross-border litigation and to reducing the costs of such litigation. The Regulation aimed to facilitate enforcement by eliminating the need for intermediate proceedings to enable recognition and enforcement in a Member State other than the country where the judgement was given. The new procedure is an alternative to those existing in the Member States for claims of up to €2,000. Features of the procedure are as follows;

- It is in principle a written procedure, with standard forms and strict deadlines;

²⁶ Civil Justice Council, *A Guide to Bringing and Defending a Small Claim*, April 2013

²⁷ Williams, K., *Research Summary 2/11 Litigants in person: a literature review*, (Ministry of Justice) June 2011

²⁸ Regulation 861/2007, establishing a European Small Claims Procedure

- Representation by a lawyer is not mandatory;
- Use of electronic communication is encouraged;
- The unsuccessful party only bears the costs of the proceedings of the successful party to the extent that they are proportionate to the claim; and,
- The procedure is available to both consumers and businesses.

46. It should be noted here that the procedure has been used in Scotland in only a small number of cases (approximately 20); it is unclear as to why there has been such a low uptake.

47. In November 2013, the European Commission put forward a proposal to amend the European Small Claims Procedure.²⁹ The main elements of the proposal are as follows:

- Extension of the scope of the Regulation for claims up to €10,000;
- Extension of the definition of cross-border cases;
- Improving the use of electronic communication, including service of particular documents;
- Imposing an obligation on courts to use videoconferencing, teleconferencing and other means of distance communication for the conduct of oral hearings and taking of evidence;
- A maximum limitation on court fees (10% of the claim);
- An obligation on Member States to put in place distance means of paying court fees; and,
- Imposing information obligations on the Member States in respect of court fees, methods of paying court fees and the availability of assistance in filling in forms.

48. These proposals are currently being considered and the current rules for small claims will remain in force until the Commission's proposed amendments become EU law.

²⁹ European Commission *Proposal for a Regulation of the European Parliament and of the Council* (2013)

2. Party Litigants: Legal Capability/ Public Legal Education

49. The SCCR recommended that public legal education (PLE) has a role to play in supporting the litigant who does not have a lawyer and the matter was subject to consultation as part of the review. It was suggested in the consultation document that by increasing general public knowledge about the law and the civil justice system, it may help people to avoid becoming involved in legal problems. It was also suggested that well informed citizens may be able to engage in discussion and negotiation with others, with a view to reaching a resolution without resort to the courts.

50. The overall response to the consultation in this area was positive, with over three-quarters of respondents seeing potential benefits. The dominant view was that by raising public awareness and knowledge about the law and the legal system (and rights and remedies), that this would help people to: avoid legal problems, understand different options for dealing with legal problems and know where to go to for advice to obtain redress.

51. It is noted that responses from judges and lawyers were also positive, seeing it primarily as a way to help people identify when they require advice and to find their way to sources of professional help, rather than enabling people to be more self-reliant in dealing with legal problems. A common theme from family lawyers was that greater PLE can help to dispel preconceptions about the law and the legal system, making people aware of the available support and alternatives to litigation. The most common suggestion on how to improve PLE was that education about the law and the legal system should be part of the school curriculum.

52. Conversely, there were some limitations identified. There was a common theme that PLE needs to be part of a larger strategy incorporating improved access to good quality advice and representation, and be adequately resourced and co-ordinated. Further, that people should not be over-loaded with information that they could not reasonably be expected to understand or deal with. Some respondents note that there would always be sectors of the public who would not be able to benefit from PLE because of poor literacy levels or other factors such as social or health problems.

53. A seminar was held on the general theme of PLE in March 2009, prior to publication of the SCCR, which the Scottish Government and Consumer Focus Scotland (CFS) organised together. It was an awareness raising seminar aimed to encourage debate about how PLE might be developed in Scotland. Various PLE topics were discussed, including the challenges for developing PLE in Scotland along with the target groups for any PLE

initiatives.³⁰ The SCCR states that the delegates overwhelmingly thought that the Scottish Government had a key role to play in taking PLE forward in Scotland on a strategic level.

54. The SCCR recommends that PLE should be an element of any strategy to improve justice in Scotland, advising that:

Raising awareness amongst the public of ways of dealing with legal problems and disputes and of sources of advice and help is likely to assist those who, when faced with a justiciable problem, either try to resolve it themselves or simply “lump it”. It may also mean that those who do seek help find the right help more quickly.³¹

55. In its response to the SCCR, the Scottish Government expressed agreement in that ‘targeted legal education’ could make it easier for people to resolve disputes. The issue was to be considered further by the CJAG, with the resulting recommendations to be considered further by the Scottish Government in order to assist with implementation of the SCCR recommendations.

Relevant research and commentary

56. During 2009, Gemma Crompton of Consumer Focus Scotland (CFS) wrote a series of three short articles exploring Public Legal Education in Scotland. The aim of the first paper³² was to explore and research the current understanding and perceptions of PLE in Scotland, whilst also undertaking a comparative analysis of other jurisdiction’s approaches to the matter. Two approaches for delivery were identified; ‘wide’ and ‘formalistic’. The author does not make any recommendations as to which system would be most suitable in Scotland.

57. During her research, the author identifies that despite a lack of acquaintance with the terminology of PLE, there was consensus among those interviewed about the purpose and desired outcomes:

- Through the access of proper help at the correct time, individuals should be able to enforce the rights accorded to them by law.
- The early prevention of problems at their source and the avoidance of the growth of the individual’s problem.
- Increasing societal engagement.

³⁰ Consumer Focus Scotland Produced a Seminar Report after the event:

<http://www.consumerfocus.org.uk/scotland/files/2011/09/Legal-Capability-Seminar-report.pdf>

³¹ Scottish Civil Courts Review, Chapter 11, Para. 8.

³² Crompton, G., *Perceptions and Understanding of PLE in Scotland*, (2009)

58. It is suggested the research reveals that those interviewed were more concerned about early avoidance of problems and access to appropriate help, rather than the availability of self-help activity. There was also consensus amongst those interviewed that PLE can act as a substitute for the provision of direct assistance. Whilst overwhelmingly in favour of PLE, there were differing responses as to its underlying priority.

59. In her second paper,³³ the author aimed to discuss some of the problematic areas in the drive for accessible justice and how PLE may alleviate those problems. The author expands from traditional perceptions of access to justice as being synonymous for access to legal advice, to define it as the ability to identify and choose a legal solution where necessary, and thereafter pursue a solution. Crompton refers to Dame Hazel Genn's papers *Paths to Justice* (1999 and 2001),³⁴ to support the assertion that many individuals find difficulty in the former stages of identification and selection of problems and solutions. It is highlighted that the *Paths to Justice* research indicates that the difficulty may be particularly prevalent within the Scottish legal system.

60. Crompton acknowledges that unawareness of law is problematic in itself. She points to the results of the *Paths to Justice* research which is thought to indicate that certain problems can increase the chances of experiencing other, further, legal problems, or else start a 'cascade' of problems. The example provided is the experience of an employment problem which leads to financial difficulty which may in turn lead to breakdown of a relationship which then affects the mental health of an individual. The example and research contained in *Paths to Justice* appear to emphasise the importance of early resolution of legal problems.

61. Crompton advises that there is difficulty in identifying solutions to problems and that this is a major hindrance in access to justice. The author suggests that PLE can be of significant benefit when it provides knowledge about not only the problem, but also the potential actions which the individual may take to solve the problem.

62. In conclusion, the author highlights three issues for consideration in the implementation of PLE:

- PLE activity may have implications especially on other branches of legal assistance for individuals. For example, as people become more aware of their rights they may in turn seek increased provision of advice.

³³ Crompton, G., *Public Legal Education and Access to Justice*, (2009)

³⁴ Genn, H., *Paths to Justice: What People Do and Think about Going to Law* (1999) and Genn, H., and Paterson, A., *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (2001).

- PLE encompasses a wide range of activities and aims however, in the planning for PLE attention should be paid to the known barriers that people face.
- In accordance with (2) above, PLE is most effective when it has a strong evidence base for its activities and aims. PLE should address problems that are encountered in practice.

63. In her final paper,³⁵ Crompton focuses on the anticipated challenges in implementing PLE in Scotland which include ‘understanding’ and ‘justification’.

64. With regards to ‘understanding’, it is reiterated that there is a general unawareness of PLE and its potential role in accessible justice. The solution that is suggested is to effectively communicate the meaning of PLE in order dispel myths about its meaning.

65. In relation to ‘justification’, the solution proposed is to analyse current activities, armed with the definition of PLE, in order to explore if there are any current PLE activities in operation.

66. It is explained that justifying PLE is generally considered to be problematic, despite the research detailed in the author’s second paper. A dearth of PLE evaluation, coupled with the difficulty of providing the link between PLE activity and the outcome, are the main challenges in being able to justify PLE. However, the author identifies a growing trend of government steps towards early prevention measures and indicates that support for such measures may be instrumental in the implementation of PLE.

67. Shortly after publication of these three articles, in 2010, the author also wrote the paper *Making Justice Work for Consumers: the consumer perspective on making the civil justice system in Scotland for the 21st century*,³⁶ where she set out a four-step approach to removing barriers to accessible justice and recommended adopting a PLE strategy as the first step. In line with previous work, the report stressed that PLE is key in helping consumers choose a strategy for solving their problems, and further, that PLE can assist in the avoidance of problems, by improved decision making. The Scottish Government is identified as being the most appropriate primary developer of PLE.

³⁵ Crompton, G., [The Challenges for Developing PLE in Scotland](#), (2009)

³⁶ Crompton, G., [Making Civil Justice Work for Consumers](#), (2010)

After the SCCR

68. CJAG reported on its review into the SCCR recommendations on PLE in 2011³⁷ and recommended that funding should be made available to pilot more proactive initiatives in order to build legal capability amongst particular population groups. It was considered that, whilst very useful, web and telephone services alone would not be able to meet the needs of all consumers in building legal capability.

69. CJAG addressed the main criticism of PLE, that there is insufficient empirical evidence of the effectiveness of PLE initiatives, by recommending that pilots should be conducted and properly evaluated so that they may be used to build an evidence base for further initiatives.

70. Shortly after, in its *Strategy for Justice*,³⁸ the Scottish Government recognised the important contribution that building legal capability can make to achieving its justice outcomes, and so included a work stream for this within its *Making Justice Work* programme. Consumer Focus Scotland (CFS) were initially the lead organisation for the PLE workstream.

71. CFS produced a report called *Facing up to legal problems*, based on qualitative research commissioned jointly by CFS, the Scottish Government and SLAB.³⁹ The research involved both focus groups and in-depth interviews, and aimed to explore why consumers behave in certain ways when experiencing legal issues. Behaviour was found to be dependent on the context and impact of the problem as well as the person's background and access to resources. It should be noted that the findings and recommendations of the report are not specifically directed at party litigants, with the focus being more on the resolution of problems out-with formal structures, such as the courts.

72. Further to those issues, the three aspects of knowledge, skills and confidence/attitude were found to influence behaviour. Knowledge was closely linked with experience rather than specified legal information. Where those participating in the research felt they did not have the required knowledge, internet research was found to be an effective avenue for some but not all. Skill set was defined more broadly than specifically legal-based skills, for instance, effective communication or the anticipating of consequences. The sole legal skill identified as important was the reading and understanding of legal contracts, although there was an identifiable overlap between what participants regarded as a 'skill' and as an 'attitude'.

73. The key research insights identified by CFS are as follows:

³⁷ Civil Justice Advisory Group, [*Ensuring Effective access to appropriate and affordable dispute resolution: The final report of the Civil Justice Advisory Group*](#), (2011)

³⁸ Scottish Government, [*The Strategy for Justice in Scotland*](#), (2012)

³⁹ Consumer Focus Scotland, [*Facing up to legal problems – Towards a preventative approach to addressing disputes and their impact on individuals and society*](#), (2012)

- Improving people's legal capability requires knowledge of legal rights, like skills and personal resilience.
- The 'legal' aspect of the problem may not adequately reflect the underlying issues or the perception of the problem.
- The 'legal' problem must be viewed in the broader context of the person's life.
- Resolution of the problem included the related emotions, not just the legal issue itself.
- Organisations out with the civil justice system have a role to play.
- Responsibility for avoiding and resolving problems lies with organisations as well as individuals.

74. As a result, CFS made the following specific recommendations:

- The remit of the Making Justice Work programme's Enabling Access to Justice project (3) should be extended to adopt a 'whole system' approach.
- The Scottish Government and the MJW Programme should look out-with the justice system for solutions.
- Efforts to increase legal capability, as part of the MJW Programme should be 'life stages' or 'life events' models, capitalising on the contact that certain organisations have with consumers at such life stages/events.
- Interventions to increase legal capability should focus on knowledge, skills, confidence and attitudes.

The following practical arrangements were identified in order to assist with the development of proposals, based on its recommendations, to address PLE:

- Signposting of information and assistance should refer to legal sources but also to other forms of assistance, such as mental health support.
- Specific materials for distributing in locations commonly accessed by people, such as doctors' surgeries, could be developed.
- Advice providers should ensure that their resources include information not only on what people need to know, but what they need to do to deal with their problem. Materials should include guidance on solving a problem, and acknowledge the emotional elements involved.
- Resources for use at appropriate life stages should be developed.
- Links should be made with other Scottish Government programmes/strategies, such as Curriculum for Excellence or financial capability.
- The MJW Programme should consider how to build on referral networks to develop better links between organisation within and outwith the civil justice system.

- The Scottish Government should work with other relevant organisations to consider how it could encourage or compel organisations in the public and private sector to ‘get it right first time’ and improve their initial decision making and complaints handling.

Current developments

75. CFS ended its work on legal issues, and therefore also within the *Making Justice Work* programme, at the end of 2012 due to UK-wide government reforms. PLE is now being taken forward under project 3 of the *Making Justice Work* programme (Enabling Access to Justice) with SLAB as the lead organisation. Project 3’s work on legal capability is focussed on the development of a public facing portal or platform which is feeding directly in to developing the Justice Digital Strategy (MJW Project 4).

Recent report by the Legal Services Board

76. Building on top of numerous large-scale national ‘legal needs’ surveys (such as *Paths to Justice*) of the public’s experience of civil legal problems, a recent report by the Legal Services Board⁴⁰ (England and Wales) sought to review the evidence to date (from 26 large-scale ‘legal needs’ surveys across 15 jurisdictions) and present and integrate the results of detailed new analysis of data from the English and Welsh Civil and Social Justice Panel Survey. The reports analysis is the most detailed yet on problem resolution strategy and forms of problem outcome undertaken and can be applied in principle to Scotland. The report states that it focussed on: the relationship between personal capability and problem resolution strategy or forms of problem outcome, subjective legal empowerment,⁴¹ the reasons behind different strategy decisions and what drives the form of problem outcome. The key findings of the report are as follows:

Courts and law are peripheral to everyday justice

- Fewer than one in ten people experiencing legal problems instruct solicitors
- Consumer experience does not mirror traditional legal services distinctions including reserved activities
- Deficiencies in the civil justice system in meeting consumers’ needs are largely due to difficulty enabling vulnerable populations with limited capability/resources access appropriate help from a complex market.

⁴⁰ Pleasence, P. and Balmer, N.J., ‘[How People Resolve ‘Legal’ Problems](#)’ (2014)

⁴¹ It is explained that subjective legal empowerment is described as the self-belief that an individual can solve problems of a legal nature if they occur, which is based on the following report: Gramatikov, M.A. and Porter, R.B. (2011) “Yes, I can: Subjective legal empowerment,” in 18(2) *Georgetown Journal on Poverty Law & Policy*, pp.169-199, as cited in Pleasence, P. and Balmer, N.J. (2014)

Increasing severity are duration funnels problems towards law

- People are more likely to go to a lawyer in relation to more severe problems, and problems taken to lawyers are more likely to involve the courts.
- But, people also often take no action to resolve more severe problems.

Most inaction in response to a problem is rational... but...

- A significant minority of inaction is characterised by helplessness.
- Inaction is associated with poorer prospects of effective problem resolution.

Civil law and social justice

- Links between social disadvantage, legal capability and inaction are well illustrated by the Civil and Social Justice Panel Survey.
- Problem solving behaviour becomes entrenched over time.

Determinants of advice (and its impact)

- Problem characterisation, problem type and cost are key drivers of strategy.
- The importance of problem type is a function of both market structure and peoples' understanding of legal services.
- People who characterise problems as 'legal' are less likely to 'lump' them and far more likely instruct a solicitor.
- Choices of sources of help can be unpromising, and where people are forced to look elsewhere they can suffer referral fatigue, getting lost in the system.

The wider advice sector makes a critical contribution to civil justice

- Failure to characterise problems as legal does not bear on use of the wider advice sector, with people using it regardless of their understanding.
- However, traditional legal practices provide few welfare related services.

Counting costs

- Most respondents who obtained help from an advice agency rather than a lawyer said they did so because of the perceived cost.
- People's perceptions of cost can be inaccurate.
- Making lawyers cheaper to access may not greatly change consumer behaviour. Public legal education and/or the development of services that meet the public's perceived needs may also be necessary.
- Marketing (the private sector form of public legal education) of personal injury services appears to overcome concerns about cost.

How problems conclude

- It is rare for problems to conclude through a legal process.
- Problem resolution strategy, problem severity, problem type, psychological factors and respondent mental health are key drivers of form of outcome.
- Emotional stability was associated with both a greater tendency to put up with problems and lesser tendency to go to court.

Educational resources

77. There is also a 'Citizenship' category under the 'Educational Resources' section of the Scottish Parliament website,⁴² which provides resources for teachers to use within their classes. It provides for themes on: political awareness, human rights, elections, debate, diversity, equality, global citizenship, media awareness, peace education, committees, enterprise and petitions. We are not aware whether the material is currently in use in Scotland or to what extent. Other projects and organisations which work with schools and school age children who promote rights and responsibilities also provide educational resources for 'Citizenship', including the United Nations and under the BIG Lottery programme "Realising Ambition".

78. The Law Society of Scotland have recently developed a pilot "street law" curriculum programme for secondary schools, which will run in the next school year in selected schools around Scotland, as an optional module under the new "Curriculum for Excellence".

Developments in England and Wales

79. Since 2002, there has been a statutory 'citizenship' element to the national curriculum which is compulsory and provided to all pupils aged 11 to 16. The citizenship course covers issues such as democracy, justice and rights and responsibilities. In parallel, a nine year evaluation of the implementation and impact of the programme was commissioned to evaluate the benefits of the programme. The Citizenship Longitudinal Study (CELS) was tasked with taking evaluation of the programme forward and the eighth and final report from CELS was published in 2010.⁴³

80. The final report concluded that there was preliminary evidence to show that citizenship education can make a positive contribution to the young people's citizenship outcomes as identified in the evaluation. It is summarised that:

Young people's citizenship practices have changed over time in relation to their attitudes, attachments and efficacy. The picture is mixed. On the one hand, there has been a marked and steady increase in young people's civic and political participation and indications that these young people will continue to participate as adult citizens. In contrast, there has been a hardening of attitudes toward equality and society, a weakening of attachment to communities and fluctuating levels of engagement, efficacy and trust in the political arena.

⁴² <http://www.scottish.parliament.uk/visitandlearn/Education/15377.aspx>

⁴³ Department for Education, [Citizenship education in England 2001 – 2010: young people's practices and prospects for the future: the eighth and final report from the Citizenship Education Longitudinal Study \(CELS\) – Brief](#), (2010)

81. Unfortunately, this research does not provide information specifically in relation to the identification and selection of problems and solutions; which is suggested as being the main benefit of PLE in the research detailed above.

82. The Civil Justice Council's Working Group also made recommendations for PLE in its 2011 report⁴⁴ (provided at Annex C) and considered that "[p]ublic legal education (or PLE) is the true starting point for helping the public and thereby those who could become self-represented litigants." The Working Group did not consider this report to be the appropriate place to deal with PLE, but sought to highlight its importance in the overall scheme of access to justice, particularly at a time of proposed (as they were at that time) reductions and changes to legal aid. Therefore, development PLE was viewed as action point for longer-term focus (between 2011 and 2016).

Other jurisdictions

83. PLE is referred to in some other jurisdictions by the term 'street law'. Street law is a concept which began in 1972 in Georgetown University Law Centre, where students developed an experimental curriculum to teach high school students about law and the legal system. The initiative appears to have been taken forward under the auspices of Street Law Inc.,⁴⁵ a non-profit organisation located in the United States.

84. Street Law has been extended to numerous jurisdictions around the world, beginning with South Africa in 1986. There is a wide range of curricula and programs available, with relevant course materials, including online resources. A textbook called *Street Law: A Course in Practical Law* is the most popular and widely used practical law text in the United States and has been adapted for use in more than a dozen countries.

85. Street Law Inc. has previously partnered with Non Governmental Organisations (NGOs) to educate underserved populations, including pregnant and parenting teens, youth who are going out of foster care and young people in the juvenile justice system. Other NGOs have utilised the Street Law curricula to educate young people and adults in democratising countries about the principles of democracy.

⁴⁴ Civil Justice Council, [*Access to Justice for Litigants in Person \(or self-represented litigants\)*](#), (2011)

⁴⁵ www.streetlaw.org

3. Party Litigants: Self-help

86. The SCCR recommended that self-help services should be available as a safety net for those who either do not qualify for legal aid or cannot afford to instruct a solicitor. The SCCR consulted on the issue and, overall, the attitude of respondents was that self-help services had their place within the civil justice system and could make a contribution to improving access to justice. However, there were concerns expressed that there may be limitations as to the types of case and categories of people who could benefit from self-help services. The SCCR noted that a number of respondents to the consultation were of the view that cases would always require legal advice and representation in order for the litigant to have effective access to justice.

87. In its consideration of self-help services, the SCCR also noted the following findings of the Ipsos MORI research report into the views of sheriff court users:

“The clear message emerging from the research is the need for greater provision of practical and comprehensive information for litigants on what to expect during legal proceedings and how litigants can best seek advice and progress their case effectively.”⁴⁶

88. The approach taken in other jurisdictions was also explored including New Zealand, Ontario and British Columbia, where similar reviews into self-help services were undertaken; in each, self-help services were considered to be necessary. The information which was generally agreed to be necessary to a party litigant in those reviews is summarised as follows:

- Basic legal information and resources.
- Referrals to other agencies (for further information and with a view to accessing ADR methods).
- Assistance with completion of forms.
- Information on court procedures.
- Hard copies of documents as well as on-line access is important.
- Presentation of materials should be carefully considered (eg. flow charts are often more accessible than pages of text).
- There should always be a contact person/organisation listed for provision of further information.

⁴⁶ Ipsos MORI, [The views and experiences of civil sheriff court users](#) (2009)

89. It is noted that dedicated self-help centres have been established in British Columbia, Quebec and Alberta, and that self-help centres can take the form of a physical location, virtually on the internet, or a mixture of both models.

90. However, the SCCR did not recommend the development of a dedicated centre, arguing that “other jurisdictions have a well-developed system of self-help services because there is lesser or indeed no provision of civil legal aid”.⁴⁷ Thus, the SCCR recommends the following:

- The position in Scotland is that we are fortunate to have a legal aid system that is not capped and in which the threshold for assistance has increased;
- A mixed economy, with a range of sources of information, advice and help to deal with legal disputes, which also encourages the development of good, informative on-line facilities, is the best way to ensure that most people have the support they need to obtain access to justice;
- In terms of the SCS Website:
 - Access is not as easy as it could be; litigants need to know what they are looking for before they start
 - There should be a section of the SCS website that is much more obviously aimed at the public and contains all the information required to start or defend a case under the simplified procedure.
 - There should also be information about the structure of the civil courts and other civil procedures;
 - Material should be regularly review, updated and tested on focus groups;
 - The SCS website should provide links to other bodies’ websites and information about mediation and other methods of ADR; and,
- The SCS proposals (at that time) to establish a new system for dealing with party litigants in the Court of Session, involving a dedicated clerk and an appointment system and a document which sets out the respective rights and responsibilities of party litigants and SCS staff, should be implemented extended to all courts. In particular, consideration should be given to the documentation of service standards which should be made available to party litigants in cases under the simplified procedure.

91. Following the SCCR, CJAG made two recommendations on matters of self-help. First, it was recommended that a ‘triage’ approach should be adopted to help inform and guide individuals in identifying the most appropriate route to dealing with civil justice problems

⁴⁷ Scottish Civil Courts Review (2009), Chapter 11, para 20.

at each stage of the 'users journey'. Second, it was recommended that a web-based system should be created, bringing together information on rights, responsibilities, sources of self-help and advice and options for dispute resolution, which would guide people through the dispute resolution process.

Guidance Available to Party Litigants

92. Currently, there is material available on the SCS website, in the form of guidance notes and forms, which provide information on how to start or defend a case for the following procedures in the sheriff court:

[Small Claim Guidance Notes](#)

[Summary Cause Guidance Notes](#)

[Simplified Divorce and Dissolution of Civil Partnership Guidance Notes](#)

[Dealing with a Deceased's Estate Guidance Notes](#)

93. Although not specifically labelled as being for party litigants, this guidance does seem to be aimed at a novice.

94. It does not appear to be the case, as per the SCCR recommendation, that the proposals which the SCS had in hand at the time of the review for a new system of dealing with party litigants have been extended to cover the sheriff court.

95. Separate "going to court" guidance is also available, under each of the different procedures and contains general information on: the type of court hearing, preparing for attendance at court, court procedures, the courts decision, appeal provisions, recalling/enforcing the courts decision, documents you will receive and expenses. There is also a section in the guidance called "where can I go for advice?" and reference is made to organisations such as Citizens Advice Bureaux and law centres.

96. However, the guidance could be developed further with web links/contact information for the recommended organisations and updated on a regular basis. Although the guidance does in some places touch on behaviour standards expected of litigants, it could not be said that it sets out the respective rights and responsibilities of party litigants and SCS staff as was envisaged in the SCCR.

97. With regards to the Court of Session, there is guidance available which is specifically labelled as being for Party Litigants: [Raising and Defending Ordinary Actions in the Court of Session: A guide for Party Litigants](#). There is further additional guidance documents

available relating to specific technical practice/procedure and is provided to the party litigant when they attend the office of court (not currently available online).

98. There is a separate “Statement of Standards” document, provided at Annex E, specifically for the Court of Session (not currently available online) which sets out the respective roles, rights and responsibilities of SCS staff and party litigants, in line with the SCCR recommendations. It is provided to party litigants who attend the office of court.

99. It should be noted that the online guidance for the Court of Session was not as easy to locate as that for the sheriff court and was not signposted in the same way.

100. The SCS website also provides information on the European Union Small Claims Procedure⁴⁸ and provides a link to a practice guide for the application of the European Small Claims Procedure.⁴⁹ Although, it perhaps could be argued that the litigant would still need to know what they are looking for, before they start, especially since none of the guidance is particularly titled as being for party litigants/ persons representing themselves.

101. There is a section of the SCS website which refers to “more organisations”, however, it could be said that this should be more prominently signposted throughout the website, with more organisations listed and a description as to what each organisation provides (rather than just the title of the organisation). Four Advice and Assistance Providers are referred to here (a very small proportion of those which are available) and there is no information provided on ADR. Within the Small Claims guidance note, the only alternative to court referred to is to write formally to the other party to try and resolve the dispute. There is also a section called ‘Frequently asked questions’ which provides answers to some common questions about court procedure. A glossary of legal terms is also provided to assist the litigant.

102. Whilst the SCS guidance does seem to be aimed at a complete novice, the style of writing and visual lay-out could perhaps be more accessible. It appears that guidance and information is only available online or within the courts themselves, rather than being more widely accessible (e.g doctors surgeries and community centres).

103. The Supreme Court’s website provides a section called “Guidance to proceedings for those without a legal representative”⁵⁰ and is presented as a short FAQ resource. Litigants are directed to other sections of the website and staff in the Registry for further information.

⁴⁸ Scottish Court Service Website: [European Small Claims Procedure](#)

⁴⁹ European Commission, [Practice guide for the application of the European Small Claims Procedure](#), (2013)

⁵⁰ The Supreme Court, [Guide to proceedings for those without a legal representative](#), (2014)

104. Organisations other than the SCS may also provide guidance and information specifically for party litigants going to court in Scotland. Those organisations identified during the review were: Citizens Advice Scotland,⁵¹ West Lothian Citizens Advice Bureau,⁵² Shelter Scotland⁵³ and Families Need Fathers⁵⁴.

105. Some advice providers give step by step instructions for attending court and how to fill out forms, whereas others give more general information on matters such as how to gather evidence and what to expect on the day. In some instances, there is advice about alternatives to court and guidance on how to identify if you are able to go to court (i.e if there is a real dispute).⁵⁵ Also, some of the guidance is aimed at specific areas of law (such as family) or procedures (such as small claims) rather than all civil matters.

106. Whilst all of the guidance appears to be aimed at novices, the styles can differ substantially in terms of visual aids, detail of information, use of language and lay-out.

Other jurisdictions

107. The CJC in England and Wales has recently produced guidance for party litigants in small claims proceedings and is widely available online and in places such as Citizens Advice Bureaux and GP surgeries; although it is not specifically titled as being for persons representing themselves.⁵⁶ There are dedicated sections for ‘help and advice available’ and ‘weighing up your options’ which provide links to other organisations and information on alternatives to court. The information is aimed to help the litigant to know what to prepare in advance of going to court and what to expect once they do. The judiciary have also provided guidance on Interim Applications in the Chancery Division⁵⁷ and the Queens Bench Division of the High Court which are specifically entitled as being for litigants in person.⁵⁸

⁵¹ Citizens Advice Scotland Online [Advice Guide](#) provides step by step guides on specific issues such as [Taking a trader to court](#)

⁵² Citizens Advice Bureau West Lothian’s [Court Advice Project](#) provides two guides: [Thinking about pursuing a small claim](#) and [How to raise a small claim](#). These are unique to the West Lothian Bureau and are not available on the national Advice Guide resource.

⁵³ Shelter Scotland [Representing yourself](#) and Shelter Scotland [What happens at court?](#)

⁵⁴ Families Need Fathers, [Representing yourself in a Scottish Family Court- a guide for party litigants in child contact cases](#) (2014)

⁵⁵ Citizens Advice Bureau West Lothian, [‘Thinking about raising a small claim’](#)

⁵⁶ Civil Justice Council, [A Guide to Bringing and Defending a Small Claim](#), (2013)

⁵⁷ Judiciary of England and Wales, [Interim Applications in the Chancery Division: A Guide for Litigants in Person](#), (2013)

⁵⁸ Judiciary of England and Wales, [The Interim Applications Court of the Queens Bench Division of the High Court: A guide for Litigants in Person](#), (2013)

108. Guidance is also provided by other organisations in England and Wales, such as the Bar Council,⁵⁹ which is aimed for use by those more knowledgeable of court processes and procedure.

109. The Northern Ireland Courts and Tribunals Service have produced guidance for party litigants in the small claims court⁶⁰ and the High Court,⁶¹ which is clearly entitled as being for persons representing themselves. The guidance here also provides a comprehensive section on what help is available to the litigant (e.g. CAB, Law Centre, Solicitors, Barristers, Pro Bono Units and McKenzie Friends), and what you need to know before going to court (e.g. alternatives, do I have the correct parties, have I brought the claim in time and costs).

⁵⁹ The Bar Council, [A Guide to Representing Yourself in Court](#), (2013)

⁶⁰ Northern Ireland Courts and Tribunals Service, [Small Claims Guide](#), (2011)

⁶¹ Northern Ireland Courts and Tribunals Service, [A guide to proceedings in the High Court for people without a legal representative](#), (2012)

4. Party Litigants: Advice and Support Services

In-court advice/ lay supports

110. The first in-court advice project was established in Edinburgh Sheriff Court in 1997 with funding from the European Commission, which was managed jointly by Citizens Advice Scotland (CAS) and the Scottish Consumer Council. The aim of the project was to provide assistance to unrepresented litigants in the sheriff court in small claims, summary and ordinary matters. It was linked to the in-court Mediation project and the two services have since continued to work together.

111. The Edinburgh project was successfully evaluated in 2002 and its funding was continued.⁶² Following the success at Edinburgh, between November 2003 and March 2004, five more projects were introduced into the following sheriff courts; Aberdeen, Airdrie, Dundee, Hamilton and Kilmarnock, with the aim of:

- Increasing the number of clients seeking advice and assistance
- Increasing client confidence in court proceeding
- Increasing the effectiveness of court hearings
- Increasing general efficiency of the court system
- Decreasing the number of decrees granted in absence of the defender.⁶³

112. An evaluation of all of the in-court advice projects was carried out in 2005,⁶⁴ which was positive in its conclusions. The report recommended that the pilots be continued on a longer term basis and extended nationally. Demand was found to be high, as were levels of satisfaction amongst clients, court staff, sheriffs and local agencies. However, there were a number of problems identified:

- Adequacy of accommodation for the advisers and the related health and safety issues
- Administrative support staff for the advisers
- Adviser qualifications and training
- Early intervention in cases
- Further expansion of the services

⁶² Samuel, E., *Supporting Court Users: The In-court Advice and Mediation Projects in Edinburgh Sheriff Court*, Legal Studies Research Findings No. 30 (2002)

⁶³ <http://www.slab.org.uk/providers/advice/grant-funding/Projectstodate/index.html>

⁶⁴ Morris, S., et. al., *Uniquely Placed: Evaluation of the In-court Advice Pilots*, (2005)

- Models of service provision

113. The Ipsos Mori report (2009)⁶⁵ was also supportive of the in-court advice projects at that time, noting that the litigants interviewed were almost universally positive about these services and the advisers who worked there. However, some concerns were also raised, to which the report recommended increased staffing and better publicity, together with better liaison between the services and court staff.

114. The SCCR focussed part of its review on in-court advice services and consulted to ask what contribution they could make to improving access to justice. Two thirds of respondents considered that these services could make a positive contribution and there was strong support for extending the in-court advice services which were available at that time.

115. The SCCR was, in conclusion, supportive of in-court advice services and recommended the following:⁶⁶

- In-court advice services make a useful contribution to improving access to justice for those who are able to make use of their services.
- Such services should be developed and extended.
- Such development should happen within the context of SLAB's broader plans for the improvement and co-ordination of publicly-funded civil legal assistance and advice.
- SLAB should consider the quality and consistency of advice and help being provided by the different services.
- It is for SLAB to conduct an in-depth evaluation of the current provision for in-court advice and to develop a policy of what an in-court advice service should look like;
- One particular issue which requires careful consideration, is whether in-court advice services are to be targeted at any particular group of potential users, and therefore, by implication, to be unavailable to other groups.
- Local requirements may differ, but it can be argued that where in-court services are publicly funded they should have similar policies and practices. It is difficult to justify a private landlord in one area being able to get advice from an in-court adviser about a problem tenant, but not in another area, simply because of the management structure in place at the relevant advice service.
- We have no difficulty with in-court advice services being targeted at particular user groups where an analysis of local needs supports this; but the

⁶⁵ Ipsos MORI, [*The views and experiences of civil sheriff court users*](#), (2009)

⁶⁶ Scottish Civil Courts Review, Ch. 11, paras 36-40

rationale should be clear and explicit, so as not to raise the expectations of other potential user groups or case difficulties for the advisers themselves.

- Where the in-court adviser is unable to assist the inquirer, there should be clear and consistent protocols for referrals to other sources of advice and help. These should apply where the inquirer does not fall within the service's target group, if it has one, and where the service is already assisting the other party in the dispute and there would accordingly be a conflict of interest.

116. Responsibility for the funding of in-court advice projects transferred to SLAB as of April 2009. At the time of transfer there were seven projects which provided advice, but also representation where appropriate, within the sheriff courts at: Aberdeen, Airdrie, Dundee, Edinburgh, Hamilton, Kilmarnock and Paisley. SLAB explains that there was no single model of service, with only 5 of the 7 courts having a project worker permanently based in court buildings, and are moving away from using the term 'in-court advice' services as this does not accurately reflect the services which are provided.⁶⁷

117. SLAB reviewed in-court advice services again in 2011⁶⁸ (unpublished) concluding that "projects with a presence at court do not need to be permanently based in court to be accepted there, to deliver services at court and gain referrals from court staff or sheriffs. These projects are seen as experts in court process, despite not being based there permanently." This contrasts with the conclusion reached in the 2005 evaluation.

118. This conclusion was reached mainly through analysis of databases and narrative reporting returns, with some supplementary input from interviews with projects. However, limitations of the research relied upon to reach this conclusion should be noted. Only 21 out of the 23 projects being funded had completed SLAB's database, and the database was not completed consistently. Interviews to supplement the data analysis were conducted, but across only 8 of the 23 projects funded by SLAB at the time, due to time and resource constraints.

119. The report explains that the full programme of projects funded by SLAB included different models of service delivery and provided: advice and information to those who represent themselves; in-court advice to those who represent themselves; and, representation on behalf of the individual in courts and tribunals. These projects predominantly provided services to people who were referred to them pre-hearing, rather than assisting people who turned up on the day of their hearing unrepresented. Furthermore, in terms of representation services, it could be provided by either a legally

⁶⁷ Scottish Legal Aid Board, *Evaluation of grant funding programme: draft report for consideration of different models*, (unpublished 2011)

⁶⁸ *Ibid.*

qualified individual or a lay representative. Accordingly, SLAB prefer not to categorise projects they fund as providing only advice, casework or representation services, as many projects provide a mixture of these services depending on what is required in each specific case.

120. The report by SLAB also aimed to evaluate the different models of provision for the projects which it funded and includes information on routes of referral to its programmes. The aim of the report was to draw out lessons to be learned about the models of service delivery. This was in a context of seeking to identify which models best supported achievement of the programme outcomes; to connect people to help pre-court, to resolve problems at the earliest stage, and to target and co-ordinate help at court for people on specific types of problem (housing debt) rather than broader general at court help.

121. SLAB helpfully define projects into 6 different models based on types of advisers (legally qualified or lay) and whether they are based permanently at court. Statistics are grouped by the areas of law which each model tends to deal with.

122. Analysis is further broken down into the three different 'types' of assistance, as categorised by the Scottish National Standards for Information and Advice Providers as:⁶⁹

- Type I: Advice and information, sign-posting and explanation
- Type II: Casework, including negotiation and mediation and written forms
- Type III: Advocacy, representation and mediation at court or tribunal level

123. Overall, the report identified that the most dominant type of assistance was Type II (50%), followed by Type I (28%) and then Type III (22%). However, the findings have their limitations, as identified by SLAB in its report, so it is not clear if this would be the relative breakdown of the types of service across all of the funded projects at that time, or currently.

124. It is explained in the report that the characteristics of people reached and the outcomes achieved varied according to the model of the project and the referral route taken. Key observations include:

- Projects which are permanently based in court or which have a presence at court, do not get all their referrals from court. These projects have shaped their service by making referral links to external organisations.

⁶⁹ Information is available on the Scottish Government [website](#); The Scottish National Standards are specific to Scotland with no equivalent in England and Wales. They are not mandatory for advice and assistance providers, however, many funders now require is as evidence of the quality of service they are funding.

- The higher the proportion of casework referred from the court, the more variation there is in the kind of cases received.
- Projects with a presence at court do not need to be permanently based in court to be accepted there, to deliver services at court and gain referrals from court staff or sheriffs. These projects are seen as experts in court process, despite not being based there permanently.
- Projects covering multiple courts were not viewed as a problem by project staff or stakeholders, except in terms of logistics such as court scheduling, the time and money taken up by travelling to court.
- There were different pressures relating to being based in court permanently, including unsuitable accommodation, some inappropriate client behaviour and issues with coping with referrals from the bench.
- Benefits of being based in court permanently included being involved in planning for court days (although services not based in court permanently were also involved in court planning) and being easily accessible for people attending court who need to be signposted to the service.

125. Based on both this analysis and on-going monitoring of the now far wider range of service it funds (currently 93 projects across two grant funding programmes), SLAB suggests that the range of services provided even by some of those projects physically based at court do not appear wholly different to the services that might in other places be provided by a 'regular' advice agency. Where early advice is provided by an 'in court' advice service, this may result in there being no court action (and therefore no party litigant as such), much in the same way as could be the case were a potential litigant would approach a Citizens Advice Bureau or other advice agency for help in resolving their problem. While the 'in court' label might imply a distinct model and a focus on assisting party litigants to navigate the court process or to represent themselves, it is SLAB's view that the distinction is far less clear cut: many advice agencies provide help in relation to issues that are, or may become, subject of court action, while much of the work of in-court services flows from pre-hearing referrals rather than party litigants turning up on the day unrepresented. Importantly, 'in court' work is not limited to helping people at court: in court advisers may take on a client's case in much the same way as any other adviser, with the court aspect not necessarily being the dominant feature of their work.

126. In consideration of the value of or need for in-court advice to party litigants, SLAB defines in-court advice services in two ways:

- The first type of assistance would provide information, advice and possibly direct assistance in dealing with the case, including but not limited to advice as to how to initiate or defend court proceedings. This type of support could

also extend to advising on options for settlement, negotiating on a client's behalf or representing them in court where lay representation is permitted. SLAB considers that such support may or may not be best delivered in a court-based setting.

- The second type of assistance would provide a more limited range of services that can assist a litigant in person in running their case, understanding court procedures, identifying necessary steps to be taken, forms to be used and preparing to represent themselves in a court hearing. SLAB considers that this second type of assistance would be best suited to delivery in a court setting, as it is likely to be accessed by those turning up at court, either to lodge documents or attend a hearing, or directed to the service by court staff or indeed sheriffs.

127. This distinction is important to bear in mind when considering the support either available for or needed by party litigants. The former can be seen as similar to other models of advice service delivery, and therefore its availability and funding should be seen in the context of the availability and funding of the wide variety of non 'in-court' services. The latter can be viewed either alongside those other services or, potentially, as a stand-alone service designed to address a very specific range of concerns regarding party litigants' ability to raise, defend and conduct proceedings.

The current landscape of advice and support services in Scotland

128. Whilst in-court advice was the main focus of the SCCR, as noted in the previous section there is in fact a wide variety of advice and support services available throughout Scotland, which can be funded either by SLAB, local government or the Scottish Government and may take a variety of forms:

- court-based or not;
- providing in-court advice;
- providing casework prior to going to court;
- providing representation at court; or
- a combination of the above services.

129. The purpose for the funding in each programme may be focussed on a variety of outcomes, and only some may focus on outcomes related to aiding or reducing numbers of party litigants.

130. Although following the SCCR CJAG were to consider those recommendations in relation to access to justice, CJAG omitted consideration of advice from its remit.⁷⁰ Nevertheless, CJAG commented to endorse the earlier view of the 2005 CJAG report,⁷¹ which identified that there must be an improved and more joined-up system of advice services in Scotland. It was considered that this view is particularly relevant in today's financial climate of reduced funding allocation and budgetary pressure on local authorities, which is likely to impact on the provision of front-line advice services, at a time when the demand for such services might be expected to grow as a result of problems associated with the economic downturn.

131. Most advice and support projects are funded publicly via the Scottish Government, local government or SLAB. This report sought to provide a picture of the current landscape of in-court advice and support services available in Scotland covering:

- what type of advice and support is provided: advice, casework or representation?
- what area of law does the service specialise in?
- who provides the advice or representation: a lay person or legally qualified individual?
- who is able to access that advice: are there any restrictions on the category of people (by location or otherwise) who are able to access the service?

132. To that end, SLAB were able to provide some initial information as they are currently conducting research and analysis into this area under the auspices of MJW Project 3.

133. SLAB's recently published report (2014),⁷² reviews publicly funded legal assistance (PFLA) across the three providers and offers high-level information as to the amount of funding which has been allocated across specific areas of law by the three providers: Scottish Government, local government and SLAB. In 2012/13, at least £90 million was invested by the Scottish Government, local authorities and the Board in advice and representation services in order to tackle civil problems and disputes (SG £4 million, LG £30 million and SLAB £56 million).

134. The purpose of SLAB's report was to: improve understanding of current arrangements for publicly funded legal assistance; provide information relating to funding streams;

⁷⁰ Civil Justice Advisory Group, [*Ensuring Effective access to appropriate and affordable dispute resolution: The final report of the Civil Justice Advisory Group*](#), (2011)

⁷¹ Civil Justice Advisory Group, [*The civil justice system in Scotland – a case for review?*](#), (2005)

⁷² Scottish Government, [*Landscapes Review of Publicly Funded Legal Assistance*](#), (Making Justice Work Project 1) (2014)

establish a baseline against which to measure change; and to raise awareness and identify key contacts across public funders for the project.

135. The overall key findings are as follows:

- there is a mixed economy providing publicly funded advice and representation, covering the public sector, the third sector and the private sector. The workforce is comprised of volunteers, paid advisers and solicitors.
- different funders and policy interests have divergent reasons for supporting advice and representation services.
- there are few established operational or policy links between local and national funders/planners, with the exception of some areas such as housing and consumer advice.
- all funders were interested in measuring and monitoring outcomes of advice and representation, with progress made by specific funders in some policy areas.

136. There are a number of recommendations for improvement. Primarily, it is considered that there should be greater integration of public services at a local level driven by partnership, collaboration and effective local delivery; as, currently, the mixture of funding from local and central government is unplanned. It is recommended that the three providers of PFLA continue to work together to improve how funds can be directed to best effect, with proposals given on how this might best be achieved. Three further recommendations are made in regard to: improving performance, shifting towards prevention and greater investment in the people who deliver services.

137. The recommendation for greater integration of public services is currently being taken forward under MJW project 3, with Scottish Government and key stakeholders working together to plan and coordinate their grant funding.

138. Unfortunately, detailed information is not available on models of provision for PFLA programmes funded by local and national government. Although, it was recently reported that Scottish local authorities invest £20 million a year in the provision and funding of money advice services, according to research conducted by the Improvement Service and Money Advice Service⁷³ which was the first comprehensive overview in over a decade of the provision and funding of money and advice services across Scotland's councils.

⁷³ The Money Advice Service and Improvement Service, '[Scottish councils invest £20m a year in money advice services](#)', 30 August 2013.

139. Work is still underway, under the auspices of MJW 3, to better plan, co-ordinate and integrate all of the different advice, support and representation services which are provided. It is understood that this currently includes taking a more outcome-based approach to funding, achieving better transparency of outcomes and consideration of which models of help best contribute to achievement of these outcomes. It is further understood that the hope is that this may help future planning for co-ordinated help aimed at connecting people at court who are unrepresented to available support, or to more clearly identify gaps in existing forms of assistance.

140. While it is considered that there could be benefits in identifying the entirety of the projects and programmes currently funded in Scotland (for example, to understand if there are any gaps in support available to party litigants, whether in specific areas of law, such as small claims or insolvency etc., or by geographical area), it is clear that this would require a significant, and potentially disproportionate, amount of resource.

The court rules

141. Chapter 12A⁷⁴ of the Rules of the Court of Session provides for lay support within the Court of Session. An application document must be lodged, which is signed by the litigants and the named lay support. Permission of the court may be withdrawn at any time and remuneration is excluded.

142. The Sheriff Court Rules provides for lay support within the sheriff court.⁷⁵ A form is not required as is the case in the Court of Session, but permission must be requested from the Sheriff. The Sheriff may withdraw permission at any time and remuneration is excluded.

England and Wales

143. In England and Wales the terminology used for lay support and lay representation are the same; both are described as “McKenzie Friends”. The position is that a litigant is (in certain circumstances) permitted to be accompanied by a lay advisor who, in some limited circumstances, may be permitted an audience with the court and be able to conduct proceedings (therefore providing representation).⁷⁶ McKenzie Friends shall be discussed in the next section.

⁷⁴<http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap12a.pdf?sfvrsn=8>

⁷⁵ As inserted by the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 2) 2010, SSI 2010/416.

⁷⁶ See Judiciary of England and Wales, [*The Judicial Working Group on Litigants in Person Report*](#), (2013), Chapter 6.

5. Party Litigants: Lay Representation and McKenzie Friends

144. As discussed, it can be unclear what type of service is provided by each individual PFLA provider. For those services which are identified as providing representation for a litigant this may be either in the court or tribunal, and that representation may either be provided by a legally qualified individual or layman. Therefore, the number and extent of PFLA services which can provide lay representation in the civil courts is unclear at this time, although this is an area which SLAB are tasked with under MJW 3.

145. Projects which are funded by SLAB are listed on its website with a short description of the service provided⁷⁷ which can help to identify if it is a 'type III' project (providing representation). In total, 264 projects are listed by geographical area, 35 (13.3%) of which mention that they are able to provide representation. However, it is unclear if this would be representation at court (or a tribunal) and by either a legally qualified individual or layman.

146. According to the information provided by SLAB, 93 projects are currently funded (some which may operate in multiple geographical areas, hence 264 being listed on its website), including projects which are designed to provide help for individuals across the majority of the sheriff courts in Scotland. These projects are designed to help people facing court action in specific court areas, including help at court where necessary, on specific problem types. Projects funded by SLAB are asked to connect with other forms of help in their local areas, such as solicitors in private practice, the Civil Legal Aid Office, or law centres to achieve the full spectrum of support.

147. The SCCR explored the idea of lay representation in the civil courts.⁷⁸ It was recognised that a trend had developed in England and Wales whereby party litigants had been allowed in-court assistance from a 'McKenzie Friend' who might also be granted a right of audience to speak on their behalf; providing 'representation' as well as in-court advice and support.

148. The SCCR consulted on whether a person without a right of audience, unable to provide representation, should be permitted to address the court on behalf of a party litigant (PL). Respondents were evenly divided. The arguments for and against can be summarised as follows:

⁷⁷ <http://www.slab.org.uk/public/civil/Othersourcesofhelp/>

⁷⁸ Scottish Civil Courts Review, Chapter 11.

Arguments in support

- It is appropriate in circumstances where English is not the PL's first language, or they have a disability which restricts full participation in the action.
- A PL may be substantially assisted by a more articulate, confident and more experienced representative, which may also benefit the court and opposing solicitor.
- However, many of those in favour stated that it should only be permitted in exceptional circumstances, at the courts discretion, and without any remuneration.

Arguments against

- The current rules (as they were at that time) manage to strike the correct balance.
- Professional obligations incumbent on legally qualified professionals would not be applicable to lay representatives.
- The court benefits from advisers who are not intimately involved in the litigations.
- There could be an increase in 'recreational' PL's who offer their expertise to others, charging a fee for their services.

149. The SCCR recommends that, with the exception of its proposals in relation to simplified procedure cases, rights of audience should not be extended generally to those without suitable qualifications. However, it was thought that there would still be specific, exceptional circumstances in which it would be appropriate:

We therefore recommend that a person without a right of audience should be entitled to address the court on behalf of a party litigant, but only in circumstances where the court considers that such representation would help it. Whether such a person would be of assistance would be at the discretion of the court. Without prejudice to its general discretion, the court should be entitled to refuse to allow any particular person to appear on specific grounds relating to character and conduct. The court should be entitled to withdraw its approval at any time. The court's decision should be final and not subject to appeal. The rules of court should specify the role to be played by the individual and should provide that he is not entitled to remuneration.⁷⁹

⁷⁹ Scottish Civil Courts Review, Chapter 11, Para. 53.

150. Separate recommendations are made in respect of the proposed new simplified procedure⁸⁰ so that for cases with a value of £5,000 or less, the party litigant would automatically be entitled to have their case presented for them by a suitable lay representative. This is regardless of legal aid being available.

151. As a result of the SCCR recommendations, complementary provisions were provided for in the Legal Services (Scotland) Act 2010 in order to permit a lay assistant to make oral submissions to the Court on behalf of a party litigant, so as to be able to provide lay representation.⁸¹

152. Court rules were required to implement the changes. A Working Group with membership of both the Court of Session and Sheriff Courts Rules Councils (as they were at that time) was set up to consider the appropriate policy to implement the changes which would be required. The Working Group consulted on the matter and the consultation note is provided at Annex F.⁸²

153. The consultation note discusses that, at that time, the provisions for and concept of lay assistance was approached differently by the two courts. The Working Group aimed to make recommendations which would take into account the different circumstances of the two courts whilst maintaining, where possible, consistency in the overall approach.

The Court of Session Rules

154. Following the recommendations of the Working Group, the Court of Session Rules Council introduced a new Chapter 12B⁸³ for Lay Representation, which came into force on 9 July 2012.⁸⁴ Thus, lay representatives are now recognised in the Court of Session and are able to make oral submissions on behalf of a PL. However, lay representatives are unable to engage in the examination of witnesses, the reasons for which are set out in the consultation note referred to above.

155. Lay representation in the Court of Session also does not extend to allow a representative to make an oral submission on behalf of a company or other non-natural person. As detailed in the consultation note referred to above, the Working Group

⁸⁰ As provided at Chapter 5 of the Scottish Civil Courts Review.

⁸¹ Section 126 amends the Court of Session rules and section 124 amends the sheriff court rules.

⁸² Lord President's Working [Group Consultation Note](#) on Proposals Concerning Lay Representation in the Court of Session and the Sheriff Court

⁸³ <https://www.scotcourts.gov.uk/docs/default-source/cos---rules/chap12b.pdf?sfvrsn=2>

⁸⁴ As inserted by Act of Sederunt (Rules of the Court of Session Amendment No. 3)(Miscellaneous) 2012 (SSI 2012/189)

considered that, “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”.⁸⁵

156. The practicalities are that an application must be made to the court asking permission for a named individual to appear, along with the litigant, for the purpose of making oral submissions on behalf of the litigant. A form must be completed and submitted prior to the date of the relevant hearing, except in exceptional circumstances where it may be accepted on the day. The application requires the prospective lay representative to make five different declarations relating to: financial interests, confidentiality, convictions and whether or not they have previously been declared a vexatious litigant.

157. The issue of whether a lay representative should be able to represent a company was considered in *Secretary of State for BERR v UK Bankruptcy Ltd*,⁸⁶ where it was considered that it was not open to the court to modify that rule, and even if it were, it was not minded to do so. The salient points are summarised as follows:

- The proposal raises questions of social policy relating to rights of audience in the civil courts; such questions are not for the court to decide.
- It is clear that every extension of rights of audience in the court has been brought about by legislation.
- If there were to be an extension of rights of audience in relation to artificial legal persons, it should only be effected after the normal consultative process of law reform.
- Certain problems are evident without deep analysis, such as a director should not be able to represent a company which is being liquidated/ wound up, whose own actions may have caused the litigation.
- If lay representation of companies were to be allowed, it would not be long before such persons would make their services available for that purpose, as has happened in England and Wales.⁸⁷

⁸⁵ Lord Presidents Working Group [Consultation Note](#) on Proposals Concerning Lay Representation in the Court of Session and the Sheriff Court

⁸⁶ [2010] CSIH 80

⁸⁷ See, for example, *POW Trust and Anor v Chief Executive and Registrar of Companies* ([2002] EWHC 72783 (Admin)) the company was represented by a director, Mr Terence Ewing, who was a serial party litigant in his own right (cf *Ewing v Times Newspapers Ltd*, 2010 CSIH 67). In *Bournemouth and Boscombe Athletic Football Club Ltd v Lloyds TSB Bank plc* [2004] EWCA Civ 935) the claimant company was represented by a person who had been appointed as a director for the purpose of conducting the litigation (cf paras 27 and 40), cited in *Scottish Civil Courts Review* (2009).

- Lastly, the Lord Justice Clerk was of the view that granting such a proposal would inevitably lead to wider questions of rights of audience in relation to unqualified persons; e.g. in the representation of a trust by one of its trustees; or the representation of a commercial partnership by one of its partners.

158. However, lay representation of companies was later commented by the Supreme Court in *Apollo Engineering Limited v James Scott Limited*,⁸⁸ to say that the issue must be re-examined, as a company which is unable to pay for a lawyer should not be prevented from accessing the court.⁸⁹

159. The Courts Reform (Sc) Bill does intend to address this point and sections 92-94 allows for lay representation of non-natural persons which would require subsequent amendment to court rules.

The Sheriff Court Rules

160. Following the recommendations of the Working Group, the sheriff court rules were also amended, in April 2013, by the Act of Sederunt (Sheriff Court Rules) (Lay Representation) 2013.⁹⁰ However, the new rules now sit in parallel with previous existing rules for lay representation which was allowed for in small claims actions and some specific types of cases in summary and ordinary cause procedure.⁹¹

161. Under the new rules, a lay representative is only entitled to make oral submissions at hearings when he or she has been specifically authorised to do so. The PL must also appear at court alongside the lay representative. However, under the existing parallel provisions for specific types of action the lay representative is, on the whole, allowed to do for clients whatever they could do for themselves.

162. An application is to be made orally on the date of the first hearing at which the litigant wishes to be represented by a lay individual. The application is to be accompanied by a signed document which covers the same issues as detailed in the equivalent form for the Court of Session, described earlier. The Sheriff may only grant the application if it is considered that it will assist with his or her consideration of the case. Similar to the Court of Session, only natural persons may be represented by a lay representative.

⁸⁸ [\[2013\] UKSC 37](#), on appeal from [2012] CSIH 4; [2012] CSIH 88

⁸⁹ *ibid*, para. 30.

⁹⁰ <http://origin-www.legislation.gov.uk/ssi/2013/91/contents/made>

⁹¹ The explanatory note to the instrument states that, “[e]xisting rules in relation to representation and lay support are preserved and sit in parallel with the new rules”.

163. There has been commentary around how the new rules for lay representation and the previous existing ones interact which suggests that there is a problem, as it requires specialist knowledge of the system that the majority of persons with lay knowledge will not, and by definition should not, have.

164. In an article for the Journal Online⁹² the author argues that the current rules are inaccessible, confusing and, as they exist in parallel with existing provisions, are creating obstacles to the litigant by applying different tests and designing different functions to different roles, even although those roles are all named 'lay representative'. It is concluded that the aim of the Legal Services (Scotland) Act 2010 has not been fulfilled as lay representatives still do not have rights of audience.

165. During Parliamentary scrutiny of the new rules, the Subordinate Legislation Committee asked for clarification on some matters whilst expressing concern about how the new arrangements would sit in parallel with existing provisions.⁹³ In response, the Sheriff Court Rules Council recommended that a review of arrangements for lay representation be undertaken by the Scottish Civil Justice Council.

Provisions in the Courts Reform (Sc) Bill relating to the Court of Session and sheriff court

166. Sections 92-94 of the Bill makes provision for lay representation of non-natural persons (companies and other bodies) in civil proceedings for both the Court of Session and sheriff court, and provides that the Court of Session may make further provision for lay representation by way of court rules. Thus, in order to alter the court rules for lay representation, primary legislation will no longer be required.

Lay Representation in other jurisdictions

England and Wales

167. As mentioned, in England and Wales a lay representative is referred to as a "McKenzie Friend" (MF). MF's are not specifically provided for in the rules of court.⁹⁴ The recent

⁹² Alan McIntosh, [Fifty Shares of Lay?](#), The Journal (April 2013)

⁹³ Scottish Parliament, [Subordinate Legislation Committee 23rd Report, 2013 \(Session 4\)](#), (2013)

⁹⁴ The term derives from *McKenzie v McKenzie* [1971] P 33.

report of the *Judicial Working Group on Litigants in Person (2013)*⁹⁵ explains the development of and current position of MF's in England and Wales.

168. The CJC report *Access to Justice for Litigants in Person (or self-represented litigants)*(2011)⁹⁶ explored the issue of MF's. The CJC recommended that a notice of McKenzie Friend be introduced which would provide the court with some background information as to the nominated representative; also, it was recommended that a Code of Conduct for McKenzie Friends be developed (drafts of which are provided in the report).⁹⁷

169. Although not quite a code of conduct, Practice Guidance⁹⁸ is currently available for MF's explaining what they may or may not do, which was developed by the Master of the Rolls (President of the Civil Division). The Practice Guidance also explains that an application must be made at the start of a hearing (similar guidance is not available in Scotland). However, the guidance has been subject to the criticism that its wording is too formal.⁹⁹ The Judicial Working Group report (2013) states that when it was originally conceived in 2004, the Practice Guidance was intended to be complemented by a specific guide prepared by HMCTS for litigants in person, but that this has not yet been produced.

170. MF's in England and Wales do not have an automatic independent right to make oral submissions or to carry out the conduct of litigation. The Practice Guidance explains that MF's may not:

1. Act as the litigants' agent in relation to the proceedings;
2. Manage litigants' cases outside of court (e.g. sign court documents); and,
3. Address the court, make oral submissions or examine witnesses.

171. However, it is later explained that although MF's have no automatic right of audience (to make oral submissions) or to conduct litigation, they may be able to do so in exceptional circumstances if the court grants such a right as per the Legal Services Act 2007, sections 12-19, Schedule 3.

⁹⁵ Judiciary of England and Wales (2013), Chapter 6

⁹⁶ Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants)*, (2011), the recommendations of which are summarised in Annex D

⁹⁷ *Ibid*

⁹⁸ Courts and Tribunals Judiciary, [McKenzie Friends guidance](#) (2010), and Courts and Tribunals Judiciary, [President of the Family Division Guidance: McKenzie Friends](#) (2005)

⁹⁹ Judiciary of England and Wales, [The Judicial Working Group on Litigants in Person Report](#),(2013), Chapter 6

172. It is explained that the court should only be prepared to grant such rights where there is good reason to do so, taking into account all of the circumstances of a case. Furthermore, it is explained that courts should be 'slow' to grant rights of audience as a person exercising such rights must ordinarily be: properly trained, under professional discipline (including an obligation to insure against liability for negligence) and subject to an overriding duty to the court. Those requirements are considered by the Master of the Rolls to be necessary for the protection of all parties to litigation, and essential to the proper administration of justice.

173. Examples of typical special circumstances which have been held to justify the grant of a right of audience are as follows:

1. The person is a close relative of the litigant;
2. Health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative; and,
3. The litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.

174. The practice guidance also explains that those who hold themselves out as professional advocates, or professional MF's, or who seek to exercise such rights on a regular basis, whether for financial reward or not, will only be granted the right of audience in exceptional circumstances.

175. In terms of remuneration, it is lawful for litigants to enter into agreements to pay fees for a MF for general assistance, although such fees cannot be lawfully recovered from the opposing party. Where fees are incurred by a MF for exercising a right of audience following the grant of such a right by the court those fees are, in principle, recoverable from the litigant and also from the opposing party. Where fees are said to be incurred for carrying out the conduct of litigation, after the court has granted such a right, those fees are also in principle recoverable from the litigant for whom the work was carried out; but not from the opposing party.

176. The recent report of the *Judicial Working Group on Litigants in Person (2013)* notes that there has been a substantial increase in "professional" lay advocates, or MF's, who seek to act as advocates for litigants in person for remuneration. It is explained that some of the fees charged are similar to, if not more than, a professional lawyer and can be disruptive to the proceedings. However, it is also noted that the power to allow a lay person to conduct litigation is very infrequently exercised.

177. The Judicial Working Groups' report (2013) explains that, in effect, there are three different types of lay individual, which are all termed 'McKenzie Friend' in England and Wales: individuals who simply attend court to provide moral support to the litigant in person or to take notes; individuals who speak as advocate on behalf of the litigant during the hearing; and, individuals who conduct the claim for the litigant.

178. A summary of the Judicial Working Group's general recommendations is provided at Annex D. Specific recommendations are provided in Chapter 6 relating to McKenzie Friends and provide that there should be a review of lay assistants with the objective of issuing further guidance. Also, it is recommended that consideration should be given to whether there should be court rules (or practice directions) introduced, as is the case in Scotland. It is also emphasised that where lay representation is allowed for a particular case, it is vital that all are fully aware of the role the representative is playing, and the scope and restrictions on that role.

179. On the topic of fee-charging and regulation of MF's, it was announced in January 2014 that the Legal Services Consumer Panel was to investigate the emergence of 'professional' MF's who charge litigants in person for their services,¹⁰⁰ as part of its larger programme of work to investigate the regulatory implications of the anticipated rise in litigants in person (as MF's are currently unregulated). The Legal Services Consumer Panel reported in April 2014,¹⁰¹ with the overall message that the potential benefits of fee-charging McKenzie Friends outweigh the potential risks and they should be accepted as a legitimate feature of the legal services market, especially and inevitably as a result of legal aid reforms. It is concluded that there will require a cultural shift and thus there is an important role for government and senior judges to change attitudes, but that McKenzie Friends will also need to play a part through effective self-regulation. It was suggested that there is a need to educate litigants about the benefits and pitfalls of using McKenzie Friends.

Other jurisdictions

180. The SCCR provides a comparative analysis of the rights of audience in some other jurisdictions (England and Wales, Northern Ireland, New Zealand, Ireland and Germany).¹⁰² It was not found to be the case in any of those jurisdictions that a lay representative has an automatic right to audience. Generally, a lay representative will only be granted rights of

¹⁰⁰ Family Law Week, '[Legal Services Consumer Panel to investigate fee-charging McKenzie Friends](#)', 24 January 2014

¹⁰¹ Legal Services Consumer Panel, '[Fee-charging McKenzie Friends](#)', (2014)

¹⁰² Provided in the Annex to Chapter 11 of the Scottish Civil Courts Review

audience in special circumstances, except in Germany where there is an absolute prohibition on lay representation at the oral hearing.

181. The Northern Ireland Courts and Tribunal Service have also produced a practice note for lay representatives, who they also term McKenzie Friends,¹⁰³ which covers information on: what a McKenzie Friend may or may not do, confidentiality, rights of audience and remuneration.

¹⁰³ Northern Ireland Courts and Tribunals Service, [Practice Note 3/2012: McKenzie Friends \(Civil and Family Courts\)](#), (2012)

6. Party Litigants: Case Management

The SCCR Recommendations

182. Although the SCCR made recommendations to provide help to persons representing themselves, it was also thought that there are party litigants “whose lack of understanding of the law and court procedures causes the court and other litigants considerable trouble, delays and unnecessary expense; there are some who misguidedly raise actions with no stateable legal basis; and there are a few who actively abuse the court process.”¹⁰⁴

183. These are matters which the SCCR considered improved judicial case management would help to address. A system of active judicial case management is outlined in Chapter 5 of the report, which recommends the principle that it is for the court to control the conduct and pace of litigation. The review later goes on to examine, in Chapter 9, the range of case management powers that it considers the court should have at its disposal, along with the case management challenges created by party litigants and the problems caused by vexatious litigants. Annex B provides an extract of those recommendations most relevant to the focus of the Access to Justice Committee’s work.

184. Case management was one of the main provisions of the SCCR’s remit and, consequently, one of the main features of the overall SCCR recommendations for a new civil courts regime.

185. At Chapter 5, the SCCR specifically recommends that, with the exception of certain types of action, all actions in the Court of Session and the sheriff court should be allocated to a single judge for the lifetime of a case and be subject to a general model of judicial case management with the following features:

On the lodging of defences, a case should be allocated to the docket of a particular judge or sheriff. A case management hearing should be fixed shortly thereafter. This would normally take place by means of a telephone conference call. Parties would make submissions as to further procedure and any other matters arising, such as disclosure of documents. The judge or sheriff would identify the factual and legal issues in the case and decide what form of case management is most appropriate. In complex cases this may take the form of active judicial case management akin to the commercial model...with further case management hearings as the case progresses. In straightforward cases the court might decide that a timetable and related orders akin to the case-flow procedure under

¹⁰⁴ SCCR, Ch. 11, para. 2

*Chapter 43 would be appropriate. In that event, no further case management hearings would be required. In certain cases a mixture of these techniques would be appropriate.*¹⁰⁵

186. At Chapter 9, the SCCR made further recommendations for enhanced judicial powers of case management including in relation to:

- abbreviated forms and adjustment of pleadings;
- the court's powers to order disclosure and lodging of documents relating to an action;
- the arrangements for expert evidence;
- the timetabling of cases;
- the court's powers to impose sanctions for abuse of process; and
- actions involving party litigants and vexatious litigants.¹⁰⁶

Party litigants and vexatious litigants

187. The SCCR recommends¹⁰⁷ that the sheriff clerk should be given discretion to refer any ordinary action or summary application presented by a party litigant to a sheriff who may direct whether or not the action should be allowed to proceed and that at any case management hearing the court should explain to a party litigant the requirements of any order made and the sanctions for non-compliance.

188. In considering that vexatious litigants present a growing problem for the administration of justice in the Scottish civil courts, the SCCR recommends that the civil courts should have powers similar to the courts in England and Wales in relation to civil restraint orders which would provide for a system of orders regulating the behaviour of parties persisting in conduct amounting to an abuse of process.

Judicial case management in the Employment Tribunal (Scotland)

189. Many of the SCCR recommendations reflect procedures which are currently in place for active judicial case management within the Employment Tribunal Scotland (ET(S)), which has been designed to be accessed by parties without the benefit of professionally qualified legal representation. The Employment Tribunal utilises proactive case management in order to meet its overriding objectives as identified in the [Employment Tribunals \(Constitution and Rules of Procedure\) Regulations 2013, Schedule 1 Rule 2:](#)

¹⁰⁵ SCCR, Ch. 5, para. 5

¹⁰⁶ SCCR Recommendations 112-134

¹⁰⁷ SCCR Recommendations 131-133.

Overriding Objective

2. *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –*
- (a) ensuring that the parties are on an equal footing;*
 - (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
 - (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
 - (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
 - (e) saving expense.*

190. The Employment Judge has wide case management powers in terms of Rules of Procedure 29-40. Rules 29 provides for case management orders:

29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

191. Other powers relate to matters such as disclosure of documents and information. The Employment Tribunal may also strike out a case for non-compliance of any of the Rules or with an order of the Tribunal.¹⁰⁸

192. Case management powers may be exercised “on paper”, or else at a Preliminary Hearing¹⁰⁹ where the Employment Judge may do one or more of the following:

- (a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);
- (b) determine any preliminary issue
- (c) consider whether a claim or response, or any part, should be struck out under rule 37;
- (d) explore the possibility of settlement alternative dispute resolution (including Judicial Mediation)

¹⁰⁸ Rule 37 (1)(c)

¹⁰⁹ Rules 53

193. The Employment Judge will normally conduct a Case Management Discussion (CMD) at a closed preliminary hearing, where the Judge will aim to conduct preliminary consideration of the complaint(s) and make Case Management Orders (including orders relating to the conduct of the Final Hearing). The Judge will aim to identify, articulate, confirm and record, and give direction as required, in respect of:

- The nature of the claim which is being made, the statutory provisions upon which the claimant relies and the essential matters which must be capable of being proved at the hearing if the claim is to have a reasonable prospect of success;
- The issues in dispute between the parties requiring investigation and determination;
- Whether there are any preliminary issues arising in the case which it would be appropriate to determine at a further preliminary hearing;
- In the event of it being decided that a further preliminary hearing should be fixed, the length of any such hearing and the date(s) upon which it will take place;
- Otherwise, the length of the hearing required to deal with the merits of the claim (including any preliminary matters reserved to it on a PBA basis) and the date(s) upon which it will take place;
- The identity of the witnesses whom each party intends to call, and the relevance of the evidence which those witnesses are being called are to give, to the issues before the tribunal;
- The documentary evidence likely to be produced by each party and any directions required in relation to its production and exchange;
- What facts may be capable of being agreed between the parties in advance of the hearing and any directions required in relation to the production of an Agreed Statement of Facts;
- Whether the Employment Judge considers any Orders are necessary at this stage in order to deal with the proceedings efficiently and fairly, and if so, the nature and scope of these Orders; e.g. disclosure/ recovery of Documents, the provision of further particulars of claim or response,(specification);
- The nature and scope of any Orders sought by either party and why it is considered such orders would assist the tribunal to deal with proceedings efficiently and fairly;
- Where either party raises the issue and / or where the judge considers it may be appropriate, whether parties wish to proceed by way of Judicial Mediation; and,
- Any other matter which the Employment Judge considers can be usefully discussed with a view to ensuring the effective management of the claim.

194. Following the CMD, the Employment Judge will issue a written copy of any Case Management Orders or Directions which have been pronounced orally in the course of the CMD, together with an accompanying Note. These are designed to direct parties' preparation for the Hearing. They are also thought to provide a moral "blue print" for its conduct in terms of issues, witnesses, scope of inquiry, fair notice and time-scales.¹¹⁰ In the ET(S) active judicial case management is thought to have led to a reduction in the number of postponements and split hearings, and a corresponding increase in the number of cases which not only commence Final Hearing within the 26 guideline period but also conclude within that period or shortly after.¹¹¹

Judicial Mediation as a case management tool in the Employment Tribunal (Scotland)

195. Judicial Mediation is a tool by which the overriding objective of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 can be furthered. The overriding objective is provided for in Rule 3:

3. A tribunal shall, whenever practicable and appropriate, encourage the use by the parties of the services of ACAS, Judicial or other Mediation, or other means of resolving the dispute by agreement.

196. When judicial mediation is requested, the case will be referred by the case managing judge, together with a recommendation on the prospects of success, to the Vice President of ET(S) who controls the allocation of judicial mediation resource, for consideration and allocation of resource, if approved. Where mediation is conducted by a judge mediator, it will be for a single day of mediation. Since its introduction in Scotland, there has been a high success rate for Judicial Mediation in the ET(S).¹¹² Historical figures for the duration of the scheme (from April 2010 to 2013) show an average of 104 net sitting days saved per year and an average success rate of 73%.¹¹³ In the year to end September 2013, 35 Judicial Mediation Hearings took place in Scotland with a success rate was 77% and 89.5 net hearing days saved.¹¹⁴ The experience in the ET(S) suggests that informed consent is an important factor in assisting parties in achieving success.¹¹⁵ However, it should be borne in mind that

¹¹⁰ d'Inverno, J., *Case Management in the Employment Tribunal (Scotland)*, (Unpublished 2014)

¹¹¹ *Ibid.*

¹¹² d'Inverno, J., *Judicial Mediation in the Employment Tribunal (Scotland)*, (Unpublished 2014)

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

in those cases which proceed to Judicial Mediation, ACAS has already had an opportunity to assist parties to settlement through Conciliation, which may also run concurrently with Judicial Mediation.

Scottish Government Response to the SCCR Recommendations

197. The Scottish Government is supportive of the SCCR recommended approach to “better case handling, with case docketing, more reliance on active judicial case management and the further development of case flow management procedures in other types of action.”¹¹⁶ It is considered that the work will largely be for the judiciary and the Scottish Court Service to take forward and it is noted that there will be particular resource implications (particularly for court IT systems).

198. The Scottish Government recognised that similar implemented recommendations for civil courts reform in England and Wales (including active judicial case management) are thought by most commentators to have been either costly or unsuccessful.¹¹⁷ It is stated that the experience of England and Wales shows that a move to greater judicial case management does not inevitably reduce the on-going costs to the courts or to parties; whatever its benefits in terms of the efficient handling of individual cases. The SCCR recommendations were considered to be more flexible in their expectations for mediation and pre-court procedure and that “consideration and adoption of Lord Gill’s recommendations on case management will require careful development of the detail.”¹¹⁸

199. In response to the particular recommendations for judicial case management and enhanced case management, it is stated that the Scottish Government agrees with the fundamental principle that the court should exercise effective control over the conduct and pace of litigation and it was thought that case flow management procedures should be encouraged and further developed in appropriate case types.¹¹⁹

200. Overall, the Scottish Government recommends that a “carefully balanced package of case management policies is required, tailored specifically to different case types and linked to administrative capacity and available resources.”¹²⁰

¹¹⁶ Scottish Government, *Response to the Report and Recommendations of the Scottish Civil Courts Review*, (2010)

¹¹⁷ *Ibid*, para. 37

¹¹⁸ *Ibid*, para. 39

¹¹⁹ *Ibid*, para. 158

¹²⁰ *Ibid*, para. 161

Current developments

201. The SCJC Rules Rewrite Working Groups' Interim Report¹²¹ considered the implementation of judicial case management and recommended that it be taken forward as a priority, with drafting to begin during 2014. Enhanced case management was also considered and it is thought to be a medium-term priority. The report sought to understand how practical case management (and docketing) is; what changes to behaviours, training and processes are needed to support this; and, what ICT changes are required. The Rules Rewrite Working Group (RRWG) gave particular attention to similar recommendations which have been implemented in England and Wales (although other jurisdictions were considered).

202. The report highlights that Strasbourg case law has made it clear that delays in progressing a case through the courts will be attributed to the Member State, even where the parties themselves have deliberately caused, or contributed to, the delay.¹²² The RRWG considers it to be "essential that management of litigation transfers to the court, and that judges and the judicial system take a proactive stance in managing the progression of cases through the courts."¹²³ In order to bring about the necessary shift in culture and practice it is stated that both legislative and non-legislative measures are required. Some initial views and steps are identified to assist with this, including an overarching objective, rules for sanction and enforcement and supporting measures.

Overarching objective

203. The RRWG considers that placing an objective within the civil court rules would be essential to ensuring effective case management, but that were it to have an overriding and binding effect that that might cast doubt on the applicability of individual rules and lead to satellite litigation. The recommendation is that instead, there should be a statement of principle and purpose in both the sheriff court and Court of Session rules, to which the court should have due regard, but that it should not override the other rules of court.¹²⁴

Culture change

204. The RRWG provides that whilst both practitioners and litigants are keen to see active judicial case management, that this requires a significant culture change on the part of the judiciary and court staff. It is explained that anecdotal evidence suggests that the High

¹²¹ Scottish Civil Justice Council, [Interim Report on the 'Making Justice Work 1' Rules Rewrite Project](#), (2014)

¹²² See recent example of *Anderson v United Kingdom* [No. 19859/04, 9 February 2010]

¹²³ Scottish Civil Justice Council, [Interim Report on the 'Making Justice Work 1' Rules Rewrite Project](#), (2014), para. 75.

¹²⁴ *Ibid*, para. 71

Court in England and Wales has adopted case management more readily than at district court level. In order to support effective case management and culture change, judicial training and appropriate ICT support are considered to be essential.

Case management

Docketing

205. Effective docketing systems (allocating an individual judge to the lifetime of a case) is mentioned in the Report so far as to note that, although recommended by the SCCR, it has the potential to be “resource heavy, requiring judges to be allocated at reasonably short notice and may make managing the caseload of a court much more difficult”. The RRWG did not provide a view on the matter in the interim report but notes the intention to do so in due course (the final report of the RRWG is expected in late 2014).

Sanction and enforcement

206. The interim report considers costs reform to be a necessary complement to ensure the success of procedural reform and states that we are fortunate in Scotland to be in a position to take forward both courts and costs reform in an integrated way (following the recent publication of the Taylor Review).¹²⁵ It recommended that rules for sanctions and enforcement, as recommended in the SCCR,¹²⁶ be taken forward as a priority (and perhaps ahead of any implementation of Sheriff Principal Taylor’s recommendations).

Enhanced case management

207. The RRWG considers that the SCCR recommendations for enhanced judicial case management are suitable to be taken forward separately from the structural reforms of the Courts Reform (Sc) Bill, which include:

- abbreviated forms and adjustment of pleadings;
- the court’s powers to order disclosure and lodging of documents relating to an action; and
- the arrangements for expert evidence.

The Courts Reform (Sc) Bill

The Bill does not provide any direct provision relating to case management as it is thought that it would not be appropriate to provide such rules for all of the different kinds of litigation in primary legislation.¹²⁷ However, the Bill does provide for the Court of Session, as advised by the SCJC, to have wide powers to make whatever rules are thought necessary to implement case management.

¹²⁵ Sheriff Principal Taylor, [Review of Expenses and Funding of Civil Litigation in Scotland](#), (2013)

¹²⁶ SCCR, Ch. 9, pp. 228-233

¹²⁷ Scottish Government, [Courts Reform \(Scotland\) Bill – Policy Memorandum](#), (2014), para. 216

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Data on Party Litigants in the Court of Session 2011 – 2014 (end of April)

The following data is in relation to Party Litigants who are unable to obtain the signature of a duly authorised person i.e. solicitor / advocate to sign their summons / Petition etc. and make an application to the court in terms of Rule of Court 4.2(5) for the leave of a Lord Ordinary to proceed without a duly authorised signature and sign the document themselves.

2011 - 62 applications made – 9 granted

2012 - 83 applications made – 24 granted

2013 - 55 applications made – 7 granted

2014 – 16 applications made – 5 granted (end of April)

Applications for leave to proceed under section 1 of the Vexatious Actions (Scotland) Act 1898.

These are applications from Party Litigants who have been declared vexatious under the above Act and make an application to the Court of Session for leave to institute legal proceedings (anywhere in Scotland)

2011 - 15 applications made – 0 granted

2012 - 15 applications made – 2 granted

2013 - 26 applications made – 0 granted

2014 - 4 applications made – 0 granted (end of April)

***Please note that there are serious limitations to the conclusions which can be drawn from this data, as it may not accurately reflect the number of party litigants acting in the Court of Session at any given time. This data presents the numbers of party litigants in the Court of Session as at the commencement of an action only and does not take into account any changes in representation after that point.**

Extracts, Report of the Civil Courts Review, Recommendations (p. 131-158)

Chapter 5 A new case management model

48. There should be explicit recognition of the principle that the court should have power to control the conduct and pace of all cases before it. (Paragraph 6)

Actions before the District Judge

79. There should be a single new set of rules for cases for £5,000 or less. (Paragraph 125)

80. The new rules for low value cases should be based on a problem solving or interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. (Paragraph 126)

81. The new rules should be written in plain English and be as clear and straightforward as possible. (Paragraph 127)

82. At the first hearing the district judge should decide what further information is required and what the next stage of procedure should be. He should be able to continue the case to a later date if he considers that to do so will enhance the prospects of achieving a settlement. There should be a permissive provision that will allow the district judge to assist the parties to reach a settlement at any point in the case, rather than a requirement that he should do so at the first hearing in every case. (Paragraph 128)

83. The simplified procedure should enable a party litigant, with the help of written explanatory guidance and/or support from an in-court or other advice agency, to initiate a claim or lodge a defence and conduct his case to a conclusion. Such a party should be entitled, with the permission of the court, to have his case presented for him by a suitable lay representative. (Paragraph 130)

84. The rules should be drafted for party litigants rather than practitioners. They should describe in outline how the case will proceed. They should also entitle the judge to permit lay representation and to hold any hearing in chambers. (Paragraph 131)

Chapter 9 Enhancing case management

Guiding principles

112. A Preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in

accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court. (Paragraph 13)

Party Litigants and vexatious litigants

Managing party litigants

131. The sheriff clerk should be given discretion to refer any ordinary action or summary application presented by a party litigant to a sheriff who may direct whether or not the action should be allowed to proceed. That decision should be based on whether or not, in the sheriff's opinion, the writ discloses a stateable case. The decision of the sheriff should be final and not subject to review. (Paragraph 166)

132. At any case management hearing the court should explain to a party litigant the requirements of any order made and the sanctions for non-compliance. (Paragraph 168)

Vexatious litigants

133. The civil courts should have powers similar to those in England and Wales in relation to civil restraint orders which would provide for a system of orders regulating the behaviour of parties who persist in conduct which amounts to an abuse of process. In considering whether or not to impose a civil restraint order, the court should be entitled to take into account proceedings in other jurisdictions. (Paragraph 190)

Chapter 11 Access to justice for party litigants

Public legal education

142. The promotion of public legal education should be an element of any strategy to improve access to justice in Scotland. (paragraph 8)

Self help services

143. There should be a section of the SCS website which is much more obviously aimed at the public and contains all the information required to start or defend a case under the simplified procedure. There should also be information about the structure of the civil courts and other civil procedures. (Paragraph 22)

144. The SCS website should provide links to other bodies' websites which can be a source of advice and guidance e.g. Citizens' Advice, the Scottish Government, law centres, Consumer Focus Scotland etc. Information about mediation and other methods of dispute resolution should also be provided. (Paragraph 24)

145. The proposals which SCS have in hand to establish a new system for dealing with party litigants within the Court of Session should be extended to all courts. In particular, consideration should be given to the documentation of service standards which should be made available to party litigants in cases under the simplified procedure. (Paragraph 25)

In court advisers

146. In-court advice services should be developed and extended to be more widely available, if not in every sheriff court then within a reasonable distance. Such development should happen within the context of the Scottish Legal Aid Board's broader plans for the improvement and co-ordination of publicly-funded civil legal assistance and advice. In addition to the matters identified in the evaluation reports, SLAB should also consider the quality and consistency of advice and help being provided by the different services. (Paragraphs 36, 37)

147. Consideration should be given to whether in-court advice services are to be targeted at any particular group of potential users and therefore, by implication, to be unavailable to other groups. (Paragraph 38)

148. Where the in-court adviser is unable to assist an inquirer, there should be clear and consistent protocols for referrals to other sources of advice and help. (Paragraph 39)

McKenzie friends

149. A person without a right of audience should be entitled to address the court on behalf of a party litigant, but only where the court considers that such representation would be of assistance to it. The court should be entitled to refuse to allow any particular person to appear on specific grounds relating to character and conduct.

The court's decision should be final and not subject to appeal. The rules of court should specify the role to be played by the individual and should provide that he or she is not entitled to remuneration. (Paragraph 53)

Scottish Government Response to the Scottish Civil Courts Review

4.5 ACCESS TO JUSTICE

210. Lord Gill makes a number of recommendations designed to ensure greater access to justice. They include expansion of services for in-court advice, a national mediation service, more in-court assistance, simple, web-based self-help tools presented in plain English and a public legal education campaign.¹²⁸

211. The Scottish Government strongly agrees that securing access to justice must be a key aim of the civil justice system. In the last two years, it has significantly expanded in-court advice and related services to provide enhanced protection for people affected by the economic downturn. It has also greatly broadened financial eligibility for legal aid, created new rights in the Home Owner and Debtor Protection (Scotland) Act 2010, and, in the Legal Services (Scotland) Act 2010, created a new responsibility on the Scottish Legal Aid Board to monitor and report on the availability and accessibility of legal services in Scotland, and new provisions to allow for rules of court to be made on oral submissions by lay representation in court.

212. Despite these measures, the Scottish Government is not complacent, and knows that more could be done, were resources infinite. The difficulty, of course, is that Scotland faces a period of unprecedented pressure on public finances, and it is clear that simply spending more money on a wider range of publicly funded services to improve access to justice is unaffordable and unsustainable. It will be necessary to prioritise, to co-ordinate expenditure more efficiently, and to be innovative in identifying opportunities to secure justice in new, cheaper ways.

213. The Scottish Government has already begun to do this, through work with the Scottish Legal Aid Board and the Convention of Scottish Local Authorities to move towards a more strategic and co-ordinated approach to publicly funded legal assistance, whether provided via legal aid or advice services funded by Scottish Government, the UK Government, local authorities or voluntary funding.

214. In the coming months the Scottish Government will work closely with the Scottish Legal Aid Board to look at different models of publicly funded legal assistance, to consider those which can be delivered within available resources and are best suited to the model of civil courts recommended by Lord Gill. It anticipates that different forms of assistance may

¹²⁸ Recommendations 86-87, 101, 142-148.

be most appropriate in different parts of the system, with a greater reliance on self help and lay assistance at the district judge level.

215. The Scottish Government agrees that it could be made easier for people to resolve disputes without litigation, or represent themselves effectively should litigation be necessary, through carefully targeted legal education and support for self help; although any such new provision would almost certainly require to be resourced by savings elsewhere in the system. These issues are currently being considered by the Civil Justice Advisory Group led by Lord Coulsfield, and the Scottish Government will consider carefully their recommendations when they report early in 2011.

216. The Group is also considering the opportunities afforded by mediation and other forms of alternative dispute resolution (ADR). It is noted that the Review did not favour compulsory mediation, in the sense of court rules making specific provision for sanctions in expenses for parties who refuse to engage in ADR.¹²⁹

217. Nonetheless, the Scottish Government believes that mediation offers significant opportunities for parties to reach an acceptable settlement of disputes, potentially at less cost to the public purse, and often with less distress and inconvenience to the parties. Subject to the caveats above regarding public funding, the Scottish Government agrees that the other Review recommendations concerning mediation are generally worthwhile¹³⁰, but is not persuaded that, by themselves, they will support a major shift towards ADR. It will therefore consider what further options may be available and affordable.

¹²⁹ Recommendations 96 and 100.

¹³⁰ Recommendations 97-99, 101.

A summary of the recommendations of the Civil Justice Council in its paper: *Access to Justice for Litigants in Person (or self-represented litigants)*

i) Recommended immediate actions

- Improve accessibility, currency and content of existing website material.
- Prepare and publish (at least online) a “nutshell” guide for self-represented litigants
- Prioritise judicial and court staff discussion on service provision to self-represented litigants.
- Provide a short Memorandum to Judges that summarises the availability of pro bono advice and assistance.
- Publish guidance for Court Staff when dealing with self-represented litigants (a draft was made available within the appendices).
- Publish guidance for legal professionals representing a party against a self-represented litigant and a statement of what a self-represented litigant is entitled to expect from legal professionals representing other parties in the case (a draft was made available within the appendices).
- Introduce a notice of McKenzie Friend (a draft was made available within the appendices).
- Introduce a short Code of Conduct for McKenzie Friends (a draft was made available within the appendices).
- Clarify the position over pro bono working by in-house counsel and legal executives, and remove any impediments.
- Concerted leadership from the major umbrella bodies representing advice agencies and the pro bono clearing houses to drive coordination and collaboration between all advice agencies and pro bono initiatives across England and Wales.

ii) Medium Term Recommendations (2011-2014)

- Undertake a review, involving consultation with those with expertise in service provision to self-represented litigants, of all HMCTS leaflets and Court Forms and supporting information, and arrangements for access to them.
- Ensure the availability of an up to date primary website that draws the best guidance together.
- Increase the number of court centres that have a Personal Support Unit, and support these with an information officer.

- -Introduce a Guide to Small Claims.
- Encourage the accessible retail of legal advice without transferring the conduct of the case to the lawyer.
- Develop LawWorks Initial Electronic Advice for use by self-represented litigants as well as advice agencies.
- Find new ways of funding the infrastructure of pro bono and other types of support.
- - Offer surgeries and after-hours sessions at Court for self-represented litigants.
- - Keep records of and monitor the numbers and circumstances of self-represented litigants, and cause self-represented litigants to be a standing item on the agenda of Court user groups.
- Review the question of access to appeals after a refusal on paper.

iii) Longer Term Recommendations (2011-2016)

- Development of arrangements for Mediation and Early Neutral Evaluation that are suitable where a self-represented litigant is involved.
- Development of public legal education (PLE) in line with the work of and that has followed the PLEAS Task Force.
- Further development of forms of pro bono advice and assistance.
- Research-led improvement to the small claims procedure.
- -A study of the possibility for a different procedure, at least in some types of case, where a party will be self-represented and in particular where both parties will be self-represented.



PARTY LITIGANTS IN THE COURT OF SESSION: Statement of Service Standards

1.1 Introduction

This statement sets out the arrangements for the provision of services to party litigants by the staff of the Court of Session, principally the staff based in the Offices of the Court.

A party litigant is a user of the Court of Session who is involved in the legal process but, for one reason or another, is not receiving advice from, nor is he/she represented, by a legally qualified professional. A party litigant is an individual representing their own interests in the litigation in which he/she is a party. A party litigant cannot seek to represent the rights of another individual or another legal entity such as a registered company. A person involved in a partnership may in some circumstances be able to represent that partnership.

The Offices of Court are as defined in Rule 3.1 of the Rules of the Court of Session, namely:

- (a) the General Department
- (b) the Petition Department
- (c) the Rolls Department (more commonly known as the Keeper's Office)
- (d) the Extracts Department; and
- (e) the Teind Office (although this office now serves little practical purpose) .

The statement recognises that the party litigant is a particular category of court user who will require dedicated services not normally offered to, or required by, the professional court user.

This statement has been subject to a comprehensive consultation process which included:

[Members of the Judiciary
Party Litigants
Staff with roles and responsibilities under the statement
CAB/Faculty of Advocates/Law Society/Society of Solicitor Advocates
SCS Policy and Strategy Directorate
Sheriff Clerks]

2.1 Purpose

The purpose of the statement is to assist party litigants by providing a clear statement of the services that will be provided to them by court staff and how those services will be delivered. It also makes clear which services are outwith the responsibilities and competence of court staff.

3.1 Scope

The statement is for the guidance of:

- unrepresented civil litigants or prospective civil litigants (referred to in this statement as party litigants) who are seeking information about, and practical assistance to enable them to comply with, the rules of court and the procedures and practices of the Court of Session;
- Scottish Court Service (SCS) staff working in the Court of Session, so that they are aware of the level of service they are expected to provide to party litigants and;
- others who need to understand the services provided by court staff to party litigants.

This statement does not seek to interfere with the functions of the Judiciary or the Auditor of Court. It makes no provision for the giving of legal advice and assistance by court staff on matters of law such as evidence or the legal competence of particular orders, which a party litigant may wish to seek from the Court. It does not seek to advise party litigants on issues of legal representation and rights of audience in court proceedings. These are matters that are outwith the responsibility of court staff.

4.1 The functions of the staff of the Court of Session.

A Party Litigant will come into contact with various members of court staff. The title and functions of the main groups/individuals are briefly summarised below:

4.2 Assistant Clerks of Session

An Assistant Clerk of Session, or Executive Officer, is a section manager in the Offices of the Court. Each party litigant will be assigned a designated Assistant Clerk of Session as an adviser for the purposes of this statement, who will not only be a point of contact for the party litigant, but who will also be responsible for the provision of most of the services outlined in this statement. These Assistant Clerks of Session are fully trained to meet the needs of party litigants. There will be continuity of service whenever possible, but party litigants will be provided with alternative contact details should the designated Assistant Clerk of Session be absent from duty for any reason.

4.3 Depute Clerks of Session

A Depute Clerk is a clerk of court. Their role involves managing what happens in the courtroom. A Depute Clerk works closely with the Judiciary and is authorised to deal with certain incidental matters on their behalf. They are expected to have expert knowledge of Court of Session practice and procedures.

4.4 The Deputy Principal Clerk of Session

The DPCS is the senior official responsible for the administration of the Court of Session. He is responsible for court staff and the services they provide and also has a number of official responsibilities to the Court under the Rules of the Court of Session.

4.5 Cashier

Issues invoices and collects court fees, and will enforce fees which are not paid on time.

4.6 The Offices of Court (General Department, Petition Department, Inner House/Extracts Department and Keeper's Office)

The General Department is responsible for ordinary civil actions (such as compensation claims arising from personal injury, commercial & family actions).

The Petition Department is responsible for cases that are raised by way of petition to the Court (such as applications for judicial review of decisions of public bodies). Petitions before the Inner House (such as nobile officium, solicitor discipline tribunal and some trusts) are dealt with by the Inner House/Extracts Department.

The Inner House/Extracts Department is responsible for all appeals from the sheriff court & statutory bodies, all reclaiming motions and Inner House Petitions as above, and issuing extracts of court orders, normally for the purposes of enforcement of the order.

The Keeper's Office is responsible for fixing court hearings and allocating cases to particular Courts.

5.1 Rights and Responsibilities of parties

Every individual who operates within the framework of this statement, which includes both party litigants and members of the court staff, has certain rights. These rights can be insisted upon and will be respected by others.

5.2 Each individual has a right to:

- Be treated with respect
- Be provided with accurate information
- A degree of privacy
- Safety
- Complain
- Manage their time effectively
- Document meetings
- Refuse unreasonable requests
- Terminate a meeting in the face of unreasonable conduct.

5.3 Responsibilities

Parties who operate within the framework of this statement have different levels of responsibility.

5.4 Designated Assistant Clerks of Session have a responsibility to:

- Effectively arrange and conduct appointments with a party litigant if necessary or required
- Provide practical assistance on practice and procedure (which is based on a full and accurate knowledge and understanding of the Rules of the Court of Session)
- Receive, check and give feedback on documents
- Record meetings and discussions
- Collect court fees and advise on fee exemptions under the Court Fees Order currently in force and approved by the Scottish Parliament
- Respond to enquiries according to agreed timescales
- Advise party litigants on their rights and responsibilities under this statement.
- Provide accommodation for meetings.

5.5 Party Litigants have a responsibility:

- For the content and presentation of their case
- To proceed with their action in accordance with the Rules of Court
- To attend appointments and hearings on time
- To bear their own expenses subject to orders of court
- To pay court fees or claim exemption
- To submit documents in a legible format (preferably typed) and in the correct form
- To respect the rights of others under this statement.

5.6 Depute Clerks of Session have a responsibility to:

- Give advice and practical assistance in complex cases
- Provide guidance on in-court procedures and protocols
- Fee and collect fees from party litigants
- Write interlocutors (the formal orders of the court) and summarise in appropriate terms, in the Minutes of Proceedings, the important steps in the history of the particular case
- Provide advice to Assistant Clerks of Session and other staff
- Issue opinions of court (a written judgment setting out a decision of the court and the reasons for that decision).

5.7 Reception staff have a responsibility to:

- Welcome party litigants
- Guide them through security checks
- Direct them to the appropriate court or office
- Make enquiries of the relevant department if a party litigant is unclear of their destination with the Parliament House.

5.8 The Cashier has a responsibility to:

- Recover court fees by issuing accurate invoices
- Follow recovery procedure for all outstanding fees.

5.9 Senior Management of the Court of Session have a responsibility to:

- Deal promptly with complaints
- Provide resources e.g. trained staff, good accommodation, copying facilities
- Provide security to court users and staff
- Effectively support the process, and
- Staff involved in the process.

6.1 Staff of the Court of Session are committed to providing the following services to party litigants:

- You will be directed and escorted within the building by a trained member of our security staff;
- You will be assigned a designated Assistant Clerk of Session who will be fully trained to deal with the processes referred to in this statement;
- Appointments will normally take place on a one to one basis;
- At an initial appointment the contents of this statement will be explained;
- Advice would preferably be given by appointment, although contact by telephone and email will also be possible where necessary and appropriate;
- Any necessary appointments will take place within safe and comfortable accommodation and in private, where appropriate;
- If required you may be provided with templates and guidance on legal procedure;
- You will be given access to photocopying facilities;
- We guarantee safe custody of the Court Process (your file);
- We will provide information on the progress of your case and give you copies of written orders of Court (interlocutors);
- We will provide a copy of the Court's Opinion in your case within 24 hours of signature by the Judge;
- You will be given, if you wish, the details of contacts who may provide you with legal advice;
- You will be treated with courtesy and respect at all times, however Court staff will not tolerate any form of abusive behaviour.

7.1 Complaints

Any complaints under the statement will be dealt with under the normal Scottish Court Service (SCS) customer complaints procedure, details of which can be found within the court building or provided on request.

Deputy Principal Clerk of Session

2011

I agree to the aforementioned Service Standards.

Signed:
(Party)

Print Name:

Date:

Signed:
(Assistant Clerk of Session)

Print Name:

Date:

CONSULTATION NOTE: 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.

December 2014

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