

PROPOSALS FOR RULES: LAY REPRESENTATION

Policy Proposal

1. The Council is invited to consider and approve a draft instrument which implements policy proposals developed by the Access to Justice Committee (“the Committee”) in relation to lay representation.
2. These proposals have been developed by the Committee at its meetings in October and December 2016 and April 2017.
3. Draft rules are provided for consideration at **Paper 8.2A**.

Timing

4. The draft rules shown at Paper 8.2A have been developed by the Committee and accordingly are not time critical. Once approved by the Council they will be submitted to the Court for consideration in due course.

Rationale

5. At its meeting in February 2016 the Committee considered a paper prepared by the Secretariat setting out proposals for reviewing lay representation and related areas. The Committee agreed to review the current guidance available and in June and August 2016 the Committee again considered the issues surrounding lay representation and lay support.
6. At its meeting dated 17 October 2016 the Committee decided that it wished to take forward the discrete issue of the scope of the lay representative’s power. Having considered the lay representative’s power to cross-examine, the Committee agreed that, subject to the views of the sheriffs principal, there should not be an automatic power to cross examine but that rules of court should make provision to allow a lay representative to make an application to do so if it would be in the interests of justice.
7. At its meeting on 12 December 2016, the Committee considered two possible rule options to implement this decision. Option 1 took a broad approach to amending the rules to allow a lay representative to cross examine. It provided that the lay representative could apply for permission from the sheriff to “represent” the litigant. This would include all forms of representative action as if the lay representative were the litigant. Option 2 was more aligned to the

Committee's original decision and broke lay representation down into two areas, namely permission to generally represent a litigant and permission to cross examine. The Committee preferred option 1 and instructed the drafting of rules in this regard.

8. At its December meeting the Committee also agreed that the draft rules should make clear that the withdrawal of permission for a lay representative to represent a party should not preclude any other lay representative applying for permission to represent that party. However, the Committee reconsidered this at its meeting on 18 April 2017 and agreed that the rules do not require to make provision in these terms as this was implied. Accordingly the Committee instructed LPPO to revise the draft rules to this effect and this revised draft was agreed by the Committee by correspondence in May 2017.
9. The Committee intends to continue its review into lay representation and lay support in the Scottish courts and the matter remains a priority for the Committee throughout the remainder of 2017. Alongside the scope of the lay representative's power, which is addressed in the draft instrument shown at **Paper 8.2A**, the Committee has identified the issue of remuneration of a lay representative as a potential issue that it may wish to take forward. It was agreed at the Council's strategy meeting in January of this year that a priority for the Committee in 2017 would be to have recommendations made to the Council by the end of the year and the Committee is working towards this.

Issues raised during policy development stages

10. There have been no further issues raised during policy development.

Compatibility with SCJC guiding principles

Principle	Compatibility
The civil justice system should be fair, accessible and efficient	The draft rules support fairness and accessibility in the civil justice system as they provide that a litigant can instruct a lay representative to represent them throughout their case in both the Sheriff Court and Court of Session.
Rules relating to practice and procedure should be	These rules have been drafted in line with the Rules Rewrite Style Guide in order to make them as short,

as clear and easy to understand as possible	streamlined and easy to understand as possible.
Practice and procedure should, where appropriate, be similar in all civil courts	The draft instrument applies to Court of Session, Sheriff Appeal Court, Ordinary Cause, Summary Application and Summary Cause Rules, ensuring consistency for lay representatives across courts. There is no requirement for these rules to amend the Simple Procedure claims as a lay representative may already represent the party in full under the core Simple Procedure Rules.
Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted	There is no scope to consider alternative methods of resolving disputes in the context of these rules.

Links to other initiatives

11. There are no links to other initiatives.

Implementation

12. The Secretariat is liaising with Legislation Implementation Team of SCTS and the Judicial Institute with regard to the impact of these rules on staff or judicial training. Draft rules will be shared with them for this purpose when they are made.

Consultation

13. There has been no consultation on the draft rules.

Legal advice

14. Legal advice from LPPO is provided in the drafting commentary provided at **Annex A**.

Recommendation

- 15. The Council is invited to consider the draft rules at Paper 8.2A and to approve them for submission to the Court of Session for consideration, subject to any stylistic or typographical amendment.**

**Scottish Civil Justice Council Secretariat
May 2017**

ANNEX A**Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court and Sheriff Court Rules Amendment) (Lay Representation) 2017**

DRAFTING COMMENTARY

Overview

1. Amendments are made to the RCS, SAC Rules, OCR, Summary Application Rules and Summary Cause Rules. References below to paragraphs are to those in the draft Act of Sederunt; references to rules are to those in the relevant rules under amendment.

Paragraph 2(2) - RCS

2. Sub-para (a) substitutes the reference to making oral submissions on behalf of the litigant with representing the litigant. The drafting is intended to signal a change in approach as well as making it clear that the new role of the lay representative is full representation rather than merely the making of oral submissions.

3. Sub-para (c) adjusts the current test for grant of an application from it being in the court's opinion that it would assist the court to grant it to it being in the interests of justice.

4. Sub-para (d) inserts a new paragraph into rule 12B.2. As regards the new paragraph (7A), the power of the lay representative has been framed with the definite article rather than the indefinite so as to follow the drafting approach of the rest of the existing rule. The power given to the lay representative is framed by reference to being able to do anything which the litigant could do in relation to the hearing for which the permission has been granted.

Paragraph 2(3)

5. Paragraph (3) is to adjust the terms of Form 12B.2 to reflect the change from oral submission to full representation.

Paragraph 3 – SAC Rules

6. The SAC Rules are uniquely drafted compared to the other rules being amended and therefore the drafting approach differs.

7. The current test for grant of an application in rule 4.3(5) is that it would assist in the court's consideration of the appeal to grant it. This is amended to the new harmonised test of "the interests of justice".

Paragraphs 4 to 6 – OCR, SAR and Summary Cause Rules

8. Changes of equivalent effect are made for the other court rules mentioned. In relation to Summary Cause, the amendments are made to the existing provisions for lay representation of party

litigants. Those provisions do not affect other types of representative and are expressly subordinate to any other statutory provisions on representation, whether in the Summary Cause Rules or elsewhere.

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10 May 2017