

# Rights of Audience Review

The Scottish Legal Action Group

For the benefit of readers and members, produced below is the submission of the Scottish Legal Action Group to the draft report of *The Thomson Review: Rights of Audience in the Supreme Courts of Scotland* ([www.scotland.gov.uk/Topics/Justice/legal/Rights-of-Audience-1-1](http://www.scotland.gov.uk/Topics/Justice/legal/Rights-of-Audience-1-1)).

## Introduction

The Scottish Legal Action Group (SCOLAG) was formed in 1975 with the aim of explaining and improving the law, and promoting changes in the law and the legal system so as to benefit the disadvantaged members of society. It has a particular interest in increasing access to justice and to legal services. It is the publisher of the *SCOLAG Journal*.

The purpose of any modern justice system in an open and democratic society should be to provide equal access to justice and just treatment to all. SCOLAG believes that certain key principles underlay all aspects of such a justice system. These key principles are: transparency; impartiality; accessibility; accountability; consistency; fairness; and sustainability. The Group firmly believes that these principles should apply to those who use any part of the system or who might need to use it, and to those who form any part of any such system. These principles should therefore apply to the structure and operation of the court system, its structure and its operation. The Group also supports the principle that there should be common minimum standards which ought to apply to all Court practitioners.

Bearing these principles in mind, the Group considers that the Review has not succeeded in the task that it has been set. In particular it has failed to examine in any detail how rights of audience actually operate in practice, it has carried out little in the way of detailed research, and it has produced little or no evidence to support its main conclusions. The draft Report is very good at describing existing systems and structures but does not provide an evidence base to justify its outcomes. The absence of any analysis showing that there is any adverse impact on the administration of justice from the present arrangements does not in our view assist in supporting the draft Report's recommendations.

We make a number of general observations about the draft Report. It might have been expected that in an examination of the operation of rights of audience, the Review would have identified what was required by way of a minimum of standards and training in order to properly serve the operation of the Court and the proper administration of justice. This has not been done. A further notable failing is the complete omission of any reference to the actual quality of existing training, or of any existing requirements for continuing professional development. A third major failing is that having identified the different nature and roles of solicitors and advocates, the Review has not examined how these have operated in practice. The Group also considers that the absence of any attempt to take evidence from the users of legal services (i.e. the clients) as to their experience is a further failing in the Review process. Finally the Review does not address at all whether the reported concerns as to how the system is said to operate on occasions are actually justified (and if so the reasons why this has come about, and the impact on this for the proper administration of justice).

## Training and qualification

We agree that it is not appropriate for criminal solicitor-advocates to self certify themselves as seniors or juniors according to what suits them on the day. At the very least this brings the system into disrepute, and in our view does amount to an improper manipulation of the process in order to restrict competition. It does not seem to us that this can be said to be in the best interests of clients or in the best interests of the administration of justice. We agree that generally speaking a person should either be a properly designated senior (QC), or a solicitor-advocate or advocate. We consider that the Report has failed to meet a major part of its remit in failing to analyse the extent to which the problems raised by the case of *Woodside v HMA* are occurring in practice in spite of the Society's code of conduct, and what impact this has had on the proper administration of justice.

We are supportive of the view that there should be a minimum standard (either set by the Court, or at least subject to the Court's overall supervision and approval) for those wishing to practise before it, but we see no reason why that should prevent either solicitor-advocates or advocates being trained to a standard higher than the minimum standard required by the Court. We could not see from the draft Report that there was any evidence of anything lacking in the existing system of training be either the Society or the Faculty.

The draft Report seemed to assume that any member of Faculty who wished to become a QC merely had to apply in order to be appointed, provided that they had a certain number of years of experience. The Group does not believe that the experience of changes over the past twenty years means that this is the case. Solicitor-advocates can become QCs, and have done so. Is there any evidence that in considering applications that the Lord President's office has treated solicitor-advocates differently from advocates? What are the "many other aspects" of the solicitor-advocates practice which merit consideration for appointment to QC, and do these aspects currently get taken into account when appointing advocates as QCs? These seem to the Group to be relevant questions which are pertinent to the issues, but which the Review has failed to give any consideration.

The draft Report accepts that it is not necessary for all Pleaders to go through the same training programme, but goes on to state that the granting of rights of audience by the relevant professional body need not entitle a person to practise before the Court. From the point of view of a solicitor, one is left to wonder then what is meant to be the difference between a solicitor and a solicitor-advocate? The outcome of the Review proposal would be to create an additional layer of regulation and bureaucracy, additional costs in terms judicial time, and additional costs and burdens for legal service providers.

It is notable that no qualitative assessment was made of the standard of training for either solicitor-advocates or of advocates, no reference was made to what is a desirable minimum standard for obtaining rights of audience and how this might be measured, no reason or evidence given for the recommendation that the granting of rights of audience to either

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solicitor-advocates or advocates need not entitle them to act as a Pleader before the Court. The draft Report refers to raising the threshold of knowledge and skill of those who appear in the Court without any consideration of, or demonstration of any apparent knowledge of, the existing standards of either the Society or the Faculty. The Review does not analyse the roles and functions of solicitors, solicitor-advocates and advocates, or analyse how each might typically spend their time in relation to these functions. Distinguishing between membership of the Society or of the Faculty, and admission as a Pleader seems to suggest that the Society and Faculty have no role beyond that of a social club, whereas the Group believes that the role of Pleader is a key function of both organisations.

### **Maintenance of Standards**

No reason or evidence is given for the recommendation that Pleaders should be reviewed on a three yearly or five yearly cycle. The needs and benefits from imposing this additional burden are not addressed. The absence in the draft Report of any analysis showing that there is any adverse impact on the administration of justice from the present arrangements does not in our view assist in supporting the draft Report's recommendations.

### **Common Code of Conduct**

It seems to the Group that the Report shows that there are considerable similarities between the two codes of conduct. We note what is said about the fact that where there are meaningful differences these largely reflect the different working practices of solicitors and advocates. Given the considerable degree of overlap that does exist the Group considers that there are common principles which do apply to the exercise of rights of audience. The Group sees no particular reason why these similarities, and the few differences which do exist, mean that it is necessary to insist upon a unitary code. The Report does not point to any practical disadvantage to the proper administration of justice which arises from the present situation.

We recognise that there have been for many years differing views expressed about court dress, and that there are a wide range of views and reasons in support of the differing views. Given that the Review has not canvassed these matters in its Report there is little we feel we can say at this stage. The complete absence in the draft Report of any analysis showing that there is any adverse impact on the administration of justice from the present arrangements does not in our view assist in supporting the draft Report's recommendations.

### **Complaints Process**

Given the specific issues raised by the case of *Woodside v HMA* we are left wondering: (i) why the Review has failed to investigate and report on these issues; (ii) whether the role of solicitor as 'gatekeeper' means that these issues have had an impact on fair competition; (iii) whether they have any implications for civil as well as criminal practice; and (iv) whether they have had any impact on the proper administration of justice? Does the case not support an argument for saying that there may have been failings in the systems for regulating the conduct of solicitor advocates appearing before the Courts? If it does, is there not a public interest in considering how those possible failings be investigated and addressed? The Group is puzzled why these matters are not addressed in the draft Report.

### **Rule 3**

It seems to the Group that whilst the Society may have a point about duplication, the preservation of the Rule does have the benefit of reinforcing the point. However the same comments we made about the implications of *Woodside v HMA* apply. Duplication and reinforcement of the Rule are however meaningless if they are not applied or enforced. This Review ought to have been the means for examining how that could be done. The Group considers that the draft Report shows the Review to have been a wasted opportunity.