

Response On Behalf Of The Scottish Legal Action Group

To The Lord President's Working Group Consultation On Proposals Concerning Lay Representation In The Court of Session And The Sheriff Court

The Scottish Legal Action Group

SCOLAG is a not for profit organisation and a registered charity. It is the publisher of the SCOLAG Journal. The Group was formed in 1975 with the aim of explaining the law and promoting legal services and changes in the law and the legal system so as to benefit the disadvantaged members of society. Accordingly, the Group seeks to:

- Promote and advance education and knowledge of the law in Scotland;
- Improve and advance Scots law and the provision of legal services for the benefit of those members of society who are economically, socially, or otherwise disadvantaged; and
- Promote equal access to justice in Scotland.

Summary of Response

Traditionally Mackenzie Friends originated with a far more passive role than they currently have in England and Wales, with the purpose being to provide party litigants with moral and organisational support and quiet advice. Now Mackenzie Friends are playing a more active role, including making oral submissions to courts on behalf of litigants. It is this concept of Mackenzie Friends (which we otherwise refer to as 'lay support') which the Civil Court Review ('the Gill Review') recommends is introduced into Scotland.

In our view there is a confusion which exists in the way that the Gill Review recommendations have been carried forward. Paragraph 51 of Chapter 11 of the the Gill Review recommends an enhanced role for Mackenzie Friends, and, crucially, paragraph 52 (as quoted in the Consultation Document) states "*assistance and representation ... permission would be given only if the court was satisfied that this would help*". The same test is repeated in paragraph 53 of Chapter 11, namely "*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.*" We therefore do not agree with Paragraph 11 of the Consultation Document which seeks to make a continued distinction between lay representative and lay assistance in the proposed new Rules. The Consultation Document fails to fully appreciate the already well developed and distinctive role of lay representatives in Scots Law, and the wider opportunities that exist in Scotland for broadening the opportunities for lay support to participate in Scottish civil law procedures. When reading the Consultation Document on Lay Representation, it is not clear why the opportunity has not been taken to expand the role of lay support as the Gill Review recommended; and to continue with an unhelpful distinction between lay support and lay representation in the context of non-statutory procedures which have expressly authorised representation by non-legally qualified persons.

Background

Lay support is a relatively new concept in Scots Law (the equivalent of a Mackenzie Friend), but is now provided for in all Sheriff Court and Court of Session rules. In its current form it is a more passive role to that of lay representation and does not allow oral submission to be made on behalf of party litigants. It is, however, permissible in a far wider set of circumstances than that currently allowed for lay representation. It is also more likely to be performed by family and friends than those of advice agency advisers.

Lay representation, although permitted in a far more restricted set of circumstances, has developed extensively over the last few decades and allows a more active role to be played. Lay representation is now permitted in actions raised under the small claims and summary cause rules, although in small claims not in relation to appeals to the sheriff principal or in summary cause, beyond that of first hearings. Lay representation is also permitted in any applications under the Debtors (Scotland) Act 1987, the Debt Arrangement and Attachment (Scotland) Act 2002, s12 hearings under the Bankruptcy (Scotland) Act 1985 and time order applications under S129 of the consumer Credit Act 1974. In addition to this, there is also an additional category of approved lay representatives that are allowed to represent in repossession hearings under S24 of the Conveyancing and Feudal Reform (Scotland) Act 1974.

These representative roles tend to be performed not so much by family members and friends but by advice agency advisers, primarily money and in-court advisers, who are likely to be more knowledgeable and skilled and theoretically more able to assist the court and speed up court processes. There is also the role of approved money advisers under the Debt Arrangement Scheme (Scotland) Regulations 2011, who have as one of their functions and duties under regulation 12(1) (f) the obligation to act as lay representatives on behalf of their clients where they have accepted their instructions to act. Such instructions may not necessarily relate specifically only to the Debt Arrangement Scheme, but may also relate to procedures a client is involved in relation to any of the above processes where lay representation is allowed, as it may be important for the advisers to act in such actions to secure the success of any debt payment programme or an application for one under the Scheme.

Comment

We consider it unfortunate that the development of Chapter 12A of the Rules of the Court of Session and Rule 1.3A of the Ordinary Cause Rules was carried out separately from the question of lay representation in the wider sense, as we consider that this has encouraged the Working Group to follow a path which is inconsistent with both the wording and the spirit of Chapter 11 of the Gill Review. It is our belief that the Working Party has erred in failing to recognise that the Gill Review proposed an enhanced role for Mackenzie's Friends, and that it seeks to continue a distinction between lay support and lay representation which the Gill Review did not consider to be necessary. To that end, the Gill Review did not, contrary to what is suggested in Paragraph 14 of the Consultation Document, propose a higher test for lay representation where it is to be provided by an 'enhanced Mackenzie Friend' compared to the provision of lay support/assistance. What does have to be recognised is that the Gill Review saw the role for an 'enhanced Mackenzie Friend' as being

applicable to 'exceptional circumstances' and to be used only in 'a small number of cases'. We therefore agree that the requirement for suitability should be no different, regardless of whether the person acting is acting in a 'support' role or in a 'representative' role.

We do have a concern therefore that the ability of a person to appear in a 'representative' role will be treated distinctly from, and subject to stricter criteria than in a 'support' role. We believe that this is a particular issue in respect of the sheriff court where we believe that for an application or motion to be required before a lay representative can act is impractical and contrary to the whole spirit of the Gill Review and S127 of the Legal Services (Scotland) Act 2010.

Many in court advisers or money advisers may receive very short notification from a client that they are due to appear in court, possibly for an eviction or repossession hearing. It is unlikely therefore when dealing with other lay representatives who might appear, that requiring a formal request to be made before appearing would save the court time or speed up proceedings and is more likely to result in increased requests for continuations, in order that approval can be obtained, or minutes of recall being lodged in order that clients can be represented.

It is clear that the purpose of the provisions in the Legal Services (Scotland) Act 2010 is to extend the circumstances where a lay representative can act. It should be left to the courts discretion to decide where it is more appropriate for a person to act as a lay representative or lay support and in deciding the court should take into consideration the background, qualifications and experience of the person acting.

Where a lay representative has specialised knowledge or skill or experience in a particular area such as money advice, it may well be appropriate for that person to act as a lay representative. Such people are likely to be able to assist the court in that they will possibly have knowledge of the facts of the case, be able to advise the litigant and also hopefully have knowledge of the law and other options the client may have.

Where a person has no such knowledge, skill or experience, it may be that acting as a lay representative will not be suitable and it may be more appropriate that person acts a lay support. It may also be that a person acting initially as a lay support is found to be more helpful if that person steps in to act as a representative capacity.

It may be that a register of appropriate and regular lay representatives can be kept by courts, with advisers being able to make applications to be included onto such registers. This may avoid, even if it is decided a formal request or motion has to be made to appear, that such formalities can be bypassed by those advisers who have already registered with the court.

We therefore do not agree that the test for allowing lay representation should be "somewhat tighter and more focussed" than the test for allowing lay support generally. We appreciate that difficulties may be caused by someone appearing in a representative capacity at the last moment if it turns out that the person demonstrates that they are hindering the process rather than helping it. We also appreciate that lay representatives ought to be people who are well informed in advance about the facts and circumstances of the case so that they can be of assistance to the court. However we would prefer that any person who is to act in a representative capacity and where acting in that capacity has not notified the Court in advance should be given the opportunity to address the court

so as to satisfy the Court of their ability to address the Court in place of the party litigant. We are concerned by what we see as the unduly restricted nature of the circumstances in which late notification of a lay representative will be permitted which is set out in Paragraph 17 of the Consultation Document. We think that the procedure in the Court of Session as regards Chapter 12A should be modified so as to automatically permit representation. We believe that the existing procedures for lay assistance in the Sheriff Court should be adopted to permit representation. In the Sheriff Court a motion seeking permission from the Court should continue to be possible at the Bar of the Court.

We generally agree otherwise with proposals in paragraphs 21(a) to (c) of the Consultation Document. We assume that paragraph 21(d) is not intended to deprive the party litigant of any expenses of process that the party litigant would otherwise be entitled to if acting for himself, and that the intention is to ensure that the lay representatives time does not itself become a recoverable expense. If so, we would agree with that that proposal. If something else is intended we would wish to consider exactly what was being said before commenting further.

We are happy for this Response to be made publicly available.