

response to Scottish Executive
consultation draft:
guide for professional or other bodies on
making an application to enable their
members to acquire rights to conduct
litigation and rights of audience
December 2006

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

Please check our web site at www.scotconsumer.org.uk for news about our publications.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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Introduction

The Scottish Consumer Council welcomes the opportunity to comment on this consultation draft. The purpose of the Scottish Consumer Council is to make all consumers in Scotland matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change. Accordingly, we have an interest in the running of the civil justice system from the perspective of the consumers who need to use it. In order to ensure that those who experience civil justice problems have meaningful access to justice, there must be sufficient affordable and accessible legal services available to them.

We therefore welcomed Sections 25-29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which relate to the granting of rights of audience in the Scottish courts to non-lawyers, when they were first introduced. We saw the potential introduction of competition in the provision of legal services as being in the interests of consumers, provided adequate safeguards were put in place. We were therefore surprised to find in 2002 that, although the Act had been in force since 1990, these provisions had never been brought into force.

We have been arguing for the provisions to be brought into force since that time, and we were pleased when this was finally agreed by all of those involved in the Research Working Group on the Legal Services Market in Scotland. We have welcomed section 42 of the Legal Profession and Legal Aid (Scotland) Bill, which repeals an existing provision making it an offence for anyone who is not a solicitor or qualified conveyancer to prepare certain legal documents. We understand that the bill is expected to receive royal assent early in 2007, which will then allow the relevant provisions of the 1990 Act to be commenced.

Once the provisions are in force, it is then for any organisation that wishes to make such an application to prove that it fulfils the necessary criteria laid down by the legislation. We therefore welcome the present consultation draft in anticipation of the commencement of the provisions. We hope that, in view of the length of time this matter has been ongoing, the application process will be in place for applications to be received without delay, once the current bill receives Royal Assent.

General comments

While it is crucial that the interests of consumers who use the services of those granted rights of audience are protected, it is important that the application process is conducted in a way that strikes an appropriate balance between consumer protection and ensuring that there is sufficient competition in the provision of legal services.

It is important that the guidance is framed sufficiently broadly to encompass the interests of any type of body which may in the future wish to apply for rights of audience, from voluntary advice agencies to commercial organisations, within the constraints of the legislation.

We would also observe that increasingly powers to make provisions relating to rights of audience for non-lawyers are being provided for under other specific pieces of legislation. In these instances, those who are granted rights of audience are not required to satisfy the criteria set down in the 1990 Act. For example, we have argued in the past that insolvency practitioners would be just as competent as lawyers in representing clients in bankruptcy cases. We therefore welcome the recent Scottish Executive amendment contained in section 28A of the Bankruptcy and Diligence (Scotland) Bill, which provides for non-lawyers to be permitted to represent debtors in bankruptcy proceedings. There may, however, be issues to be addressed here in relation to protecting the interests of those who use the services of such representatives.

We are also aware that rights of audience have been granted to non-lawyers in Scotland's courts by virtue of certain UK legislation. The Commissioners for Revenue and Customs Act 2005, for example, provides that rules may be made granting rights of audience in the courts to Revenue and Customs officers. Similarly, section 49 of the Child Support Act 1991 provides for such rules to be made in respect of representation of any party in related proceedings by someone who is not a solicitor or an advocate. Again, we would point out that those who are granted rights of audience under such legislation are not required to satisfy the criteria set down in the 1990 Act. In instances where such individuals might be representing members of the public, there may again be consumer protection issues to be addressed here.

Specific comments on the consultation draft

Draft schemes

We note that applicant organisations are obliged to provide details of arrangements for securing, where reasonably practicable, that any person wishing to be represented before a court by one of the organisation's members is so represented. While we appreciate that this is required under section 27(5) (c) of the legislation, and may be seen to be in the interest of consumers, we would comment that this could be viewed as an unfair burden on such bodies. While there is a parallel provision in section 25A (6)(c) of the Solicitors (Scotland) Act 1980 in relation to solicitors, that provision only applies with regard to rights of audience in the higher courts. Otherwise, so far as we are aware, no similar requirement is imposed on the existing legal professional bodies.

The application process

We would suggest that it might be helpful for applicants if an application form were provided for them to complete, incorporating the information which they are required to provide, as detailed on pages 7 and 8 of the draft.

The guide states that the letter of acknowledgement of the application will give an indication of the time frame process, but gives no indication as to what the likely time frame might be. We would suggest that this should be clarified.

Finally, we note that, while section 26 of the legislation requires the Lord President and Scottish Ministers to consult each other on a draft scheme, taking into account any written representations received and advice from the Chairman of the Office of Fair Trading, the Lord President alone makes the final decision, in terms of section 26(6).

We are concerned that there is no right of appeal for applicant bodies if the Lord President refuses their application. Given the Lord President's role within the court system, we do not believe that this process is sufficiently independent or transparent. We therefore believe that an external appeal mechanism should be considered to ensure greater transparency and openness.