

## **Report of the Scottish Civil Courts Review**

The Report of the Scottish Civil Courts Review was launched by the Lord Justice Clerk, the Rt Hon Lord Gill, on Wednesday, 30th September 2009.

### **Chapter 11 - Access to justice for party litigants**

1. In the Consultation Paper we recognised that there has been a significant growth in the number of party litigants appearing in the courts. Comments reflected the particular perspective of the respondent, with most demonstrating one or other of two opposing attitudes: either that litigants who represent themselves were more often than not a source of trouble to the court and created additional burdens on judges and other litigants and that measures should be put in place to reduce their numbers; or that the courts were unwelcoming and inaccessible and that significant changes were needed to simplify court procedures and to support and empower people to act for themselves.

2. In our view both of these attitudes reflect part of the truth. There are certainly 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. These are matters that require case management. We discuss how this should be done in Chapter 9. But we also agree that there is a need for changes to court practices and procedures so that people who do not have legal representation are able to enter and navigate their way through the court process effectively. This is particularly relevant for cases of low monetary value where the cost of legal representation would be disproportionate.

In Chapter 5 we propose a new simplified procedure for low value and housing cases. Public legal education, self - help services, in - court advice services and lay representatives and McKenzie friends also have a role to play in supporting the litigant who does not have a lawyer.

We discuss these matters in this chapter.

#### **Public Legal Education**

3. The Consultation Paper suggested that increasing general public knowledge about the law and the civil justice system may help people to avoid becoming involved in legal problems and that well informed citizens may be able to engage in discussion and negotiation with a view to reaching a resolution without resort to the courts.

4. Overall, public legal education (PLE) was seen in a positive light by our respondents, with over three - quarters seeing potential benefits. Most commonly respondents thought that raising public awareness and knowledge about the law and the legal system, and about rights and remedies, would help people to avoid legal problems, understand the options for dealing with legal problems when they arise and know where to go for advice to obtain redress. Some thought it could help to save the time of the courts. One respondent thought that it might enable some people to undertake some legal work for themselves. Among judges and lawyers it was seen primarily as helping people to identify when they needed advice and find their way to sources of professional help, rather than as a way of enabling people to be more self - reliant in dealing with legal problems. Family lawyers were all supportive of greater PLE, and put the

emphasis on its value in dispelling preconceptions about the law and the legal system, and making people aware of the available support services and alternatives to litigation.

5. Many respondents suggested ways by which PLE could be improved. By far the commonest suggestion was that education about the law and the legal system should be part of the school curriculum. The Public Legal Education and Support (PLEAS) Task Force project mentioned in the Consultation Paper was noted with approval by several respondents. Several also described educational initiatives in which they had themselves been involved.

6. General support for PLE was tempered with caveats about its limitations. The most commonly recurring theme was 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. There was also some concern that people should not be over-loaded with information they could not reasonably be expected to understand or deal with. Some respondents noted that there would always be sectors of the public who would not be able to benefit from PLE because of their poor level of literacy or other factors such as social or health problems.

7. In March 2009, the Scottish Government and Consumer Focus Scotland jointly organised a seminar on PLE at which a range of topics was discussed, including the challenges for developing PLE in Scotland and the target groups for any PLE initiatives. The seminar delegates overwhelmingly thought that the Scottish Government had a key role to play in taking PLE forward in Scotland on a strategic level.<sup>1</sup>

8. 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 solve it themselves or simply "lump it."<sup>2</sup> It may also mean that those who do seek help find the right help more quickly.

We recommend that the promotion of PLE should be an element of any strategy to improve access to justice in Scotland.

### **Self - Help Services**

9. The Scottish Court Service (SCS) currently has available on its website a guide for party litigants, small claims and summary cause information and procedural guides, and a guide to simplified divorce/dissolution of civil partnerships. A section called 'Your Questions' gives answers to some common questions about court procedure. The website also has links to other sites, such as Edinburgh Citizens Advice Bureau (CAB), Shelter, Scottish Law Online and the Scottish Government, although these are not on the front page. The SCS also have proposals in hand to establish a new system for dealing with party litigants within 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.

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<sup>1</sup> Consumer Focus Scotland (May 2009), *Public Legal Education, Report of Seminar*

<sup>2</sup> H Genn and A Paterson (2001), *op. cit.*, Chapter 3

## ***Responses to the Consultation***

10. In the Consultation Paper we asked what contribution, if any, 'self - help' services for party litigants can make to improving access to justice. The majority of respondents thought that they had some contribution to make, although proportionately fewer responses from the legal profession and judiciary took this view. It was generally thought that there is considerable potential for greater use of information technology within the courts.

11. Suggested ways to assist individuals to prepare and present their own cases included court forms/styles; information on what to expect in a specific court; guides to the law in specific areas and to party litigants' rights in court; and information packs on how to go about pursuing or defending small claims. Materials could be provided in a litigants' library which could be available either on - line, in hard copy or on DVD. Suggestions as to who could prepare such guidance included universities working with advice agencies and the SCS.

12. Many respondents, while considering that self - help services can make a contribution to improving access to justice, thought that they were appropriate mainly in straightforward, low value cases. There were concerns about whether such services could help in cases of any complexity. Family cases were singled out by several practitioners as examples of the kinds of case where self - help services would not have a significant role to play. On the other hand one respondent saw advantages in parties representing themselves, possibly with the assistance of a McKenzie friend,<sup>3</sup> and wished to see websites being developed which included a step - by - step approach to court procedures, with examples of documentation, information on how to conduct a case and simple explanations for the various procedures required.

13. Overall the attitude of respondents towards self - help services was that these had their place within the civil justice system and could make a contribution to improving access to justice, but that there are limitations in relation to the types of case in which they could be useful and the people who can benefit from them. There was a consistent view that in complex cases, in particular family or matrimonial cases, it would always be in a litigant's best interests to have expert legal advice and representation. However, self - help services should be available as a safety net for those who do not qualify for legal aid and cannot afford to instruct a solicitor.

## ***Research on the views and experiences of civil sheriff court users***

14. The recently published report<sup>4</sup> of a small scale research project carried out by Ipsos MORI on behalf of the Scottish Legal Aid Board (SLAB)<sup>4</sup> and Consumer Focus Scotland provides some interesting information about the experiences of some sheriff court users. The research project was an exploratory qualitative study based on telephone interviews with a sample of 35 civil litigants in the sheriff court. It found that people who try to move through the civil court system without representation can experience considerable anxiety because of their lack of awareness or understanding of the process. This can create preconceptions that are worse than the reality turns out to be. Lack of information about the reasons for postponement of hearings and lengthy waiting times in court were also sources of irritation for litigants. Overall, the report concludes that "The clear message emerging from the research is the need for greater provision

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<sup>3</sup> See paras 41-53 of this chapter for a discussion about McKenzie friends

<sup>4</sup> Ipsos MORI (July 2009), *The Views and Experiences of Civil Sheriff Court Users: Findings Report*.

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.”

### **Other Jurisdictions**

15. The issue of self - help services has been addressed in reviews of other civil justice systems including New Zealand,<sup>5</sup> Ontario<sup>6</sup> and British Columbia.<sup>7</sup> Overall these conclude that self - help services are necessary if party litigants are to be assisted either to deal with their dispute without having to go to court or to obtain access to the courts successfully, not only from their own perspective but also from that of the court and other court users. Information generally basic legal information and resources, referrals to other agencies (for further information and with a view to accessing alternative methods of dispute resolution), assistance with completion of forms and information on court procedures.

16. There is also an accepted view that hard copies of documents as well as on - line access is important and that the presentation of materials should be considered carefully. Sometimes more personalised sources are required. Written information should be provided in plain language, with the use of headings, large print, pictures or diagrams. It should be provided in a variety of languages, and in braille. Flow charts are often more accessible than pages of text, although the most user - friendly form of information provision can often be face - to - face or at least accessible by phone or email. There should always be a contact person/organisation listed for provision of further information.

17. The New Zealand report takes the view that some kind of central agency should take the lead role in overseeing the delivery of legal information. The Civil Justice Reform Project in Ontario goes further and proposes a model for a self - help centre, a number of which have already been established in British Columbia, Quebec and Alberta. The components of a self - help centre may vary. It may provide services in a physical location at or near a courthouse, from a mobile unit or through a virtual location on the internet, or a mixture of these models.

18. The report of the British Columbia Justice Review Task Force proposes what it refers to as a “hub,” a single place where people can get the information and services they require to solve legal problems on their own. The hub would:

- co - ordinate and promote existing legal - related services;
- provide legal information;
- establish a multidisciplinary assessment/triage service to diagnose the legal problem and provide referrals to appropriate services;
- provide access to legal advice and representation if needed through a clinic model;
- support dispute prevention and planning through plain language, legal education, preventive law and systems design;
- facilitate access to mediation or other dispute resolution processes.

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<sup>5</sup> New Zealand Law Commission (2004), Report 85, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Part 1

<sup>6</sup> Justice CA Osborne (2007), *Civil Justice Reform Project, Summary of Findings and Recommendations*, Ontario Justice Reform Project

<sup>7</sup> Civil Justice Reform Working Group in British Columbia (2006), *op. cit.*

19. A number of jurisdictions in the USA have developed fairly substantial self help services, for example in Washington and Indiana.<sup>8</sup> In Indiana the Supreme Court has laid the groundwork for a state - wide network providing basic resources to party litigants. An Advisory Committee was set up in response to “the growing national phenomenon of people choosing to represent themselves without lawyers”.

Its role is to make recommendations to the Supreme Court; develop a comprehensive strategy plan; and help trial courts respond to the growing numbers of party litigants. The Committee also provides basic resources to party litigants including uniform, state - wide forms. It encourages local courts to develop their own assistance programs. The Advisory Committee is comprised of judicial officers, county clerks, Bar representatives, legal services providers, librarians, and other community members. The Division of State Court Administration houses and administers the project with the help of Counsel to the Chief Justice.

20. It may be argued that other jurisdictions have a well developed system of self help services because there is lesser or indeed no provision of civil legal aid. The Washington State Supreme Court’s 2003 *Civil Legal Needs Study*,<sup>9</sup> which found that nearly 90 per cent of low - income families in Washington receive no help whatsoever when facing serious civil legal problems, resulted in increased funding for the Northwest Justice Project which supports Washington Lawhelp.<sup>10</sup> In Indiana the alternative to self - help provision is *pro bono* services. As the report of the Law Commission for New Zealand states:

“...improving access to legal information and advice is becoming even more pressing in the face of the contemporary reality of increased self - representation and of uneven representation.”<sup>11</sup>

### **Recommendations**

21. In Scotland we are fortunate to have a legal aid system that is not capped and in which the upper disposable income threshold for financial assistance for civil legal aid has recently been increased from £10,306 to £25,000. The traditional model of legal aid provided by lawyers is only part of the picture. In our view 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.

22. Respondents to the Consultation Paper and the conclusions of the research project commissioned by SLAB and Consumer Focus Scotland (see paragraph 14) support the view

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<sup>8</sup> See Washington LawHelp, <http://www.washingtonlawhelp.org/WA/index.cfm>; and the Indiana Supreme Court Self Service Legal Center, <http://www.in.gov./judiciary/selfservice>.

<sup>9</sup> Washington State Supreme Court Task Force on Civil Equal Justice Funding (2003), *The Washington State Civil Legal Needs Study*

<sup>10</sup> Washington LawHelp is an internet guide to free civil legal services for people on low incomes in Washington. It provides legal education materials and tools giving basic information on a number of legal problems, detailed instructions and forms to help parties represent themselves in court, and information on free legal aid programs in Washington. It is maintained by staff at the Northwest Justice Project (NJP). The NJP is a not-for-profit statewide organisation that provides free civil legal services to those on low incomes from offices throughout the state of Washington. Information obtained from <http://www.washingtonlawhelp.org>.

<sup>11</sup> New Zealand Law Commission (2004), *op. cit.*

that there is a need to provide clear and easy to access self - help facilities for parties involved in disputes which will fall within the new simplified procedure. Some material is already available on the SCS website, but the documentation can appear lengthy and confusing to a litigant who has no previous experience of the legal system. Access is not as easy as it could be. Litigants need to know what they are looking for before they start, for example guidance on small claims procedure. We recommend that 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.

23. Material should be regularly reviewed and updated to ensure that it is accurate. It would be useful to test material on focus groups as it is being developed and, in due course, to monitor its effectiveness.

24. The SCS website should provide links to other bodies' websites which can be a source of advice and guidance; for example, CAB, the Scottish Government, Law Centres, Consumer Focus Scotland and the like. Information about mediation and other methods of dispute resolution<sup>12</sup> should also be provided to allow potential litigants to explore other options before commencing a case or once the process has started.

25. We also recommend that 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.

## **In - Court Advisers**

### ***Current projects***

26. The first in - court advice project was introduced in Edinburgh Sheriff Court in April 1997 to provide court users with legal and other advice.<sup>13</sup> Subsequently five in-court advice pilots funded by the Scottish Government were located in Kilmarnock, Aberdeen, Dundee, Hamilton and Airdrie. The Scottish Government also funds the Homelessness Advice Desk in Paisley Sheriff Court, which is run by Paisley Law Centre.

27. The main aims of the pilots are

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

28. All the in - court advisers have the same remit - to provide a range of services to people without legal representation involved in certain civil court proceedings, including small claims and debt and heritable summary cause actions. The range of services available includes advice,

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<sup>12</sup> We discuss these in more detail and make recommendations in Chapter 7.

<sup>13</sup> E Samuel (1999), *Supporting Court Users: The In-court Advice Project in Edinburgh Sheriff Court*

information, negotiation, advocacy, onward referral and representations. Clients are largely local authority or housing association tenants, although there is a difference in the balance between sheriff courts. For example, housing accounts for the vast majority of cases in Kilmarnock but for only around half of cases in Airdrie. Some cases subject to ordinary cause procedure are undertaken but the policy and practice on this differs. The attitude of the sheriff is an important factor in whether the adviser becomes involved in such cases.

29. The Edinburgh project is managed by the local CAB. The other five services have different management structures, with Aberdeen, Hamilton and Airdrie having a local CAB manager, Dundee jointly managed by CAB and Shelter, and Kilmarnock managed by East Ayrshire Council. The management structure has implications for how the adviser carries out the remit and who is able to make use of the service. For example, it is considered inappropriate for the adviser in Kilmarnock to appear on behalf of anyone who is being taken to court by East Ayrshire Council, although representation may be an element of the role for another adviser. Nearly all of the Kilmarnock in - court adviser's work is to do with housing cases and her role is restricted to giving advice and dealing direct with the housing and legal sections of the Council on the tenant's behalf. Another example of the influence of the management arrangements on the delivery of the service is in Dundee where the in-court adviser, whose part - time post is managed by Shelter, deals predominantly with summary cause heritable cases, but will not act for landlords against tenants because this would be contrary to Shelter's policy.

30. The independent evaluations of the service in Edinburgh<sup>14</sup>, Aberdeen, Hamilton, Airdrie, Dundee and Kilmarnock<sup>15</sup> were positive in their conclusions. Demand was found to be high, as were levels of satisfaction amongst clients, court staff, sheriffs and local agencies. The services were found largely to meet their aims and objectives while advisers were generally fitting well into courts and with local agencies. There were a number of problems. These included the 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; and models of service provision. Recommendations were made to continue the pilots on a longer term basis and to extend the services nationally so that as many people as possible would have access to an in - court adviser. It was also recommended that, following consultation, a decision should be taken on whether to include cases subject to ordinary cause procedure as part of the services.

31. The Ipsos MORI report referred to at paragraph 13 above also provided some information about public perceptions of the in - court advice services. The litigants interviewed were "almost universally positive about the in - court advice services and the advisers who work there." There were however some concerns about whether the services had sufficient staff and resources to meet demand, and about whether they were properly publicised. The report suggests that increased staffing and better publicity, together with better liaison between the services and court staff, could have benefits both for litigants and for the effective management of cases in the court.

32. The Scottish Government has continued to provide funding for the pilots up to the current financial year. Responsibility for them has now transferred to SLAB.

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<sup>14</sup> E Samuel (1999), *ibid* and E Samuel (2002), *Supporting Court Users: The In-court Advice and Mediation Projects in Edinburgh Sheriff Court: Phase 2*

<sup>15</sup> S Morris et al (2005), *Uniquely Placed: Evaluation of the In-court Pilots, Phase 1*.

## ***Responses to the Consultation***

33. Chapter 2 of the Consultation Paper asked what contribution court - based advice services could make to improving access to justice. Two thirds of respondents thought that they could make a positive contribution and there was strong support for the extension of the existing in - court service. This supported the findings of the evaluation project. Respondents tended to view the services as being of most relevance in housing, debt and consumer claims and other types of “social welfare” cases, especially where solicitors in private practice would not consider the work to be sufficiently remunerative. There were some concerns that an in - court adviser could not provide as good a service as a lawyer in private practice and about whether the provision of an in - court advice service might compromise the independence of the courts. In - court advisers were not generally thought to have a significant role to play in relation to personal injury and family cases.

34. Some respondents thought that one of the benefits of in - court advice services would be in putting pressure on party litigants to take advice when it was available and the court thereby being able to take a more robust approach to those party litigants who failed to do so. One respondent thought that sheriffs should have the power to compel a party litigant to meet the representative of the in - court advice service for advice on rules of procedure and that failure to use the service following such referral should be taken into account by the court when awarding expenses.

Another thought that the cost of providing an in - court service would be offset by cost savings in terms of court time where the service assisted party litigants with procedural aspects of their litigation. There was also a view that party litigants who unreasonably refused such services should not be excused by the court for failing to comply with the court rules, as is currently the approach in many cases.

35. In addition to seeking responses in the Consultation Paper, we had meetings with the in - court advisers. It was apparent from these meetings that the services all operate in different ways, partly as result of the different management structures. It is also likely to be a reflection of the different backgrounds and training of the individual advisers and a response to the local culture within the relevant sheriff courts and to the attitude of individual sheriffs. In some instances the in - court advisers saw themselves as the final stage after other agencies such as CAB had been consulted. In others, the adviser was much more proactive in trying to offer assistance at an early stage in a dispute.

## ***Recommendations***

36. We consider that the in - court advice services make a useful contribution to improving access to justice for those who are able to make use of their services. We recommend that 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.

37. In addition to the matters identified in the evaluation reports, we recommend that SLAB should consider the quality and consistency of advice and help being provided by the different services.

38. 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 we think requires to be carefully considered 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. In the Kilmarnock and Dundee services this already happens, in effect, because of the management structures of the project. This has resulted in what might appear to be an arbitrary limitation on the ability of some potential users to obtain help from the services. The structure of each of these services may be the result of a pragmatic approach to establishing and evaluating a pilot project, but consideration should be given to whether such arrangements are appropriate in the longer term. 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 rationale should be clear and explicit, so as not to raise the expectations of other potential user groups or cause difficulties for the advisers themselves.

39. 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. 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.

40. We have considered the suggestion that a link should be made between the availability of in-court services and their use by party litigants, and that failure to use the service should be taken into account by the court when awarding expenses or in relation to the leeway party litigants are allowed in conducting cases. It is always open to the court in awarding expenses to take account of a party's behaviour. In recommending a new simplified procedure our intention is that the court should take an interventionist approach, which should include such action as is necessary to ensure that party litigants comply with the court's directions. We therefore do not consider that it is necessary to make a recommendation on this particular issue.

## **McKenzie Friends**

### ***Current position***

41. As a general rule parties in Scotland are entitled to represent themselves in court or be represented in the sheriff court by a solicitor or a member of the Faculty of Advocates, and in the Court of Session by a member of the Faculty of Advocates or by a solicitor advocate.<sup>16</sup> Under the procedures for small claims and summary causes, a party may be represented by an

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<sup>16</sup> *Mushtaq v Secretary of State for the Home Department* unreported, 3 March 2006. Rights of audience were extended in 2000 to include a solicitor from a member state of the European Union and in March 2007 to include persons granted a right of audience under section 25 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990. Act of Sederunt (Sheriff Court Rules Amendment) (Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) 2009 (SSI. 2009/163) enables members of the Association of Commercial Attorneys who are properly qualified and trained to exercise certain rights to conduct litigation and certain rights of audience in the sheriff court.

authorised lay representative, if the sheriff considers the representative to be a suitable person.<sup>17</sup> A party can generally represent only himself and not, for example, a group of which he purports to be a spokesman.

42. In Chapter 6 of the Consultation Paper we asked whether a person without a right of audience should be entitled to address the court on behalf of a party litigant and, if so, in what circumstances. This relates to a trend in the courts in England and Wales where, for over 30 years, party litigants have been allowed assistance in court from what have become known as “McKenzie friends”.<sup>18</sup> McKenzie friends do not take on the role of a lawyer, but may give assistance by making notes, helping with case papers or quietly giving advice on the conduct of the case, as well as providing moral support in court. Sections 27 and 28 of the Courts and Legal Services Act 1990 provide the court with a discretionary power to grant rights of audience to a lay individual. A court may therefore grant a McKenzie friend a right of audience in exceptional circumstances, provided an application is made at the start of a hearing. This has happened on occasion.<sup>19</sup>

43. Many party litigants are assisted in conducting their litigation before the Court of Session by friends and acquaintances, who sit behind them in court.<sup>20</sup> The practice of the Scottish Land Court permits McKenzie friends. Differing views have been expressed by Outer House judges as to the competency of permitting a person assisting a party litigant to address the Court on the party litigant’s behalf. In *Kenneil v Kenneil*<sup>21</sup> Lord Glennie, granting an application for a wife to represent her husband who was otherwise unrepresented at the hearing, found that the Court of Session has discretion to allow a lay person to speak for a party litigant. He emphasised, however, that such representation should be allowed only in exceptional cases. Each case will depend on its own facts. In *Anderson, petitioner*<sup>22</sup>, in the absence of any Scottish authority supporting that approach, Lord Mackay of Drumadoon found it to be incompetent, although he did acknowledge that such an arrangement might in certain circumstances prove to be of practical assistance.<sup>23</sup>

### **Responses to the Consultation**

44. Respondents to the Consultation Paper were fairly evenly divided as to whether or not a person without a right of audience should be permitted to address the court on behalf of a party litigant.

#### **Arguments in support**

45. Some respondents considered that such representation was appropriate where, for example, English is not a party litigant’s first language, or where the party litigant is subject to a disability which restricts his full participation in the action. Another thought that a party litigant

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<sup>17</sup> Small Claims Rules 2002, rule 2.1; Summary Cause Rules 2002, rule 2.1.

<sup>18</sup> *McKenzie v McKenzie* [1971] P 33.

<sup>19</sup> *Izzo v Philip Ross & Co (a firm)* Times Law Reports 9 August 2001.

<sup>20</sup> *Martin Frost and John Parkes v Cintec International Limited* [2005] CSOH 119, 9 September 2005

<sup>21</sup> [2006] CSOH 95, 16 June 2006

<sup>22</sup> [2007] CSOH 110, 26 June 2007

<sup>23</sup> A public petition was presented to the Scottish Parliament (PE1247) in April 2009 calling for the introduction of a McKenzie friend facility in the Scottish courts.

could be substantially assisted by a more articulate, less nervous or more experienced representative. This might also benefit the court and the opposing party and his solicitor. A common theme was that a person without a right of audience should be permitted to address the court only in exceptional circumstances and that the court should retain an ability to make the decision on a case by case basis and have the power to revoke its decision if it sees fit. Various tests were proposed in relation to the exercise of that discretion.

46. Respondents submitted that the circumstances in which such a representative is permitted to address the court should be carefully controlled and their role clearly defined. It was suggested that the representative should not be entitled to remuneration of a financial nature, other than reasonable travel expenses. The assistance he could give would include providing moral support, giving non-legal advice, suggesting questions to ask witnesses, consulting with the party litigant during the proceedings, making notes and helping source legal forms.

### *Arguments against*

47. A number of respondents were against change on the basis that the existing rules strike the correct balance. They emphasised the maintenance of high standards and the obligations of professionalism which enable matters to be dealt with efficiently. One respondent pointed out that the professional regulation associated with legal representation underpins the way in which the court system functions.

Professional obligations would not be incumbent upon non-legally qualified representatives, who could not be relied upon to provide the same quality of assistance to the court. Another respondent considered that it is important to bear in mind the legal representative's dual roles as adviser and officer of the court, and that courts benefit from advisers who are not intimately involved in the litigation.

48. One respondent highlighted the particular difficulties it saw in a McKenzie friend acting in a family law case. It thought there would be considerable difficulties in introducing such a scheme, which would have to address issues such as what, if any, qualification and/or experience in the law, practice and procedure the person would require to have; whether the person had a vested interest in the case on behalf of a special interest group; and at what stage in the litigation the person would first appear. Another respondent warned that one consequence of individuals being able to act on behalf of party litigants could be an increase in the number of "recreational" party litigants who offer their experience or "expertise" to other party litigants.

Quite often these people are described to the court as being a friend or acquaintance, but in reality are charging a fee of some sort for their services. If the current restrictions were to be relaxed, this trend would, in its view, almost certainly develop.

49. A comparative analysis of rights of audience in some other jurisdictions is given in the Annex to this chapter.

### *Recommendations*

50. We agree that the legislation regulating those who have rights of audience in the courts is aimed at providing appropriate safeguards and protections to members of the public and seeks to ensure a high quality of representation before the courts.

With the exception of our proposals in relation to lay representation in simplified procedure cases, discussed in Chapter 5, we do not favour rights of audience being extended generally to those without suitable qualifications.

51. However, we recognise 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 to the court.

52. This is not to say that parties would have the 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.

53. 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.