



Briefing for the Public Petitions Committee

Petition Number: [PE1724](#)

Main Petitioner: Bill Alexander

Subject: Equal rights for Commercial Attorneys and Party Litigants in the legal system

Calls on the Parliament to urge the Scottish Government to carry out a review to ensure there are equal rights for all legal professionals, including Commercial Attorneys and Party Litigants in the legal system.

Introduction

The Petitioner argues that commercial attorneys are not given rights equivalent to those of solicitors or advocates in the Scottish legal system - in particular as regards rights of audience in the Scottish courts (i.e. the right to appear and conduct proceedings in court).

This briefing provides information on:

- The role of solicitors and advocates in Scotland
- The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990
- The Association of Commercial Attorneys
- Previous petitions by the Petitioner
- Scottish Government action in this area

The role of solicitors and advocates in Scotland

Historically, the legal profession in Scotland involved in court work has been split into two main branches: solicitors and advocates.

Solicitors act as legal advisers and can also carry out court work – e.g. in the sheriff court and tribunals. However, they can only argue cases in the highest courts (Court of Session, High Court of Justiciary and UK Supreme Court) if they demonstrate sufficient experience and have passed additional exams/training courses (they are then known as “[solicitor advocates](#)”). Solicitors/solicitor advocates are regulated by [the Law Society of Scotland](#).

The [standard route for becoming a solicitor](#) involves graduating in Scots law (LLB degree), passing a practical course (the Diploma in Professional Legal Practice) and completing on-the-job training known as a “traineeship”.

Advocates are lawyers with special training in advocacy. They can represent any person in the Scottish courts, but traditionally specialise in work at the highest courts where they, along with solicitor advocates and certain EU qualified lawyers, have sole rights of audience. Advocates are self-employed members of an [“independent referral bar”](#) and do not provide services directly to the public. Instead, they are instructed by solicitors and a [limited number of other bodies](#). They are regulated by the [Faculty of Advocates](#).

The [standard route for becoming an advocate](#) involves the three stage process for becoming a solicitor (the traineeship can be shortened) followed by training with an advocate (known as “devilling”); and passing an examination in evidence, practice and procedure.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 introduced changes to the structure of the Scottish legal profession.

One of the changes was to give other bodies the right to apply to the Lord President of the Court of Session (head of the Scottish judiciary) and the Scottish Ministers so that their members can appear and conduct litigation in the Scottish courts (sections 25-29 of the 1990 Act). The broad aim was to give consumers more options in deciding who to represent them in court.¹

Applications for rights to conduct litigation and rights of audience must be accompanied by a draft scheme which includes the code of conduct which the members of the body have to follow, as well as educational and training requirements for members and disciplinary procedures. Both the Lord President and the Scottish Ministers have to approve the scheme before it comes into effect and can withdraw their approval if the body does not comply with the scheme. Under section 42 of the 1990 Act, they can also carry out a review of the terms of the scheme.

The aim behind these rules is to ensure that members of the body in question have sufficient skills to appear in court and that consumers are protected by an appropriate regulatory framework.

Sections 25-29 of the 1990 Act did not come into effect automatically as their introduction was dependent on secondary legislation. They were ultimately not [brought into force until 21 March 2007](#) following the recommendations of a [Scottish Executive working group](#).

Following the coming into force of the provisions, the then Lord President and Scottish Executive published a [guide on the procedure for making applications for the right to conduct litigation and rights of audience](#).

¹ See [House of Lords’ debate on the Bill on 29 March 1990](#) (Hansard - column 1078)

The Association of Commercial Attorneys

The Association of Commercial Attorneys is a body representing specialists in the construction industry (e.g. qualified engineers, architects and surveyors) with additional legal qualifications (an LLM in construction law or an LLB) who are not solicitors or advocates.

In 2007, the Association applied to the Lord President and Scottish Ministers for rights of audience for its members under the rules in the 1990 Act.

The Lord President and Scottish Government approved the final scheme in April 2009.

[The scheme](#) granted the Association's members the right to conduct construction litigation in the sheriff court in relation to smalls claims or summary cause procedures ([both now largely replaced by the new simple procedure for claims under £5,000](#)). However, it did not give members a right of audience for defended [ordinary cause actions](#) (a procedure normally used in the sheriff court where the value of the claim is over £5,000). In addition, members of the Association were also not granted rights of audience in the Court of Session.

The scheme also provided rules in relation to: admission to the Association; training, legal qualifications and experience required by members; continuing professional development (CPD); professional indemnity insurance; professional standards; and complaints procedures.

The scheme was to apply for a transitional period of three years after which it would be reviewed by the Lord President and the Scottish Ministers. It appears that the Association submitted a revised scheme in October 2016. Much of the Petitioner's arguments relate to the scope of this revised scheme. Further details on this issue can be found in Scottish Government freedom of information responses dated [21 August 2018](#) and [18 September 2018](#).

Previous petitions by the Petitioner

The Petitioner has previously submitted the following petitions to the Scottish Parliament in similar fields to the current one:

- [PE 1021](#) (closed on 23 October 2007). The Committee agreed to close this petition on the grounds that the relevant statutory provisions in the Legal Profession and Legal Aid (Scotland) Act 2007, Solicitors (Scotland) Act 1980 and Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which address the issues highlighted by the petitioner, had come into force.
- [PE 1197](#) (closed on 10 February 2009). The Committee agreed to close this petition on the grounds that the Scottish Government had considered the matter and had no plans to amend the system of authorisation for rights of audience.

Scottish Government action

In 2017, the Scottish Government invited Esther Robertson to carry out a review of the regulation of legal services in Scotland. The [review](#), published in October 2018, made a series of recommendations, including the need for an independent regulator for all legal service providers in Scotland. [The Scottish Government published its response to the Robertson review on 25 June 2019.](#)

Angus Evans

Senior Researcher - Civil Justice
3 August 2019

SPICe researchers are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot.

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.