



LORD PRESIDENT OF THE COURT OF SESSION



SCOTTISH EXECUTIVE

**GUIDE FOR PROFESSIONAL OR OTHER BODIES ON MAKING
AN APPLICATION TO ENABLE THEIR MEMBERS TO
ACQUIRE:**

RIGHTS TO CONDUCT LITIGATION

AND

RIGHTS OF AUDIENCE

Introduction

This Guidance has been prepared on behalf of the Lord President of the Court of Session and the Scottish Ministers.

The Guidance has been prepared for any professional or other body which is considering making an application to enable any of its members to acquire

- rights to conduct litigation on behalf of members of the public; and
- rights of audience in the courts

The aim of this Guidance is to explain to applicant bodies:

- the statutory framework
- what issues they will need to address in an application and draft scheme
- the application process

The Statutory Framework

Sections 25-29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provide for professional or other bodies to apply for the right to enable their members to acquire rights to conduct litigation and rights of audience. References in this Guidance to sections and Schedules are references to sections of and Schedules to that Act. Sections 40 to 42 and Schedule 2 are also relevant.

The following is a brief description of the legislative provisions relevant to applications for rights to conduct litigation and rights of audience. The description should not be regarded as comprehensive nor as constituting legal advice.

Section 25 (rights to conduct litigation and rights of audience)

This section provides that any professional or other body may apply to the Lord President of the Court of Session and the “Secretary of State” (on devolution the function of the Secretary of State transferred to the Scottish Ministers) to enable their members to acquire rights to conduct litigation and rights of audience¹. Applications must include a “draft scheme”². The draft scheme must set out the arrangements by which the body will regulate their members. Specifically, the draft scheme should describe:

¹ section 25(1)

² section 25(2)

- a) which courts, what kind of proceedings, and what type of business the body is applying to allow its members to participate in³;
- b) the requirements for training and the code of practice which the body will impose on its members in relation to the rights being sought⁴;
- c) how the public will be indemnified against losses they might suffer as a result of the exercise of these new rights by the body's members⁵;
- d) arrangements for handling complaints received by the Scottish Legal Complaints Commission and passed to the body about the exercise of the new rights by the body's members⁶.

The code of practice referred to at paragraph b) above must provide for members' rights to be revoked, suspended or to have conditions attached to them in consequence of a breach of the code of practice⁷.

Section 26 (consideration of applications)

The Lord President is required:

- in relation to the draft scheme, to consider the provision made about the matters set out in paragraphs a) to d) above⁸;
- in relation to the code of practice included in a draft scheme, to consider the desirability of there being common principles applying in relation to the exercising of rights to conduct litigation and rights of audience⁹.

The Scottish Ministers are required:

- in relation to the draft scheme, to consider the matters set out in paragraphs b) to d) above after taking the advice of the Office of Fair Trading¹⁰;
- but, their consideration of the provisions of the code of conduct included within the draft scheme is restricted to those provisions which would, in their view, directly or indirectly unduly inhibit the freedom of a member of a body concerned to undertake all the work necessary for the preparation or presentation of a case.¹¹

The Lord President and the Scottish Ministers are required to:

- consult each other in considering a draft scheme¹²;
- consider any written representations which are made to them within the time limits¹³;

³ section 25(2)(a)

⁴ section 25(2)(b)

⁵ section 25(2)(c)(i)

⁶ section 25(2)(c)(i)

⁷ section 25(3)

⁸ section 26(1)

⁹ section 26(2)

¹⁰ section 26(1) and section 40(1)

¹¹ section 26(1) and section 26(5)

¹² section 26(3)(a)

¹³ section 26(3)(b) and Schedule 2

- have regard to whether a draft scheme achieves and ensures the maintenance of appropriate standards of conduct and practice¹⁴.

All persons and bodies with functions in relation to the consideration of applications for rights to conduct litigation and rights of audience are required to exercise their functions “*as soon as reasonably practicable*”¹⁵.

Section 27 (exercise of rights to conduct litigation and rights of audience)

This section provides that, following a successful application by a body, any member of that body who has fulfilled the relevant training requirements and who appears to that body to be a ‘*fit and proper person*’ will have rights to conduct litigation and rights of audience such that the body has applied for.¹⁶

The section also provides:

- for the suspension of the member’s rights to conduct litigation and rights of audience following a complaint of professional misconduct¹⁷;
- that instructions to the member to appear in court take precedence over any other professional or business obligations the member may have. The scheme’s code of practice must include rules relating to the precedence of courts (in the event of the member having instructions to appear in more than one court) and the acceptance of instructions¹⁸;
- that the member has same immunity from liability for negligence as an advocate, and no act or omission on the part of any such person shall give rise to an action for breach of contract in relation to the exercise by him of such a right of audience¹⁹; and
- that it is an offence for someone to pretend to have rights of audience or rights to conduct litigation which the person does not have²⁰.

These provisions do not affect the power of the court to hear someone who doesn’t have rights of audience, or to refuse to hear someone who does have those rights but the reasons for any such refusal are to be given.

Section 28 (surrender of rights to conduct litigation and rights of audience)

This section provides that a body whose members are entitled to acquire rights to conduct litigation and rights of audience, may apply to the Lord President and Scottish Ministers for permission to ‘surrender’ that entitlement. If such an application is made, the Lord President and Scottish Ministers must tell the body concerned what it must do in order to be allowed to surrender the entitlement. When the Lord President and Scottish Ministers are satisfied that the body has complied with these instructions the Lord President must grant the application. When the application has been granted, the members of the body who had acquired rights to conduct litigation and rights of audience no longer hold those rights.

¹⁴ section 26(4)

¹⁵ section 27(2)

¹⁶ section 27(1)

¹⁷ section 27(4)

¹⁸ section 27(5)

¹⁹ section 27(6)

²⁰ section 27(7)

Section 29 (revocation of rights of audience and rights to conduct litigation)

Section 42 provides the Lord President and Scottish Ministers with the power to direct a successful body to review its scheme. Where a body has failed to comply with a direction under section 42(6), section 29(1) provides that Scottish Ministers can revoke the granting of these rights. This power must be exercised by making a Scottish Statutory Instrument. The Scottish Parliament would need to agree to such an instrument²¹.

Section 40 (advisory functions of the Office of Fair Trading)

Scottish Ministers are required to send a copy of a draft scheme to the Office of Fair Trading (OFT)²². The OFT must consider whether the provisions of the draft scheme would have, or would be likely to have the effect of restricting, distorting or preventing competition to any significant extent and give such advice to Scottish Ministers as they see fit²³. The OFT is allowed to publish this advice subject to certain provisos relating to data protection²⁴.

Sections 41, 41A and 41B (investigatory powers of the Office of Fair Trading)

The OFT can require any person, by notice in writing, to produce documents and information as may be specified, at a time and place also to be specified²⁵. However, a person shall not be required to produce documents or disclose information which he would be entitled to refuse to produce or disclose on the grounds of client confidentiality in any civil proceedings. It is an offence for a person to alter, suppress or destroy a document which that person has been required to produce.

Section 42 (review of the scheme approved by the Scottish Ministers)

This section allows the Scottish Ministers to instruct a body that successfully applies for these rights to review its scheme. If the Lord President asks the Scottish Ministers to make such an instruction, they must do so²⁶. When the body has reviewed the scheme it may revise the scheme²⁷. The body must then re-submit the scheme to the Lord President and Scottish Ministers²⁸. The Lord President and Scottish Ministers can then take action depending upon their view of the resubmitted draft scheme, including amending the scheme and directing the body to bring the amended scheme into force as soon as practicable²⁹.

Schedule 2 (publication of applications)

Schedule 2 stipulates that applicant bodies must make publicly available (for 6 weeks) a copy of the draft scheme, advertise its existence (in the Edinburgh Gazette and in a daily newspaper circulated throughout Scotland) and send a copy out on request to whoever asks for it (or make it publicly available to them in their locality)³⁰. Anyone can make written

²¹ section 29(2)

²² section 40(1)(c)

²³ section 40(3)

²⁴ section 40(4) and (5)

²⁵ section 41(1)

²⁶ section 42(1)(b)

²⁷ section 42(2)

²⁸ section 42(2)(b)

²⁹ sections 42(5), (6) (7)

³⁰ Schedule 2, paragraph 1

representations to the Lord President and Scottish Ministers about a draft scheme. Such representations must be made within the 6 week period.³¹

The Legal Profession and Legal Aid (Scotland) Act 2007 creates a new independent body to receive all complaints about legal practitioners where local resolution between legal practitioner and client has been attempted but has proved unsuccessful. Practitioners who exercise rights obtained under section 27 of the 1990 Act and the bodies of which they are members will fall within the scope of the complaints handling arrangements. The Scottish Legal Complaints Commission will operate independently of the legal professional bodies. The Commission will investigate complaints about service and will delegate complaints about conduct to the relevant professional organisation. However, the Commission will have an oversight role in relation to how the professional body investigates conduct complaints. New compensation levels will apply to service and conduct complaints that are upheld. A maximum amount of £20,000 will be payable to a client in respect of a service complaint and a maximum amount of £5,000 will be payable for a conduct complaint. In addition, the Commission can order a professional organisation to pay up to £5,000 to a complainer where it considers that the professional organisation has not dealt with a conduct complaint in a satisfactory manner. The Commission will be funded by the legal profession through two levies: a general levy to be paid by all practitioners and a specific levy to be paid by practitioners when a complaint against them has been investigated by the Commission and upheld or where the Commission has mediated between complainer and practitioner or proposed a provisional settlement and a settlement has then been agreed between the parties.

³¹ Schedule 2, paragraph 2

Draft Schemes

The Draft Scheme

The application must include details of the arrangements in place for publicising the application (including the draft scheme) and a statement that your organisation has complied with the provisions of Schedule 2.

The draft scheme must set out the nature and scope of the rights which your organisation wishes to grant to its members, specifying:

- the courts you would wish your members to appear in;
- the categories of proceedings in which they would be involved;
- the nature of the business; and
- the rights to conduct litigation and the rights of audience in relation to which the application is made.

The rights sought need to be tailored to your client group and realistic to the services the members of your organisation might provide to their clients. You should refer to any available evidence.

Your scheme will need to demonstrate that the members to whom your organisation would wish to grant the rights will be properly qualified to undertake these rights and that the code of practice proposed will be appropriate and will be effectively enforced.

In addressing these matters the Lord President and Scottish Ministers will wish to consider the following:

Education and Training

- The entrance requirements for membership of the body;
- The level and type of experience that would be required before a member might be considered for these new rights;
- The education and training, including in oral advocacy, which will be delivered to your members seeking these rights and by whom; and
- The level of attainment, in terms of education, training and/or working experience, which those members who seek the new rights will be required to reach in order to ensure that they have adequate knowledge, skill and experience including details of any independent assessments of such training and/or examination standards required or specified as well as any recognition of ‘on the job’ training towards the award of a qualification.

Continuing Professional Development

- Details of any requirement on members to keep skills and knowledge up to date, and more generally to maintain knowledge, skills and personal qualities in order to perform professional activities competently.

Code of Practice, Disciplinary Mechanism and Complaints Procedures

- Details of your organisation's code of practice in relation to your members' exercise of the rights sought under this application, including
 - provisions for revoking, suspending or attaching conditions to the exercise of any rights acquired by member in breach of that code of practice (sections 25(3) and 27(4));
 - rules regarding the order of precedence of courts, where appropriate this can include European courts (section 27(5)(a));
 - general criteria to which members of the body should have regard in determining whether to accept instructions in particular circumstances (section 27(5)(b)); and
 - arrangements for securing, where reasonably practicable, that any person wishing to be represented before a court by one of your members is so represented (section 27(5)(c)).
- Details of your organisation's disciplinary mechanism and procedure for handling complaints received from the Scottish Legal Complaints Commission in relation to the exercise by those members of the rights sought under this application;
- Details of how these mechanisms will effectively protect the consumer and ensure that good standards are maintained by those exercising the new rights;
- Where appropriate, details of how the proposed code of practice contains procedures controlling the handling of client's money and details of the provision for compensation;
- Details of how the professional interests of your organisation are balanced by the public interest, particularly in relation to its code of practice, disciplinary and complaints procedures, for example, by the inclusion of non-professional representatives on its board and/or complaints handling body.

Professional Indemnity Insurance

- Details of your organisation's arrangements for an adequate level of professional indemnity insurance against loss suffered by members of the public through your members' exercising of the rights sought.

Transitional Arrangements

- Where appropriate, details of the transitional arrangements your organisation will set in place to allow these rights to be exercised while members of your organisation qualify for rights under any new arrangements. Alternatively, confirmation of the arrangements to be put in place and likely timetable for these new rights to be exercised.

Additional Information

- Background information, including information about the constitution and activities of your organisation and its members and an explanation as to why you wish to apply for the right to enable your members to acquire rights to conduct litigation and rights of audience.
- An indication of whether it is intended that your members will provide civil and/or criminal legal assistance and, if so, an indication of what discussions your organisation has had with Scottish Legal Aid Board about the quality assurance measures that will be in place.

- Details of any rights of audience or rights to conduct litigation which your members currently enjoy and under what legislation these rights are granted, or which the body is currently authorised to grant.

Office of Fair Trading requirements

It would be useful for the OFT in its consideration of whether applications would have, or would be likely to have, the effect of restricting, distorting or preventing competition to any extent if the draft scheme set out:

- the market in which your organisation would be competing if the draft scheme is approved; and
- how in your opinion competition in the provision of such services would be affected if the draft scheme was approved.

This would avoid any unnecessary delay incurred by the formal request of such information under section 41 of the Act.

The Application Process

Submitting the draft scheme

You should address your application to both the Lord President and the Minister for Justice and send it to:

Ms Elaine Hamilton
Access to Justice Division
Scottish Executive Justice Department
2W
St Andrew's House
Regent Road
EDINBURGH
EH1 3DG

who will manage the application process on behalf of the Lord President and Scottish Ministers.

On receipt of your application, a letter of acknowledgement will be sent to you. The letter will also give an indication of the time frame for considering the application, although this may be subject to adjustment. Please note that there are a number of stages and a number of different people who must consider the application. Where possible, the following paragraphs provide details of the overarching timetable for these stages.

Publicising your application and draft scheme

Please remember that the legislation requires that when you make an application for these rights, a copy of your draft scheme requires to be made publicly available for a period of six weeks. In addition, during this period, a copy of your draft scheme must be sent to anyone who requests it or otherwise made available for public inspection "*at a suitable place in his locality.*"

Also, at the same time as your application is lodged with the Lord President and Scottish Ministers, your organisation must place an advertisement both in the *Edinburgh Gazette* and in a daily newspaper circulating throughout Scotland.

Any person will have 6 weeks in which to make written representations to the Lord President and/or Scottish Ministers concerning any draft scheme.

The detailed requirements are set out in Schedule 2 to the 1990 Act.

Involving the Office of Fair Trading

Scottish Ministers will send a copy of your application and draft scheme together with accompanying documents and any additional information you have provided, to the Office of Fair Trading (OFT) immediately on receipt of the application. The OFT will consider whether granting the application would have, or be likely to have, any significant effect on competition, and will give advice to Scottish Ministers in relation to the application as they

see fit. The OFT will be working to a target date of 90 working days to provide this advice. They may publish this advice subject to certain provisos regarding data protection.

Considering the application and draft scheme

Feedback from the OFT will be collated along with any written representations from the public which are received. All of this information will be taken into account when the Lord President and Scottish Ministers consider your application.

In considering applications, the Lord President will be seeking to ensure appropriate standards of conduct and practice by persons who may acquire rights to conduct litigation or rights of audience relative to the level of rights sought in the draft scheme and Scottish Ministers will be seeking to ensure both fair competition and that consumers are adequately protected.

The Lord President and Scottish Ministers may make preliminary observations in relation to the draft scheme. Those observations will be published. In response to the observations you may then make such adjustments to your draft scheme as appear to you to be appropriate. The Lord President and Scottish Ministers (consulting the OFT as appropriate) will then consider the draft scheme as adjusted.

The Lord President and Scottish Ministers will consider whether the application should be granted. You will be notified of the decision as soon as practicable after the decision is made. If the application is refused, you will be given reasons. Any person making written representations will be advised of this decision and provided with a copy of the decision letter.

Once a draft scheme has been approved no aspect of it can be materially altered in relation to the rights of audience or rights to conduct litigation, without submission of a new application. However, it is recognised that there may be instances where a professional or other body may wish to make alterations to its code of practice or other aspects of its working practices which would not be material to rights of audience or rights to conduct litigation. In these circumstances it would not be necessary to submit a new application. If a successful body is not sure whether a proposed change to their professional code would be material to these new rights they may seek advice from Scottish Ministers before deciding whether a fresh application is necessary.

In the interests of openness, the following documents will be posted to both the Scottish Court Service and the Scottish Executive websites:

- the application, draft scheme, any accompanying documents and any additional information provided;
- any preliminary observations made by the Lord President and/or Scottish Ministers;
- any adjusted draft scheme;
- advice provided and published by the Office of Fair Trading; and
- a copy of the decision letter.

You may find it helpful to refer to the flow chart in the Annex which describes the application process.

If you have any questions about this process or the preparation of an application, you should contact Ms Elaine Hamilton at the address shown above, contact her on 0131 244 2180, or e-mail Elaine.Hamilton@scotland.gsi.gov.uk.

APPLICATION PROCESS

