



The Scottish Parliament  
Pàrlamaid na h-Alba

**PUBLIC PETITION NO.**

**PE01724**

### **Name of petitioner**

Bill Alexander

### **Petition title**

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

### **Petition summary**

Calling on the Scottish 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.

### **Action taken to resolve issues of concern before submitting the petition**

I have written to the Scottish Government, the Lord President of Scotland and the Sheriffs Principal.

### **Petition background information**

At the moment there are only two bodies who are allowed to conduct litigation within the sheriff courts on behalf of others, and be paid for doing so. These are solicitors; and a much smaller organisation called the Association of Commercial Attorneys (the Association). Advocates have a right of audience in the sheriff court, but they cannot act on behalf of a party direct, and can only be instructed by someone who has the rights to conduct litigation.

The Association of Commercial Attorneys are a group of relatively new, highly specialised lawyers, who only act in construction, building, and engineering matters. All of the members are dual qualified, in that not only do they have a law degree (normally at Masters level). They must also have a construction related architectural, surveying or engineering qualification, and have practiced within the construction industry for at least 5 years. The academic and technical standards required to become a commercial attorney are not easily obtained. There have been no complaints against any commercial attorneys at the Scottish Legal Complaints Commission since the Association of Commercial Attorneys was granted limited practicing rights in 2009.

The various justice departments before and after devolution, and the Scottish courts, have long resisted opening up the ability of alternative forms of legal representation in the courts.

Sections 25 to 29 of the Law Reform Miscellaneous Provisions Scotland Act 1990 took



Sections 29 to 33 of the Law Reform (Miscellaneous Provisions) Scotland Act 1990 took 17 years to be commenced. Were it not for previous petition committee support, it is unlikely if it would ever have occurred. I understand that secret lobbying was carried out by senior law officers to prevent the commencement of these sections, without even giving the legislation a chance, despite it being constitutionally inappropriate to try and undermine the will of parliament.

When the Association of Commercial Attorneys was eventually given the right to practice in 2009 no "Practice Notes" were ever issued by the Sheriffs Principal in order to give guidance to the courts and the public with regard to the fact that solicitors had lost their monopoly in sheriff court practice.

There have been no changes to the sheriff court forms and rules to recognise the new legal profession. When the sheriff court rules on simple procedure were introduced, commercial attorneys were not recognised as legal professionals, and instead are categorised as a non-legal organisation. The Association of Commercial Attorneys were excluded by the Scottish Government from the advisory panel on the legal services review carried out by Esther Robertson. The legal services review subsequently decided that commercial attorneys were not lawyers, but then proposed that the title "lawyer" should be regulated. There is no information on either the Scottish Courts or the Scottish Government websites which makes any attempt to explain to the public that there are alternatives to solicitors in the sheriff court, in certain circumstances. For at least 10 years solicitors, and latterly advocates, have been granted private meetings with Scottish Government Justice Ministers. No Justice Minister has ever met with the Association of Commercial Attorneys.

Both the Scottish Government and the Competition and Markets Authority have confirmed that there has been no consideration as to whether or not there is any distortion of competition in the provision of legal services in the sheriff courts by virtue of the fact that solicitors have the dominant position in the marketplace.

In 2016, Scottish Ministers requested under Section 42 of the Law reform Act 1990 that a revised practice scheme should be submitted by the Association, as it had been agreed by Scottish Ministers and the Lord President, that the transitional practice scheme for the Association should now be replaced with a permanent scheme.

A revised scheme was submitted in October 2016. No issues were raised at that juncture which would indicate that the scheme did not meet with what had been requested by Scottish Ministers under Section 42 of the 1990 Act. Some seven months later, on the 10 May 2017, the Access to Justice Department, with, it is understood, the concurrence of the Lord President's Private Office, sent an e-mail claiming that the revised scheme did not comply with a prior agreement that the changes should be restricted to reflect simple procedure, and therefore it could not be accepted. For the avoidance of any doubt, there was never any such agreement. What was alleged within the e-mail of the 10 May 2017 is completely, and utterly, untrue.

When subsequently pressed for clarification on the alleged agreement, the Access to Justice Department initially claimed that it took place at a meeting, and then eventually conceded that no meeting had actually ever taken place. It was then claimed that the agreement was reached during a telephone discussion, and that the letter of confirmation sent after the meeting supported the position. This is not true and there is no evidence to support what has been claimed. The Scottish Government, has stated that the restrictions had actually been at the request of the Scottish Courts. The Scottish Courts have declined to confirm if this is the case. Irrespective of who is correct, there was no consultation required when restricting the practice rights of the Association, and certainly no thought of seeking the views of the Competition and Markets Authority with regard to any potential restrictions on competition.

In October 2017, the Access to Justice Department put forward a proposal by the Lord President that an "informal consultation" should be carried out in regard to extending rights of audience for commercial attorneys in procedural hearings, since Lord Carloway supported this aspect of the revised scheme. On the 29 October 2017 the Association, having formed the opinion that there was no real alternative, reluctantly accepted this proposal. The consultation eventually took place on the 5 December 2018



2019.

In parallel with the consideration of the revised scheme, when the Association put forward the proposal that its members should wear gowns in court, in the exact same way that all other officers of the court, including clerks, do, the response from the Sheriffs Principal was that a commercial attorney wearing a gown was more likely to mislead the court. This is a pretty astonishing allegation to make. No explanation was provided as to why it was felt that this would be the case. The Sheriffs Principal then declined to meet with the Association in order to discuss their concerns, but suggested that it was a matter for the Lord President to decide. The Lord President did not disagree with the views of the Sheriffs Principal; however he did suggest that any misleading would not be deliberate. Whether this leaves an implied allegation of incompetence as being a reason is unclear. He further advised that the public could be confused if a commercial attorney wore a gown in court. No evidence has been provided to support this suggestion. Bearing in mind that the only people who are normally in court are officials, other lawyers, and the clients, it is quite difficult to understand the concerns over the alleged public confusion, and why guidance in the form of Practice Notes etc could not be published on the Scottish court website to assist the public and other court practitioners of any changes.

The overriding impression is that commercial attorneys are not, and never will be, welcome in the Scottish legal system. There will never be any attempt to create a level playing field, and no support will ever be given to anything that encourages fair competition.

Justification for the restrictions on the ability to practice is consistently put forward without any attempt to provide evidence to support the position. This does seem quite strange, bearing in mind that the courts normally require evidence as part of the burden of proof. No matter how hard commercial attorneys try to gain equal recognition with other legal professionals, if there is institutionalised prejudice within the legal system of Scotland, then it may be a difficult, if not impossible, burden to overcome.

The right to a fair hearing at an impartial tribunal is one of the foundations of the Scottish legal system. It is also a fundamental human right. Justice has to be done, but it also has to be seen to be done. Therefore in order to demonstrate that there is equality of arms in the court, it may be necessary to end the tradition of wearing gowns in civil proceedings, so that both commercial attorneys, and party litigants, can be assured that there is no potential for prejudice against them.

For over 23 years there appears to have been a culture of bias and prejudice against anyone who is not a solicitor or advocate practicing in the Scottish courts.

As this may have an impact on greater choice in legal services representation, and access to justice, it is perhaps time that there is an impartial investigation in order to establish if there is institutionalised prejudice and bias, and whether this might reduce confidence in the integrity and impartiality of the legal system of Scotland.

#### Unique web address

<https://www.parliament.scot/GettingInvolved/Petitions/PE01724>

#### Related information for petition

**Do you wish your petition to be hosted on the Parliament's website to collect signatures online?**

**YES**

**How many signatures have you collected so far?**

How many signatures have you collected so far?

0

**Closing date for collecting signatures online**

25 / 07 / 2019

**Comments to stimulate online discussion**

Have you experienced prejudice and bias in the Scottish legal system particularly in relation to access to justice and/or competition restrictions in the provision of court legal services.