

PETITION PE1197

Response To submissions by

The Scottish Government

The Faculty of Advocates

The Law Society

The Scottish Government

Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 were to be commenced in 1996 as agreed by the Secretary of State for Scotland Michael Forsyth and Lord President Hope. The civil servants at the time decided not to carry out the wishes of the Secretary of State nor did they, as I understand it, inform him that his instructions were not to be followed. The file covering this subject has been destroyed. In 2003 the Public Petitions Committee were advised by the Scottish Executive that, in their response to the Public Petitions Committee supporting my petition, commencement of Sections 25 to 29 could entail a burden for the courts. It has now been proven that this suggestion was entirely without foundation and in fact the internal advice to ministers was fundamentally flawed.

Much of the technical information provided by the Justice Secretary is correct except that, unqualified and unregulated civil servants are also allowed to be paid to prepare writs on any subject matter under sections 32 of the Solicitors Scotland Act 1980, as is any member of the public whatsoever providing they do not seek payment. This is separate from a right of audience which allows a person to appear in court and speak on behalf of a third party which is restricted (apart from one or two minor exceptions) to solicitors and advocates. Much of the response from the Justice Secretary seems to assume (as does the response from the Faculty and the Law Society) that the right to represent parties in court in my petition is to do with payment. The Association of Commercial Attorneys had expressed an interest in carrying out *pro bono* work and had written to the courts (on the recommendation of the then head of civil justice at the Scottish Executive) to explore if this was possible but the request for a meeting was declined.

It is not possible, within the restrictions of trying to curtail my response to a manageable level, to provide a detailed argument to all of the points put forward by the Secretary for Justice regarding the Application by the Association but perhaps if I point out that solicitors can practice in any area of law, even if they have never passed an exam or received training in that

area. The Association has had some difficulty in understanding what seemed to be a different approach to its members ability to practice in area's like employment law, which is covered in the Masters Degree that all of its members must have. In trying to push forward the ability to carry out *pro bono* work the application sought to have as many areas as possible of civil law covered in its application. It does seem clear that the Lord President and Scottish Ministers have adopted a very strict interpretation of the legislation.

I would like to make the point that it is very difficult for any new organisation to demonstrate experience in certain areas of law if the ability to practice has been severely restricted to the exclusion of anyone other than a solicitor or advocate in the first place. This does seem to inadvertently contain a fairly high degree of self protection to the benefit of the existing legal professions. Perhaps the Secretary for Justice can indicate how it is possible for a members of a body seeking rights under Sections 25 to 29 to gain experience of other areas of contract and delict to his satisfaction if it is a criminal offence to draft or prepare a writ in these areas of law. It is clearly a self perpetrating restriction that cannot be overcome.

There appears to be considerable inconsistency between the supposed high standards that solicitors, advocates, civil servants and members of the public are all apparently seeking to achieve.

The previous Scottish Executive did look at the Scandinavian Countries from a legal markets point of view in its Report by the legal Research Working Group in 1996. Perhaps they could look afresh with an access to justice perspective.

Finally, whilst the Cabinet Secretary for Justice has set out his current position, he does not, with respect, address why a system similar to Sweden and Finland would not be beneficial to the people of Scotland. I am convinced that my fellow Scots would be more than able to conduct themselves properly in court and would seek to learn the law to a sufficient level that would allow them to help other parties who could not afford a solicitor but who did not qualify for legal aid. In England they have had a *McKenzie Friend* facility since 1970. Moves to create a similar situation have been resisted in the Scottish Courts. It does seem that the Scottish legal system would rather have an individual appear on his or her own without any help; irrespective of how frightening or harrowing the procedure might be, than allow for someone who was not a solicitor to help them and speak on their behalf.

The Law Society

The submission by the Law Society is quite fair and helpful with the information that it provides and it does recognise that there are potential benefits to aspects of the Sweden and Finland

legal systems. I am quite content to let the Committee consider the comments made by the Law Society without any great deal of response except that I believe that the benefits indicated in the response by the law Society would suit Scotland and are certainly worth further investigation. The Law Society is to be commended for resisting the temptation to make a case purely in the interest of its members.

The Faculty of Advocates.

The Faculty of Advocates, in their submission, makes a good case for a theoretical model of what might be best, from their perspective, with regard to legal representation. However they do not address what is supposed to happen to parties who cannot afford a solicitor (bearing in mind that members of the public cannot instruct advocates direct) or who, for what might be legitimate reasons, do not want to instruct a solicitor or who cannot get a solicitor to act on their behalf. The harsh reality is that not everyone can afford a solicitor and there might not be civil legal aid available in that instance. Is it to be suggested that our legal system simply abandons people when they might be at their most vulnerable. I think that we can do better than that. The Faculty of Advocates rightly seeks to promote the highest possible standards of representation and that is always to be supported, however, there are instances where this is simply not financially viable and it is right and proper that we have a safety net for those who are in need of it.

With regard to the submission pertaining to criminal law, can I simply point out that Article 6 gives a right to representation of a person's choosing therefore the law seems quite clear and it would seem that the Faculty are not strictly correct in their interpretation of the Law.

Summary

My original petition in January 2003 considered commencement of Sections 25 to 29 to be a compromise on my view that there should be unrestricted access to justice and representation. It is now January 2009 and whilst there has been some movement (albeit at a snail's pace), at this juncture, nothing has actually changed.

Whilst the application by the Association of Commercial Attorneys has been approved in principle there are still a number of hurdles to be overcome and there is no guarantee that this will be achieved.

It is perhaps worthwhile considering that it took **17 years** for Sections 25 to 29 to be commenced, **18 years** for small claims limits to be increased to approximately half of that in

England, and that **39 years** after *McKenzie vs. McKenzie* we still do not have an equivalent in Scots law, to form the view that there is something fundamentally wrong in our ability to give our people the same rights in access to justice as are enjoyed by the rest of the United Kingdom.

We should abandon the resistance to anything English and where there is something to be of benefit to the people of Scotland we should embrace it in an expeditious manner.

I have seen nothing in the submissions that demonstrates that the Swedish system could not work in Scotland and the Law Society has, to its credit, admitted that there can be benefits.

I would suggest that the Parliament should carry out its own independent investigation and visit Sweden and Finland to see if parts of their system could be adopted for Scotland.

We should, without any further delay, create a facility for a "*McKenzie friend*" in the Scottish Courts who has the right to speak on someone's behalf if they are incapable or do not have the confidence to so, providing always that they act in a manner that is respectful and helpful to the courts.

To suggest that someone who may be lacking any knowledge of court proceedings, the Scottish system of pleadings, how to research, access and interpret the relevant case law, may be lacking in confidence about debating in public and has their health affected by the worry about appearing in court as a party litigant against an experienced solicitor or advocate has a fair hearing under Article 6 of the Human Rights Act is, I would submit, a rather peculiar view of what is a fair and equitable process.

Due to time constraints I have restricted my comments to the responses that I feel are the most relevant in regard to my petition. This is not to be taken either express or implied that I consider the other responses to be of any lesser merit.

For completeness can I state that as the Chairman of The Association of Commercial Attorneys it might be considered that I have an interest that should be declared.