

EXECUTIVE NOTE

THE LAY REPRESENTATION IN PROCEEDINGS RELATING TO RESIDENTIAL PROPERTY (SCOTLAND) ORDER 2010

SSI 2010/264

The above instrument was made in exercise of the powers conferred by section 24E(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (1970 Act) and section 5F(3) of the Heritable Securities (Scotland) Act 1894 (1894 Act). The instrument is subject to negative procedure.

Policy Objectives

The purpose of the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 is to provide further detail in relation to lay representation provisions to ensure that high standards are established and maintained. In particular the Order:

- prescribes those persons or bodies who may approve lay representatives
- prescribes the procedures by which and the manner in which lay representatives should be approved and approval be withdrawn
- prescribes circumstances in which an approved lay representative may not represent a debtor or entitled resident
- prescribes the information which Scottish Ministers may request on the number and nature of approvals and withdrawals of approval, and other information to assist with monitoring and evaluation of the effectiveness of the new arrangements

Consultation

There was a statutory obligation to consult the Lord President of the Court of Session on this Order in section 24E(6) of the 1970 Act and section 5F(6) of the 1894 Act before making this instrument. The Lord President was consulted by correspondence in April 2010 and his comments were considered along with those from a consultation with a wide range of stakeholders, including the following organisations:

Citizens Advice Scotland
Consumer Focus
COSLA
Council of Mortgage Lenders
Law Society for Scotland
Legal Services Agency
Money Advice Scotland
Scottish Court Service
Scottish Legal Aid Board
Shelter

Financial Effects

The Order does not impose any new burdens on providers of advice services that were not anticipated when the Home Owner and Debtor Protection (Scotland) Act was introduced.

Costs of between £1668 and £11,668 may be incurred by organisations seeking to achieve the status of prescribed body (in order to be able to approve lay representatives) through accreditation at Type III Level of the Scottish National Standards on Information and Advice in the competency of mortgages/secured loans but many prescribed bodies will not incur any additional costs at all.

There will also be direct staff costs for prescribed bodies in providing a lay representation service through use of the individuals they approve as lay representatives.

Some costs will also be incurred in relation to training and requests for information to assist with overall monitoring and evaluation of the new provisions, but such costs are expected to be minimal.

A full Business Regulatory Impact Assessment of the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 has been prepared.

BUSINESS REGULATORY IMPACT ASSESSMENT

The Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 (S.S.I. 2010/264)

1. Title of proposal

The Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 (**S.S.I. 2010/264**)

2. Purpose and intended effect of proposals

2.1. Objective

The Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 will :

- Prescribe those persons or bodies who may approve lay representatives under section 24E(3) of Conveyancing and Feudal Reform (Scotland) Act 1970 (1970 Act) and section 5F(3) of Heritable Securities (Scotland) Act 1894 (1894 Act)
- Make provision about the procedures by which and manner in which persons and bodies prescribed for the purpose of approving lay representatives may approve individuals as lay representatives.
- Prescribe the circumstances in which an approved lay representative may not represent a debtor or entitled resident.
- Prescribe the information which Scottish Ministers may require about approvals and withdrawals of approvals of lay representatives under section 24E(4)(c) of 1970 Act and section 5F4(c) of 1894 Act.

2.2. Background

In early 2009, in response to the economic downturn and consequent rise in repossessions, the Scottish Government convened a Repossessions Group, as a sub-group of the Debt Action Forum, to consider whether protection for Scottish home owners facing repossession was sufficient. Members of the Group represented a wide range of interested parties, including representatives from the Council of Mortgage Lenders, the Finance and Leasing Association, the Scottish Law Commission, Shelter, Citizens Advice Scotland and the Scottish Legal Aid Board. The Group made a number of recommendations to strengthen protection for home owners, which were taken forward through Part 1 of the Home Owner and Debtor Protection (Scotland) Act 2010.

In particular paragraphs 5.3 to 5.14 of the Repossessions Group Final Report, published in June 2009,¹ recognised that the repossessions process, in

¹ www.scotland.gov.uk/Publications/2009/06/00164837/0

particular a court appearance, can be intimidating for home owners faced with repossession and recommended that there should be statutory change to enable home owners to have the option of being represented in court by approved lay representatives as well as solicitors. This would make the court process more accessible, and encourage more people to take advantage of the legal protection on offer.

Section 24E(1) of 1970 Act and section 5F(1) of 1894 Act, as introduced by the Home Owner and Debtor Protection (Scotland) Act 2010, allow the debtor or entitled resident to be represented by an approved lay representative in court proceedings relating to repossession of residential property, including recall proceedings. Section 24E(4) of the 1970 Act and section 5F(4) of the 1894 Act give Scottish Ministers the power to make further provision about lay representation in secondary legislation..

This Regulatory Impact Assessment has been prepared to assess the costs and benefits of the proposed detail of the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010.

2.3. Rationale for government intervention

The rationale for government intervention was to improve arrangements for assisting individuals intimidated by the prospect of court action to repossess their home, by allowing lay representation as an alternative to representation by a solicitor. In particular, lay representation will assist individuals who do not qualify for legal aid and could not afford to instruct a solicitor, and who were previously faced with the prospect of appearing at court as an unrepresented litigant.

It hoped that lay representation will encourage more home owners faced with repossession to appear in court, and thereby ensure that they are well supported and represented, while ensuring that the smooth running of court business is not put in jeopardy.

The court process can be intimidating and a lack of familiarity with court procedure and formalities may dissuade some home owners from asserting their legal rights. By allowing lay representation by approved persons (persons approved by another person or body which is prescribed by Scottish Ministers), the Home Owner and Debtor Protection (Scotland) Act 2010 will reduce such barriers, while also ensuring that persons are only allowed to appear if they are suitable for such a role.

The proposed Order therefore provides further detail in relation to lay representation provisions introduced by the 2010 Act to ensure that high standards are established and maintained.

3. Consultation

3.1. Public consultation

In November 2009, during Stage 1 of the Home Owner and Debtor Protection (Scotland) Act's parliamentary scrutiny, Ministers provided the Local Government and Communities Committee initial drafts of what the secondary legislation in relation to lay representation might look like. This was to allow the lead Committee to consider whether the balance between what would be on the face of the Act and what is likely to be in the SSIs was appropriate. At this time, these working drafts were also circulated to all Stakeholders to review and comment.

The draft instrument was sent to The Repossession Advice Group (RAG), which was established by the Scottish Legal Aid Board in October 2009 with representation from the advice sector, lenders, the Scottish Court Service, COSLA, the Law Society and the Scottish Government. The RAG was established with the aim of inputting to the advice related elements of the Home Owner and Debtor Protection (Scotland) Act and implementation of the advice related non legislative recommendations of the Repossessions Group's report of June 2009.

Stakeholders were also consulted in May and June 2010 on the revised statutory instrument.

The organisations consulted included:

Citizens Advice Scotland
Consumer Focus
COSLA
Council of Mortgage Lenders
Law Society for Scotland
Legal Services Agency
Money Advice Scotland
Scottish Court Service
Scottish Legal Aid Board
Shelter

3.2. Consultation of the Lord President

There was a statutory obligation to consult the Lord President of the Court of Session on this Order in section 24E(6) of the 1970 Act and section 5F(6) of the 1894 Act before making this instrument. The Lord President was consulted via correspondence in April 2010.

4. Costs and benefits

4.1. Benefits

The introduction of approved lay representatives in repossession proceedings relating to residential property, as a result of the Home Owner and Debtor Protection (Scotland) Act 2010 and this SSI, significantly strengthens protection for Scottish home owners in the current economic climate and in the years ahead.

The 2010 Act requires that all repossession cases are heard in court (except where the property is being surrendered voluntarily), and that home owners and entitled residents are able to engage an approved lay representative to represent them in court should they wish to do so.

Currently only about 5% of cases are defended. The new provisions in the 2010 Act, and as set out in more detail in the Order, will make it easier for home owners and entitled residents to be represented in court, and be better supported to address the court and mount a defence or seek further time to find alternative accommodation as appropriate.

In many cases debtors may be able to continue using the same advisors and advice service with whom they were already liaising and who have built up a good understanding of their situation. This will also save on the time and effort involved in passing case details on to a solicitor.

The new provisions should therefore encourage a significant increase in the number of people who feel able to exercise their rights and defend cases, although it is not considered possible or even sensible to set a target in that regard.

By making it less intimidating to address the court and defend cases the provisions will work alongside the other measures in the Home Owner and Debtor Protection (Scotland) Act to reduce avoidable episodes of homelessness. Research by Heriot Watt university in 2007 indicated that the average cost of sustaining a homeless household in temporary accommodation was £5,300 a year.

This potential saving per household has to be set against data from the Scottish Court Service showing 8,154 applications for repossession being lodged in 2009, 6,049 decrees for repossession granted that year, and the Council of Mortgage Lenders forecasting a 11% increase from 2009 in repossessions across the UK in 2010. That would suggest the number of actions for repossession in Scotland might also increase by 11% to about 9,100 in 2010, although it isn't possible to be sure whether trends will differ significantly in Scotland. Not all decrees for repossession that are granted end up in actual repossessions, and not all repossessions result in new homelessness applications. However, alongside the other measures in the Home Owner and Debtor Protection (Scotland) Act, the Order should make an important contribution to reducing the costs associated with avoidable homelessness applications and contribute to meeting the national 2012 homelessness target.

In stipulating the type of organisations appropriate for providing lay representation, set against established national standards on the provision of information and advice, and making provision about the manner in which approval of individual lay representation is to be granted, the Order sets an appropriate quality assurance framework for lay representation. The framework will ensure high standards of representation, for the benefit of individuals depending on good quality representation when faced with repossession and for the benefit of the smooth running of court business.

It makes use of an existing national accreditation system on advice, and organisations with a long and respected track record of providing advice and support for those facing repossession, avoiding the additional and unnecessary costs that would be involved in setting up an entirely new quality assurance process. The Order also takes into account that much more fundamental use of in-court advice and lay representation may be ushered into the Scottish legal system through the Legal Services (Scotland) Bill following the Gill Review, and that introduction of any new or more stringent quality assurance process might best be considered within that wider context.

The Order also recognises the pressures facing the advice sector, and the need to ensure that the quality assurance process is not so unduly onerous as to impose impossible additional burdens on an already stretched advice sector.

4.2. Costs

Any costs in relation to the Order will fall mainly on the advice sector and local authorities who may be approached by people at risk of repossession seeking advice and lay representation, and who wish to approve individuals as lay representatives. No additional costs are envisaged as a result of this SSI, that were not taken into account when the Home Owner and Debtor Protection (Scotland) Act 2010 was introduced.

For the purposes of calculating costs of lay representation it is necessary to focus on two aspects: (1) the direct staff costs in relation to the total number of cases in which lay representation may be sought and (2) the costs involved in meeting the requirements associated with being a prescribed organisation including requests for information

(1) Direct staff costs in relation to anticipated number of cases in which lay representation may be sought

As indicated above, the Council of Mortgage Lenders forecasts an 11% rise to 53,000 repossessions across the UK in 2010 from 47,700 in 2009, and a similar 11% increase in Scotland would lead to the number of court actions for repossession in Scotland increasing to about 9,100 in 2010.

When the Financial Memorandum for the 2010 Act was prepared information was sought from Citizens Advice Scotland (CAS) to estimate the likely increase in advice sector provision that would be needed as a direct consequence of the Act's provisions regarding lay advisers representing in repossession matters.

The Financial Memorandum prepared for the 2010 Act assumed 2.5 hours of preparation and court time with the client per case, and an average hourly rate per adviser of £14.55, giving an average cost per case of around £36.40. Lay representation will only be required in a minority of cases. A large proportion will employ legally aided solicitors (currently 55% although we anticipate this will be less when lay representation is available). Others will employ their own solicitors privately or represent themselves. It was assumed that lay representation may be sought in 25% of repossession actions defended (and that a maximum of 50% of all repossession cases would be defended)

These over-arching assumptions still look valid.

The Financial Memorandum for the 2010 Act estimated annual costs of about £72,750 across the advice sector as a whole (falling to £60,00 in 2012-13 when the level of repossession cases was expected to begin reducing). However this was based on the assumption at the time that repossession cases might increase from 10,000 in 2008 to 16,000 in 2010-11. With the number of cases now looking more likely to be only about 9,100 the direct costs in staff time across the advice sector in relation to lay representation are now estimated to reduce to about £41,500.

As the Financial Memorandum to the 2010 Act indicated, however, the Scottish Government has provided £3 million of funding through SLAB to improve in-court and other advice services during the period April 2009 to April 2011 with a particular focus on repossessions, and with a view to the anticipated new requirements with regard to lay representation. The grant funding element of this programme is supporting around 25 additional posts, lay and solicitor, providing advice and representation. This additional boost in advice capacity will help with the process and cost of providing lay representation across the country. It is on top of other Government initiatives to expand capacity in the advice sector, including an additional £1.1 million direct funding for CAS bureaux over 2008/10, and increased funding in recent years to expand and maintain Shelter's housing law advisory service and general helpline. There has also been funding of £500,000 from the Department for Business Innovation and Skills in 2010/11.

It is expected that the expansion in capacity in the advice sector developed in this way will be able to be maintained, although that is of course subject to the Spending Review.

Local authorities will be prescribed organisations and individuals may approach their advice services about providing lay representation. However any additional costs falling on local authorities should be outweighed by the

potential savings of £5,300 per year for each homeless household that doesn't have to be put up in temporary accommodation.

No additional costs are anticipated for the Scottish Court Service in relation to this Order, and overall costs as a result of the Home Owner and Debtor Protection Act are again expected to be less than originally anticipated due to the lower rise in repossession cases than previously forecast.

No new costs are anticipated for lenders or borrowers as a result of the Order.

(2) Costs associated with becoming or retaining the status of a prescribed approving body and complying with the requirements of the SSI, including accreditation and training costs and the cost of providing information .

In prescribing the bodies which have the power to approve individuals to undertake lay representation we included Organisations which have been awarded accreditation at Type III against the Scottish National Standards for Information. These organisations listed as prescribed bodies include;

- Organisations with a current entry on the register of advice organisations established and maintained by the Scottish Legal Aid Board;
- Organisations which have been awarded accreditation at Type III against the Scottish National Standards for Information and Advice Providers in the area of mortgages/secured loans;
- Local Authorities; and
- Citizens advice bureaux which are full members of the Scottish Association of Citizens Advice Bureaux – Citizens Advice Scotland.

The cost of gaining Accreditation at Type III, which includes up to five areas of law, is currently £1668. Once achieved, accreditation is valid for four years. For advice agencies who have recently gained accreditation at Type III in other areas of law, the cost of securing further accreditation at Type III level in Mortgages/Secured Loans may be reduced.

The order also provides a list of requirements that prescribed bodies or persons must take into account as part of their procedure for approving individuals to act as lay representatives These include the following;

- the prescribed body or person must be satisfied that the lay representative intends to act as a lay representative for clients of that approving organisation as part of the services provided by that approving organisation,
- they must ensure that the person to be approved has a good knowledge and understanding of

(i) Scottish legislation and common law in so far as they relate to housing and repossession;

(ii) court procedures and rules, in particular those relating to summary applications in the Sheriff Courts

- they must also ensure the following;

That the person to be approved;

(i) is competent at constructing and stating a case both orally and in writing

(ii) has advocacy skills, in particular in support and representation

(iii) undertakes not to act as a lay representative in any situation where this would place the applicant in a situation of conflict of interest; and

(iv) undertakes to respect client confidentiality.

The approving organisation will not be able to approve anyone as a lay representative until they are satisfied they are competent in terms of the above criteria, and may choose to provide or arrange training if they believe that person needs training to achieve that and they wish that individual to be so approved. However the approving organisation is not required to provide training for everyone who may approach them seeking to be a lay representative.

Additional training and awareness raising will be required for the advice sector in relation to the new lay representation role, but the Scottish Legal Aid Board is arranging and funding the delivery of that training, as well as contributing to travel and accommodation costs incurred by advice sector staff.

There will be costs associated with maintaining high standards of quality of lay representation, but prescribed agencies are likely to already have processes in place to ensure such standards are maintained.

For organisations seeking to secure accreditation at Type III level of the Scottish National Standards, however, an action plan will need to be developed showing how they intend to manage and deliver the particular elements of service delivery that will be carried out under the lay representation provision.

Following this Order, Scottish Ministers will have the power to request specific information from prescribed bodies. In particular this will be to ensure that they are complying with requirements under the order and, if not satisfied, would be able to remove that particular category of prescribed body. The cost involved with the provision of information to Scottish Ministers would be a recurrent cost for prescribed bodies. The information required will however be

proportionate to the Scottish Government's need to monitor whether there is an adequate supply of competent advisors. This will be agreed with agencies or their representatives and so the cost is expected to be minimal.

5. Competition assessment

There should be no competitive advantage to any particular individual or group, as a result of the Order.

6. Enforcement, sanctions and monitoring

The Scottish Government will carefully monitor how the new legislation and regulations work through regular dialogue with the Scottish Court Service, the Council of Mortgage Lenders, Finance and Leasing Association, advice agencies and others.

Following this SSI, Scottish Ministers will have the power to request specific information from prescribed bodies. Scottish Ministers will not seek to obtain information on individual lay representatives. However it is anticipated that aggregated information will be requested in relation to:

- the total number of approved lay representatives by an organisation
- range of courts in which these lay representatives operate
- number of lay representatives approved in the past year
- number of cases involving lay representation for repossession cases
- details of any issues or difficulties which have arisen
- number of lay representatives that have had approval withdrawn over past year and the reasons why approval was withdrawn

Those bodies with the power to approve lay representatives will be encouraged to maintain a definitive list of individuals whom they have approved as lay representatives and regularly review their performance and capabilities in that role.

7. Implementation and delivery plan

Prescribed bodies will be asked to develop an action plan showing how they intend to manage and deliver the particular elements of service delivery that will be carried out under the lay representation provisions. The organisation will need to be able to carefully consider individuals' competence, training needs, and supervisory requirements.

Bodies should put in place a system for monitoring the performance of individuals approved as lay representatives, paying particular attention to any complaints or concerns about their performance as lay representatives raised by Sheriffs, other court staff or clients, investigating any such complaints thoroughly.

The Repossessions Advice Group is being fully involved in the development of a programme of training and awareness raising around commencement of the Home Owner and Debtor Protection (Scotland) Act 2010 and the requirements regarding lay representation. The Scottish Government is also consulting fully with all stakeholders including the advice sector and the Scottish courts on the development of guidance on this Order, and the lay representation role.

8. Post-implementation review

Independent research will be commissioned to evaluate how the Home Owner and Debtor Protection Act and all the accompanying regulations, including this one on lay representation, are working in practice. This will involve a mixture of quantitative research, such as analysing court data on trends in the number of applications for repossession sought and the number of decrees granted, and qualitative research involving interviews and dialogue with creditors, the Scottish Court Service and advice agencies to evaluate the impact on creditors, borrowers, advice agencies, and the impact on courts, including the smooth running of court business.

The review will also take account of the information that prescribed bodies will be required to provide for the Scottish Government (as indicated in section 6 above).

This independent research will be published, and the Scottish Government will consider whether any changes are necessary to the legislation or associated guidance in the light of its findings, drawing any such changes to the attention of the Scottish Parliament and liaising with Parliamentary committees as necessary.

9. Summary costs and benefits

The Scottish Government considers that the introduction of the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 commands a broad consensus of support amongst key stakeholders, and will benefit individuals faced with repossession.

By ensuring that those at risk of repossession are better supported to make representations to the courts it will help individuals faced with the trauma of court action for repossession, help prevent avoidable episodes of homelessness with its associated financial and emotional costs, and contribute to meeting the national 2012 target on homelessness.

The intention has been to avoid introducing a new set of requirements on top of those that advice agencies should already be using as good quality assurance for their activities and thus minimise any costs involved in implementation of the Lay Representation approval process.

The benefits of the Order will far outweigh the costs, and the overall costs involved in providing lay representation are actually likely to be significantly

less than forecast when the Home Owner and Debtor Protection (Scotland) 2010 Act was originally introduced into Parliament.

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed.....

Date.....

ALEX NEIL
Minister for Housing and Communities