



## Ensuring effective access to appropriate and affordable dispute resolution

### A consultation by the Civil Justice Advisory Group

July 2010

# About Consumer Focus Scotland

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Consumer Focus Scotland works to secure a fair deal for consumers in both private markets and public services, by promoting fairer markets, greater value for money, and improved customer service. While producers of goods and services are usually well organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or shoppers in a supermarket.

We have a commitment to work on behalf of vulnerable consumers, particularly in the energy and post sectors, and a duty to work on issues of sustainable development.

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# Foreword

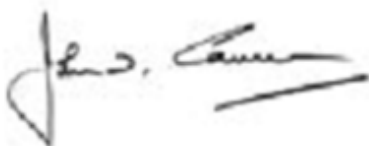
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In 2004 and 2005, I had the privilege of chairing a series of seminars organised by the Civil Justice Advisory Group under the auspices of the Scottish Consumer Council on issues relating to civil justice in Scotland. As is explained in this consultation paper, these led to a report which advocated the setting up of a review of a number of aspects of the Scottish civil justice system and played some part in persuading the Scottish Government to commission such a review. The report of that review, which was led by Lord Gill, was published in 2009 and recommends substantial changes in the administration of justice in civil matters in Scotland. If implemented, those recommendations will have marked effects not only on the functioning of the courts in Scotland but on the resolution of disputes in a wider context and on the operation of the legal system generally.

When published, the civil courts review was generally welcomed, and its proposals were seen as the way forward. It would not be desirable, even if it were possible, to carry out a full 'review of the review'. Nevertheless, the proposals are, in some respects, radical, and it is important that they should be fully debated and understood before they are put into effect. In addition, there are questions as to the cost and practicability of some proposals, which may have become more acute in the months since the review was published.

I therefore welcome the decision of Consumer Focus Scotland to reconvene the Advisory Group in order to examine some of these issues. In doing so, it is intended that the main focus should be on issues which are directly important to individual consumers considered as 'users' of the civil justice system. These were, to a large extent, the matters which sparked off the original series of seminars and one of the objectives now is to see how far these original concerns are likely to be met by the new proposals. It is, however, not possible to assess the likely impact of these proposals on consumers without paying some attention to their impact on the structure and operation of the whole court system. In the past, and even still, there has been a major problem in obtaining clear and accurate information about how the legal system actually functions and how it is perceived by those who come into contact with it.

I would therefore strongly urge anyone who has any relevant experience, good or bad, of the operation of the court system or other means of resolving disputes, or any comment, criticism or suggestion to contribute to this important debate by responding to this consultation paper.



The Right Honourable Lord Coulsfield

July 2010

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# Ensuring effective access to appropriate and affordable dispute resolution: a consultation by the Civil Justice Advisory Group

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## 1. Introduction

In 2004, the Scottish Consumer Council, one of Consumer Focus Scotland's predecessor bodies, established the Civil Justice Advisory Group, chaired by the Right Honourable Lord Coulsfield, supported by the then Scottish Executive and funded by the Nuffield Foundation. The Group held six seminars between September 2004 and April 2005<sup>1</sup>, structured to mirror a user's journey through the civil justice system, from seeking advice on their dispute, through the dispute resolution process, to the enforcement stage. The Group published its final report, *The Civil Justice System in Scotland – a case for review?* in November 2005. Within its report, the Group recommended that there should be a review of several important aspects of the civil justice system in Scotland, namely:

1. The problem of disproportionate costs, particularly in relation to cases of relatively low financial value.
2. The relationship between civil and criminal business and its impact on the organisation and administration of the courts.
3. Whether there is a need for specialisation among courts or judges and the manner in which such specialisation might be organised.
4. Whether the conduct of court business could be improved by increasing the role of the courts in case management.
5. The way in which lawyers' remuneration is assessed and particularly its impact on the costs recoverable in litigation.
6. Whether enforcement of court judgments can or should be left to the parties or whether there should be some public role in ensuring that judgments are observed.

In February 2007, the Minister for Justice announced that Lord Gill, the Lord Justice Clerk, would lead a review of the civil courts in Scotland, which was to focus on the first four of the six areas identified within the report as being in need of review.

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<sup>1</sup> Scottish Consumer Council (2005) *The Civil Justice System in Scotland – A Case for Review? The Final Report of the Civil Justice Advisory Group*, Glasgow: Scottish Consumer Council

The remit of the review was ‘to review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to:

- the cost of litigation to parties and to the public purse
- the role of mediation and other methods of dispute resolution in relation to court process
- the development of modern methods of communication and case management
- the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts<sup>2</sup>

To inform its report, the review conducted a comprehensive consultation exercise, receiving over 200 responses, held meetings with a wide range of stakeholders and visited courts in other jurisdictions.

The report of the Scottish civil courts review was published in September 2009. Its assessment was that the civil courts, in delivering a system that is slow, inefficient and expensive, do not deliver ‘the quality of justice to which the public is entitled’<sup>3</sup>. The report makes far-reaching recommendations aimed at improving access to the civil courts in Scotland.

The administrative justice system, a vital part of the wider civil justice system, has also recently been under review. Administrative justice broadly encapsulates the systems by which public bodies make decisions that affect consumers’ rights, and the systems used for resolving disputes about these decisions, such as complaints handling processes and tribunals. The Administrative Justice Steering Group (AJSG), chaired by the Right Honourable Lord Philip, was established in 2006 by the Scottish Public Services Ombudsman, in conjunction with the former Scottish Committee of the Council on Tribunals and with the support of the then Scottish Executive. The Group’s remit was to commission research and act in an advisory capacity in the preparation of a final report to the Scottish Government on the administrative justice framework in Scotland taking account, among other things, the likely impact of the Tribunals, Courts and Enforcement Act 2007. The Group produced two reports,<sup>4</sup> published by Consumer Focus Scotland, the first of which identified a number of concerns with the current operation of tribunals in Scotland and outlined possible options for the future.

The second report recognised that the complaints-handling processes, ombudsmen, tribunals and alternative methods of dispute resolution may be capable of providing better, more accessible and less costly options than the courts when someone wants a quick and inexpensive resolution to their case and where the value of any claim or grievance is relatively low. However, the overall opinion of the AJSG was that the current administrative justice system does not meet the needs of users, and it identified areas where improvements could be made.

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<sup>2</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

<sup>3</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

<sup>4</sup> Scottish Consumer Council (2008) *Options for the Future Administration and Supervision of Tribunals in Scotland: A report by the Administrative Justice Steering Group*; Consumer Focus Scotland (2009) *Administrative Justice in Scotland – The Way Forward: The final report of the Administrative Justice Steering Group*

Following the publication of the two reports of the Administrative Justice Steering Group, the Minister for Community Safety, Fergus Ewing, announced his intention to take forward a recommendation in the first report for a new tribunal service for Scotland to be established. The Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) has recently published a discussion paper outlining options for tribunal reform in Scotland<sup>5</sup>. The responses to the discussion paper will be used to inform SCAJTC's advice to Scottish Ministers on the implementation of the AJSG's report *Future Administration and Supervision of Tribunals in Scotland*.

Following the reports of the Scottish civil courts review and the Administrative Justice Steering Group, the Scottish Government intends to establish a major change programme to manage reform across the system, entitled *Making Justice Work*. The overall aim of this programme is to achieve a justice system which:

- provides an accessible framework for the prosecution of crime, the assertion of rights and settlement of disputes
- makes cost-effective, efficient and proportionate use of resources across the whole system
- promotes early resolution of disputes and deals with cases quickly
- has fair processes and secures just outcomes

The reports of the civil courts review and the Administrative Justice Steering Group have recognised that neither the civil courts nor the administrative justice system are working to the benefit of their users. There therefore is currently a unique opportunity to consider these aspects of the civil justice system in tandem as changes are made and reforms undertaken, to ensure that such reforms result in a civil justice system which meets the needs of its users and provides an optimal system for resolving disputes.

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<sup>5</sup> Scottish Committee of the Administrative Justice and Tribunals Council (2010) *Options for Tribunal Reform in Scotland: A Discussion Paper from the Scottish Committee of the Administrative Justice and Tribunals Council*, available at <http://www.ajtc.gov.uk/docs/tribunal-reform-scotland-discussion-paper.pdf>

## 2. Scope of the Civil Justice Advisory Group's work

Having considered the civil courts review report, Consumer Focus Scotland decided to re-convene the Civil Justice Advisory Group in January 2010 to consider the review's recommendations. Given its instrumental role leading up to the civil courts review, the Group felt it was very well placed to react to the review's proposals, and also to make its own recommendations about future courses of action. The Scottish Government and other interested parties are considering a number of aspects of the report and in the light of these activities, it has been decided that the Group's attentions would best be focused on taking forward those aspects of the proposals that impact most directly on individual users of the courts, namely family actions, claims of lower financial value and those recommendations designed to improve access to justice.

Given the Group's original focus on the wider civil justice system, it does think it necessary to look more broadly at the processes and support required to create a civil justice system which achieves the most appropriate means of resolving disputes in the most appropriate and cost effective way. Therefore, the Group will not restrict its deliberations to how problems should be resolved within the court system, but will also encapsulate issues of non-court resolution, and the support required to help facilitate access to justice. The prospect of reform to the governance of the administrative justice system in Scotland, as well as any implications emerging from potential moves towards merging Her Majesty's Court Service with the Tribunals Service in England and Wales, also presents the opportunity to look at whether there are lessons to be learned from, and greater links made with, the administrative justice system.

Therefore, following the publication of the Scottish civil courts review report and the two reports of the Administrative Justice Steering Group, this group aims to produce practical solutions to ensure that individual users have real and effective access to appropriate, affordable and fair dispute resolution processes in order to resolve their legal problems. Framed in the context of the civil courts review's recommendations relating to assistance to improve access to justice, a new simplified procedure and a third-tier of judicial office, the Group is specifically examining:

1. What an appropriate, affordable and fair dispute resolution process or processes should look like, particularly for claims of low financial value, housing cases, family cases and children's hearing referrals.
2. What structures would best support such a process or processes, including what links might be made with the administrative justice system.
3. How it can be ensured that those with civil disputes have appropriate and effective routes to justice at the appropriate time, including access to methods of dispute resolution outwith the courts, such as alternative dispute resolution.
4. What range of assistance (excluding advice and funding) is required to ensure and support appropriate and effective access to justice, including public legal education, McKenzie Friends, lay representation and use of IT.

A decision has been made to exclude issues of cost and funding of litigation from the remit (for example, contingency fees, recoverability of expenses, and the assessment of lawyers' remuneration). This is regrettable because these are matters of the greatest importance to the proper operation of a dispute resolution system, but they were not dealt with in the civil courts review and are likely to be considered in a separate review established by the Scottish Government. In addition, the Scottish Government, Scottish Legal Aid Board and COSLA are working on a strategic approach to publicly funded legal assistance. In order to avoid duplication of effort, the Civil Justice Advisory Group will therefore not consider questions relating to access to advice but will instead take a different focus in this area, looking more generally at what support needs to be in place for individuals involved in civil disputes, to ensure problems can be resolved as quickly and effectively as possible. In doing so, the Group aims to build upon the findings of the civil courts review by considering the civil justice system more widely, rather than focusing simply on the courts.

### 3. What do we know about users' experiences of the current civil justice system?

#### a) Views and experiences of the civil justice system

Individuals engage with the civil justice system in a variety of ways, be it family problems, neighbour disputes, problems with debt, employment issues, or problems with goods or services, for example. Evidence suggests, unsurprisingly, that generally speaking, most people would prefer to avoid becoming involved in legal and court processes. They are apprehensive about involvement with lawyers; they are very concerned about the potential costs, formality, delay and trauma they associate with legal processes<sup>6</sup>. Scottish Consumer Council research into consumers' experiences of civil disputes in Scotland found that even among those consumers who had won their case, almost three in ten would have preferred an alternative way of resolving the dispute<sup>7</sup>. Often, however, individuals are defending rather than pursuing actions, and therefore contact with the courts may be unavoidable.

For those working within the civil justice system, such as legal professionals, other advisers and court staff, the sources of help, and remedies and recourse available are usually well known. Yet for ordinary individuals, the experience of civil justice problems can often be a bewildering, even frightening time. As far back as 1980, the Royal Commission on Legal Services in Scotland (Hughes Commission) recognised that many people were unaware of their legal rights and responsibilities or legal remedies available to them<sup>8</sup>.

This was confirmed by the Paths to Justice Scotland research, which reported the findings of a large-scale survey exploring the public's preferences and motivations in taking action when experiencing a large range of everyday problems. This research indicated 'a widespread feeling of ignorance about legal rights that exists across most social groups'<sup>9</sup>. For example, while only 3 per cent of respondents who had experienced a problem did nothing to resolve it, the survey found that over half of those taking no action did so because they thought nothing could be done. In addition, of the 32 per cent who 'self-helped', that is who took some action to resolve their problem but without outside help, one in four considered seeking advice, but chose not to. The most commonly cited reasons for not seeking help were that the respondent did not think anything could be done or that advisers would not be able to help them.

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<sup>6</sup> Genn, H and Paterson A (2001) *Paths to Justice Scotland: what people do and think about going to law*, Oxford – Portland Oregon: Hart Publishing; Scottish Consumer Council (1997) *Civil Disputes in Scotland: A report of consumers' experiences*, Glasgow: Scottish Consumer Head of Policy and Solicitor Council

<sup>7</sup> Scottish Consumer Council (1997) *Civil Disputes in Scotland: A report of consumers' experiences*, Glasgow: Scottish Consumer Council

<sup>8</sup> Hughes Commission (1980) *Report of the Royal Commission on Legal Services in Scotland*, Edinburgh: HMSO (Cmd. 7846)

<sup>9</sup> Genn, H and Paterson A (2001) *Paths to Justice Scotland: what people do and think about going to law*, Oxford – Portland Oregon: Hart Publishing

Paths to Justice Scotland also found that ‘expressions of powerlessness and general pessimism were more common in Scotland than in England and Wales’<sup>10</sup>. This appears to have had a negative impact on how people view and interact with the justice system. The research found that perceptions of fairness of adjudicated decisions were markedly different in Scotland than England and Wales; in Scotland only 48 per cent said their decision was fair compared to 71 per cent in England and Wales. 23 per cent of Scottish respondents said they accepted an unfair agreement because of a general sense of powerlessness; the figure was only 6 per cent in England and Wales.

People also have preconceptions about formal civil justice processes which impact on their willingness to engage with the system. Paths to Justice Scotland found that the public were largely unable to distinguish between criminal and civil courts and that their assumption that court means a criminal court contributed to their reluctance to become involved in civil court proceedings. This was something that was acknowledged within the original Civil Justice Advisory Group report, and formed part of the rationale for the Group’s recommendation that a civil justice review should consider whether there should be greater separation between civil and criminal business.

The generally negative perception is obviously a matter of concern. It is, nevertheless, necessary to bear in mind that the court system is designed to lead to a definitive answer to a dispute, which can be enforced with the full authority of the state, so that some degree of formality is likely to be inevitable. Again, there are parts of the law which apply to consumer disputes which are difficult even for lawyers, and cannot always easily be put into simple language. Recent research into the views and experiences of civil sheriff court users, commissioned by Consumer Focus Scotland and the Scottish Legal Aid Board, has found that the complexity of court processes can create considerable anxiety amongst litigants<sup>11</sup>. A consistent message emerging from the research was that few people knew what to expect and many were deeply concerned about not understanding the language and procedures of the courts. While represented litigants felt they were kept reasonably well informed by their solicitor, and those who had received advice from in-court advisers felt they had received good communication, a number of unrepresented litigants said they found it difficult to know what was expected of them during their case and wanted to be kept better informed by the court about their hearings.

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<sup>10</sup> Genn, H and Paterson A (2001) *Paths to Justice Scotland: what people do and think about going to law*, Oxford – Portland Oregon: Hart Publishing

<sup>11</sup> Consumer Focus Scotland and the Scottish Legal Aid Board (2009) *Views and Experiences of Civil Sheriff Court Users: Findings Report*, Glasgow, Edinburgh: Consumer Focus Scotland and the Scottish Legal Aid Board

There is some evidence that people accessing the courts can have a positive experience. Recent research into court users' customer service levels demonstrates that the majority of court users are positive about their experience of the courts. The Scottish Court Service's 2009 Annual User Survey<sup>12</sup> highlights that over four-fifths of respondents were either very or fairly satisfied overall with the services that were provided by SCS staff. Further, almost all respondents (95 per cent) indicated that court staff had been very or fairly polite. It should be noted, however, that this research focused on customer service provided by courts, rather than actual court processes, and only a very small percentage of these respondents were individuals involved in civil proceedings, or supporting someone who was involved in such proceedings<sup>13</sup>.

The lack of specific information on the experience of civil court users was something that Consumer Focus Scotland and the Scottish Legal Aid Board began to address with research into the views and experiences of civil sheriff court users<sup>14</sup>. This research confirmed that civil litigants can have a positive experience of using the courts. While this was only a small-scale exploratory research project, the majority of litigants interviewed were quite satisfied with the experience they had appearing at court. Within the court setting itself, most had little difficulty understanding what was being discussed in court with respondents indicating that they were treated fairly and with empathy by the sheriff.

Even though the overall experience of litigants once they had reached court was positive, what the research could not do was indicate how many people were put off pursuing or defending their case as a result of their preconceptions about what was involved. Court statistics indicate that the majority of cases which go through the court system are debt actions, a large proportion of which are undefended<sup>15</sup>. The court users research found that information about next steps to take; how long it might take to resolve the issue; what they should expect from a court appearance; and what will happen to them afterwards, would all be helpful for litigants in terms of navigating the civil justice system and minimising their fear and concerns about the unknown.

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<sup>12</sup> Scottish Court Service (2009) *Scottish Court Service Court User Satisfaction Survey 2009 Final Report* available at [http://www.scotcourts.gov.uk/docs/report/Court\\_User\\_Satisfaction\\_Survey2009.pdf](http://www.scotcourts.gov.uk/docs/report/Court_User_Satisfaction_Survey2009.pdf)

<sup>13</sup> Of the 74% of respondents to the survey who regarded themselves as non-professional users, 2% were civil litigants; 1% were supporters of civil litigants; 2% were witnesses in civil cases and less than 1% were supporters of witnesses in civil cases. *Scottish Court Service (2009) Scottish Court Service Court User Satisfaction Survey 2009 Final Report* available at [http://www.scotcourts.gov.uk/docs/report/Court\\_User\\_Satisfaction\\_Survey2009.pdf](http://www.scotcourts.gov.uk/docs/report/Court_User_Satisfaction_Survey2009.pdf)

<sup>14</sup> Consumer Focus Scotland and the Scottish Legal Aid Board (2009) *Views and Experiences of Civil Sheriff Court Users: Findings Report*, Glasgow, Edinburgh: Consumer Focus Scotland and the Scottish Legal Aid Board

<sup>15</sup> In 2002, actions for payment accounted for 99% of small claims; in 53% of these cases judgment was given in favour of the pursuer on an undefended basis. NB: There are no separate figures for damages cases under the small claims procedure, so it is likely that these account for a proportion of 'payment' actions. Only 33% of summary cause actions were for payment only, but 62% related to land or heritable matters: it is likely that the majority of these related to rent arrears. Debt actions accounted for 44% of ordinary cause cases, and half of these were undefended. It is also likely that some cases categorised under other headings in the ordinary cause category related to debt eg. mortgage lender cases. Source: *Civil Judicial Statistics*, Scottish Executive, 2002

## b) Complicated nature of the system

Even the small claims procedure, designed for consumers to use without the need for legal representation and therefore seen as more informal and user-friendly than other court procedures, has been found not to operate as informally as was intended, placing unrepresented litigants at a disadvantage<sup>16</sup>. While changes to the procedure introduced in 2002 were designed to make the system more user-friendly, anecdotal evidence suggests that this has not been a great success. There is evidence that some consumers are reluctant to use that procedure. Scottish Consumer Council research into knowledge of consumer rights found that, although just over half of the sample had heard of the small claims court, only 7 per cent said they would consider using it to resolve a consumer problem<sup>17</sup>.

The formality of court proceedings is not only a deterrent for potential individual litigants, but has also been found to be one of the key deterrents, alongside a lack of resources, to non-solicitor advisers representing individuals in court<sup>18</sup>. Research from Citizens Advice Scotland has found that very few advisers provided representation in the small claims or heritable court, although levels were higher in tribunals<sup>19</sup>. A 2004 survey carried out by the Scottish Sheriff Court Users' Group found that only one in four of its member organisations (including citizens' advice bureaux, local authority advice services, law centres and other advice agencies) who responded provided court representation more than 10 times in a year. This represents a total of only 14 agencies across Scotland, including five law centres<sup>20</sup>. The Paths to Justice Scotland study found that while two-thirds of those who had been involved in court proceedings were represented by a solicitor, only one per cent were accompanied by an advice worker.

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<sup>16</sup> See, for example, Scottish Consumer Council (1989) *Report of a Study to Investigate the Attitudes of Advisers to the Small Claim Procedure in Scotland*, Glasgow: Scottish Consumer Council; *Small Claims in the Sheriff Court in Scotland: an assessment of the use and operation of the procedure*, Scottish Office Central Research Unit, 1991; *Lay Representation in Courts and Tribunals*, Citizens' Advice Scotland, 1998

<sup>17</sup> Scottish Consumer Council (2003) *Knowledge of Consumer Rights in Scotland*, Glasgow: Scottish Consumer Council

<sup>18</sup> See, for example, Citizens' Advice Scotland (1998) *Lay representation in Courts and Tribunals*, Edinburgh: Citizens' Advice Scotland

<sup>19</sup> Citizens' Advice Scotland (1998) *Lay Representation in Courts and Tribunals*, Edinburgh: Citizens' Advice Scotland.

<sup>20</sup> Source: *Scottish Sheriff Court Users' Group Newsletter* – Special Issue, June 2004

### c) Challenges for unrepresented litigants

Unrepresented court users face particular challenges when appearing in court. The Consumer Focus Scotland and Scottish Legal Aid Board research into the views and experiences of civil sheriff court users found that those who were unrepresented were particularly likely to be concerned about having to stand up in court on their own to address the sheriff and not being able to understand the language being used by the sheriff and other legal professionals<sup>21</sup>. The 2010 evaluation of mediation pilots in Aberdeen and Glasgow Sheriff Courts found that a number of claimants 'showed clear signs of unease (eg trembling, flustered), whether claiming for a personal or business debt. The layout of the court and lack of familiarity with its etiquette and its personnel were observed to be among the contributing factors to their unease'<sup>22</sup>.

Recent research in the context of tribunals, however, indicates that consumers are not necessarily disadvantaged without representation<sup>23</sup>. This research found that where the processes are appropriate, and particularly where an inquisitorial approach is taken, it is experience of advice rather than representation which benefits consumers. Indeed, in relation to some tribunals, those who had sought advice but were unrepresented were actually more successful than those parties with representation. Overall, the research found that consumers' accessing pre-hearing advice reduced the 'representation premium' by almost 50 per cent. Although these conclusions, from limited evidence, cannot be taken too far, they do suggest that access to proper advice is likely to be a crucial element in the formation of an adequate dispute resolution system.

### d) In-court advice services

In-court advice services, where available, have been found to provide useful support for court users. There are currently eight in-court advice services, six of which have accommodation within specific courts. These services provide free, independent advice to litigants on issues such as debt, small claims, consumer actions, rent arrears and evictions. The in-court advisers can, where appropriate, also provide representation. There is strong evidence that in-court advice services, where they exist, have been viewed as a great success by all involved, including clients, sheriffs, solicitors and advice agencies, and court staff<sup>24</sup>. The Consumer Focus Scotland and Scottish Legal Aid Board research pointed to an urgent need for wider access to support services in all courts.

The Scottish Legal Aid Board currently also provides funding for 16 projects, linked to the courts, designed to help people affected by the economic downturn, with a particular emphasis on issues such as repossession and debt. These projects are funded until March 2011.

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<sup>21</sup> Consumer Focus Scotland and the Scottish Legal Aid Board (2009) *Views and Experiences of Civil Sheriff Court Users: Findings Report*, Glasgow, Edinburgh: Consumer Focus Scotland and the Scottish Legal Aid Board

<sup>22</sup> Ross, M and Bain, D (2010) *In Court Mediation Pilot Projects*, Edinburgh: Scottish Government Social Research, p.28

<sup>23</sup> Adler, M. (2009) *Tribunals Ain't What They Used To Be*, article written for Adjust newsletter

<sup>24</sup> Samuel, E. (1998) *Supporting Court Users: the Pilot In-Court Advice Project in Edinburgh Sheriff Court*, Edinburgh: Scottish Office; Samuel, E. (2002) *Supporting Court Users: the In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2*, Edinburgh: Scottish Executive; Morris, Richards et al (2005) *Uniquely Placed: Evaluation of the In-Court Advice Pilots (Phase 1)*, Edinburgh: Scottish Executive

## e) Alternative dispute resolution

In addition to the in-court advice services, some courts provide, or have provided in-court mediation services to parties attending court proceedings. The recently published evaluation of the in-court mediation pilots in Glasgow and Aberdeen Sheriff Courts found that those respondents who had used the services reported satisfaction with the services in terms of cost, effectiveness and use of time compared to litigation<sup>25</sup>. Those who had used the mediation service were 'very positive about the results and process, and the opportunity to talk, listen and be listened to was valued'<sup>26</sup>. Respondents also felt the mediation process was fair and transparent. The evaluation also found that 'referral to mediation increased satisfaction with services, rather than undermined the recognised role of the court.' However, court-users' awareness of mediation remained problematic: 'Parties who did not mediate who indicated why not most often said it was because they did not have information about it'<sup>27</sup>. Judicial encouragement for mediation appears to have been lukewarm: 'The sheriffs in both courts had felt that they were not there to stop mediation, but if a party did not ask for it then it was not necessarily for the sheriff to point it out'<sup>28</sup>.

However, this contrasts with the evaluation in 2002 of the Edinburgh mediation service, which reported that the in-court mediation project was becoming well established among sheriffs with more sheriffs mentioning the possibility of mediation to litigants<sup>29</sup>. The evaluation of the Edinburgh mediation service, which was previously jointly managed by the Scottish Consumer Council and Citizens' Advice Scotland as part of the in-court advice service and is now funded by the Scottish Legal Aid Board, found the service met a previously unidentified need for consumers<sup>30</sup>.

While alternative dispute resolution, and particularly mediation, is fairly well developed in other jurisdictions, notably in the USA, Canada and Australia, it has been slower to progress in Scotland. There has, however, been some success in family cases and community mediation. Studies of family mediation have found that this method of dispute resolution to be successful 'both as an alternative to and as an adjunct to the legal system'<sup>31</sup>.

While community and family mediation services receive central and/or local government funding, the only publicly funded mediation service dealing with civil and consumer disputes in Scotland is the Edinburgh mediation service. The Glasgow and Aberdeen in-court mediation pilots were also government-funded, but these pilots have now concluded.

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<sup>25</sup> Although it was noted that respondent numbers were low, particularly in relation to use of mediation. Ross, M and Bain, D (2010) *In Court Mediation Pilot Projects, Edinburgh*: Scottish Government Social Research

<sup>26</sup> Ross, M and Bain, D (2010) *In Court Mediation Pilot Projects, Edinburgh*: Scottish Government Social Research

<sup>27</sup> Ross & Bain (2010) p.17

<sup>28</sup> Ross & Bain (2010) p.34 This contrasts markedly with the situation in England & Wales, as summarised in Her Majesty's Court Service Annual Report for 2009, which states: 'Evidence from the evaluation of court mediation schemes shows that at the local level a key factor in the success of a scheme is the commitment of the Designated Civil Judge and District Judges. The judicial role is important in driving the change process and encouraging parties to mediate.'

<sup>29</sup> Samuel, E. (2002) *Supporting Court Users: the In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2*, Scottish Executive, Legal Services Research Findings No. 38

<sup>30</sup> Samuel, E. (2002) *Supporting Court Users: the In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2*, Scottish Executive, Legal Services Research Findings No. 38

<sup>31</sup> Lewis, J (1999) *The Role of Mediation in Family Disputes in Scotland, Legal Studies Research Findings No 23*, Edinburgh: Scottish Office Research Unit

Research conducted by the Scottish Consumer Council, however, found that over half of those with a dispute said they would have preferred to have had their case handled by mediation, including a third of those who had already gone to a court or tribunal. Even among those who won their case, almost three in 10 would have preferred an alternative way of resolving the dispute<sup>32</sup>. There is evidence, however, that there is a lack of awareness of means of alternative dispute resolution.

Separate omnibus polls commissioned by the Scottish Consumer Council and Scottish Government found, respectively, that only 57 per cent and 53 per cent of people in Scotland had heard of mediation<sup>33</sup>. These polls found, however, that once the process was explained to them, over half of respondents said they would consider using mediation if they had a dispute<sup>34</sup>.

There is evidence that use of alternative dispute resolution processes can lead to increased satisfaction with the process. The Paths to Justice Scotland research found that fewer than half of those whose dispute was resolved by a court or tribunal thought the decision was fair, as opposed to 80 per cent of those who reached an agreement<sup>35</sup>. The final report of the original Civil Justice Advisory Group noted clear agreement among stakeholders that the system should encourage the resolution of disputes at the earliest stage possible. The report acknowledged that the courts will always be central to the civil justice system, but concluded that they should be viewed as a last resort, should other less formal means of dispute resolution prove unsuccessful<sup>36</sup>.

## f) Problem of lack of empirical evidence

While the available research provides some evidence of both the problems and successes of the current operation of the civil justice system, the Civil Justice Advisory Group was keen to point out in its original report that, overall, there is a lack of empirical evidence about the operation of the system. The recent evaluation of the Glasgow and Aberdeen in-court mediation pilot projects, for example, measured the cost and speed of mediated cases, but found there was no directly comparable information about the average full costs of litigation, taking account of all factors, not just the known court fees etc<sup>37</sup>. The Consumer Focus Scotland and Scottish Legal Aid Board research into the views and experiences of civil sheriff court users was an attempt to strengthen the evidence base on court users' experiences identified by the Civil Justice Advisory Group. This lack of empirical evidence hampers the ability to build an evidence-based approach to the reform programme. Therefore, the views and experiences of those directly involved in all aspects of the civil justice system are hugely important in reflecting on the civil court review's recommendations to ensure future reforms achieve maximum benefits.

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<sup>32</sup> Scottish Consumer Council (1997) *Civil Disputes in Scotland: A report of consumers' experiences*, Glasgow: Scottish Consumer Council

<sup>33</sup> Scottish Consumer Council (2005) *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland*, Glasgow: Scottish Consumer Council; Scottish Government (2007) *Public Awareness and Perceptions of Mediation in Scotland*, Edinburgh: Scottish Government

<sup>34</sup> Scottish Consumer Council (2005) *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland*, Scottish Consumer Council: Glasgow. See also Scottish Government (2007) *Public Awareness and Perceptions of Mediation in Scotland*, Edinburgh: Scottish Government

<sup>35</sup> Genn, H and Paterson A (2001) *Paths to Justice Scotland: what people do and think about going to law*, Oxford – Portland Oregon: Hart Publishing

<sup>36</sup> Scottish Consumer Council (2005) *The Civil Justice System in Scotland – A Case for Review? The Final Report of the Civil Justice Advisory Group*, Glasgow: Scottish Consumer Council

<sup>37</sup> Ross, M and Bain, D (2010) *In Court Mediation Pilot Projects*, Edinburgh: Scottish Government Social Research

## 4. Overview of the civil courts review's recommendations

### a) Principles underpinning the review (civil courts review chapter 1)

The civil courts review adopted as its aim 'the objective of ensuring that the civil courts provide the public with a high quality system of civil justice.' The review identified a number of principles under which such a system should operate:

- It should be fair in its procedures and working practices
- It should be apt to secure justice in the outcomes of disputes
- It should be accessible to all and sensitive to the needs of those who use it
- It should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice
- It should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and values of the issues at stake
- It should have regard to the effective and efficient application of the resources of others<sup>38</sup>

### b) Structure and processes (civil courts review chapters 4 and 5)

The recommendations of the civil courts review were founded on the principle that business should be dealt with at the appropriate level of court hierarchy. The report therefore proposes substantial changes to the structure of the courts, including the creation of a new 'third-tier' of judicial office. The effect of these proposals would be to displace much of the work of the Court of Session to the Sheriff Court, and much existing Sheriff Court work would be dealt with in the new third-tier. The review indicated that one effect of these proposals is to 'promote the development of specialisation at shrieval level while maintaining, where practicable, the principle of access to local justice.' It was also designed to lessen the impact of summary criminal work on ordinary civil business, as well as providing a better service in lower value cases. It is proposed that the 'third-tier' hear all summary criminal business and civil claims under £5,000. The third-tier would also be responsible for housing actions, appeals and referrals from the children's hearing system, and would have concurrent jurisdiction with the sheriff court in relation to family actions. It was recommended that a new judicial office of District Judge should be created in order to administer the business of the third-tier.

The volume of defended claims of low financial value was not thought sufficient to justify the District Judge having only a civil jurisdiction. It is currently anticipated that 70–80 per cent of cases heard by the District Judge will be summary criminal cases. The review intended that the District Judges sit in the sheriff court, and there was thought to be some potential for some District Judges to specialise in civil or criminal business. The review rejected the suggestion that the civil cases falling within the proposed third tier jurisdiction could be undertaken by lay justices, expressing concern about the breadth of civil cases they may be exposed to, the interventionist approach desired, and the cost effectiveness of requiring training of justices and the appointment of legal advisers.

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<sup>38</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

The review considered it unnecessary to continue to have two different sets of procedures for civil cases under £5,000, and instead recommended a single new set of rules for such cases. The review recommended that these rules should be based on a problem solving or interventionist approach and should be written in plain English and be as clear and straightforward as possible. It was recognised that many cases in the new simplified procedure were likely to involve unrepresented litigants. It was therefore recommended that the procedure should be designed in such a way that an unrepresented litigant, with information and/or more active support from court resources such as in-court advisers, could fully conduct their own case. In order to do so, the review recommended that the simplified procedure rules be drafted for unrepresented litigants rather than legal practitioners.

The review also recommended that the new simplified procedure, with some modifications, be applied to all housing cases. Judicial specialisation in housing and family cases should also be encouraged where possible, and district judges should receive special training relevant to the scope of their work. The review also suggested that a forum of family sheriffs and district judges should be established so that knowledge and experience can be shared and issues of common concern discussed.

### c) [Support to facilitate access to justice \(civil courts review chapters 7 and 11\)](#)

While it focused principally on court structures and procedures, the report of the civil courts review made a number of recommendations designed to support litigants and facilitate access to justice. With particular reference to unrepresented litigants, the review emphasised the need for changes to be made to court practices and procedures so that people are able to enter and navigate their way through the court process effectively. This includes recommendations that a range of regularly reviewed and updated sources of information, advice and help to deal with legal disputes should be available online. In particular, the report recommended that a new section of the Scottish Court Service website be created, aimed specifically at the public, to contain information about the structure of the courts, court processes, and alternative dispute resolution, as well as links to other sources of advice and information. The review also recommended that the Court of Session's system for dealing with unrepresented litigants be extended to all courts, and that consideration be given to the documentation of service standards made available to party litigants under the new simplified procedure.

The review made a number of other recommendations to improve the assistance available to litigants at court, including that in-court advice services be extended and developed to be more widely available, with clear and consistent protocols for referrals to other sources of assistance should the in-court adviser, if available, be unable to help.

It was also suggested that court-based mediation schemes be available for claims of under £5000, and that the courts should bear some responsibility for raising awareness of the different options available.

The recommendation that 'McKenzie Friends', who in the traditional sense offer unrepresented litigants moral support and other assistance such as taking notes and quietly giving advice, should be entitled to address the court on behalf of unrepresented litigants where the court considers that this would be of assistance, has recently been incorporated into the current Legal Services (Scotland) Bill.

Some of the report's recommendations to improve access to justice have implications wider than assisting litigants to access the courts. The review recognised that raising awareness of means of resolving disputes, and identifying sources of help was a key means of helping people with disputes to resolve them in the quickly and effectively. It therefore recommended that promotion of public legal education be an element of any strategy to improve access to justice. The review also recommended that a mediation telephone helpline be set up to provide information about alternative dispute resolution to those with disputes.

## 5. Consultation questions

In order to inform the preparation of its report, the Civil Justice Advisory Group would welcome general comments on the issues raised in this paper as well as responses to the following specific questions:

### a) Structure and processes

1. Drawing on the principles underpinning the review, as outlined in section 4a, what should be the features of an appropriate, affordable and fair dispute resolution process or processes, particularly for claims of low financial value, housing cases, family cases and children's hearing referrals?
2. What structures would best support such a process or processes?
3. Are the proposals in the review the best means of resolving the cases identified as falling within the remit of the proposed third tier and new simplified procedure? What are the strengths and weaknesses of the proposals? Can any better forum or procedure for these cases be identified?
4. Can/should greater links be made between different forms of dispute resolution, including the courts, administrative justice and alternative dispute resolution? What would be the purpose of doing so, and how might it be done?

### b) Support to facilitate access to justice

5. Does the package of measures/assistance to support citizens to have appropriate access to justice via the courts or other routes, as proposed in the civil courts review report (such as self-help, public legal education, McKenzie Friends and in-court advice services) represent the best way forward?
6. Are there additional/alternative measures to those suggested that would be appropriate?
7. Given the likelihood of future funding constraints, are any particular priorities for support required?
8. How can we ensure that citizens have access to other appropriate routes to justice, for example through self-help remedies or alternative dispute resolution?
9. What relationship, if any, should there be between these services and the courts?
10. How should a strategy for such assistance be taken forward?

## 6. Responding to the consultation

Responses to the consultation can be submitted in the following ways:

By email:

[civil.justice@consumerfocus.org.uk](mailto:civil.justice@consumerfocus.org.uk)

By post:        Civil Justice Advisory Group Consultation  
                    Consumer Focus Scotland  
                    Royal Exchange House  
                    100 Queen Street  
                    Glasgow  
                    G1 3DN

Using the response form on Consumer Focus Scotland's website:

<http://www.consumerfocus.org.uk/scotland>

**Comments should be submitted by 24 September 2010.**

## 7. Consultation seminar

The Civil Justice Advisory Group will also be holding a consultation seminar on 13 September 2010 to discuss the issues raised in this consultation paper. **Professor Dame Hazel Genn**, Dean of Laws, Professor of Socio-Legal Studies and co-director of the Centre for Empirical Legal Studies in the Faculty of Laws at University College London, will be the keynote speaker. Dame Hazel is a renowned authority on civil justice, having written widely on the subject, including co-authoring *Paths to Justice Scotland: what people in Scotland do and think about going to law*. Dame Hazel was also the chair of the Public Legal Education and Support Task Force. She is currently jointly leading a two-year study of tribunal decision-making, funded by the Nuffield Foundation. Other speakers include

Sarah O'Neill	Head of Policy and Solicitor, Consumer Focus Scotland
Richard Young	In-Court Adviser, Airdrie Sheriff Court
Charlie Irvine	Visiting Lecturer at Strathclyde Law School and Chair of the Scottish Mediation Network

This full-day event will be interactive, with roundtable discussions and feedback sessions. This will provide further opportunity to discuss the implications of the review report and provide feedback to the Civil Justice Advisory Group. There is no charge for attendance, although places for the consultation seminar are limited and will be allocated on a first-come, first-served basis. More details can be found on the Consumer Focus Scotland website <http://www.consumerfocus.org.uk/scotland>

# Appendix: Civil Justice Advisory Group – membership

## CHAIRMAN

The Right Honourable Lord Coulsfield

## MEMBERS

Iain Armstrong QC	Vice-Dean, Faculty of Advocates
Richard Henderson	Chair, Scottish Committee of the Administrative Justice and Tribunals Council
Charlie Irvine	Chair, Scottish Mediation Network
Keith Jones	Advisory Officer (Legal Projects), Citizens' Advice Scotland
Jon Kiddie	Secretary, Scottish Association of Law Centres
Colin Lancaster	Director of Policy and Development, Scottish Legal Aid Board
Colin McKay	Deputy Director, Legal System Division, Scottish Government
Sarah O'Neill	Head of Policy, Consumer Focus Scotland
Professor Alan Paterson	Law School, University of Strathclyde
Neil Rennick	Executive Director Policy & Strategy, Scottish Court Service
Fiona Robb	Professional Practice Department, Law Society of Scotland
Secretary:	Gemma Crompton, Senior Policy Advocate (Legal Services), Consumer Focus Scotland



Consumer Focus Scotland | Royal Exchange House | 100 Queen Street | Glasgow | G1 3DN

Tel 0141 226 5261 | Fax 0141 221 9695 | [www.consumerfocus-scotland.org.uk](http://www.consumerfocus-scotland.org.uk)