response to scottish civil courts review: a consultation paper

March 2008

SCC Scottish Consumer Council

Making all consumers matter

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. 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 simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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1. Introduction

The Scottish Consumer Council welcomes the opportunity to respond to this consultation paper from the Scottish Civil Courts Review. The purpose of the Scottish Consumer Council (SCC) is to make consumers matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change. We are therefore particularly concerned with the impact of the review on individual users of the courts and the wider civil justice system in Scotland.

The SCC has argued for a review of the civil justice system in Scotland for many years. In 1980, the Royal Commission on Legal Services in Scotland (Hughes Commission) said:

'We have had evidence criticising civil litigation procedures as being unduly cumbersome, slow and costly. It has been suggested to us that for these and other reasons, such as excessive formality, persons wishing to assert or defend their rights are sometimes unwilling or are financially unable to resort to the civil courts in Scotland'. [1]

While since 1980 there have been many reforms of individual aspects of the civil justice system, many of which have improved access to justice for consumers, these changes have been largely piecemeal. We have long argued that, while a piecemeal approach to reform may improve aspects of the system in the short term, it limits the extent of reform, as the changes made must fit into the existing civil justice structure.

In 2003, SCC, with the support of the then Scottish Executive, secured funding from the Nuffield Foundation to carry out a series of seminars to critically examine the civil justice system, and to encourage proposals for change and development. We established an advisory group chaired by the Right Honourable Lord Coulsfield and representing various stakeholder interests, to take the process forward.

Six seminars were held between September 2004 and April 2005. The structure of the seminar series was intended to mirror a user's journey through the civil justice system, from seeking advice on their dispute, through the dispute resolution system, to the enforcement stage. The final report of the Civil Justice Advisory Group, published in November 2005,[2] concluded that while some parts of the system were working well, there was a need for review of a number of aspects of the system.

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[1] *Report of the Royal Commission on Legal Services in Scotland*, 1980 at paragraph 14.2

[2] *The Civil Justice System in Scotland - a case for review?: the final report of the Civil Justice Advisory Group,* published by the Scottish Consumer Council, November 2005

We are delighted that the first four of the six areas identified in the report form the basis of the remit for the civil courts review. As set out in the consultation paper, these are:

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.*

We hope that the review will result in a more user-friendly system for the 21st century, which will allow people to resolve their disputes more quickly, cheaply and easily than at present. Sarah O'Neill, Legal Officer at the SCC, is a member of the Policy Group for the review.

The need to focus on users

We very much welcome the statement in paragraph 1.9 of the consultation paper that the primary purpose of the review is to improve access to justice for the people of Scotland. It is vital that the review focuses on the needs of those who have to use the civil justice system. The present system is too focused on the needs of the lawyers, rather than on the needs of the ultimate users of the system, those individuals who become involved in civil disputes.

There is considerable evidence that some people are currently denied access to the civil justice system, either through lack of information and advice and/or because they perceive the courts as intimidating, remote, complex and expensive.[3] We are delighted to see the focus in Chapter 2 of the paper on access to justice issues such as public legal education and advice and assistance for unrepresented parties.

We were pleased to see that the press release which accompanied the launch of the consultation paper in November 2007 included the following quote from Lord Gill:

'We are especially interested in hearing from members of the public about their experiences of the civil court system. In this way we can ensure that their voice

[3] See for example *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, with National Centre for Social Research, 2001; *Civil Disputes in Scotland*, Scottish Consumer Council, 1997

is heard and that their interests are central to any recommendations for reform that we make'.

We hope that members of the public will respond to the review, but we do not anticipate that many will respond in any great detail. We consider that there is a need to obtain as much data as possible about the views and experiences of individual court users. While considerable insight can be obtained from speaking to those who advise and represent such court users, it can be very difficult to gain direct access to them. While solicitors, business users and others are 'repeat players' or regular users of the courts, most individuals are likely to be involved in a court case only once in their life, and are not always easy to identify.

Some information about the experiences and views of court users can be obtained from research studies into how people deal with their civil disputes, but the numbers are small. The most comprehensive research study in this area, *Paths to Justice Scotland*, published in 2001, found that only 14% of those with civil disputes became involved in legal proceedings. Good quality data is therefore scarce, and although there have been various research studies in recent years into the experiences of consumers in accessing legal and advice services, there is very little data available about those who have been through civil court proceedings.

This was recognised by the SCC Civil Justice Advisory Group, which recommended in its final report that research should be conducted into the views and experiences of individual users of the civil justice system as part of any review. SCC has been involved in discussions with the Scottish Legal Aid Board about possible joint research into the views and experiences of court users during 2008, which we hope will help to inform the review.

Given the primary stated purpose of the review, it is important that the review finds ways of capturing the views and experiences of members of the public other than the present formal consultation process. We would therefore suggest that the review should make clear by which other processes it will ensure that it obtains this valuable user input.

Administrative Justice

The review focuses on the court system, and does not therefore include within its remit the administrative justice system in Scotland. There are, however, as the paper recognises, clear and important links between the two systems. The administrative justice system - which includes tribunals, complaints systems, ombudsmen and other forms of dispute resolution - deals with many more disputes than the civil courts in Scotland. Given the suggestion in the paper that the civil justice system should encourage the early resolution of disputes, it is important that developments within administrative justice are taken into account by the review.

The Administrative Justice Steering Group, chaired by Lord Philip, is expected to report on whether there is a need for review of the administrative justice system before the civil courts review issues its final report. The Scottish Consumer Council is providing policy support for this process, and we would suggest that there is a clear need for the work of that review to be taken fully into account by the civil courts review.

2. Answers to the consultation questions

We do not propose to respond in detail to all of the questions in the consultation paper, but will focus our attention on the issues which we see as being of primary importance to individual users of the civil justice system.

Chapter 1: Introduction

1. Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

While the review has been established specifically to look at the civil courts, we do not believe that it would be possible to carry out a thorough review without careful consideration of the role of the courts within the wider civil justice system. This would include the administrative justice system, as discussed in the introduction to this response.

We believe that the review must be underpinned by the central principle set out in the report of the Civil Justice Advisory Group set up by the Scottish Consumer Council and chaired by Lord Coulsfield[4]: that the system should encourage the resolution of disputes as early as possible, and that the courts should be viewed as a last, rather than a first resort. The review should, in our view, begin by considering how the civil justice system as a whole, not just the courts, can be made more accessible, affordable and user-friendly than it is at present.

While it is essential in any democracy that the courts exist as the ultimate arbiter of disputes where they cannot otherwise be resolved, even under the present system the vast majority of those who have civil disputes do not end up in a court. [5] The cases dealt with by the courts are only the tip of the iceberg, when seen in the context of the numbers of justiciable disputes in which people become involved, with significant numbers being resolved through administrative justice processes.

At present, there are too many barriers preventing people from gaining entry to the civil justice system as a whole, and we believe that the review should identify ways to remove these barriers and increase access to justice. The major barriers which exist at present are complexity, formality and cost.

As the consultation paper states at paragraph 1.9:

'An effective and efficient civil justice system is a vital component of a civilised and prosperous society. A good civil justice system must provide citizens with high quality advice, information and assistance, at a price they can afford, to help them avoid civil legal problems arising, to provide means to help to resolve problems satisfactorily when they do arise, and to ensure that citizens' civil rights and responsibilities are protected and enforced when necessary. The system will be failing if the civil courts are seen as remote and inaccessible, if people are

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[4] *The Civil Justice System in Scotland - a case for review?: the final report of the Civil Justice Advisory Group,* published by the Scottish Consumer Council, November 2005

[5] *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001 found that only 14% of those with justiciable problems ended up in formal legal proceedings

inhibited from pursuing or defending valid claims because they cannot afford the assistance they need to enable them to do so, or if the procedures and language the courts use create confusion in the minds of the general public'.

We believe that there is a need for a four step approach to remove the present barriers to access to justice within the system:

1. a public legal education strategy
2. joined up and appropriate advice services
3. an emphasis on informal means of resolving disputes
4. more user-friendly formal dispute resolution mechanisms

Each of these aspects is discussed in more detail later in this response, in relation to the appropriate questions.

2. Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?

We agree that there is a need to find more proportionate ways of dealing with disputes, as identified in *Modern Laws for a Modern Scotland,* while increasing access to justice for consumers. Cases should be dealt with as early as possible, at the lowest appropriate level of the system.

Regarding the principles set out by the Civil Justice Council, while we agree that parties should have access to funding for their case where it cannot be resolved by less formal means, this must be proportionate in the circumstances. As the consultation paper acknowledges, civil justice is a public service, and the state therefore has a responsibility to ensure that it is efficient and properly resourced.

It could be argued that true access to justice can only be achieved within a civil justice system in which the public purse pays for everyone to assert their rights in a formal court or tribunal with the benefit of legal representation. It would not be proportionate, however, for the state to pay for every dispute to be decided by a court. In any case, the evidence suggests that this is not what people actually want. While most people who are involved in disputes agree that the courts are an important way for people to enforce their rights, on the whole they are more interested in finding a resolution to their problem or obtaining compensation for harm or loss than necessarily enforcing their legal rights.[6]

A greater emphasis on resolving disputes informally at an earlier stage and the provision of better advice and information for the public, coupled with a less

[6] *Paths to Justice Scotland*, ibid

adversarial decision-making forum with a greater case management role, is likely to increase access to justice in a more effective and proportionate way than simply providing sufficient resources for everyone to be legally represented in court.

While we would like to see a system where most cases are resolved without the need for a formal court resolution, we would observe that for those cases which are not, it is not clear who decides whether they are ‘meritorious’, or how this decision is to be made. While we are aware that there may be some difficulties with a very small number of vexatious litigants in Scotland’s courts, we would be concerned if this test were used to make the bar for taking a case to court higher than it is at present.

3. Are there any matters within the Review’s remit about which you have concerns but which are not dealt with in this paper?

We would wish to highlight two particular issues which are not covered in the consultation paper, but which we consider to be very important, and which we think are within the scope of the review.

a. Enforcement

We agree with the final report of the Civil Justice Advisory Group that the review should look at the issue of enforcement, particularly in relation to claims of lower financial value. [7] While enforcement is a problem for creditors generally, we are particularly concerned about the position of individual pursuers involved in cases against commercial organisations. It is clear from the research that such individual creditors often misunderstand the role of the court in enforcement. The court’s role is simply to make a decision on the case, and to issue a decree for payment where appropriate. After that the onus is on the pursuer to enforce the decree and obtain payment. Yet research has shown that many individual creditors expressed a high degree of surprise at the limited role of the courts; nearly half of them thought that the court should provide more assistance with enforcement.[8]

Most individual creditors were unhappy with their experience of the system, regardless of whether they had eventually secured repayment of the debt.[9] While providing advice for individuals pursuing a debt at the outset of an action would help, we would argue that there is a case for a greater degree of assistance from the courts. Given that the civil justice system is a public service, as the paper acknowledges, we would argue that an important aspect of that public service should be to provide people with assistance in enforcement.

[7] *The Civil Justice System in Scotland - a case for review?: the final report of the Civil Justice Advisory Group,* published by the Scottish Consumer Council, November 2005 at Chapter 8, paragraph 61

[8] *Evaluation of the Debtors (Scotland) Act 1987: Study of Individual Creditors*; Debbie Headrick and Alison Platts, Scottish Office Central Research Unit, 1999

[9] See Note 8

As the Civil Justice Advisory Group report pointed out, there is a precedent here: in small claims cases, an unrepresented individual may require the sheriff clerk to serve the summons on the defender and/or to intimate an incidental application to the other party.[10] In practice, the sheriff clerk generally does this as a matter of course; this is clearly one instance where the court already goes beyond its usual role by providing additional assistance to unrepresented individuals. At present, although such individuals are responsible for enforcing their own court decrees, it is clear that many expect the court to assist them with this. We therefore agree with the Civil Justice Advisory Group that the review should look into the possibility of a role for the state in assisting individuals to enforce their decree.

b. Conventions, dress and titles

There is considerable evidence that the public perceive the courts as intimidating, formal and complex, and that this plays a role in deterring them from going to court. In order to address this issue, we believe that there is a need to modernise the courts and abolish outdated practices, conventions and forms of dress. As Douglas Osler's 2006 report on the Agency Review of the Scottish Court Service pointed out, there is a need to balance respect for the origins of such practices with the needs of those who use the courts in today's society. [11]

We welcomed the report's recommendation that the judiciary, together with the then Justice Department, should consider a review of these historic titles and conventions. Even simple changes should help to make going to court a less frightening ordeal for individual users. These should include requiring judges and sheriffs to remove their wigs and gowns when hearing civil cases. We would also like to see greater openness in court processes, by ensuring for example, that there is a nameplate on the court bench, so that party litigants and witnesses know the name of the sheriff or judge who is hearing their case.

[10] Section 36A Sheriff Courts (Scotland) Act 1971; Act of Sederunt (Small Claim Rules) 2002, Rule 10.1(3)

[11] *Agency Review of the Scottish Court Service*, Report by Douglas Osler CB KSG, Scottish Executive Justice Department, January 2006 at paragraphs 11.15-11.18

Chapter 2: Access to Justice

1. What contribution can public legal education make to improving access to justice?

We believe that public legal education can play a very important role in ensuring that more people have access to justice. If people are to exercise their legal rights, they need firstly to know what those rights are, and how the legal system works. Many people do not currently have access to justice either because they do not recognise in the first place that they are involved in a dispute,[12] or because they do not know what to do, or where to go for help, about the dispute.

The Civil Justice Advisory Group report concluded that there is a need for improved public education about the civil justice system and basic legal rights and responsibilities, targeting hard to reach groups in particular. Such groups might include those with a long-term illness or disability, lone parents and those in receipt of welfare benefits. Research has shown that these groups are more prone than others to experiencing a range of justiciable problems, and are more likely to experience multiple problems than others. They are also more likely to experience problems that can lead to social exclusion, such as homelessness or divorce.[13]

While at present there are various organisations in Scotland which produce educational materials on legal rights and carry out other public legal education work, there is no coherent central strategy to co-ordinate this work. An independent Public Legal Education and Support Task Force was set up in England and Wales in 2006, following work by the Legal Action Group and Advice Services Alliance. Its final report, published in July 2007, set out a strategy for the development of public legal education, including:

- creation of a coherent focus and identity for public legal education
- creation of a practitioner network and an online knowledge bank for use by all stakeholders
- development and spread of good practice: evaluation and quality frameworks through a public legal education pilot projects and research
- securing sustainable funding
- working to establish a statutory remit for the development of public legal education[14]

We believe that there is a need for an integrated strategy for public legal education in Scotland, building on work done in England and Wales, Canada and

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[12] *Paths to Justice Scotland,* ibid found that one in four people in Scotland had experienced one or more justiciable problems during the previous five years, considerably fewer than the proportion of those who say they have had justiciable problems in England and Wales and in other countries
[13] *Causes of Action: Civil Law and Social Justice*, Legal Services Commission, 2004 at pages 31-34
[14] *Developing capable citizens: the role of public legal education: the report of the PLEAS Task Force*, Public Legal Education and Support Task Force, July 2007

elsewhere. Such a strategy would have two main goals: firstly, to inform people about their legal rights, and secondly, to educate and inform them about the legal system and how it works. Research has found that those with civil disputes in Scotland have negative perceptions about the civil justice system, more so than their counterparts in England and Wales.[15] This is partly because they associate the courts with criminal matters, which makes them reluctant to use them. While the separation of criminal and civil courts would go a long way towards addressing this difficulty, increasing the understanding of members of the public about how the courts work would also help to break down barriers and negative perceptions.

We believe that investing money in public legal education would pay dividends in increased access to justice, while saving the courts time and money.

2. Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?

It is important that adequate and appropriate advice services are available to diagnose a legal problem, deal with it or refer it on to the most appropriate dispute resolution service. As the paper notes, effective intervention by an adviser at an early stage will often be sufficient to resolve a dispute, before it escalates into a more serious problem.

Legal and advice services are currently provided by a wide range of agencies, from solicitors in private practice to small voluntary sector generalist advice services. We believe that publicly funded legal assistance should be provided on a client-led basis, to ensure that people have access to the most appropriate services to deal with their problem.

We have no detailed information about geographical gaps in provision. While past research has suggested that legal aid provision may be a particular problem in some rural areas,[16] we are aware of concerns that increasing numbers of private legal firms across Scotland are withdrawing from legal aid provision. We understand that this is largely due to the increasing disparity between legal aid rates and private fees, which have increased considerably in recent years.

In terms of subject matter, it is clear that the present legal aid scheme concentrates on traditional areas of work provided by private practice solicitors, such as family law and reparation. This has resulted in unmet legal need, particularly in the area of 'social welfare law', which includes welfare benefits, housing, consumer and employment issues. This has led to a situation where many consumers rely heavily on non-solicitor advice services and law centres for

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[15] *Paths to Justice Scotland*, ibid at Chapter 7

[16] *Distribution of the supply of legal aid in Scotland*, Scottish Legal Aid Board, 2002

assistance with such matters. Non-solicitor advice services cannot presently be funded by legal aid, and the inadequate funding which they presently rely on prevents them from fulfilling the need that exists.

We therefore welcomed the 2005 proposals by the previous Scottish Executive to extend publicly funded legal assistance to non-solicitor advice agencies.[17] These were enshrined in the Legal Aid and Legal Profession (Scotland) Act 2007, which provides for grant funding to such advice agencies. The relevant provisions have not yet been implemented, and we understand that Ministers are still considering policy in this area. We hope that the current Scottish Government will seek the early implementation of the provisions of the Act.

With regard to representation, we believe that many people are currently unrepresented in civil court cases. While the 'repeat players' within the system, such as businesses and public authorities, are routinely legally represented in courts, an individual with a dispute may not find it so easy to secure representation. This raises important questions about the 'equality of arms' of the parties to a dispute, and is discussed further in our response to question 3 below.

3. To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?

As stated earlier in this response, we do not believe that it would be proportionate for everyone to be legally represented in every case. We believe that the way forward is to make dispute resolution procedures less formal and more user-friendly, reducing the need for parties to be represented. Bearing in mind the underlying principle that court should be a last resort, we would hope to see a system where most disputes could be resolved through less formal processes.

Court processes and procedures are complex and often very difficult for non-lawyers, even well educated and articulate individuals, to follow. While our strong preference would be for an entirely new user-friendly process, we consider that, at the very least, there should be a comprehensive overhaul of all current court procedures, to make them easier to use and simpler to understand. At present, these can be confusing, intimidating and even frightening for parties, particularly those who are unrepresented, and also for other court users, such as witnesses.

Under current sheriff court procedures, there are a plethora of court forms which require to be used by, or served on, parties to a dispute. If the current procedures were broadly to be retained, there would need to be a complete overhaul of these forms. Although attempts have been made in recent years to make some of these forms, such as the small claims summons, more user-friendly, they are still not easy for many people to understand. It is very common, for example, for

[17] *Advice for All: Publicly Funded Legal Assistance in Scotland - the Way Forward*, Scottish Executive, 2005

defenders in small claims and summary cause cases to turn up at court on the calling date, having failed to return the summons by the return date, to discover that decree has passed against them.

Other court forms may cause people to be distressed and upset. The standard witness citation forms, for example, are written in a very formal tone, informing the witness that if they fail to attend court, a warrant will be granted for their arrest.

In some instances, court forms are preferable to the requirement for written pleadings under ordinary cause procedure. Where a party is unrepresented, they cannot be expected to produce written pleadings in the way that a solicitor would. We would therefore prefer to see a more simplified system where the likelihood of an unrepresented party appearing in a procedure where written pleadings are required is significantly reduced, or preferably eliminated altogether.

Even the small claims procedure, which was intended to be an informal forum where consumers could take cases without the need for legal representation, has in practice operated much more formally than was originally envisaged.[18] We have welcomed attempts which have been made in recent years to make it easier for people to make a small claim. In 2002, the rules were simplified and a glossary of legal terms added, while plain English guidance was produced for party litigants.

Despite these improvements, the procedure remains complex and adversarial, and is governed by the usual rules of evidence. In those cases where they actually get as far as the hearing, party litigants are very often faced with a solicitor representing the other side, within an intimidating and formal setting dominated by lawyers wearing formal dress and using legal language. Overall, the whole court experience can be very off-putting for those who are not represented. The formality, together with the need to take time off work and possibly having to return for several further hearings, when only a small amount of money may be at stake, is likely to deter many people.

We believe that a new more user-friendly process for lower value cases would help to address these difficulties, as discussed further in our response to Question 6 below.

While the current small claims system is far from perfect, recent increases in the jurisdiction limits should at least in the short term ensure that fewer unrepresented individuals are required to appear in the summary or ordinary

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[18] See eg *Report of a Study to Investigate the Attitudes of Advisers to the Small Claim Procedure in Scotland;* Scottish Consumer Council, 1989*; 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

cause courts, which are more complex and formal, while exposing parties to potentially significant expenses.

Whatever mechanisms are provided for dealing with cases which do end up in a more formal setting, it is important that the processes are simple and easy to use, and that the venues themselves are more accessible and less intimidating than at present. People may be encouraged to turn up on the day and assert their rights if provision was made for cases to be dealt with outside of working hours, at times which suit people, and if facilities they might require to assist them in attending court, such as a crèche, were provided.

Representation

While we would hope that any new process for lower value claims can be designed in such a way that most people will not require representation, there will still be cases where representation is necessary. Representation by a solicitor, however, will not always be required: other advisers can and do represent people in certain types of court proceedings. Representation by non-solicitors is currently permitted, subject to certain conditions, in certain types of case, such as small claims, summary cause first callings and proceedings under the Debtors (Scotland) Act 1987, and will soon be introduced in relation to sequestration proceedings and time order applications under the Consumer Credit Act.

Yet the evidence suggests that very few people are represented by a non-solicitor adviser in formal court proceedings. While two-thirds of those in the *Paths to Justice Scotland* study were represented by a solicitor, only one per-cent were accompanied by an advice worker. This suggests that levels of representation by other advisers are very low, reflecting the findings of Citizens' Advice Scotland research that very few advisers provided representation in the small claims or heritable courts, although the levels were higher in relation to tribunals.[19]

A 2004 survey carried out by the Scottish Sheriff Court Users' Group also found that only 1 in 4 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.[20]

The major reasons why non-solicitor advisers are not currently representing clients in court appear to be 1) a lack of resources and 2) the formality of court proceedings, which puts advisers off going to court. In 2006-7, citizens' advice bureaux in Scotland denied representation to 351 clients due to lack of resources;[21] this was also reported as being a major factor by almost half of those who responded to the Scottish Sheriff Court Users' Group survey. Advisers

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[19] *Lay Representation in Courts and Tribunals, Citizens Advice Scotland, 1998*

[20] Source: *Scottish Sheriff Court Users' Group Newsletter –Special Issue*, June 2004

[21] Figures obtained from Citizens' Advice Scotland

taking part in the Citizens' Advice Scotland research felt that the courts should be less formal, while some also felt they had not been well treated by sheriffs in the small claims court.

The introduction of less formal procedures may help to encourage greater representation where necessary, while it is likely that greater exposure to in-court advisers in some sheriff courts has reinforced to sheriffs the potential benefits of representation by non-solicitors for both parties and the courts.

We argued for some years for the commencement of sections 25-29 of the Law Reform (Miscellaneous Provisions) Act 1990, which were on the statute book for 17 years before they were finally commenced in 2007. These provisions allow suitably qualified non-lawyers to apply for rights of audience in Scotland's courts, ending the monopoly previously enjoyed by solicitors and advocates.

We welcomed the commencement of these provisions as being in the interests of consumers, although we expressed concerns to the previous Scottish Executive about the transparency of the application process.[22] To date, no professional or other body has been awarded rights of audience under the provisions, but we hope that in future they will lead to increased choice of legal representation for consumers.

4. What contribution, if any, can (a) "self–help" services for party litigants and (b) court based advice services make to improving access to justice?

While some people with disputes will require advice and representation, we believe that there is also scope for providing practical help to assist those who are confident about dealing with their dispute, but who would benefit from information and help in relation to their rights and how the legal system works. Theories about the 'unbundling' of legal services suggest that some people are able to deal with some aspects of their problem by themselves, while requiring assistance from a lawyer with others. This allows them to use only a limited amount of legal assistance at the point where they need it most. This is likely, however, to be more useful for well-educated and informed people than those in more disadvantaged groups.

There is considerable potential for greater use of information technology within the courts or other formal dispute resolution mechanisms. It was suggested by one of the speakers at the Civil Justice Advisory Group seminars that Scotland might follow the example of some US states, which have introduced IT based 'self-service centres' in courts aimed specifically at party litigants, which provide

[22] *Response to Scottish Executive consultation – draft guide for professional or other bodies on making an application to enable their members to acquire rights to conduct litigation and rights of audience*, Scottish Consumer Council, 2006

advice on various types of proceedings, rather than the substantive law.[23] We believe that such initiatives are worth exploring in more detail for Scotland.

We would also very much like to see in-court advice services being rolled out across the whole of Scotland. The Scottish Consumer Council was responsible, together with Citizens' Advice Scotland, for establishing the first such service in Edinburgh in 1997. There are now five further services in sheriff courts across Scotland. There is strong evidence that these services, where they exist, have been viewed as a great success by all involved, including clients, sheriffs, solicitors and advice agencies and court staff.[24]

In-court advice services recognise the reality that many people with disputes, who often have chaotic lives, tend to bury their heads in the sand, and fail to seek advice until the last minute. While the emphasis should be on encouraging the resolution of disputes as early as possible, there is also a need for services catering for those who deal with their problems in this way. A Scottish Executive research report recommended in 2005 that the current pilots should be continued on a longer term basis and that the service should be extended nationally, in order that as many people as possible have access to an in-court adviser.[25] We would wholeheartedly support this recommendation, as such an extension would ensure that court users across Scotland have access to these valuable services.

5. ***Are there any other issues which impact on access to justice in Scotland which the Review should consider?***

Please see our answer to Question 3 of Chapter 1.

6. ***Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?***

While recent increases in the jurisdiction limits are very welcome, and simplified forms and procedures would be a definite improvement on the current situation, we think that much more radical reform is required in relation to cases involving lower monetary value. It must be stressed that while such claims may involve sums of relatively low financial value in terms of the broad spectrum of cases dealt with by the courts, they may well be of considerable importance to those who are involved in them.

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[23] *See Civil Justice and Legal Aid: Paper for Seminar, 2 March 2005*; Roger Smith. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil

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

[25] *Uniquely Placed: Evaluation of the In-Court Advice Pilots (Phase 1)*, Morris, Richards et al, Scottish Executive, 2005

We would like to see a new system where certain types of claim are dealt with in a separate, less formal forum outwith the courts altogether. There is no compelling reason why cases should continue to be allocated to a particular court or other forum based purely on the financial value of the claim. They might be allocated by subject matter, for example.

The small claims procedure was introduced in 1988 as an informal and simple means for individuals to bring consumer claims to court without representation. In reality, however, the procedure has come to be dominated by undefended debt cases brought by large companies or public bodies with legal representation, often against other companies, but also against individuals.

One possibility might be to separate out consumer cases from debt cases and deal with each within a separate forum, as in Ireland, for example. With regard to debt cases, there is a need for a specialist forum which can ensure that debtors are protected so far as possible. While the debt arrangement scheme has gone some way towards this, it has not been taken up to the degree anticipated. We have argued for many years for a specialist debt tribunal. In addition to cases currently dealt with under the small claims and summary cause procedures, such a specialist forum could also deal with ordinary cause money claims involving individuals.

It may also make sense to include other related types of case, such as creditor sequestrations and consumer credit cases relating to unfair relationships and time orders, within such a forum. Unrepresented parties are currently forced to appear in the ordinary cause court for such cases, and it is likely that some do not appear in court due to the complexity of the forms and procedures and the intimidating surroundings.

A specialist forum for consumer cases could take a much more active case management role than the courts do at present, taking into account any imbalances of power between the parties, and providing greater assistance to unrepresented litigants.

We are not convinced that such a process would need to be within the direct jurisdiction of the courts, although there would of course always have to be provision for a right of appeal where necessary to a higher decision-making body. Consumer and debt cases could perhaps be presided over by either legally qualified decision-makers similar to tribunal chairs, or even non-legally qualified justices with a legally qualified clerk, along similar lines to the district court in criminal cases.

We think there is also merit in considering the introduction of a separate forum to deal with housing cases. At present, the sheriff courts deal with large volumes of such cases, the majority of which relate to rent arrears owed by tenants of social landlords. While the sheriff is required by law to decide whether it is ‘reasonable’ to grant a decree for eviction, in practice most cases tend to involve negotiation

with landlords and continuation of the case for payment or processing of housing benefit, rather than complex legal arguments.

Experience suggests that in many of these cases the defender does not turn up in court, which often means that decree is granted against them in their absence. A less intimidating specialist housing forum would help to encourage such people, where they do not receive help at an earlier stage, to turn up and have their case heard. Such a specialist forum could also hear mortgage repossession and other housing cases. The Chartered Institute of Housing in Scotland has recommended the creation of a specialist rented housing tribunal for Scotland, with jurisdiction over a wide range of housing issues.[26]

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[26] *A Housing Tribunal for Scotland?: Improving Rented Housing Dispute Resolution*; Derek O'Carroll and Suzie Scott, Chartered Institute of Housing in Scotland, 2004

Chapter 3: the Cost and Funding of Litigation

2. To what extent does the cost of litigating deter people from pursuing or defending cases in court?

It is clear from the *Paths to Justice Scotland* research that cost, and fear of cost, is a major deterrent to many people in pursuing a claim. Those who are not eligible for legal aid, and who do not have trade union backing or legal expenses insurance, must generally pay the costs involved in resolving their disputes from their own pockets.

These costs are not generally predictable at the outset of a dispute, and this is a major difficulty for people. Uncertainty about the costs of legal advice and representation, and about liability for their own expenses and those of the other side is a major concern for those with civil disputes.[27] Those who had considered consulting a solicitor but had not done so mostly gave concerns about cost as the main reason for this, while concern about having to pay legal expenses was greater in Scotland than in England and Wales.

3. Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?

We have concerns about the current policy of 'full cost pricing'[28] (or 'full cost recovery') or in relation to civil court fees. As the Civil Justice Advisory Group report noted,[29] this approach is not followed in other major common law and European jurisdictions. Neither is it followed in Scotland in relation to the criminal courts, where those who are taken to court are not expected to pay for the costs of the hearing, nor in tribunals.

As the Civil Justice Council for England and Wales has observed:

'The policy of full cost recovery through court fees fails to recognise the public function that civil law and civil litigation perform. Fees are collected only from litigants, but the civil justice system benefits many who do not become involved in proceedings. It is to the collective benefit that individuals have an efficient and authoritative means for resolving disputes'. [30]

The Council also identified three further reasons why courts should not be funded on the basis of full cost recovery:

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[27] *Paths to Justice Scotland,* ibid at pages 98, 174 and 231-2

[28] This new terminology is used by the Scottish Court Service in its current *Consultation Paper on review of fees charged by the Court of Session, Sheriff Courts, Office of Public Guardian, Accountant of Court and High Court* (February 2008)

[29] Chapter 6, paragraph 29

[30] *Full costs recovery: a paper by the fees sub-committee*; Civil Justice Council, 2002

- it limits arbitrarily the nature and quality of the services provided within the civil justice system
- it may limit access to the courts
- it is not possible without inappropriate cross-subsidy

While we accept that litigants should be required to pay towards the cost of their court case, the civil justice system provides a public service. We do not believe, therefore, that individual litigants should be expected to pay for the entire cost of providing the judge and running the courts.

While it is unlikely that the cost of court fees is a major factor in people's decisions about whether to go to court, it may within the context of the overall costs involved influence some of those who do not qualify for an exemption and who may find it difficult to pay the fee. Although recent research in England and Wales suggests that the level of court fees plays a minor role in the decision to go to court for most people, 30% said cost was an influencing factor in their decision whether to go to court. [31] Moreover, the research did not include those who had not actually taken their case to court. In any case, the *Paths to Justice Scotland* findings would suggest that cost may play a bigger role for many people in Scotland.

Those in receipt of legal aid do not have to pay court fees, and we welcomed the introduction of exemptions from the payment of court fees for those in receipt of means tested state benefits in 2002,[32] which we had long campaigned for as being in the interests of access to justice.

Current proposals to increase certain court fees in Scotland,[33] if implemented, may have the effect of deterring more people from going to court. While we agree with the Scottish Court Service that it is inequitable that well resourced commercial litigants in the Court of Session should be subsidised to a greater degree than day-to-day users of the sheriff courts, some of the proposed increases are quite considerable. It is proposed that the fee for small claims cases, for example, should rise by 48%, in order to reflect the recent increase in the jurisdiction limit. This is a significant rise, particularly for cases at the lower end of the scale.

[31] *What's Cost Got to Do with It?: the impact of changing court fees on users*, Ministry of Justice Research Series 4/07, 2007
[32] Sheriff Court Fees Amendment Order 2002, Court of Session etc Fees Amendment Order 2002
[33] See Note 28

4. Are the current rules for recovery of judicial expenses satisfactory?

As recorded in the Report by the Research Working Group on the Legal Services Market in Scotland,[34] we have previously expressed concern that the tables of fees are set by the Lord President's Advisory Committee, which is chaired by a judge and comprised of lawyers, and does not include any consumer representation.

5. Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?

As the consultation paper states at paragraph 3.17, we have previously expressed concerns about the complexity, lack of transparency and potential inconsistency of the taxation process, and those concerns remain.

6. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

As the paper notes, recent estimates suggest that only half of the population is currently financially eligible for civil legal aid, while 60% of that group would be subject to a contribution. This situation has led to concerns that many people on moderate incomes are dissuaded from pursuing cases through their perceived inability to meet potential expenses. *Paths to Justice Scotland* found that those on middle incomes felt most disadvantaged in obtaining legal advice in relation to both those who were better off and those on low incomes.[35]

For those who require to take advice from a solicitor, and who end up in court or another formal dispute resolution process, there are a number of ways in which this 'middle income trap' might be addressed. These include increased take-up of legal expenses insurance, as further discussed below. Another possibility would be the widening of eligibility for legal aid on a 'tapered' basis, together with a system of progressive contributions as proposed in the *Strategic Review on the Delivery of Legal Aid, Advice and Information* report in 2004.[36] We are disappointed that this, as with many of the other proposals contained in that report, has not yet been implemented.

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[34] Report by the *Research Working Group on the Legal Services Market in Scotland*, Scottish Executive, May 2006, at paragraph 10.91

[35] *Paths to Justice Scotland : what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001 at pages 100-1

[36] *Strategic Review on the Delivery of Legal Aid, Advice and Information: Report to Ministers and the Scottish Legal Aid Board*, Scottish Executive, October 2004

8. What impact have speculative fee arrangements had on access to justice?

We believe that speculative (or conditional) fee arrangements may provide a useful means of increasing access to justice in some cases for those who are ineligible for legal aid and do not have access to other means of funding, such as a trade union or legal expenses insurance. To date, however, such agreements appear to have been offered primarily in relation to personal injury cases, and we believe that their use could be extended to other types of case.

The advantage to the client is that they get someone to take on their case, when the potential costs would otherwise have prevented from doing so. Research shows, however, that solicitors will offer such fees only if the risks of losing are very low and the benefits of winning the case are sufficiently high to counteract the possible risks of losing.[37] This means that only those pursuers who have a very strong case are likely to have their cases taken on this basis.

A recent petition lodged with the Scottish Parliament alleged that speculative fee arrangements lead to a 'conflict of interest' between the solicitor and their client. We said in our evidence to the Public Petitions committee that, although we could see that such a conflict could potentially arise in relation to extra-judicial settlements, we had no empirical evidence about this. [38] We pointed out that research suggests that around 99% of all personal injury cases, however they are funded, are settled out of court.[39] This suggests that a 'win' in a speculative fee case is unlikely in the overwhelming majority of instances to mean an actual victory in court, as opposed to an agreed settlement.

We would, however, welcome further research in this area, as there appears to be little up to date Scottish evidence about the impact of speculative fees on clients and on the outcome of cases.

In addition to increased use of speculative fees, we think that other alternative means of funding, such as 'before the event' legal expenses insurance and contingency fees, should be considered in Scotland. We are surprised and disappointed that contingency fees are not discussed in the consultation paper.

Under a contingency fee arrangement, which is currently illegal in both Scotland and England, the lawyer receives a percentage of the court award as a fee if their client is successful. We are not convinced that the conflict of interest argument, on the basis of which such fees were made illegal, is any stronger than that

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[37] *Funding in Personal Injury Litigation;* Blackie, Paterson, Phillips and Squires, Scottish Office Central Research Unit, 1998

[38] *Response to Public Petitions Committee relating to Petition PE1063 - speculative fee arrangements*, Scottish Consumer Council, November 2007

[39] *Personal Injury Litigation, Negotiation and Settlement*, Samantha Coope and Sue Morris, Scottish Executive Social Research, 2002

which can be made about speculative fees. As far back as 1995, we stated that we were not opposed in principle to contingency fee arrangements.[40]

In England and Wales, the Civil Justice Council, having considered the future funding of litigation in some depth, recently concluded, albeit within a different system to that in Scotland, that conditional fees are a key aspect of the future funding of civil justice. It also recommended that a supplementary legal aid scheme should be established, and regulated contingency fees permitted in certain cases.[41]

9. Should legal expenses insurance, including "before the event" and "after the event" insurance, have a greater role to play in the funding of litigation in Scotland?

Yes. While we believe that the state should bear a reasonable proportion of the funding for the resolution of disputes, we think that there is merit in considering how people might be persuaded to take up such private means of funding. Despite the fact that 'before the event' legal expenses insurance policies are inexpensive, take up has been relatively low in the past.[42] *Paths to Justice Scotland* found that only 1% of those who incurred legal expenses were supported by such insurance. [43]

However, recent GB research suggests that take-up has increased significantly, with 59% of people owning this type of insurance.[44] That research found that the most common type of legal expenses insurance, held by around half of those people, was an add-on to motor insurance, which generally covers the policy holder in relation to claims arising from motor accidents only. Policies sold as an add-on to household insurance cover a broader range of problems, such as employment, contract, personal injury and property disputes, although most exclude some categories of dispute. Such policies were held by 35% of policy holders, with only 2% holding a 'stand alone' legal expenses insurance policy. The research also found that only one quarter of respondents had actually heard of the terms 'before the event' or 'after the event' insurance. This lack of consumer awareness must be addressed, to ensure that those who hold such policies appreciate the potential they offer.

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[40] *Response to the Law Society of Scotland's Consultation on Contingency Fees*, Scottish Consumer Council, 1995

[41] *Improved Access to Justice-Funding Options and Proportionate Costs; The Future Funding of Litigation- Alternative Funding Structures,* Civil Justice Council, 2007

[42] A 1990 GB survey found that 7% of respondents had legal expenses insurance: *Legal Expenses Insurance in the UK: A report by Consumers' Association and the Law Society*, January 1991

[43] *Paths to Justice Scotland*, ibid at page 172

[44] *The Market for 'BTE' Legal Expenses Insurance*, Ministry of Justice, July 2007

10. What impact would the ability to recover "after the event" insurance premiums from unsuccessful parties have on litigation?

As the paper points out, one disadvantage of speculative fees at present is the need for the pursuer to take out an 'after the event' insurance policy, which will pay the other party's costs should they lose the case. Such policies can be costly, yet unlike in England and Wales, where successful litigants can recover the cost of this insurance premium, this cost cannot presently be recovered in Scotland. The Association of Personal Injury Lawyers has said that this has resulted in a situation where 'no win no fee' arrangements are 'not universally viable due to the lack of an effective after-the-event insurance market in Scotland'.[45]

The STUC has expressed concerns about this anomaly, warning that if the situation is not addressed, it may lead to unions taking on and funding fewer cases, leaving their members to go to private solicitors on a 'no-win, no-fee' basis. Action against Medical Accidents has also said that it places those pursuing claims for medical negligence in Scotland at a disadvantage compared to those in England and Wales.

It is important to note, however, that the context south of the border is quite different to that which applies in Scotland. In that jurisdiction, legal aid was withdrawn from personal injury cases some years ago, and was replaced by conditional fees and 'after the event' insurance. This has led to concerns that some people who may previously have received legal aid on the basis of a reasonable chance of winning their case may not now be able to find a lawyer to offer them a conditional fee agreement. We would not wish to see such an approach taken in Scotland. While we accept that legal aid funding is not limitless, we see speculative fees as a means of increasing access to justice for those on 'middle incomes', not as a substitute for legal aid.

[45] Written submission by the Association of Personal Injury Lawyers to the Civil Justice Advisory Group, April 2005. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil

Chapter 4: The Structure and Jurisdiction of the Civil Courts

1. Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?

It is clear from the statistics set out in the paper that the number of days allocated to criminal business in the sheriff courts, both solemn and summary, has been steadily increasing in recent years. As the Civil Justice Advisory Group Report made clear, considerable concerns were expressed by stakeholders involved in that process about the extent to which the demand for court resources to deal with criminal cases impacts on civil court business. While criminal business often had an impact on the availability of court time for civil cases in the sheriff courts, this was seen to be a particular issue in the higher courts. There are of course good reasons why criminal business often takes precedence, as there are strict time limits within which cases must be heard in court.

Some stakeholders told the Advisory Group that the demand placed on the courts by criminal business often led to a lack of judges to deal with civil cases, delays in cases being heard on the day and cancellation of civil proofs, which were often then delayed for a considerable time. This also led to a significant amount of time being spent by solicitors and advocates waiting in court at a cost to the client, or to the public purse in legally aided cases. As the Group's final report noted, there was little hard evidence available, and while views differed on the extent of the problem, this anecdotal evidence was in line with the experience of some members of the advisory group.

2. Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?

3. Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?

We believe that the first step towards removing barriers to using the civil courts would be to separate the civil and criminal courts so far as possible. People tend to associate the courts with criminal matters. While it is likely that this is partly due to the portrayal of the courts in the press and other media, the lack of any physical separation between the two in our courts can only serve to reinforce this. *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.[46]

While we are aware of the arguments, which are set out in the paper, against creating a system where sheriffs and judges specialise in either civil or criminal matters, we consider that where it is practicable, this would be in the interests of

[46] *Paths to Justice Scotland*, ibid at page 242

users. To ensure that court procedures are fair to those who use them, those sitting in judgment should ideally have a thorough knowledge of, and interest in, the area of law concerned in each case. We do not believe that it can be conducive to justice if, for example, a newly appointed sheriff with a background in purely criminal work is suddenly expected to deal with complex civil cases.

At the very least, if both new and existing judges and sheriffs are to be expected to deal with areas of law in which they have no experience, they should be provided with intensive training in those areas. We have previously suggested that specialisation along these lines could be encouraged through the judicial recruitment and appointment process.[47] If for example, a particular sheriff court required a sheriff with a civil background, candidates with appropriate experience could be selected from the current 'slate' of candidates.

4. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?

While we accept that specialisation may not always be practical, particularly in smaller courts, we believe that every effort should be made to allow specialisation as far as possible. While consideration of specialisation within the courts is important, however, in our view the key issue is the forum in which particular types of case should be dealt with. We would particularly wish to see specialist and more appropriate processes outside the courts for consumer, debt and housing cases, as discussed in more detail in our response to Question 6 of Chapter 2.

6. Given the range in value and complexity of civil business in the sheriff court, should there be a tier of civil court below the level of the sheriff court?

7. Alternatively, should there be another level of judiciary within the sheriff court to deal with "third tier business"?

Please see our answers to Question 6 of Chapter 2 on these issues.

8. Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?

9. Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?

Our primary concern in answering these questions is to ensure that the interests of users are adequately protected. It seems to us to make sense to rationalise the administration of sheriff court business in the interests of efficiency, provided

[47] *Response to Judicial Appointments: An Inclusive Approach*, Scottish Consumer Council, 2000

that this does not have a negative impact on members of the public who may need to use the courts. It is vital that institutions for resolving disputes are easily accessible to those who need to use them. While we would wish to see increased specialisation where possible, it is important that disputes are handled as locally as possible for the ease and convenience of the parties, and to minimise delay and expense. A local court is also likely to have a greater understanding of local circumstances and local customs and practices.

This is recognised by the current court system, within which there are 49 sheriff courts in Scotland, in every city and in most towns, and which deal with the vast majority of civil business in Scotland.[48] As the paper points out, however, the current structure of sheriff court districts may now be less appropriate than it was in the past, and we believe that it should therefore be reviewed.

At present, there are clear rules as to which sheriff court has jurisdiction in a particular case: the general rule is that a defender must be sued in his or her local court.[49] There are, however, some exceptions to this rule: perhaps the most important for individual users relates to consumer contracts, where the consumer may sue in his or her local court, regardless of where the other party is based.[50] We consider that these rules are clear and fair so far as individuals are concerned (although we have been made aware in the past of instances where English companies have sued Scottish consumers in the English courts). We assume that, given their origins in European law, these would not change, whatever the future structure.

The need for local dispute resolution mechanisms is likely to be particularly acute in rural areas, where distances can be large and public transport may not be easily available. It will be important that steps are taken to ensure that local communities are involved in discussions on any proposed changes to the services provided in such areas. We have recently pointed out the need for increased 'rural proofing' of new policies to assess their impact on rural communities.[51]

It is important to emphasise that *accessibility* and *proximity* are not the same. While it is important that courts and other dispute resolution mechanisms are located close to where people live (proximity), they must also be accessible. Accessibility does not simply relate to physical access, but also means that courts should be open during hours when people are able to get to them, that

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[48] In 2002, the most recent year for which statistics are available, 115,236 cases were initiated in the sheriff courts, while 5059 were initiated in the Court of Session (4855 in the Outer House and 204 in the Inner House). Source: *Civil Judicial Statistics 2002*, Scottish Executive

[49] Civil Jurisdiction and Judgments Act 1982 Schedule 8, Rule 1, as substituted by the Civil Jurisdiction and Judgements Order 2001 [SI 2001/3929]

[50] Civil Jurisdiction and Judgments Act 1982 Schedule 8 Rule 3.1, as substituted by the Civil Jurisdiction and Judgements Order 2001

[51] *Rural Advocacy in Scotland*, Scottish Consumer Council, 2007

they should be affordable, and that processes should be simple and easy to understand.

We consider that a central administration could have advantages, provided that provision is made for easily accessible local courts and other dispute resolution mechanisms. This could, for example, lead to greater consistency in the way in which cases are administered within different courts. Increased use of information technology will be important in ensuring that any centralisation is carried out effectively.

It is worth noting too that the geographical proximity of civil justice institutions is likely to become less important in the future, with the increasing use of IT. The Sheriff Court Rules Council has, for example, proposed the submission of court documents by electronic means, and envisaged a 'virtual court', where undefended cases can be dealt with electronically, without involving expense by the other parties in attending court, and saving court time.[52] The use of IT will be particularly important in rural and remote areas of Scotland.

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[52] *Consultation paper on proposals for further extension of the use of information technology in civil cases in the sheriff court*, Sheriff Court Rules Council, September 2004

Chapter 5: Principles for Reform to Civil Procedure and Key Procedural Issues

1. Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?

We believe that the overriding objectives of the entire civil justice system, including the rules of civil procedure, should be focused on those who use it, with the aim of increasing access to justice as much as possible. We agree with the view expressed by the previous Scottish Executive that the civil justice system:

> *'must be modern, inclusive, accessible and efficient. And it must focus first and foremost on the needs of those who have to use it, rather than on the convenience of those who run it.'* [53]

The civil courts are first and foremost a public service, and they should therefore be underpinned by the five values of public service set out by the Policy Commission on Public Services. These are:

- Flexibility and responsiveness
- Fairness and equity
- Openness and honesty
- Efficiency and effectiveness
- Responsibility and accountability[54]

We believe that the principles set out by Lord Woolf in his review, which are very much focused on the interests of users, should be the starting point for any overriding objective within the Scottish courts. These principles, which echo those set out by civil justice review bodies in other jurisdictions,[55] state that a civil justice system should:

a. be *just* in the results it delivers

b. be *fair* in the way it treats litigants

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[53] From a speech by Hugh Henry MSP, Deputy Justice Minister at the Scottish Mediation Conference, 4 March 2005

[54] *Making Public Services Personal: the Independent Policy Commission on Public Services Report to the National Consumer Council*, National Consumer Council, 2004

[55] See for example *Ontario Civil Justice Review*, First Report, March 1995; *Managing Justice: a review of the federal civil justice system*, Australian Law Reform Commission Report No. 89, 2000

c. offer appropriate procedures at a reasonable *cost*

d. deal with cases with reasonable *speed*

e. be *understandable* to those who use it

f. be *responsive* to the needs of those who use it

g. provide as much *certainty* as the nature of particular cases allows

h. be *effective*: adequately resourced and organised [56]

2. Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

As stated in our response to Question 1 of Chapter 1, we believe that the civil justice system should encourage the resolution of disputes as early as possible, and that the courts should be viewed as a last resort. While we would hope in time to see a system in which most cases are resolved at an early stage by less formal means of dispute resolution, we consider that there is at this point in time a need for the courts to encourage earlier resolution of disputes. Experience from other jurisdictions such as the US and Canada suggests that such a 'top down' approach from the judiciary is necessary to change the culture within the legal profession towards a less adversarial approach.

We believe that the use of mediation should be encouraged so far as possible. We know that people would generally prefer to avoid becoming involved in legal and court processes. They are apprehensive about involvement with lawyers and also the potential costs, formality, delay and trauma they associate with legal processes.[57] The evidence clearly suggests that people generally prefer processes where they have more direct control over the process and the outcome.[58]

Mediation is flexible and focuses on what the parties want to achieve, rather than their strict legal rights. The mediation process can introduce non-legal solutions to meet the needs and interests of the parties. Mediation is therefore capable of achieving a 'win/win' result, with both parties achieving the outcome they want, rather then the 'win/lose' result imposed by a court decision.

The powers of the courts are limited and inflexible, being largely geared towards awarding financial compensation. A court cannot order one party to apologise to

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[56] *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*; by the Right Honourable Lord Woolf, Master of the Rolls, June 1995 at pages 2-3
[57] *Paths to Justice Scotland, ibid*; *Civil Disputes in Scotland: a report of consumers' experiences,* Scottish Consumer Council, 1997
[58] *Paths to Justice Scotland,* ibid at Chapter 6

the other, for example, but an apology could be agreed through mediation. The payment of money is not always the primary remedy sought by those involved in disputes: many people also want to prevent the same thing happening to someone else in the future, and/or an apology or an explanation about what went wrong. [59]

Mediation also gives the parties a chance to be heard, and to put forward their case, in a less formal and more private environment than a court. It is also likely to lead to faster settlement of a dispute than going to court,[60] and where it is successful, should also be cheaper.[61] In addition to the benefits it can bring in terms of increased access to justice, use of mediation rather than the court process is likely to save money, not just for the parties, but also for the courts. There is some evidence from the mediation service at Edinburgh sheriff court that mediation saves the court time and money: in 2004-5, it was estimated that use of the mediation service saved the court around five small claims full hearings or summary cause proofs per month.[62]

The available research indicates that those who have been through the mediation process are generally very satisfied with the process, even though they may not have achieved a successful outcome.[63] Scottish Consumer Council research has 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 ten would have preferred an alternative way of resolving the dispute.[64] More recent research found that, once the process was explained to them, over half of respondents said they would consider using mediation if they had a dispute.[65]

Court rules

We think that, at the very least, the courts should have the power to compel parties to *consider* mediation. The introduction of such court rules would be most effective within the context of wider case management reforms designed to

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[59] *Civil Disputes in Scotland: A report of consumers' experiences*, Scottish Consumer Council, 1997

[60] See eg. *The Central London County Court Pilot Mediation Scheme Evaluation Report*; Lord Chancellor's Department Research Series No 5/98; Professor Hazel Genn, 1998

[61] *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002

[62] *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2004 - August 2005

[63] See for example *The Central London County Court Pilot Mediation Scheme Evaluation Report*; Lord Chancellor's Department Research Series No 5/98; Professor Hazel Genn, 1998; *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002; *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2004 -August 2005

[64] *Civil Disputes in Scotland: A report of consumers' experiences*', Scottish Consumer Council, 1997

[65] *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland*, Scottish Consumer Council, March 2005

encourage earlier resolution of disputes, and should be accompanied by awareness raising and training for sheriffs about mediation and its potential benefits. Experience in Edinburgh has shown that once sheriffs start to see the benefits of mediation, they will suggest to parties that they consider it.

Such rules should also give the court discretion to award expenses where one party unreasonably refuses to consider negotiation or mediation, encouraging the parties to give very serious consideration to using mediation or another form of appropriate dispute resolution.

Compulsory mediation
We believe, however, that the possibility of introducing compulsory mediation in certain types of case is worth exploring. It is generally argued by mediators that mediation must be a voluntary process, and the parties to a dispute should never be compelled to participate in mediation. On this view, forcing parties to mediate would be contrary to the philosophy of mediation, which is a consensual process. Moreover, if parties have no choice, the dispute is less likely to settle. If one or both parties do not wish to go to mediation, the dispute will continue to be adversarial.

A mandatory mediation scheme has been running in Ontario, Canada since 1999. Under this model, most defended non-family civil cases are referred to mediation; cases may be exempted only by means of a court order. Cases are automatically referred to mediation before there is any court hearing, and the numbers of cases going to court have reduced significantly as a result.

Any party failing to comply with the requirement to mediate may be subject to court-imposed sanctions. An evaluation of the scheme found that mediated cases were resolved more quickly and cheaply than those which went through the court process, and that a substantial majority of lawyers and litigants were satisfied with the process, and would use it again if they had a choice in the matter. Overall, around 40% of cases were settled at mediation, although this proportion varied considerably depending on the type of case, and was over 50% in some categories.[66]

Following a number of cases relating to mediation and the Civil Procedure Rules, the English courts ruled in 2004 that, while the courts have jurisdiction to impose sanctions on successful parties who unreasonably refuse to mediate, they have no power to order parties to mediate.[67] This was reflected in amendments to the Civil Procedure Rules, which now say that *'it is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR*.' [68] The English courts have indicated that it is likely that compulsory mediation would be

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[66] *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report- the first 23 months*, published by the Ontario Ministry of the Attorney General, 2001
[67] *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576
[68] Practice Direction- Protocols, paragraph 4.7, as amended in April 2006

seen to be in breach of Article 6 of the European Convention on Human Rights.[69] We are not convinced by this argument, however: the parties may be compelled to mediate, but they cannot be compelled to reach an agreement, and would retain the option of going back to court if necessary.

We do not consider that compulsory mediation would be appropriate in all cases, but would suggest that it should be considered in the majority of ordinary cause actions, with the exception of family actions. This would be broadly in line with the categories of case which are included within the scope of compulsory mediation in Ontario. Mediation should, however, be encouraged so far as possible in small claims and summary cases, and court annexed schemes provided where possible to deal with such cases.

We would be concerned that if court rules provide only that sheriffs have discretion to require the parties to consider mediation, this discretion may be little used. Research in England and Wales has found that, although the courts have a duty under the Civil Procedure Rules to encourage the parties to use alternative dispute resolution where appropriate, most judges have little experience of ADR being used. There was felt to be little enthusiasm for it, and even real resistance to its use. Judges did not think that mediation played a role in the court process, and were reluctant to order its use due to a lack of facilities and resources. The researchers concluded that *'it would not be possible to find support from these findings for court mandated ADR.'* [70]

Disappointingly, this suggests that despite some high profile cases, little use is currently being made of the court rules relating to ADR on a day-to-day basis in the English courts. While the reforms have increased the number of cases which are settled, it seems that once cases are in court, they are not being sent to ADR.

The research suggests that one reason why ADR is not being used is that judges are not using their powers under the rules. Where a dispute reaches the court stage, the judiciary has a crucial role in the promotion of mediation. However, members of the judiciary are lawyers, who have been trained in the adversarial court system. It is therefore likely that their views on mediation will be similar to those of the legal profession.

As we discussed in our 2001 report on how the use of mediation might be encouraged in non-family civil disputes,[71] the evidence available then suggested that, while some members of the profession had embraced the benefits of

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[69] See *obiter* judgement in the *Halsey case*, above, where the court expressed the view that it was likely that compulsion to mediate would constitute a violation of Article 6

[70] *The Management of Civil Cases: the courts and post-Woolf landscape,* DCA research series 9/05, Professor John Peysner and Professor Mary Seneviratne, published by the Department of Constitutional Affairs, November 2005

[71] *Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland,* Scottish Consumer Council, August 2001

mediation, many remained sceptical about its usefulness. There is little evidence that those attitudes have changed significantly during the intervening period.

While the evidence from the Edinburgh sheriff court mediation service is that sheriffs are becoming more comfortable with the idea of mediation, and are increasingly suggesting mediation to parties in small claims and summary cause cases, any new court rules may meet with resistance from some members of the judiciary. Certainly, research on family mediation has found considerable variation among sheriffs in referral to mediation. This variation in approach seemed to depend on the particular sheriff's views on the value of mediation. While some saw mediation as playing a valuable role, others were sceptical about its value.[72]

If court rules on referral to mediation were to be truly effective, they would need to be introduced as part of a wider strategy aimed at changing the prevailing culture within the civil justice system. This would include the introduction of increased case management, encouraging all of those involved within the civil justice system to try to settle cases as early as possible. An awareness raising and training strategy would also be required, in order to change attitudes among the judiciary, the legal profession and also members of the public. We believe that the current general lack of enthusiasm among some members of these groups is partly due to a lack of knowledge and experience of mediation and its potential benefits.

3. If so, how should this be done and at what point or points in the progress of a dispute?

If there is to be a change in the culture so that the courts are truly viewed as a last resort, there is a need to move away from the prevailing view that mediation is best conducted within the 'shadow of the court'. On this view, mediation works best when court proceedings are already underway. Yet at this stage, costs have already been incurred in raising a court action and preparing for a hearing, in addition to the stress and anxiety that may have been caused to the parties.

Where mediation or another form of ADR is employed before the court stage and is successful, this avoids both parties incurring court costs and enduring the stress involved in a court case. If ADR does not succeed, the parties still have the option of going to court. One of the major criticisms of recent civil justice reforms south of the border has been that, while successful mediation saves money, unsuccessful ADR can increase the costs for parties. It is important to note that such mediation usually takes place once court proceedings have already begun.

As the final report of the Civil Justice Advisory Group noted:

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[72] *The Role of Mediation in Family Disputes in Scotland*, Jane Lewis, Legal Studies Research Findings No. 23, Scottish Office Central Research Unit, 1999

'Greater use of mediation at an earlier stage would potentially save cost, delay and stress for the parties involved, while freeing up court resources. The stumbling block, however, is persuading the parties, and more crucially their advisers, to go to mediation when there is no outside pressure on them to do so.'[73]

We see the introduction of court rules allowing the sheriff to order the parties to consider using alternative dispute resolution, or compelling them to use it, as a key means of delivering such outside pressure, where a case has reached the court stage.

4. Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

It must be acknowledged that mediation will not be appropriate in every case. There will always be some cases where an authoritative court ruling is required, for example. We believe, however, that mediation is potentially suitable in most cases, and offers greater control to the parties than going to court.

Mediation may not be appropriate where there is a significant imbalance of power between the parties; where, for example, an unrepresented individual is in dispute with a legally represented company or a local authority. It could, however, be argued that such imbalances exist at present in a court setting, and some existing codes of practice for mediators recognise the need for mediators to be aware of any imbalance of power, and to attempt to minimise any such imbalance so far as possible.[74]

5. What form should mediation or other methods of dispute resolution take and how should this be funded?

We have previously argued that greater public funding must be made available for mediation if it is to take off to any real extent outside the commercial, family and community fields.[75] While it may be economically viable for parties in ordinary cause cases and possibly also summary cause cases, to pay commercial mediation rates, this may not be the case in relation to small claims cases, where it is likely that public funding will be required.

If court rules were to be successful in practice, sufficient quality assured mediation services would need to be in place to meet the demand which will be

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[73] *The Civil Justice System in Scotland - a case for review?: the final report of the Civil Justice Advisory Group,* published by the Scottish Consumer Council, November 2005 at paragraph 5.68

[74] See for example Section 6 *Civil and Commercial Mediation Code of Practice*, Law Society of England and Wales, April 1999; *Practice Standards for Mediators and Mediation Services*, Mediation UK, 2005

[75] *Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland,* Scottish Consumer Council, August 2001

created. One possible means of facilitating the use of mediation would be to provide court annexed mediation schemes.

It could be argued that moving a process which was intended to be less formal and legalistic into the court system may result in that process resembling the adversarial court process it was intended to supplement or replace.[76] However, we consider that on balance it may be more efficient and convenient to house such schemes within court buildings, where sufficient space is available. Experience also suggests that, in cases involving unrepresented parties, it is important to have close links between in-court advice services, where they exist, and mediation services.

Many court-annexed mediation schemes exist in the USA, where all federal courts are required to offer some form of ADR, and a number of such schemes have been established in England and Wales. Such a service has, of course, been in existence in Edinburgh sheriff court for some years, and further pilot schemes based on different models have been running in Glasgow and Aberdeen sheriff courts since 2006.

The Edinburgh service has been very successful, particularly since it became based within the sheriff court building. In 2006-7, 78% of cases that proceeded to mediation were resolved. The overwhelming majority of those who used the service during that period said they would advise a relative or friend to use mediation, and that they would go to mediation again if necessary.[77] In addition to increasing access to justice for the parties, there is some evidence from the Edinburgh service that mediation saves the court time and money.[78]

If court rules were to be introduced, the question of funding for such schemes would be a central one, particularly in relation to cases of lower financial value. To date, the Edinburgh service has been provided by volunteer mediators, supported by a part-time mediation co-ordinator. It cannot be expected, however, that either existing or future services can rely so heavily on the goodwill of volunteers in the longer term. Mediators are highly trained professional people, and while to date many have been happy to provide their services free of charge in exchange for the experience they gain, this situation cannot continue forever.

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[76] See *Institutions of Civil Justice: a paper prepared for the Scottish Consumer Council Seminar on Civil Justice, December 15 2004*: Professor Carrie Menkel-Meadow, Georgetown University, Washington DC Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

[77] *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2006 - August 2007. 92% of pursuers and 100% of defenders said they would advise a relative or friend to use mediation; 92% of pursuers and 100% of defenders said they would go to mediation again

[78] In 2006-7, it was estimated that it cost the service £482 for each case settled. While the cost to the court, had the cases not been settled by mediation, is unknown, it was considered likely to be significantly more than this: *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2006 - August 2007

Research also suggests that the provision of sufficient administrative support, such as a mediation co-ordinator, is central to the success of such schemes.[79]

There are various possible means of funding such schemes. Some court-annexed mediation schemes in England charge the parties relatively modest fixed fees based on the value of the dispute, while the Glasgow and Aberdeen pilot schemes charge the parties in summary and ordinary cause cases. While charging may be economically viable for the parties in ordinary and summary cause cases, public funding would have to be made available for mediation in small claims, and possibly also and summary cause or ordinary cause cases where one or both parties cannot afford to pay.

One possibility might be for the state to employ full-time mediators, which may be more cost-effective than purchasing the services of private mediators. This would follow the approach taken by a number of local authorities, which employ mediators to deal with neighbourhood disputes within their area. One possibility might be that the Scottish Legal Aid Board could pay for the provision of public mediators. While funding for mediation is presently available through legal aid for those who are eligible, take-up has to date been very low, particularly in non-family cases. An alternative option might be to retain experienced mediators to carry out a certain number of mediations per year for a fixed fee agreed in advance.

It is important to note, however, that despite high satisfaction rates among those who do make use of such voluntary court-annexed schemes, the experience in England and Wales has been that there is a very low take-up rate, even where the mediation is provided free or at very low cost.[80] Again, this is an issue that might be tackled as part of an awareness-raising campaign, ultimately requiring cultural change. The evidence from the Edinburgh scheme is that experience of mediation can change attitudes among legal advisers and the judiciary, and we believe that this could be replicated on a wider scale.

6. In what respects can modern communications and information technology be harnessed to improve access to the civil courts?

As set out in our response to question 4 in Chapter 2, we believe that effective use can be made of IT in providing advice and assistance for unrepresented litigants. We also consider that IT could potentially transform the way in which the courts are administered, particularly within the context of a Scotland-wide sheriff court.

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[79] *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002

[80] *The Central London County Court Pilot Mediation Scheme Evaluation Report*; Lord Chancellor's Department Research Series No 5/98; Professor Hazel Genn, 1998; *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002

Other uses of IT might include greater use of ‘virtual courts’ and video links, as well as greater use of telephone conferences, particularly in remote and rural areas. Almost one million people live in rural Scotland and 280,000 of those live in remote rural Scotland. Our highly dispersed population lends itself well to increased use of IT, and such initiatives would be much more convenient for parties, while also reducing delays in the process and saving money in the longer term.

Other possibilities may include the conduct of court proceedings, including the taking of evidence, via live television links, which are already available in some cases involving vulnerable witnesses such as children. Online dispute resolution methods may be used more in future. Various online mediation services have been in existence in the USA for some years, and similar services are now available within the UK, while applications for some consumer arbitration schemes may also be completed online.

7. To what extent should the court control the conduct and pace of litigation?

We agree with the conclusions of the Civil Justice Advisory Group that there is scope for greater case management by judges and sheriffs in Scotland, as one means of addressing problems of cost and delay in the civil justice system. Such case management should encourage all of those involved within the civil justice system to try to settle cases as early as possible, including referring cases to mediation as discussed above.

Recent amendments to the Civil Procedure Rules 1998 in England and Wales, introduced in April 2006, now make clear that litigation should be viewed as a last resort, and that claims should not be issued while the parties are still actively exploring a settlement. We would like to see similar rules being introduced in Scotland.

Chapter 6: Working Methods of the Civil Courts

5. Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.

We are aware that the Sheriff Court Rules Council has only limited resources available at present to make rules of civil procedure, and to draft and revise rules and court forms. We believe that but for the high levels of commitment and hard work by the Chairman and other members of the Council, including sheriffs principal and sheriffs, and the under-resourced secretariat, the current system would collapse under the weight of its increasing workload.

We think that the recommendation by the Review of the Scottish Court Service that the secretariat for all of the various Rules Councils should be provided by a single branch of the Scottish Court Service makes sense. There may also be a case for merging the Sheriff Court Rules Council and the Court of Session Rules Council. This would in fact be necessary if the rules were to be merged into a single set of civil procedure rules.

If this does not happen, we would support the recommendation of the Review of the Scottish Court Service that provision should be made to appoint lay members to the Court of Session Rules Council. We would very much welcome this, having played an important role in ensuring that provision was made for lay members on the Sheriff Court Rules Council. Such members can provide valuable insight into issues that are of particular importance to non-professional users of the courts.

It is also vital that effective means of communicating changes in the rules to advisers and court users, as well as to members of the legal profession, are put in place. At present, there is no formal mechanism for doing so, and rules changes are frequent, making it difficult for those who need to use them to keep abreast of the changes.

6. Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?

7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?

If the present methods of procedure were largely to be retained, we would support any attempt to simplify the current complex set of procedures within the courts. It is difficult to see any justification for retaining four separate sets of procedures in the sheriff court.

If such a rationalisation of the rules were to be carried out, it would be necessary to ensure that the rules were completely overhauled and re-written in simple and accessible language, in order to ensure that unrepresented court users can understand them. It would be necessary to ensure that sufficient resources were made available for this huge task, and to ensure that consumers themselves, and consumer and advice organisations, were fully consulted as part of this process.

21. Is the current legislation on vexatious litigants in need of reform and, if so, how should that be done?

22. Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?

We are concerned at the focus within the paper on what we believe to be the very small minority of party litigants appearing within the courts who could be described as 'vexatious'. While we understand that this tiny minority can cause difficulties for the courts, we do not believe that the vast majority of unrepresented litigants are vexatious, but that most do not have representation because they cannot afford to pay for it. It is important that advice and assistance should be made available to those within this group, through in-court advice services and self-help guides, as discussed in relation to Chapter 2.

Research sponsored by the Scottish Consumer Council[81] suggests that it is likely that those viewed by the courts as 'vexatious litigants' fall into one of two main categories. The first, which might be termed 'persistent litigants' are those who refuse to accept they have reached the end of the court process, and appeal at each stage. The second group, who might be seen as 'serial litigants', continually bring one court case after another. The difficulty is in deciding when those in either category become 'vexatious'. Anyone who takes a court case is to some extent persistent, continuing to pursue an issue where others might give up. The majority of unsuccessful litigants will give up at some point in the process, but a small minority will continue to pursue the matter through each possible stage of the court process.

It is important in the interests of justice that such people are tenacious up to a point; the difficulty is in deciding at what point persistence ceases to be something to be admired and becomes a problem, and who takes that decision. In the case of both 'persistent' and 'serial' litigants, their actions may be entirely reasonable, depending on the circumstances. It is certainly likely to be the case that most persistent litigants have some grounds for legitimate grievance, providing some basis for a legal case.

While it is not in the interests of the courts, other litigants or the persistent /serial litigants themselves to allow them to pursue a case which has no legal merit, it is important that they are handled as sensitively as possible. We would be

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[81] *A Review of Approaches to Persistent Complainers*, unpublished paper produced for the Scottish Consumer Council by Craigforth Consultancy and Research, 2003

concerned at any suggestion that representation should be made compulsory, which raises access to justice and human rights issues. We would, however, suggest that consideration be given to ways in which such litigants might be provided with access to legal advice as to the merits or otherwise of their intended appeal. It may be that in some cases the person involved has not understood that an appeal must be founded on a point of law rather than fact, or simply does not fully understand the basis of the initial court judgment.

We would welcome recognition by the Scottish courts of the need for discretion to allow some form of 'McKenzie friend' to accompany and possibly represent a party litigant in appropriate cases.

23. Would it be desirable to introduce separate procedures for multi-party litigation?

To date, the debate about reform of the civil courts in Scotland has focused almost entirely on providing mechanisms for individual redress. We believe, however, that there will need to be much greater emphasis on collective forms of redress in the future.

The legal system in Scotland, unlike that in England and Wales, the United States and other jurisdictions, does not provide for a procedure for class actions. At present, where there are a large number of people with a similar grievance against the same company or individual, each of them must take their case separately through the courts.

In 1982 the SCC published a report which recommended the introduction of a class actions procedure in the Scottish courts, as a means of providing better access to justice for consumers.[82] In 1996, the Scottish Law Commission recommended that a procedure for multi-party actions should be introduced,[83] and its report actually contained draft court rules to implement the procedure.

In 2006, we wrote to the Secretary to the Court of Session Rules Council, asking whether the Council intended to take any action on this matter. We were advised that the Council had discussed the Commission's report in some detail over several years, but concluded in 2000 that the existing Court of Session procedures were adequate, and that there was therefore no need to introduce special rules of procedure for multi-party actions. Twelve years on from the Commission's report, therefore, its draft rules have never been implemented. We believe that the civil courts review should look at this issue again, building on the work of the Commission.

[82] *Class Actions in the Scottish Courts: a new way for consumers to obtain redress?,* Scottish Consumer Council, May 1982
[83] Scottish Law Commission, *Multi-Party Actions,* Scot. Law Com. No. 154, HMSO Edinburgh 1996

We believe that the introduction of a class actions procedure in Scotland's courts would make it easier for ordinary people to pursue claims against big businesses, and would:

- increase access to justice
- provide an effective remedy, allowing people to exercise their legal rights
- save time and money, both for parties and the courts
- avoid inconsistent decisions in similar cases
- act as a deterrent to unlawful/unfair behaviour by businesses[84]

Alongside this, the review must recognise current UK government initiatives, emanating from Europe, which are designed to encourage the use of representative actions by consumer bodies and others on behalf of groups of consumers with claims against the same defender. Under the Unfair Terms in Consumer Contracts Regulations 1999, for example, a number of regulatory and consumer bodies have the power to seek interdicts against those who use unfair contract terms. Part 8 of the Enterprise Act 2002 gives powers to certain bodies to apply to the courts for enforcement or 'stop now' orders to stop traders infringing a wide range of consumer protection legislation where those infringements harm the collective interests of consumers.

A similar list of 'designated bodies' can take action for damages on behalf of consumers before the Competition Appeals Tribunal. Which? recently took such an action against a major sportswear retailer in relation to the alleged cartel overpricing of replica football strips. We believe that the use of this type of action is likely to grow in the future. The Office of Fair Trading (OFT) consulted recently on further extending the scope of representative actions under competition law,[85] and the UK Department for Business, Enterprise and Regulatory Reform is shortly expected to consult further on this.

The UK government has also recently consulted on the introduction of a representative actions procedure throughout the UK which would allow certain bodies to take court action on behalf of consumers against businesses which are in breach of consumer protection laws.[86] This growing interest in collective redress within the UK government and the European Commission stems from the introduction of such procedures in a number of European and other countries, and increased high-profile enforcement activity by the OFT on issues such as bank charges and airline fuel surcharges.

We believe that representative actions could significantly increase access to justice for large numbers of consumers who are entitled to compensation, but who do not wish to take individual claims for relatively small amounts of money.

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[84] For further discussion on the SCC's policy on this issue, see *A Class of Their Own: why Scotland needs a class actions procedure*, Scottish Consumer Council, 2003

[85] *Private Actions in Competition Law: Effective Redress for Consumers and Business*, Office of Fair Trading, April 2007

[86] *Consultation on Representative Actions in Consumer Protection Legislation*, Department of Trade and Industry, July 2006

We think that the widening of representative actions of this nature could potentially lead to a fundamental shift in the way in which litigation is undertaken in the Scottish courts. Yet at present, there are no suitable court processes in place in Scotland to deal with such cases. It is therefore vital that the review takes account of these developments in looking to the future structure of the courts.