

About Consumer Focus Scotland

Consumer Focus Scotland started work in October 2008. Consumer Focus Scotland was formed through the merger of three organisations – the Scottish Consumer Council, energywatch Scotland, and Postwatch Scotland.

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

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

www.consumerfocus-scotland.org.uk

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Introduction

The civil justice system should be a positive tool for consumers. It has two main purposes: firstly, to provide people with the means to enforce their legal rights; and secondly, to regulate disputes between two or more parties.¹ Yet for many consumers, their interaction with the civil justice system will be unwelcome: they may be divorcing their spouse or involved in difficult custody proceedings; they may have fallen behind in rent or mortgage payments and be facing the prospect of losing their home; they may have lost their job for reasons they think are unfair; they may have problems with neighbours who are making their life unbearable; or they be unable to reclaim money which they are owed. Consumers' engagement with the civil justice system is likely to be in times of great stress, and the design and operation of that system should not add to this anxiety. The civil justice system needs to be user-friendly, affordable and accessible to ensure that within such situations consumers are able to enforce their rights and settle their disputes.

A common criticism levelled at the civil justice system, however, and particularly the courts, is that it focuses on the needs of professional users of the system, such as solicitors, advocates and judges, rather than the needs of the ultimate users of the system, those who become involved in civil disputes. Professional users of the courts, and other 'repeat players' such as local authorities and banks, are not only well versed in the operation and language of the civil justice system but have their interests well represented by their professional organisations. Individual court users, however, will come in contact with the system only rarely and their needs are very different and harder to pin down. There is a need, therefore, for the consumer interest to be identified, advocated and taken into account to ensure the civil justice system meets the needs of individual consumers.

To this end, Consumer Focus Scotland, and previously the Scottish Consumer Council (SCC), one of its predecessor bodies, has had a long involvement in campaigning for change in the civil justice system, to better meet the needs of consumers. Our interest in civil justice focuses principally on ensuring that consumers have adequate access to justice. As a result of many years of research and policy development in this field,² we have identified a four-step approach to removing barriers to access to justice which we believe is necessary for the civil justice system to function effectively in the interests of consumers:

- 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 processes.**

We do not think each step should be looked at in isolation, but rather they should be regarded as steps in a continuum of assistance, with the courts to be viewed as the last resort for resolving legal problems. Each of the earlier steps should also be viewed as the potential point of resolution of a problem.

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

² A full list of all SCC and Consumer Focus Scotland research and policy reports on civil justice issues can be found at Appendix One.

Assessing the needs of the user in civil justice: the consumer tests

In order to achieve a consistent approach to thinking about the needs of consumers across different markets, including the legal services market, a set of consumer tests can be used to highlight consumers' interests and identify where and why consumer detriment might occur. This includes key factors such as:

- **Access** – can people get the goods and services they need or want?
- **Choice** – is there any?
- **Information** – is it available, accurate and useful? Is it succinct and clear enough to enable the consumer to understand it and use it to make effective choices?
- **Representation** – do consumers have a say in how goods and services are provided?
- **Redress** – if things go wrong, is there a system for putting them right?
- **Education** – do consumers have the skills and knowledge that they need to make informed choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on these?

Aims of this Report

Although many more consumers will be affected by civil justice issues in their lifetime than criminal justice issues,³ development in civil justice has often taken a backseat to criminal justice policies.⁴ While there have been a number of reforms of civil justice, these have been piecemeal and have, in the words of Lord Gill, ‘left us with a structure of civil justice that is seriously failing the nation.’⁵ The SCC long campaigned for a review of civil justice in Scotland and its work in establishing the Civil Justice Advisory Group, set up under the chairmanship of Lord Coulsfield, to look at the need for such a review, ultimately led to the then Scottish Executive announcing a review of the Scottish civil court system in 2007. The review of the civil courts, led by Lord Gill, published its report in September 2009 and made wide-ranging recommendations designed to improve the operation of the civil courts. Its damning assessment was that the civil courts do not deliver ‘the quality of justice to which the public is entitled.’⁶ The second report of the Administrative Justice Steering Group, published by Consumer Focus Scotland in June 2009, also concluded that the current administrative justice system in Scotland does not meet the needs of users, and identified areas where improvements could be made.

The civil justice system is potentially braced for great change but at the same time, the funds available to implement any reforms are likely to be tighter than ever before over the next few years. The need for prioritisation will therefore be acute, and the focus is likely to be on those reforms that can be introduced quickly and cost effectively. However, the civil justice system, and the court system in particular, provide a public service.⁷ It is therefore critical that the focus for reform should be on changes that can be made which will achieve maximum benefit for the public. Consequently, there is a need to examine where the needs of the consumer sit within this proposed reform. In the context of the four-step approach to removing barriers to justice, the aims of this report are:

- to assess the extent to which developments in civil justice have benefited consumers
- to identify areas where improvements can be made
- to set out the priorities for action to ensure that the civil justice system meets the needs of consumers in a system fit for the 21st century

3 Buck, A., Pleasence, P., and Balmer, N. (2008) ‘Do Citizens Know How to Deal with Legal Issues? Some Empirical Insights,’ *Journal of Social Policy*, 37(4), 661-681

4 Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*, Edinburgh: Scottish Executive

5 Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*. Edinburgh: Scottish Civil Courts Review

6 See note 5

7 See for example Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*, Edinburgh: Scottish Executive; Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

Step One: A Public Legal Education Strategy

As far back as 1980, the Royal Commission on Legal Services in Scotland (Hughes Commission) recognised that many people were unaware of their legal rights and responsibilities or legal remedies available to them. The Hughes Commission therefore recommended that the need for legal services be thought of in two stages: ‘firstly enabling the client to identify and if he judges it appropriate, to choose a legal solution; and secondly enabling the client to pursue a chosen legal solution.’⁸

In other jurisdictions, public legal education (PLE) is seen as an important tool to help consumers navigate these two stages. In England and Wales, the Public Legal Education and Support Task Force was set up in 2006 with a remit to define PLE, review its delivery and identify how a national strategy could be taken forward, making recommendations for the future.⁹ The task force proposed the following definition of PLE:

PLE provides people with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important, it helps people recognise when they may need support, what sort of advice is available, and how to go about getting it. PLE has a further role in helping citizens to better understand everyday life issues, making better decisions and anticipating and avoiding problems.¹⁰

Thus in this definition, PLE is about more than simply improving legal knowledge; through building individuals’ skills and confidence, it aims to provide them with sufficient ‘legal capability’ to act upon this knowledge. It is Consumer Focus Scotland’s view that without equipping consumers with such knowledge, skills and confidence, they will not be able to take full advantage of the civil justice system. We therefore believe a public legal education strategy is the first step in removing barriers to access to justice for consumers in Scotland.

How well does this step currently measure against the consumer tests?

Access

If consumers are to be able to access legal services, and make informed choices about which services best meet their needs, they need to be able to:

- a) recognise they have a problem
- b) recognise the problem has a potential legal remedy
- c) identify a course of action to pursue that remedy, be it taking action themselves, or seeking help from an appropriate source

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

9 Public Legal Education and Support Task Force (2007) *Developing Capable Citizens: The Role of Public Legal Education. The Report of the PLEAS Task Force*, London: PLEAS Task Force

10 See note 9

Evidence suggests, however, that these stages are very difficult for consumers to navigate. Research has found that consumers in Scotland are less likely to have reported experiencing a ‘justiciable event’¹¹ than consumers in England and Wales.¹² It is unlikely that consumers have in reality experienced fewer problems, a more plausible explanation put forward being that justiciable events are reported differently by consumers, potentially because of ‘a greater sense of fatalism or powerlessness’ in Scotland.¹³ This indicates that Scottish consumers may have difficulties in identifying when they have a problem, and particularly identifying that such problems have a potential means of resolution.

There is further evidence that points to many consumers lacking the knowledge and skills to recognise that their problem has a potential remedy. The Paths to Justice Scotland research, while finding that only three per cent of respondents who had experienced a justiciable event did nothing to resolve their problem, found that over half of those taking no action did so because they thought nothing could be done. As the research points out, however, such judgements about their problem(s) were made without the benefit of advice.¹⁴ In addition, of the 32 per cent who ‘self-helped’, that is who took some action to resolve their problem but without outside help, one in four considered seeking advice, but chose not to. The most commonly cited reasons for not seeking help were that the respondent did not think anything could be done or that advisers would not be able to help them.¹⁵

The Paths to Justice Scotland survey was found to indicate ‘a widespread feeling of ignorance about legal rights that exists across most social groups.’¹⁶ This ignorance clearly is impacting on consumers’ abilities to identify problems, potential solutions and sources of help and therefore impacting on their ability to access justice.

Consumer Focus Scotland strongly believes that a public legal education strategy is fundamental to improving access to justice for consumers. We are therefore delighted that the report of the civil courts review recognised the important role that raising awareness of sources of help and how to deal with legal problems can play in assisting consumers, particularly those who might otherwise have not taken any action or might have self-helped, unaware other options were available. We would emphasise that PLE must be thought of as much broader than information giving, however, and must incorporate the building of skills and confidence to ensure that consumers are able to act on their improved knowledge. We are fully in support of the review’s recommendation that ‘the promotion of PLE should be an element of any strategy to improve access to justice in Scotland.’¹⁷

Choice

As outlined above we believe PLE is an important tool to assist consumers in dealing with their problems. Only if consumers know the range of options available to them and the consequences of these, can they make an informed decision. Therefore we see PLE as having a key role in helping consumers choose their problem-solving strategy. This could be about

11 Defined as ‘a matter experienced by the respondent which raised legal issues, whether or not it was recognised by the respondent as being “legal” and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system’ see Genn (1999) *Paths to Justice: What People Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing

12 Genn, H. and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing

13 See note 12

14 See note 12

15 See note 12

16 See note 12

17 See note 5

giving them the knowledge and confidence to reach the appropriate adviser at the appropriate time to help them resolve their problem(s), or it could be equipping them with the necessary skills to take action themselves. We believe those who have adequate knowledge and capability to self-help, either on their own or with support, should be encouraged to do so. This will have the additional benefit of freeing up advice resources for those who are most in need of that assistance.

We would emphasise, however, that the potential of PLE goes beyond simply assisting consumers make choices once they have a problem; we believe PLE is a key tool to assist consumers avoid problems by making better choices. Indeed within the publication *Modern Laws for Modern Scotland*, which outlined the need for a review of the civil courts, the Scottish Executive expressed the desire that everyone should have ‘an understanding of the importance of the civil law in their daily lives, to have access to the advice and support they need to make the right choices about the legal matters that affect them, and to be confident that our civil justice services will help them to sort out problems when they arise.’¹⁸ In doing so, the publication recognised that advice and information is not only crucial at times when things go wrong, but can also play an important preventative role, to ‘ensure that people make the right choices when making decisions which have legal consequences for them.’ Thus PLE should be looked at as a means to help people avoid problems developing in the first place as well as enabling them to identify these problems at an early stage.

While we recognise that current resources are constrained, we believe investment in PLE is critical to improving access to justice for consumers. We also believe it has the potential to make better use of resources at later steps in the continuum of assistance by increasing the potential for problems to be resolved earlier and in the most appropriate way. It is fundamental, however, that any future investment in this area must not have the consequence of restricting consumer choice through a reduction in funding for other types of assistance. In voicing our support for developing PLE, we have always emphasised that it should not be viewed as a replacement for legal aid, as can arguably be said to be the case in other jurisdictions such as Canada, Australia and the USA. PLE should be seen as an additional rather than alternative tool to assist consumers in accessing justice.

Information

As far back as 1992, in its paper *A Scottish Civil Justice Review?* the SCC highlighted the lack of information available for consumers on their rights, and on the courts and court processes as being obstacles which our civil justice system place in the path of consumers, potentially denying them access to justice. This view was recently reinforced by research into the views and experiences of civil sheriff court users, commissioned by Consumer Focus Scotland and the Scottish Legal Aid Board, which pointed to an urgent need for better information for the public and wider access to support services in all courts.¹⁹ A consistent message emerging from this research was that few people knew what to expect and many were deeply concerned about understanding the language and procedures of the courts. Crucially, what no research can do, however, is indicate how many people are put off pursuing their case as a result of their preconceptions about what’s involved. Consumer Focus Scotland views this as another reason why investment in giving people a deeper understanding of the Scottish legal system is essential to opening up civil justice.

¹⁸ See note 4

¹⁹ Consumer Focus Scotland and the Scottish Legal Aid Board (2009) *Views and Experiences of Civil Sheriff Court Users: Findings Report*, Glasgow, Edinburgh: Consumer Focus Scotland and the Scottish Legal Aid Board

The SCC and Consumer Focus Scotland have, however, not only campaigned for more information and guidance to be available to consumers, we have also sought to fill the gap in consumers' knowledge through developing consumer guides on a number of topics.²⁰ Consumer Focus Scotland not only distributes such materials directly to the public, but also targets intermediaries such as local authorities and the advice sector. We believe providing information to such intermediaries, who may be well placed to identify when a consumer has a justiciable problem and provide them with support in resolving that problem, is an important way to assist consumers, particularly those who are more vulnerable for a variety of reasons.

Although a number of organisations, particularly law centres and advice agencies, produce a lot of material for the public, there has been no strategic oversight of this provision. The principles of public legal education, therefore, are not unknown in Scotland, nor is the recognition of the need for a PLE strategy in Scotland. Since devolution, multiple reviews and reports on civil justice in Scotland have recognised the importance of improving individuals' knowledge and skills as a means of avoiding or seeking a resolution to civil justice problems.²¹

We believe a public legal education strategy is the best way to ensure the quality and consistency of materials available to support consumers. We have been keen to learn how the experience of other jurisdictions can be used to inform the development of a coordinated approach to PLE in Scotland and in 2006 a study visit to Canada was undertaken, where meetings were held with PLE practitioners, academics and federal government officials. We have also been keen to engage with Scottish stakeholders with an interest and expertise in this area. In March 2009 we held a joint seminar with the Scottish Government which looked at how PLE should be developed in Scotland. There was a lot of support for developing this area, but overwhelmingly participants agreed that the Scottish Government had a key role to play in taking this area forward.²² We therefore believe that Government support will be a key driver for developing this area.

Education

As has been highlighted throughout this chapter, we believe consumers lack the skills and knowledge that they need to make informed choices about how to anticipate, avoid and resolve problems. As the Paths to Justice Scotland research has shown, consumers may be making decisions about what help is, or is not available, on the basis of wrong assumptions.²³ Evidence from England and Wales suggests that a lack of knowledge can have severe consequences for consumers. Analysis of the English and Welsh Civil and Social Justice Survey found that, though varying between problem type, 62 per cent of respondents reported not knowing what their legal rights had been in relation to their problem, 69 per cent having no knowledge of the associated legal processes.²⁴ Such lack of knowledge of rights and processes was found to have a negative impact on outcomes achieved, whether objectives were met, and those lacking in knowledge were significantly more likely to regret the way they handled their problem.²⁵

20 A list of these consumer guides can be found at Appendix Two

21 See for example Scottish Executive (2001) *The Review of Legal Information and Advice Provision in Scotland*, Edinburgh: Scottish Executive; Scottish Executive (2004) *Strategic Review on the Delivery of Legal Aid, Advice and Information. Report to Ministers and the Scottish Legal Aid Board*, Edinburgh: Scottish Executive; Scottish Executive (2006) *Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward. Analysis of Written Consultation Responses*, Edinburgh: Scottish Executive Social Research; Scottish Consumer Council (2005) *The Civil Justice System in Scotland – A Case for Review? The Final Report of the Civil Justice Advisory Group*, Glasgow: Scottish Consumer Council

22 Consumer Focus Scotland (2009) *Public Legal Education Seminar Report*, Glasgow: Consumer Focus Scotland

23 See note 12

24 Buck, A., Pleasence, P., and Balmer N.J. (2007) *Report to the Public Legal Education and Support Task Force: Education Implications from the English and Welsh Civil and Social Justice Survey*, London: PLEAS Task Force

25 See note 24

The last large-scale survey of people's experiences of justiciable problems in Scotland was in 2001, however, and only indicates a general lack of knowledge of rights and remedies; no specific questions were asked about what respondents knew of their rights. The SCC undertook a number of topic-specific surveys in recent years, including knowledge of consumer rights in 2003²⁶ and knowledge of wills and inheritance rights in 2006.²⁷ The SCC research on knowledge of consumer rights found that one third of consumers do not feel well informed about their rights, with those within disadvantaged groups feeling less informed than others. More than a third of respondents thought it was difficult to get information or advice about their rights. We therefore believe more research is required to identify priority areas for investment and development.

The Way Forward

Of the four steps to removing barriers to access to justice, this step has seen least development, despite recommendations stretching back 30 years calling for more information and support to be offered to consumers. While there are a number of organisations doing good work in this area, the consequence of the lack of strategic approach to PLE means that this step currently scores poorly against the consumer tests. Evidence suggests consumers lack the knowledge to identify when they have a problem, whether potential legal remedies are available, and what remedies are most suitable.²⁸ This suggests an urgent need for greater investment in public legal education, and consumers to be given not only more information about their rights, responsibilities and means of redress, but also support to improve their skills and confidence to act upon such knowledge. Research could be used to identify priority areas for investment and development.

If consumers continue to lack the knowledge, skills and confidence needed to access the civil justice system and make informed choices about the options available to them, they will be unable to take full advantage of the remedies the civil justice system offers. We therefore believe the development of a Scotland-wide public legal education strategy to be fundamental to efforts to improve access to justice for consumers. Without greater investment and prioritisation being given to this first step, any developments made in the subsequent three steps to improve the experience of consumers will never achieve their maximum impact. We believe investment in public legal education has the potential to save resources further down the line by preventing problems from occurring or enabling them to be resolved earlier and in the most appropriate way, ensuring that best use is made of available resources. We therefore strongly endorse the recommendation in the civil courts review that public legal education should form part of any access to justice strategy. We view public legal education as an area where early action could be taken to improve the current situation and would urge the Scottish Government to progress the review's recommendations on PLE and self-help services as a matter of urgency.

26 Scottish Consumer Council (2003) *Knowledge of Consumer Rights in Scotland*, Glasgow: Scottish Consumer Council

27 Scottish Consumer Council (2006) *Wills and Awareness of Inheritance Rights in Scotland*, Glasgow: Scottish Consumer Council

28 See note 12

Step Two: Joined Up and Appropriate Advice Services

An important feature of a just and inclusive society is the ability of all of its members to enforce their rights, meet their responsibilities and resolve their disputes. Fundamental to this is the need for consumers to have access to high quality legal advice. The costs of doing so should be affordable, while the processes available should be both appropriate and free of undue delay.

In Scotland, legal and advice services are provided by the private, public and third sectors, and each has a crucial role to play in ensuring consumers have access to justice. To ensure the most effective delivery of such advice, however, we have argued there is a need for a clear national strategy for planning and coordination of advice services, to be implemented at a local level. We believe that the emphasis must be on partnership between the various local bodies which will have a stake in the provision of legal assistance. The need for services to be joined up is particularly acute in light of evidence of ‘referral fatigue’ whereby the more times people are referred to a different service, the less likely they are to follow up that referral.²⁹ Analysis of the Scottish Executive’s ‘Advice for All’ consultation found that three quarters of respondents supported the establishment of a new body responsible for the planning and coordination of publicly funded legal advice. The Scottish Consumer Council, one of our predecessor bodies, was fully in support of these proposals.

Although the progress in joining up advice services in a strategic way has been disappointing, there are beginning to be signs of movement, with the Legal Services (Scotland) Bill containing provisions giving the Scottish Legal Aid Board the general function of monitoring the availability and accessibility of legal services in Scotland.³⁰ We believe this is an important step towards ensuring a planned and coordinated approach to advice provision in Scotland which will be to the benefit of consumers. There have also been a number of other developments in the provision of advice, which can be measured against the consumer tests.

How well does this step currently measure against the consumer tests?

Access

Consumer Focus Scotland has a particular interest in the provision of publicly funded legal assistance. We have long-advocated that publicly funded legal assistance should be provided on a client-led basis, and that people should have access to the most appropriate services to deal with their problem. While we welcome the recent increase in upper disposable income eligibility limit for civil legal aid, which means nearly three quarters of the population will be potentially eligible for civil legal aid,³¹ there remain problems with how the legal aid scheme is administered. The civil legal aid scheme has traditionally focused on areas of practice such as family law and reparation, provided by private practice solicitors and is therefore solicitor-led.

29 See for example Pleasence, P., Balmer, N.J., Tam, T., Buck, A., Smith, M. and Patel, A. (2008) *Civil Justice in England and Wales: Report of the 2007 English and Welsh Civil and Social Justice Survey*, London, Legal Services Commission, LSRC Research Paper No. 22.

30 Legal Services (Scotland) Bill section 96 – as introduced

31 Scottish Legal Aid Board (2009) *Scottish Legal Aid Board Annual Report 2008-09*, Edinburgh: Scottish Legal Aid Board

To date, this has meant that there has been no strategic approach to the provision of publicly funded legal assistance. This has resulted in patchy service provision and consequently unmet legal need in some areas, in terms of both geography and subject area. Indeed, the Scottish Legal Aid Board's own research identifies Aberdeen and Aberdeenshire, and West Lothian council area, as geographic areas where there are potential access to justice concerns across a wide range of topic areas. Protective orders and social welfare law being subject areas where there are particular concerns about the low numbers of applications being received nationally.³² We have supported the use of solicitors directly employed by the Scottish Legal Aid Board to provide civil legal assistance in geographic and subject areas where there is currently a lack of private sector supply and have welcomed the greater flexibility for such employment arrangements introduced by the Legal Profession and Legal Aid (Scotland) Act 2007.

Consumer Focus Scotland sees the opening up of the ways of delivering legal services to be an important means of improving access to justice and combating unmet legal need. The majority of legal services are delivered by private practice solicitors and their role will continue to be crucial in ensuring consumers have access to justice. We do, however, believe consumers are best served by the 'complex mixed model'³³ of advice provision, with services delivered by the private, public and voluntary sectors. This model provides consumers with a range of advice services to suit their particular personal and legal circumstances. It is crucial for this model to work effectively that mechanisms are in place to ensure speedy and effective referrals between services.

The success of the Scottish Legal Aid Board's Civil Legal Assistance Office in Inverness, designed to complement rather than compete with existing private practice solicitors, shows how consumers can benefit from suppliers working cooperatively. However, people should be directed towards the most appropriate adviser for their problem, who may not always be a lawyer and public funds should be made available to ensure that these services are provided. We welcomed the provisions in the Legal Profession and Legal Aid (Scotland) Act 2007 widening the Scottish Legal Aid Board's powers to fund the advice sector. While we welcomed the announcement in November 2008 that the Board was to be given monies to administer a grant funding programme, we are disappointed that the provisions enabling the Board to fund registered advice agencies on a case-by-case basis have never been enacted. Non-legally qualified advisers currently make a significant contribution to the provision of legal advice, assistance and in some cases, representation, particularly in the area of social welfare law, and opening up advice agencies' funding to include legal aid would be a key means of ensuring such agencies can adequately meet the advice needs of consumers.

We also believe it is critical that services exist to provide consumers with access to advice at any stage in the process when they may require it. While it would be preferable for consumers to seek advice at an early stage to prevent their problems from escalating, we recognise that for many people this is not the reality. To this end, in 1997 the SCC, together with Citizens' Advice Scotland, set up the first in-court advice service, in Edinburgh Sheriff Court, designed to give free legal advice and other assistance to unrepresented litigants. There is strong evidence that the in-court advice services, where they exist, have been viewed as a great success by all

32 The Scottish Legal Aid Board (January 2009) *Patterns of Civil Supply: Response to Findings*, http://www.slab.org.uk/about_us/research/Patterns_Supply/Archive/Supplyofcivilassistance07-08.htm

33 Scottish Executive (2004) *Strategic Review on the Delivery of Legal Aid, Advice and Information. Report to Ministers and the Scottish Legal Aid Board*, Edinburgh: Scottish Executive

involved, including clients, sheriffs, solicitors and advice agencies and court staff.³⁴ We have long called for in-court advice services to be rolled-out nationally, and are therefore delighted by the Scottish Legal Aid Board's recent commitment to enhance and expand the existing in-court advice services, as well as funding new projects.³⁵ We believe such advice services have an important role in ensuring access to justice for those who have been unable, for whatever reason, to access advice at an earlier stage.

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, and concerns about costs have been found to be a common reason for not consulting a solicitor to help with a problem.³⁶ While the provision of publicly funded legal assistance is crucial to access to justice, Consumer Focus Scotland believes access to legal and advice services could be improved by looking at alternative means of funding disputes. For example, we think there is merit in considering how people might be persuaded to take up private means of funding such as before or after the event insurance. The lack of consumer awareness of before the event insurance must be addressed to ensure that those who hold such policies appreciate the potential they offer.

The SCC, and now Consumer Focus Scotland, has also been supportive of the use of speculative (or conditional) fee arrangements, whereby a lawyer will not receive a fee unless their client wins their case. Under such agreements, the client agrees that their lawyer will receive an uplift on the fee otherwise payable if they are successful, in order to encourage the lawyer to take the risk of a case for which they may get no payment if they lose. Although the use of contingency fees, a funding arrangement whereby a solicitor will take an agreed percentage of any award made to their client, are not permitted under the current rules, we also think there is merit in exploring further what benefits these might offer to consumers. Although there are perhaps limited circumstances in which they may be useful, the development of multi-party actions being one such area, we see potential for contingency fees to 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. It is our understanding that the Scottish Government intends to consult on contingency fees as part of its response to the civil courts review recommendations and we look forward to feeding into that discussion at a later date.

Choice

The improvements in funding for advice services should not only increase access, but also ensure consumers have increased choice of services available. Consumer Focus Scotland believes, however, that consumer choice in relation to legal and advice services should not be limited to choice between traditional models of service, but also that innovative ways should be found to deliver legal services. The SCC, and now Consumer Focus Scotland, for a long time has campaigned for the need to open up competition in the market for legal services in Scotland and to look for new ways of delivering these services. The SCC was a member of the Research Working Group on the Legal Services Market in Scotland, which examined the market for legal services in Scotland. Although levels of competition varied, the group found

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

35 Legal Advice for People Facing Repossession and Debt, Scottish Legal Aid Board News Release, 6 May 2009, available at <http://www.slab.org.uk/news/documents/grantfundingGENERALPRESSfinalforwebpdf.pdf>

36 See note 12

relatively low levels of competition in executry work, family law, welfare, debt and housing law and consumer law.³⁷ We support the liberalisation of the legal services market in Scotland, subject to the necessary consumer protections being put in place. We believe this will result in more user-friendly, high-quality legal services in Scotland.

We therefore fully support the principle behind the Legal Services (Scotland) Bill to remove restrictions on the types of business models under which solicitors can offer legal services, while allowing the traditional model to remain an option for those who wish to carry on practising within that structure. We also welcome the provisions within the Bill for creating a process for other professionals to apply for approval to undertake confirmation services, and consider such a move to be in the interests of greater competition and consumer choice. We believe opening up competition in the legal services market offers many potential advantages for consumers including:

- **Increased choice** in deciding where to go for legal and some non-legal services
- **Reduced prices** through economies of scale and reduced transaction costs
- **Better access to justice** for some consumers in rural areas and some communities
- **More consumer-focused service** through external finance, specialist non-legal expertise and approachability
- **Greater convenience** through ‘one-stop shopping’ and increased opening hours
- **Increased consumer confidence** through improved reputation and branding of legal services

We believe enabling new business models to enter the legal services market will improve the choice of services open to consumers as well as improve access to justice. Nevertheless, increased competition and choice must not be at the expense of quality and we would emphasise that the choice available to consumers must be between high quality, accessible and affordable services.

Representation

To ensure consumers’ needs are adequately represented in the provision of legal services, it is crucial that the consumer voice is heard in legal services policy. To this end, the SCC and Consumer Focus Scotland have actively campaigned for significant non-lawyer membership of the Council for the Law Society of Scotland. It has been a considerable drawback for a professional organisation which has a statutory responsibility to promote the public interest that its decision-making body has no non-solicitors amongst its membership, leaving it open to criticism that its views of what is in the public interest are not sufficiently informed by opinions from outwith the legal profession. We welcome the provisions within the Legal Services (Scotland) Bill that ensure the regulatory committee of the Society has 50 per cent lay membership with a lay chair, but we maintain that a similar constituency is required for the Society’s Council. Although a significant development in ensuring the interests of consumers are represented, we do not think the Society’s current proposals for 20 per cent lay membership of the Council goes sufficiently far enough. We are also disappointed that there are no provisions ensuring the consumer interest is adequately represented within the governance framework of the Faculty of Advocates.

37 Scottish Executive (2006) *Report of the Research Working Group on the Legal Services Market in Scotland*, Edinburgh: Scottish Executive

Redress

We believe that those who use publicly funded legal and advice services are entitled to expect that those providing those services, whoever they may be, are competent, have adequate training and expertise, and that the services are of a good standard. All service providers should be subject to the same minimum standards for the same type of advice. The SCC was actively involved in the Law Society of Scotland's review of its standards in 2008 and we believe adopting a more concise approach to outlining what standards are expected of solicitors will be to the benefit of consumers. We believe the Scottish Government has a role in regulating markets where there are concerns about quality or consistency of advice standards, but as such we have, for example, supported recent proposals to regulate non-lawyer will writers.³⁸

We remain concerned, however, about the lack of consistency in quality standards for advice agencies. There are a variety of quality standards in place for advice agencies, and some smaller independent advice agencies may have no clearly defined set of standards and may not be adequately monitored, other than on their financial accountability rather than on the quality of advice. While many of the current quality standards schemes work well, we would like to see an integrated set of standards, with due recognition given to existing quality assurance systems and effective passporting of services who have these systems, for all advice agencies. We believe such an approach would have the benefit of helping consumers know what to expect from advice agencies, and ensure consumers receive a good standard of advice provision, whichever agency they use. We welcomed the commitment to an over-arching quality assurance system set out in Advice for All, which led to provision in the 2007 Act for the Scottish Legal Board to establish and maintain a register of advice agencies approved to provide legal advice and assistance.³⁹ As the Scottish Government has yet to enact the provisions allowing the Board to fund registered advice agencies on a case-by-case basis, such a register has not been established. We believe there is merit in revisiting this work and we would like to see the creation of such a register, following the approach suggested by Advice for All. We think that, given the substantial turnover of volunteer advisers within many agencies, it makes sense that, while individual advisers should be required to follow the code, a specific 'compliance' person is designated within each agency, who is registered with, and therefore responsible and answerable to, the Board.

While having suitable standards in place for advice services should protect against problems arising, it is crucial that if things do go wrong, consumers have a means of putting things right. Consumers who use lawyers or advice services do so at important and often stressful and difficult times in their lives. They place important transactions in the hands of their lawyers, and if things go wrong with that relationship it can have a devastating effect on client confidence. Where dissatisfaction does arise, consumers need to have no doubt about the impartiality of the dispute resolution mechanism.

The SCC for a long time campaigned to ensure that complaints about lawyers in Scotland are handled in a way that operates in the interests of Scottish consumers. In 1999, its research into the experiences of those who had complained to the Law Society of Scotland about a solicitor found that half of those who responded believed that their complaint had not been handled fairly.⁴⁰ The research recommended that an independent complaints handling body be set up,

38 Consumer Focus Scotland (2010) *Consumer Focus Scotland Supplementary Evidence on the Legal Services (Scotland) Bill*, Glasgow: Consumer Focus Scotland

39 Legal Profession and Legal Aid (Scotland) Act 2007 section 67, which amends the Legal Aid (Scotland) Act 1986

40 Scottish Consumer Council (1999) *Complaints about Solicitors: a study of consumers' experiences of the Law Society of Scotland's complaints procedure*, Glasgow: Scottish Consumer Council

and the SCC was subsequently an active campaigner on that issue, contributing heavily to the Justice 1 Inquiry into Regulation of the Legal Profession and to the then Scottish Executive consultation on reforming complaints handling and building consumer confidence in regulation of the legal profession in Scotland. Our view is that an independent complaints handling body is the only way to ensure that consumers can have confidence in the adjudication of legal complaints and the SCC was therefore delighted that its research and wider involvement in this area eventually resulted in the establishment of the independent Scottish Legal Complaints Commission under the Legal Profession and Legal Aid (Scotland) Act 2007. We were particularly supportive of the rules surrounding membership of the Scottish Legal Complaints Commission, which dictate that the Commission must have a non-lawyer majority and a non-lawyer chair.⁴¹ We believe this is an important step to ensure that the Commission is seen as truly independent of the legal profession. The Commission began operation on 1 October 2008 and we view it as a welcome measure to ensure consumers have an adequate means of redress when things go wrong.

We believe, however, that problems remain with the current system. Although we welcome the Commission's role as a single gatekeeper for all complaints, we expressed concerns that distinguishing service and conduct complaints could cause confusion for consumers, particularly as many complaints will have elements of both types of complaint. Consumer Focus Scotland is concerned that these problems will be exacerbated by the current proposals within the Legal Services (Scotland) Bill to add a third type of complaint – regulatory complaints – for licensed legal providers. We believe this will add to confusion for consumers, and would like the landscape to be simplified.

The Way Forward

There have been a number of significant improvements in this area in recent years. The establishment of an independent Scottish Legal Complaints Commission has been a significant step forward for the interests of consumers, giving them greater confidence in the independence and impartiality of the complaints system. The Legal Profession and Legal Aid (Scotland) Act 2007, under which the Commission was established, has also brought a number of other access to justice benefits, notably the powers it gives to the Scottish Legal Aid Board to respond to issues of access through its grant funding powers and increased flexibility to directly employ solicitors. We have long called for in-court advice services to be rolled-out nationally so we are particularly pleased by the Scottish Legal Aid Board's recent commitment to enhance and expand the existing in-court advice services, as well as funding new projects. We have also welcomed the recent significant increase to the disposable income limit for civil legal aid eligibility, which is estimated will leave approximately three quarters of the population as potentially eligible for civil legal aid.⁴² The provisions within the current Legal Services (Scotland) Bill giving the Scottish Legal Aid Board the powers to monitor the availability and accessibility of legal services in Scotland is another significant step forward in ensuring consumers have access to justice.

⁴¹ Legal Profession and Legal Aid (Scotland) Act 2007 Schedule 1

⁴² See note 31

Of the four steps to removing barriers to access to justice, this second step is the area which has seen the most notable change to the benefit of consumers in recent times. However, there are still significant gains to be made. While there have been reforms to improve consumers' access to advice, there has been little significant development in terms of *joined-up* advice services. In order to improve this step to the benefit of consumers we believe the following action should be taken:

- The Scottish Government should implement the full range of powers given to the Scottish Legal Aid Board under the Legal Profession and Legal Aid (Scotland) Act 2007. Allowing advice agencies to be funded through legal aid would be an important way of increasing access and choice for consumers, as well as increasing those agencies' funding.
- A number of previous reviews⁴³ undertaken since devolution should be revisited to identify any further steps to improve access to justice that could be taken. In particular, consideration should be given to the ways in which coordination of advice services could be improved.
- More research should be undertaken exploring options for funding for advice and litigation, including contingency fees, before the event insurance and after the event insurance.
- One of the most significant benefits for consumers could be the opening up of legal services to competition. By enabling firms to respond flexibly and innovatively to clients' needs, there is great potential for increasing the accessibility of advice services for consumers and for these services to be much more client-focused. We believe passing the Legal Services (Scotland) Bill will be a key development in advancing the interests of consumers.

⁴³ See for example Scottish Executive (2001) *The Review of Legal Information and Advice Provision in Scotland*, Edinburgh: Scottish Executive; Scottish Executive (2004) *Strategic Review on the Delivery of Legal Aid, Advice and Information. Report to Ministers and the Scottish Legal Aid Board*, Edinburgh: Scottish Executive; Scottish Executive (2005) *Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward*. Edinburgh: Scottish Executive Social Research

Step Three: An Emphasis on Informal Means of Resolving Disputes

We have a long-standing interest in ensuring that consumers who become involved in disputes have access to appropriate and affordable means of resolving them. However, this need not necessarily mean access to the courts and it is therefore a mistake to think of civil justice only in terms of court processes. While most people agree that the courts are an important way for people to enforce their rights, on the whole, those involved in disputes are more interested in finding a resolution to their problem or obtaining compensation for harm or loss than necessarily enforcing their legal rights.⁴⁴ We also 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.⁴⁵ Those who actually end up in a court or tribunal tend to express high levels of dissatisfaction with the process. The Paths to Justice Scotland research found that fewer than half of those whose dispute was resolved by a court or tribunal thought the decision was fair, as opposed to 80% of those who reached an agreement.⁴⁶ The evidence clearly suggests that, in general, people prefer processes where they have more direct control over the process and the outcome.⁴⁷ Consumer Focus Scotland therefore has long been a supporter of informal means of resolving disputes, particularly mediation.

We have also been actively involved in recent developments in relation to the administrative justice system. Administrative justice broadly encapsulates the systems by which public bodies make decisions that affect consumers' rights, and the systems used for resolving disputes about these decisions, such as complaints handling processes and tribunals.⁴⁸ There have been a number of recent developments in this area, including the Fit-for-Purpose Complaints System Action Group, chaired by Douglas Sinclair, then Chair of the Scottish Consumer Council, which considered how to improve the complaints-handling system in Scotland, and the Administrative Justice Steering Group, established by the Scottish Public Services Ombudsman, in conjunction with the Scottish Committee of the Council on Tribunals with the support of the then Scottish Executive and for which Consumer Focus Scotland provided policy support. The Administrative Justice Steering Group (AJSG), produced two reports for the Scottish Government on the administrative justice framework in Scotland, published by Consumer Focus Scotland, the most recent of these being published in June 2009.⁴⁹ Many

44 See note 12

45 See note 12; Scottish Consumer Council (1997) *Civil Disputes in Scotland: a report of consumers' experiences*, Glasgow: Scottish Consumer Council

46 See note 12

47 See note 12

48 Consumer Focus Scotland (2009) *Administrative Justice in Scotland – The Way Forward: The final report of the Administrative Justice Steering Group*, Glasgow: Consumer Focus Scotland

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

more people make use of the administrative justice system in Scotland than the court system⁵⁰ and it therefore plays an important role in the informal resolution of disputes.

How well does this step currently measure against the consumer tests?

Access

The SCC and Consumer Focus Scotland have always been at the forefront of encouraging the need for a greater emphasis on informal dispute resolution, particularly mediation. We believe that mediation can offer to a whole range of people – those involved in civil disputes, patients, parents and pupils, neighbours, families, juvenile offenders and their victims - an accessible, affordable means of resolving their disputes in appropriate cases. Mediation 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. Given that both parties have indicated willingness to try to resolve the dispute, there is likely to be more trust between them than there would be in a court. This should in turn make it easier for the parties to communicate with each other. The increased availability of mediation would be an important step towards achieving better access to justice for consumers in Scotland.

In December 2001, SCC published *Consensus Without Court*,⁵¹ which considered how the use of mediation might be encouraged in Scotland in relation to non-family civil disputes. This found that the principal barrier to the development of mediation in Scotland was cultural and that there was a general lack of awareness of and/or support for mediation among members of the public, the legal profession, other advisers and the judiciary. SCC held a seminar on non-family mediation in April 2002, where there was a general consensus that mediation was a positive step, and should be given a higher priority. In order to try and progress this issue, in 2003 SCC funded a short study trip to Maryland for a delegation of key stakeholders, including members of the judiciary, legal profession, Scottish Government officials, media, mediation community and the Convener of the Justice 1 Committee of the Scottish Parliament. The trip was used to observe first-hand various mediation initiatives within the state of Maryland and meet those leading these initiatives, which it was hoped would help delegates gain some insight into how mediation could be employed across a diverse range of subject areas in a Scottish context. We continue to have well-developed links with the Maryland Mediation and Conflict Resolution Office.

However, while mediation is fairly well developed elsewhere, notably in the USA, Canada and Australia, it has been slower to progress here, although there has been some success in family cases and community mediation. While community and family mediation receive government funding, the only publicly funded mediation service dealing with civil and consumer disputes in Scotland is the Edinburgh mediation service, which was previously jointly managed by SCC and Citizens' Advice Scotland as part of the in-court advice service and is now funded by the Scottish Legal Aid Board. This project was positively evaluated in 2002 and was found

50 In 2008, 124,039 actions were initiated in the Sheriff Court. Source: Scottish Civil Courts Review (2009) Report of the Scottish Civil Courts Review. Edinburgh: Scottish Civil Courts Review. In 2008-09, examples of cases heard by tribunals include: 22,351 cases received by Employment Tribunals in Scotland; 42,866 hearings at the Children's Hearings and 7,513 cases received by the Valuation Appeal Committees. Source: Administrative Justice and Tribunals Council statistics, available at <http://www.ajtc.gov.uk/stats/index.htm>. The Administrative Justice System is defined broadly by the Administrative Justice Steering Group and includes complaints systems used to resolve disputes and grievances. In 2008-09, there were 10,967 complaints received by NHS organisations in Scotland. Source: Information Services Division Scotland, available at <http://www.isdscotland.org/isd/4424.html>. The Scottish Public Services Ombudsman received 2875 complaints in 2008-09. Source: Scottish Public Service Ombudsman Annual Report 2008-09.

51 Scottish Consumer Council (2001) *Consensus Without Court: Encouraging Mediation in Non-Family Civil Disputes in Scotland*. Glasgow: Scottish Consumer Council.

to meet a previously unidentified need for consumers.⁵² Two other in-court mediation pilots have recently concluded and are awaiting publication of their evaluation report. Aside from the Edinburgh service, the only real progress in civil mediation in recent years has come from the commercial sector, where research has found largely positive perceptions of and approaches to mediation amongst the legal profession.⁵³ While we are pleased this sector is recognising and taking advantage of the benefits mediation offers to their clients, we are concerned that access to informal means of dispute resolution remains limited for individual consumers.

There also remain issues with access to the administrative justice system. In its evaluation of the current system, the AJSG identified a number of problems with the current system, including that consumers are often confused by the complexity of the grievance system and have difficulty getting their grievance started; that the principles for allocations of grievances to different institutions are unclear and/or not consistently applied, and that problems of high costs and other access barriers exist across a number of grievance procedures.⁵⁴ The second report of the AJSG recognised that the complaints-handling processes, ombudsmen, tribunals and alternative methods of dispute resolution can provide better, more accessible and less costly options than the courts when someone wants a quick and inexpensive resolution to their case and where the value of any claim or grievance is relatively low.⁵⁵ However, the overall opinion of the AJSG was that the current administrative justice system does not meet the needs of users, and it identified areas where improvements could be made.

The Scottish Government has announced it will take forward the recommendation in the first report of the AJSG for a new tribunal service for Scotland to be established and will be seeking views on how such a service could work in practice. This may help address some of the problems identified above, but as was recognised by the AJSG, the user must be at the centre of any reforms.

Choice

The recently published report of the civil courts review recognised that mediation and other forms of alternative dispute resolution provide ‘an opportunity for dispute resolution in cases where the confrontational process of litigation is inappropriate’.⁵⁶ The report recognised that mediation can be particularly useful where there is a continuing relationship between the parties. A settlement reached through mediation, which has been agreed by both parties, is more likely to preserve that relationship than a court judgment in favour of one party. In addition, mediation is more likely than any other method of dispute resolution to bring out any underlying tensions, and can help the parties to consider together how they might address such problems, and improve their relationship for the future. This has been found to be a benefit in both individual and commercial disputes.⁵⁷

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

53 Clark, B. and Dawson, C. (2007) ‘Scottish Commercial Lawyers and ADR: Awareness, Attitudes and Experience’, *Civil Justice Quarterly*, April 2007

54 See note 48

55 See note 48

56 See note 5

57 See, for example, Scottish Government (2007) *Public Awareness and Perceptions of Mediation in Scotland*, Edinburgh: Scottish Government; Clark, B. and Dawson, C. (2007) ‘Scottish Commercial Lawyers and ADR: Awareness, Attitudes and Experience’, *Civil Justice Quarterly*, April 2007

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.⁵⁸ Research conducted by the SCC 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.⁵⁹ 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.⁶⁰ There are concerns that solicitors and other advisers are not aware of and/or not notifying clients of the alternative options available to them, however. There is, for example, evidence from the commercial sector that while awareness of mediation was high, solicitors have lower levels of awareness of other alternative dispute resolution processes. This research also questioned, given the lack of training many solicitors had received on mediation, whether they have a full understanding of what the mediation process entails.⁶¹ If advisers do not know of, or fully understand the processes available, this may impact on their ability to adequately advise their clients, and therefore limit the choice available to consumers about how to resolve their disputes.

However, while it is clear that most people would prefer to take a more consensual approach to resolving their disputes, the civil justice system in Scotland remains largely adversarial. The final report of the Civil Justice Advisory Group chaired by Lord Coulsfield and published by the Scottish Consumer Council, noted clear agreement among stakeholders that the system should encourage the resolution of disputes at the earliest stage possible. The report acknowledged that the courts will always be central to the civil justice system, but concluded that they should be viewed as a last resort, should other less formal means of dispute resolution prove unsuccessful.⁶² The report of the civil courts review supported the principles that the civil justice system should encourage the early resolution of disputes, that cases should be dealt with proportionately and that efficient use should be made of resources.⁶³ Although it recognised that encouraging use of alternative dispute resolution in appropriate cases was consistent with these principles, the report does not recommend that the courts should be a resolution of last resort. We believe introducing court rules to this effect, whereby the courts should have the power to compel parties to at least consider mediation, would be an important contributor to ensuring a cultural shift among the judiciary, lawyers and court users, which would encourage greater choice of alternative dispute resolution being offered to consumers. We have in the past suggested that the possibility of introducing compulsory mediation is worth exploring, having seen the positive results of such schemes in other jurisdictions such as Canada;⁶⁴ however, the civil courts review report does not recommend compulsory referral to mediation by the courts.

There has been a commitment by the Scottish Government to encourage resolution of disputes through other methods of alternative dispute resolution, for instance in the introduction of the Arbitration (Scotland) Act 2010. This Act clarifies and codifies the laws surrounding arbitration

58 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

59 Scottish Consumer Council (1997) *Civil Disputes in Scotland: A report of consumers' experiences*, Glasgow: Scottish Consumer Council

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

61 See note 53

62 See note 1

63 See note 5

64 *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

in Scotland, bringing it in line with England and Wales. While arbitration may not always be the best option for consumers it may be less flexible than mediation in terms of the outcomes it can achieve, for example, and some schemes can be relatively expensive – arbitration can offer an accessible, quick and low-cost means of dispute resolution to consumers in appropriate cases.

We hope that the Arbitration (Scotland) Act 2010 and the comments on the benefits of mediation in the civil courts review report will lead to an increased emphasis on methods of alternative dispute resolution. We are pleased that the civil courts review’s recognition of the potential advantages of mediation resulted in the recommendation that a free in-court mediation service be established for claims of under £5000, and that the Scottish Government also consider establishing a mediation telephone helpline. However, we are disappointed that the civil courts review did not recommend that the courts should be a remedy of last resort. We believe 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. Evidence from solicitors also suggests that by the time a case reaches court, parties’ positions may have become too entrenched to fully benefit from mediation.⁶⁵

Education

It is clear from the research conducted by SCC and others, that there is a lack of understanding and awareness of alternative methods of dispute resolution. We believe an awareness raising and training strategy is 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.⁶⁶

Redress

The second report of the AJSG provided an overview and analysis of the administrative justice system in Scotland. The report identified an emerging consensus that the aims of the administrative justice system should be:

- ensuring public bodies get it right the first time when making decisions
- ensuring that, where decisions are incorrect or treatment of citizens is otherwise defective, there are effective redress mechanisms
- ensuring that public bodies learn from their mistakes, increasing the likelihood of getting it right the first time⁶⁷

While the preferable situation for consumers is that public bodies get it right the first time, the AJSG found a problem of defective initial decision-making and other administrative failings and that incorrect initial decisions were happening more frequently than they should be.⁶⁸ Worryingly, while the AJSG found that effective redress mechanisms were operating ‘tolerably well’, they found the most serious deficiency to be one of access. The report stated that ‘citizens’ ability to use these remedies effectively is compromised by various barriers including cost, lack of expertise, low visibility of some complaints mechanisms and lack of systematic

65 See note 53

66 See note 51

67 See note 48

68 See note 48

and comprehensive availability of advice and assistance'.⁶⁹ We hope that the recommendations from the Fit-for Purpose Complaints System Action Group will lead to greater simplification and consumer focus in complaints handling processes, which would be to the benefit of consumers. We are also pleased that bodies such as the Scottish Legal Complaints Commission (SLCC) are founded on the principle that consumer complaints should ideally be dealt with quickly and effectively at a local level, by the business or professional involved, so far as possible. Many complaints can be resolved by way of an apology or informal agreement at this stage. Only where local resolution fails, should the complaint then go to a higher complaints-handling body.

The SLCC may also offer parties the opportunity to try to resolve the complaint through mediation, prior to a complaint being investigated. We welcome the commitment to offer parties this option and would like to see other complaints resolution processes adopting such an approach. We believe there is potential for mediation to be used by a wide range of organisations, including public bodies, as a way of resolving complaints and other disputes. In 2001 the Lord Chancellor made a 'pledge' that all UK Government departments would use alternative dispute resolution to settle their own disputes in all suitable cases.⁷⁰ We would like to see widespread adoption of such pledges amongst the public and private sectors.

We recognise that if the use of mediation is to be encouraged, issues in relation to the quality assurance of mediation services require to be addressed. Those who use such services are entitled to expect that the mediators providing those services are competent, have adequate training and expertise, and that the services will be of a good standard. Those who make referrals to such services will also wish to have such assurances. At present, there is no universally accepted set of quality standards for mediation, but the Scottish Mediation Network has developed a set of benchmark standards for admission to its register of mediators. Admittance to the register is not compulsory, however, and we believe this could be viewed as a weakness in reassuring parties about the quality of mediation services. If there is to be greater emphasis on informal means of resolving disputes in the future, there may be merit in considering whether such a register should be compulsory for all mediators operating in Scotland.

The Way Forward

Following the reports of the Scottish civil courts review and the Administrative Justice Steering Group, both the civil justice system and administrative justice system are at a point of transition. These reports have recognised that neither system is working to the benefit of its users. This presents an opportunity for greater connection to be made between the two systems as changes are made and reforms undertaken, to make improvements to the benefit of consumers.

The potential for significant improvements to be made to this step will only be fully realised if there is wider recognition of the potential benefits of informal means of resolving disputes. The SCC's work on the issue of mediation confirms that significant effort is required to raise understanding and awareness of alternative dispute resolution, so it can be considered a viable alternative to the courts amongst the public, lawyers and the judiciary alike. We believe the benefits of mediation for consumers merit a stronger stance being taken by the Scottish Government than that suggested by the civil courts review report, and we hope it endorses the Civil Justice Advisory Group's conclusion that the courts should be viewed as a remedy of last resort. We believe this commitment will lead to greater emphasis on informal means of resolving disputes, which we believe would be in the interests of consumers.

⁶⁹ See note 48

⁷⁰ See, for example, Ministry of Justice (2009) *Annual Pledge Report 2007/08: Monitoring the effectiveness of the government's commitment to using alternative dispute resolution*, London: Ministry of Justice

Step Four: More User-Friendly Formal Dispute Resolution Processes

Although we are keen that disputes be resolved at as early a stage as possible, it is inevitable that some problems will require to go to a formal dispute resolution process. It is therefore crucial that such processes are accessible and user-friendly for those who are involved in civil disputes. We have long been concerned that at present court processes in particular can be confusing, intimidating and even frightening for parties, especially for those who are unrepresented. Research into the views and experiences of civil sheriff court users found that those who were unrepresented were particularly likely to be concerned about having to stand up in court on their own to address the sheriff and not being able to understand the language being used by the sheriff and other legal professionals.⁷¹ Court processes and procedures are complex and often very difficult for non-lawyers, even well-educated and articulate individuals, to follow.

Consumer Focus Scotland does 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.

The SCC campaigned for a civil justice review for more than 25 years. In November 2005, it published *The Civil Justice System in Scotland - a case for review?*, the final report of the civil justice advisory group chaired by the Right Honourable Lord Coulsfield, supported by the then Scottish Executive and funded by the Nuffield Foundation.⁷² The report concluded that there was a need for review of a number of important aspects of the civil justice system in Scotland. The SCC was delighted when in February 2007, the Minister for Justice announced that Lord Gill, the Lord Justice Clerk, would lead a review of the civil courts in Scotland, which was to focus on four of the six areas identified within the report as being in need of review. The report of the Scottish civil courts review was published in September 2009. We have welcomed the recognition by the review that the current court system, in providing a system that is 'slow, inefficient and expensive' is failing to deliver justice.⁷³ The report makes far-reaching recommendations on improving access to civil justice in Scotland which, if implemented, will result in considerable improvements to the experience of individual users of the courts.

71 See note 19

72 See note 1

73 See note 5

How well does this step currently measure against the consumer tests?

Access

Although we are keen that cases be resolved at as early a stage as possible, preferably outwith court processes, there is a need to ensure that people are able to access the formal dispute resolution processes should early resolution not be possible. The SCC and Consumer Focus Scotland have campaigned for court processes to be made simpler and more user-friendly. The SCC was instrumental in the introduction of the small claims procedure in Scotland, seeing the procedure as providing an important means of increasing access to justice for individuals who wished to pursue consumer claims. It also actively campaigned for an increase in the small claims limit, and welcomed the change in legislation in 2008 which increased the limit from £750 to £3000.

We remain concerned, however, that although the small claims procedure is seen as more informal and user-friendly than other court procedures and is designed for consumers to use without the need for legal representation, research has found that even that procedure is not operating as informally as was intended, placing unrepresented litigants at a disadvantage.⁷⁴ While changes to that procedure introduced in 2002 were designed to make the system more user-friendly, anecdotal evidence suggests that this has not been a great success.

We are therefore concerned that many people are likely to be put off making a small claim application because they are frightened to go to court and/or believe that it will be too difficult for them to take the case by themselves. The SCC's research into knowledge of consumer rights has found that, although just over half of our sample had heard of the small claims court, only 7% said they would consider using it to resolve a consumer problem.⁷⁵

Although we would prefer that courts be viewed as a remedy of last resort and that cases be dealt with outwith the courts wherever possible, it is unacceptable that consumers or others should be given rights which they cannot effectively enjoy. In order to improve access to the civil courts, we believe there should be a comprehensive overhaul of all current court processes, to make them easier to use and simpler to understand and therefore to encourage more consumers to make use of the processes that exist to help them. This includes simplifying the content and tone of court forms. We are therefore delighted that the civil courts review has recommended introducing new simplified rules for low-value cases, with these rules to be as clear as possible and written in plain English. The review also recommends that rules should be drafted for party litigants, rather than practitioners, explaining how the procedure works and how the judge will deal with the case.⁷⁶ We believe such recommendations, if adopted, will help reduce the fear and uncertainty associated with attending court, and will make consumers much more confident at pursuing or defending actions. As such, they have the potential to play an important role in improving access to the courts. It is crucial, however, that rules, guidance and forms are consumer tested to ensure they provide the information consumers require and can be easily understood.

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

75 See note 26

76 See note 5

We also believe the courts could be more user-friendly if there was greater separation between civil and criminal business. 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.⁷⁷ We consider greater separation of civil and criminal business to be a key step in removing barriers to accessing the civil courts and therefore, while we acknowledge resource constraints make such a course of action difficult in the current economic climate, we are disappointed that the civil courts review has not recommended such a course of action. The recommendation for a new third tier of court appears very similar to the existing structure of the sheriff court, with a mixture of criminal and civil business, and we are concerned it may retain the same problems, not only of perceptions amongst the public but also the impact of criminal business on the civil courts. We believe the creation of new court procedures provides the opportunity to look at whether the courts could be structured differently, to the advantage of court users.

We have long advocated for greater specialisation within the courts and judiciary, particularly for consumer, debt and housing cases. We believe that, in order to ensure that court procedures are fair to those who use them, those sitting in judgement should have a thorough knowledge of, and interest in, the area of law concerned in each case. We believe there would be advantages in dealing with certain types of cases in a separate, less formal forum outwith the courts altogether, which could take a more inquisitorial approach to resolving disputes, rather than the traditional adversarial nature of the courts. The restructuring of the courts as suggested by the civil courts review could create such a forum and we believe there would be advantages in exploring how this forum could link with the administrative justice system. For example, housing cases are currently resolved using a variety of different court processes as well as tribunals such as the Private Rented Housing Panel and Rent Assessment Panel. We believe there could be merit in exploring whether all housing cases could be resolved within one forum.

Even if the courts were to be made more user-friendly, other barriers to access to the courts remain. It is clear from the Paths to Justice Scotland research⁷⁸ that cost, and fear of cost, is a major deterrent to many people in pursuing a claim. 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.⁷⁹ We have been long-time supporters of the introduction of a multi-party action procedure in Scotland, believing such actions to have the potential to enable litigation to be conducted more efficiently and making a remedy a practical possibility, particularly where large numbers of people have each lost small amounts which it would not be economic to litigate about individually. We have been active campaigners on this issue, the SCC having published two reports since 1982 calling for the introduction of a multi-party action procedure⁸⁰ and holding a seminar for stakeholders on the topic. We are therefore delighted that the introduction of such a procedure has been recommended by the civil courts review and is viewed by the Scottish Government as being one area where it is hopeful for early consensus and implementation.⁸¹ There are also proposals for collective redress schemes within the UK Government's Financial Services Bill and its proposals for a Consumer Advocate. We believe the introduction of such a procedure will have real benefits for consumers of legal services.

77 See note 12

78 See note 12

79 See note 12

80 Scottish Consumer Council (1982) *Class Actions in the Scottish Courts*, Glasgow: Scottish Consumer Council; Scottish Consumer Council (2003) *A Class of their Own: Why Scotland Needs a Class Actions Procedure*, Glasgow: Scottish Consumer Council

81 Scottish Government letter of 27 October 2009 to the Scottish Parliament's Public Petitions Committee, available at <http://www.scottish.parliament.uk/s3/committees/petitions/petitions/submissions/sub-09/09-PE1234D.pdf>

We remain concerned that the current rules around court fees may also act as a barrier to access to the courts. Court fees, although fixed and often likely to represent a small proportion of overall costs, are an important component of the costs of going to court, particularly in lower value cases. The SCC welcomed the introduction of exemptions from the payment of court fees for those on legal aid and/or in receipt of means tested state benefits in 2002,⁸² for which we had long campaigned as being in the interests of access to justice. In 2008, we were also successful in our campaign to limit the proposed rise in court fees for small claims cases of £200 or less, which we regarded as disproportionate. While the cost of court fees may not be the primary 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.

We have also made clear to the Scottish Court Service that we believe that the current policy of 'full cost pricing' through court fees, introduced by the UK government in the 1990s, should be reviewed.⁸³ While we accept that litigants who can afford to do so should be required to pay towards the cost of their court case, the civil justice system, as was explicitly recognised by the previous Scottish Executive⁸⁴ and more recently by the civil courts review,⁸⁵ 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. Judges are public office holders and court users should not have to pay for their services. Therefore, we do not accept the principle of full-cost pricing, as we believe that government has some responsibility to finance the court structures through which disputes can be resolved.

Choice

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. Many consumers will have the skills and ability to take action themselves and we believe they should be supported to do so where they are able and willing. We welcomed the positive recommendations around self-help in the civil courts review and would like to see these implemented in early course. Research in the context of tribunals indicates that consumers are not necessarily disadvantaged without representation and indeed, in relation to some tribunals, those who had sought advice but were unrepresented were actually more successful than those parties with representation.⁸⁶ Overall, the research found that consumers' accessing pre-hearing advice reduced the 'representation premium' by almost 50 per cent.⁸⁷ It is therefore clear that where the processes are appropriate, and particularly where an inquisitorial approach is taken,⁸⁸ it is the experience of advice rather than representation which benefits consumers. However, as stated above, we recognise that current court processes and procedures are complex and often very difficult for non-lawyers, even well-educated and articulate individuals, to follow. Within such circumstances, we believe it is critical that consumers not only have access to representation should they wish it, but that they have a choice of representation.

82 Sheriff Court Fees Amendment Order 2002, Court of Session etc Fees Amendment Order 2002

83 Scottish Consumer Council (2008) *Response to the Scottish Court Service consultation paper on review of fees charged by the court of session, sheriff courts, office of the public guardian, accountant of court and high court*, Glasgow: Scottish Consumer Council

84 See note 4

85 See note 5

86 Adler, M. (2009) 'Tribunals Ain't What They Used To Be', article written for *Adjust* newsletter

87 See note 86

88 See note 86

While we have welcomed the recent significant increase to the disposable income limit for civil legal aid eligibility, which is estimated will leave approximately three quarters of the population as potentially eligible for civil legal aid,⁸⁹ we recognise that some people will still not have access to legal representation. This is likely to be for a number of reasons, including difficulty in finding a solicitor to take their case; the real or perceived cost of obtaining legal advice and/or representation; or because they leave it until very late in the process to seek assistance. It is therefore important that consumers have access to other forms of assistance and representation.

In Scotland, there is currently a confusing array of different rules on rights of audience for representatives who are neither solicitors nor advocates. Such representatives are not permitted at all in the Court of Session or in most sheriff court ordinary cause actions, including repossession cases. In small claims cases,⁹⁰ summary cause cases,⁹¹ cases under the Debtors (Scotland) Act 1987⁹² and the Debt Arrangement and Attachment (Scotland) Act 2002⁹³, the sheriff retains discretion to decide whether an authorised lay representative is a 'suitable person'. More recent court rules relating to sequestration proceedings provide, however, that the sheriff must be satisfied that the representative 'is able properly to represent the debtor'.⁹⁴

We are also aware that rights of audience have been granted to non-lawyers in Scotland's courts by virtue of certain UK legislation. The Commissioners for Revenue and Customs Act 2005, for example, provides that rules may be made granting rights of audience in the courts to Revenue and Customs officers. Similarly, section 49 of the Child Support Act 1991 provides for such rules to be made in respect of representation of any party in related proceedings by someone who is not a solicitor or an advocate.

The SCC for a long time campaigned for Sections 25-29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 to be brought into force, allowing suitably qualified non-lawyers to apply for rights of audience in Scotland's courts, ending the monopoly enjoyed by solicitors and advocates. While not supporting any particular application, it long argued that opening up the legal services market to greater competition meant greater choice and a reduction in the cost of legal representation. Consumer Focus Scotland has welcomed the announcement that the Association of Commercial Attorneys has been granted rights of audience in construction and building law cases and our hope is that this will encourage others to apply.

Consumer Focus Scotland also supports the use of McKenzie Friends in Scotland, who can provide unrepresented litigants with moral support and other assistance such as taking notes and quietly giving advice. We believe McKenzie Friends can offer valuable support to unrepresented litigants and may help the litigant present their case better. This can assist not only the unrepresented litigant but also the court and the other party involved in the case. We have also highlighted the fact there is legislation in England and Wales providing the court with a discretionary power to grant unqualified persons, including McKenzie Friends, a right of audience or the right to conduct litigation in relation to particular proceedings⁹⁵ and suggested

89 See note 31

90 Act of Sederunt (Small Claims Rules) 2002, rule 2.1

91 Act of Sederunt (Summary Cause Rules) 2002, rule 2.1. Note: lay representatives may normally appear only at the first calling of a summary cause case

92 Act Of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Rule 1.3

93 Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002

94 Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008, rule 15

95 Courts and Legal Services Act 1990 sections 27 and 28. See also Guidance of the President of the Family Division of the Judiciary of England and Wales: McKenzie Friends, dated 14th October 2008, available at http://www.judiciary.gov.uk/docs/pfd_guidance_mckenzie_friends_oct_2008.pdf

that there may be merit in considering whether similar legislation should be introduced in Scotland. The report of the civil courts review has recently recommended that McKenzie Friends be given a right of audience in exceptional circumstances.

We also believe other developments, such as the proposals within the Home Owner and Debtor Protection (Scotland) Bill to allow lay representation in mortgage repossession cases, have the potential to improve the choice open to consumers involved in court action. We would in particular see in-court advisers as an obvious and important group of potential lay representatives in repossession cases. We do, however, remain concerned that the choice in representation for consumers is a theoretical rather than practical one. The current evidence suggests that very few people are represented by a non-solicitor adviser in formal court hearings,⁹⁶ for which the major reasons appear to be 1) a lack of resources, and 2) the formality of court proceedings.⁹⁷ We believe many such non-solicitor advisers, particularly in-court advisers, will have sufficient knowledge and experience to represent clients in such hearings and are disappointed that more do not do so. We would welcome the appropriate investment and support being given to enable more non-solicitor advisers to represent in court, thus increasing consumer choice in terms of their representative.

We also believe more use may be made of lay representatives if the rules surrounding rights of audience for such representatives were clearer. We recognise the importance of striking a balance between protecting consumers and reassuring the court about the competence of any such representative, and making sure consumers have access to and choice of representation should they wish it. However, we would be disappointed if any of the proposed extensions of rights of audience for lay representatives as discussed above were to further complicate an already complex picture and we would have particular concerns if such rules were to further deter appropriate lay representatives from assisting consumers in court. We therefore believe there would be merit in reviewing all rules surrounding rights of audience for lay representatives, with a view to making the rules as uniform and cohesive as possible. We believe this would add clarity for consumers, the courts and the advice sector.

Information

Our research into the views and experiences of civil sheriff court users, commissioned with the Scottish Legal Aid Board, found that, while represented litigants felt they were kept reasonably informed by their solicitor, and those who had received advice from in-court advisers thought they had communicated well with their clients, a number of unrepresented litigants said they found it difficult to know what was expected of them during their case and wanted to be kept better informed by the court about their hearings.⁹⁸ The research found that:

- information about next steps to take
- how long it might take to resolve the issue
- what they should expect from a court appearance
- what will happen to them afterwards

96 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. Research from Citizens Advice Scotland has also found that very few advisers provided representation in the small claims or heritable court, although levels were higher in tribunals; see Citizens' Advice Scotland (1998) *Lay Representation in Courts and Tribunals*, Edinburgh: Citizens' Advice Scotland.

97 See, for example, Citizens' Advice Scotland (1998) *Lay representation in Courts and Tribunals*, Edinburgh: Citizens' Advice Scotland

98 See note 19

would all be helpful for litigants in terms of navigating the civil justice system and minimising their fear and concerns about the unknown.⁹⁹ There is therefore a need for much more information for users of the courts about how the system works and what to expect.

The report of the civil courts review recognised that access to information is not always as easy as it should be for consumers and the review makes a number of recommendations in terms of what information should be available, and from where.¹⁰⁰ We have welcomed the positive response within the review to the issues of public legal education and self-help, and believe these recommendations should be taken forward as a priority and in early course.

Representation

If those who use the courts, and the general public, are to have confidence in how the courts are run, it is important that the public and consumer interests are adequately represented on the governing body and rules councils. The SCC played an important role in ensuring that provision was made for non-lawyer members on the Sheriff Court Rules Council and has argued that similar non-lawyer representation was required on the Court of Session Rules Council, as recommended by the Agency Review of the Scottish Court Service (the 'Osler Review')¹⁰¹ and on the Lord President's Advisory Committee for recovery of judicial expenses. In its response to the civil courts review, the SCC supported the Osler Review's recommendation that the secretariat for the various Rules Councils should be provided by a single branch of the Scottish Court Service, and stated there may be a case for merging the Sheriff Court Rules Council and the Court of Session Rules Council.¹⁰² We therefore welcome the civil court review's recommendation to establish a Civil Justice Council for Scotland with responsibility for drafting rules of all the civil courts and keeping the civil justice system under review, and hope that if this proposal is progressed, that this Council will have adequate non-lawyer representation on its membership. Such members can provide valuable insight into issues that are of particular importance to non-professional users of the courts.

While we welcome the establishment of new governance arrangements for the Scottish Court Service by the Judiciary and Courts (Scotland) Act 2008, we are disappointed about the balance of representation on the new Scottish Court Service Board, which will take over the administration of the Scottish courts on 1 April 2010. The Scottish Consumer Council (SCC) welcomed the recommendations in the final report on the Osler Review that the Scottish Court Service should engage and consult with users and stakeholders, and that there should be greater transparency in decision-making at board level.¹⁰³ The SCC maintained throughout the Bill consultation process that the new body should have at least equal numbers of legal and non-lawyer members, and should be chaired by a non-lawyer. This would follow best practice, and would be in keeping with similar bodies within the justice field, such as the Judicial Appointments Board and the new Scottish Legal Complaints Commission.

While we are pleased that there will be non-legal/judicial members on the new body, we do not consider that three such members out of a total of thirteen¹⁰⁴ is sufficient. We would maintain that a fundamental principle of the Scottish Court Service is to provide accessible and good quality services to the public. While we welcome the legal obligation on members of the

99 See note 19

100 See note 5

101 Osler, D. (2006) *Agency Review of the Scottish Court Service*, Edinburgh: Scottish Executive Justice Department

102 Scottish Consumer Council (2008) *Response to Scottish Civil Courts Review: A Consultation Paper*, Glasgow: Scottish Consumer Council

103 See note 101

104 Judiciary and Courts (Scotland) Act 2008 Schedule 3 paragraph 2(3)(d)

Scottish Court Service governing body to take into account in particular the needs of members of the public and those involved in proceedings in the Scottish courts, we believe an important means of meeting this obligation would be greater representation of non-legal members on the governing body of the Scottish Court Service.

In addition, we do not believe the interests of consumers in how the courts operate can be well represented without conducting regular research with users of the courts. Such research should be a key tool not only to measure whether the court system meets the needs of users but will also assist in identifying areas where development is required. Unfortunately, to date there has been a lack of research focusing on court users, something Consumer Focus Scotland and the Scottish Legal Aid Board began to address with their research into the views and experiences of civil sheriff court users. The limited nature of that research highlighted areas where gaps exist and more work could be done. Areas highlighted as benefiting from further research include:

- research looking specifically at unrepresented litigants, identified to be a particularly vulnerable group
- research of court users involved in more complicated court processes, such as the ordinary cause procedure
- a mapping exercise of the advice and information available for litigants across all courts.¹⁰⁵ We believe such areas should be examined as a matter of urgency, particularly as reforms resulting from the civil courts review are taken forward.

Redress

Although there are clear processes in place for consumers to complain about their lawyer or court staff, it is much less clear how consumers can complain about members of the judiciary. While we entirely accept that the judiciary must have independence in making legal decisions, this should not mean that they cannot be held to account for their conduct where necessary. While judges and sheriffs are not employees, they are public office holders, paid for by the public purse. In order to ensure that it is receiving value for money, the public is entitled to expect them to be held to account, in the same way as others providing a public service should be publicly accountable.

While we do not believe that complaints about judicial conduct are currently a widespread problem, there is a need for a structured process for dealing with those complaints which do arise, to ensure public confidence in the judicial system. While we are pleased that the Judiciary and Courts (Scotland) Act 2008 gives powers to the Lord President to make rules for dealing with complaints about judicial conduct, we are concerned that the Act focuses solely on disciplining the judicial office holder. It is not clear how the complaint might be dealt with from the perspective of the complainer, who may be aggrieved and upset about the way in which the judge or sheriff has conducted him/herself. There does not appear to be any mechanism for any form of redress to the complainer. While we accept that judges and sheriffs are immune from suit, provision should be made for other suitable forms of redress, such as compensation for distress or inconvenience, an apology, an explanation as to what went wrong, or an assurance that the same thing will not happen again to someone else.

¹⁰⁵ See note 19

It would of course be necessary for any such process to filter out those who were simply unhappy with the outcome of their case, rather than the service they had received or the conduct of the judge. There would also need to be a transparent way of filtering out any frivolous or vexatious complaints, with provision for independent review. However, we believe that these difficulties can be dealt with; the priority should be to ensure that a clear and accessible complaints procedure exists, to deal with any valid complaints which do arise.

While the Act makes provisions for the appointment of a Judicial Complaints Reviewer with such powers as to review the handling of an investigation, we would suggest that there should be an independent complaints body for Scotland. We believe this is the best way to ensure a fair, open and accessible complaints procedure for making a complaint about treatment by, or the conduct of, a judge or sheriff.

The Way Forward

While there have been a number of developments aimed at improving the court system, many of which have had benefits for consumers, the civil courts review's analysis was that this piecemeal reform has left a system which is not fit for purpose. There is general recognition that the review's recommendations will be both expensive and long-term to implement, and the Scottish Government is currently considering its response to the recommendations. What should be fundamental to implementing any reform is recognising that the review's primary purpose was to improve access to justice for the people of Scotland. Reforms should not focus primarily on improving the administrative convenience to the courts or to make things easier for professional users; they must have real, tangible benefits for the ordinary users of the courts.

In light of this, Consumer Focus Scotland believes the initial focus for reforms must be to make those changes which will have the greatest impact for consumers. The SCC and Consumer Focus Scotland have campaigned for the introduction of a class actions procedure since 1982. We hope that the recommendations within the civil courts review for such a procedure to be introduced will be taken forward in early course. This recommendation, together with other proposals for a proposed Consumer Advocate and for multi-party actions contained within the UK Government's Financial Services Bill, has the potential to bring about real benefits for consumers. It will make a remedy a practical possibility for consumers who might otherwise have been unable to litigate individually.

There is also an urgent need to make the court system simpler and more accessible for individual court users. We believe there should be a comprehensive overhaul of all current court processes, to make them easier to use and simpler to understand. This not only includes simplifying the content and tone of court forms but also allowing the use of 'McKenzie Friends' to offer unrepresented litigants moral support and other assistance. These would be important steps to encourage more consumers to make use of the processes that exist to help them. We also think there is merit in reviewing rights of audience for lay representatives with a view to making the rules as uniform and cohesive as possible. We believe this would add clarity for consumers, the courts and the advice sector and may encourage greater use of lay representatives where a consumer cannot afford, or otherwise access, a solicitor.

It is a mistake, however, to think of formal dispute resolution processes simply in terms of the courts and the current court structures. In particular, we see there being great potential to use the recommendations of the civil courts review as an opportunity to look at how things could be done differently, rather than potentially replicating the existing problems within a new structure. We see potential for greater links between the proposed third-tier structure and the

administrative justice system. We believe this would create opportunities to take certain types of case, such as housing, debt and consumer issues, out of the traditional court setting to be resolved in more specialised forums. These forums should be designed to operate much more informally and inquisitorially than the current court processes. Research has shown that adopting such an approach can have significant benefits for consumers, particularly if they have received advice, even if they are not represented.¹⁰⁶ We therefore believe the use of specialist forums, where an informal inquisitorial approach is adopted, could take away some of the fear associated with resolving disputes, increase consumer confidence and improve access to justice.

We do not believe the interests of consumers in how formal dispute resolution processes operate can be well represented without conducting regular research with individual users of these processes. Consumer Focus Scotland and the Scottish Legal Aid Board's research with sheriff civil court users accessing legal aid or in-court advice services identified provision of information as a key requirement for these consumers. The research also made a number of other recommendations, including exploring the potential for an appointments system to be introduced.¹⁰⁷ In order to ensure that any reforms to formal dispute resolution processes will address the issues of most relevance to consumers, it is essential that much more research is conducted with a full range of users, in order to identify their different needs. Areas identified by Consumer Focus Scotland and the Scottish Legal Aid Board research as benefiting from further study include: research looking specifically at unrepresented litigants, identified to be a particularly vulnerable group; research of court users involved in more complicated court processes, such as the ordinary cause procedure; and a mapping exercise of the advice and information available for litigants across all courts.¹⁰⁸ The important issues facing consumers can only be discovered by engaging directly with them and further research must form a key part of taking forward the civil court review's recommendations. We therefore believe these research areas should be examined as a matter of urgency.

106 See note 86

107 See note 19

108 See note 19

Conclusion

Although there have been a number of developments in civil justice in recent years which have had benefits for consumers and measure well against the consumer tests, it is widely acknowledged that the piecemeal reform to date has left Scotland with a civil justice system unfit for the 21st century.¹⁰⁹ While we welcome the civil courts review's recognition that the whole civil courts system needs to be overhauled, in taking forward future reforms we would advocate two main points:

Firstly, the user of the courts must be at the centre of any reforms to the court system. As the civil courts review noted: 'the structural and functional flaws in the working of the Scottish civil courts prevent the courts from delivering the quality of justice to which the public is entitled'.¹¹⁰ The review report makes clear that the civil justice system is a public service and therefore it is the public that the reforms should be designed to benefit, not the judiciary, advocates or solicitors.

Secondly, as we have made clear here, we view access to justice as being much wider than access to the courts, and indeed endorse the view of the Civil Justice Advisory Group that the courts should be accessed only as a last resort. We believe the four areas we have outlined here – a public legal education strategy, joined up and appropriate advice services, an emphasis on informal means of resolving disputes and more user-friendly formal dispute resolution mechanisms - each represent a key step in removing the barriers to access to justice that currently exist. It is crucial, however, that these steps not be looked at in isolation, but rather be regarded as steps in a continuum of assistance for consumers. Any reforms to the civil justice system must be taken forward in the context of the interdependencies that exist between each of these steps. Only by considering the whole continuum will consumers receive maximum benefit from developments designed to create a civil justice system fit for the 21st century.

Additional Areas for Review

Although the civil courts review makes wide-ranging proposals, many of which, as we have stated here, we support and hope will be taken forward, there are areas where we are disappointed with the proposals. In particular, we would have wished to see greater support for the use of mediation and greater recognition of the potential role such informal means of resolving disputes can play in improving access to justice. There are also areas, identified by the Civil Justice Advisory group, which the review did not cover. We therefore consider there would be merit in reviewing the following areas:

- the way in which lawyers' remuneration is assessed and particularly its impact on the costs recoverable in litigation
- whether enforcement of court judgements can or should be left to the parties or whether there should be some public role in ensuring that judgements are observed

In addition, as recommended by the Osler Review, we believe there would be merit in reviewing the use of conventions, dress and titles, in order to modernise the courts and improve public perceptions

¹⁰⁹ See note 5

¹¹⁰ See note 5

The Role of Consumer Focus Scotland in Driving Change

We are proud of our contribution to developments in civil justice, most notably the SCC's role in establishing the Civil Justice Advisory Group, the work of which was instrumental in identifying the need for a civil courts review. The report of the civil courts review represents a new phase in the development of civil justice in Scotland. Within this report we have identified priority areas for development, not only within the court system, but within each of the four steps to removing barriers to access to justice, which we believe are fundamental to meeting the needs of consumers. We believe we have a proactive role to play in driving forward this change through delivery of our forward work programme in this area.

Given our background in producing a variety of consumer guides and conducting various pieces of research on consumers' knowledge of their rights, we see ourselves as having a key role to play in facilitating developments in public legal education. Our PLE seminar, held jointly with the Scottish Government in March 2009, was an important means to generate discussion and engage with stakeholders. Among the recommendations made within this report is the need for more research into consumers' knowledge of their rights, responsibilities and means of redress. We have extensive experience in conducting such research on a number of topic-specific areas, and therefore we consider it appropriate that we should take forward this work. We believe such a survey would be a useful foundation for future development work and will act as an evidence base for driving policy work in this area. We are proposing undertaking such a research project in 2010.

Consumer Focus Scotland has been at the forefront of advocating for change in a number of areas of civil justice. We have, for example, been a key player in driving discussion on multi-party actions, through our policy reports and seminar report. We have also sought to raise understanding and encourage greater use of alternative dispute resolution, particularly mediation, through our policy work, consumer research and our study trip, involving a number of justice stakeholders, to Maryland. We will continue to use our strong background in such areas to engage with stakeholders and advocate for change for the benefit of consumers. In order to inform future debate and policy reform we hope to reconvene the Civil Justice Advisory Group. This group, involving a wide-cross section of justice stakeholders, may have a useful contribution to make to the reform debate by providing an independent view on proposals within the civil courts review. We are currently considering the Group's remit and the potential role it could play in facilitating change to best improve access to justice for individual users of the civil justice system.

Appendix One: SCC and Consumer Focus Scotland Civil Justice Research and Policy Reports

Consumer Focus Scotland

Research Reports

- *The Views and Experiences of Civil Sheriff Court Users* (2009)

Policy Reports

- *Administrative Justice in Scotland – The Way Forward: The Final Report of the Administrative Justice Steering Group* (2009)

Scottish Consumer Council

Research Reports

- *Wills and Awareness of Inheritance Rights in Scotland* (2006)
- *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland* (2005)
- *Knowledge of Consumer Rights in Scotland* (2003)
- *Home Truths: A Report on Research Into the Experiences of Recent House Buyers in Scotland* (2000)
- *Complaints About Solicitors: a study of consumers' experiences of the Law Society of Scotland's complaints procedure* (1999)
- *Civil Disputes in Scotland: A Report of Consumers' Experiences* (1997)
- *Client Care: A report of a survey on the client care provided by solicitors in Scotland* (1995)
- *Written Information for People Attending Tribunals* (1991)
- *Court Reports: A Review of Facilities in Scotland's District Courts* (1990)
- *A Study to Investigate the Attitudes to the Small Claims Procedure in Scotland* (1989)
- *Report of a Survey on the Small Claims Procedure* (1989)
- *Following Our Advice: A Review of Advice Services in Scotland* (1988)
- *Report on the Survey on the Use of Solicitors* (1987)
- *I'm Not Happy With My Solicitor* (1986)
- *Tackling Tribunals: A Study of Access to Social Security Tribunals in Scotland* (1984)

Policy Reports

- *Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Steering Group* (2008)
- *The Civil Justice System in Scotland – A Case for Review?* (2005)
- *Policy Paper on Increasing the Financial Limit in Small Claims Procedure* (2003)
- *A Class of Their Own – Why Scotland Needs a Class Actions Procedure* (2003)
- *Consensus Without Court: Encouraging Mediation in Non-Family Civil Disputes in Scotland* (2001)
- *The Limits of Self-Regulation of the Legal Profession: A Consumer View of the Law Society of Scotland's Handling of Complaints Against Solicitors* (2001)
- *Access to Justice for Ethnic Minorities* (1993)
- *A Scottish Civil Justice Review?* (1992)
- *Small Claims in Scotland: A Discussion Paper* (1990)
- *Class Actions in the Scottish Courts: A New Way to Obtain Redress* (1982)
- *Report on Small Claims* (1978)
- *Consumer Law in Scotland: A Discussion Document* (1976)

Appendix Two: List of SCC and Consumer Focus Scotland User Guides

Common Repair and Common Sense, a guide for consumers giving information on how Scottish property law affects consumers' rights and responsibilities as flat owners.

Moving Home in Scotland, a guide explaining the process of buying and selling in Scotland, outlining the various options open to you and explaining the factors to be considered at every stage.

The Legal System of Scotland, which provides an overview of various aspects of the legal system, including the origins and sources of Scots law, the civil and criminal courts, tribunals, the personnel of the law, administration of the Scottish legal system; legal aid and protection of the public.

A-Z of Scots Education Law which offers parents an easy-to-use reference guide to the law on all aspects of children's education in Scotland.

Your Right to Know – a guide to freedom of information law in Scotland published jointly with the Office of the Scottish Information Commissioner.

What's on my Record? A Practical Guide to your Rights of Access to Personal Information a guide explaining consumers' rights under the Data Protection Act 1998 and how these rights apply under different contexts.

Making Civil Justice Work for Consumers: The consumer perspective on making the civil justice system in Scotland fit for the 21st century

Written by Gemma Crompton
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