



the civil justice system in scotland – a case for review?

the final report of the civil justice advisory group

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

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

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

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

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

These are:

ACCESS

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

CHOICE

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

INFORMATION

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

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

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

REPRESENTATION

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

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Chairman's Foreword



In late 2003, the Nuffield Foundation awarded a grant to the Scottish Consumer Council to support a series of seminars on the future of the civil justice system in Scotland. The initiative had the full support of the Scottish Executive. The aim of the seminars was described as:-

“to examine critically the arguments for and against the case for a review of the system of civil justice and to establish the degree of consensus that exists in relation to building an agenda for change”.

An advisory group was formed to help to plan and organise the seminars, and I was invited to chair both the meetings of the advisory group and the seminars. The advisory group met on no fewer than eleven occasions, which represented a very substantial commitment of time and effort to this project. The group played an invaluable part not only in the planning and organisation of the project but also in the drafting and revision of this report. The seminars were held on six evenings between September 2004 and April 2005. Each seminar was attended by between thirty and forty participants, all of whom took a full part in the proceedings. More than one of the visiting speakers remarked on the willingness of the participants, all of whom are people with extensive responsibilities, to commit themselves to attending as they did.

We also received a number of written and oral submissions, and we are very grateful to those who undertook the burden of preparing and presenting these submissions. I would like to put on record my great gratitude to the members of the advisory group for their commitment and enthusiasm. The group members were: Laura Dunlop QC, Colin Lancaster, Valerie Macniven (and Micheline Brannan who succeeded her from June 2005), Rory Mair, Iain McMillan CBE, Susan McPhee, Gordon Nicholson QC, Professor Alan Paterson, Sheriff Fiona Reith QC, Bill Speirs and George Way. I would also like to thank Barbara Brown and Bruce Ritchie, who made a significant contribution to the work of the group.

I would also like to express my thanks to the Nuffield Foundation for its support and enthusiasm throughout the project, in addition to providing the finance to make the project possible. I would like to record my thanks to the six speakers, and to the participants who contributed so greatly to the success of the series. Finally, I would like to record my gratitude to Martyn Evans, the Director of the Scottish Consumer Council and to Sarah O'Neill, its Legal Officer, who undertook the heavy burden of drafting the report.

In introducing this report, I think it may be helpful to make clear what it does not attempt to do. Firstly, it does not attempt to set out specific proposals for reform. As is clear from the terms of the grant, the object of the course of seminars was to explore attitudes to the civil justice system, to identify if possible complaints and

problems which might call for action, and to give an opportunity for suggestions for possible reforms to emerge. Secondly, the report could not be said to represent a full survey of opinions and attitudes among members of the public or even among the principal stakeholders in the civil justice system. The seminars brought out a range of views and attitudes, from which helpful conclusions can be drawn, but do not amount to a comprehensive opinion survey. For that and other reasons we have felt free to include in the report ideas and suggestions which seem to us to be worthwhile, even if there is little evidence of general support for them. The aim was to be inclusive rather than exclusive in canvassing possibilities. With that in mind, the invitations to take part in the seminars stressed that all proposals, however radical, would be welcome. It follows, of course, that those individuals who contributed to the process, whether as members of the advisory group or as participants, or the organisations to which they belong, are not to be regarded as necessarily committed to supporting any of the specific suggestions made in the report.

Thirdly, this report does not purport to be a comprehensive study of the civil justice system. The nature of the investigation undertaken in the seminars required us to think about what kind of review might be carried out, and this became particularly relevant as it became clear that detailed examinations of some parts of the civil justice system, including legal aid and the provision of advice and assistance, and regulation of the legal profession, have already been, or are in the course of being, undertaken.

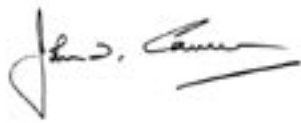
The point of stating first what the report is not intended to do is that it allows me to close this introduction by stressing that in this series of seminars we succeeded in identifying some major challenges and opportunities for reform and in pointing out possible routes by which reform might proceed. These conclusions, which are fully explained in the concluding chapter of the report, concern particularly the methods of dealing with claims of lower financial value, which are especially important to consumers, and the organisation of the courts, with a view to maintaining the efficiency of the civil justice system. It would not be helpful, and might be confusing, to try to summarise them here.

In addition, we believe that we have identified a number of respects in which the information, particularly statistical information, available about the way in which the civil justice system operates at present is not satisfactory. These areas require research, whether or not a decision is taken to carry out some form of review, and it would be very desirable to start the process of researching them as soon as possible.

I would add as a personal observation that during the period since our seminars were planned, there have been developments and proposals in a variety of jurisdictions which may have important lessons for us in Scotland. For example, the Clementi Review of the Regulatory Framework for Legal Services in England and Wales was published at the beginning of 2005, and contains material which could have profound effects on the way in which legal services are to be provided. Similarly, there are very active discussions going on about new arrangements for financing litigation, including the involvement of commercial finance organisations. I happen to have learnt recently about some very radical experiments in the organisation

of family courts in other jurisdictions, designed to improve the services available to the courts and their users and also to reduce the confrontational element in family litigation. It was not possible to include all of these developments in our discussions, but they do form an important part of the background against which the need for a review has to be assessed.

Systems of justice require re-examination from time to time because new problems arise, new practices, good or bad, develop and new demands and expectations can be perceived. The seminars which we have conducted do strongly suggest that the system in Scotland would benefit from a review of the kind which we have suggested, and we commend that conclusion to the Scottish Executive.

A handwritten signature in black ink, appearing to read 'J. Coulsfield', with a horizontal line underneath.

The Right Honourable Lord Coulsfield
November 2005

Background to the Report

Scotland's civil justice system has grown up and evolved gradually over the centuries into the system we have today. In recent years, concerns have been expressed from various quarters that the system as it stands may no longer be able to meet the demands being placed on it, and that the system, or at least aspects of it, would benefit from a review. In 2003, the Scottish Consumer Council hosted two meetings for a wide range of key stakeholders to test their views on the need for a civil justice review. There was agreement at these meetings that the case for a review of the civil justice system should be investigated. Those present agreed that the way forward was through a series of structured and open discussions on the issues.

Following these meetings, the Scottish Consumer Council, with the support of the Scottish Executive, applied to the Nuffield Foundation for funding to carry out a series of seminars to examine the issues further. The funding bid was successful, and in June 2004 an advisory group was constituted under the chairmanship of the Right Honourable Lord Coulsfield to take the process forward. The membership of the advisory group is set out at Appendix 1.

The purpose of the seminar series was to carry out a critical examination of the civil justice system, and to encourage proposals for change and development. In doing so, we hoped that the seminars would reveal what agreement there may be about the nature and direction of future reforms to the system. The idea behind the project was to encourage thinking about potentially radical solutions to any perceived problems with the current system and to gather these together in the final report. If the conclusion were reached that there was a need for a full or partial review, it would then be for any future review body to take these ideas and make a decision as to the scope of any review.

Six seminars were held in Edinburgh between September 2004 and April 2005. The structure of the seminar series was intended to mirror a user's journey through the civil justice system, from seeking advice on their dispute, through the dispute resolution system, to the enforcement stage. Details of the individual seminars can be found at Appendix 2.

In addition to the seminars, letters were sent out to stakeholder organisations in February 2005, asking for views on the following questions:

1. In what respects do you think the current civil justice system works well?
2. Are there any particular aspects of the system that you see as priority areas for reform? If yes, please say what these are.
3. Do you / your organisation consider that there is a need for a full or partial review of the civil justice system in Scotland? If so, why?

Submissions could also be made through the Scottish Consumer Council website, and articles were written for various publications encouraging those with an interest to submit their views. A total of 16 written submissions were received from a variety of bodies, and a list of those who made submissions can be found at Appendix 3.

A series of meetings were also held with key stakeholders, and details of these meetings can be found at Appendix 4.

This report considers in detail the issues arising from the seminars themselves, the written submissions received and the various stakeholder meetings held. The issues are discussed according to the structure of the seminar series: the user's journey through the system. The concluding chapter looks at the themes emerging from the seminars and the conclusions we have reached as a result of the views gathered throughout the process. It then makes recommendations as to the way forward.

The papers prepared by the seminar speakers, the transcripts of the six seminars and the written submissions received are available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from:

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1. Introduction

What is the civil justice system?

1. When we talk about the 'civil justice system', what exactly do we mean? The term may mean different things to different people, and before we can go on to consider whether and in what ways the system might require reform, we need to identify exactly what we mean by it, and to define the scope of what is to be considered.
2. The justice system in Scotland is broadly split into two parts: the criminal justice system and the civil justice system. The criminal justice system exists to regulate criminal activity, and to prosecute or otherwise deal with those who are alleged to engage in such activity. The civil justice system, meanwhile, exists firstly to provide people with the means to enforce their legal rights, and secondly, to regulate disputes between two or more parties.
3. The civil justice system deals with legal rights and disputes relating to a wide range of civil law matters. There are two main branches of civil law - public law and private law. Public law regulates and controls the exercise of political and administrative power within Scotland. It concerns the activities of the UK and Scottish parliaments, the Scottish Executive, the courts, local government and public bodies, and their relationships with private individuals. Issues governed by public law include:
 - Asylum and immigration
 - Education
 - Housing
 - Human rights
 - Planning
 - Tax
 - Welfare benefits
4. Private law deals with the rights and obligations of citizens themselves. The major areas covered by private law in Scotland include:
 - Adoption of children
 - Bankruptcy, insolvency and sequestration
 - Company and commercial matters
 - Consumer goods and services
 - Contact with, and residence of, children
 - Contract
 - Debt
 - Defamation
 - Discrimination
 - Divorce and separation
 - Employment

- Health
 - Intellectual property
 - Negligence
 - Personal injury
 - Professional negligence
 - Property, both heritable and moveable
 - Wills and succession
5. The civil justice system in Scotland is extremely complex and varied, having evolved over many centuries into the system that we have today. Following the Union of the Parliaments in 1707, the laws and legal institutions of Scotland and of England and Wales remained separate. Scots law remains markedly different today from that of the rest of the UK. By virtue of the Scotland Act 1998, the Scottish Parliament now has powers to legislate in most areas of civil law.
 6. Scots law has its origins in a civil law system, similar to that of most European and some other countries. In a civil law system, based on Roman law, the rules of law are derived from first principles set out by authoritative jurists, whereas in a common law system, derived from English law, the rules emanate from the decisions made by judges in particular cases, known as precedent. Over time, however, Scots law has gradually moved more towards a common law approach, becoming, like many Western legal systems, a hybrid between the two types of system.
 7. Traditionally, the civil justice system in Scotland has, as in other jurisdictions, been largely focused on the courts. The system has taken an adversarial approach to dealing with disputes, rather than the more inquisitorial approach traditionally adopted in some European civil law systems. In an adversarial system, the judge or other arbiter presides over a contest between the two parties, ensuring that the law and procedural rules are followed, and makes a decision based on the legal arguments made and the evidence put forward.
 8. In an inquisitorial system, the judge, rather than the parties, has primary responsibility for defining the issues in dispute and investigating and advancing the dispute. While in the past, countries such as France and Germany took this approach, these systems have gradually moved towards a more hybrid approach, importing some of the features of an adversarial system.
 9. The institutions and procedural rules which form the basis of the current civil justice system in Scotland have gradually grown up and developed over the years. The increasing 'legalisation' of our society has contributed to an increasingly complex system, as more and more new laws are passed, giving us all more legal rights and responsibilities than ever before. The increasing influences of Europe, new human rights legislation and devolution have all brought new challenges to the system and have placed new burdens on it. While the broad structure of the courts has not changed, there have been many procedural changes within that structure, while the introduction of new dispute resolution mechanisms such as tribunals and ombudsmen have also considerably altered the civil justice landscape.

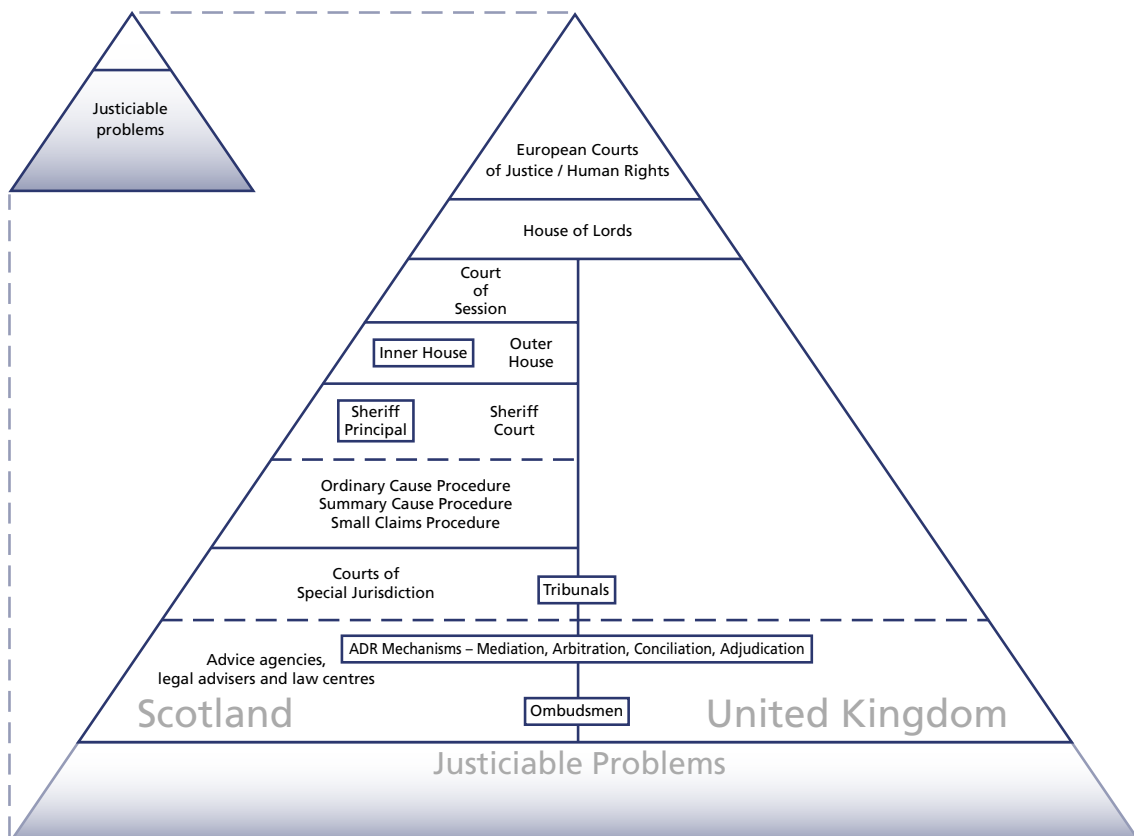
10. While the courts remain central to today’s civil justice system, the picture is as a result much more complicated than it was in the past. As the Deputy Justice Minister recently observed, the civil justice system today is:

*‘a whole collection of different things, different systems, different services and different processes. It includes advice and information providers, from the smallest voluntary advice agency up to the most expert QC, it includes the civil courts, from the small claim court up to the Court of Session and beyond, and it includes a whole variety of other processes such as mediation and arbitration’.*¹

11. The diagram below attempts to represent in simple terms the potential parameters of the civil justice system in Scotland, and the relationship between the various aspects of the system. It may be seen from the diagram that the current system remains in many ways focused on the courts but that other methods of dispute resolution are growing up around the court system. The seminar series was based around a wide interpretation of civil justice in keeping with that pictured in the diagram.

12. It may also be seen from the diagram that, in most respects, Scotland has its own distinct civil justice system. Under the Scotland Act 1998, the administration of the civil justice system in Scotland is almost entirely devolved to the Scottish Parliament. This includes the structures, procedures, jurisdictions and day-to-day running of the courts and other dispute resolution bodies, and the provision of publicly funded legal services.

The Civil Justice System in Scotland



¹ From a speech by Hugh Henry MSP, Deputy Justice Minister at the second Scottish Mediation Conference, 4 March 2005

13. The major non-devolved part of the civil justice system, aside from the House of Lords, the ultimate court of civil appeal for Scotland,² is the majority of tribunals that currently operate in Scotland. While some tribunals, such as children's panels, are wholly Scottish and therefore within the remit of the Scottish Parliament, most are GB bodies and their operation is accordingly reserved to the Westminster parliament. These include, for example, employment and social security tribunals.
14. Other dispute resolution bodies which operate in Scotland are likewise not wholly Scottish. While some ombudsman schemes, such as the Scottish Legal Services Ombudsman, operate only in Scotland, others such as the Financial Services Ombudsman serve the whole of the UK. Similarly, providers of services such as mediation and arbitration may operate on either or both sides of the border.

A need for review?

15. It can be seen, then, that the current civil justice system in Scotland has grown up over the years in a largely unplanned way. This has led to concerns in some quarters that the system is no longer capable of meeting the new and increased demands being placed upon it in today's modern society. In 1980, the Royal Commission on Legal Services in Scotland (the Hughes Commission) reported that it had received evidence criticising the civil justice system as being '*unduly cumbersome, slow and costly*'. It was suggested to the Commission that:

'for these and other reasons, such as excessive formality, persons wishing to assert or defend their rights are sometimes unwilling or are financially unable to resort to the civil courts in Scotland'.³

16. In light of the evidence before it, the Commission recommended that: -

- a committee should be appointed by the Secretary of State to review the structures, jurisdiction and procedures of the civil courts of Scotland⁴
- a review of the working methods of both the civil and the criminal courts should be carried out⁵

17. Such a review has never been carried out, and since 1980 there have been repeated calls for a review of the civil justice system from a number of organisations in Scotland. The Scottish Consumer Council has argued, for example, that reform has been carried out on a piecemeal basis, which, while it may improve aspects of the system in the short term, limits the extent of reform, as the changes made must fit into the existing structure.⁶

² Note: in April 2005, a proposal was lodged within the Scottish Parliament by Adam Ingram MSP for a proposed Civil Appeals (Scotland) Bill, to create a civil appeals committee in the Court of Session as a final appeal procedure for Scottish civil cases

³ *Report of the Royal Commission on Legal Services in Scotland*, 1980 at paragraph 14.2

⁴ Recommendation 14.1

⁵ Recommendation 14.2

⁶ See eg. *A Scottish Civil Justice Review?*, 1992; *Civil Justice Review Update*, 1995; *Response to Access to Justice: Beyond the Year 2000*, 1998; *Evidence to the Justice and Home Affairs Committee on its Inquiry into Legal Aid and Access to Justice*, 2000, all by the Scottish Consumer Council

18. Other organisations, such as the Law Society of Scotland,⁷ Citizens' Advice Scotland,⁸ and the STUC⁹ have also supported the need for some form of review. There has also been some support for a review from a senior judge:

*'our system of civil procedure is a contemporary relic of a vanished age which is ill-serving the litigants....the familiar piecemeal approach to reform....must give place to a comprehensive review of civil justice, with no assumption in favour of the status quo, in which the public should have a proper voice.'*¹⁰

19. In 2001, the Justice 1 committee of the Scottish Parliament recommended that the Scottish Executive should examine the need for a review of the civil justice system, and the resources required for such a review, and report back to the committee with its findings.¹¹

20. In recent years, the main focus by the Scottish Executive Justice Department has been on reforms to the criminal justice system.¹² While there has been no major review of civil justice, however, there have been numerous reforms to the civil justice system in Scotland since 1980. An illustrative list of these reforms, and of reforms which are ongoing or under consideration, which has been provided by the Scottish Executive, is on page 12.

21. More recently, however, the Scottish Executive has recognised the importance of civil justice and acknowledged that there may be a need for reform:

*'The civil justice system is a vital public service which underpins our daily lives. It supports our family and business relationships, it protects our legal rights, and it helps us solve our legal problems. Like every other public service it must be fit for its purpose in the 21st century – modern, inclusive, accessible and efficient.'*¹³

⁷ See *Law Reform in the 21st Century: A Manifesto for Change*, Law Society of Scotland

⁸ See eg. *Legal Aid Briefing* by Citizens' Advice Scotland and the Scottish Consumer Council, 1993

⁹ Source: Decision of the STUC General Council, July 2003

¹⁰ *The Case for a Civil Justice Review* - address to the Law Society of Scotland Annual Conference 1995 by Lord Gill, now Lord Justice-Clerk, published in the *Journal of the Law Society of Scotland*, April 1995 at page 129

¹¹ *Report on Legal Aid Inquiry*, Justice 1 Committee 8th Report, 2001

¹² In December 2004, the Scottish Executive published *Scotland's Criminal Justice Plan*, which contained proposals to reform the criminal justice system, including the courts and other relevant agencies. As part of this plan, the Executive is taking forward proposals to improve the operation of the High Court through the implementation of the Criminal Procedure (Amendment) (Scotland) Act 2004, supported by major changes in prosecution practice. In September 2005, the Executive announced its intention to introduce a Summary Justice Reform (Scotland) Bill to reform the summary criminal justice system.

¹³ From a speech by Cathy Jamieson MSP, Minister for Justice at the Annual Dinner of the Scottish Branch of the Chartered Institute of Arbitrators, 14 March 2005

Illustrative List of Civil Justice Reforms in Scotland since 1980

Legislative changes

- Civil Jurisdiction and Judgments Act 1982
- Bankruptcy (Scotland) Acts 1985 and 1993
- Law Reform (Miscellaneous Provisions) (Scotland) Act 1985
- Legal Aid (Scotland) Act 1986
- Debtors (Scotland) Act 1987
- Court of Session (Scotland) Act 1988
- Civil Evidence (Scotland) Act 1988
- Civil Evidence (Family Mediation) (Scotland) Act 1995
- Adults with Incapacity (Scotland) Act 2000
- Debt Arrangement and Attachment (Scotland) Act 2002

Court procedures

- Revised procedures for judicial review in the Court of Session (1985)
- Introduction of small claims procedure (1988)
- Ordinary cause rules re-written (1993)
- Streamlined rules for commercial actions in the Court of Session (1994)
- Court of Session procedures revised (1995)
- Family law and child welfare procedures substantially revised in both Court of Session and sheriff court following Children (Scotland) Act (1995)
- Summary application rules consolidated and updated (1999)
- Commercial court rules introduced to sheriff court (2000)
- Small claims and summary cause procedure revised (2002)
- New procedures for personal injury cases in Court of Session (2003)

Reforms ongoing or under consideration

- Legal advice and assistance - consultation (June to September 2005) on
 - (a) development of a national strategy for publicly funded legal assistance on civil matters
 - (b) proposals for specific changes in civil advice and assistance
- Evaluation of pilot in-court advice projects in most sheriffdoms in Scotland, as basis for consideration of further roll-out
- Development of agenda to improve complaints handling by legal profession in Scotland – analysis of responses to public consultation
- Scottish Executive working with Scottish Mediation Network to raise awareness and promote good practice in mediation, and piloting 2 new in-court mediation services in Glasgow and Aberdeen
- Sheriff Court Rules Council looking at:
 - (a) extending use of information technology in court
 - (b) mediation and other forms of ADR within the court process
 - (c) improving ordinary cause rules
- Reform of bankruptcy and diligence – bill being drafted for introduction before end of current parliamentary session
- Revision of summary cause, small claims and sheriff court jurisdiction limits
- Review of collation and publication of civil judicial statistics
- Revision of arbitration law

22. In recent years, concerns echoing those of the Hughes Commission have led to reviews of civil justice in a number of other common law jurisdictions throughout the world. In general terms, it can be said that these reviews have been driven by broadly similar concerns. They have generally been set up to look at tackling perceived problems within the existing civil justice system, summed up by Lord Woolf in his review in England and Wales as *'the key problems facing civil justice today...cost, delay and complexity'*.¹⁴

23. Consideration of the stated aims of each of these reviews reveals that they are remarkably similar:

To review the rules and procedures of the civil courts in England and Wales, in order to:

- *improve access to justice and reduce the cost of litigation*
- *reduce the complexity of the rules and modernise technology*
- *remove unnecessary distinctions of practice and procedure*¹⁵

(England and Wales)

'To review procedures in Northern Ireland for the administration of civil justice, and produce, for consultation with interested parties, recommendations as to how the civil justice system could be developed so as to make it as accessible, economical and efficient as possible'.¹⁶

(Northern Ireland)

To consider 'the need for a simpler, cheaper and more accessible legal system'.¹⁷

(Australia)

To 'address the twin problems of expense and delay threatening the civil justice system, and to propose "specific and implementable solutions" to those problems'.¹⁸

(Ontario, Canada)

24. Cost, delay and complexity are problems that any civil justice system must face up to. Lord Woolf believed that these problems are interrelated and are inherent in an adversarial system where the conduct, pace and extent of litigation are left almost completely to the parties themselves, with little judicial control over the process. His view was that, taken together, these problems can restrict access to justice, and as one commentator in England and Wales has noted, *excessive cost, delay and complexity lead to the exclusion of some people from the legal system*.¹⁹

¹⁴ *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, by the Right Honourable Lord Woolf, June 1995 at Chapter 3

¹⁵ *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, by the Right Honourable Lord Woolf, June 1995

¹⁶ *Review of the Civil Justice System in Northern Ireland: final report*, Civil Justice Reform Group, June 2000

¹⁷ *Managing Justice: A review of the federal civil justice system*, Australian Law Reform Commission, 2000

¹⁸ *Ontario Civil Justice Review*, Supplemental and Final Report, November 1996

¹⁹ *The Domestic Context*, Roger Smith from *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s*, Legal Action Group, 1996

25. Those who are the most excluded in society in general are equally likely to be excluded from the legal system due to economic, cultural, social and educational barriers. There is considerable evidence that many of those with civil disputes in Scotland feel alienated from, and negative about, the law and the legal system, more so than those in England and Wales.²⁰ This is a major issue which will require to be tackled if the system is to better serve the need for access to justice, and this is further discussed in Chapter 3.
26. Cost, delay and complexity are only problematic when they occur to an excessive degree. In certain complex situations, complex procedures may be required - in a complicated action relating to commercial or intellectual property, for example. Equally, some degree of delay may be helpful in certain instances. Firstly, some types of case cannot be dealt with quickly: in serious personal injury cases, for example, it may take some time to assess the extent and consequences of the injury sustained. In other cases, delays managed by the courts can be beneficial; for example where the court freezes or *sists* an eviction action, to allow time for a tenant's claim for housing benefit to be processed.
27. But do the problems of excessive cost, delay and complexity identified by Lord Woolf exist in Scotland, which also operates under an adversarial system? And if they do, or even if they do not, are there other problems within the Scottish civil justice system that require to be addressed? Although there is a shortage of empirical evidence available on the workings of the Scottish civil justice system, there is some evidence that the problems of cost, delay and complexity do exist to varying degrees in Scotland.
28. On the issue of cost, research has found that those who had considered consulting a solicitor but had not done so mostly gave concerns about cost as the main reason for this. The same research found that, despite the higher proportion of people offered legal aid in Scotland, concern about having to pay legal expenses is greater in Scotland than in England and Wales.²¹ Issues related to the funding of the system are further discussed in Chapter 6.
29. In general, fewer concerns appear to have been raised with regard to delay in Scotland's civil justice system than in England and Wales, and this was not a major issue arising from the seminars. This may be partly due to the fact that, unlike in other jurisdictions, the number of cases going through the sheriff courts has dropped steadily over the past decade.²² There is also some evidence that the number of social security and employment tribunal cases is declining across Great Britain, although others, such as immigration appeal tribunal cases, have increased substantially in recent years.²³

²⁰ *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001 at Chapter 7

²¹ *Paths to Justice Scotland*, *ibid* at page 253

²² Source: *Civil Judicial Statistics 2002*, published by the Scottish Executive. In 1993, 166,393 civil actions were raised in the sheriff courts. By 2002, this had dropped to 115,326, a decrease of around 30%

²³ Source: *Council on Tribunals Annual Reports 2003 and 2004*. In both 2002 and 2003, there was a drop in cases dealt with by the Appeals Service, by 6% and 42% respectively. Employment tribunal cases were also down by 40% in 2002, although they increased again slightly in 2003. Immigration appeal tribunal cases rose by 27% in 2002 and a further 60% in 2003, while cases dealt with by immigration adjudicators rose by 35% and 19% respectively. Note: these are GB figures

30. All cases going through the courts will inevitably take a minimum length of time to be heard, due to timescales built into the court rules for each stage of court procedure. This is, of course, necessary to ensure that the parties involved receive sufficient notice and have adequate time to prepare for the court hearing.
31. In the sheriff courts, where the majority of civil business is heard, the introduction of a new streamlined ordinary cause procedure in 1994 addressed some of the criticisms of the previous procedure, and was shown to be effective in reducing delay in the system.²⁴ Average waiting periods for ordinary civil cases have met and even slightly exceeded set ministerial targets in recent years.²⁵
32. On the face of it, therefore, delay is not a significant problem in the sheriff courts. There is, however, some evidence that users perceive excessive delay within the system - research has found that the majority of people with a civil dispute said it had taken longer than they expected to sort it out.²⁶ We are also aware that there are real concerns among some of those working within the system that, in some instances, substantial delays can be experienced. These can vary from court to court: we understand, for example, that there may be issues surrounding the time taken to deal with freeing for adoption cases in certain courts.
33. It was also suggested to us that there has been an increase in continuations by sheriffs in recent years, with the result that parties and witnesses may turn up in court for a hearing, only to be told that their case has been continued to another date.
34. A lack of availability of sheriffs, coupled with the priority afforded to criminal business, was cited by some stakeholders with whom we met as a major cause of such problems, and this is discussed further in Chapter 4. This was seen by some as an even greater problem in the Court of Session, and there is, in fact, evidence of increased delay in the Court of Session in recent years. Over the past few years, average waiting periods for ordinary proofs and civil appeals have fallen far short of the target periods set.²⁷
35. With regard to complexity, it can also be argued that the current civil justice system is complicated and difficult for people to understand. The variety of different courts and procedures available add to the complexity of the system. In the sheriff court, for example, there are still three broad categories of procedure, dependent on the amount of money or type of action involved, and a variety of other more specialised, and sometimes rarely used, procedures. Scottish Consumer Council research found that almost half of those with a civil dispute thought the other party had an advantage over them in terms of knowledge and experience of the law.²⁸

²⁴ *Defended Actions in the Sheriff's Ordinary Court*, Samuel and Bell, Scottish Office Central Research Unit, 1997

²⁵ Source: *Scottish Court Service Annual Report and Accounts 2003-4*. The target period has been 12 weeks for the past 3 years, while the actual waiting period was 11 weeks in each of those years

²⁶ *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001 at page 195

²⁷ The target periods have been 18 and 19 term weeks respectively for the past 3 years, while the actual waiting periods rose to 30 and 41 weeks respectively in 2003-4. Source: *Scottish Court Service Annual Report and Accounts 2003-4*

²⁸ *Civil Disputes in Scotland*, Scottish Consumer Council, 1997

36. Does this mean, however, that there is a need to review the entire civil justice system? Are there really such fundamental problems with the system as it stands? If there was a need for reform in 1980, can it be assumed that there must be a much more urgent need for reform 25 years down the line? Or have the many changes that have taken place since that time lessened or even negated the need for such major reforms?
37. The purpose of the Nuffield seminar series was to examine these issues in more detail. Our aim was to carry out a critical examination of the civil justice system and to encourage proposals, including radical proposals, for change and development. We hoped that the seminars would enable us to see what agreement there may be about the nature and direction of future reforms to the system.
38. While various organisations and individuals have in the past called for a review of civil justice in Scotland, it has not always been clear exactly what they mean by this. The term 'civil justice review' may mean very different things to different people, and it was important to try to explore this further.
39. It was clear at the start of the process that, while some believe that there is a need for review of the system, this was not a view shared by all of those working within the system. The process was intended to provide a means for discussion of the arguments in favour of retaining the current system, either as a whole, or in part.
40. We wanted to find out in particular:
- in which respects the current civil justice system was seen to work well
 - whether any particular aspects of the system were viewed as priority areas for reform, and if so, what these were
 - whether there was a general view that the civil justice system in Scotland required to be reviewed, and if so to what extent
41. The remainder of this report goes on to examine the issues which arose from each of the seminars, from the written submissions received and the stakeholder meetings held. The concluding chapter draws conclusions as to the main themes emerging from the process and makes recommendations as to the possible way forward.

2. Scope, Aims and Principles of a Civil Justice System

Introduction

1. In considering whether the civil justice system requires change, and if so, what changes might be needed, it must first of all be considered:
 - What the scope of the civil justice system is
 - What the purpose and aims of a civil justice system should be
2. This chapter considers these questions in detail, thereby laying a foundation for exploring the more detailed questions as to the ways in which the current system works well, how it might be improved, and which areas, if any, should be prioritized for reform.

Scope of the civil justice system

3. It can be argued that there is no ‘civil justice system’ in the same way that the criminal justice system exists.²⁹ While the criminal justice system is quite clearly defined in terms of a consistent and readily identifiable range of processes and institutions, this is not the case with civil justice. The criminal justice system is broadly geared towards prosecution by the state of an individual accused, by means of those processes and institutions.
4. Civil justice problems can, however, relate to a huge variety of matters, from welfare benefits or money problems experienced by individuals to large-scale commercial disputes between companies. Those with civil justice problems need information and advice as to their rights and how to enforce these. Those pursuing or defending a case might be any combination of private individuals, businesses, public authorities and government. In criminal cases, the state prosecutes in the courts, whereas in civil disputes, the party initiating a claim must decide how to proceed, faced with a growing variety of institutions and processes which might potentially deal with his or her problem.
5. Given the variety of civil justice institutions and processes available in Scotland today, how do we then define the scope of the ‘civil justice system’? Our seminar series was based on a wide interpretation of what the civil justice system encompasses, as illustrated on page 9. This interpretation is broadly in line with that of the Australian Law Reform Commission, which carried out a civil justice review in the late 1990s.

²⁹ See *Solving Civil Justice Problems: what might be best?*: Paper by Professor Hazel Genn, University College, London for Seminar 4 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

6. The Commission interpreted the term 'federal civil justice system' to mean:

*'the full array of judicial, administrative review and community and court based alternative dispute resolution (ADR) schemes found in federal civil jurisdiction. This extends, for example, to the use of ADR by industry ombudsmen in areas under federal regulation, such as banking and telecommunications'*³⁰

7. The seminar series was, however, based on an even broader understanding of what should be included within the system. Given that one important function of the system is to provide access to information and advice about legal rights and how to enforce them, as further discussed below, it was important to include those providing such information and advice within the scope of the system. This includes private practice solicitors, law centres, citizens' advice bureaux and other advice agencies.
8. Such a wide interpretation of civil justice was supported at the seminars: there was broad agreement that the scope of civil justice had to be viewed as much wider than the court system. It was generally accepted that, while the courts were a central aspect of the system, it was necessary to look beyond the present adversarial system towards other institutions and processes which might advise people on their rights and resolve their disputes.
9. It was also observed during the seminars that the future workload of the courts would be very much dependent on whether and to what extent civil justice issues were dealt with outside the court system. This meant that it would be very difficult to look at one aspect of the system - the courts - in isolation, as each part of the system has an impact on other aspects of it.

What is the purpose of the civil justice system?

10. At the most basic level, the civil justice system exists to provide people with access to knowledge about their rights, and if necessary to a means of enforcing them. The system provides a means of regulating relationships and resolving disputes in a peaceful manner, rather than leaving this to less civilised ways of deciding who is right and who is wrong. Such relationships and disputes may exist between private individuals, between businesses, between individuals and businesses or between individuals and the state. As an English High Court judge has said:

*'Any civilised society must have the means by which intractable disputes, whether between the state and the citizen or between citizens themselves are to be resolved. That is the purpose of the courts and the system of civil and family justice in this country'*³¹

³⁰ *Managing Justice: A review of the federal civil justice system*, Australian Law Reform Commission, 2000 at paragraph 1.12

³¹ Mr Justice Hedley, in *Portsmouth NHS Trust v Wyatt and others* [2004] EWHC 2247

11. As the Deputy Justice Minister recently described it:

*'the basic aim of the civil justice system is to help people find their way through [the law and legal system], to provide advice and information on them, to sort out disputes about them, and, when necessary, to clarify and enforce them, so that conflict is reduced and people can get on with their lives.'*³²

12. A civil justice system is therefore a cornerstone of any democratic society, providing an essential public service. As Lord Woolf observed:

*'A system of civil justice is essential to the maintenance of a civilized society. The law itself provides the basic structure within which commerce and industry operate. It safeguards the rights of individuals, regulates their dealing with others and enforces the duties of government.'*³³

13. The civil justice system can be seen to have four broad and interlinked functions:

- a. the provision of access to information and advice about legal rights and how to enforce them
- b. the resolution of disputes
- c. the determination of disputes and enforcement of rights
- d. the formulation of legal principles and authoritative interpretation of legislation

14. The first function underpins the others by ensuring that those with civil justice problems are aware of their rights and entitlements. This knowledge and / or advice may be sufficient by itself to equip the party involved with a means of resolving their problem: by claiming their entitlement to welfare benefits, for example. The problem may become a dispute, however, if the other party involved challenges or denies the first party's legal rights.

15. Where this happens, the second function is in most cases likely to correspond with the primary aim of the parties to a dispute. Most parties simply want a resolution to their problem. The successful resolution of disputes might potentially be achieved by means of any of the dispute resolution mechanisms that exist, including mediation, arbitration and ombudsmen as well as the courts.

16. Where a dispute cannot be resolved by such means, it may be necessary to seek a formal determination of that dispute. Such a determination can be carried out through a binding process such as arbitration, as well as by a court or tribunal. However, legal rights can only be enforced by a court or tribunal. While many disputes might be resolved by less formal means to the satisfaction of the parties, there will always be occasions where a formal adjudication is required to uphold a party's rights. Moreover, there are certain types of 'status' issues which require a court hearing even where the matter is undefended: for example, some divorce matters, proof of marriage or presumption of death.

³² From a speech by Hugh Henry MSP, Deputy Justice Minister at the second Scottish Mediation Conference, 4 March 2005

³³ Taken from *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, by the Right Honourable Lord Woolf, June 1995

17. The fourth and final function, clarifying and interpreting the law, can also be exercised only by courts and tribunals. Some cases may establish important legal principles to be applied in future cases. There has also been a huge increase in statutory regulation in relation to, for example, planning law, social security law, employment law and discrimination legislation. The courts have an important role in interpreting the meaning of statute law.

What should the objectives of the civil justice system be?

18. In his review, Lord Woolf identified a number of objectives that a civil justice system should meet in order to ensure increased access to justice. These principles are very much focused on the interests of the users of the civil justice system, and are very similar to those set out by civil justice review bodies elsewhere.³⁴ They state that a civil justice system should:

- a. be *just* in the results it delivers
- b. be *fair* in the way it treats litigants
- c. offer appropriate procedures at a reasonable *cost*
- d. deal with cases with reasonable *speed*
- e. be *understandable* to those who use it
- f. be *responsive* to the needs of those who use it
- g. provide as much *certainty* as the nature of particular cases allows
- h. be *effective*: adequately resourced and organised³⁵

19. The Scottish Executive has echoed these principles in declaring that the civil justice system:

*'must be modern, inclusive, accessible and efficient. And it must focus first and foremost on the needs of those who have to use it, rather than on the convenience of those who run it.'*³⁶

20. The principles set out by Lord Woolf were broadly accepted as a sensible starting point by those attending the first seminar. It was recognised, however, that the interests and needs of the users of the system may vary significantly, depending on who they are. The interests of an individual pursuing a case may be different from those of a company, which may again be at variance from those of a public body initiating a claim. Likewise, the interests of those defending a claim are likely to differ from those who are pursuing, and may vary even among defenders, depending on their status as an individual or other body. It would therefore be very difficult to construct a system which would meet all of these needs at once, and this is discussed further in Chapter 5.

21. In addition to Lord Woolf's set of principles, one further objective was suggested at the first seminar: namely, the need to serve the public interest, as well as the private interests of the parties.

³⁴ See for example *Ontario Civil Justice Review*, First Report, March 1995; *Managing Justice: a review of the federal civil justice system*, Australian Law Reform Commission Report No. 89, 2000

³⁵ *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*; by the Right Honourable Lord Woolf, Master of the Rolls, June 1995 at pages 2-3

³⁶ From a speech by Hugh Henry MSP, Deputy Justice Minister at the second Scottish Mediation Conference, 4 March 2005

22. As Lord Woolf recognized in setting out his principles, the primary objective of any civil *justice* system must be to deliver justice. But what does this mean: how do we measure justice, and how can we ensure that it is achieved? There are many objectives to be considered in attempting to achieve justice. These can largely be summed up by the remaining objectives set out by Lord Woolf: parties must be treated fairly; cases must be dealt with quickly and cheaply; the system must be efficient, easy to understand, provide certainty, and otherwise meet the needs of those who use it.
23. If all of these objectives could be achieved, then absolute justice would also be achieved. Unfortunately, however, in reality many of these objectives compete against one another, and in any system it must be decided which objectives are given the greatest priority.
24. While absolute certainty that a court's decision is the correct one in law based on the facts of the case is very important, for example, it may be of little use to the parties if it has taken years to reach that decision and has cost more than the amount originally in dispute. On the other hand, a fast, cheap and efficient outcome is unhelpful to the litigant if they have failed to understand what was going on, and/or the decision is unjust or wrong in law. Widening access to the system potentially conflicts directly with any attempt to keep down costs. In every system, important decisions must be taken as to where the balance should lie between these objectives.
25. The aim of any system must therefore be to reach the best compromise available in order to achieve optimum justice:
- 'Most people understand that there is no perfect system of justice. We all know that human judgement is imperfect and that resources are not limitless.....what we expect, and are entitled to expect, is a reasonably competent and timely investigation of the merits of disputes at a reasonable and proportionate cost to ourselves as well as the public.'*³⁷
26. This expectation, the '*moderate demand for justice*', is tempered by the practical limitations placed on it by time and the resources available. The existing civil justice system represents just one possible way of balancing the various objectives, and there are infinite possible variations as to the balance which might potentially be struck in the future.
27. In recent years, many countries throughout the world have experienced problems with the operation of their civil justice systems, in both common law and civil law jurisdictions. The problems that exist vary from system to system, depending on the balance of importance placed on the various objectives. A 1999 survey of the state of civil justice in some 13 countries³⁸ found that, broadly speaking, the problems in common law countries such as England, Australia and the USA relate largely to cost, but also to delay in the system. In civil law countries however, delay has been generally a greater problem than cost.

³⁷ See *Is it possible to provide access to justice at a reasonable cost?:* Paper by Adrian A.S. Zuckerman, University College, Oxford for Seminar 1 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

³⁸ *Justice in Crisis: Comparative Dimensions of Civil Procedure*; Adrian A.S. Zuckerman from *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, edited by Adrian A.S. Zuckerman, Oxford University Press, 1999

28. A number of common trends were observed across the various jurisdictions. Firstly, in virtually all countries there has been a steady increase in the number of cases going to court (although this has not been the case in Scotland).³⁹ This has created backlogs and delays in some countries and has also increased the cost of litigation in some instances. In all of these systems reforms have been introduced to address these problems; yet in most countries the problems of delay and cost have remained.
29. Three systems, however, were singled out for their efficiency, all of which have civil law systems.⁴⁰ The reasons cited for this include fixed litigation costs, competition in the provision of legal services and legal costs subsidies shared between the state and the legal profession. While such civil law countries have very different legal systems to our own, there may be valuable lessons to be learnt for Scotland.

³⁹ Source: *Civil Judicial Statistics 2002*, published by the Scottish Executive. In 1993, 166,393 civil actions were raised in the sheriff courts. By 2002, this had dropped to 115,326, a decrease of around 30%

⁴⁰ These are Japan, Germany and the Netherlands

3. Seeking Help, Advice and Representation

Seeking advice

1. Most people in Scotland are likely to become involved in a civil dispute – whether with their partner, neighbour, employer, landlord, creditor, a retailer or someone else – at least once during their lifetime. We live in an increasingly complicated society, and research has shown that civil justice problems tend not to occur in isolation, but often come in ‘clusters’. Money problems, for example, are often linked to family issues and / or housing or employment problems.⁴¹
2. Various studies in recent years have consistently found that around 1 in 4 people in Scotland have experienced one or more ‘justiciable problems’⁴² during the previous five years.⁴³ This is considerably lower than the proportion of those who say they have had justiciable problems in other countries. In England and Wales, closer to 2 in 5 of respondents say they have had such problems within the previous five years,⁴⁴ while this figure is closer to half in the United States,⁴⁵ New Zealand⁴⁶ and Canada.⁴⁷ In 2003, a study in the Netherlands found that two-thirds of respondents said they had had justiciable problems within the past three years.⁴⁸
3. The explanation for this low rate of justiciable problems in Scotland is not clear. It seems unlikely that there is actually a lower incidence of such problems in Scotland than elsewhere. One possible theory advanced in *Paths to Justice Scotland* was that sections of the Scottish population are more likely to feel powerless or to take a more fatalistic view, and are therefore less likely to report such problems.⁴⁹ It is also possible that people in Scotland are less likely than those elsewhere to view a situation as a problem that is difficult to resolve.

⁴¹ *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001 at pages 44-48

⁴² A ‘justiciable problem’ was defined in the *Paths to Justice Scotland* research as a matter experienced by a 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 it involved the use of any part of the civil justice system

⁴³ *Paths to Justice Scotland*, *ibid* found that 26% of people had a justiciable problem within the previous 5 years; *The Public Perspective on Accessing Legal Advice and Information*, Scottish Executive Central Research Unit, 2001 found a prevalence rate of 25%; *Community Legal Service: Assessing Need for Legal Advice in Scotland*, Scottish Executive Central Research Unit, 2004 found that the prevalence rate across four areas of Scotland varied between 28-32%

⁴⁴ *Paths to Justice: what people do and think about going to law*, Hazel Genn, Hart Publishing, 1999 found a prevalence rate of 40%, while *Causes of Action: Civil Law and Social Justice*, Legal Services Commission, 2004 reported an incidence of 37%

⁴⁵ *Legal Needs and Civil Justice: A Survey of Americans – Major Findings from the Comprehensive Legal Needs Study*, American Bar Association, 1994 found an incidence of 49%

⁴⁶ *Meeting Legal Service Needs: Research Report prepared for the Legal Services Board*, Legal Services Board, Wellington reported a prevalence of 51%

⁴⁷ A 2004 study of low-to-moderate income Canadians found that 48% had experienced one or more law-related problems within the previous 3 years. Source: *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians*, paper by Ab Currie, Department of Justice, Canada, April 2005

⁴⁸ The methodology of the study was designed to replicate that of the *Paths to Justice* studies. Source: *Paths to Justice Netherlands*, Ben C.J. Van Velthoven and Marijke ter Voert, paper presented at the ILAG conference, Killarney, Ireland, June 2005

⁴⁹ *Paths to Justice Scotland*, *ibid* at page 83

4. There is some evidence that certain groups are less likely than others to perceive something as a problem. *Paths to Justice Scotland* found that those who did report justiciable problems were significantly better educated and younger than those who did not.⁵⁰ This is supported by research into complaints about consumer problems, which found that those with higher incomes, those with formal qualifications and those aged under 55 were much more likely to say they had reason to complain about goods and services than others.⁵¹ Whatever the reasons for the low rate of reporting, it does seem likely that a considerable number of people in Scotland experience civil justice problems but fail to recognise them as problems that may be difficult to resolve.
5. When people become involved in a dispute, whether they have initiated it or someone else is taking action against them, it is important that firstly, they recognise that they have a dispute, and secondly, they decide what steps they should take to deal with that dispute. As we have seen, it seems that some people in Scotland do not even get over the first hurdle: if someone does not recognise that they even have a problem, they will not know that they may need to take steps to deal with that problem, let alone which steps they should take.
6. For those who do recognise that they have a dispute, the first point of entry into the civil justice system comes when they seek advice or help with their dispute. This is the first stumbling block for those belonging to some of the most vulnerable and disadvantaged groups in society. Research suggests that a small proportion of people who recognise that they have a dispute take no action at all to resolve it.⁵² Again, as with those who fail to recognise that they have a dispute, there is some evidence that those who take no action have very low incomes or are disadvantaged in other ways.⁵³
7. It is likely that such people do not seek advice because they do not know where to go for advice. While the most common first points of contact for advice are solicitors or citizens' advice bureaux, the evidence is that many people initially go to a wide range of agencies for advice, such as the police, trade unions and their local council.⁵⁴ Such agencies are unlikely to be the most appropriate source of advice in relation to most civil disputes. Research on knowledge of consumer rights has also found that a significant minority did not know where to go for advice about their consumer rights.⁵⁵

⁵⁰ *Paths to Justice Scotland*, *ibid* at page 83

⁵¹ *Knowledge of Consumer Rights in Scotland*, Scottish Consumer Council, 2003

⁵² *Paths to Justice Scotland* found that 3% of those with disputes took no action (pages 86-7); Scottish Executive research found this proportion to be 9%: *The Public Perspective on Accessing Legal Advice and Information*, Scottish Executive Central Research Unit, 2001. A more recent study found that between 34% and 78% of people with justiciable problems had not sought help or advice; the proportion varied considerably between geographical areas: *Community Legal Service: Assessing Need for Legal Advice in Scotland*; Scottish Executive Central Research Unit, 2004

⁵³ *Paths to Justice Scotland* found that almost half of those who failed to take action had an annual income of less than £10000, although there were no significant differences in terms of education (page 87), while *The Public Perspective on Accessing Legal Advice and Information* (*ibid*, see Note 52) found that those who did not take advice had a lower socio-economic profile (page 23)

⁵⁴ While *Paths to Justice Scotland* found that the two most common points of first contact were solicitors and the CAB, the Scottish Executive research (see Note 52) found that as many people with civil legal problems (21%) went first to the police or their local council as to the CAB, more than first went to a solicitor (16%). More recent research found that across four different areas of Scotland, the local council (between 17-39%) or the police (between 7-20%) were the most often contacted source of advice: *Community Legal Service: Assessing Need for Legal Advice in Scotland*, Scottish Executive Central Research Unit, 2004

⁵⁵ *Knowledge of Consumer Rights in Scotland*, Scottish Consumer Council, 2003

8. Those within this group are often overwhelmed by a sense of powerlessness: they are likely to feel that nothing can be done about the problem.⁵⁶ Some do consider contacting an adviser but decide not to do so because they believe the adviser would not, or would be unable to, help with the problem.⁵⁷ Such people often also have negative perceptions of the law and lawyers, and have clear concerns about the costs of obtaining legal advice.⁵⁸ They may also have difficulty in articulating their problem, particularly where they may have multiple problems to deal with.
9. Even among those who do try to contact an advice organisation, some fail to do so. Barriers to accessing advice may include difficulty in getting to the nearest advice agency, limited opening hours, and difficulty in getting through to advice agencies by phone.
10. Both those who do not recognise that they have a problem, and those who do but fail to seek advice, are particularly excluded from the civil justice system. Ways must be found of helping the first group to recognise that they have a problem, and of encouraging both groups to take advice as a first entry point into the system, in order to help them resolve their disputes. If the civil justice system is to provide justice, the first priority must be to find ways of ensuring that people do not fall at the first hurdle. There is little point in providing accessible dispute resolution processes if those with problems do not even know that they have rights or entitlements, or that it may be possible to do something about the problem if they seek advice.
11. This issue is crucial to the effective functioning of the civil justice system. As the Scottish Legal Action Group put it:

*'it is not possible to aim for an inclusive society based on each person exercising their rights and fulfilling their responsibilities without giving them a basic understanding of the legal system of the country they live in.'*⁵⁹
12. There was general agreement at the seminars and in the written submissions that there are a number of approaches that might be taken to attempt to address this issue. Firstly, there is a need for improved public education about the civil justice system and basic social and legal rights and responsibilities, targeting hard to reach groups in particular.

⁵⁶ *Paths to Justice Scotland*, ibid found that around half of those who did nothing thought there was nothing that could be done about the problem (page 87). *Community Legal Service: Assessing Need for Legal Advice in Scotland* (see Note 52) found that between 8 and 23% believed this, depending on geographical area (at page 24). *The Public Perspective on Accessing Legal Advice and Information* research (see Note 52) found, however, that 80% of those who took no action agreed that they were confident that they could get help if they wanted to.

⁵⁷ *Paths to Justice Scotland*, ibid at page 92

⁵⁸ *Paths to Justice Scotland*, ibid at page 231

⁵⁹ Written submission from the Scottish Legal Action Group. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

13. Such groups might include those with a long-term illness or disability, lone parents and those in receipt of welfare benefits. Research has shown that these groups are more prone than others to experiencing a range of justiciable problems, and are more likely to experience multiple problems than others. Moreover, as people experience multiple problems, the more likely they are to experience problems that can lead to social exclusion, such as homelessness or divorce.⁶⁰
14. It must be borne in mind, however, that an estimated 800,000 adults in Scotland have very low literacy and numeracy skills.⁶¹ While public education may help some people, therefore, there are more fundamental educational issues to be tackled first in order to improve the understanding of those who experience such difficulties.
15. In the longer term, addressing these issues in schools should help to improve awareness. One difficulty here, however, is that in Scotland, unlike England and Wales, there is no statutory curriculum. While the 5-14 guidelines include sections on rules, rights and responsibilities and law and order, the exact nature and content of these subjects is not tightly prescribed. While guidelines for primary schools emphasise the rights and responsibilities of citizens, those for secondary school pupils are largely geared towards the criminal justice system.⁶²
16. It is important that the necessary resources are made available to ensure that teaching of these subjects in schools includes information about the civil justice system and basic rights and responsibilities. This might cover, for example, consumer rights, housing rights, parental rights and responsibilities and managing money and debt problems.
17. General public education and awareness raising for the adult population also remains vital, however. While equipping people with the skills required to deal with their problems at an early age is important, it is likely to be only when they reach adulthood that they will be faced with civil justice problems. At that point they will need to know what to do and where to go for help.

⁶⁰ *Causes of Action: Civil Law and Social Justice*, Legal Services Commission, 2004 at pages 31-34

⁶¹ *Adult Literacy and Numeracy in Scotland*, Scottish Executive, 2001

⁶² Source: 5-14 *National Guidelines on Environmental Studies- Society, Science and Technology* and on *Law and Order*, Learning and Teaching Scotland, 2000

18. Secondly, a greater focus on preventative work would help. This involves raising awareness among the public of the importance of seeking advice before a problem develops: for example, before signing a tenancy agreement or buying goods or services. One possibility might be to develop specific projects aimed at encouraging people to come for help at an earlier stage, before their problems escalate and become more serious. Citizens' Advice Scotland has, for example, received Scottish Executive funding for financial literacy projects aimed at vulnerable and excluded groups such as lone parents, homeless people and those with mental health problems, with a view to dealing with their problems before they become unmanageable. If advice is sought at an earlier stage, there is a greater likelihood that the problem can be sorted out before it reaches the stage of formal proceedings and negotiation with the other party becomes more difficult.
19. Thirdly, it is important to ensure that those with civil justice problems are referred to the most appropriate agency to deal with their problem as early as possible. There was a clear view expressed by some of those attending the seminar on seeking advice, help and representation that there was a need for some form of 'gatekeeper' agency, to provide a widely recognised common entry point into the system. One clear contender for this 'gatekeeper' role was seen to be citizens' advice bureaux. Bureaux currently provide free generalist advice in the first instance, and increasingly also specialist advice, referring clients on where necessary, while public awareness of their existence is very high.⁶³
20. While the concept of such a designated 'gatekeeper' agency has obvious attractions, the evidence clearly shows that those with civil justice problems currently go to a wide range of advisers, as discussed above, who may not always be the most appropriate for their needs. It is therefore important to take this into account and try to address this, rather than try to change people's behaviour.
21. The key to ensuring that people are directed to the correct agency is appropriate diagnosis and referral; the approach taken by the agency which is the first point of contact is crucial to ensuring that they end up in the right place within the system. It is essential that, so far as possible, the first agency contacted asks the right questions and diagnoses the problem correctly. It may then be appropriate for that agency itself to deal with the problem, depending on its nature and on the skills available within the agency. Where the agency is not adequately equipped to take the matter on, it must ensure that the person is referred to the most appropriate service within the system.

⁶³ *Knowledge of Consumer Rights in Scotland*, Scottish Consumer Council, 2003 found that 93% of respondents had heard of citizens' advice bureaux

22. Ways must therefore be found to ensure that all of the agencies that might be approached for advice become linked into the system and are able to make appropriate referrals. Appropriate, quick and effective referrals are crucial to ensuring that people stay within the system and do not give up: the more times people are referred on to another advice service, the less likely they are to act on that referral.⁶⁴ There is a need to reduce the incidence of inappropriate referrals, and to maximise the quality of services provided, so that when someone is referred to the right agency they receive the right service.
23. In order to ensure that appropriate referrals are made, there must be an improved and more 'joined-up' system of advice services in Scotland. The general view at the seminars was that, rather than building a new system from scratch, the current structure of legal and advice services should be built upon, addressing the gaps in provision which currently exist. There is currently a lack of co-ordination, and therefore a need to strengthen links between all types of advice providers. This should include those agencies which are not mainstream advice providers but which may be approached for advice, as discussed above.
24. There was some support at the seminar on seeking help, advice and representation for the view that the best way of linking this wide range of agencies into the network of appropriate advice services might be to provide some sort of national directory of services, or perhaps a national website, possibly along the lines of the *CLS direct* website (previously the *Just ask* website) in England and Wales. This mirrors the proposal by the *Scottish Executive Working Group on a Review of Legal Information and Advice Provision in Scotland* to introduce an easily accessible and regularly updated directory of service providers, available in a variety of formats.⁶⁵
25. It was agreed at the seminars that there is a clear need for partnership between the voluntary and legal sectors. Any new system should retain the best of what exists at present, ie. a mixture of public, voluntary and private provision, but without any gaps in the safety net. This 'complex mixed model' of provision has many strengths in reaching a great variety of people and addressing their advice needs. It is widely accepted, however, that there are weaknesses within the current system, including a lack of consistent planning as well as a need for different agencies and providers to work better together, and the Scottish Executive proposes to address this by developing a national strategy for publicly funded legal assistance.⁶⁶

⁶⁴ *Causes of Action: Civil Law and Social Justice*, Legal Services Commission, 2004 at pages 77-78

⁶⁵ *Review of Legal Information and Advice Provision in Scotland*, Scottish Executive, 2001

⁶⁶ *Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward; a consultation*, Scottish Executive, June 2005

26. It was noted at the seminars that there are already strong links between advice providers in many areas as a result of consumer support networks, which were set up as part of the UK government's consumer strategy, with the aim of creating a joined-up consumer advice network across the UK,⁶⁷ but it was felt that there was a need to build better links, particularly with the private sector legal profession. Three in ten people with a dispute go first to a solicitor, while almost half of those who seek advice go to a solicitor at some stage.⁶⁸ The legal profession therefore has a vital role to play within any joined-up system, and ways need to be found to encourage private practice solicitors to become more involved.
27. A solicitor may not always be the most appropriate adviser, depending on the problem. Non-legally qualified advisers also make a significant contribution to the provision of legal advice, assistance, and in some cases, representation, across a wide range of subject areas, often areas in which there are few solicitors providing a service. Research suggests, for example, that only a minority of solicitors deal with welfare benefits issues.⁶⁹ Non-solicitor advisers regularly advise clients in relation to debt, housing, benefits and other aspects of social welfare law. Yet it is clear that many people with civil justice problems first contact a solicitor, and it is therefore important that they know which agencies in their local area they might most appropriately refer people to.
28. Even where a solicitor is the most appropriate adviser, there is currently some concern that there is a lack of solicitors in private practice who are willing and able to take on legal aid work. While recent increases in legal aid rates may help to address this, it seems unlikely that further increases in these rates alone will solve the problem. One way forward for the future may be the introduction of salaried solicitors paid for by public funds to provide legal services direct to the public. The Scottish Legal Aid Board does not currently have power to provide for such solicitors; however, the Scottish Executive has recently proposed that this might be one way forward. Other proposals include introducing possible incentives to law graduates to train with legal aid firms, and to firms to take on such trainees.⁷⁰
29. Another possibility might be to train a new category of non-solicitor advisers, perhaps at paralegal level, to provide advice in areas of unmet legal need. Such advisers might work alone or alongside solicitors. It is important, however, that such advisers should be required to conform to a clear set of quality standards. Those who use publicly funded advice services are entitled to expect that those providing those services are competent, have adequate training and expertise, and that the services are of a good standard.

⁶⁷ Following the publication of *Modern Markets: confident consumers - the government's consumer white paper* by the Department of Trade and Industry in 1999, local consumer support networks were set up across the UK, including every local authority area in Scotland. These networks bring local trading standards departments, citizens' advice bureaux and independent consumer advice agencies together to work towards a common aim: to provide joined up, expert and customer-focused advice on consumer matters.

⁶⁸ *Paths to Justice Scotland*, *ibid* at Chapter 3

⁶⁹ In 1995, only 25% of principals in legal firms (partners and sole practitioners) dealt with welfare benefits and social security rights: *Specialism in Private Legal Practice: the Provision and Use of Specialist Resource by Solicitors in Scotland*, Karen Kerner, Scottish Office Central Research Unit, 1995

⁷⁰ *Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward; a consultation*, Scottish Executive, June 2005

30. This was discussed at the seminar on seeking advice, help and representation; it was agreed that this was a difficult issue to address in a system where people may go to a huge range of advisers, as it would not be easy to include all of them within the same quality framework. The Scottish Executive is currently considering how to set up such an over-arching quality assurance system for all those delivering within the system, in the context of current proposals to reform the provision of publicly funded legal assistance.⁷¹
31. It was noted at the seminar that, at present, the services available do not always match up with the services that people need, and this would need to be addressed within any new improved system. In co-ordinating and planning advice services, there is also a need to consider the potential impact on choice. Some felt that it was important to retain an element of choice for those who could not afford to pay for legal services as to where they went for advice.
32. Whatever system was put in place, it was clear that a 'one size fits all' approach would not address the current gaps in provision. One particular difficulty with the current system is that while many people, particularly those in disadvantaged groups, have multiple problems, the current structure encourages increasing specialisation among both legal and other advisers. In addition to this, some recent advice initiatives, such as the National Debtline and Consumer Direct telephone helplines, require people to self-diagnose their problem, when there may be other relevant issues to consider. This makes it more difficult to take a holistic approach by looking at someone's situation as a whole, rather than dealing with each of their problems separately.
33. The main priority in providing advice services must therefore be to get people into the system at an early stage, and to ensure that they are directed towards the most appropriate agency for their needs. While some people are able and willing to deal with their disputes by themselves, the evidence clearly suggests that the majority want someone else to deal with their problem; they want to be 'saved' rather than empowered.⁷² This may however be due, at least in part, to their fear of, and negative views about, the legal system. If ways could be found of making the system appear less intimidating and of providing easier access to information and advice, perhaps more people would be encouraged to tackle at least some aspects of their problems by themselves, as discussed further below.
34. Even among those who are informed and confident, it is not always possible to resolve a dispute without outside help. The vast majority of people recognise, for example, that they need to seek advice about divorce or separation, or personal injury.

⁷¹ *Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward; a consultation*, Scottish Executive, June 2005

⁷² *Paths to Justice Scotland*, *ibid*

35. We know that around one third of those with disputes regret the way their problem was handled.⁷³ The most common reasons for this regret are that they feel they were not sufficiently persistent or assertive, they wish they had taken action sooner, or that they should have gone for advice from a solicitor or advice agency.
36. We also know that, once people are in the civil justice system, if they have a good experience they are likely to use it again if necessary. This also has an effect on whether members of the person's family take advice when they have a problem.⁷⁴ Good quality advice at an early stage in a dispute is therefore fundamental in ensuring that those with disputes find an appropriate way of resolving them.

Help for those who do not require advice

37. While around two-thirds of those with a dispute seek help or advice from an outside adviser at some stage,⁷⁵ not everyone with a dispute will require advice. This will depend to some extent on the nature of the individual and also on the nature of the problem. When faced with a problem, the vast majority of people will first try to resolve it directly themselves by contacting the other person or organisation involved in the dispute. This strategy is often successful - in the case of consumer problems, for example, most people successfully take direct action themselves to sort out the problem, without recourse to advice.⁷⁶
38. Where people are sufficiently informed, confident and persistent to sort out a problem by themselves, and they are able to do so, they may not need to become involved to any real extent with the civil justice system. There may be scope, however, for providing practical help to assist those who are confident about dealing with their dispute, but who would benefit from information and help in relation to their rights and how the legal system works. Initiatives such as information kiosks or 'self-service centres' based on US models and in-court advice services might provide cost effective means of assistance for such people.
39. Useful advice can also be accessed via the internet. Citizens' Advice Scotland's *Adviceguide*, for example, helps people to identify the nature of their problem and the steps they might take before they go for advice, while the Office of Fair Trading also produces consumer information on its website on consumer rights matters.

⁷³ *Paths to Justice Scotland*, *ibid*; *Causes of Action: Civil Law and Social Justice*, Legal Services Commission, 2004

⁷⁴ *Causes of Action: Civil Law and Social Justice*, Legal Services Commission, 2004

⁷⁵ *Paths to Justice Scotland*, *ibid* at Chapter 3

⁷⁶ *Paths to Justice Scotland*, *ibid*; *Knowledge of Consumer Rights in Scotland*, Scottish Consumer Council, 2003

40. Theories about the ‘unbundling’ of legal services suggest that, in some cases, people are able to deal with some aspects of their problem by themselves, while requiring assistance from a lawyer with others.⁷⁷ This allows them to use only a limited amount of legal assistance at the point where they need it most. It is likely, however, to be most useful for well-educated and informed people, rather than those in more disadvantaged groups.

Beyond advice - representation

41. While around one-third of civil disputes are eventually resolved by agreement, a minority end up in formal legal proceedings.⁷⁸ When a dispute reaches this stage, people’s needs may go beyond just advice; they may also require representation at a court or tribunal. While this may not be problematic for businesses or public authorities – the ‘repeat players’ within the system who are routinely legally represented in courts and tribunals - an individual with a dispute may not find it so easy to secure representation. This raises important questions about the ‘equality of arms’ of the parties to a dispute.

42. While there are no comprehensive statistics on the number of unrepresented people appearing in Scotland’s courts, we know from *Paths to Justice Scotland* that one quarter of those attending a court or tribunal said they attended by themselves.⁷⁹

43. Although the numbers were too small to break down according to the type of court or tribunal attended, it is likely that many of those representing themselves were involved in tribunal cases. Some are also likely to have gone to the small claims court, which was introduced with the intention of providing a cheap, quick and informal procedure for consumer cases involving small sums of money, where legal representation would not be required. Unfortunately however, the procedure has been found not to be operating as informally as was intended,⁸⁰ and where the other party is a business or public authority they are likely to be represented, placing party litigants at a disadvantage. New procedural rules designed to improve the procedure were introduced in 2002, but the overall structure of the system has changed little, and anecdotal evidence suggests that many parties without representation still find the procedure off-putting and overly formal.

⁷⁷ See eg. *The unbundling of legal services: increasing legal access*, Forrest S Mosten, in *Shaping the Future: New Directions In Legal Services*, Legal Action Group, 1995

⁷⁸ *Paths to Justice Scotland* found that 14% of those with justiciable problems ended up in legal proceedings - see page 158

⁷⁹ *Paths to Justice Scotland*, *ibid* at page 215

⁸⁰ Eg *Report of a Study to Investigate the Attitudes of Advisers to the Small Claim Procedure in Scotland*, Scottish Consumer Council, 1989; *Small Claims in the Sheriff Court in Scotland - an assessment of the use and operation of the procedure*, Scottish Office Central Research Unit, 1991; *Lay Representation in Courts and Tribunals*, Citizens’ Advice Scotland, 1998

44. Meanwhile, anecdotal evidence also suggests that the numbers of people appearing in the sheriff courts at all levels of procedure without legal representation are increasing. The main reason for this may well be the cost involved – almost half of the population is not eligible for legal aid, while many more are eligible only subject to a contribution.⁸¹ Moreover, although the issues involved can be legally complex, legal aid is not available for representation in small claims or defamation cases.⁸² Legal aid has in recent years been made available for certain tribunals, but in some instances only where the case is judged to be sufficiently complex for legal representation to be required.⁸³
45. Those who are not eligible for legal aid may find the costs of legal representation prohibitive. This is borne out by the evidence – one of the most common reasons given by those in the *Paths to Justice Scotland* survey who were not represented as to why this was the case was that they could not afford a representative.
46. Representation need not always be provided by a solicitor: other advisers can and do represent people in tribunals and in certain types of court proceedings. Representation by non-solicitors is permitted, subject to certain conditions, in small claims, summary cause cases (first calling only), proceedings under the Debtors (Scotland) Act 1987 and any proceedings before a sheriff relating to attachment under the Debt Arrangement and Attachment (Scotland) Act 2002.
47. Yet there is evidence that very few people are represented by a non-solicitor adviser in formal court proceedings. While two-thirds of those in the *Paths to Justice Scotland* study were represented by a solicitor, only one per-cent were accompanied by an advice worker. This suggests that levels of representation by other advisers are very low, reflecting the findings of Citizens' Advice Scotland research that very few advisers provided representation in the small claims or heritable courts, although the levels were higher in relation to tribunals.⁸⁴
48. Likewise, a 2004 survey carried out by the Scottish Sheriff Court Users' Group found that only 1 in 4 of its member organisations (including citizens' advice bureaux, local authority advice services, law centres and other advice agencies) who responded provided court representation more than 10 times in a year. This represents a total of only 14 agencies across Scotland, including 5 law centres.⁸⁵

⁸¹ In 1998/9, the last year for which figures are available, 45% of 'benefit units' ie person/s who would be considered as one unit for the purposes of assessing eligibility of state benefits, were ineligible for civil legal aid. A further 29% were eligible only subject to a contribution. Source: *Legal Aid in a Changing World*, Scottish Legal Aid Board, 2001

⁸² Legal Aid (Scotland) Act 1986 Schedule 2 Part 2

⁸³ Legal Aid and Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003, regulation 13

⁸⁴ *Lay Representation in Courts and Tribunals*, Citizens Advice Scotland, 1998

⁸⁵ Source: *Scottish Sheriff Court Users' Group Newsletter – Special Issue*, June 2004

49. The major reasons why non-solicitor advisers are not currently representing clients in court appear to be firstly, a lack of resources and secondly, the formality of court proceedings, which puts advisers off going to court. In 2003/4, citizens' advice bureaux in Scotland denied representation to at least 244 clients due to lack of resources,⁸⁶ and this was also reported as being a major factor by almost half of the organisations who responded to the Scottish Sheriff Court Users' Group survey. Advisers taking part in the Citizens' Advice Scotland research felt that the formality of courts should be reduced, while some also felt they had not been well treated by sheriffs in the small claims courts, although sheriffs did appear to welcome the appearance of lay representatives in the housing court.⁸⁷
50. Perhaps surprisingly, the most common reason given by those in the *Paths to Justice Scotland* study who were not represented as to their lack of representation was that they did not need anyone to represent them.⁸⁸ When asked if they felt at a disadvantage, most said they did not. While on the face of it, this suggests that lack of representation may not be a major problem, it is likely that those who get to the stage of formal legal proceedings without a representative are generally those who are confident and informed enough to do so.
51. Of greater concern are those who may need representation, but who fail to obtain this. While the emphasis should be on resolving disputes at an early stage, there will always be cases where legal proceedings will be required. The statistics show that the vast majority of cases in the sheriff court are decided in favour of the pursuer without the case being defended.⁸⁹ While it may be that in some cases there is no defence to the action and/or the defender does not wish to have representation, it is likely that in many cases defenders do not seek to challenge the claim, possibly because they have no-one to represent them, and they are not confident about representing themselves.
52. Equally, there may be considerable numbers of potential pursuers who do not pursue a court case because they are deterred by costs, lack of advice and representation and / or alienation from the court process. This is potentially a significant issue in relation to exclusion from the civil justice system. There is clear evidence that, as might be expected, those who are not represented are at a disadvantage at courts and tribunals when compared with those who have representation.⁹⁰

⁸⁶ Source: Citizens' Advice Scotland briefing for Executive Debate on Legal Aid Reform in the Scottish Parliament, 23 June 2005

⁸⁷ *Lay Representation in Courts and Tribunals; Citizens Advice Scotland*, 1998

⁸⁸ *Paths to Justice Scotland*, *ibid* at page 216

⁸⁹ Source: *Civil Judicial Statistics*, Scottish Executive, 2002. These show that in 75% of ordinary causes, 98% of summary causes and 54% of small claims, judgment was given in favour of the pursuer on an undefended basis

⁹⁰ See for example *In the Shadow of the Small Claims Court*, Elaine Samuel, Scottish Office Central Research Unit, 1998; *The Effectiveness of Representation at Tribunals: Report to the Lord Chancellor*, Hazel Genn and Yvette Genn, 1989

4. What Kind of Institutions are Needed for Solving Civil Justice Problems?

What is the purpose of the courts and other dispute resolution institutions?

1. When reflecting on the types of institutions the civil justice system requires to provide for the resolution of civil disputes, the purpose of such institutions must first be considered. Historically, legal institutions have developed to fulfil the functions required of them by society: initially, preserving or ensuring peace by means of criminal sanctions, then enforcing the duties of payment of taxes to the Crown or state, and later in resolving civil disputes about economic, property and eventually personal matters, such as personal injury and family relationships.⁹¹
2. Institutions of civil justice have, as discussed in Chapter 2, four broad and interlinked functions:
 - a. the provision of access to information and advice about legal rights and how to enforce them
 - b. the resolution of disputes
 - c. the determination of disputes and enforcement of rights
 - d. the formulation of legal principles and authoritative interpretation of legislation
3. Institutions relating to the first function, the provision of access to information and advice, were discussed in Chapter 3. The discussion in the present chapter therefore focuses on the remaining functions. Traditionally the courts have been viewed as the primary institution within the civil justice system for determining disputes. Courts and tribunals can serve some or all of these other functions, but there has been a growing recognition in recent years that a court hearing may not always be the best way to resolve a dispute in a way which meets the needs of the parties involved.
4. The courts will always be central to the civil justice system, for a number of reasons. Firstly, while they should not necessarily be viewed as the first port of call for resolving a dispute, they must always be there as a last resort, should other less formal means of dispute resolution fail. Thus, these other forms of dispute resolution are often seen to be conducted 'in the shadow of the court'. Secondly, the courts ultimately set the rules against which future cases must be measured, and there will always be instances where they will be required to set precedents and make authoritative rulings.

⁹¹ See *Institutions of Civil Justice: a paper prepared for the Scottish Consumer Council Seminar on Civil Justice, December 15 2004*, by Professor Carrie Menkel-Meadow, Georgetown University, Washington DC. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

5. Finally, and perhaps most importantly, courts and tribunals can also be seen to perform an important function in preserving peace in society as a whole. This might be seen as a 'deterrent' function: by making rulings, courts and tribunals may prevent future disputes arising between private individuals.
6. While the courts will always retain a central place in the civil justice system, however, it is increasingly recognised throughout the world that in many instances there may be alternative and perhaps better ways of resolving civil disputes. Other less formal means of dispute resolution may be quicker, cheaper and better suited to the needs of the parties involved.
7. Firstly, there are strong arguments to be made in favour of alternatives on economic and efficiency grounds. As Lord Woolf and others have recognised, the court process can be expensive and subject to long delays. Yet most cases will not require a formal ruling for the purposes of setting a legal precedent. Moreover, most cases in the courts are undefended,⁹² while it is widely accepted (although there is little statistical evidence available) that the vast majority of defended cases are settled before they reach the stage of a full court hearing.⁹³ the 'door of the court' syndrome.
8. There was general agreement at the seminars that, where possible, the system should encourage the resolution of disputes at an early stage. It was recognised that a system where the courts became involved in every dispute would be inefficient in terms of cost, time and court resources.
9. It was, however, argued by one of the seminar speakers that if the courts were made cheaper and more accessible, this might encourage more people to use them to enforce their legal rights. He argued that people should not be prevented from taking their dispute to court where they wished to do so simply because of the excessive cost involved.⁹⁴ While this is clearly a strong argument in favour of reducing exclusion from the *courts*, exclusion from the civil justice system as a whole is a separate issue.
10. The research available suggests that 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.⁹⁵ This might, of course, be achieved in a number of ways, such as informal agreement or formal means of dispute resolution, including the courts.

⁹² Source: *Civil Judicial Statistics*, Scottish Executive, 2002. In 75% of ordinary causes, 98% of summary causes and 54% of small claims, judgment was given in favour of the pursuer on an undefended basis

⁹³ Note: this is not necessarily the case with tribunals, however: for example in 2002-3, only around 32% of employment tribunal cases and 13% of pensions appeal tribunal cases in Scotland were withdrawn before the hearing. Source: *Council on Tribunals Annual Report 2002-3*

⁹⁴ See *Is it possible to provide access to justice at a reasonable cost?*: Paper by Adrian A.S. Zuckerman, University College, Oxford for Seminar 1 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

⁹⁵ *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001

11. We also know that those involved in disputes are often looking for an outcome that cannot be awarded by a court or tribunal. In some instances, notably family cases, courts can and do adopt a flexible approach to the orders which they make. In general however, the powers of the court are more limited and can be inflexible, being largely geared towards awarding financial compensation, ordering a party to do something or preventing a party from doing something. Research suggests that while the main objective of those involved in disputes is usually money-related, they often also have other motivations. They may also be looking for an apology or an explanation, for example, or may wish to ensure that the same thing does not happen to someone else in the future.⁹⁶
12. The vast majority of those with disputes do not become involved in formal legal proceedings, and many feel alienated from the courts and the legal system.⁹⁷ It is clearly important that those who wish to go to court are not excluded from doing so, but equally it is likely that many people do not wish to engage in the formal court process if they can avoid doing so.
13. An ongoing court case, as well as being time consuming and expensive, may be very stressful for the parties involved. Moreover, the complexity of court rules and procedural law have led some to suggest that:

*“ ‘trial by court’ has become the new trial by ordeal ”*⁹⁸

It should be acknowledged, however, that a degree of complexity is inevitable in court rules, since they exist in order to ensure that there will be fair and predictable procedures in a wide variety of cases and situations. Some attempts have already been made to simplify court rules,⁹⁹ but it may be that such attempts should be carried further.

14. All of this suggests that in the twenty-first century, there is a need for an increased emphasis on ‘problem solving’ in the civil justice system, rather than focusing as in the past on the formal declaration of legal rights:

*“modern life requires ‘process pluralism’ or a variety of different institutions as we are evolving away from ‘trial by court’, just as we evolved from ‘trial by ordeal’ ”*¹⁰⁰

⁹⁶ *Civil Disputes in Scotland: a report of consumers’ experiences*: Scottish Consumer Council, 1997; *Paths to Justice Scotland*, ibid

⁹⁷ *Paths to Justice Scotland*, ibid

⁹⁸ See Note 91

⁹⁹ For example, the Act of Sederunt (Small Claim Rules) 2002 incorporates directly into those rules certain summary cause and ordinary cause rules which were previously incorporated only by reference, while a glossary of terms was also added as an appendix to the rules for the benefit of users

¹⁰⁰ See Note 91

15. Over the past fifty years or so, this has been increasingly recognised within the UK, with the establishment of various non-court bodies intended to deal with civil justice problems. The most obvious and oldest example is the ever-growing system of tribunals, which were set up largely to deal with administrative disputes between individuals and the state. Originally viewed as part of the state administration rather than as independent judicial bodies, tribunals became firmly established as part of the civil justice system following the Franks Report in 1957.¹⁰¹
16. Tribunals were designed with the intention of providing a less formal forum than the courts for dealing with disputes, and they have increased in number and importance over the years. While most still focus on disputes between individuals and the state (eg. social security, tax and immigration matters), some, such as employment tribunals, deal with disputes between private individuals and/or businesses. Tribunals are now a central part of the civil justice system, handling considerable volumes of cases in comparison with other means of dispute resolution.¹⁰²
17. Unfortunately however, despite the intention of less formality, some of these tribunals have themselves become increasingly complex. An obvious example is employment tribunals: employment law has become ever more complex with the result that it is very common for parties, particularly employers, to be represented at such tribunals, often by lawyers.
18. Since 1967, when the office of Parliamentary Ombudsman was established, there has also been a considerable growth in ombudsman services which will investigate and give a ruling on complaints made about public and private organisations. They provide a last resort when complaints cannot be, or are not, resolved through the internal procedures of the organisation complained about.
19. Some ombudsmen, such as the Scottish Legal Services Ombudsman, are established by statute, and the organisations they oversee are obliged to co-operate with their investigations; however, they can only make recommendations, which are not binding on those organisations. In most cases, statutory ombudsmen can only review how a decision was made, and cannot look at the merits of the decision itself. Private sector ombudsman schemes, such as the Surveyors' Ombudsman Scheme, which has been piloted in Scotland, have been established voluntarily by the relevant industry, and awards made by them are binding on the industry.
20. Some ombudsman schemes have UK wide remits - for example the Financial Ombudsman Service, the Pensions Ombudsman and Otelco, the telecommunications ombudsman. There are also two statutory ombudsmen with wholly Scottish remits: the Scottish Public Services Ombudsman and the Scottish Legal Services Ombudsman.

¹⁰¹ *Report of the Committee on Administrative Tribunals and Enquiries, 1957*

¹⁰² In 2002, a total of 120,385 cases were initiated in the sheriff courts and the Court of Session. Source: *Civil Judicial Statistics 2002*, Scottish Executive. In the same year, 35,904 cases were received by the Appeals Service in Scotland, 44,278 by Children's Panels, 13,112 by Employment Tribunals in Scotland and 16,353 by Valuations Appeals Committees, for example. Source: *Council on Tribunals Annual Report 2002-3*

21. Meanwhile, there are also a growing variety of public and private sector complaints procedures, and bodies such as the Scottish Parliamentary Standards Commissioner and the Scottish Information Commissioner, who have powers to investigate complaints in relation to particular public bodies or public office holders.
22. There has also been an increase in recent years in the availability of other means of dispute resolution, such as mediation, arbitration and adjudication. These various forms of 'alternative' or 'appropriate' dispute resolution are discussed in greater detail in Chapter 5, which considers the most appropriate *processes* for resolving disputes.

In what physical location / by what type of body should disputes be dealt with?

23. Within all civil justice systems, institutions of dispute resolution must be developed to meet a variety of needs. The needs of those who use the system will vary depending on who they are - whether they are individuals, businesses or other bodies, whether they are pursuing or defending in a dispute, whether they have legal representation and so on. This is discussed further in Chapter 5, which looks at *processes* for resolving civil justice disputes.
24. Within the current system, institutions have already developed in certain ways to meet some of the needs of those who require to use them. Firstly, institutions for resolving disputes must be easily accessible to those who need to use them. It is clearly important, for example, that disputes should be handled as locally as possible for the ease and convenience of the parties, and with a view to minimising delay and expense. The closer the parties are to an advice service or a dispute resolution institution, the more likely they will be to use it. There may also be a cultural aspect to this, as a local institution is likely to have a greater understanding of local circumstances and local customs and practices.
25. These issues have long been formally recognised within the courts system and the tribunals system.¹⁰³ A system of local courts and tribunals has grown up in Scotland to try to meet local needs. The sheriff courts, which deal with the vast majority of civil business in Scotland,¹⁰⁴ have a very wide jurisdiction when compared with courts elsewhere, in terms of the types and value of cases they can deal with.

¹⁰³ Note: until 1983, however, the Court of Session had exclusive jurisdiction in divorce cases. Since that time, such cases can also be, and generally are, raised in the sheriff courts

¹⁰⁴ In 2002, 115,236 cases were initiated in the sheriff courts, while 5,059 were initiated in the Court of Session (4,855 in the Outer House and 204 in the Inner House). Source: *Civil Judicial Statistics 2002*, Scottish Executive

26. There are 49 sheriff courts in Scotland, in every city and in most towns. There are clear rules as to which sheriff court has jurisdiction in a particular case: the general rule is that a defender must be sued in the court for the area in which he or she is based,¹⁰⁵ although there are some important exceptions to this. For example, where the dispute concerns a consumer contract, the consumer may sue in his or her local court, regardless of where the other party is based.¹⁰⁶
27. While in general terms the parties involved in a dispute will wish to have that dispute resolved as locally as possible, there may be instances where this will not be the primary consideration. In some large commercial disputes, such as those relating to intellectual property, the parties may choose to have their case dealt with in another jurisdiction. Such ‘forum shopping’ can occur where the courts in another jurisdiction are seen to be quicker or cheaper, or to have greater expertise in a particular type of case than the local courts. We understand that this can be an important consideration for large commercial organisations involved in complex high value disputes, and that some lawyers may advise such clients to litigate in England, for example, where they view this as being in their clients’ interests.
28. It is possible that with the increased use of information technology, the geographical proximity of civil justice institutions will become less important in the future. Recent proposals by the Sheriff Court Rules Council, for example, include the submission of court documents by electronic means and envisage a ‘virtual court’ where undefended cases can be dealt with electronically, avoiding expense to the parties in attending court and saving court time.¹⁰⁷
29. Another possibility might be the conduct of court proceedings, including the taking of evidence, via live television links. Such links are already available in some cases involving vulnerable witnesses such as children. Further extending their use may be problematic, however, as the judge requires to assess the credibility of each witness, which may be more difficult to do when they are not in the same room. Finally, online dispute resolution methods may be used more in future. Various online mediation services have been in existence in the USA for some years, and similar services are now available within the UK, while applications for some consumer arbitration schemes may also be completed online.
30. In addition to geographical considerations, the type of civil justice institution used may depend on the subject matter of the dispute. This is increasingly the case: a trend towards greater specialisation has begun to develop in recent years. As we have seen, various categories of administrative disputes are now dealt with by specialist tribunals, as are employment disputes. As noted earlier, a number of ombudsmen have also come into being to deal with disputes in particular sectors, both in the public or private spheres.

¹⁰⁵ Civil Jurisdiction and Judgments Act 1982 Schedule 8, Rule 1, as substituted by the Civil Jurisdiction and Judgements Order 2001

¹⁰⁶ Civil Jurisdiction and Judgments Act 1982 Schedule 8 Rule 3.1, as substituted by the Civil Jurisdiction and Judgements Order 2001

¹⁰⁷ *Consultation paper on proposals for further extension of the use of information technology in civil cases in the sheriff court*, Sheriff Court Rules Council, September 2004

31. Within the courts system, there has also been some recognition of the advantages of specialised procedures. In recent years, Scotland has seen the establishment of specialist commercial courts, both within the Court of Session and in Glasgow, and more recently, Aberdeen sheriff courts. A number of insolvency judges were also recently appointed in the Court of Session. A specialist family court has also grown up in Glasgow, while a new procedure dealing with personal injury actions has been developed in the Court of Session. Nominated sheriffs or judges are allocated to these procedures, although they are generally rotated after a period of time. In general terms, however, the courts are largely general courts, where judges and sheriffs deal with a wide variety of cases, both civil and criminal.
32. It was widely agreed at the seminars and stakeholder meetings that the specialist procedures currently in place have been successful, and that there are clear advantages in providing access to such procedures where this is appropriate and practicable. Scotland is a small jurisdiction and while, for example, a specialist commercial court may work well within a large population centre such as Glasgow, most smaller courts are unlikely to produce sufficient business to sustain such a facility. Moreover, it is vital that local dispute resolution is available, and this was seen to be an overriding concern. It is more important that users have access to a local sheriff court where necessary than a specialist court that may be several hundred miles away.
33. There is an important distinction to be drawn here between specialist *decision makers* (such as judges and sheriffs) and specialised *procedures*. Some of the stakeholders we met with, such as the Faculty of Advocates, expressed the view that knowledge of the particular rules relating to that procedure, together with the guarantee that the same judge would be allocated to a case throughout, was more important than whether the judge had expertise in that particular area of substantive law. Knowledge of the substantive law was seen as something which an experienced judge could easily pick up; knowledge of the particular procedures, however, speeded up the process for all involved and minimised delay. Others expressed the view, however, that it could be very helpful to have a case heard by a judge who had gained considerable experience in a particular subject area in their previous legal practice.
34. Another consideration which may influence the choice of civil justice institution made by the parties to a dispute is whether they require a public or private means of resolving it. Decisions made by a court or tribunal are made in public, and this may often be what is required, in cases where there is a need for a clear public ruling on a matter of important legal principle. There may be cases, however, where the parties wish to keep their dispute private and to have it resolved by private means. This is often the case in commercial disputes, where companies do not wish to publicise the matter and may wish to avoid public embarrassment.
35. Processes such as arbitration and mediation, which are further discussed in Chapter 5, may be suitable in such cases. In the USA however, the increasing use of such processes by commercial parties has led to criticisms that they are 'privatising' justice by keeping both the facts and the outcome private.

Where should the divisions lie between different procedures and institutions?

36. There are a variety of possible ways to divide up and allocate different civil justice procedures and institutions. As we have seen, these include physical location, subject matter, and whether they provide public or private means of dispute resolution. Another basis for allocation might be the nature of the parties involved. This may follow naturally from the subject matter involved: as we have seen, tribunals deal with specialised subject areas, many of which focus on disputes between individuals and the state.
37. One clear institutional issue in Scotland relates to the lack of any clear separation between civil and criminal business in both the sheriff courts and the higher courts. While at the lowest level the district courts deal only with criminal cases, the sheriff courts deal with both civil and criminal cases. Meanwhile, although the Court of Session in Edinburgh and the High Court of Justiciary, which sits in Edinburgh and Glasgow and other towns and cities as required, are at first glance separate institutions, criminal cases are also heard within the Court of Session building, while the judges are the same individuals, although dressed in different robes.
38. This raises a number of issues in relation to the administration of justice. Firstly, one recurring theme in our meetings with stakeholders was the extent to which the demand for court resources to deal with criminal cases impacts on civil court business. While criminal business often had an impact on the availability of court time for civil cases in the sheriff courts, this was seen to be a particular issue in the higher courts.
39. The majority of business in the courts at both levels relates to criminal matters. In 2003-4, nearly twice as many 'sitting days' were allocated to criminal business in the High Court as to civil business in the Court of Session, while in the sheriff courts more than twice the number of days were allocated to criminal business as compared with civil cases.¹⁰⁸ The number of days allocated to criminal business in the sheriff courts, particularly summary cases, has been steadily increasing in recent years.¹⁰⁹ There are good reasons as to why criminal business often takes precedence, due to the strict time limits within which cases must be heard in court. However, we were told by some stakeholders that the demand placed on the courts by criminal business often led to a lack of judges to deal with civil cases, delays in cases being heard on the day and cancellation of civil proofs, which were often then delayed for a considerable number of months. This also led to a significant amount of time being spent by solicitors and advocates waiting in court, at a cost to the client, or to the public purse in legally aided cases. While there is little hard evidence available, and while views differ on the extent of the problem, this anecdotal evidence from stakeholders accords with the experience of some members of the advisory group.

¹⁰⁸ In 2004-5, a total of 1,672 'sitting days' were allocated to new civil business in the Court of Session, compared with 3,215 days for new criminal business in the High Court. In the sheriff courts, 8,840 sitting days were allocated to new civil business, while 19,341 days (3,942 for solemn business and 15,399 for summary business) were allocated to new criminal business. *Figures obtained from the Scottish Court Service.*

¹⁰⁹ The number of sitting days allocated to summary criminal business has increased gradually from 13,748 in 1999-2000 to 15,399 in 2004-5, an increase of 12%. The number of days allocated to solemn business has also increased, although less markedly, in recent years, and there was in fact a slight decrease in 2004-5 from the previous year. *Figures obtained from the Scottish Court Service*

40. Secondly, this system requires judges and sheriffs to deal with both civil and criminal cases. Some have suggested that it might improve the administration of justice if judges and sheriffs were able to specialise in one or other of these two spheres. The view was expressed by the legal professional bodies and others, however, that the current arrangements broadened the experience of decision-makers, enriching the quality of their decision-making skills as well as their own job satisfaction.
41. Thirdly, the lack of any clear separation between civil and criminal matters has an impact on public perceptions: people tend to associate the courts with criminal matters. While it is likely that this is due in no small part to the portrayal of the courts in the press and other media, the lack of any physical separation between the two in Scotland's courts can only serve to reinforce this. *Paths to Justice Scotland* found that the public were largely unable to distinguish between criminal and civil courts, and that this assumption that court means a criminal court contributed to their reluctance to become involved in civil court proceedings.¹¹⁰
42. Divisions between civil justice institutions have traditionally been drawn on the basis of either subject matter - for example, employment cases are dealt with by employment tribunals - or the financial amount involved. At present, all cases with a value of £1500 or less must be dealt with in the sheriff court,¹¹¹ regardless of the complexity of the case. For cases above this level, the pursuer may choose to take their case in either the sheriff court or the Court of Session.
43. There are currently three separate procedures within the sheriff court; cases are allocated to a particular procedure mainly according to the amount of money involved.¹¹² Thus in Scotland, as in most jurisdictions, cases of lower financial value tend to be dealt with under a quicker and less formal procedure than those involving greater sums. This is understandably driven by attempts to ensure 'proportionate dispute resolution'; yet small claims cases can be just as complex in terms of their facts and / or the legal issues they raise as those with a higher value.
44. Moreover, division on this basis may not always have the intended result. The small claims procedure, for example, was introduced in 1988 as an informal and simple means for individuals to bring consumer claims to court without representation. What has happened in reality, however, is that the procedure has come to be dominated by undefended debt cases brought by large companies or public bodies with legal representation, often against other companies, but also against individuals.

¹¹⁰ *Paths to Justice Scotland*, ibid at page 242

¹¹¹ This limit is known as the privative jurisdiction limit. In 1998, the Scottish Courts Administration published a consultation paper: *Proposals to Increase Jurisdiction Limits in the Sheriff Court (Including Privative Jurisdiction Limit)*, which proposed to raise this limit, but no increase has yet been implemented

¹¹² These are: small claims procedure for cases with a value of £750 or less; summary cause procedure for cases between £751 and £1500, and ordinary cause procedure for cases worth £1500 or more

45. Meanwhile, research has found that the procedure has not been operating as informally as was intended, placing party litigants at a disadvantage,¹¹³ while there is also evidence that although most people have heard of the small claims court, only a tiny minority would consider using it to resolve a consumer problem.¹¹⁴
46. At the same time, however, it was pointed out at the seminars that the rules of evidence and substantive law are the same in the small claims court as they are in other court procedures, which means that the sheriff's decision must be reached on the basis of both the law and the facts. This restricts the ability of the sheriff to conduct the case on an informal basis. The court cannot give advice to unrepresented parties or be seen to favour one party over the other within an adversarial process. Research on small claims has found that sheriffs were more likely to adopt an inquisitorial role where neither party was legally represented: where one party was legally represented, sheriffs appeared unwilling to adopt an inquisitorial approach.¹¹⁵
47. The question therefore arises as to whether the courts are always the best place to deal with certain civil matters. Is a court really the best place to deal with consumer small claims cases, for example, or consumer debt? The recently introduced debt arrangement scheme aims to provide a less formal means of dealing with the latter; would consumer cases also benefit from a less formal procedure? In the criminal justice system we have the district court for minor offences, presided over by lay justices of the peace. Would civil cases benefit from a similar institution?
48. Consideration might equally be given to the possibility of amalgamating or streamlining the various institutions and / or procedures available. Is there, for example, a need to retain the current overlapping jurisdiction between the sheriff court and the Court of Session for most cases above the privative jurisdiction limit? Should consideration be given to creating a single civil court of first instance, as has been proposed in England and Wales?¹¹⁶
49. There is a particular issue here in Scotland in relation to personal injury cases of lower financial value raised in the Court of Session. This issue was raised at the seminars and also at a number of our stakeholder meetings. The view was expressed by some that it was not in the interests of proportionate dispute resolution that such cases should be raised in the higher courts when the sheriff courts had competence to deal with them.

¹¹³ Eg *Report of a Study to Investigate the Attitudes of Advisers to the Small Claim Procedure in Scotland*, Scottish Consumer Council, 1989; *Small Claims in the Sheriff Court in Scotland - an assessment of the use and operation of the procedure*, Scottish Office Central Research Unit, 1991; *Lay Representation in Courts and Tribunals*; Citizens' Advice Scotland, 1998

¹¹⁴ *Knowledge of Consumer Rights in Scotland*, Scottish Consumer Council, 2003

¹¹⁵ *In the Shadow of the Small Claims Court*, Elaine Samuel, Scottish Office Central Research Unit, 1998 at pages 76-7

¹¹⁶ *A Single Civil Court?: the scope for unifying the civil jurisdictions of the High Court, the county courts and the Family Proceedings Courts*, Department for Constitutional Affairs, February 2005

50. Many, perhaps a majority, of these cases are supported by trade unions, and the STUC has told us that there are good reasons why pursuers should have the option of taking such cases to the Court of Session. These include the need to retain an element of choice, the importance of a Court of Session decision in cases which require a legal ruling that will apply throughout Scotland, greater cost efficiency and more efficient court procedures following the recent introduction of new rules.
51. It may also be asked whether there is any justification for retaining three separate procedures for financial claims in the sheriff court, particularly if the small claims limit were to be substantially increased as some have proposed. These are just some examples of issues that might be considered. These questions also raise issues as to whether increased case management is required by the courts, including allocation of cases to the most appropriate procedure, based on the parties involved, the subject matter and complexity of the case and the amount of money involved. This is discussed further in Chapter 5.

What types of civil justice institutions should there be?

52. While it can be seen that there is already a degree of 'process pluralism' in Scotland, this has not yet developed to the extent that exists in England and Wales or in many other jurisdictions. While various specialist court procedures are being developed, the courts are largely generalist institutions. The general approach of the courts and some tribunals is still adversarial, and suggestions have been made that certain types of case might better be dealt with by processes outwith the courts. This is discussed further in Chapter 5. At present, the courts also deal with cases on an individual basis; Scotland currently has no class actions procedure, and this is also further discussed in Chapters 5 and 6.
53. There are, of course, already a number of non-court based types of resolution available. In addition to tribunals and ombudsmen, these include arbitration, which has largely been used for commercial matters but is also available for many consumer disputes, and adjudication, which applies largely to construction disputes. The availability of mediation is growing, and although it has not yet taken hold to any real extent outwith the community, family and commercial mediation fields, there are considerable possibilities for its future expansion. There are no court rules relating to referral to mediation as in England and Wales, beyond the discretionary power of the sheriff to refer a family dispute to mediation at any stage where this seems appropriate.¹¹⁷
54. In considering what Scotland's civil justice institutions should look like in the future, the overriding objectives of a civil justice system – achieving justice and meeting the needs of its users and its potential users – must be the starting point. These institutions must fulfil the functions required by society, as discussed at the beginning of this chapter, but as discussed in Chapter 2, there is a need to balance the aims of the civil justice system so as to best achieve justice. It is difficult to decide what institutions there should be without first looking at the processes that should be made available. This is discussed further in Chapter 5.

¹¹⁷ Ordinary Cause Rule 33.22. Note: the Sheriff Court Rules Council is currently considering the use of mediation in relation to court procedures

5. What kind of processes would be best for solving Civil Justice Problems?

What should the aims and principles of dispute resolution processes be?

1. The previous chapter considered the kinds of *institutions* which might be required for resolving civil disputes; this chapter goes on to examine in more detail what kinds of *processes* might be made available within those institutions to best meet the needs of those who require to use them. There is inevitably a degree of overlap between these two issues. The broad purpose of dispute resolution processes reflects the main purpose of civil justice institutions: to resolve civil disputes in a peaceful manner. The courts do of course have other important functions, as discussed in more detail in Chapter 4.
2. The aims and principles of dispute resolution processes should reflect those of the civil justice system as a whole, as set out in Chapter 2. Such processes should aim to deliver ‘justice’ according to law, and to meet the needs of those who use them and those who may potentially use them. While it is vital that the available processes meet the needs of those involved in disputes, it is also important that the needs of those who work within and administer the system - such as lawyers, judges and court staff - are taken into account in their design. Beyond this, the design of such processes should aim to fulfil the interests of society as a whole: to preserve peace and harmony, and to provide proportionate dispute resolution.
3. A distinction must be made here between the needs of users and their desires. These may not always be the same: for example, a party may wish to have his or her ‘day in court’ simply in order to humiliate the other party involved in the dispute. Objectively however, it might be thought that they do not ‘need’ this, and that the state should not pay for them to fulfil their desire. There is a difficult balance to be struck here between the needs, the desires and the objectively viewed ‘interests’ of the parties.

What are the needs and interests of users?

4. In Chapter 4, the increasing demand for ‘process pluralism’ to meet the needs of those with disputes was examined. One major difficulty in designing such processes is that the needs and interests of those with civil disputes can vary significantly depending on who the parties are. Moreover, the needs and / or interests of two or more parties involved in a particular case may well conflict.
5. It might be assumed that in certain basic respects, most parties will be looking for similar things - a quick, cheap and accessible process, and ‘justice’. However, those who are pursuing a case will also have different interests from those who are defending, while the interests of individuals may differ from those of corporate bodies or public authorities.

6. Firstly, while pursuers choose to become involved in the civil justice system, albeit reluctantly, defenders do not have a choice, aside from making the choice whether or not to defend the case. Pursuers take action because they believe they are 'right' and justified in taking that action, and want to minimise the time and cost involved in having this vindicated by a court or other body. They therefore want quick and cheap procedures, in order to get it over with as soon as possible.
7. Defenders may also feel this way; they are even less likely to want to go through the system than pursuers. In an action for interdict, for example, a defender may wish to see the matter resolved as soon as possible, while the pursuer might be happy to be in possession of an interim interdict for some time. Similarly, the defender in a professional negligence action is likely to be keen to see a conclusion to the case, rather than have the matter hanging over them for an extended period of time. In other instances however, a slow, complicated and costly process may be in a defender's interests. Where a defender is able to pay up but refuses to do so, he or she benefits from postponing the time when payment will have to be made. There is also always a possibility that the pursuer will be deterred from taking legal proceedings or will abandon the case. Equally, a defender who cannot pay a debt may benefit from a slow and expensive process, as it postpones the inevitable.
8. What motivates the parties to a dispute does not depend only upon whether they are pursuing or defending a case, however. It may also depend on the type of case involved and on the nature of the party. Individuals may, for example, have slightly different motivations and priorities to those of companies or public authorities.
9. The primary motivation of an individual party is likely to be vindication or enforcement of their rights. While this is also likely to be the central consideration for corporate and public bodies, they may also have other factors to take into account. While individuals may have concerns about the impact of a case on their reputation and any potential publicity, these concerns might be even greater for companies and public bodies. In particular, the latter may also have to take into account political considerations, including their duties of public accountability for their actions. In some situations, both individuals and corporate or public bodies may be keen to have their 'day in court' to vindicate their position, while in other circumstances they may prefer to settle the matter in a less public way. Individuals may also have greater financial concerns than companies or public bodies, which will generally have greater resources available, allowing them to secure legal representation and to pursue or defend a case for as long as it might take.

How can these needs and interests best be addressed?

10. In designing processes to deal with civil disputes, it is important to consider how these can best meet these various needs and interests. It is clear that different kinds of processes may be necessary for different kinds of people or different types of problems:

*'We are living in a time of social and legal evolution and it appears as if a single civil adversary court style process will not be adequate to satisfy all of the desiderata of a good justice system. With specialization in some areas...and varying claimant preferences in others.....it certainly appears that a modern civil justice system ought to permit some menu of choices for particular kinds of processes...'*¹¹⁸

11. The concept of such a 'menu of choices' emphasises the importance of taking users' preferences into account. It also reflects the American notion of 'fitting the forum to the fuss'. This involves allocating civil justice problems to the most appropriate process, depending on what the parties involved wish to achieve. This may be problematic, however, where one party wants something different, and therefore a different procedure, to that favoured by the other party.

12. Where the parties have explored other less formal means of resolving their dispute, and these have been unsuccessful, they will have to consider which process might be most appropriate at that stage. The criteria which might influence the parties' choice of process could include the following:
 - the need / desire for confidentiality / privacy
 - whether a precedent is required
 - where a ruling from a court is required eg. divorce or judicial review
 - where a reputation or good name is at risk
 - the costs involved
 - the time the process might take
 - the importance of preserving relationships
 - vindication of their position/s
 - the importance of financial recovery (including recovery of the costs of the process)
 - the desire for non-legal solutions
 - the desire for an opinion or evaluation by a third party
 - the need / desire to tell their side of the story
 - the desire to have their 'day in court'
 - the desire to cause harm to the other party
 - the number of parties involved¹¹⁹

¹¹⁸ *Institutions of Civil Justice: a paper prepared for the Scottish Consumer Council Seminar on Civil Justice, December 15 2004*: Professor Carrie Menkel-Meadow, Georgetown University, Washington DC. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

¹¹⁹ See Note 118

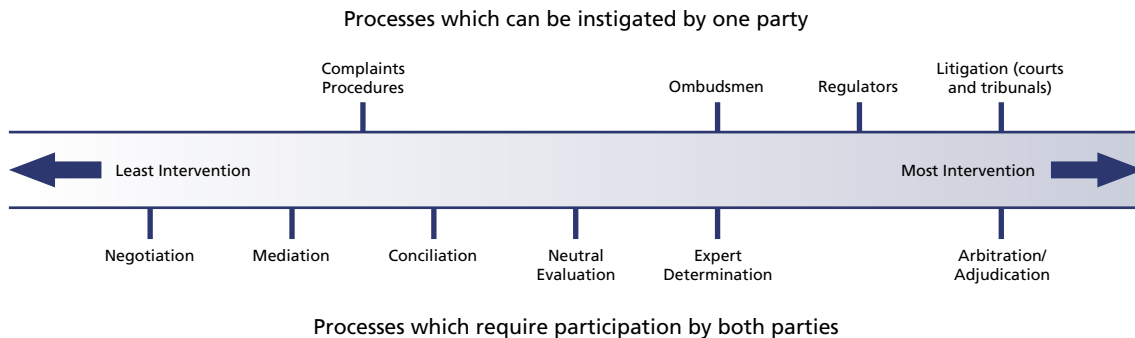
13. There are two main difficulties with this approach. Firstly, while it may be seen as important that users have a choice so far as possible as to how they resolve their disputes, this again raises questions as to where the balance of priorities should lie within the civil justice system. While such a 'menu of choices' might meet the needs and desires of users, policy makers and service providers will have a competing set of objectives. These might include keeping costs down and maximising efficiency, in order to ensure that the process chosen is appropriate and proportionate to the dispute. If, for example, a party wishes to choose an expensive option from the menu which others may not view as being objectively justified in the circumstances, should the state provide this, particularly where the party is relying on the state to provide funding for the process?
14. Secondly, offering people a choice is not problematic where they are adequately informed about the differences between the various institutions and processes available. Unfortunately however, they are often not well informed about the availability of these institutions, and do not know how to access them. They often simply want to have their problems 'fixed' by someone else, so that they can get on with their lives.¹²⁰ This may be a particular problem where an uninformed individual is in dispute with a company or public organisation which has access to expert advice on its options, leading to an inequality of arms.
15. This difficulty again points to the vitally important role of the various advisers within the civil justice system in providing people with an informed choice about their options and referring them to the most appropriate institution or process. The US concept of the 'multi-door' courthouse was considered by some to be worth exploring in this context. This idea centres on a "screening clerk" who assigns cases to the most appropriate locally available process, including court, conciliation, mediation, ombudsmen services and specialised tribunals. There may, however, be issues to be addressed here with regard to any potential liability of such clerks, should they direct someone towards an inappropriate form of process.
16. While a court building may not be the most appropriate venue for such a service, the concept of some sort of 'pre-court' body which would listen to people's problems and discuss the possible options with them was discussed at the seminars. This might resemble the publicly funded 'legal services counters' in the Netherlands, and would help to ensure that those with disputes were fully involved in deciding which process to use.

¹²⁰ *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001

What kinds of processes might be made available?

17. A 'menu of choices' of dispute resolution processes might include a whole range of options along the continuum of dispute resolution from the most coercive, involving intervention by a third party, such as a court ruling, to the least directive, involving negotiation directly between the two parties themselves. The possible options are set out in the diagram below.

The Spectrum of Dispute Resolution Processes



What kinds of processes do people want?

18. People do not necessarily know in advance what specific process they might want to use, although they could be given guidance in making this choice by a 'pre-court' body along the lines of that suggested above. One observation discussed at the seminars was that while someone may be happy with a process after they have used it, they may not realise that this is what they wanted until after they have been through it.
19. We do however have information about what people want when they have a dispute: broadly they simply want to get their problem sorted out as quickly and as painlessly as possible.¹²¹ They want certainty about the cost and timescale involved. They also want a chance to be heard, to tell their side of the story: they want to have a 'voice' in the process.¹²²
20. We also have some evidence about what people do *not* like - generally speaking, they would prefer to avoid becoming involved in legal and court processes. Most people are apprehensive about involvement with lawyers; they are very concerned about the potential costs, formality, delay and trauma they associate with legal processes.¹²³ These fears are borne out for those who actually end up in a court or tribunal, who tend to express high levels of dissatisfaction with the process, much more so than those in England and Wales. 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

¹²¹ *Paths to Justice Scotland*, *ibid*

¹²² See Note 118

¹²³ *Paths to Justice Scotland*, *ibid*; *Civil Disputes in Scotland: A report of consumers' experiences*, Scottish Consumer Council, 1997

to 80% of those who reached an agreement. Even among those who won their case, one in five thought the decision was unfair.¹²⁴ The reasons for this are not clear, but it may be that they felt they had not been awarded sufficient compensation or that they had received the wrong remedy.

21. Meanwhile, while 70% of those who resolved their problem by agreement said they had completely or partly achieved their main objective, only 43% of those who went to a court or tribunal said the same.¹²⁵ Many felt they did not have a 'voice' in the proceedings: only one-quarter of those attending hearings said they had the opportunity to say everything they wanted to say during the hearing. Meanwhile, half thought that the judge or tribunal had not understood the case very well, while three-quarters felt that the court or tribunal favoured the other side.¹²⁶
22. Finally, while two-thirds of respondents agreed that the courts are an important way for ordinary people to enforce their rights, those who had been involved in legal proceedings were more likely to strongly disagree than others.¹²⁷
23. So what conclusions can be drawn from this evidence? As we have already seen, considerable numbers of people avoid entering into the formal legal system and fail to pursue their disputes, deterred by the formality and potential cost of legal proceedings. Moreover, the small proportion of people with disputes who do end up in formal legal processes tend to be dissatisfied with the process, even in some cases where the outcome was in their favour.¹²⁸ Yet those who reach an agreement in their dispute tend to be more satisfied with both the process and the outcome.
24. It must be ensured, however, that parties are fully aware of their legal rights before entering into any dispute resolution process. While it is important that they are happy with both process and outcome, it is equally important in ensuring that justice is done that the process and the result are seen to be as 'fair' as possible on an objective view. While a party may be happy with a settlement at the time, justice has not been done if they then find out several years later that they have missed out on rights to which they were legally entitled, if they were not made fully aware of this at the time.
25. The evidence suggests that many people tend to prefer processes where they have more direct control over both the process and the outcome, rather than those that are controlled by lawyers and judges. And there is an important point here - Lord Woolf was concerned that prior to his reforms the parties, through their legal representatives, had too much control over the process; yet it seems unlikely that the parties themselves would view things in this way. From their point of view, the process may seem to be controlled by the lawyers, and also by the court itself, which listens to and weighs up the evidence and makes the final decision on their case.

¹²⁴ *Paths to Justice Scotland*, ibid at Chapter 6

¹²⁵ *Paths to Justice Scotland*, ibid at Chapter 6

¹²⁶ *Paths to Justice Scotland*, ibid at Chapter 7

¹²⁷ *Paths to Justice Scotland*, ibid at Chapter 7

¹²⁸ *Paths to Justice Scotland*, ibid at Chapter 6

26. It is possible that much of the dissatisfaction expressed by those with disputes could be reduced by improvements in the way the legal process works, aimed at ensuring the parties feel more informed about, and therefore more involved in and less alienated from, the proceedings. It may be, for example, that in some cases the parties' lawyers and / or the court could explain to them more clearly and in greater detail what will happen during the process.

What processes should be made available?

27. While such changes may improve the perception of litigants, it is also important to consider what other processes might be offered to the parties. While a court ruling may be required in some instances as discussed in Chapter 2, there are various other options that may be made available. These processes are generally referred to collectively as '*alternative dispute resolution*' or ADR, although there has in recent years been an increasing trend towards defining ADR as '*appropriate dispute resolution*'.

28. The various dispute resolution processes available are set out on page 50. They range from negotiation directly between the parties (or their solicitors or other advisers) to more coercive processes such as adjudication or arbitration. Some, such as recourse to an ombudsman or complaints procedure, require action by only one party to the dispute. Most, however, require the agreement of both or all parties involved.

29. The processes which might be made available include:

- **Adjudication** - a statutory process which applies to construction contracts only in Scotland.¹²⁹ The process automatically applies to any dispute arising out of a construction contract, and the adjudicator's decision is binding on the parties, although a final settlement can be reached on the basis of an arbitration award or a court decision.
- **Arbitration** – a formal and binding process where a decision is reached by an independent arbiter. It is most commonly used in the resolution of commercial disputes. The law relating to arbitration in Scotland is complex and unclear, and the Arbitration Act 1996 does not apply in Scotland. It has been argued that this anomaly has resulted in a situation where businesses in Scotland are deciding to have their disputes arbitrated in other jurisdictions.¹³⁰ A draft Arbitration Bill designed to clarify and codify the law of Scotland in this area, bringing it into line with the 1996 Act, is currently under consideration by the Scottish Executive.

The Chartered Institute of Arbitrators provides around 70 arbitration and adjudication services for business to consumer (including small business) disputes, which cover the whole of the UK. These are largely sector-specific, such as the ABTA scheme for package holidays and trade organisation

¹²⁹ Housing Grants, Construction and Regeneration Act 1996. The Act automatically applies in relation to construction contracts entered into after 1 May 1998. Note: the Act also applies to the telecommunications industry and installation of security systems in England and Wales

¹³⁰ See Note by the Clerk to Justice 2 Committee of the Scottish Parliament, 6th meeting, 2004 (Session 2), 24 February 2004

schemes run by bodies such as the Glass and Glazing Federation and the National Housebuilding Council. Most of these schemes are provided free of charge or at low cost to the consumer. It is thought that consumer awareness of these schemes is generally low in Scotland; they are mainly used by people in England and Wales, and the Institute is currently looking at ways to raise awareness in Scotland.

- **Conciliation** – similar to mediation (see below), but the conciliator can propose a solution for the parties to consider before agreement is reached.
 - **Expert determination** – a private process involving an independent expert with inquisitorial powers who issues a binding decision. It appears to be little used in Scotland at present.
 - **Mediation** – a process where an independent mediator assists the parties to a dispute to come to an agreement.
 - **Neutral evaluation** - a private and non-binding process whereby a third party, usually a judge or legally qualified person, gives an opinion on the likely outcome of a case in court as a basis for discussion about settlement.
30. Some or all of these options might be made available in the future as part of a ‘menu of choices’ from which parties can choose the most appropriate form of resolution for their dispute, with the aid of suitable advice on the available options. Experience from other jurisdictions such as England and Wales, where mediation is the most commonly used form of alternative dispute resolution, suggests that mediation in particular may play a significant part in any future system. Mediation, while it may not be suitable in all cases, does offer parties greater control over the process than a court. It is less formal, more flexible and focuses more on what the parties want to achieve than on imposing legal solutions.
31. Few people with disputes have experienced mediation; it is likely that one reason for this is that solicitors and other advisers rarely suggest it to them as a possible option. This is reflected in the relatively low levels of public awareness about mediation in Scotland. A recent omnibus poll found that only 57% of people in Scotland had heard of mediation, although this varied considerably according to social grouping and age.¹³¹
32. Despite this low public awareness, we know that those who have been through the mediation process are generally very satisfied with the process, even though they did not necessarily achieve a successful outcome.¹³² This is borne out by research which suggests that if those with disputes knew about mediation, many would prefer this to going to court. Over half of those with a dispute said they would have preferred their case to have been handled by mediation, including a third of those who had already gone to a court or tribunal. Even

¹³¹ *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland*, Scottish Consumer Council, March 2005

¹³² See for example *Edinburgh Mediation Project: Final Report*, Liz Cameron and Nicola Loughran, May 1998; *The Central London County Court Pilot Mediation Scheme Evaluation Report*, Lord Chancellor’s Department Research Series No 5/98, Professor Hazel Genn, 1998

among those who won their case, almost three in ten would have preferred an alternative way of resolving the dispute.¹³³ Among the general population, recent research found that, once the process was explained to them, over half said they would consider using mediation if they had a dispute.¹³⁴

33. While mediation may provide a suitable means of resolving disputes in some cases, it will not always be appropriate. It may not be appropriate where there is a significant imbalance of power between the parties, for example. Such imbalances may exist where an unrepresented individual is in dispute with a legally represented company or a local authority. It could however be argued that such imbalances also exist at present in a court setting. Some existing codes of practice for mediators recognise the need for mediators to be aware of any imbalance of power, and to attempt to minimise any such imbalance so far as possible.¹³⁵
34. The clear view was also expressed at the seminars and in the written submissions and stakeholder meetings that mediation must always be entered into on a voluntary basis in order to be effective.
35. It seems, then, that there is considerable room for improvement in the processes made available within the civil justice system, in order better to meet the needs and interests of users and potential users. There are many possible ways of doing this, firstly by improving existing court processes, and secondly by providing increased access to alternative processes. A more flexible structure than the present court-centred adversarial system might provide a 'menu of choices' better targeted to the individual needs of the parties involved.
36. As discussed in more detail in Chapter 4, the courts will always have a central function within the civil justice system. It is clear from the research, however, that the courts currently play a minor role in numerical terms in resolving the disputes of ordinary members of the public.¹³⁶ While the courts have an important indirect impact on disputes which are resolved by other means within the 'shadow of the court', they are not widely used by individuals, although they do of course have an important direct role to play in resolving family disputes, for example. We also know that most cases are settled without a full court hearing; again, it is likely that this happens in the context of the 'shadow of the court', as discussed later in this chapter.
37. It was generally agreed by those attending the seminars that the civil justice system should encourage the settlement of disputes at the earliest stage possible. If this is our starting point, it makes sense to view the courts as the last port of call in the process, rather than the first, as has traditionally been the case for those working within the civil justice system. As already discussed, the evidence suggests that very few people choose to use the courts, and the advice most commonly given by first advisers is to contact the other side

¹³³ *Civil Disputes in Scotland: A report of consumers' experiences*, Scottish Consumer Council, 1997

¹³⁴ See Note 131

¹³⁵ See for example Section 6 *Civil and Commercial Mediation Code of Practice*, Law Society of England and Wales, April 1999; *Practice Standards for Mediators and Mediation Services*, Mediation UK, 2005

¹³⁶ *Paths to Justice Scotland*, *ibid*: only 14% of those with disputes became involved in legal proceedings

first. However, solicitors are almost as likely to advise people to threaten legal proceedings or go to court, while the police and local councils are also quite likely to suggest this.¹³⁷

38. It was therefore agreed at the seminars that the emphasis should be on identifying the most appropriate method of dispute resolution for each individual dispute, whether that might be mediation, arbitration, an ombudsman or indeed a court, as it may be in some cases.
39. So what might an improved, more flexible system look like? Taking into account the difficulties with the present system and the users' potential needs and preferences, a new system might be based on some or all of the following principles:
 - appropriate, quick and effective referral mechanisms
 - emphasis on the early and appropriate resolution of disputes, with the courts being viewed as a last resort
 - provision of a 'menu of choices' within a 'multi-door' system, accompanied by appropriate referral in consultation with the parties
 - greater case management by the courts
 - more specialised and appropriate court processes where necessary
40. These principles reflect the common themes emerging from major reviews of civil justice in other jurisdictions:
 - earlier resolution of disputes
 - increased use of alternative or 'appropriate' dispute resolution
 - increased case management by judges

How might such a system be achieved?

41. Appropriate, quick and effective referral mechanisms are a prerequisite for the remaining elements of an improved system, as discussed in more detail in Chapter 3. An emphasis on earlier resolution of disputes and alternative methods of resolving them would require a cultural change among those working within the system - lawyers, other advisers and adjudicators – to think more in consensual, rather than adversarial terms. This change then requires to be translated into increased availability of non-court processes. This has been recognised in other jurisdictions, notably in England and Wales, where the Woolf reforms have led to earlier settlements and greater co-operation between the parties, although costs have not been reduced.

¹³⁷ *Paths to Justice Scotland*, *ibid* at page 113. While CAB advisers suggested threatening legal action or taking legal proceedings in a minority of cases (11% and 13% respectively), the police advised going to court in 50% of cases, while local councils advised people to threaten legal proceedings in 29% of cases. Solicitors advised people to contact the other side in 41% of cases, but advised threatening the other side with legal proceedings in 42% of cases and going to court in 26% of cases

42. While early settlement and greater co-operation seem to be laudable aims, how might these be achieved within the Scottish civil justice system? Such a change in culture and available processes will not happen overnight, although there are already signs of a slow movement towards the increased use of alternative dispute resolution processes. The attitude of the legal profession, the major 'gatekeepers' within the system, is crucial here.
43. Many lawyers will argue that their approach has always been consensual in trying to negotiate a settlement between parties, and there is clear evidence of this in relation to family cases.¹³⁸ Yet while this may be true, such negotiations by lawyers tend to be conducted against the background of legal proceedings. While solicitors often advise clients to contact the other side as a first step in a dispute, they are equally likely to threaten the other side with legal proceedings,¹³⁹ although this appears less likely to be true in family cases.
44. This adversarial way of thinking is apparent from the evidence available on solicitors' attitudes to mediation. While increasing numbers of lawyers are training as mediators, there is some evidence that in general they lack enthusiasm about the process. Research on one mediation pilot scheme found, for example, that joint demand for mediation was lowest when both parties were legally represented.¹⁴⁰ Forthcoming research on a compulsory mediation pilot in London also suggests that high rates of opting out of mediation are strongly influenced by advice from lawyers acting for the parties involved.¹⁴¹
45. While the role of lawyers is crucial in changing the culture, non-solicitor advisers also have a very important role here. Such advisers are the first point of contact for considerable numbers of people with disputes.¹⁴² While in general such advisers are likely to take a more consensual approach than solicitors, and are much less likely to suggest legal proceedings as the way forward,¹⁴³ they may not be fully aware of the various dispute resolution options available.
46. The evidence also suggests that some other non-solicitor agencies whom people go to for advice may not approach things in such a consensual way.¹⁴⁴ Given that a substantial proportion of those with disputes approach such agencies for advice, it is important that ways are found of raising awareness of alternative forms of dispute resolution among these agencies, in order to ensure that appropriate referrals are made.

¹³⁸ *Meeting in the Middle: a study of solicitors' and mediators' divorce practice*, Fiona Myers and Fran Wasoff, Legal Studies Research Findings No 25, Scottish Executive Central Research Unit, 2000

¹³⁹ *Paths to Justice Scotland*, *ibid.* See Note 137

¹⁴⁰ *The Central London County Court Pilot Mediation Scheme Evaluation Report*, Lord Chancellor's Department Research Series No 5/98, Professor Hazel Genn, 1998

¹⁴¹ See *Solving Civil Justice Problems: what might be best?:* Paper by Professor Hazel Genn, University College, London for Seminar 4 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

¹⁴² *Paths to Justice Scotland*, *ibid.* at Chapter 3. 17% of those with justiciable problems went first to a CAB, 9% to the police, 6% to a trade union or staff association and 5% to their local council. Scottish Executive research found that 21% first went to a CAB, 21% to the police and 21% to their local council: *The Public Perspective on Accessing Legal Advice and Information*, Scottish Executive Central Research Unit, 2001

¹⁴³ *Paths to Justice Scotland*, *ibid.* See Note 137

¹⁴⁴ See Note 137

47. The judiciary also has a crucial role to play here. Members of the judiciary are lawyers, who have been trained in the adversarial court process. There is evidence in relation to family mediation that while some sheriffs see mediation as performing a valuable role, others are sceptical about its value.¹⁴⁵ The experience of the mediation service in Edinburgh sheriff court suggests however that when sheriffs can see the value of mediation in dealing with non-family cases of lower financial value outwith the court, they will actively refer cases to a mediation service.¹⁴⁶

A 'menu of choices'

48. It could be argued that providing too many possible dispute resolution options may simply be confusing for some parties, and that it may therefore be best to offer only a limited number of options. If, however, a 'menu of choices' for dispute resolution was seen to be the way forward, this would need to be accompanied by appropriate advice and discussion with the parties. Where these are individuals, it may be appropriate for this advice to be provided by some sort of publicly funded 'pre-court' forum.

49. If parties opt for a non-court based means of resolution, it is important to ensure that they have access to legal advice on their rights before entering into that process. While the purpose of processes such as mediation is to provide an outcome that is acceptable to the parties, rather than one which might be seen as objectively 'just' on the basis of their legal rights, it is important that they are fully informed as to their legal position at the outset.

50. Corporate bodies and public authorities are likely to have their own legal advisers, and it must be considered how such advisers might be encouraged to consider alternative means of dispute resolution where appropriate. One possibility might be to encourage the development of complaints procedures that such bodies may already have in place, towards a mediation-based approach.

51. The provision of a 'menu of choices' presumes that appropriate and accessible services would be available to provide the dispute resolution processes that those in dispute might require. This is likely to be a considerable challenge, and raises questions about the availability of services and who would pay for them. Before any new system was put in place, mapping of the services available in each geographical area would be likely to be necessary to ensure that sufficient and appropriate services are available.

52. Who pays for dispute resolution services is a fundamental issue here. The central question to be addressed is to what extent the state should be responsible for providing a menu of choices, and what should be left to the private market. This will depend to some extent on the parties involved; for example whether they are individuals or commercial organisations. Issues surrounding funding of the civil justice system, including alternative dispute resolution options, are discussed in more detail in Chapter 6.

¹⁴⁵ *The Role of Mediation in Family Disputes in Scotland*, Jane Lewis, Legal Studies Research Findings No. 23, Scottish Office Central Research Unit, 1999

¹⁴⁶ *Supporting Court Users: The In-Court Advice and Mediation Projects in Edinburgh Sheriff Court: Research Phase 2*, Elaine Samuel, Scottish Executive Central Research Unit, 2002

53. Court annexed mediation schemes are one possible way forward, such as those which exist in the USA, where all federal courts are required to offer some form of ADR, and increasingly in England and Wales. Such a service has been in existence in Edinburgh sheriff court for some years, and the Scottish Executive has announced its intention to set up similar schemes in Glasgow and Aberdeen sheriff courts. It could be argued, however, that moving into the court system a process which was intended to be less formal and legalistic can result in that process resembling the adversarial court process it was intended to supplement or replace.¹⁴⁷

Case management by judges

54. A common theme underlying civil justice reforms in other jurisdictions in recent years has been a trend towards greater judicial case management. In England and Wales, Lord Woolf saw this as crucial to the success of his reforms. This meant that ultimate responsibility for controlling the progress of cases had to be transferred from the parties and their legal advisers to the court. The Woolf proposals led to the Civil Procedure Rules, which follow the US example by requiring judges to actively manage cases throughout the court process.

55. The essential elements of Lord Woolf's proposals for case management were:

- allocation of cases to the most appropriate track / court
- encouraging and assisting the parties to settle cases, or at least to agree on particular issues
- encouraging the use of ADR
- identifying at an early stage the key issues requiring a full trial in court
- summarily disposing of weak cases and hopeless issues
- achieving transparency and control of costs
- increasing the parties' knowledge of what the progress and costs of the case would involve
- fixing and enforcing strict timetables for procedural steps leading to trial and for the trial itself¹⁴⁸

56. There is currently no general duty on the Scottish courts to manage cases in this way. Allocation of cases is, as noted in Chapter 4, largely based at present on the amount of money involved or the type of case. There are, however, existing rules allowing the court to use its discretion in remitting a case to a higher or lower procedure where this is appropriate, usually on the basis of the nature of the questions of fact and law involved.¹⁴⁹

57. There has in recent years, however, been a move towards introducing a more interventionist approach in certain procedures. Under ordinary cause procedure, the sheriff is required to 'secure the expeditious progress' of a case at the options hearing stage,¹⁵⁰ while the rules for commercial cases in some sheriff courts go further in requiring the sheriff to seek to secure the

¹⁴⁷ See Note 118

¹⁴⁸ *Access to Justice: final report to the Lord Chancellor on the civil justice system in England and Wales*, by the Right Honourable Lord Woolf, July 1996

¹⁴⁹ For example, Rule 15.2 of the Small Claim Rules 2002 allows the sheriff to remit a small claim to the ordinary cause procedure

¹⁵⁰ Ordinary Cause Rule 9.12(1). Note: Rule 33.22A also contains an analogous provision for family cases, in relation to child welfare hearings

‘expeditious resolution’ of a dispute.¹⁵¹ The new small claims rules also require the sheriff to ‘seek to negotiate and secure settlement of the claim between the parties’.¹⁵²

58. While it might be argued that such a role is very different from the traditional role of a judge or sheriff within the adversarial court process, it seems that practice is already moving in this direction. Recent evidence from the evaluation of the Glasgow commercial court suggests that a case management approach has been very successful in commercial cases: solicitors found the procedure to be decisive, fast, geared to settlement and cheaper than the ordinary cause procedure.¹⁵³ There may therefore be a case for increasing judicial involvement in trying to bring about settlements in other types of case.
59. The increased use of case management by the courts could save costs in a number of ways. Firstly, a number of organisations, such as the Faculty of Advocates, the Association of Personal Injury Lawyers and the Law Society of Scotland, support the introduction of some form of ‘pre-action protocols’ in Scotland, along the lines of those in England and Wales. The general purpose of these protocols, which are tailored to different types of case, is to promote early settlement of cases, by encouraging earlier contact and earlier investigation and exchange of information between the parties. Research on the impact of the Woolf reforms on pre-action behaviour has found that the reforms have led to later issue of court proceedings, once pre-action protocol deadlines have elapsed, and that more cases are now being resolved without court involvement, particularly in the personal injury category.¹⁵⁴
60. A precedent for such protocols already exists in Scotland: the current Court of Session practice note on commercial actions requires the solicitors acting for the parties to an action to fully set out the details of their case to the other side in correspondence, and to disclose any documents or experts’ reports on which they intend to rely before commencing an action.¹⁵⁵
61. Greater case management can also reduce the number of formal hearings and court appearances required in a case. In the Glasgow commercial court, case management conferences and procedural business is conducted by e-mail and conference call. This has resulted in reduced costs for the solicitors and the parties, and has also helped to speed up the process.¹⁵⁶ In a similar vein, the UK government recently consulted on the use of telephone hearings in relation to various procedural matters in the civil courts throughout England and Wales,¹⁵⁷ while the Council on Tribunals has sought views on whether oral hearings are the best means for resolving disputes.¹⁵⁸

¹⁵¹ Ordinary Cause Rule 40.12(1), incorporated by Act of Sederunt (Ordinary Cause Rules) Amendment (No.3) (Commercial Actions) 2000, with effect from 31 March 2001. Note: similar rules apply to commercial actions in the Court of Session

¹⁵² Act of Sederunt (Small Claim Rules) 2002 Rule 9.2 (2) (b)

¹⁵³ *Commercial Procedure in Glasgow Sheriff Court*, Elaine Samuel, Scottish Executive Social Research, 2005

¹⁵⁴ *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour*, T Goriely, R Moorhead, P Abrams, Law Society and Civil Justice Council, 2002

¹⁵⁵ Practice Note on Commercial Actions 2004, part 11

¹⁵⁶ See Note 153

¹⁵⁷ *Telephone Hearings in Civil Proceedings: Consultation Paper*, Department of Constitutional Affairs, July 2005

¹⁵⁸ *The Use and Value of Oral Hearings in the Administrative Justice System*, Council on Tribunals, 2005

62. Another central aspect of case management in other jurisdictions is the involvement of the court in encouraging the parties to consider alternative methods of dispute resolution. There is at present no requirement on the Scottish courts to refer cases to other dispute resolution processes, beyond the discretionary power of the sheriff to refer a family dispute to mediation at any stage where this seems appropriate,¹⁵⁹ which has been in place since 1990. The Sheriff Court Rules Council has, however, recently set up a sub-committee which is exploring the possibility of introducing court rules on referral to mediation more generally.
63. As we have seen, the current civil justice system is still largely focused on adversarial court procedures, rather than taking a more consensual approach to dispute resolution. But how can this be addressed and the use of mediation and other forms of ADR encouraged? Can this cultural change happen from the 'bottom up' or does it have to come from the 'top down' ie. from the state and the courts? The experience of the Edinburgh sheriff court mediation service suggests that mediation is now supported by many sheriffs, without the need for a change in the court rules. Yet there is increasingly a view within the mediation world that mediation will only really take off if it is encouraged by the system ie. in court rules, as has happened in England and Wales following the Woolf reforms.
64. This view might be taken to suggest that mediation, and possibly other methods of alternative dispute resolution, can only work effectively if conducted within the 'shadow of the court', that is where court (or tribunal) proceedings are already underway. In this scenario, mediation is conducted against the backdrop of court proceedings, and if it is unsuccessful, the case will proceed to a full hearing in court. This might therefore be seen to run contrary to the principle that disputes should be resolved as early and informally as possible.
65. While in some cases, mediation and other forms of ADR might take place in the 'shadow of the court', they are almost always conducted within the 'shadow of the law'. While the former only applies to disputes which have reached the stage of court proceedings, ADR processes can potentially be used to deal with any justiciable dispute, that is, any matter that could potentially end up in court proceedings if not resolved sooner. Thus all disputes might be, and often are, resolved within the 'shadow of the law', including those which are unlikely ever to reach the stage of a court case, such as neighbour disputes, which can often be dealt with by community mediation.
66. If the civil justice system is to encourage the resolution of disputes as early as possible, the use of alternative dispute resolution methods must be encouraged at an early stage. Where mediation or another form of ADR is employed at an early stage and is successful, the dispute can be resolved sooner, while neither party has incurred any court costs or had to deal with the stress involved in a court case. If ADR does not succeed, the parties still have the option of going to a court or tribunal, although the costs of the process will still have to be absorbed.

¹⁵⁹ Ordinary Cause Rule 33.22

67. Where the process is carried out within the shadow of the court, while a successful mediation will bring the court case to an end, the parties will still have to pay for both the costs of the mediation and those incurred to date in relation to the court case. They will also have endured the stress involved in the court case, and the case will have taken up court resources until settlement. If the mediation is unsuccessful however, the costs of the unsuccessful mediation must be added to those of the court case, which may increase the parties' costs overall.
68. Greater use of mediation at an earlier stage would potentially save cost, delay and stress for the parties involved, while freeing up court resources. The stumbling block, however, is persuading the parties, and more crucially their advisers, to go to mediation when there is no outside pressure on them to do so.
69. It is generally accepted that the parties to a dispute should never be forced to participate in mediation, and that it must be a voluntary process. If parties have no choice, the dispute is less likely to settle: if one or both parties do not wish to go to mediation, adversarial conditions will remain. It is also likely that compulsory mediation would be in breach of Article 6 of the European Convention on Human Rights.¹⁶⁰
70. There is a growing view within the mediation world, however, that compulsory *referral* to mediation might be one way forward. This would involve compelling parties to *consider* mediation, as distinct from forcing them to actually attend a mediation. As noted earlier, parties often do not know that they want to use a process until they have been through it. That said, the current pilot scheme in Central London County Court, under which 100 cases per month are automatically referred to mediation with a chance to opt out, has experienced a very high opt-out rate, although it seems likely that this is due in no small part to the attitude of legal advisers.¹⁶¹
71. While mediation has not been made compulsory in England and Wales following the Woolf reforms, there is certainly strong pressure on parties involved in court proceedings to consider mediation. In recent years, the English courts have ruled that there is a duty on the parties to consider the use of alternative dispute resolution,¹⁶² and that parties may be penalised if they unreasonably refuse to try ADR or they unreasonably withdraw from an ADR process, by having costs awarded against them.¹⁶³ However, an important recent Court of Appeal decision held that while the courts have jurisdiction to impose sanctions on successful parties who unreasonably refuse to mediate, the court has no power to order mediation.¹⁶⁴

¹⁶⁰ See *obiter* judgement in the *Halsey* case (see note 164 below) where the court expressed the view that it was likely that compulsion to mediate would constitute a violation of Article 6

¹⁶¹ See *Solving Civil Justice Problems: what might be best?:* Paper by Professor Hazel Genn, University College, London for Seminar 4 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

¹⁶² *Cowl and Others v Plymouth City Council*, (2001) EWCA Civ 1935; *Dunnett v Railtrack PLC* (2002) EWCA Civ 302

¹⁶³ *Hurst v Leeming* (2002) EWCA Civ 1173; *Leicester Circuits Ltd v Coates Brothers PLC* (2003) EWCA Civ 333; *Royal Bank of Canada Trust Corporation v SS for Defence* (May 2003)

¹⁶⁴ *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576

72. One possible additional case management role for the courts would be to provide 'early neutral evaluations'. Neutral evaluation of a case, whereby a third party, usually a judge, gives an opinion on the likely outcome of a case as a basis for settlement discussions, is usually a private process. However, it can also be connected to the court system, where it is sometimes referred to as 'early neutral evaluation'. This process is used in the USA and Australia, and is also available in the commercial court in England and Wales.
73. In the English commercial court, the judge can offer to provide the evaluation or arrange for another judge to do so. The judge who provides the evaluation can take no further part in the court proceedings.¹⁶⁵ The process has only been used in a small number of cases to date, but there may be some demand for such a process to be made available in Scotland. The research on the commercial procedure in Glasgow sheriff court found that solicitors welcomed the early and informal intimation of the sheriff's view of the likelihood of whether their clients would succeed or fail in their action.¹⁶⁶

More specialised and appropriate court processes

74. While mediation and other forms of ADR can provide an important supplement to court processes, there will always be cases which will require to go to court, such as undefended debt actions, divorce cases and judicial review. In any case, while the system should encourage early dispute resolution where possible, the choice of going to court should be made available from the outset or where other attempts to resolve a dispute have failed.
75. If there are seen to be problems with the way in which the courts system currently operates, ways must be considered of addressing these. Clearly, increased case management by the courts is one option to be considered. The issue of cost came up time and again at the seminars, and it is clear that this is a major concern for those with disputes, and deters many from becoming involved in the formal legal process. Delay caused by a lack of judicial resources, mainly due to the priority accorded to criminal business, is also seen to be a problem, as discussed in Chapter 1. The way in which the court system has grown up has led to a situation where there are too many different procedures for similar cases. This makes the system complex and confusing, and there may be scope for streamlining some of these, as discussed in Chapter 4.
76. At the same time, however, there has been an increased trend towards specialisation of processes and procedures in recent years. It is clear that one uniform system cannot deal with all types of case, and this has been demonstrated by the success of specialised procedures dealing with commercial and family cases. There may be considerable scope for further tailoring court rules to deal with specific types of cases, resulting in possible efficiency savings and more importantly, better justice.

¹⁶⁵ Practice Note, Queen's Bench Division (Commercial Court) 7 June 1996

¹⁶⁶ See Note 153

77. Specific suggestions which have been made to us include taking small claims cases out of the courts altogether, and dealing with them in some more informal forum by means of a more inquisitorial approach. The Law Society of Scotland also suggested that 'heritable' or housing cases, currently dealt with under the summary cause procedure, might be dealt with more efficiently in another forum. The majority of such cases relate to rent arrears owed by tenants of social landlords, and while the sheriff is required by law to decide whether it is 'reasonable' to grant a decree for eviction, in practice such cases normally involve negotiation with landlords and continuation of the case for payment and / or processing of housing benefit, rather than complex legal arguments. The Chartered Institute of Housing in Scotland has also recommended the creation of a specialist rented housing tribunal for Scotland, with jurisdiction over a wide range of housing issues.¹⁶⁷
78. Another possibility which might be considered would be the introduction of some form of procedure to deal with multi-party actions. The court system can at present deal only with individual cases separately, even if there are a number of cases involving the same issue and the same defender. Such a procedure might be used in relation to consumer claims, for example, or claims arising from a mass disaster. This would allow one court to deal with a large number of related cases within one action, potentially saving considerable resources and increasing access to justice.
79. In 1996, the Scottish Law Commission recommended that a procedure for multi-party actions should be introduced, initially only in the Court of Session.¹⁶⁸ The Commission's report contained a draft Act of Sederunt to implement the procedure; however, such a procedure has never been introduced.

Quality issues

80. Those who require to use dispute resolution processes are entitled to expect that the people involved in providing those processes are competent, have adequate training and expertise, and that their services will be of a good standard. Moreover, those who may be involved in referring cases to a particular dispute resolution process, such as solicitors, other advisers and judges must be satisfied that those to whom they are referring parties are providing a good quality service.
81. It is therefore very important that quality assurance measures are built into dispute resolution processes, in order to ensure public confidence in them. How quality might be defined and measured is a difficult question, however, particularly as a number of different services would be involved in a 'multi-door' type of system. It is quite difficult to envisage one body or office trying to ensure quality throughout a whole range of services. One possibility would be for each service or sector to regulate itself, by ensuring that those practising within it had appropriate training, and this might ultimately be approved by the courts.

¹⁶⁷ *A Housing Tribunal for Scotland?: Improving Rented Housing Dispute Resolution*, Derek O'Carroll and Suzie Scott, Chartered Institute of Housing in Scotland, 2004

¹⁶⁸ *Multi-Party Actions*, Scottish Law Commission. Report No 154, 1996

6. Funding and Costs

1. Who should pay for the civil justice system? What should the state pay for, and how much should be funded by private individuals, in order to ensure that the system fulfils its aims and provides access to justice for all of its users and potential users?
2. If 1) advice and representation, 2) courts and tribunals and 3) other dispute resolution services are to be provided, then clearly these must be funded in some way. The existence of appropriate and sufficient funding is central to ensuring the effective functioning of the civil justice system. Although we know how much is spent on some parts of the system - on the courts or legal aid, for example - there is little concrete evidence at present as to how much the civil justice system actually costs to run overall.
3. Funding for various aspects of the civil justice system currently comes from a variety of different sources. This chapter considers the main elements of the civil justice system as discussed throughout the seminar series: advice and representation, courts and tribunals, and other forms of dispute resolution. The initial focus is on the role of the state in funding each element of the system, followed by consideration of what other options might exist.
4. Central government funding is key to the operation of the system at present; there is state funding for legal aid, while the courts and tribunals are state subsidised to varying extents. However, central government is not the only funder. In general, those who are not legally aided must pay for their own legal representation, while the losing party in a court case is generally liable for both sides' expenses, unless that party is legally aided.
5. Commercial organisations will often meet the costs of dispute resolution services such as mediation or arbitration, while the policy of full cost recovery means that at least in theory, court users pay for the court system. Advice services are also funded from a variety of sources. Non-solicitor services are funded mainly, but not entirely, by local authorities, while a limited amount of funding for such services comes from private or corporate donations.
6. Other sources of funding for litigation, such as conditional fees and insurance are available, although the evidence suggests that these have not taken hold in Scotland to any great extent, as discussed later in this chapter. Trade unions also play a significant role in funding advice and representation for their members, particularly in personal injury actions as well as proceedings before certain tribunals.

To what extent should the state be responsible for funding?

7. In considering who should pay for the system, the first question to be asked is what responsibility the state should have for funding. As the Justice Minister has recently stated, the civil justice system is an important public service. It is therefore logical to assume that the state should play a major role in funding the system, in order to ensure that the public has access to it. At present the state pays for the running of the courts, although this is largely recovered from court fees paid by the parties, as discussed later in more detail.

Advice and representation

8. The major source of funding for the voluntary advice sector at present is local authorities, with further funding coming from central government and other funders such as the Community Fund, social inclusion partnerships, European funders such as the European Commission and some private or corporate benefactors.
9. Legal aid is the other main source of public funding for advice services. In 2003-4, the net cost of civil legal assistance was £40 million; £19 million of this was spent on civil legal aid and £21 million on civil advice and assistance. This accounts for only 28% of total expenditure on legal aid; the remainder goes on criminal legal aid.¹⁶⁹ This is significantly lower than the percentage spent on civil legal aid in England and Wales - 43% - in the same year.¹⁷⁰
10. The reasons for this were discussed at the seminar on funding: while it was noted that significantly more is spent on asylum cases south of the border, there were thought to be a number of other possible explanations. It was suggested that barristers are involved in civil legal aid cases to a greater degree than advocates are in Scotland, partly due to the existence of regional bars. The view was also expressed that there may be a different approach to funding in Scotland, which was possibly more cautious in relation to the taking of test cases. Finally, it was suggested that part of the difference may be explained by the fact that, as *Paths to Justice Scotland* found, people in Scotland were less likely than those in England and Wales to regard something as a problem on which they are likely to seek advice and had less confidence in the justice system, which might make them more reticent about going to court.
11. At present legal aid can only be paid to solicitors and advocates, although the Scottish Executive has recently proposed that the provision of 'publicly funded legal assistance' for civil cases should be extended to pay for advice services provided by other non-lawyer advisers.¹⁷¹

¹⁶⁹ *Scottish Legal Aid Board Annual Report 2003-2004*

¹⁷⁰ See *Civil Justice and Legal Aid: Paper for Seminar, 2 March 2005*, Roger Smith. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

¹⁷¹ *Advice for All: Publicly Funded Legal Assistance in Scotland - the Way Forward*, Scottish Executive, June 2005

12. The recent *Strategic Review of Legal Aid* ¹⁷² identified two main sets of purposes of publicly funded legal assistance, as expressed by the various stakeholders:
- ensuring equality of access to the law and the legal system, and an equal ability to use it
 - a broader purpose of ensuring fairness and contributing to social inclusion by advising on rights and remedies, assisting with problem resolution and by using the law to bring about social change
13. Broadly, the first set of purposes has been reflected in the legal aid system from its establishment in the post war period to the present day. The second is reflected in the range of other ways of delivering legal advice which have grown up more recently, including the provision of services by those other than private practice solicitors.
14. It must be recognised that the resources available for public funding of advice and representation are not, and can never be limitless. There is therefore a need to make the most efficient use of what is available. At present legal aid in Scotland is 'demand-led', and therefore in theory expenditure could increase without limit if the demand is there.
15. It could however be argued that at present the system is in reality solicitor-led, as most legal aid money is spent on services traditionally provided by private practice solicitors. The vast bulk of civil legal aid money goes on family and matrimonial cases, which in 2003-4 accounted for 73% of net civil legal aid expenditure, while reparation cases accounted for a further 9% of net expenditure. ¹⁷³
16. The present solicitor-led system has resulted in less spending on 'social welfare law', which includes welfare benefits, housing, consumer and employment issues. This has led to a situation where many people rely heavily on non-solicitor advice services and law centres for assistance with such matters. Although law centres can and do earn income from legal aid, core funding for these and for non-solicitor advice services is not demand-led in the same sense as legal aid. This may mean that such services do not have capacity to meet all needs. Meanwhile, while law centres can provide legal aid services, these are only available in certain geographical areas.
17. As discussed in more detail in Chapter 3, there is limited expertise in these areas of law, particularly within private practice, partly due to the lack of financial incentive for solicitors. The Scottish Executive has recently proposed the introduction of an enhanced rate for civil advice and assistance for solicitors undertaking work which requires specialist skills. ¹⁷⁴ Such an incentive, together with the future funding of non-solicitor advice services to provide advice and representation, may help to address unmet need in these areas.

¹⁷² *Strategic Review on the Delivery of Legal Aid, Advice and Information: Report to Ministers and the Scottish Legal Aid Board*, Scottish Executive, October 2004

¹⁷³ *Scottish Legal Aid Board Annual Report 2003-2004*

¹⁷⁴ *Advice for All: Publicly Funded Legal Assistance in Scotland - the Way Forward*, Scottish Executive, June 2005

18. Without any restrictions, a demand-led budget for publicly funded legal assistance could very easily spiral out of control. One way of limiting expenditure is to prioritise in some way. This is the case at present, as the availability of legal aid is restricted in two main ways.
19. Firstly, financial eligibility and merits criteria are applied. Almost half of the population is not financially eligible for legal aid, while another 3 in 10 are eligible only subject to a contribution.¹⁷⁵ To qualify for legal aid, applicants must meet four tests:
- they must qualify financially
 - they must have ‘probable cause’ ie. a legal basis for their case
 - it must be reasonable in the particular circumstances of the case that they should receive legal aid
 - financial help must not be available from someone else – such as a trade union, insurance company or professional body.¹⁷⁶
20. At present, the financial eligibility criteria are such as to admit only those of relatively modest means, which has led to concerns, expressed at the seminars and elsewhere, that many people on moderate incomes are dissuaded from pursuing cases through their perceived inability to meet potential expenses. *Paths to Justice Scotland* found that those on middle incomes felt most disadvantaged in obtaining legal advice as against both those who were better off and those on low incomes.¹⁷⁷ The *Strategic Review* report attempted to address this ‘middle income trap’ by proposing that eligibility for legal aid should be widened on a ‘tapered’ basis, together with a system of progressive contributions. This would bring those beyond the current income threshold within the scope of civil legal aid on the basis that they would pay a substantial contribution. The aim of this proposal is to allow wider access to legal aid for a greater number of people.
21. Secondly, the scope of legal aid is currently limited. It is not presently available for representation in certain types of proceedings, although advice and assistance may be available if the person is eligible on financial grounds. Legal aid is not currently available for small claims or defamation cases, for example. Neither is it currently available for multi-party actions, and this is further discussed below. In recent years, legal aid in various forms has been made available for certain tribunals, but in some instances only where the case is sufficiently complex for legal representation to be required.¹⁷⁸ The Scottish Executive has recently indicated, however, that the scope of civil legal assistance may be reviewed in the future, with a view to widening it to include additional categories of case.¹⁷⁹

¹⁷⁵ In 1998/9, the last year for which figures are available, 45% of ‘benefit units’ ie person/s who would be considered as one unit for the purposes of assessing eligibility of state benefits, were ineligible for civil legal aid. A further 29% were eligible only subject to a contribution. Source: *Legal Aid in a Changing World*; Scottish Legal Aid Board, 2001

¹⁷⁶ Sections 14 and 15 Legal Aid (Scotland) Act 1986

¹⁷⁷ *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001 at pages 100-1

¹⁷⁸ Legal Aid and Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003, regulation 13

¹⁷⁹ See Note 174

22. By contrast, in England and Wales the scope of civil legal aid has been reduced in recent years; it is no longer available for personal injury cases, for example. Yet as noted above, expenditure on legal aid south of the border is significantly higher than that in Scotland. There was support at the seminar on funding for the view that the scope of civil legal aid should not be reduced in Scotland in a similar way. In fact, the *Report on the Strategic Review of Legal Aid* suggests that there may be a case to be made for the scope of legal aid to be *extended* to make it available for categories of proceedings not currently covered, where an evidence-based analysis of the need for representation supports this.¹⁸⁰ Thus it might potentially be made available in some small claims cases, for example.

23. The *Report on the Strategic Review of Legal Aid* identified six criteria which might provide a basis for the prioritisation of publicly funded legal assistance in the future. It is not for this report to look at these in detail, as the Scottish Executive is currently dealing with these issues. It is worth noting, however, that unlike the situation in relation to criminal cases, there is no express requirement in the European Convention on Human Rights that legal aid must be provided in civil cases.

24. Nevertheless, the European Court of Human Rights has said that Article 6 (1):

*'may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case'.*¹⁸¹

However, the court recognised that legal aid was not the only means by which a state could meet this responsibility. In particular, it noted that simplification of procedures could help to make access to the courts more effective.

25. As discussed in Chapter 3, there may be scope for the state to provide better information and assistance in order to allow those who are more confident about sorting out their own disputes to do so. If good information were made available, this could help to make people feel more empowered and confident, and may save public money in the long run. It was suggested by one of our speakers that one possible approach might be to follow the example of certain US states by putting more money into the court system rather than into legal aid.¹⁸²

26. A number of US courts have introduced 'self-service centers' aimed specifically at party litigants, which provide advice on various types of proceedings, rather than the substantive law. These centres are largely IT based, and may be worth considering in a Scottish context, although where they can be made available, in-court advisers can provide a more in-depth and personal service to litigants.

¹⁸⁰ *Strategic Review on the Delivery of Legal Aid, Advice and Information: report to Ministers and the Scottish Legal Aid Board*, Scottish Executive, October 2004 at Paragraphs 4.60 - 4.63

¹⁸¹ *Airey v. Ireland* (1979) 12 EHRR 305

¹⁸² See Note 170

Courts and tribunals

27. In the early 1980s, the UK government introduced a policy of full cost recovery through court fees in order to finance the civil court system. The rationale behind this policy is that the costs of running the courts - including the costs of court accommodation and staff and the salaries and pensions of judges - should be paid for by those who use them. The policy continued to be adopted by the Scottish Executive after devolution.

28. In 2001, the Scottish Executive stated:

*'Scottish Ministers have reviewed the policy that was inherited from their predecessors. The view is that there should continue to be a move in the direction of full cost recovery. This should be tempered by the need to ensure that access to justice is not denied to those who cannot easily afford the cost of going to court.'*¹⁸³

29. This approach is not followed in other major common law and European jurisdictions. In Scotland, it has never been applied in relation to the criminal courts, where those who are taken to court are not expected to pay for the costs of the hearing. Neither does a policy of full cost recovery apply in the case of tribunals. There has been much criticism of this policy, and concern was expressed at the funding seminar that, given the clear public interest in having a court structure, individual litigants should be expected to pay for the cost of the judge and the running costs of the courts.

30. As the Civil Justice Council for England and Wales observed in 2002:

*'The policy of full cost recovery through court fees fails to recognise the public function that civil law and civil litigation perform. Fees are collected only from litigants, but the civil justice system benefits many who do not become involved in proceedings. It is to the collective benefit that individuals have an efficient and authoritative means for resolving disputes.'*¹⁸⁴

31. In addition to its argument that full cost recovery is wrong as a matter of principle, the Civil Justice Council identified three further reasons why it should not be the basis for funding the courts:

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

¹⁸³ *Civil Court Fees in the Court of Session and the Sheriff Courts: a consultation paper*, Scottish Executive, September 2001

¹⁸⁴ *Full costs recovery: a paper by the fees sub-committee*, Civil Justice Council, 2002

32. However, the Scottish Executive remains committed to a policy of moving towards full cost recovery, although this is not currently being achieved. In 2003-4, there was a total deficit of over £9m in the sheriff courts and the Court of Session, an increase on the previous year.¹⁸⁵ Following resistance to proposals in 2001 to increase the level of fees for Court of Session hearings by around 250% in order to address this deficit,¹⁸⁶ the Executive announced the following year that the fees were to be increased by only a modest amount.
33. Not all litigants are required to pay court fees. Those on legal aid do not have to pay court fees and in 2002, the Scottish Executive introduced exemptions from the payment of court fees for those in receipt of means tested state benefits,¹⁸⁷ in order to meet concerns about access to justice. This means that someone on benefits can, for example, bring a small claims action without being required to pay the court fee, although they cannot get legal aid for representation in the case.
34. While there are clearly important arguments for providing for such exemptions in access to justice terms, in a system operating on the basis of full cost recovery fee exempt litigants are being subsidised by other court users. In 2003-4, around £1.4m of fees were exempted in Scotland's courts, representing around 9% of the total fees chargeable.¹⁸⁸

Other forms of dispute resolution

35. So if there is an argument that the state should pay for the provision of the courts, then who should pay for alternative means of dispute resolution? If alternative methods are to be provided and encouraged, should the state pay for these? Where companies and public bodies are concerned, there appears to be less of an issue - they already pay for their own legal costs in any case, and if they are successful they can generally recover these from the other party. It would therefore seem logical that they should pay for the costs of mediation or other forms of dispute resolution; if the dispute is as a result resolved more quickly, this is likely to be cheaper in the long run.
36. Unfortunately, the evidence suggests that this may not always be the case: while mediation may save money where an agreement is reached,¹⁸⁹ the story may be quite different where this is not the case. This issue has been one of the most contentious in England and Wales following the Woolf reforms. The new system has been criticised as 'frontloading' costs in such a way

¹⁸⁵ *Scottish Court Service Annual Report and Accounts 2003-4*

¹⁸⁶ See Note 183

¹⁸⁷ Sheriff Court Fees Amendment Order 2002, Court of Session etc. Fees Amendment Order 2002

¹⁸⁸ See Note 185

¹⁸⁹ The available research is inconclusive as to whether mediation costs less than going to court. While some research suggests that it can be cheaper than legal remedies (eg. *Resolving Neighbour Disputes Through Mediation in Scotland*, Jim Dignan and Angela Sorsbury, Scottish Office Central Research Unit, 1999), other studies indicate that this may not always be the case (eg. *The Central London County Court Pilot Mediation Scheme Evaluation Report*, Professor Hazel Genn, Lord Chancellor's Department Research series No 5/98, 1998) See also Note 190 below

that if mediation fails, it may actually increase the overall costs of a case.¹⁹⁰ This is perhaps an inevitable consequence of a system in which mediation is conducted in the 'shadow of the court'; whether mediation must always be conducted against the backdrop of a court case is discussed in Chapter 5. It should be borne in mind, however, that the success or otherwise of a dispute resolution process cannot be measured solely in monetary terms. It may also provide a better outcome and greater control over the process for the parties involved, and therefore better access to justice.

37. If parties should not have to pay the full costs of providing a judge in court, it is difficult to argue that they should pay the full costs of providing a mediator. Moreover, in relation to the costs of the case, it is less clear how the concept of 'loser pays' might be applied in a mediation, for example, although in general the parties reach an agreement about costs as part of the mediated settlement.
38. Where individuals are in dispute, there are different issues about funding. Private mediators, for example, charge considerable commercial fees, which may be beyond the reach of ordinary people, particularly those who are involved in disputes over sums of relatively low financial value. There are various possible means of funding: some court-annexed mediation schemes in England charge the parties relatively modest fixed fees based on the value of the dispute, for example.¹⁹¹ Public funding may also be made available, as with the service at Edinburgh sheriff court which is currently funded by the Scottish Executive, as are various family and community mediation initiatives.
39. Some public funding is provided at present, from both central government and local authorities, for family and community mediation services. Funding for mediation is also available through legal aid, although this does not appear to be widely known. Despite guidance to the legal profession alerting its members to the availability of legal aid, to date take up has been very low, particularly in non-family cases. It has been argued that greater public funding must be made available for mediation if it is to take off to any real extent outside the family and community fields.¹⁹²
40. One possibility might be for the state to employ full-time mediators, perhaps in a court setting, which may be more cost-effective than purchasing the services of private mediators. A number of local authorities already employ mediators to deal with neighbourhood disputes in their area. While it is important that there should never be any suggestion of compulsion, one possibility might be that the Scottish Legal Aid Board, for example, could pay for the provision of public mediators.

¹⁹⁰ Research published in 2002 found that the perception of the legal profession was that successful ADR saves the likely cost of proceeding to trial and may save expenditure by promoting earlier settlement than might otherwise have occurred. Unsuccessful ADR, however, was thought to increase the costs of parties: *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, Professor Hazel Genn, Lord Chancellor's Department Research Paper No1/2002

¹⁹¹ For example, the Leeds Combined Court Centre Mediation Scheme launched in July 2000, the Manchester Law Society Mediation Scheme launched in December 2000 and the Birmingham Civil Justice Centre Mediation Scheme launched in November 2001

¹⁹² See for example *Consensus without Court: encouraging mediation in non-family civil disputes in Scotland*, Scottish Consumer Council, 2001

41. Other means of dispute resolution are already funded by other means: ombudsmen schemes, for example, are always free to the consumer. Some are funded by the state, while other private sector schemes are funded by members of the industry they regulate. Most consumer arbitration schemes are also free to the consumer, while others are provided at a low cost, which may be reimbursed if the consumer is successful. These schemes are subsidised by the relevant trade association or industry body. Proposals in the current Consumer Credit Bill for an ADR scheme dealing with consumer credit disputes also envisage a scheme that is free to the consumer and funded by a levy on the credit industry.
42. Aside from these examples, alternative dispute resolution is generally funded privately by the parties involved. This is the case in relation to commercial mediation, arbitration and adjudication, for example.

Conclusions on the role of the state

43. There was a strong view at the seminar on funding that, given the important role of the civil justice system in providing a vital public service, the state should be expected to pay significantly towards the provision of formal dispute resolution. Some felt that the system should be paid for through national insurance in the same way as the health service. It was pointed out that at the end of the day, public funding comes from all of us as taxpayers, and it was suggested that we should all pay for the system as taxpayers, rather than expecting only those with disputes to pay.
44. If a 'menu of choices' is to be provided for those with disputes as to the methods by which they might resolve those disputes, there is, as noted in Chapter 5, a question as to the extent to which the state should be obliged to pay for the process chosen. If a party chooses an expensive option that might not be seen to be objectively justifiable in the circumstances, should the state pay for this, particularly where the state is funding the party to pursue the case?
45. As discussed in Chapter 2, one of the principles of a civil justice system should be the provision of appropriate processes at a reasonable cost. There is therefore a balance to be struck to ensure that the state provides 'proportionate dispute resolution' so far as possible. Such considerations are taken into account at present - for example, the Scottish Legal Aid Board will not generally make legal aid available for financial claims in the Court of Session where the amount likely to be awarded is less than £50,000, unless the solicitor can show that there is a particular complexity or difficulty which would make the case unsuitable for the sheriff court.¹⁹³

¹⁹³ Source: *The Recorder*, Issue No.39, published by the Scottish Legal Aid Board, May 2004

Lawyers' costs and court expenses

46. Those who are not eligible for legal aid, and who do not have trade union backing or legal expenses insurance, must generally pay the costs involved in resolving their disputes from their own pockets. These costs may not always be predictable at the outset of a dispute, and we know that 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.¹⁹⁴ Although the Woolf reforms have made many improvements to the civil justice system in England and Wales, the cost of litigation there remains very high. As one of our seminar speakers from England observed:

*'The expense of litigation places access to the courts beyond the reach of all but the rich, the victims of accidents who can obtain representation on a conditional fee basis and that diminishing number of persons still entitled to legal aid.'*¹⁹⁵

47. There is little evidence available on the costs of litigation in Scotland,¹⁹⁶ although the general view among those at the seminars and the stakeholders we spoke to was that they are not as high as those in England and Wales. There was considerable concern, however, at the current level of costs involved in going to court.

48. There are three potential sources of costs which must be paid for by the parties. Firstly, they must pay the fee charged by their own solicitor and / or advocate. Until recently, the Law Society of Scotland published an annual table of recommended fees for work done by solicitors. While it was for the solicitor and client to agree on the method of pricing, whether by an agreed hourly rate or by a fixed fee, the Society recommended an hourly charge rate. This table was withdrawn in July 2005 amid concerns that it may restrict competition, although the fees charged by a solicitor are still required to be fair and reasonable in all the circumstances and not grossly excessive.¹⁹⁷

49. Since 1 August 2005, solicitors are required to advise clients in writing at the outset of a case either an estimate of the total fee to be charged (including VAT and outlays) or the basis upon which the fee will be charged.¹⁹⁸ While fixed fees are a common method of charging in non-court work such as conveyancing, and may be agreed in some instances between solicitor and client in relation to civil court work, charging by the hour is more usual. Advocates' fees are usually agreed between the solicitor, the client and the advocate.

¹⁹⁴ *Paths to Justice Scotland*, ibid at pages 98, 174 and 231-2

¹⁹⁵ See *Is it possible to provide access to justice at a reasonable cost?*: Paper by Adrian A.S. Zuckerman, University College, Oxford for Seminar 1 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

¹⁹⁶ Note: average case costs of legally aided cases are available from the Scottish Legal Aid Board, but there is little information available on average costs in other cases

¹⁹⁷ Article 6 of the Code of Conduct for Scottish Solicitors; Section 39A Solicitors (Scotland) Act 1980

¹⁹⁸ Solicitors (Scotland) (Client Communication) Practice Rules 2005

50. If a party is unhappy with the fees charged by his or her solicitor, he or she can ask for the fee to be taxed by the auditor of court, unless he or she has entered into a written fee charging agreement with the solicitor.¹⁹⁹
51. Secondly, the parties must pay fees to the court under the policy of full cost recovery as discussed above, and may also have to pay for other outlays upfront, such as reports ordered to be obtained by the court.
52. Thirdly, the award of costs by the court usually follows success. Therefore the losing party is generally liable for the other side's costs as well as his or her own expenses, subject to certain exceptions. Legal aid does not cover the expenses of a successful party who has been sued by a person in receipt of legal aid, for example, except in exceptional circumstances. Other than in small claims cases, where expenses are generally limited to £75,²⁰⁰ the basis on which these expenses are calculated is set out in tables of fees annexed to the relevant rules of court; there are different scales for different categories of procedure.²⁰¹ Unless the expenses have been modified by the court to a fixed amount, or the amount of expenses to be paid has been agreed between the parties, the expenses must be taxed by the auditor of court.
53. As our first speaker pointed out, remuneration according to the detail of the work done in preparing for and conducting a case tends to increase costs, or to at least make costs difficult to control.²⁰² This appears to be a major problem in England and Wales, and although it seems that the situation in Scotland is less serious, the basic method of payment is similar, with expenses broadly calculated on a time and line basis.
54. The German system was cited as an example of a system with lower litigation costs, but which provides increased access to justice. In Germany, court fees and recoverable lawyers' fees are calculated as a percentage of the claim. The advantages of this system were seen to be: firstly, it is structured so as to remove any incentive for lawyers to exaggerate the value of claims; secondly, litigation costs are moderate; and thirdly, and perhaps even more importantly, the costs of litigation are predictable. This has meant that the market for legal expenses insurance there is thriving; most household insurance policies include cover for litigation costs, with the result that relatively few people are denied access to the courts.²⁰³

¹⁹⁹ Under Section 61A of the Solicitors (Scotland) Act 1980, a solicitor and their client can enter into a written fee charging agreement in respect of any work done or to be done. It is likely that an acceptance by a client in writing of the proposed fee, or basis on which a fee will be charged, as set out in a 'letter of engagement' by the solicitor would constitute a written fee charging agreement

²⁰⁰ Section 36B Sheriff Courts (Scotland) Act, Small Claims (Scotland) Order 1998: this is the general rule, but there are some exceptions. No expenses can be awarded where the value of the claim is less than £200. The £75 limit does not apply where the defender has not stated a defence, or having stated a defence, has not proceeded with it, or having stated and proceeded with a defence has not acted in good faith as to its merits. Neither does it apply where there has been unreasonable conduct by either party, or in relation to an appeal: Section 36B(3) Sheriff Courts (Scotland) Act 1971; Act of Sederunt (Small Claim Rules)2002, rule 26

²⁰¹ In the sheriff court, these are calculated according to the Table of Fees attached to Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1993. In the Court of Session, the basis for the solicitor's account is the Tables in the Rules of Court

²⁰² See Note 195

²⁰³ See Note 195

What other options are available for funding?

55. Aside from the state (and therefore the taxpayer) and the parties themselves, what other funding options are available to pay for the system? Three other possible options suggested by our speaker at the seminar on funding were:
- other court users
 - other clients of lawyers
 - lawyers²⁰⁴
56. Firstly, litigation might be funded through fees and fines imposed on other users directly by the court. In some US states, the money collected from court fees and fines to fund civil legal aid is greater than the amount of direct state subsidy.²⁰⁵ There are a number of difficulties with this, however. Firstly, most cases in the courts are debt cases: adding an additional fee onto defenders would simply add further to the burden on those who are already in financial difficulty. Moreover, under the system of full cost recovery, court fees are already set at high levels, and adding to this would lead to disproportionately high costs for users. Finally, it could be argued that one group of users should not have to pay for the costs of another.
57. Secondly, there is the possibility that cases might be funded by the clients of other lawyers. In most US states, the interest on lawyers' client accounts is diverted towards the funding of legal services, usually through an independent body. In this way, the relatively small amounts of interest earned on each account can be accumulated to help provide civil legal services to those who cannot afford to pay for a lawyer.
58. This idea was not supported at the seminar, as it was seen to be unworkable under the Scottish system. In practice most solicitors were seen to be operating with a debit as far as litigation is concerned, as they fund outlays for their clients upfront. Therefore the vast majority of litigation lawyers do not generate interest on client funds, and even if they are holding money upfront for a client, this will be put into an interest - bearing account, and the client will get the interest. It was also felt that the interest on money held by a solicitors' firm on behalf of other clients, such as conveyancing or trust clients, should not go towards funding litigation, as any interest earned should go to those clients. In any case, the position in law is that the interest earned on a client's account is held for the client by the solicitor under the law of agency, and therefore belongs to the client.²⁰⁶

²⁰⁴ See Note 170

²⁰⁵ See Note 170

²⁰⁶ *Brown v IRC* 1964 SC (HL) 180. The Solicitors (Scotland) Accounts, Accounts Certificates, Professional Practice and Guarantee Fund Rules 2001, state (at rule 11) that where a solicitor holds money for or on account of a client, and it is reasonable that interest should be earned for the client (defined as applying where the sum is not less than £500, and is not likely to be either wholly disbursed or reduced by payments to a sum of less than £500 within two months of receipt), the solicitor must place the money in a separate interest bearing client account, and must account to the client for any interest earned on that money

59. Neither of these first two ideas found much favour at the funding seminar; nor did the suggestion that lawyers might fund cases by being required to pay a supplement to the fee for their practising certificate to legal aid. The final possibility, however - paying for cases by means of conditional or contingency fees - was discussed at greater length. Such arrangements are designed to encourage lawyers to take cases for clients who are otherwise without funds to finance them, either through private funds or legal aid.
60. With conditional or 'no win no fee' arrangements, the party's lawyer receives an uplift on the fee otherwise payable if the party is successful. This means that the person pays more than they otherwise would in order to encourage the lawyer to take the risk of a case that they might lose, and for which they may get no payment. While solicitors and advocates have long been able to offer their services on the basis of such 'speculative fees', it is only since 1992 that they have been permitted to charge an uplift on their fee of up to 100%.²⁰⁷ Such arrangements are now widely offered in Scotland in personal injury cases. The available research shows, however, that solicitors will offer such fees only if the risks of losing are very low and the benefits of winning the case are sufficiently high to counteract the possible risks of having to pay all the costs if the action is lost.²⁰⁸
61. In an attempt to meet these concerns, the Law Society of Scotland introduced its Compensure scheme in 1997, under which a solicitor could agree to act for a client on a speculative basis, provided the client agreed to pay an insurance premium to insure against the possibility of losing the case and therefore having to pay for both their own costs and those of their opponent. The scheme was unsuccessful however, and no longer exists, due to lack of take up because clients were unable to recover the premium paid even where they were successful, as further discussed below.
62. In England and Wales, conditional fees have become a major source of funding following the Woolf reforms. Legal aid is no longer available for personal injury cases, and conditional fees have become the norm in these cases, although they have not really taken hold to any great extent in other types of dispute. It might be argued that this has opened up the possibility of making a personal injury claim to many who would previously have been unable to afford to do so. It can equally be argued, however, that such a system encourages solicitors to 'cherry pick' the cases with the highest chances of success, and that some people are unable to find legal representation as a result. It has also been suggested that as defendants in England are now responsible for paying the success fees as well as the costs of the claimant's insurance, conditional fee agreements have contributed to the increasing amount of 'satellite' litigation about costs.²⁰⁹

²⁰⁷ Section 61A of the Solicitors (Scotland) Act 1980, inserted by section 36 Law Reform (Miscellaneous Provisions) Act 1990; The Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992 (SI 1992 No. 1599)

²⁰⁸ *Funding in Personal Injury Litigation*, Blackie, Paterson, Phillips and Squires, Scottish Office Central Research Unit, 1998

²⁰⁹ See *Solving Civil Justice Problems: what might be best?:* Paper by Professor Hazel Genn, University College, London for Seminar 4 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

63. In England and Wales, successful litigants can also get back the cost of any insurance premium paid to indemnify against the risk of a costs order being made against them. This is an important aspect of the system, and it is significant that this cost cannot presently be recovered in Scotland. The Association of Personal Injury Lawyers has pointed out that this has resulted in a situation where 'no win no fee' arrangements are *'not universally viable due to the lack of an effective after-the-event insurance market in Scotland'*.²¹⁰
64. The STUC also has concerns about this anomaly, warning that if the situation is not addressed it may lead to unions taking on fewer cases, leaving their members to go to private solicitors on a 'no-win, no-fee' basis, rather than having their cases funded entirely by their union. Concern has also been expressed by Action against Medical Accidents that this places those pursuing claims for medical negligence in Scotland at a disadvantage compared to those in England and Wales.
65. While it would appear, therefore, that those suffering personal injuries in Scotland are at a disadvantage compared with their counterparts in England and Wales, concerns were expressed at the funding seminar that Scotland should not go down the road taken in England and Wales, by replacing legal aid for personal injury cases with conditional fees and after the event insurance. There was concern that within that jurisdiction some people who may previously have received legal aid on the basis of a reasonable chance of winning their case may not now be able to find a lawyer to offer them a conditional fee agreement. Moreover, the costs of obtaining after the event insurance can be very high, particularly in complicated medical negligence cases, for example.
66. It was also recognised, however, that the English system had some advantages: while some people who would previously have received legal aid would now have difficulty in taking a case, others who may previously have been ineligible for legal aid, but who had a strong case, had benefited. Recent proposals to extend the scope of legal aid eligibility in Scotland²¹¹ suggest, however, that the Scottish Executive is unlikely to follow the path taken by the UK government.
67. Unlike conditional fees, it is illegal both in Scotland and in England and Wales for lawyers to charge contingency fees, although they have long been used in the USA, where there is little state funded legal aid available. This involves the lawyer taking a percentage of the damages awarded as a fee. There is clear potential for a conflict of interest in allowing such fees, as the lawyer has a direct stake in the outcome of the case. This may put at risk the ability of the solicitor to deal with the client's affairs in an objective and independent way, and it is for this reason that such agreements are currently prohibited. This prohibition applies only to legal advisers engaged directly in litigation on behalf of client, and it is therefore legal for claims management companies to charge contingency fees.²¹²

²¹⁰ Written submission by the Association of Personal Injury Lawyers. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

²¹¹ See Note 174

²¹² *Quantum Claims Compensation Specialists Ltd v Powell* 1998 SLT 228

Insurance

68. A further possible means of funding civil disputes is insurance. Such insurance falls into two main categories: 'before the event' and 'after the event' insurance. The insurance discussed above, which is linked to the notion of conditional or speculative fees, comes 'after the event', and this makes it more expensive - on average around £500. Also as we have seen, such premiums are not presently recoverable in Scotland if the insured party wins the case.
69. 'Before the event' insurance, on the other hand, otherwise known as legal expenses insurance, is relatively cheap. In the UK, this is generally provided as an add-on to other types of insurance, usually motor or household insurance, and generally costs around £15-25 a year. Most policies cover the insured person for up to £50,000 in legal expenses, but may not cover certain types of disputes.
70. Such policies have clear attractions, given the relatively low cost. The difficulty identified at the funding seminar was that most people probably do not expect to become involved in litigation, and therefore do not bother to take out this form of insurance. The available evidence would suggest that take-up is relatively low. A GB survey carried out in 1990 for the Consumers' Association and the Law Society of England and Wales found that only 7% of respondents had legal expenses insurance.²¹³ More recently, *Paths to Justice Scotland* found that only 1% of those who incurred legal expenses were supported by such insurance.²¹⁴
71. It was suggested at the seminar on funding that one possible way forward might be to consider introducing compulsory legal expenses insurance. It was noted that there are very high levels of such insurance in countries such as Sweden and Germany, where it is more affordable, although not compulsory. It was also noted that expenses are calculated in a more easily quantifiable way in such countries, and suggested that a system involving more predictable costs in Scotland might be worth considering. It was also suggested that better public education about the benefits of such insurance might help to increase take up.
72. Overall however, while it was agreed that insurance might have a role to play in funding the system in future, it was felt that it should not be viewed as having a central role. The view was expressed that there was a danger in looking to the insurance industry to fund the civil justice system, as this would inevitably mean that the insurance industry would have a considerable say in how the system operates. This was seen to be happening south of the border, where it was thought that the major insurers were starting to influence the way in which the system is run. Giving greater power to insurance companies in this way might allow them to take decisions that certain categories of case were not eligible for compensation, such as those below a certain financial level, for example.

²¹³ *Legal Expenses Insurance in the UK: A report by Consumers' Association and the Law Society*, January 1991

²¹⁴ *Paths to Justice Scotland*, *ibid* at page 172

Other possible means of funding

73. Another possible funding model might be a contingency legal aid fund. This is a fund which takes a proportion of the money received by a successful pursuer to meet claims on the fund by unsuccessful pursuers. It is accordingly a form of mutual insurance, although the initial funding would need to be provided by the state. The administration costs of the scheme would be met by charging a registration fee to all applicants, and applicants would have to demonstrate that they had a good chance of success. The only such fund in existence, which is in Hong Kong, appears to be very successful.
74. In 1994, the Scottish Law Commission concluded that the arguments in favour of such a fund were stronger than the counter-arguments.²¹⁵ The Commission was examining the fund specifically in the context of multi-party actions, however, and came to the view that such a fund may not be viable if restricted to such actions. There may be scope for reconsidering such a fund in relation to court actions more generally, and this issue was raised at the funding seminar.

Class actions

75. In relation to multi-party, or class actions generally, funding is a central issue. There is no such procedure available at present; therefore no funding structure is in place. At the same time, funding is crucial if such a procedure is ever to be introduced. In 1982, the Scottish Consumer Council recommended the creation of a class actions fund, administered by an independent body, which would provide the necessary resources for class actions.²¹⁶ Successful litigants funded by the scheme would be required to pay a percentage of any damages recovered to the fund, and the scheme was intended eventually to be self-supporting after being funded initially by the state.
76. The Scottish Law Commission concluded that legal aid was the most suitable means of funding for such actions.²¹⁷ In 2001, the Justice 1 Committee of the Scottish Parliament recommended that the Scottish Executive should examine how access to legal aid might be made available to support collective action, organisations and representative bodies.²¹⁸ While legal aid is one option to be considered, it cannot provide the only answer, as it is probable that in most cases, not all of those involved in a class action will qualify for legal aid.

²¹⁵ *Multi-Party Actions: Court Proceedings and Funding*, Discussion Paper 98, Scottish Law Commission, November 1994

²¹⁶ *Class Actions in the Scottish Courts: a new way for consumers to obtain redress?*, Scottish Consumer Council, 1982

²¹⁷ *Multi-Party Actions*: Report No 154, Scottish Law Commission, July 1996

²¹⁸ Justice 1 Committee, 8th Report 2001. *Report on Legal Aid Inquiry*, SP Paper 437, paragraph 18

7. Enforcement

1. Enforcement plays a key role in any civil justice system. There is little point in providing a system to deal with civil disputes if this is not backed up by an efficient structure to enforce the decisions of courts, tribunals and other decision-making bodies. While enforcement measures come at the end of the civil justice process, they are a vital means of underpinning the effective working of the system. In the words of Viscount Stair:

*'Decrees would be of no effect, but as bees without stings, if the law did not fix the kinds and forms of the executions thereof.'*²¹⁹

2. Providing effective means of enforcement is therefore essential to upholding the rule of law:

*'If society is to function in a fair and orderly manner, everyone must be able to assert legal rights and those owing legal obligations must be held to account. Where such rights and obligations have been upheld by the courts, but they have not been fulfilled, wilfully or otherwise, compliance must be compelled. Without this, judicial decisions in civil, commercial, administrative or social matters would be rendered ineffective for business, individuals and the state, who all rely on confidence in an effective and efficient enforcement system. It is untenable, in such circumstances, for the fulfilment of civil obligations to be elective in the hands of those obliged to do so.'*²²⁰

3. The majority of cases which go through the court system are debt actions, a large proportion of which are undefended.²²¹ Most creditors are reluctant to take court proceedings unless they cannot recover the money owed by less formal means.²²² If they cannot do so, however, they will need to take the matter to court in order to obtain a decree.
4. Even where a case is undefended, it is likely to take at least six weeks from beginning a court action to obtaining an extract decree (a final court order); where it is defended, it may take considerably longer. In some cases, sending a copy of the extract decree to the defender will result in payment. If this does not happen, the pursuer needs to decide what further steps to take to enforce the court decree. The onus of enforcement is on the pursuer, rather than the

²¹⁹ *Stair Memorial Encyclopaedia*, Vol 8, Diligence and Enforcement of Judgments, paragraph 101, taken from *Stair's Institutions* IV, 47, 1

²²⁰ From *Enforcement of Civil Obligations in Scotland: a consultation document*, Scottish Executive, 2002 at page 3

²²¹ In 2002, actions for payment accounted for 99% of small claims; in 53% of these cases judgment was given in favour of the pursuer on an undefended basis. NB: There are no separate figures for damages cases under the small claims procedure, so it is likely that these account for a proportion of 'payment' actions. Only 33% of summary cause actions were for payment only, but 62% related to land or heritable matters: it is likely that the majority of these related to rent arrears. Debt actions accounted for 44% of ordinary cause cases, and half of these were undefended. It is also likely that some cases categorised under other headings in the ordinary cause category related to debt eg. mortgage lender cases. Source: *Civil Judicial Statistics*, Scottish Executive, 2002

²²² *Evaluation of the Debtors (Scotland) Act 1987: Study of Commercial Creditors*, Alison Platts, Scottish Office Central Research Unit, 1999

court, and he or she must at this stage decide whether he or she is willing to incur further expense by pursuing the sum owed. If the pursuer fails to recover the money, the costs of diligence will not be recovered. The pursuer must therefore weigh up at the start of the process whether it is worthwhile pursuing the debt, or whether this may simply involve 'throwing good money after bad.'

5. If the pursuer decides to proceed with enforcement, he or she must first pay a sheriff officer to serve a charge (a formal demand for payment) on the debtor,²²³ giving him or her formal notice of enforcement. The defender then has, in most cases, 14 days to pay the sum owed.²²⁴ If the defender does not do so - and the evidence suggests that most do not²²⁵ - the pursuer can then proceed to the next stage of enforcement, which involves incurring more expense.
6. Scotland has a complex system of enforcement measures, known as diligences. The various diligences available provide means by which the creditor can seize the money or property of the defender in order to recover the sum due. There has been considerable focus on the law of diligence in recent years, including the abolition of poinding and warrant sale in 2001 and its replacement with attachment orders and exceptional attachment orders.²²⁶
7. In 2001, the Scottish Law Commission recommended various changes to the existing diligences and the introduction of two new diligences, land attachment and money attachment.²²⁷ These were designed to fill perceived gaps in the system, ensuring that virtually any kind of property belonging to a debtor could be attached by diligence. The Scottish Executive consulted on a draft bill in 2004, proposing to implement most of the Commission's recommendations.²²⁸ In September 2005, the Scottish Executive announced the Bankruptcy and Diligence etc. (Scotland) Bill as part of its legislative programme for the remainder of the parliamentary session.
8. The most commonly used diligence at present, and the one seen as most effective by commercial creditors,²²⁹ is arrestment of earnings, where a creditor receives a proportion of the debtor's wages every week or month directly from the employer. In addition to providing a reliable source of regular payments for the creditor, this is the least intrusive diligence available from the debtor's point of view. The debtor is protected, as only a certain proportion of his or her wages can be arrested, safeguarding a minimum level of income.

²²³ Note: no charge is required where a summary warrant is obtained from the sheriff by a local authority or central government for the payment of unpaid taxes, rates or duties. Where a summary warrant is obtained, the pursuer can go straight to diligence. Concerns have been expressed about the fairness of summary warrant procedure, and the Scottish Executive has proposed that certain diligences should no longer be available on the basis of a summary warrant - see *Modernising Bankruptcy and Diligence in Scotland: draft bill and consultation*, Scottish Executive, 2004

²²⁴ Section 90 Debtors (Scotland) Act 1987. Note: the period of charge is 28 days where the defender is outside the United Kingdom or his or her whereabouts are unknown

²²⁵ *Evaluation of the Debtors (Scotland) Act 1987: Study of Individual Creditors*, Debbie Headrick and Alison Platts, Scottish Office Central Research Unit, 1999. The research found that only 17% of individual creditors received full payment as a result of the charge. Most commercial creditors also considered that obtaining a decree was generally ineffective in obtaining payment without further enforcement: *Evaluation of the Debtors (Scotland) Act 1987: Study of Commercial Creditors*, Alison Platts, Scottish Office Central Research Unit, 1999

²²⁶ Abolition of Poinding and Warrant Sales Act 2001; Debt Arrangement and Attachment (Scotland) Act 2002

²²⁷ *Report on Diligence*, Report No 183, Scottish Law Commission, 2001

²²⁸ *Modernising Bankruptcy and Diligence in Scotland: draft bill and consultation*, Scottish Executive, 2004

²²⁹ See Note 222

9. Other diligences available to creditors include arrestment of the debtor's bank account, attachment of the debtor's moveable property (within or outwith the debtor's home), and inhibition, where a creditor registers a notice against the debtor's heritable property, preventing it from being sold until the sum due is paid. The proposed new diligence of land attachment will, subject to safeguards for debtors, allow a creditor to force the debtor to sell heritable property, while money attachment will allow a creditor to seize cash held by a debtor, but only on their business premises.
10. Both arrestment and inhibition may be granted by the court *on the dependence* of an action. This means that the creditor can ask the court to grant a warrant whilst a court action is ongoing, or even before it begins, allowing him or her to take steps to seize the defender's property so that it will be available to satisfy any claim eventually upheld by the court. There is an argument that there are sound reasons for allowing diligence on the dependence of an action, as a means of protecting the creditor's interests by preventing the defender from disposing of their assets during the court action. It can equally be argued, however, that it is harsh and unfair to the debtor, as the creditor can freeze his or her assets before having to prove their case against the defender.
11. This was recognized in three recent cases which held that the then current practice in inhibition²³⁰ and arrestment²³¹ on the dependence was incompatible with the Human Rights Act 1998, as it constituted an interference with the defender's rights and enjoyment of his or her property. While previously warrant was granted as a matter of course, following these decisions the Scottish courts will no longer grant diligence on the dependence unless: 1) a prima facie case is established on the merits of the action and 2) the applicant demonstrates that the diligence sought is proportionate to the claim. Such an application must be considered by a judge or sheriff before it is granted. To do this, however, does not require a judge or sheriff to sit in court or to hear the parties orally.
12. The most serious enforcement action that a creditor can take is to bring a court action to make a debtor bankrupt, known as *sequestration*. Where a debtor owes £1500 or more to one or more creditors, they can take action individually or collectively to transfer all of the debtor's assets to a trustee who will distribute them to his or her various creditors.

Balancing the interests of the parties

13. The major challenge in designing an effective enforcement system is to ensure that it recognises, and achieves a balance between, the interests of all of the parties involved. As discussed in Chapter 5, the needs of the parties involved in a dispute may vary significantly, depending on who they are. This has long been recognised by the Scottish Law Commission, which has been responsible for much of the law in this area. As the Commission has identified, a fundamental

²³⁰ *Karl Construction Ltd v Palisade Properties plc*, 2002 SLT 312; *The Advocate General for Scotland v Taylor* 2003 SLT 1340

²³¹ *Fab-Tek Engineering Ltd v Carillion Construction Ltd* 2002 S.L.T. (Sh.Ct.) 113

principle underpinning any legal system is the rule of law, which requires that where the law confers a right on a person, it must also provide an effective mechanism to make that right genuine and real in its practical effect.²³² The law confers rights on a creditor who holds a court decree, but it also confers rights and protections on the debtor.

14. It is clear, therefore, that there is a need to balance the interests of the debtor and the creditor. But those interests can also vary depending on the nature of the party involved. Individuals, small businesses, large commercial organisations and public bodies can all be both creditors and debtors. It is therefore important to ensure that the enforcement mechanism which is used is appropriate to the particular situation. It was widely recognised at the seminar on enforcement that there are many different categories of situation, and that what was an appropriate mechanism in one case may not be in another.

The rights of the creditor

15. Some of those attending our seminar on enforcement argued that reforms in recent years have led to a situation where the balance is weighted too heavily in favour of the debtor. This argument echoes research which found that commercial creditors saw the debt recovery system in Scotland as costly, time consuming, unproductive and weighted towards the debtor.²³³ These criticisms are not unique to Scotland: problems with enforcement undermine the effectiveness of civil justice systems in other jurisdictions including England and Wales. A recent study of enforcement in England and Wales in relation to default (ie. undefended) judgments found that 50% of county court claimants and 62% of High Court claimants failed to recover any payment from the defendant whatsoever, regardless of whether they took enforcement action or not.²³⁴
16. In considering the rights of the creditor, it is important firstly to distinguish between commercial creditors and individual pursuers, such as those taking small claims cases. While commercial creditors are generally 'repeat players' within the system and are therefore likely to be aware of the difficulties involved in enforcement, individual pursuers may not appreciate these, and many assume that the court will enforce the decree for them. Research has shown that one quarter of individual creditors believed that the award of a decree in their favour meant that the repayment of the debt was guaranteed, while almost half thought that the court should have a greater involvement in securing repayment.²³⁵

²³² *Report on Pounding and Warrant Sale*, Scottish Law Commission, 2000 at Part 2

²³³ See Note 222

²³⁴ *Evaluating the Effectiveness of Enforcement Procedures in Undefended Claims in the Civil Courts*, J Baldwin, Lord Chancellor's Department Research Series 3/03, 2003

²³⁵ *Evaluation of the Debtors (Scotland) Act 1987: Study of Individual Creditors*, Debbie Headrick and Alison Platts, Scottish Office Central Research Unit, 1999

17. Commercial creditors generally understand that there are informal ways of collecting debt which can be much more effective than diligence, and many have sophisticated debt collection procedures in place. Recent research by Citizens' Advice Scotland on the experiences of debt clients found that very few creditors had taken formal court action, suggesting that most prefer to use informal recovery methods than risk the expense of formal court action. This was particularly the case where the debt related to personal or unsecured loans or credit card debt: utility companies, local authorities and housing debt creditors were more likely to have taken formal action.²³⁶
18. Individual creditors, however, have neither the benefit of the debt collection procedures that are available to commercial creditors nor their detailed knowledge of the system. They are therefore less likely to be successful in making informal attempts to recover the money owed. Research has found that two-thirds of individual creditors who were awarded decree by the court received no payment or only part payment. Of these, one quarter took no action to recover the money due, while 14% had restricted their attempts at recovery to informal methods, such as letters and telephone calls. Thus nearly two-fifths had not taken formal steps to enforce the decree. Individual creditors 'dropped out' at each stage of the enforcement process, taking no further action, despite continued non-payment of the debt.²³⁷
19. It was recognised at the seminar on enforcement that there was a need for better information about enforcement for individual pursuers, who often do not know where to go or what to do. It was suggested that perhaps they could be given greater assistance by the courts, and this is discussed further below. The Society of Messengers-at-Arms and Sheriff Officers does produce a booklet aimed at party litigants which is available in sheriff courts, but it is clear that many individuals do not understand how the system works. Some felt that there may be a need for some sort of gatekeeper, to assist and advise those who wish to pursue claims; in-court advisers, where they exist, may have a crucial role here. It is very important that people are fully aware of the potential pitfalls involved in enforcement before they embark on court proceedings, particularly if there may be issues about tracing the defender and / or obtaining their bank account or employment details, or where there may be a potential insolvency situation.
20. It was also recognised, however, that separating out businesses from individuals was not always easy to achieve. While it was obvious that help should be provided to an individual pursuing a large organisation, the situation was less clear-cut in relation to small businesses, for example.

²³⁶ *On the Cards: the debt crisis facing Scottish CAB clients*, Citizens' Advice Scotland, 2004

²³⁷ *Evaluation of the Debtors (Scotland) Act 1987: Study of Individual Creditors*, Debbie Headrick and Alison Platts, Scottish Office Central Research Unit, 1999

Financial information about debtors

21. One crucial concern for commercial creditors, and possibly also individual creditors, in enforcing their rights is how to distinguish between those who can pay but won't and those who can't pay. This was discussed in some detail at the seminar on enforcement, and there was a general feeling that there was a need for better information about the financial circumstances of debtors to be made available, to help creditors make this distinction and decide whether it was worthwhile taking enforcement action. If the debtor falls into the 'can't pay' category, there is no point in the creditor paying out for enforcement, but if the debtor simply 'won't pay', the creditor needs the information in order to decide which method is most likely to give the best return.
22. The recent enforcement review in England and Wales saw access to information about debtors as vital to creditors in enforcing their rights, and to the effectiveness of the system. The introduction of 'data disclosure orders' was proposed as a means of securing relevant information about debtors who fail to respond to court judgments or to comply with court-based methods of enforcement.²³⁸ These will allow the creditor to confirm that the information they have about the debtor is current prior to raising an action. The creditor will also, following wilful non-compliance by the debtor, be able to ask the court for an order requiring information to be disclosed by third parties, such as the Department for Work and Pensions, the Inland Revenue, banks, building societies and credit reference agencies. This is intended to assist the creditor to decide upon the most appropriate enforcement action and may also help to protect the debtor from inappropriate action.
23. There was some support at the enforcement seminar for providing some means of assisting creditors to obtain such financial information about debtors, and it has been suggested that such orders should be introduced in Scotland.²³⁹ However, the Scottish Executive has taken the view that such a model may be expensive for users, particularly debtors, who would be required to pay for it, and that it would take up considerable court time and resources.²⁴⁰
24. The Executive is currently working with the UK government on this issue, as there is a need for uniform arrangements throughout the UK for the purposes of cross-border enforcement, taking into account data protection, human rights and privacy considerations. The proposed Scottish Civil Enforcement Commission will have responsibility for this matter.
25. One point raised at the seminar on enforcement was that there is not always a rigid divide between those who can't pay and those who won't pay, as often people fall somewhere in between. While a debtor may be able to pay the money due at the start of the process, his or her circumstances may change over time.

²³⁸ Lord Chancellor's Department, White Paper, *Effective Enforcement: Improved Methods of Recovery of Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents*, Cm. 5744 (HMSO, London, 2003)

²³⁹ Written submission from the Society of Messengers-at-Arms and Sheriff Officers. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

²⁴⁰ *Enforcement of Civil Obligations in Scotland: a consultation document*, Scottish Executive, 2002 at paragraph 3.80

Non-financial motivations for enforcement

28. While it is important that access to improved information about the circumstances of debtors is available to creditors, recovering the money due is not always the only motivation for creditors in taking court action. While commercial creditors are often aware that there may be little prospect of recovery, some still take court action in order to obtain a court judgment against the debtor. Recent research in England and Wales found that there was a strong moral motivation behind enforcement for many creditors, who sought a court judgment merely to ensure that the defendant's name would be entered in the Register of County Court Judgments.²⁴¹ This allowed them to register formally and publicly their profound disapproval of the defendant's business practices, which they saw as unfair.
29. The Register is included in the files of credit reference agencies, and is regularly checked by companies before offering loans. It can therefore result in individuals and companies with county court judgments against them being 'blacklisted' for credit: This was the primary motivation for some creditors, to ensure that the debtor could not do the same thing to someone else.
30. There is no similar statutory register for Scottish judgments, however. The Registry Trust Limited has an agreement with the Scottish Court Service under which it collects information about small claims and summary cause decrees, but it does not collect information about ordinary cause decrees or Court of Session judgments. This may mean that in Scotland there is less incentive for creditors to obtain a decree for this reason, as decrees for over £1500 are not recorded. This seems very unfair to debtors who owe smaller amounts, and it was suggested by our seminar speaker that this situation should be addressed, given that the consequences for the debtor of having a judgment registered against them are much more severe than either the judgment itself or the enforcement measures.²⁴²
31. The UK government has recently proposed that information held in the Register of County Court Judgments should be made more readily available to consumers, as a means of enabling them to make better-informed decisions about the traders they use.²⁴³ Such information would also assist individuals who might be considering suing a trader to decide whether doing so would be worthwhile. In Scotland, access to the existing register would only provide information about decrees up to £1500, placing Scottish consumers at a disadvantage compared with those in England and Wales.

²⁴¹ *Evaluating the Effectiveness of Enforcement Procedures in undefended Claims in the Civil Courts*, J Baldwin, Lord Chancellor's Department Research Series 3/03, 2003

²⁴² See *The Crisis in Civil Enforcement – What Can be Done?*: Paper by Ralph M Cunnington for Seminar 6 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council

²⁴³ *Extending Competitive Markets: Empowered Consumers, Successful Business: consultation*, Department of Trade and Industry, July 2004

Protections for the debtor

32. The philosophy which underpins the diligence system is the *principle of least coercion*, which the Scottish Law Commission first applied in 1985 when proposing the reforms which led to the Debtors (Scotland) Act 1987.²⁴⁴ This principle states that where a choice is available between two different procedures, preference should normally be given to the one that involves the least coercion.
33. Thus, creditors should try first of all to recover the money due by less formal methods if possible, rather than going to court. Most commercial creditors do in fact attempt to recover the money owed to them by individual debtors by less formal debt collection measures, and are reluctant to take court proceedings unless this proves to be absolutely necessary.²⁴⁵
34. Where they do obtain a court decree, the law requires creditors to attempt the least serious form of diligence first. Where the debtor is an individual, for example, and the creditor is seeking an exceptional attachment order (to attach goods belonging to the debtor within his or her home), the creditor must satisfy the court that he or she has first executed, or attempted to execute so far as it is reasonable to do so, both a bank arrestment and an earnings arrestment.²⁴⁶
35. Where a debtor is a commercial or public organisation, there is little need for the law to provide it with protection against enforcement. Those debtor protections which the law provides are designed to protect individual debtors, who may be very vulnerable, particularly where they have multiple debts. Where an individual is being sued for debt by a company or a local authority, the mechanisms for collecting debt are not the only consideration. The circumstances of the debtor must also be taken into account in deciding upon the appropriate mechanism.
36. Where a debtor is insolvent, and is unable to pay because he or she does not have sufficient assets to do so, he or she may be made bankrupt. The proposed Bankruptcy and Diligence etc. (Scotland) Bill aims to reform bankruptcy procedures in Scotland, in order to distribute a debtor's assets fairly among their creditors.
37. The Debtors (Scotland) Act 1987 aimed to provide much better protection for debtors in relation to individual debts. It introduced the concept of time to pay, which allows the debtor to apply to the court, where he or she admits liability for the debt, for time to pay the sum due in instalments. Such an application can be made before decree is granted, by means of a time to pay direction, or afterwards, by applying for a time to pay order. The Act also sets out a scheme for calculating protected minimum amounts which cannot be arrested by means of an earnings or bank arrestment. Further debtor protections in relation to attachment orders and exceptional attachment orders are contained in the Debt Arrangement and Attachment (Scotland) Act 2002.

²⁴⁴ *Report on Diligence and Debtor Protection*, Scottish Law Commission, 1985

²⁴⁵ See Note 222

²⁴⁶ Section 48(1) (b) Debt Arrangement and Attachment (Scotland) Act 2002

38. There is little point in giving people rights, however, unless they are effective in practice. Unfortunately, research on the impact of the protections under the 1987 Act found that they had not been operating successfully.²⁴⁷ Debtors had low awareness and understanding about time to pay directions and orders, while most did not even respond to the court summons they received. They also viewed the role of the courts as part of a three-way alliance with creditors and sheriff officers to enforce the debt. Many were not aware that the sheriff has a discretionary role in deciding whether a time to pay application is accepted or rejected: some believed that the creditor had the final say.
39. The research also found that only a minority of debtors sought advice about their debt and concluded that, unless debtors consulted a money adviser or solicitor, their rights under the Act were largely redundant. The need to ensure that debtors have access to advice was discussed at the enforcement seminar, and it was suggested that some kind of gatekeeper system to provide such advice might improve the situation. This might be viewed as part of the general discussion in Chapter 3 on advice, help and representation, although it is worth noting that the Debt Arrangement and Attachment (Scotland) Act 2002 does aim to ensure that debtors receive money advice before an order for enforcement is granted by the court.
40. The Scottish Executive has taken various steps in recent years to address the difficulties identified in the research. Firstly, it has proposed reforms of time to pay procedures for individual debts, designed to increase uptake and increase the protections available.²⁴⁸ Secondly, the 2002 Act also introduced debt arrangement schemes,²⁴⁹ which are intended to provide a means for those with multiple (two or more) debts to repay those debts in a managed way without the threat of enforcement action. The available research suggests that most people who are in debt have multiple debts,²⁵⁰ and the scheme is designed to address gaps in the existing raft of protections, which are geared towards individual debts.
41. Under the new scheme, the debtor applies for a debt repayment programme through an approved money adviser. If the programme is approved by the Accountant in Bankruptcy, who administers the scheme, the creditor cannot take enforcement action against the debtor, provided that he or she maintains the agreed payments. Thus the scheme acts as a 'diligence stopper'. The Executive has also provided increased funding for money advice, to increase the numbers of advisers available and to train more money advisers to the standard required to become approved under the scheme, while debtors are required to take advice before entering into a scheme.

²⁴⁷ *Evaluation of the Debtors (Scotland) Act 1987: Study of Debtors*, David Whyte, Scottish Office Central Research Unit, 1999

²⁴⁸ *Modernising Bankruptcy and Diligence in Scotland: draft bill and consultation*, Scottish Executive, 2004

²⁴⁹ Part 1 Debt Arrangement and Attachment (Scotland) Act 2002

²⁵⁰ Source: *On the Cards: the debt crisis facing Scottish CAB clients*, Citizens' Advice Scotland, 2004. The research found that the average number of debts among CAB debt clients was 5.06, while only 1 in 5 debt clients were enquiring about a single debt

42. Concerns were expressed at the seminar on enforcement about the irresponsible lending practices of some commercial lenders, which may contribute to multiple debt situations. It was noted that the regulation of responsible lending was the responsibility of the UK government, and was currently being considered in relation to the Consumer Credit Bill, which was reintroduced following the 2005 general election. There are also provisions relating to the debt arrangement scheme which allow a creditor, on cause shown to the scheme administrator, to inspect an entry in the scheme register.²⁵¹ This is intended to encourage responsible lending by creditors.

Who should have responsibility for enforcement?

43. Four main approaches to enforcement are evident in countries throughout Europe:

- i. judicial control of enforcement proceedings
- ii. enforcement by a state agency
- iii. enforcement by independent professionals
- iv. enforcement through several co-ordinated or unco-ordinated institutions with initiative as to whom to approach being taken by the creditor²⁵²

44. Scotland has always followed the third approach. Enforcement is an entirely private matter for which the pursuer has sole responsibility. It is carried out by sheriff officers (for sheriff court warrants) and messengers-at-arms (for warrants issued by the Court of Session, High Court of Justiciary and the Court of the Lord Lyon) at the instigation of the pursuer. The pursuer is responsible for payment of the enforcement officer's fees, although this cost can be recovered from the defender if enforcement is successful. The state does not intervene in the enforcement process, except to regulate the activities of enforcement officers.

45. Such officers are self-employed private contractors rather than public servants, but have responsibility for carrying out a number of public functions related to the execution of court business. These functions include witness citation and service of court notices, in addition to enforcing court judgments. Their fees for carrying out their public functions are set by statutory instrument and they are granted a commission by the local sheriff principal or the Court of Session respectively. They have a duty to the court and may be disciplined, including having their commission suspended or revoked by the court. Complaints about messengers-at-arms are dealt with by a judge nominated by the Lord President of the Court of Session, while those about sheriff officers are dealt with by the sheriff principal.

²⁵¹ Regulation 19 Debt Arrangement Scheme (Scotland) Regulations 2004

²⁵² See Note 242

46. Following concerns about the current enforcement system in the wake of the debate surrounding the abolition of poinding and warrant sales, the Scottish Executive consulted in 2002 on possible reforms to the system.²⁵³ Most of the concerns were about the role and conduct of enforcement officers, and the arrangements for making them accountable. Some of these concerns related to the dual role of such officers, many of whom carry out informal debt collection work, as well as official enforcement. Issues were also raised about the lack of transparency and accessibility of the existing complaints procedures.
47. The Scottish Executive concluded in 2002 that there were no significant problems within the system which necessitated a move from a private to a public regime. This view was supported by a comparative study which found that the Scottish system compares favourably with other European jurisdictions.²⁵⁴ There was also broad support at the seminar on enforcement for retaining enforcement by sheriff officers and messengers-at-arms, rather than moving to another model.
48. The Executive has proposed that a new Scottish Civil Enforcement Commission should be established as a cost-effective body to oversee all matters relating to civil enforcement, with a view to improving the regulation and accountability of enforcement officers. The draft Bankruptcy and Diligence Bill provided for the creation of a Commission to oversee the appointment, organisation, training, conduct and procedure of enforcement officers.²⁵⁵
49. There was some discussion at the final seminar as to the possibility of enforcement by a state agency, but the general view was that state enforcement across the board was not justified. Firstly, it was clear that it would be too expensive for the public purse to do so. Secondly, it was recognised that the majority of financial claims in the courts involve big businesses and large lending institutions, and it would not be appropriate for such organisations to be funded by the state to enforce their debts. There was also a danger that a state funded enforcement system would encourage irresponsible lenders to continue with their practices, in the knowledge that the state would pick up the pieces when things went wrong.
50. It was therefore generally agreed that where one commercial organisation sues another, there should be no role for the state beyond providing a system of dispute resolution and a mechanism for enforcing the debt. The loser should continue to pay the costs of enforcement as at present.
51. There was some support, however, for the view that where an individual consumer is suing a commercial organisation, there may be a role for the state in assisting them to enforce their decree. It is clear from the research that such individual creditors often misunderstand the role of the court in enforcement. The court's role is simply to make a decision on the case, and to issue a

²⁵³ *Enforcement of Civil Obligations in Scotland: a consultation document*, Scottish Executive, 2002

²⁵⁴ *The Regulation of Civil Enforcement Agents in Europe*, Wendy Kennett, 2001

²⁵⁵ *Modernising Bankruptcy and Diligence in Scotland: draft bill and consultation*, Scottish Executive, 2004

decree for payment where appropriate. After that the onus is on the pursuer to enforce the decree and obtain payment. Yet this does not appear to tally with the perception of the public: research has shown that many individual creditors expressed a high degree of surprise at the limited role of the courts; nearly half of them thought that the court should provide more assistance with enforcement.²⁵⁶

52. Overall, most individual creditors were unhappy with their experience of the system, regardless of whether they had eventually secured repayment of the debt.²⁵⁷ They felt let down by the system; they had been given a right, but not a remedy. While improved advice for individuals pursuing a debt at the outset of an action would undoubtedly help, it might be argued that there is a case for a greater degree of assistance from the courts. If the civil justice system is a public service, should one important aspect of that public service not be to provide assistance with enforcement for individuals, and possibly also sole traders?
53. An analogy might be drawn here with the rules in small claims cases, where an unrepresented individual may require the sheriff clerk to serve the summons on the defender and / or to intimate an incidental application to the other party.²⁵⁸ In practice, the sheriff clerk generally does this as a matter of course; this is clearly one instance where the court already goes beyond its usual role by providing additional assistance to unrepresented individuals.
54. Another suggestion made at the enforcement seminar was that a system might be put in place to modify the rule that the loser pays the costs of enforcement, where this was considered to be in the public interest. It was suggested that, rather than the courts, the responsibility for making judgements about whether costs should be mitigated might be given to the proposed Scottish Civil Enforcement Commission.
55. Also in relation to costs, there was some discussion at the seminar as to whether there might be a role for insurance, perhaps as part of a credit agreement, or between businesses trading with each other, against the cost of recovering bad debts. If a creditor does not recover the sum due, he or she will not be able to recover the costs involved in enforcement, and it was suggested that insurance might go some way towards addressing that problem.

Enforcing non-court decisions/agreements

56. This chapter has concentrated largely on the enforcement of court orders, but what is the position in relation to enforcing decisions made by other bodies, or agreements reached through methods of alternative dispute resolution?

²⁵⁶ *Evaluation of the Debtors (Scotland) Act 1987: Study of Individual Creditors*, Debbie Headrick and Alison Platts, Scottish Office Central Research Unit, 1999

²⁵⁷ See Note 237

²⁵⁸ Section 36A Sheriff Courts (Scotland) Act 1971; Act of Sederunt (Small Claim Rules) 2002, rule 10.1(3)

57. In relation to employment tribunals, there can sometimes be difficulty in enforcing tribunal decisions. Settled cases have no special status beyond that of an ordinary contract. The process in Scotland is simpler than in England and Wales, where the decision requires to be registered in the county court. They cannot be registered in the civil courts, and if any compensation agreed is not paid, the claimant must start court proceedings on the basis of the contract, and in theory the claim can be contested. The UK government has therefore undertaken to reform the system so that an award of compensation, whether ordered by the tribunal or agreed by the parties, can be enforced as though it were an order of the civil courts.²⁵⁹
58. In mediation, the parties will, in most cases where agreement is reached, sign a written agreement setting out the agreed terms. The European Commission has proposed that it should be possible for mediation settlement agreements to be confirmed in a court judgment or other authentic instrument by a court or public authority.²⁶⁰ Enforcement will generally depend on whether the settlement agreement provides that it should be a legally enforceable contract between the parties.
59. In the case of arbitration, the arbiter's decision is final and legally binding on both parties. The award made by the arbiter can be enforced in the courts if necessary.
60. Adjudication must be conducted in relation to any dispute arising from a construction contract, and the decision of the adjudicator is binding. Enforcement through the courts requires the commencement of proceedings based on breach of contract, this breach being one party's failure to comply with an adjudicator's decision. As soon as judgment is obtained it can be enforced in the usual manner.

²⁵⁹ *Transforming Public Services: Complaints, Redress and Tribunals*, Department of Constitutional Affairs, July 2004

²⁶⁰ *Proposal for a Directive on Certain Aspects of Mediation in Civil and Commercial Matters*, European Commission, October 2004

8. Conclusions and Recommendations

Introduction

1. In the preceding chapters, we have set out the material put before us in regard to the issues which we identified and the discussions which took place at the seminars. This final chapter aims to set out our conclusions and recommendations arising from the seminars and the discussions. As explained in the introduction, the process was designed to be one of consultation and exploration, not one which could be expected to produce definite conclusions to be put forward as firm proposals for reform. Consequently, neither the advisory group nor any of its members should be thought to be committed to any particular reform agenda.
2. The object of the process was to identify, so far as possible, the features of the present system which give rise to concern, and to bring out suggestions for change, however radical those might be. We sought views on which aspects of the current system were seen to be currently working well, which, if any, particular aspects were viewed as a priority for reform, and whether there was a need for a full or partial review of the system. Although, as the earlier chapters indicate, there has not been much indication of a desire for wholesale changes to the system, the response we have received is enough to show that there are some significant elements of the civil justice system which do require an in-depth review.
3. Complaints about the costs of the system came through very strongly, as did complaints about delay, although the latter complaint was not made as strongly as it has been in relation to other systems, particularly that in England and Wales. It is true that the experience of the participants in the seminars and the evidence collected suggest that cost and delay are common complaints in all legal systems. It is perhaps unlikely that there will ever be a totally satisfactory resolution of these problems, because legal proceedings do tend to be expensive, wherever they are conducted. In view of the difficulties that can arise in relation to both matters of fact and matters of law, even in cases of lower financial value, it is unlikely that complaints about costs and delay can be wholly avoided. Nevertheless the complaints about the cost of proceedings in Scotland and about delays were forcefully made and backed by convincing examples and we think that they should be taken very seriously.
4. More worryingly, the evidence suggests a higher level of dissatisfaction with the Scottish legal system among persons who have been involved in proceedings than exists among those who have been involved in proceedings in England and Wales. That evidence does strongly suggest that there might be room for a thorough examination of some parts of the Scottish civil justice system.

The Need for Research

5. It might be thought that it is too easy for a body such as ourselves to say that more research is needed to determine what faults there are in the civil justice system. We do however have to emphasise early in this chapter that in a number of very significant respects it is hard to establish exactly what is happening in the working of the Scottish legal system. The lack of empirical evidence was a common theme throughout the process, and it is difficult to see how a review body could give adequate consideration to possible reforms unless this deficiency is addressed.
6. It is clear, for example, that there is little information on the overall costs of running the civil justice system at present. Nor do we have a great deal of evidence about the costs of litigation in terms of individual cases. While we have heard much anecdotal evidence of delays in the civil courts, often said to be due to the impact of criminal business, there is little research data to establish the real extent of the problem. It is widely accepted that the vast majority of defended cases settle before they reach a full court hearing, but again there is little statistical evidence to show how and why this happens in different types of case. The speaker at seminar 4 asked the pointed question “*Do you know what the Scottish civil justice system is delivering and to whom?*”, and it was obvious that the answer was in the negative.
7. One clear example of the sort of problem which arises is that there is plenty of anecdotal evidence that from time to time civil cases, including urgent matters such as family cases, have to be adjourned because there is no judge to hear them or because enough time is not available to complete them. There is, however, no way of establishing from the statistics that we have how frequent this problem really is, how much cost it imposes both on the parties and on the state, and how much damage it does to the family involved.
8. Another reason for putting this point early in this final chapter is that it is one which could, and in our view certainly should, be tackled even before a final decision is taken as to whether there should be a general review. The kind of information which is needed was also discussed in the speaker’s paper and the proceedings of seminar 4, and can be summarised as:
 - Who sues in the civil courts, in what kinds of disputes and in relation to what sums of money?
 - What is the outcome of cases begun in the courts? What proportion settle, go to trial, lapse or are withdrawn? What sums are awarded, or paid on settlement?
 - How long do cases take to reach a conclusion? Are there significant differences between different types of case?
 - How much does it cost the parties to litigate? Are there differences between different types of case?

9. We also recommend that research should be carried out into the views and experiences of individual users of the civil justice system as part of any review. While we have some evidence about this from the *Paths to Justice Scotland* survey, there is little recent data on the needs and experiences of those unrepresented individuals who have actually been through the courts or other civil justice processes in Scotland.

The Need for a Civil Justice Review

10. On the evidence which we do have, and after much consideration, we have arrived at the conclusion that there is a need for a review of several important parts of the system. We accept that some of the areas which we suggest are in need of review might not of themselves justify a comprehensive review; indeed there are some aspects which could be dealt with quickly, while others will require more in-depth consideration. We recognise that the Scottish Executive is currently considering various reforms to the civil justice system, while both the Court of Session and Sheriff Court Rules Councils are also active in a number of relevant areas.
11. Overall, however, we consider that a review is required: the question is how far any such review should extend. A number of investigations into particular aspects of the system are in progress or have been recently completed. The tribunal system, legal aid and legal advice and assistance are already subject to active review or consultation. It can be argued that there would be little point in setting up a review that merely duplicated investigations which have already been undertaken.
12. On the other hand, there may be room for re-examining the results of some of these investigations as part of a review. There are two main reasons for this. Firstly, the system cannot be divided into watertight compartments, and changes or proposed changes in one sector may well impact on others. Secondly, it has become increasingly evident, while our discussions have been in progress, that the problem of securing and financing access to justice is one which is being actively studied in many jurisdictions, some of which are experimenting with radical solutions. For example, some jurisdictions are considering permitting, even encouraging, commercial financial organisations to support litigation. Another example is revision of the rules governing legal practice so as to permit some legal services to be provided by persons or organisations who are not professionally qualified lawyers.
13. Developments along these lines do, of course, raise substantial issues which would require detailed study, but which may be of great interest, and we certainly do not want to preclude any review from thinking about them. However, so far as our immediate interest is concerned, it seems to us that what we have to do is identify the parts of the system where the work which we have done points to a positive need for review. For that purpose, there seems to be little point in attempting to repeat investigations that have already been undertaken.

14. For different reasons, two other areas related to the civil justice system do not seem appropriate for inclusion in any review of the kind that is suggested. These are the regulation of the legal profession and the organisation and appointment of judges. These subjects are not the primary focus of the investigation that we have undertaken and are unlikely to be the primary focus of any review. Some incidental reference to these topics may have to be made, but we would not regard them as contributing materially to the question of whether or not a comprehensive review of the civil justice system should be carried out.

The Scope of a Review

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

1. Disproportionate Costs

16. As we have explained, the cost of legal proceedings is a regular source of complaint. This complaint is not one that is confined to Scotland. It is increasingly recognised in jurisdictions in many parts of the world that access to justice is a fundamental constitutional or human right, and that the cost of legal proceedings is frequently a real barrier to that right. That cost impacts on the parties to a litigation in a number of ways.
17. There is, first of all, the need to raise the funds to meet the basic cost of beginning an action or stating a defence. Secondly, there is the problem of assessing how the cost is likely to increase as the action develops: under the present arrangements, it is extremely difficult, even impossible, either to control or to predict the way costs will develop. Thirdly, there is the risk that the losing party will have to pay the winning party's judicial expenses: that introduces another unforeseeable and uncontrollable element. These factors can give rise to difficulty, even in cases in which the financial value of the issues in the action is substantial. In cases of lower financial value, a situation can easily arise in which the costs of litigation become utterly disproportionate to the financial value of the subject matter.

18. This disproportion can create serious problems for many individuals, and even small businesses, who may become involved in legal disputes. Although the financial value of the claims in such cases may be small in comparison with those in commercial or personal injury litigation, they are often critically important to the parties, and it is most unfortunate if those parties are denied a proper legal resolution of their disputes because the risk of crippling expenses is too great. We have come to the conclusion that this is an important problem which can properly be seen as the primary focus of a review.
19. It is true, of course, that procedures have been devised in the past to try to deal with claims of lower financial value by a simplified and abbreviated procedure to save expense. There is, however, strong evidence of discontent with the way in which such cases are handled at present. This discontent has been expressed by a number of groups, including sheriffs as well as consumer and advice organisations. At present, cases in which the sum sued for is under £750 are dealt with by the small claims procedure and cases with a value of over £750 and up to £1500 by summary cause procedure. Any claims over £1500 must be dealt with under the ordinary cause procedure, which is more protracted and expensive and requires formal written pleadings. Nowadays, however, legal proceedings in which ordinary members of the public are concerned may well involve sums in excess of £1500. Such cases might concern consumer claims in respect of cars or household equipment, for example, and also extend to claims arising out of building contracts and other similar legal disputes.
20. It is true that the small claims limit could be raised without the need for a review, as indeed has been recommended in the past. We express no view on the question as to whether or not the limit should be raised without any further investigation. What we wish to stress is that there are other issues which urgently require to be considered, and which will not be resolved simply by raising the small claims limit. Firstly, it is clearly unsatisfactory that there remain three separate procedures dealing with claims of lower financial value. It should therefore be considered whether there would be any justification for retaining the three current separate procedures in the sheriff court, if the small claims limit was raised substantially.
21. Further, there has been a great deal of criticism of the present small claims procedure. It was designed to provide a quick and informal means for members of the public to pursue consumer claims without the need for legal representation. However, where members of the public do appear in this way they are liable to find themselves at a disadvantage, particularly where their opponent is a business, as such a business is likely to have members of staff who have some knowledge and experience of the procedure in the sheriff court and at least some familiarity with the court room, and may also have legal representation. Further, although the procedure was intended to be simple and user friendly, there is evidence that it is still felt to be formal and intimidating by those who are not accustomed to it. In such situations, there is no equality of arms.

22. Moreover, while the primary intention in establishing the small claims procedure was to provide a forum for consumer claims, the decision to include all cases with a value below £750 within the procedure has meant that such claims are in the minority. The position appears to be that the small claims court is dominated not by consumer cases, but by cases raised by catalogue companies, finance companies, local authorities and others suing for debt. The vast majority of these debt actions are undefended.
23. Sheriffs generally do their best to assist unrepresented parties when they are in difficulty, but there is a definite limit to the extent to which they can do so, because of the fear that they might be acting outside the proper role of the judge. In any case, a sheriff often has to deal with a considerable number of small claims cases at each sitting. These cases may involve quite complex issues of fact and law, even though the overall value is not great, and the time and effort needed to explore such questions properly is very difficult to provide without placing an unreasonable burden on the sheriff. That applies as much where the unrepresented individual is the defender as it does where he or she is the pursuer. As we have observed, much of the business of the small claims court arises from claims by businesses against customers for payment of debts, and a proper defence to such claims may equally involve difficult questions of fact and law.
24. If adequate finance were available, the solution to many of these problems might be to provide legally qualified assistance for the parties presenting or defending claims of lower financial value. It is however obvious that, even were the scope of legal aid to be widened to include small claims cases, finance to provide legal aid on such a scale is most unlikely to be available. Even if it were available, there would be a serious question as to whether it would be right for the state to provide legal assistance on a scale and at a cost which could be regarded as disproportionate, for the reasons which we have explained, to the financial value of the claims involved. Equally, it is not very likely that sufficient additional sheriffs could be provided to make it possible to devote the necessary time to dealing with claims of lower financial value in accordance with the present procedure. These considerations do point very strongly to a need to reconsider how claims of lower financial value should be handled.
25. Many may, of course, be capable of being resolved by reference to regulators, to consumer arbitration or mediation schemes where these are available, or to the complaints procedures which many businesses dealing with the public have set up. There was clear agreement at the seminars and throughout the process that where possible, the system should encourage the resolution of disputes at the earliest stage possible. The courts should be viewed as the last port of call for the resolution of disputes, rather than the first, as has traditionally been the case for those working within the civil justice system.
26. Nevertheless, as with all material disputes, there is a need for a more formal forum to which cases which are not resolved by agreement or by less formal procedures can go. It should not be forgotten that access to some form of court as a last resort for the determination of disputes is regarded as a fundamental

right. The question then is whether there is some way of devising a procedure that might be capable of dealing with a broad range of cases with a relatively low financial value in an expeditious and economical way.

What are 'cases of lower financial value'?

27. How, though, are 'cases of lower financial value' to be defined? Firstly, we must make it clear that our use of this term is not in any way intended to diminish the critical importance which such cases have for those who are involved in them. We simply use the term to distinguish those claims which involve sums of relatively low financial value within the broad spectrum of claims dealt with by the civil justice system as a whole.
28. Ultimately, it would be for any review body to decide how 'cases of lower financial value' are defined. We do not consider, however, that such cases should be confined to those currently dealt with under the small claims procedure. As we have pointed out, the present small claims limit, which has been in place since 1988, is clearly inadequate, while it appears to make little sense to retain three separate procedures for claims with a lower financial value. Our discussions seem to us to suggest a consensus that an appropriate upper financial limit might be around £5000, although it could arguably be set at a higher or lower figure. We should perhaps make it clear that we do not express any view on the question as to whether the financial limit for small claims under the present procedure should be increased without other changes being made. The discussion here is about the level at which the upper limit might be set for claims under a new procedure of the kind outlined below.
29. In 1998, the Scottish Courts Administration estimated that 90% of financial claims in the sheriff court were for £5000 or less. While inflation may have reduced this proportion since that time, it is clear that the majority of financial claims would fall within such a limit. While it does not necessarily follow that such cases take up an equivalent proportion of the courts' time, we believe that a more accessible process for dealing with claims up to this limit should encompass the majority of cases involving members of the public, with the exception of family cases. As discussed in Chapter 5, we consider that dispute resolution processes should focus on the needs of those who require to use them, and we believe that a simpler and more accessible process would help to increase access to justice for such users.
30. It is quite simple to apply a financial limit to claims arising from debt or contract. There are, however, other types of case where the position is not quite so clear. Financial claims below the limit should clearly be included in those treated as cases of lower financial value, although there is room for debate as to whether consumer claims should be dealt with separately from debt cases, as occurs in other jurisdictions such as Ireland. There is also an argument that personal injury cases have special features which require them to be dealt with separately. Family cases should continue to be dealt with under a separate procedure, even where they involve financial claims, as they have particular features which require this.

31. There are however other types of case which typically involve individuals, who are often unrepresented, and where the financial value involved is often low. These include eviction cases, currently dealt with under summary cause procedure, mortgage repossession cases, and applications under the Debtors (Scotland) Act and Debt Arrangement and Attachment (Scotland) Act. It would be necessary for any review body to consider whether a new procedure might extend to such cases or, if not, how they should be dealt with.

What might a new procedure look like?

32. There is no evidence arising from the seminars or the submissions we received of a demand or pressure for a general move to an inquisitorial type of legal procedure rather than the present adversarial procedure. However, there is an obvious attraction in considering some form of inquisitorial procedure for claims of lower financial value. It is not possible at this stage to say exactly how such a procedure would work. This would be for any review body to consider in more depth, and there are a number of issues which would have to be considered.

33. What we have in mind is a new simplified procedure of a generally inquisitorial character within the sheriff courts. We have no wish to be prescriptive about the details of how this might work, as this would be a matter for the review body. However, such a procedure might, for example, involve the parties submitting their contentions on paper in a simplified form (such as is used in applications to employment tribunals), after which the court could direct what further procedure was necessary. Some cases might be capable of being resolved on paper without any further investigation, subject to the rights of the parties to a hearing under human rights legislation. Some cases could involve the appointment of a court expert to examine goods purchased or work done and report to the court. The management of the cases could be carried out by qualified staff under the direction of sheriffs, rather than involving sheriffs at every stage of the case, and the staff could give other assistance to sheriffs in the management of such hearings as might be necessary. By qualified staff, we do not necessarily mean legally qualified staff. Paralegal and even administrative staff might be capable of providing the necessary support for the system.

34. We should mention two other suggestions which were made during our discussions. One was that the jurisdiction of the district courts might be extended to civil cases, following the current reforms of summary justice. However, the district courts as presently constituted are neither qualified for, nor suited to, dealing with civil cases; nor do they have the procedure or the administrative support required to enable them to do so. The very substantial changes which would be required to enable this suggestion to be put into effect would be likely to require as much effort as devising a new court structure. While, therefore, we record that this suggestion has been made, we do not suggest that it could be a primary focus for a review. The second suggestion was that cases of lower financial value might be decided by a new type of legally qualified decision maker. This would also involve devising a new structure of some kind, and the suggestion is too indefinite for us to discuss further.

35. Whether cases of lower financial value were dealt with within the sheriff courts or outside them, it would be necessary to decide what the relationship of any new procedure to the courts should be. As we have indicated, there are objections to removing such cases from the courts altogether, especially as from time to time issues do arise which are of general importance. We do not, however, think that there are likely to be insuperable difficulties in devising a procedure which could be conducted under the general control or supervision of the sheriff court, without involving sheriffs in too much time-consuming work.
36. A review body would obviously require to carry out research to establish how such a system might work and what the demands on it, in terms of numbers of cases and so on, might be. That would clearly depend on, among other things, the level at which the financial limit for cases of lower financial value was fixed. There is, however, no reason to think that a scheme of the type indicated above would be impracticable, and it could offer substantial advantages in terms of both cost and performance. Attempts to deal with the problems of claims of lower financial value and disproportionate expenses within the traditional adversarial structure have not been particularly successful in the past, and in our view it is well worthwhile to try to approach these problems in a different way.

Higher value cases

37. There was little evidence of a great demand throughout the process for a review of the procedures and structures of the Court of Session. While, however, we consider that the initial focus of any review should be on cases of lower financial value, it seems to us that it would be difficult to carry out a review, even one directed to such claims in the sheriff court, without some impact upon the procedure and jurisdiction of the sheriff courts generally and even those of the Court of Session.
38. Firstly, there would need to be a relationship between the financial limit for cases of lower financial value and the lower limit of the privative jurisdiction of the Court of Session. At the moment, the lower limit of the privative jurisdiction is, at £1500, surprisingly small, particularly when compared with the equivalent limit in England and Wales, which is fixed at £10000. If the limit were to be raised, it would be necessary to consider how that might affect personal injury cases. We are aware that there is in some quarters a desire to maintain a right of access to the Court of Session for personal injury claims, even in cases in which the financial value of the claim is relatively low.
39. The principal reason for this appears to be that the Court of Session offers a specialist procedure for such claims, leading to speedier resolution and a higher standard of consistency than the sheriff courts. Against this, it can be forcibly argued that there are many practical reasons why the time of the supreme court should not be occupied with cases of lower financial value, unless they raise questions of general importance and that the proper approach is to find ways of improving consistency and speed in the sheriff courts. Cases of general importance can be dealt with by permitting a reference to be made to the superior court where appropriate. This is another matter that would have to be taken into account by a review body.

40. Secondly, while it is true that the problems of lack of representation and lack of financial support are generally less prominent in the higher courts than they are in the sheriff court, there are other problems and demands which are common to courts of all levels. The discussion of cases of lower financial value has necessarily been focused on the sheriff courts. The remainder of this chapter is not intended to be so limited. There are three closely interrelated factors involved: whether there should be greater separation between the civil and criminal courts, the impact of criminal business on civil cases, and the argument made by some for greater specialisation within the courts.

2. Civil and criminal business

41. At present, there is no clear separation between the civil and criminal courts at either sheriff court or higher court level, either in terms of the buildings where they are housed or the judges who hear the cases. One consequence of this lack of physical separation is that many members of the public tend to associate the courts with criminal matters, which can be intimidating and can contribute to a reluctance to become involved in civil proceedings.

42. Moreover, criminal cases take priority, for obvious reasons, in the organisation of court business, with the result that procedure in civil cases is always open to disruption because of the demands of criminal cases. This is clearly a problem in both the sheriff courts and the higher courts, particularly at a time when the number of criminal cases and the proportion of available court time devoted to them are still increasing. Steps are being taken in the High Court, following on Lord Bonomy's report, to improve the efficiency of handling of criminal business, but it is not clear yet how far they will be successful.

43. The increasing level of criminal business has resulted in a recurrent problem in many, if not all, sheriff courts, where a civil case is partly heard and then requires to be adjourned to a date that may be weeks or months in the future. Of course, sheriffs and sheriff clerks are aware of the problem, and will do their best to set aside sufficient time for long civil cases to be heard, if they are warned of the problem in advance. Nevertheless, there is enough experience of cases having to be heard in instalments over a significantly long period to indicate that there is a continuing problem here. When this happens, it causes great inconvenience to the parties and to their representatives, and possibly also their witnesses, who must return after a lapse of time and try to take up the case where they left it. Moreover, it is possible, particularly in family cases, that the circumstances will have changed and much of the evidence already heard will have to be reconsidered or revised, and additional evidence will have to be led.

44. The problem also exists in the Court of Session: despite the efforts of court staff, it does happen that cases have to be rescheduled at short notice or put off for long periods of time. Delays and last minute cancellations can also lead to solicitors and advocates spending long periods of time waiting in court, at a cost to their client, or to the public purse in legally aided cases.

45. It seems to us that it is at least worth asking the question whether this is a sensible way of organising court business, and whether perhaps it would be better to allocate some judges and sheriffs to conduct civil business only and others to the conduct of criminal business only. It should be said at the outset that this would be a contentious proposal. Judges, like many advocates and solicitors, value the opportunity to deal with a wide range of different problems, and the ability to handle such a range of work is regarded as important in developing their professional skills. There is a risk that some of the best lawyers may be put off becoming judges if they were to be limited to one branch of work.
46. The ability of judges to deal with both types of case is an advantage in the system, and it is also an advantage for judges themselves not to be strictly confined to, say, conducting criminal business only for the whole of their careers. On the other hand, it is not very difficult to envisage that judges might be allocated to one or other branch of the business of the court for defined periods, as currently happens in relation to specialised procedures. It certainly seems clear that some arrangement for the separation of criminal and civil business would very much add to the predictability of the timetabling of court business generally. That would be a significant advantage from the point of view of efficiency. Whether it could lead to an overall reduction of costs is more doubtful: separate accommodation might be required, for example, and there would be less flexibility than at present in allocating judicial resources. In any event, the history of the last thirty years in the courts is a history of the progressive dominance of criminal business in the court timetable, and some attention needs to be paid to the protection of the courts' ability to give enough time to ensure the efficient dispatch of civil business.

3. Specialisation

47. A reorganisation of the civil and criminal business of the courts could also make room for some other arrangements which have been suggested to us as desirable. For example, there is substantial discontent about the length of time taken to deal with some family business, and in particular with contested adoption matters. This may be related to the suggestions made in some quarters that there should be specialised judges. Part of the problem with some of the lengthy family disputes is the sheer amount of evidence which the parties seek to put before the court. Specialisation has its limits and dangers, but it could also have advantages in this area. For example, a specialist family judge may be in a position to advise the parties about the extent of the evidence they are required to bring or, to put it more brutally, the amount of evidence to which he or she is prepared to listen. That might involve a modification of the judicial role in such cases, even perhaps, moving in the direction of an inquisitorial approach, but it could contribute to the efficiency and speed of disposal of such cases.

48. Here again, a review would have to take account of developments elsewhere. A number of jurisdictions have had specialist family courts for some time, but for the most part these have functioned in the same style and under similar adversarial procedures as do other courts. More recently, however, some have established family courts or tribunals which follow quite different and informal procedures and which provide, as part of the court service, and even within the court building, access to social work services and medical advice and assistance, and by this means try to reduce the need for formal evidence to be led. These developments are experimental, but by the time any review might be carried out in Scotland, some assessment of the value of these experiments should be available.
49. Greater specialisation among the judiciary would not be uncontentious, for reasons similar to those discussed above in relation to civil and criminal cases. Further, it would be impossible in practice to arrange to have specialist sheriffs in the great majority of sheriff courts. In the larger courts, like Glasgow and Edinburgh, some degree of specialisation might be possible, but it is likely that in the majority of other courts, sheriffs will need to be prepared to tackle anything that comes their way. Nevertheless, we think that there is some evidence of a demand for increased specialisation. The commercial procedures in the Court of Session and in Glasgow sheriff court, and also the family court in Glasgow, seem to have worked well, and do provide specialist services which appear to be appreciated.
50. There is, of course, a distinction to be drawn between specialist judges and sheriffs and specialised procedures, as discussed in Chapter 4. Whether any further specialisation is possible and desirable in either or both respects would be for a review body to examine.

4. Case management

51. It appears to us that, under the present system, despite attempts at case management in various courts, essentially the parties and / or their representatives decide what amount of time and effort are to be devoted to particular cases and, in consequence, how long these cases are going to take. It is arguable that this is not a sensible way of organising a large part of court business.
52. A review could at least consider whether there may be scope for providing that in particular classes of case the court could consider and decide how much time it was prepared to devote to a particular case or type of case, and tell the parties how much time they have to present their case. This is done in many jurisdictions, at least at appeal level, and in many instances the time given to parties for oral presentation of cases is quite limited. Of course tight time limits of this kind can only be imposed in cases where the court is sufficiently informed of the nature of the dispute and the means necessary to resolve it. It is by no means obvious that a scheme could be devised that would enable the court to control the amount of time and effort, and by consequence the

cost, to be devoted to particular proceedings, but that does not mean that this should not be looked at. In any case, this seems to be one of the few routes by which a significant reduction in the time taken and the cost incurred in a range of legal proceedings, other than proceedings in cases of lower financial value (however they may be defined), could be secured.

Class actions

53. Another potential way of maximising court resources and keeping costs down, while also increasing access to justice, might be the introduction of a procedure to deal with class, or multi-party, actions in the Scottish courts. Such a procedure would allow large numbers of cases arising from, for example, mass disasters, defective products or faulty drugs, to be dealt with together, rather than as separate cases. A considerable amount of work has been done in this area, and the Scottish Law Commission concluded that there was a need for such a process. We therefore recommend that a review should revisit this issue, including consideration as to how such actions might be funded. This is an issue on which a good deal of evidence is now available from other jurisdictions. A note of caution should perhaps be added because in the USA, where the idea of class actions originated, it has been found necessary to impose some restraint on them in recent legislation, the Class Action Fairness Act.

Changes to existing procedures

54. We have also received a range of suggestions for modifications of a less far-reaching nature to existing procedures. We would suggest that a review body could consider requiring the submission of pre-action protocols along the lines of those introduced in England and Wales following the Woolf report. A review could also consider whether provision could be made for provisional assessments of the prospects of the case, and for arrangements for reference of disputes to alternative dispute resolution, even if the parties would not have chosen that course for themselves. Again, judges could be given greater powers to control the amount and nature of evidence which is submitted to the court and the form in which evidence should be submitted, whether orally or in writing. That could include consideration of the utility and the cost of obtaining reports of various kinds for the information of the court, as frequently happens in family cases.
55. It has also been suggested that the management of cases of very high value, such as cases of catastrophic personal injury, has never been given detailed examination and would particularly benefit from a review. All of these are matters which could be resolved by court rules without a general review, but they are also matters which could be considered effectively as part of a general review.

5. Lawyers' remuneration

56. As has been mentioned, the cost of legal proceedings was repeatedly raised in the seminar discussions. Increased case management, as discussed above, may help to address these concerns, but it is clear that the cost of paying for lawyers is also a crucial factor here. As indicated earlier, legal aid is already under review and it would seem unnecessary to duplicate the work that is being done in that respect. There are, however, aspects of the system of remuneration of lawyers and the control of cases which could be considered in a review, in a more general way than strictly by reference to legal aid. As we observed earlier, new models for the provision of legal services are being actively considered in many jurisdictions. For example, the implications of the Clementi review of the regulation of the legal profession in England and Wales, which was published during our series of seminars, are still being explored and may turn out to be far-reaching.
57. The analysis of the costs of proceedings submitted to us indicates quite strongly that one of the problems in controlling the costs of legal proceedings, whether publicly financed or otherwise, is that lawyers are essentially paid according to the amount of work they actually do. That has great advantages in cases in which the parties are anxious to devote as much time and effort as is needed to bring out a significant result for themselves, and are not unduly concerned with the cost of doing so, but it is clear that fear of costs strongly influences whether and how people deal with their disputes. It is worth repeating that, as we said in connection with cases of lower financial value, litigants have to be concerned not only about the amount which they may have to pay their own lawyers but also the amount they may have to pay to the other side if they lose.
58. At the first seminar, the method of payment for legal services was analysed and it was pointed out that remuneration according to the detail of the work done in preparing for and conducting a case tended to increase costs, or to at least make costs difficult to control. No system, so far as we know, has ever solved the problem of paying for litigation in a way which provides proper remuneration for the highly skilled practitioners involved while keeping the overall cost at a level which seems reasonable to the general public, although some have been more successful than others. However, if there were to be a review, it is at least possible that it would be beneficial to explore some possibilities other than payment by time and line. It is possible that in Scotland it has to date been too readily assumed that the time and line basis of payment is the only or the best one for litigation.
59. Other possibilities which may be considered include a system of remuneration based on a contract for the conduct of a particular case at a fixed price, perhaps fixed as a proportion of the value of the claim. There is evidence that in the USA commercial firms have successfully pressed their attorneys to work on a contract basis in this sort of way. Even in the UK, there may have been cases in which solicitors have agreed to act for clients on the basis of a fixed fee per case. However, that has probably only been done where the client is instructing the solicitor to act repeatedly in cases of a very similar type, and the arrangement has probably been made without prejudice to the right to recover expenses from the losing party in the standard way.

60. It is clear that, while the overall level of costs is an issue which requires further investigation, lack of *predictability* of costs is just as important to those who employ lawyers. A fixed cost system, such as those which exist in countries such as Germany and Sweden, would provide greater predictability of costs for the public, which might help encourage the growth of a meaningful market for legal expenses insurance in Scotland, as exists in those jurisdictions. This may eventually result in a situation where few people feel excluded from the civil justice system should they require to use it. Again, there is a question as to whether recovery of expenses should be permitted at all, or at least whether it should be restricted to exceptional cases.

6. Enforcement

61. We would also recommend that a review should look into the issue of enforcement, particularly in relation to claims of lower financial value. There is not a great deal for us to say about this point. While it is clear that enforcement is problematic across the board, we are particularly concerned about the position of individuals involved in cases against commercial organisations. At present, although such individuals are responsible for enforcing their own court decrees, it is clear that many expect the court to assist them with this. We therefore consider that a review should look into the possibility of a role for the state in assisting such individuals to enforce their decree, as discussed in Chapter 7.

CLOSING REMARKS

62. We set out to try to identify significant problems and demands for real change in the Scottish civil justice system. What we have found is that there are a range of problems, some very significant, which have proved intractable in the past and which seem to us to require a fresh examination based on a thorough investigation of the present functioning of the system. That is why we recommend that there should be a review. We have not attempted to prescribe how the review body should be made up, or how it should proceed. These are matters for the Scottish Executive, and depend very much on the nature and scope of any review which it decides to carry out. It is sufficient for us to repeat, as is obvious, that any review should be open to fresh thinking, and that it should have the authority and independence to give weight to its conclusions.

Appendix 1 Project Advisory Group – Membership

CHAIRMAN

The Right Honourable Lord Coulsfield

MEMBERS

Laura Dunlop QC	Faculty of Advocates
Martyn Evans	Director, Scottish Consumer Council
Colin Lancaster	Head of Policy, Scottish Legal Aid Board
Iain McMillan CBE	Director, CBI Scotland
Valerie Macniven	Head of Civil and International Group, Scottish Executive Justice Department (succeeded by Micheline Brannan in June 2005)
Susan McPhee	Head of Social Policy and Public Affairs, Citizens' Advice Scotland
Rory Mair	Chief Executive, COSLA
Gordon Nicholson QC	Former Sheriff Principal of Lothian and Borders
Professor Alan Paterson	Law School, University of Strathclyde
Sheriff Fiona Reith QC	Sheriffs' Association
Bill Speirs	General Secretary, STUC
George Way	Convener, Civil Procedure Committee, Law Society of Scotland
Secretary:	Sarah O'Neill, Legal Officer, Scottish Consumer Council

Appendix 2 The Seminar Series

SEMINAR 1

22 September 2004

Speaker: Adrian Zuckerman, University College, Oxford

Scope, aims and principles of the civil justice system

- what should the scope of the civil justice system include?
- what should the aims and principles of a civil justice system be?

SEMINAR 2

3 November 2004

Speaker: Dr Nigel Balmer, Legal Services Research Centre, London

Seeking help, advice and representation

- what types of advice / dispute resolution services do those with civil justice problems need?
- who should provide these services and how?
- are there sufficient and accessible services available?
- how can it be ensured that those providing legal and advice services have adequate experience, competence and knowledge?

SEMINAR 3

15 December 2004

Speaker: Professor Carrie Menkel-Meadow, Georgetown University, Washington D.C, USA

What kind of institutions are needed for solving civil justice problems?

- what is the purpose of the courts and other methods of dispute resolution?
- in what physical location / by what type of body should various categories of disputes be dealt with?
- financial and jurisdiction limits – what / where should the divisions lie between different procedures and institutions?
- who should make the decisions in a dispute?
- how should they be appointed and their performance monitored?

SEMINAR 4

19 January 2005

Speaker: Professor Hazel Genn, University College, London

What kind of processes are best for solving civil justice problems?

- what should the aims and principles of dispute resolution processes be?
- how much autonomy should parties have?
- who should control the progress of cases?
- what should their role be – making decisions and / or managing cases?
- should formal legal representation ever be discouraged / encouraged?

SEMINAR 5

2 March 2005

Speaker: Roger Smith, Director of JUSTICE

Funding of the system

- who should pay for legal advice and representation on civil matters, and why?
- what options are available for funding legal advice and representation in civil matters?
- how can publicly funded legal services best be provided so as to meet the needs of those with civil disputes?
- who should pay for the costs involved in resolving a dispute, and how should these be determined?

SEMINAR 6

13 April 2005

Speaker: Ralph Cunnington, University of Birmingham

Additional Speaker: Professor Gerry Maher QC, University of Edinburgh

Enforcement

- who should enforce decisions made by a court or other dispute resolution body?
- how can those decisions be effectively enforced, by existing methods of diligence or otherwise, to ensure that litigants have a remedy?
- who should pay for enforcement of those decisions?
- are there issues of regulation which require to be addressed in relation to enforcement?

Appendix 3 Written Submissions Received

Association of Personal Injury Lawyers

Chartered Institute of Arbitrators Scottish Branch

Citizens' Advice Scotland

Core Consulting

ENABLE

Faculty of Advocates

Law Society of Scotland

Scottish Committee of the Council on Tribunals

Scottish Legal Action Group

Scottish Legal Aid Board

Scottish Legal Services Ombudsman / British and Irish Ombudsman Association

Scottish Liberal Democrats

Scottish Mediation Network

Society of Chief Officers of Trading Standards in Scotland

Society of Messengers-at-Arms and Sheriff Officers

Which?

Appendix 4 Meetings Held with Stakeholders

CBI Scotland	25 April 2005
Citizens' Advice Scotland	26 April 2005
Faculty of Advocates	21 April 2005
Law Society of Scotland / Forum of Insurance Lawyers	15 April 2005
Scottish Trades Union Congress	14 April 2005

Note: Meetings were also requested with the Scottish Association of Law Centres and the Scottish Sheriff Court Users' Group, but unfortunately we were unable to arrange a meeting date with either organisation.

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