

Scottish Civil Courts Review - a consultation paper

A response from Citizens Advice Scotland



**Based on the evidence of
Citizens Advice Bureaux
clients across Scotland**

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Citizens Advice Scotland

Scottish Association of Citizens Advice Bureaux



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By Chloe Clemmons, Advisory Officer (Legal Projects)

Citizens Advice Scotland and its 78 CAB offices form Scotland's largest independent advice network. CAB advice services are delivered through 216 service points throughout Scotland, from the islands to city centres.

The CAB service aims:

to ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities, or of the services available to them, or through an inability to express their need effectively

and equally

to exercise a responsible influence on the development of social policies and services, both locally and nationally.

The CAB service is independent and provides free, confidential and impartial advice to everybody regardless of race, sex, disability or sexuality.

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Table of contents

Executive Summary	6
Chapter 1	6
Chapter 2.....	6
Chapter 3.....	7
Chapter 5.....	7
Summary	7
Introduction	8
In-Court Advice Projects.....	9
Note on the compilation of this consultation response.....	9
Chapter 1, Question 1: Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what should be the key features of such a system?.....	10
The value of advice as a form of early resolution	10
Access to representation	12
The key features of a structured system to allow early resolution	13
Chapter 1, Question 2: Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review’s recommendations? Should they be supplemented by other factors?	15
Chapter 1, Question 3: Are there any matters within the Review’s remit about which you have concerns but that are not dealt with in this paper?.....	16
National strategic direction	16
Enforcement	16
Quality assurance.....	17
Evidence of current patterns of court usage	17
Chapter 2, Question 1: What contribution can public legal education make to improving access to justice?	18
Chapter 2, Question 2: Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?.....	19
Lay representation.....	19
Representation from a solicitor	19

Social welfare law	20
Implications for the advice sector.....	21
Chapter 2, Question 3: To what extent is it (a) desirable or (b) feasible to design court procedure with a view to enabling litigants to take part in the process without legal representation?	22
Complexity of substantive law.....	22
Experience of the litigant in relation to the court process.....	23
Inaccessibility of the court system	23
Chapter 2, Question 4: What contribution, if any, can (a) “self-help” services for party litigants and (b) court based advice services make to improving access for justice	25
Self help services.....	25
In Court Advice Services.....	25
Airdrie In-Court Advice Project.....	25
Dundee In-Court Advice Project	26
Hamilton In-Court Advice Project.....	26
Case example.....	27
Chapter 2, Question 5: Are there any other issues which impact on access to justice in Scotland which the review should consider?.....	28
Chapter 2, Question 6: Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?.....	29
Chapter 3, Question 2: To what extent does the cost of litigation deter people from pursuing or defending cases in court?	30
Chapter 3, Question 6: To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?	31
Chapter 3, Question 7: Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?	32
Speculative fee arrangements and legal expenses insurance (Chapter 3, Questions 8, 9 and 10).....	33
Question 8: What impact have speculative fee arrangements had on access to justice?	33
Question 9: Should legal expenses insurance, including “before the event” and “after the event” insurance, have a greater role to play in the funding of litigation in Scotland?	33

Question 10: What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?33

Chapter 5, Question 2: Should the court (a) encourage (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?..... 34

Acknowledgements..... 35

Executive Summary

Chapter 1

CAS welcomes the opportunity to respond to this wide-ranging consultation paper. We believe that the civil justice system should be designed to encourage early resolution of disputes. However, an emphasis on early resolution should not preclude access to representation where early resolution is not successful. The key features of such a system should be:

- Independent advice
- Holistic advice
- Customer focus
- Preventative advice and empowerment

Overall CAS agrees with the principles and assumptions discussed in paragraphs 1.11 – 1.14; however we hope that an emphasis on proportionality will increase the range of ways in which individuals can access justice rather than restrict the options available to those with low value cases.

CAS would like the review to consider the following additional matters:

- National strategic direction
- Enforcement
- Quality assurance
- Evidence of current patterns of court usage

Chapter 2

We believe that there is a role for public legal education in improving access to justice.

We have identified the following gaps in provision:

- Representation
- Social welfare law

Both of these gaps are particularly acute in rural areas. The presence of these gaps has implications for the advice sector as clients who are unable to find representation from a solicitor are likely to turn to the advice sector for assistance.

We suggest that it is desirable for litigants to be able to represent themselves. However, we are concerned that this may not be feasible for the following reasons:

- The complexity of substantive law
- The potential lack of experience of the party litigant in relation to the court process
- Inaccessibility of the court system for vulnerable individuals

We believe that court based advice services have a significant contribution to make to improving access for justice. This is because they are able to provide advice in line with our recommended key features of a civil justice system designed to encourage early intervention.

Based on the information provided in this consultation paper CAS does not have a strong opinion about whether there should be a new method for dealing with low value cases. However, we hope that if a new system for is introduced then it will focus on increasing access to justice and will not replicate the problems experienced in the tribunal system.

Chapter 3

The cost of litigation deters many of our clients from pursuing or defending cases in court. Therefore the availability of civil advice and assistance and of legal aid has a significant impact on whether or not cases are taken.

We are concerned that the proliferation of speculative fee arrangements and legal insurance is a consequence of inadequate arrangements for public funding of legal advice and representation. We would welcome further research into the impact that these arrangements have on access to justice.

Chapter 5

We welcome the inclusion of mediation in the civil justice system.

Summary

Overall we welcome the debate that has been begun with this consultation paper. However, we would like to highlight that use of the provisions in the Legal Profession and Legal Aid (Scotland) Act 2007 would provide a valuable contribution to the availability of legal advice, early resolution and access to the court service.

Introduction

1. Citizens Advice Scotland is the umbrella organisation for Scotland's network of 78 citizens advice bureau (CAB) offices. These CAB deliver advice at 216 service points across Scotland, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and other rural communities.
2. In 2006-07 Scots brought 444,122 new enquires to Scottish citizens advice bureaux through a total of 492,544 advice sessions with clients. Of these 30.6% were benefits issues, 22.3% were consumer issues, 10.7% were employment issues, 9.9% were housing and 7.1% were legal issues.¹
3. The single largest category of new legal issues was enquiries regarding legal proceedings at 55.5%, a further 5.5% of enquiries were regarding legal aid and 2.4% were regarding legal debts such as non-payment of court costs or fines.
4. CAB refer clients to a solicitor where necessary. In 2006-07 there were 8,249 referrals to solicitors, excluding the In-Court Advice Projects. 5% of these enquiries were about legal aid, 1% about legal fees and 9.4% regarding other civil court enquiries. A further 1,801 clients were able to see a solicitor in the CAB at a legal clinic or rota scheme.²
5. Bureaux offer a wide range of legal advice services including:
 - Welfare Benefits Advice
 - Benefits Tribunal Representation
 - Employment Advice
 - Employment Tribunal Representation
 - Immigration Advice
 - Housing Advice
 - Money Advice (including Debt Advice and Consumer Credit)
 - Legal Advice (includes cases taken by specialist or court based advisers as well as solicitors' legal clinics within bureaux)
 - Court Representation
6. The number and extent of bureaux services in any one area is dependent on the resources available to individual bureaux therefore not all services will be available in all areas.

¹ Figures taken from the CAS Social Policy Statistics Report 2006-07

² Figures taken from the CAS Legal Returns 2006-07

In-Court Advice Projects

7. The CAB service have been involved in piloting a series of Scottish Executive / Scottish Government Justice Department funded In-Court Advice Projects in which an adviser is employed by the CAB (or another host organisation) and located in the Court building. Individual CAB manage projects in Aberdeen, Airdrie, Edinburgh, Dundee and Hamilton. The In-Court Adviser provides various forms of assistance, including:
 - Help for people to understand their rights and responsibilities
 - Advice on civil court procedures and processes
 - Explaining appropriate options and outcomes (i.e. what to offer/request from the court)
 - Information on how to present/argue a case
 - Advice on the merits of a case (i.e. whether to pursue small claim)
 - Possible outcomes etc and appeal rights
 - Representation
8. All this help, and much more, is given on-the-spot, in the court building, immediately before, during or after an individual's case and can prove invaluable in assisting people to resolve disputes.³

Note on the compilation of this consultation response

9. Citizens Advice Scotland consulted with the CAB service before compiling this consultation response. In particular, contributions have been received from CAB Managed In-Court Advice Projects in Aberdeen, Airdrie, Dundee and Hamilton. Members of the Citizens Advice Scotland Legal Services Group have also provided contributions. Direct quotes from these contributions have been included in the response where relevant.
10. The views included in this response build on previous consultation responses, particularly "Advice for All"⁴ and evidence submitted to the Justice 2 Committee during the passage of the Legal Profession and Legal Aid (Scotland) Act 2007.

³ List provided by Airdrie In-Court Advice Project

⁴ *Advice for All: Publicly Funded Advice and Assistance in Scotland – The Way Forward*, Scottish Executive, 2005
<http://www.scotland.gov.uk/Publications/2005/06/16153135/31366>

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

11. The civil justice system should be designed to encourage early resolution of disputes. Indeed, Citizens Advice Scotland has been advocating reform of the civil justice system to increase availability of early, general advice and information as a means of increasing access to justice for over ten years.⁵
12. This section will explore the following topics:
- The value of advice as a form of early resolution
 - Examples of cases in which advice allowed early resolution
 - The importance of access to representation
 - Key features of a structured system to allow early resolution:
 - Independent advice
 - Holistic advice
 - Customer focus
 - Preventative advice and empowerment

The value of advice as a form of early resolution

13. It is the experience of many CAB clients that it is extremely difficult to access the formal civil justice system. Many of our clients do not qualify for legal aid, or cannot locate a legal aid solicitor who will accept their case. While the CAB service is committed to assisting individuals to access the court system where necessary, we believe that for many of our clients, access to quality assured, publicly funded information and advice may enable them to resolve their problems quickly, efficiently and without resort to the courts.

⁵ Labour Party Fundamental Reassessment of Legal Aid Scheme: response by CAS, Susan McPhee Oct 1996; Memorandum to the Justice and Home affairs Committee on the Inquiry into the Scottish Legal Aid System: A comment from Citizens Advice Scotland by Susan McPhee December 2000; Access to Justice beyond the year 2000: response by CAS, Susan McPhee August 1998; Consultation on Reform of Civil Advice and Assistance: A consultation Paper: response by CAS, Chloe Clemmons, January 2005; Advice for All: Publicly Funded Legal Assistance in Scotland- The Way Forward: A consultation Paper: response by CAS, Chloe Clemmons, September 2005; Legal Profession and Legal Aid (Scotland) Bill: Evidence to Justice 2 Committee from CAS, Kaliani Lyle, April 2006.

14. The two cases outlined below provide examples of types of case in which advice may resolve an issue that would otherwise end up in court:

Case 1:

A North of Scotland CAB reports the following case from August 2007. The client responded to an on-line advertisement for the sale of puppies. She contacted seller, agreed to purchase one puppy for £100 and sent a cheque for £100 to seller. The client later received notification that the puppy had died following a vaccination. Seller agreed to return the £100 cheque to client. The client has now noticed that that the £100 cheque payment has been deducted from her husband's bank account and she has still not received any compensation.

The CAB advised the client that as the payment of £100 falls within the small claims range of under £750 she could take the matter to a small claims court which is likely to incur a fee of about £39. The client was given a copy of The Small Claim information and procedural guide for her own reference should she decide on pursuing a small claims action, pointing out that the guide's own section explains that disputed payments are among the most routine small claims actions.

The CAB advised client that prior to pursuing a small claims action she should send a letter to the seller pointing out that she is technically in breach of contract for not refunding the payment and could potentially face a small claims action if she does not return the payment. The CAB prepared letter for the client to send to seller.

Case 2:

A North of Scotland CAB reports the following case from August 2007. The client is a self employed painter and decorator. He was recently contracted by a customer to strip wallpaper, sand and prepare walls and ceilings in two rooms prior to applying a painted finish. The client states that he was asked by his customer how long the work would take and he replied that once the initial preparatory work was done the painting of the completed surfaces would take three days. Work took a total of 69 hours to complete at £16 an hour plus material costs.

The client has received a letter from the customer stating that it was her understanding of the contract that it would take no more than three days in total to complete. The client was made an offer of £576 (£16 an hour multiplied by 12 hours a day, multiplied by three days). He is adamant that he clearly explained that once the preparatory work was completed, painting would be completed in about three days and that the client agreed that he should carry out the work. The client states that he cannot accept such a low offer for the amount of time the work took to complete.

The client was advised that if the estimated time referred only to the time to finish painting, he could potentially argue that his customer has made a breach of contract. As the disputed amount of £643 is under the small claims limit of £750 client could take the matter to a small claims court. It was explained to client that this would incur a fee of about £39. The client was also advised that he should explain his position to the customer by letter to see if some agreement can be reached before resorting to legal action. The client was despondent about the matter but agreed to a draft letter being prepared. The client was given a copy of The Small Claim information and procedural guide for his own reference should he decide on pursuing a small claims action.

15. The experience of CAB managed In Court Advice Projects suggests that for many clients going to court is perceived as a last resort, clients frequently prefer to resolve the matter by other means, such as negotiation conducted by the In Court Adviser. In the experience of advisers when other options had been explored and exhausted and the only option left is court action clients frequently decide not to pursue the matter even when they have a strong case.
16. Reasons for reluctance of clients' to go to court are discussed later in this response.

Access to representation

17. CAB and In-Court Advisers will always attempt to resolve a problem at the earliest opportunity. However, this is not always possible. Sometimes one or both parties are unwilling to negotiate or they are unable to arrive at a mutually satisfactory solution. If negotiations fail it is necessary for a client to be able to take their case to court. Indeed, the success of negotiations may be dependent on the awareness of both sides that a failure to reach resolution will result in court action.

The key features of a structured system to allow early resolution

18. If early resolution is part of the civil justice system then it is necessary for there to be a structured and sustainably resourced means of encouraging people to resolve disputes prior to the necessity for a court hearing. The characteristics of publicly funded legal advice and assistance that would enable early resolution of disputes are outlined below.

Independent advice

19. Provision of independent advice ensures that the client is able to properly assess the options available to them and make an informed decision as to whether court action is the best way to resolve their personal case. These principles are fundamental to a fair civil justice system that aims to contribute to social inclusion. This means that advice must be provided in accordance with equality standards, that the client's legitimate or lawful interests are represented and that a non-judgemental, non-discriminatory approach is adopted. It is essential that all clients are able to access independent advice services.

Holistic advice

20. Holistic advice is necessary because peoples legal problems occur in clusters, therefore when a client seeks advice about a specific issue it is likely that they will also need advice about other related issues.⁶ For example, a client seeking advice about rent arrears may have an underlying problem related to ill health or employment. Taking a holistic, client centred approach to advice giving ensures that all of a clients needs are met and therefore prevents them needing to seek advice repeatedly and prevents deterioration of the issues for which advice is not immediately sought.

Customer focus

21. The court service should be focussed on the needs of the individuals using it and not its own staff. For example, the language and processes used in the court should be closer to those used in everyday life.

Preventative advice and empowerment

22. Preventative work should include public legal education, both as part of an ongoing programme and as easy to access "just in time" resources. Provision of public legal education will empower individuals to gain appropriate knowledge of the civil legal and court system so that they can make informed choices, whether that is to take action by themselves or to seek assistance. Preventative advice also includes free, easily available independent information and advice at an early stage, e.g. supporting someone to use a

⁶ For examples see: *Paths to Justice Scotland; what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, with National Centre for Social Research, Oxford University Press, 2001

complaints procedure may ensure that their issue is resolved without the need for any further intervention.

23. See Chapter 2, Question 2 for further discussion of this issue.

Chapter 1, Question 2: Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?

24. Overall CAS agrees that the principles and assumptions outlined in paragraphs 1.11-1.14 are a sound basis for the development of the Review's recommendations.
25. In principle we agree that disputes should be resolved in a reasonable time and at a reasonable cost to both individuals and the public purse. However, we are concerned that by placing an emphasis on the value of the case, access to justice may be limited for individuals on low incomes as the disputes that they have are more likely to be of low value. We would like to highlight that although the Court system may ascribe a particular level of importance to a "low value" case this does not mean that monetary value of the case is insignificant to the individual concerned. For an individual on low income or benefits even small sums of money can have a significant impact on their household finances.
26. Access to justice requires that all individuals have equal access to the courts or an effective alternative, irrespective of the value of their dispute. It may be the case that changes to the court system, which will be discussed elsewhere in this response, will decrease the costs attached to some court actions. However, the principle of access to justice requires that an individual with a meritorious case is not excluded simply because it is of low value. The Dundee In-Court Advice Project comments that "although many of the amounts being sued for are small, this does not mean that the matter is less complex than those of greater value."
27. We would encourage the Court Service to support mechanisms that allow the option of early intervention in order to resolve matters without the necessity for court action. It is our view that effective, customer friendly early intervention will prevent many individuals from wanting to use the court service. Where this is not the case, publicly funded access to the court service should be available.

Chapter 1, Question 3: Are there any matters within the Review's remit about which you have concerns but that are not dealt with in this paper?

28. CAS would like the review to consider the following additional matters:

- National strategic direction
- Enforcement
- Quality assurance
- Evidence of current patterns of court usage

National strategic direction

29. It is essential that there is national, strategic oversight of the Civil Justice System as a whole. A national, strategic body would be able to ensure that there is integrated access to justice both through the court service, through early intervention, through advice and casework and through alternative dispute resolution, such as mediation. We are disappointed that work undertaken as part of the Strategic Review on the Delivery of Legal Aid, Advice and Information regarding national strategic direction has not been taken forward.

Enforcement

30. At present individuals who use the court service are largely responsible for the enforcement of judgements made in their favour. We are concerned that some of our clients expect more assistance from the court and would benefit from that additional assistance. If a client spends time and money taking a case to court, wins that case but is unable to enforce the judgement then their overall position may be worse than if they had not gone to court in the first place. The following case highlights the problem.

A West of Scotland CAB reports the following case. A male client has been unable to enforce a successful award of £250 after small claim case. The award related to poor building work. The client has used Sheriff Officers to enforce payment unsuccessfully and at cost of £50 per visit. The defender avoided arrestment by sending client cheque for £75 drawn on his girlfriends account and flaunts invulnerability to client. The client has taken all possible legal steps including trading standards and consumer direct and failed to obtain justice for himself.

31. It is understood that giving stronger enforcement powers to the court is a complex issue and would need careful consideration. However, we hope that this review will be able to address the issue of enforcement.

Quality assurance

32. The Review raises a number of questions regarding early resolution, including the idea of court based advisers and mediation. In these circumstances there is a need for a quality assurance standard to ensure that the service provided to members of the public is good quality. The Citizens Advice Scotland Membership Scheme requires all member CAB to undertake a regular audit. The audit is used as a basis for continuous improvement in the quality of advice given in CAB. An effective and useful audit scheme should require organisations to identify the degree of provision offered by topic e.g. generalist, casework or specialist. This would enable members of the public to make informed choices about the type and quality of service they access.

Evidence of current patterns of court usage

33. There is a need to understand who is using the court, and what for, as well as who is not using the court. The experience of In Court Advisers suggests that the inclusion of formalised processes for early resolution of disputes may not decrease the number of cases coming to court. This is because people are currently very reluctant to use the court service; if negotiation fails they are likely to drop their case, even if it is a strong case. This is a particular issue where there is no advice service available in the court. Therefore the client groups who may benefit the most from access to better managed and better funded early resolution are not necessarily clients who currently use the court system. Further research about patterns of court usage would be beneficial.
34. A Scottish Executive Consultation took place around Civil Judicial Statistics in 2006;⁷ the research demonstrated that there is a need for more accurate, more comprehensive and timelier judicial statistics. Citizens Advice Scotland would like to reiterate that a review of the court service should be predicated on accurate evidence of how the courts are used.
35. Advice services have a key role to play in collecting analysing data about clients needs, and contributing to the wider social justice agenda, by feeding back to service providers, policy makers and legislators evidence regarding the impact of policy and systems. This feedback provides the information needed to monitor the impact of changes in law and policy, to identify failings and improve public services. In this role, the independence of advice services is vital, as they provide objective, external evidence of the effect on individuals and communities.

⁷ *Research With Users of Civil Judicial Statistics*, Scottish Executive 2007, <http://www.scotland.gov.uk/Publications/2007/10/04094856/12>

Chapter 2, Question 1: What contribution can public legal education make to improving access to justice?

36. Citizens Advice Scotland believes that there is a role for public legal education in improving access to justice. It is helpful if people have an understanding of what can be achieved through legal action as well as what cannot be achieved – people need to understand the difference between what is dreadfully unfair and what is illegal. Achieving this understanding will manage expectations of the legal system and may prevent people without a legal case for entering the court system. Public legal education could also be used to help people become more confident in their understanding of the legal system so that they are able to make more informed decisions about how to address any issues that they may have. It would be especially helpful to have public legal education on mediation – both how it works and the potential advantages of the process.
37. Some of the Court based advisers suggested that spoken information can be far too much for people to be expected to take in on one occasion, especially when they are nervous about going to court imminently. Information resources could prove valuable to the adviser and the client if they are used to supplement advice rather than replace it. For example Airdrie In-Court Advice has found a self help booklet for tribunal cases to be useful – the booklet is given out at the end of the interview for the client to consult later.

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

38. The CAB service as a whole has not undertaken thorough needs assessment about geographical gaps in service; however, anecdotal evidence suggests that there are gaps in provision of:
- Lay representation e.g. In-Court Advice
 - Representation from a solicitor
 - Social welfare law
39. These gaps are particularly prevalent in rural areas.
40. These gaps have particular implications for the advice sector.
41. The Scottish Legal Aid Board (SLAB) has undertaken a survey exploring how legal problems are identified and referred on. All CAB have been offered the opportunity to contribute to this survey. We anticipate that this research will be of value in assessing the availability of the civil legal aid.

Lay representation

42. In Court Advice Projects are available to clients using courts in Aberdeen, Airdrie, Edinburgh, Dundee, Hamilton and Kilmarnock (the Kilmarnock In-Court Advice Project is not managed by a CAB). Similar services are not available in most other courts; this represents a significant gap in provision of advice and representation. Citizens Advice therefore supports the views in paragraphs 2.3 – 2.5 of the Review which highlights that “effective intervention by an adviser at an early stage will in many cases be sufficient to resolve a dispute, before it escalates into a more serious and intractable problem.” (2.3) This view matches the experience of the In Court Advisers who regularly see clients intending to take a case to court which they are able to resolve by negotiation.

Representation from a solicitor

43. **Hamilton In-Court Advice Project commented** “Our own remit is shaped not by any cohesive policy concerns but by the rules of audience in court; this means that the service we offer is limited by the extent to which lay representation is permitted at court. This has some anomalous consequences for the scope of the service which we provide and means (for example) that while we can act for clients facing eviction proceedings for rent arrears, we cannot offer the same assistance to clients with mortgage arrears (as such matters proceed through ordinary as opposed to summary procedure).

44. Consequently, where rules of audience do not permit us to act, we need to refer the client for professional legal services; such proceedings currently include Mortgage Rights Applications, Anti-Social Behaviour Orders and defended payment actions for sums in excess of £5000.
45. While there are many excellent legal practitioners in this area, there is an increasing reluctance on the part of private practitioners to take cases where the client requires to be legally aided; whatever the rights and wrongs of the current controversy concerning legal aid rates (Summary Cause rates being especially problematic), the net result is a shortage of legal practitioners prepared to act in certain civil proceedings for clients who are unable to meet the legal fees themselves.
46. Other services, such as local authority Trading Standards departments play an important part in the provision of legal advice, but their remit is deliberately limited and necessarily excludes cases without a consumer dimension.”
47. See further comments in Chapter 3, Question 6.

Social welfare law

48. Many CAB experience difficulties in locating a legal aid solicitor for their clients, particularly those working in rural areas. As noted previously in CAS consultation responses there is a shortage of solicitors and non-legally qualified advisers in the field of social welfare law including welfare benefits, housing, consumer and employment issues. Where provision does exist it is patchy. Therefore we agree with the position in paragraph 2.5 that “the development of publicly funded legal assistance needs to be taken forward in conjunction with planned changes in the justice system, rather than in isolation, given the influence and impact of each upon the other” (2.5 quoting Advice for All)⁸. CAB often report clients with the experience highlighted below.

An East of Scotland CAB reports the following case. The client has been separated from her estranged husband for 18 mths and wishes to start divorce proceedings. She had an appointment with local solicitor and was advised that a legal aid service could not be provided. The client was seeking information regarding any solicitor in Cupar who may offer a legal aid service. Adviser contacted all local solicitors on the list and was informed that none currently offered a legal aid service.

⁸ *Advice for All: Publicly Funded Advice and Assistance in Scotland – The Way Forward*, Scottish Executive, 2005

<http://www.scotland.gov.uk/Publications/2005/06/16153135/31366>

Implications for the advice sector

49. At present the lack of availability of solicitors taking on social welfare law cases has meant that individuals turn to CAB and other advice agencies for assistance. CAB are not currently able to access legal aid funding to deliver advice in these areas, therefore many CAB are unable to meet demand for advice and representation on social welfare law issues. There is a particular shortage of representation for individuals using the Civil Courts. While it is acknowledged that the Small Claims Court in particular is designed for individuals to use without representation it is common for organisations to be represented by solicitors in the Small Claims Court. This means that there can be a power and knowledge differential that may be prohibitive to access to justice.
50. Following the Strategic Review on the Delivery of Legal Aid, Advice and Information and the Advice for All Consultation legislation was passed; the Legal Profession and Legal Aid (Scotland) Act 2007, which granted wide ranging and flexible powers to SLAB. The Act makes it possible for SLAB to provide grant funding to advice agencies which provide quality assured legal information and advice. Use of these provisions would enable SLAB to fund advice provision in subject matters, such as social welfare law, and geographical areas where provision is currently lacking. The Act also enabled SLAB to directly employ solicitors to fill the gaps in legal representation. The Act received wide ranging support from advice practitioners and we hope that the Scottish Government will seek early implementation of these provisions.

Chapter 2, Question 3: To what extent is it (a) desirable or (b) feasible to design court procedure with a view to enabling litigants to take part in the process without legal representation?

(a) desirable

51. Citizens Advice Scotland agrees that it is desirable for litigants to be able to represent themselves where they are able to understand the law relating to their case and they wish to do so. In fact, access to justice would be fundamentally compromised if litigants are required by the court to be represented when affordable representation is not available. The In Court Advice Projects were designed to assist unrepresented litigants to ensure that they were able to understand the court process and use it effectively.

(b) feasible

52. However, we have serious concerns about the feasibility of effective self representation for most individuals because of:

- The complexity of substantive law
- The potential lack of experience of the litigant in relation to the court process
- Inaccessibility of the court system

Complexity of substantive law

53. It is not just the court procedure that makes it difficult for litigants to represent themselves. As the **Hamilton In-Court Project** explains “many of the difficulties which a litigant is likely to encounter stem not from procedure but from the complexity of the substantive law itself, and this will not easily be changed.
54. Litigants using the present Small Claims system will generally benefit from a procedure which is more straightforward than other types of claim, but their case will still be decided by reference to the relevant body of law, whether that be common-law principles of contract, the Statutory provisions of the Sale of Goods Act 1979 (as amended) or some other rule structure.
55. The litigant who proceeds in ignorance of the rights and duties that flow from these sources is not well placed to successfully participate in court proceedings.
56. It follows from what is said above that simplified procedures will not alleviate the need for suitable advice and assistance in connection with court action.”

Experience of the litigant in relation to the court process

57. Most litigants representing themselves have extremely limited, if any, previous experience of the court system. Therefore it is crucial that the organisational culture and normal behaviour of the court is conducive to allowing an inexperienced person to understand and present a legal argument in that environment. The following examples demonstrate the difficulties that CAB clients have experienced when representing themselves.

A West of Scotland CAB reports the following case. The client was a man in full time employment who was being sued by a creditor. Although the CAB was unable to represent the client at court they assisted with a financial statement to support an application for Time to Pay Order.

The client attended court alone. He returned to the bureau to say he had no idea what the decision of the court had been. Clearly none of the court officials nor the sheriff had made any effort to make sure that an unrepresented party understood the proceedings.

An In-Court Advice Project reports the following case. The adviser met the defender, who was a party litigant, in a debt action at the preliminary hearing where a proof diet was set down. The adviser took up his case with the pursuer in the action who was another party litigant. After many letters between the adviser and the pursuer, a sum was agreed upon and the pursuer agreed to sist the action to allow the defender time to pay the sum. As the Pursuer did not know how to sist the action, the adviser sent the pursuer an incidental application to use and gave details of the sheriff clerk's phone number in order to have the action sisted on behalf of the In-Court Adviser's client.

58. The Small Claims process was intended to provide this less formal, less intimidating environment. However, the required change in organisational culture has not taken place which means that for many litigants the Small Claims Court is still, in practical terms, inaccessible. In order for a litigant to represent themselves effectively it would be necessary for the court to adopt an inquisitorial system. This would perhaps in turn require specialist Sheriffs, or at least Sheriffs with relevant training and experience, to preside in these courts.

Inaccessibility of the court system

59. Use of an inquisitorial system may alleviate some of the problems currently experienced by unrepresented litigants. However there will always be individuals with a valid case to present who are unable to represent

themselves, perhaps because of mental ill-health, poor literacy, being speakers of other languages or because the law relating to their case is simply too complex for a lay person to understand. These individuals will require access to independent advice and representation as can be seen from the following examples. These examples are intended to illustrate the type of problem clients have experienced in attempting to access the court service over the past few years rather than indicate specific problems.

An East of Scotland CAB reports the following case from November 2006. The client is male, aged over 70 years and is blind. The client required information on how to pursue a Small Claim. A leaflet is available from the Sheriff's Court, but not standardly available in any format suitable for the visually impaired. This detracts from such clients' independence and may cause delays while they wait for someone to read to them.

A South of Scotland CAB reports the following case. The client came to CAB with documents in connection with a court action in which he is the Pursuer. The action was being pursued jointly with his brother but his brother has now withdrawn. The client has difficulty reading and writing and required assistance to continue his case.

Chapter 2, Question 4: What contribution, if any, can (a) “self-help” services for party litigants and (b) court based advice services make to improving access for justice

Self help services

60. Self help services can be a valuable tool where the issue being addressed is simple and easy to understand, for example model letters for individuals to use to challenge bank charges have been used successfully by CAB clients. In general it is only when faced with a particular situation that people need to understand, interpret and pursue their legal right and/or responsibilities. Therefore a lack of familiarity and knowledge in this area means it is likely that many will still require assistance. Consequently they will continue to seek support from agencies such as CAB and In-court Advice Projects. Even if a more informal and easier to access system is designed for litigants representing themselves, many people will still require assistance due to literacy difficulties and/or a lack of confidence in their own abilities.

In Court Advice Services

61. The CAB service manages five In-Court Advice services around Scotland, the Advisers and Managers of four of these projects have contributed to all aspects of this response, however, three comments made by individual projects are particularly helpful in understanding the contribution that court based services make to access to justice.
62. The comments highlight that the projects have been well received by the Sheriffs they work with and the benefits they provide to clients. They are followed by case examples.

Airdrie In-Court Advice Project

63. **Airdrie In-Court Advice Project** highlights “The In-Court Advice services have been proven to be hugely effective and invaluable, especially when dealing with emergency matters and clients who attend court without having been able to gain access to legal advice or representation.
64. This has been recognised time and again by Sheriffs, court staff, solicitors and various other bodies and organisations that benefit from being able to refer clients to the Adviser, especially in rent arrears, debt and other cases. It has recently been commented that,

“It is now 10 years since the first in court advice project was launched in Edinburgh Sheriff court. Its success led to the expansion of the scheme to a number of courts including Airdrie. The need for such a project to improve access to justice by assisting litigants to resolve their differences or at least narrow the issues in dispute has become more and more evident every year.”

In 2007 the consultation paper emanating from the group led by Lord Gill reviewing the Scottish Civil Courts records the important role which In-Court Advice plays at present. It also indicates the intention of the Review to consider the case for a greater availability of such services. I would welcome that as the contribution which the Airdrie project makes to ensuring that court time is more effectively used cannot be overstated.

It is essential that unrepresented persons appearing in court in relation to debt, housing and other similar problems have an effective source of advice available. This the Airdrie project provides and in doing so it assists the Court in facilitating efficiency and justice by helping to optimise the use of court resources and time." (Sheriff R. H. Dickson)

65. People require holistic, on-the-spot information, advice and representation, and both pursuers and defenders are given help with small claims, summary causes and ordinary cause cases (where applicable)."

Dundee In-Court Advice Project

66. **Dundee In-Court Advice Project** describes the service they offer – “in the first instance the adviser would write to the other party, whilst keeping the client informed of what is happening and taking into account their views, there may be many letters between the other party and the ICA until a solution to the problem can be reached.
67. Should there be no resolution; the adviser completes the court forms and provides full written pleadings on behalf of the client. The Adviser will then guide the client through the whole maize of the processes of the small claim action at every stage of the action, explaining possible outcomes and information on how to present their case and ultimately advice on what to say to the Sheriff.
68. The ICA will once again on behalf of the client continue to negotiate settlement between preliminary hearing and proof and should this is unsuccessful then the adviser will go over the evidence with the client and complete a full list of productions in a style which is appropriate. (It may be noted that over the past 18 months there have been only 3 cases which the project have dealt with have actually gone to proof, 2 of which were referred on to a law centre)."

Hamilton In-Court Advice Project

69. **Hamilton In Court Advice Project** states “we clearly have an interest in persuading the Civil Courts Review of the value of In-Court Advice; this is none-the-less, a very simple case to state.
70. The decisions reached in the Sheriff Courts will often have considerable impact on people’s lives; a large proportion of these decisions are reached in absence of one or both of the parties, indicating a low level of lay engagement in court proceedings. Of those parties who do engage in court proceedings, many find the documents and proceedings unintelligible and so struggle to

adequately put their case. Access to professional legal assistance is severely limited due to cost and the restrictive nature of the civil legal aid scheme.

71. Against this background, there is a clear need for free advice and assistance, readily available within the precincts of the court.
72. In-Court Advice services can and should complement other providers of publicly-funded legal assistance such as Law Centres and Local Authority and Voluntary Sector advice services.
73. But the limitations of resources and rules of audience mean that In-Court Advice Services are not a 'catch-all' solution to unmet legal need and some strategic assessment of legal service providers is needed.
74. In addition, where these services are in operation, they require adequate support both financially, and generally e.g. it would be useful to provide access to suitably qualified legal support, in order to assist with any particularly complex or unusual areas of law."
75. It is noted that Rights of Audience in the Sheriff Court determine whether a lay representative is permitted. If the use of In-Court Advisers who are not solicitors is to increase then these rules will need to be reviewed.

Case example

76. The case below provides a detailed example of the benefits that an In-Court Adviser can bring to the client and the court service by resolving a case without recourse to the courts.

An In-Court Advice Project reports the following cases. Two clients came to the adviser for assistance in raising an action in relation to mobile phone contracts that were taken out over the internet. However, in each case, the Project was able to resolve the matter without the need for court action. One client had taken out a contract with XXX whereby he was to receive cash back payments after the lapse of a number of months; however, these were not received. The client came to the project seeking to raise a small claims action to recover the payments due to him, but after sending off a 7 day letter to the company in attempts to negotiate, our client received full payment. Similarly, another client took out a contract with another phone company, and after sending a 7 day letter on his behalf, the company paid out all monies due to him.

Chapter 2, Question 5: Are there any other issues which impact on access to justice in Scotland which the review should consider?

77. The broad issues are outlined in Chapter 1, question 3.
78. In relation to the complex issues around self representation there is a further concern about the lack of solicitors providing legal aid for proof hearings for small claims and summary cause. These hearings require greater legal knowledge than it is reasonable for an individual to have and is hoped that a planned provision for publicly funded legal advice should include these issues.

Chapter 2, Question 6: Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?

79. Based on the level of information provided in this consultation paper CAS does not have a strong opinion about whether there should be a new method for dealing with low value cases. However, we do have a view about the underlying principles on which any new system should be based.
80. We agree that there are significant and intractable problems for individuals attempting to access existing court systems. Unfortunately a number of the same problems can be seen in the existing tribunal system. In particular there is a lack of funding for representation, and a lack of experienced representatives including non-legally qualified representatives. The tribunal system is also a method of hearing legal cases and enforcing the law, therefore issues highlighted elsewhere in this response about the complexity of the substantive law still apply. These factors and the organisational culture that has developed in the tribunal system mean attendance at a tribunal can be as intimidating and difficult for the individual as a court hearing.
81. If a new system were to be established to deal with low value cases we would want assurances that the problems experienced in the tribunal systems are not replicated that the primary focus of such a new system should be access to justice for individuals rather than cost to the Court Service. We would be pleased to review any proposals as they become available for consultation and help assess the impact any changes would have on clients. We are particularly interested to see proposals about the qualifications that decision makers will be required to have as well as how decisions will be made. If the system is intended to be less formal an inquisitorial system would be preferable.
82. If such a system for dealing with low value cases were to be introduced it may be most valuable for consumer and housing cases.

Chapter 3, Question 2: To what extent does the cost of litigation deter people from pursuing or defending cases in court?

83. The cost of litigation deters many of our clients from pursuing or defending cases in court.
84. We would strongly dispute the argument asserted at 3.10. Though it may be possible for clients to predict to an extent the possible outcome of their case, often this is an area of considerable doubt, as is the level of award which could be levied against them. It is not unusual for CAB clients with legitimate cases, particularly where legal aid is not possible, to be deterred. The question of “expenses” is often the first question asked by clients when they arrive at the service. This is particularly difficult when the case involves an individual against an organisation where the budget an organisation has available may be considerably more than the budget of that individual, this may occur, for example in housing cases or debt cases.
85. Furthermore, inability to meet costs is a particular consideration in Mortgage Rights Act cases, where people in financial difficulty who are unable to access legal aid, are denied access to this remedy, and face an increased debt burden once decree is obtained.

Chapter 3, Question 6: To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

86. It is the experience of the CAB service that the availability of legal advice and assistance from an experienced adviser, irrespective of whether that adviser is a solicitor, and legal aid is a crucial factor in whether or not a case is pursued. The In Court Adviser in Airdrie suggests that the provision of on-the-spot advice and emergency representation for people in civil cases can be hugely important and often influences whether a person will pursue or defend an action at all.
87. Publicly funded legal advice is central to the issue of access to justice, especially as not every litigant can afford the services of a solicitor or can qualify for legal aid. Even where legal aid is theoretically available it has sometimes been the experience of advisers that in an emergency, for example in a housing eviction case, there is not time for a client to identify a solicitor who will take their case using legal aid, see that solicitor, apply for legal aid and be in court before their case calls. Many litigants are up against a represented party, and it's well documented that representation can have a huge impact on a person's case as there is a higher success rate for represented parties. Therefore representation, for example by an In-Court Adviser, is an important way of creating a more level playing field.
88. The Strategic Review on the Delivery of Legal Aid, Information and Advice⁹ explored issues around legal aid and access to justice in considerable detail. We are disappointed that proposals around increasing access to publicly funded legal information; advice and representation have not been taken forward.

⁹ *Strategic Review on the Delivery of Legal Aid Advice and Information: Report to Ministers and the Scottish Legal Aid Board*, Scottish Executive, 2004
<http://www.scotland.gov.uk/Publications/2004/11/20170/45845>

Chapter 3, Question 7: Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?

89. There is a particular problem in obtaining funding for litigation in all aspects of social welfare law. There are also consistently problems in identifying a legal aid solicitor for clients in rural areas.
90. There is a further problem in that clients require information, advice and representation in circumstances which are not covered by legal aid, for example in complex small claims cases. In order to support these individuals to access justice is necessary to make grant funding for legal information, advice and representation available to ensure that services such as CAB and In-Court Advice Projects are able to meet demand.

Speculative fee arrangements and legal expenses insurance (Chapter 3, Questions 8, 9 and 10)

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

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

Question 10: What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?

91. Citizens Advice Scotland is concerned that the proliferation of speculative fee arrangements and legal insurance is a consequence of the inadequate arrangements for public funding of legal advice and representation. The consequence of these developments collectively is that decisions about whether a case should be pursued are being taken for financial reasons, often by an insurance company, rather than on the merits of the case. This means that only cases where there is little doubt about the outcome will be taken to court. In the long term this may constitute a decrease in access to justice because so many decisions are made outwith the accountability of the court service and legal profession.
92. We would welcome further research into the impact of these fee arrangements and recommendations about how insurance can ensure that access to justice is increased rather than decreased in the long term.
93. “Before the event” and “after the event” insurance are financial products. Individuals on low income are unlikely to be able to afford such insurance. Therefore we think these new fee arrangements should be in addition to legal aid rather than to replace legal aid.

Chapter 5, Question 2: Should the court (a) encourage (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

94. A successful CAB managed mediation service operates at Edinburgh Sheriff Court and the In Court Advice Service in Aberdeen Sheriff Court refers cases to the Court based mediation service there. In our view mediation can be a beneficial addition to the court system and can provide an effective and mutually satisfactory method of early resolution. In order for mediation to be an effective addition to the civil justice system it is important that the public have a greater understanding of how mediation works.
95. We would like to note paragraph 5.21 in which it is stated that “if greater use is to be made of mediation, there may be an issue as to whether it is viable for this to be delivered by voluntary organisations.” Citizens Advice Scotland would like to highlight the fact that the voluntary sector regularly provides professionally delivered, quality assured, expert services under contracts and service level agreements to local authorities.

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- Hamilton CAB

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Citizens Advice Scotland and its member bureaux form Scotland's largest independent advice network. CAB advice services are delivered using service points throughout Scotland, from the islands to city centres.

The CAB service aims:

to ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities, or of the services available to them, or through an inability to express their need effectively

and equally

to exercise a responsible influence on the development of social policies and services, both locally and nationally.

The CAB service is independent and provides free, confidential and impartial advice to everybody regardless of race, sex, disability or sexuality.

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