

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

Summary

Gemma Crompton, March 2010



## About Consumer Focus Scotland

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

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

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

**[www.consumerfocus-scotland.org.uk](http://www.consumerfocus-scotland.org.uk)**

## Introduction

After years of piecemeal reform, civil justice in Scotland has the prospect of fundamental modernisation. The reports of the Scottish civil courts review and the Administrative Justice Steering Group both made it clear that significant changes are required to the civil and administrative justice systems to make them fit for purpose. At the same time, however, the funds available to implement any reforms are likely to be tighter than ever before. The need for prioritisation will therefore be acute and the focus is likely to be on those reforms that can be introduced quickly and cost effectively. However, the civil justice system, and the court system in particular, provide a public service.<sup>1</sup> It is therefore critical that the focus for reform should be on changes that can be made which will achieve maximum benefit for the public.

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

As a result of many years of research and policy development in this field, we have identified a four-step approach to removing barriers to access to justice which we believe is necessary for the civil justice system to function effectively in the interests of consumers:

- 1. A public legal education strategy**
- 2. Joined up and appropriate advice services**
- 3. An emphasis on informal means of resolving disputes**
- 4. More user-friendly formal dispute resolution processes**

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

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<sup>1</sup> See for example Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*. Edinburgh: Scottish Executive; Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*. Edinburgh: Scottish Civil Courts Review

## Step One: A Public Legal Education Strategy

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

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

Research suggests, however, that these stages are very difficult for consumers to navigate and many fail to reach the help that is available to them or reach it only once their problems have escalated.<sup>2</sup> In other jurisdictions, public legal education (PLE) is seen as an important tool to help consumers navigate these stages. It is a tool not only to improve consumers' knowledge of their rights, remedies and means of redress, but also to build their skills and confidence so that they possess sufficient 'legal capability' to act upon this knowledge. This could be about giving them the knowledge and confidence to reach the appropriate adviser at the appropriate time to help them resolve their problem(s), or it could be equipping them with the necessary skills to take action themselves. We believe those who have adequate knowledge and capability to self-help, either on their own or with support, should be encouraged to do so. This will have the additional benefit of freeing up advice resources for those who are most in need of that assistance.

Recent research commissioned by Consumer Focus Scotland and the Scottish Legal Aid Board pointed to an urgent need for better information for the public and wider access to support services in all courts.<sup>3</sup> A consistent message emerging from this research was that few people knew what to expect and many were deeply concerned about understanding the language and procedures of the courts. Crucially, what no research can do, however, is indicate how many people are put off pursuing their case as a result of their preconceptions about what's involved. We therefore believe a public legal education strategy is critical to improving access to justice for consumers in Scotland.

Of the four steps to removing barriers to access to justice, this step has seen least development to date. While there are a number of organisations doing good work in this area, the consequence of the lack of strategic approach to PLE means that many consumers still lack the information and knowledge to identify when they have a problem, whether potential legal remedies are available, and if so, what remedies are most suitable.<sup>4</sup> If consumers continue to lack the knowledge, skills and confidence needed to access the civil justice system and make informed choices about the options available to them, they will be unable to take full advantage of the remedies the system offers. This suggests an urgent need for greater investment in public legal education.

We therefore believe the development of a Scotland-wide public legal education strategy to be fundamental to efforts to improve access to justice for consumers. Without greater investment and prioritisation being given to this first step, any developments made in the subsequent three steps to improve the experience of consumers will never achieve their maximum impact. We believe investment in public legal education has the potential to save resources further down the line by preventing problems from occurring or enabling them to be resolved earlier and in

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

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

4 See note 2

the most appropriate way, ensuring that best use is made of available resources. We therefore strongly endorse the recommendation in the civil courts review<sup>5</sup> that public legal education should form part of any access to justice strategy. We view public legal education as an area where early action could be taken to improve the current situation and would urge the Scottish Government to progress the review's recommendations on PLE and self-help services as a matter of urgency.

## Step Two: Joined Up and Appropriate Advice Services

An important feature of a just and inclusive society is the ability of all of its members to enforce their rights, meet their responsibilities and resolve their disputes. Fundamental to this is the need for consumers to have access to high quality legal advice, at an affordable cost. Such advice should be provided on a client-led basis, and consumers should have access to the most appropriate services to deal with their problem, be that from a private, public or voluntary sector provider. We believe that this 'complex mixed model'<sup>6</sup> of advice provision best serves consumers by providing a range of services to suit their particular personal and legal circumstances. To ensure the most effective delivery of such advice, however, there is a need for a clear national strategy for planning and coordination of advice services, to be implemented at a local level. It is crucial for this model to work effectively that mechanisms are in place to ensure speedy and effective referrals between services. The private, public and third sectors therefore each have a crucial role to play in ensuring consumers have access to justice.

There have been a number of significant improvements in this area in recent years. The establishment of an independent Scottish Legal Complaints Commission has been a significant step forward, giving consumers greater confidence in the independence and impartiality of the complaints system. The Legal Profession and Legal Aid (Scotland) Act 2007, under which the Commission was established, has also brought a number of other access to justice benefits, notably the powers it gives to the Scottish Legal Aid Board to respond to issues of access through its grant- funding powers and increased flexibility to directly employ solicitors. We particularly welcome the Board's recent commitment to enhance and expand the existing in-court advice services, as well as funding new projects. We have long called for in-court advice services to be rolled-out nationally, as such services have an important role in ensuring access to justice for those who have been unable, for whatever reason, to access advice at an earlier stage. We have also welcomed the recent significant increase to the disposable income limit for civil legal aid eligibility, which is estimated to leave approximately three-quarters of the population as potentially eligible for civil legal aid.<sup>7</sup>

However, while there have been reforms to improve consumers' access to advice, there has been little significant development in terms of *joined up* advice services. To ensure the most effective delivery of advice for consumers, there is a need for a clear national strategy for planning and coordination of advice services to be implemented at a local level. We believe that the emphasis must be on partnership between the various local bodies which will have a stake in the provision of publicly funded legal assistance. Although the provisions within the current Legal Services (Scotland) Bill, giving the Scottish Legal Aid Board the powers to monitor the availability and accessibility of legal services in Scotland, represent an important step forward, we believe such planning and coordination to be crucial in ensuring consumers have access to justice.

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

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

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

Of the four steps to removing barriers to access to justice, this second step is the area which has seen the most notable change to the benefit of consumers in recent times. However, there are still significant gains to be made. In order to improve this step to the benefit of consumers we believe the following action should be taken:

- The Scottish Government should implement the full range of powers given to the Scottish Legal Aid Board under the Legal Profession and Legal Aid (Scotland) Act 2007. Allowing advice agencies to be funded through legal aid would be an important way of increasing access and choice for consumers, as well as increasing those agencies' funding.
- A number of previous reviews<sup>8</sup> undertaken since devolution should be revisited to identify any further steps to improve access to justice that could be taken. We believe the recommendations of these reviews should be revisited, and in particular, consideration should be given to the ways in which coordination of advice services could be improved.
- More research should be undertaken exploring options for funding for advice and litigation, including contingency fees, before the event insurance and after the event insurance.
- One of the most significant benefits for consumers could be the opening up of legal services to competition. By enabling firms to respond flexibly and innovatively to clients' needs, there is great potential for increasing the accessibility of advice services for consumers and for these services to be much more client-focused. We believe passing the Legal Services (Scotland) Bill will be a key development in advancing the interests of consumers.

## Step Three: An Emphasis on Informal Means of Resolving Disputes

We have a long-standing interest in ensuring that consumers who become involved in disputes have access to appropriate and affordable means of resolving them. However, this need not necessarily mean access to the courts and it is therefore a mistake to think of civil justice only in terms of court processes. While most people agree that the courts are an important way for people to enforce their rights, on the whole, those involved in disputes are more interested in finding a resolution to their problem or obtaining compensation for harm or loss than necessarily enforcing their legal rights.<sup>9</sup> We also know that people would generally prefer to avoid becoming involved in legal and court processes. Those who actually end up in a court or tribunal tend to express high levels of dissatisfaction with the process. The *Paths to Justice Scotland* research found that fewer than half of those whose dispute was resolved by a court or tribunal thought the decision was fair, as opposed to 80% of those who reached an agreement.<sup>10</sup>

Mediation gives the parties a chance to be heard, and to put forward their case, in a less formal and more private environment than a court. As was recognised by the report of the civil courts review, it can be particularly useful where there is a continuing relationship between the parties. A settlement reached through mediation, which has been agreed by both parties, is more likely to preserve that relationship than a court judgment in favour of one party. Consumer Focus Scotland therefore has long been a supporter of informal means of resolving disputes, particularly mediation, and view the use of such mechanisms as playing an integral role in removing barriers to access to justice.

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<sup>8</sup> See for example Scottish Executive (2001) *The Review of Legal Information and Advice Provision in Scotland*, Edinburgh: Scottish Executive; Scottish Executive (2004) *Strategic Review on the Delivery of Legal Aid, Advice and Information. Report to Ministers and the Scottish Legal Aid Board*, Edinburgh: Scottish Executive; Scottish Executive (2005) *Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward*. Edinburgh: Scottish Executive Social Research

<sup>9</sup> See note 2

<sup>10</sup> See note 2

The administrative justice system also plays an important role in the informal resolution of disputes, particularly as many more people make use of the administrative justice system in Scotland than the court system.<sup>11</sup> There have been a number of recent developments in this area, in which Consumer Focus Scotland was actively involved, including the Fit-for-Purpose Complaints System Action Group, which considered how to improve the complaints-handling system in Scotland, and the Administrative Justice Steering Group (AJSG), which identified a number of problems with the current system and suggested areas where improvements could be made. The overall opinion of the AJSG was that the current administrative justice system does not meet the needs of users.

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

The potential for significant improvements to be made to this step will only be fully realised if there is wider recognition of the potential benefits of informal means of resolving disputes. A paper published by the Scottish Consumer Council (SCC), one of our predecessor organisations, in 2001 found that the principal barrier to the development of mediation in Scotland was cultural and that there was a general lack of awareness of and/or support for mediation among members of the public, the legal profession, other advisers and the judiciary.<sup>12</sup> However, later SCC research found that, once the process was explained to them, over half of respondents said they would consider using mediation if they had a dispute.<sup>13</sup> This confirms that significant work is required to raise understanding and awareness of alternative dispute resolution, so it can be considered a viable alternative to the courts amongst the public, lawyers and the judiciary alike. We believe the benefits of mediation for consumers merit a stronger stance being taken by the Scottish Government than that suggested by the civil courts review report, and we hope it endorses the Civil Justice Advisory Group's conclusion that the courts should be viewed as a remedy of last resort. We believe this commitment will lead to greater emphasis on informal means of resolving disputes, which we believe would be in the interests of consumers.

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

12 Scottish Consumer Council (2001) *Consensus Without Court: Encouraging Mediation in Non-Family Civil Disputes in Scotland*. Glasgow: Scottish Consumer Council. See also Scottish Government (2007) *Public Awareness and Perceptions of Mediation in Scotland*, Edinburgh: Scottish Government

13 Scottish Consumer Council (2005) *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland*, Scottish Consumer Council: Glasgow

## Step Four: More User-Friendly Formal Dispute Resolution Processes

Although we are keen that disputes be resolved at as early a stage as possible, it is inevitable that some problems will require to go to a formal dispute resolution process. It is therefore crucial that such processes are accessible and user-friendly for those who are involved in civil disputes. We have long been concerned that at present court processes in particular can be confusing, intimidating and even frightening for parties, especially for those who are unrepresented. The Scottish Consumer Council campaigned for a civil justice review for more than 25 years. In November 2005, it published *The Civil Justice System in Scotland - a case for review?*, the final report of the Civil Justice Advisory Group chaired by the Right Honourable Lord Coulsfield. The report concluded that there was a need for review of a number of important aspects of the civil justice system in Scotland. The SCC was delighted when in February 2007, the Minister for Justice announced that Lord Gill, the Lord Justice Clerk, would lead a review of the civil courts in Scotland, which was to focus on four of the six areas identified within the report as being in need of review.

We have welcomed the recognition by the review that the current court system, in providing a system that is 'slow, inefficient and expensive' is failing to deliver justice.<sup>14</sup> While there have been a number of developments aimed at improving the court system, many of which have had benefits for consumers, the civil courts review's analysis was that this piecemeal reform has left a system which is not fit for purpose. There is general recognition that the review's recommendations will be both expensive and long-term to implement, and the Scottish Government is currently considering its response to the recommendations. What should be fundamental to implementing any reform is recognising that the review's primary purpose was to improve access to justice for the people of Scotland. Reforms should not focus primarily on improving the administrative convenience to the courts or to make things easier for professional users; they must have real, tangible benefits for the ordinary users of the courts.

In light of this, Consumer Focus Scotland believes the initial focus for reforms must be to make those changes which will have the greatest impact for consumers. The SCC and Consumer Focus Scotland have campaigned for the introduction of a class actions procedure since 1982. We hope that the recommendations within the civil courts review for such a procedure to be introduced will be taken forward in early course. This recommendation, together with other proposals for a proposed Consumer Advocate and for multi-party actions contained within the UK Government's Financial Services Bill, has the potential to bring about real benefits for consumers. It will make a remedy a practical possibility for consumers, particularly where large numbers of people have each lost small amounts which it would not be economic to litigate about individually.

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

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<sup>14</sup> See note 5

It is a mistake, however, to think of formal dispute resolution processes simply in terms of the courts and the current court structures. In particular, we see there being great potential to use the recommendations of the civil courts review as an opportunity to look at how things could be done differently, rather than potentially replicating the existing problems within a new structure. We see potential for greater links between the proposed third-tier structure and the administrative justice system. We believe this would create opportunities to take certain types of case, such as housing, debt and consumer issues, out of the traditional court setting to be resolved in more specialised forums. These forums should be designed to operate much more informally and inquisitorially than the current court processes. Research has shown that adopting such an approach can have significant benefits for consumers, particularly if they have received advice, even if they are not represented.<sup>15</sup> We therefore believe the use of specialist forums, where an informal inquisitorial approach is adopted, could take away some of the fear associated with resolving disputes, increase consumer confidence and improve access to justice.

In order to ensure that any reforms to formal dispute resolution processes address the issues of most relevance to consumers, it is essential that much more research is conducted with a full range of users, in order to identify their different needs. We do not believe the interests of consumers in how formal dispute resolution processes operate can be well represented without conducting regular research with individual users of these processes.

Unfortunately to date there has been a lack of research focusing on court users, something Consumer Focus Scotland and the Scottish Legal Aid Board's research with court users accessing legal aid or in-court advice services sought to address.<sup>16</sup> The limited nature of that research highlighted areas where gaps exist and more work could be done. Areas identified as benefiting from further research include: research looking specifically at unrepresented litigants, identified to be a particularly vulnerable group; research of court users involved in more complicated court processes, such as the ordinary cause procedure; and a mapping exercise of the advice and information available for litigants across all courts.<sup>17</sup> We believe such areas should be examined as a matter of urgency, particularly as reforms resulting from the civil courts review are taken forward.

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

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

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

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

16 See note 3

17 See note 3

## Conclusion

Although there have been a number of developments in civil justice in recent years many of which have had benefits for consumers, it is widely acknowledged that the piecemeal reform to date has left Scotland with a civil justice system unfit for the 21st century.<sup>18</sup> While we welcome the civil courts review's recognition that the whole civil courts system needs to be overhauled, in taking forward future reforms we would advocate two main points:

Firstly, the individual user must be at the centre of any reforms to the court system. As the civil courts review noted: 'the structural and functional flaws in the working of the Scottish civil courts prevent the courts from delivering the quality of justice to which the public is entitled.'<sup>19</sup> The review report makes clear that the civil justice system is a public service and therefore it is the public that the reforms should be designed to benefit, not the judiciary, advocates or solicitors.

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

The full report from which this summary is taken is available on the Consumer Focus Scotland website: <http://www.consumerfocus-scotland.org.uk>

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<sup>18</sup> See note 5

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