

**CIVIL JUSTICE ADVISORY GROUP**

**CONSULTATION SEMINAR**

**13 SEPTEMBER 2010**

**ROXBURGHE HOTEL, EDINBURGH**

**ENSURING EFFECTIVE ACCESS TO APPROPRIATE AND  
AFFORDABLE DISPUTE RESOLUTION**

**RECORD OF THE SEMINAR PROCEEDINGS**

## **SEMINAR PROGRAMME**

- 9.00 – 9.30 Registration and Coffee
- 9.30 – 9.40 Welcome and Introduction, by the Right Honourable Lord Coulsfield, Chair of the Civil Justice Advisory Group

### **Session 1: Structure and Process in the Lower Courts**

- 9.40 – 10.20 *Back to Basics in Dispute Resolution: What do people want and what should we be offering?*  
Professor Dame Hazel Genn, University College London
- 10.20 – 10.40 *Delivering Justice: What Are the Essential Elements of a Dispute Resolution System?*  
Charlie Irvine, Chair, Scottish Mediation Network
- 10.40 – 10.50 Questions
- 10.50 – 11.05 Coffee
- 11.05 – 11.50 Table Discussion
- 11.50 – 12.30 Feedback session
- 12.30 – 13.25 Lunch
- 13.25 – 13.30 Welcome back (Lord Coulsfield)

### **Session 2: Support to Facilitate Access to Justice**

- 13.30 – 13.45 *What do users need from the civil justice system?*  
Sarah O'Neill, Head of Policy and Solicitor, Consumer Focus Scotland
- 13.45 – 14.00 *Practical Experience of Assisting Court Users*  
Richard Young, In-Court Adviser, Airdrie Sheriff Court
- 14.00– 14.15 *Access to lawyers or access to justice?*  
Crispin Passmore, Strategy Director, Legal Services Board
- 14.15– 14.25 Questions
- 14.25 – 15.10 Table Discussion
- 15.10 – 15.20 Coffee
- 15.20- 16.00 Feedback session
- 16.00 Wrap up and Close (Lord Coulsfield)

## **SEMINAR PROCEEDINGS**

### **9.30am : Introduction by the Rt Hon Lord Coulsfield, Chairman, Civil Justice Advisory Group**

Thank you all for coming. It's a gratifyingly large and, if I can say so, varied attendance of people we have got here. We are most impressed by the way you have been interested in turning out for this occasion and we hope that there is, as a result of your contribution and your coming here, a good prospect of some very useful outcomes in this discussion.

You are all no doubt familiar with the Gill Report and in the presence of the Chairman of the Committee, no doubt none of you will admit to not having read it from cover to cover. You will at least be aware of the main recommendations of it. In the consultation paper which you all have we tried to indicate the reasoning which led us to concentrate on a particular approach and a particular group of issues to be considered today out of the very wide range of proposals that there are in the report and in effect we tried to pick out those issues which impact most directly on individual litigants, and potential litigants, in the 'consumer' class or category of cases. That is, we are thinking of:

- cases with lower financial value. Not necessarily very low but lower, not the major type of litigation.
- Housing cases, which are in a way in a group by themselves. Special problems but dealing with housing cases is a matter which has given rise to a considerable amount of thought
- family actions and children's referrals, both of which are matters which may under the proposals be dealt with by the proposed third tier.

Now it's not the idea of this session or any of the discussion sessions that we should try to write either the legislation necessary to give effect to the Gill proposals or the rules of procedure which would be required if they are put into effect. What I hope we will be able to do is to consider what is going to be necessary to ensure that whatever form of court is set up, however it is structured, it is set up in such a way as to deal with the problems that consumers and other litigants dealing with the kind of matters I have indicated have to have deal with and that it has got the material and the range of capacities necessary to provide what's required. If there is one word which comes out of the background research about the experience of litigants it is the word 'powerlessness' and that should be, I think, in the forefront of what we think about, although we must never forget that what we are looking at is the structure of a court not a social service agency.

As regards the form of the day, we have arranged that when you are at the stage of group discussion, you will be in certain groups and we have allocated to the groups particular questions which we would ask them to look at. There is a lot of material to be covered today and what we are anxious about is that there should be some coverage of each of the questions. We have allocated different

questions to different groups and the facilitators have been given different priorities in the hope that somehow or other we will cover the whole ground that we would like to see covered. It is going to be arranged that a note will be taken of the whole of the discussion so that when we come to write a report we should have the benefit of that, but there will be a period of about forty minutes before lunch during which we will ask the groups to report back. Now, there are ten groups so that reporting back in forty minutes is something that has to be done with brevity and what we would be looking for in the reporting back session is the one point which comes out of your discussion which you think should be made or possibly the one and a half points if you can't restrict yourself to a simple one.

As regards the actual arrangements, you should know that the whole of the seminar will be recorded and it will be transcribed for the purpose of preparing the report. It will be subject to Chatham House rules and it will be transcribed so that particular contributors are not directly identifiable. There is, as you may have noticed, a photographer present who is taking photographs of the morning session and they may be used in the report when it is published and in later publicity. I think your papers and your badges tell you which group you are in for the morning and for the afternoon and where you are to go. Finally I think on the arrangements I would appeal for those groups which haven't already arranged it for somebody to be prepared to take the note of the discussion to help out the facilitator in what he or she has to do. I think that's all I have to say by way of introduction and our first speaker is Professor Hazel Genn. Now Hazel is probably well known, at least by reputation and by writing, and actually personally to many of you. She is the Dean of Laws and Professor of Socio-Legal Studies and Co-Director of the Centre for Empirical Legal Studies at University College, London. She has an unparalleled acquaintance and history of research into the sort of problems that we are concerned with facing up to and we look forward very much to what she has to say to us. Hazel.

**Professor Dame Hazel Genn:**

Thanks very much for the introduction. Before I start I would like to reassure you that not only have I read the Gill Report but that I lugged both volumes with me from London to Scotland and I have the back injury to prove it. I'm not sure that I can necessarily remember everything that I read but I definitely looked at it quite closely a while ago. This morning, I don't want to focus on the detail of the recommendations in the Gill Report, that wasn't really what I was asked to do. I was asked to kind of go back to basics a bit, to think about what are the problems that people have and what kind of dispute resolution processes might we want to offer them if we could be kind of starting from scratch. Of course one never is, but it's quite helpful to think about what you might want to do or how you might want to go about doing that if you could start from scratch.

I spent quite a lot of time thinking about what I was going to say and I decided that I didn't really have anything very new to say. I reread the material from the Consumer Focus [Civil Justice Advisory Group] paper in 2005 which I thought

was incredibly comprehensive and really rehearsed some of the issues very well indeed, so it's difficult to come up with fantastically novel ideas. What I think I'm going to do is to try and pull together some of the things that we have learned over the past decade about citizens' legal problems, what we have learned about their dispute resolution behaviour, their needs and their preferences, insofar as they know what their preferences are, and then try to distil from that some of my own thoughts about dispute resolution and some of the recent thinking that's going on in other parts of the world about what principles we should be using when we are thinking about access to justice policy. I'm personally familiar with complaint systems, courts, tribunals and mediation, and so towards the end what I want to do is to use some of my understanding of those different methods of dispute resolution, to try and think about what those different methods of dispute resolution offer, what are their strengths and what are their weaknesses, and to think which of those processes might be most appropriate for which kind of disputes. I'm going to end with a kind of fitting the forum to the fuss kind of process.

So to start with I want to look at some first principles, to think about access to justice. What does it mean and what do people need in order to have access to justice? To say something about what we have learned about citizens' needs over the past few years and then, as I said, to think about how we can meet those needs. As far as first principles are concerned, I just want to stress - this is my new starting point for when I am talking about changes to the justice system - I want to start by reminding us all that the justice system actually serves some important social purposes. It isn't just about sorting out squabbles, you know, courts are not just about sorting out squabbles. Yes, they do sort out squabbles but they also have important social and economic purposes and of course the justice system is the machinery for enforcing the rule of law. As far as the rule of law is concerned, the important elements in the rule of law are, first of all, equality before the law and equal access before the law and the fact that the law applies to everybody equally, including the government. Of course an important aspect of the rule of law is calling the government to account and the courts are an important machinery for doing that. Some of the issues that we deal with even though we say we are dealing with small problems, are issues about calling the government to account. So I just want to stress that at the beginning, before we get into the detail of how we go about resolving those issues.

I also have a question which I can't answer, which is whether or not resolution is the same as redress and maybe in workshops people can think about that later on, because I get kind of hung up on whether what the courts are supposed to be providing is resolution or whether what they are providing is redress, and that's something we could think about. In terms of the purposes that the justice system serves, they serve individual purposes in terms of the enforcement of individual legal rights and dispute resolution in relation to individual disputes between citizens or between citizens and the state or between citizens and business. The justice system also supports social order and supports social

cohesion, and not just the criminal justice system; the civil justice system and the administrative justice system support that social cohesion and order. It most importantly supports economic activity and of course the courts develop legal principles and give effect to legislation. Now you all know this, but I do think it's important that we start with those basic principles before we start getting into the detail of what kinds of dispute resolution processes we should have.

As I said at the start, a fundamental aspect of the rule of law is access to the courts and access to justice, but when we talk about access to justice, what exactly do we mean? What do people need to have access, effective access, to justice? I think they need all of these things that I have listed here. They need to be aware of their rights, their entitlements and their obligations, and I think if people are aware of their rights and entitlements and obligations it actually equips them, in some circumstances, to avoid legal problems from arising. They need to be aware of the available procedures for resolution/redress. They need to have effective access to resolution or redress systems and they need to be able to participate in resolution or redress processes in order to achieve just outcomes. The word 'outcome' is important because when we are talking about justice we are not just talking about procedural justice or procedural fairness, we are talking about substantive justice. In a society governed by the rule of law, when we are talking about the resolution or redress for rights that are legal rights, we need to be thinking about substantive justice, and I'll come back to that at the end. The other thing I want to say is that we shouldn't be shy about talking about access to justice, we shouldn't be embarrassed about the fact that we think people ought to have access to justice. Politicians aren't very keen on access to justice and they often complain about lawyers and too much use of the courts and those kinds of things, but actually access to justice is a social good. The ability to participate in public redress systems is actually a measure of the health of democracies. So the question for societies is not what rights do you give to people, what rights do you theoretically give to people, but what opportunities do you provide for the public to make good those rights and entitlements. So I suppose what I am saying is that the justice system serves an important public purpose. Access to justice is important in order for the justice system to deliver on its objectives and we shouldn't be embarrassed about talking about the need for people to have more access to justice. Access to justice is not a bad thing, it's a good thing.

So with that context then, what's the problem that we are all talking about here this morning, what are the issues that we're dealing with? We actually know quite a lot about public access to justice as a result of a number of studies of legal needs that have been done round the world over the last decade. With Alan Paterson we worked together on the Paths to Justice Scotland study in the late 1990s. I did one in England and Wales around the same time and since then there have been legal need studies conducted in different parts of the world. These legal need studies have given us a huge amount of information to help us understand what the legal needs are that people have and what they do about it.

So the kinds of things that these studies have explored: first of all, the pattern and impact of justiciable problems. When we are talking about justiciable problems we are talking about problems, disputes, for which a legal remedy exists. We know a lot about what types of problems people have, who has them and what impact those problems have, or what impact unresolved legal problems have. We know about public responses and resolution strategies. We know what people do and what outcomes they achieve. We know a great deal about advice seeking behaviour, where people go for help, what kind of help they think they need and where they go for help and the kinds of things that determine the choices that people make. We also have quite a lot of information about the use of formal dispute resolution processes, so who, when faced with a legal problem, actually invokes the legal system and for what kinds of problems. Now that's very useful contextual material for understanding the extent to which justice systems around the world are actually achieving the objectives that we would want them to achieve.

The most common types of problems that people have are the sorts of things that many of you will be familiar with. Consumer problems, neighbours, money, debt problems, employment problems, problems with welfare benefits, landlord and tenant housing, very common problem with plumbers for example. These kinds of problems are called the problems of everyday life and to an extent they are the problems of everyday life. But when I said at the beginning the justice system isn't just about sorting out squabbles, they are the problems of everyday life, but the disputes arise in the context of an allocation of legal rights and obligations. So we have to understand that the disputes that arise as a result of these everyday circumstances are legal disputes for which a legal remedy exists. The other important aspect about it is that of course they are disputes for which the power of the state can be invoked to coerce one party to perform their obligations. Just looking very quickly at this grid, you can see from these legal need studies that have been done around the world, you can see that there is the same aggravation all over the world, that no matter that people have different legal systems and different cultures when you ask them very similar kinds of questions about the sorts of legal problems that people have, you find an interesting consistency in the most common kinds of problems that people experience. So these are the problems that people have.

What have we learned about who experiences those problems? We know that a high proportion of people suffer one or more justiciable problem and that is true in jurisdictions around the world. The problems tend to occur in clusters. Those of you who work in the advice sector will know that, that will be part of your everyday experience. We have also learned and begun to kind of identify and quantify a map of the way that certain kinds of events that occur in clusters actually trigger other events. And so, that's just a kind of elaborate way of saying that certain kinds of problems lead to other problems and lead to an escalation in the difficulties that face people. We have also learned and are beginning to quantify the impact that unresolved legal problems have on people's lives. We

know that problems unrelated with family difficulties actually can cause family breakdown. We know that legal problems can cause unemployment and loss of income and we know that unresolved legal problems can cause ill health and disability. We know that there is a link between unresolved problems and health and indeed, commission of crime. The most recent study done by the Legal Services Commission, the Civil and Social Justice Survey done in 2009, has begun to try and quantify the relationship between unresolved legal problems and mental health, and you can see some statistics there which show that at least a quarter of civil law problems seem to lead to stress-related ill health that requires people to go and seek medical treatment, so we are beginning to be able to quantify that link. Other common findings are:

- that people on low income suffer more legal problems and are less likely to do anything about those problems. This is the sense of powerlessness that we spoke about before, a sense of helplessness, that people's resolution strategy, what people do when they are faced with a problem, tends to be related very much to the problem type.
- Problems for which action is most likely to be taken are things to do with family, consumer issues and issues to do with property.
- Advice seeking is related to problem type, so there are certain kinds of problems for which people are much more likely to seek legal advice, and that is particularly true for divorce and children and property.

The other thing we have learned from plotting the paths that people take to advice agencies is that advice is sought from a wide range of places and very often from inappropriate sources. What happens is that people go to the wrong place, they're referred on somewhere else and then you get this concept of referral fatigue, you know, that what people want actually is the one-stop shop. I think that a clear finding of all of the studies that I've read around the world is that there is a kind of global unmet need for accessible, relevant sources of information and advice when people are faced with legal problems. In the absence of that advice what happens is that people either give up, they don't do anything, they get referred on and then give up after a while and that you have this impact of unresolved problems. So what? 'Cos that's the question, so what? The answer to the so what question is that if people theoretically have legal rights, or theoretically there are obligations that are not being performed, in the end it leads to cynicism about legal rights and alienation from the society. There is a social cost of unresolved problems that we all pick up. You get escalation of small problems into large problems and that there are costs in public expenditure in relation to physical ill health, mental health, welfare benefits, social housing costs. So there are costs from unresolved legal problems, and the downstream costs of unresolved legal problems is, I think, a powerful argument for promoting access to justice and for protecting civil legal aid. I'm told you still have civil legal aid in Scotland which we don't have south of the border.

As far as legal processes are concerned, again a very interesting feature of the studies all around the world is that involvement in legal processes is actually

quite minimal despite the fact that you have a large proportion of the population experiencing legal problems. In fact, the number or proportion that are involved in legal processes is very small, strongly related to problem type. Again interesting in many different jurisdictions, divorce and separation matters are the kinds of issues for which people are most likely to get involved in the formal legal process. Neighbour problems, consumer problems, employment problems, money problems is where there is the least use and that of course is what you are talking about today. The least use is not necessarily because people don't want some kind of resolution, it's because people faced with those kinds of problems, I think, face significant barriers in achieving any kind of resolution or redress. The use of alternative dispute resolution, again in most of the jurisdictions that have undertaken these kinds of studies, show that its use is pretty negligible for all kinds of problems. The public actually don't ask for mediation and advisers on the whole don't advise clients to use it. I'm sure that Charlie will have something to say about that in a moment.

What's the value of these results? What have we learned in policy terms from these surveys? First of all, that there is a need for joined-up thinking and action. There is a dawning recognition that the justice system actually cleans up the messes that other departments make. That's something that governments don't always understand: that poor decision making on benefits actually leads to a cost on the justice system; that social housing policy may lead to a cost on the justice system. Poor decision making elsewhere actually makes its way down to the justice system, and that unresolved justiciable problems lead to pressure on other services and budgets. The question that people often ask, and in fact that sometimes GPs actually should be asking themselves, is does that person in the surgery need expensive anti-depressants or actually is the problem that they need to sort out their difficulty with their landlord? Again those of you involved in the advice sector I am sure will have come across those issues. The question is, what does one do in those circumstances?

The other thing in policy terms I think that has emerged in these studies is that there is a need for a smarter approach to the way that advice is being delivered. The idea of trigger problems and clusters of problems focuses down on the need for an emphasis on avoidance and early advice. Get in early and stop things from escalating. The need to make advice more accessible, understanding where people go for advice or where people go when they are involved in these kinds of problems. Very often they turn up in the doctor's surgery or they go to the police rather than going to an advice agency. So where can people go for advice, where are they likely to go for help and how can we signpost them better to advice agencies.

I think one of the things that's emerging from these studies is a renewed interest in what used to be called public legal education, what's now being called legal empowerment or legal capability. Again this goes back to the point that Lord Coulsfield made at the beginning about powerlessness, is recognising that we

have an unnecessary level of helplessness. Some people will always need help and some people will always need a lot of help, but there are some people with a bit of information and advice and a bit of skills development that actually can get on and do things for themselves, it's just that that isn't available. So what we need to be thinking about is how better to facilitate self help, how to improve public knowledge and skills development, how to equip people with the skills to resolve problems themselves and that in a sense is what empowerment is about. How can you have the knowledge and the confidence and the skills to actually get there and sort the problem at an early stage rather than allowing it to fester.

The other thing that I think is incredibly important, another very important finding from the studies or something that emerges from the studies, is the need for an integrated approach to services. You know, the courts are not social work departments but we need an integrated approach to services for example, the pulling together of legal and health services which I know is beginning to happen in some jurisdictions. I think there are some experiments in England where we are siting CAB desks in doctor's surgeries and that is a clear recognition of the link between legal problems and health and that actually in order to sort the health problem what you need to do is to sort out the legal problem. And so I think that using Richard Susskind's image, which probably many of you have seen many times before, that in terms of advice we should have ambitions that involve both avoidance and also clearing up messes, so advice and education have both protective functions and restorative potential. It can be both the barrier at the top of the cliff - things like information, advice and public legal education - as well as the ambulance at the bottom - advice and representation - and one needs to think about how ambitious we are being in the delivery of advice services.

So those are the problems that people have. There's the issue of the kind of unmet need for help with resolving or getting redress for legal problems. What do we do about it, aside from advice, what do we do about dispute resolution processes? So how should we be meeting access to justice and dispute resolution needs? The starting point, I think, should be what citizens want, although that in itself is not an easy thing to answer. So, looking through the studies that have been done talking to people about their needs and their objectives, what is it that people want when they get involved in a legal problem? The first thing they want is to be saved. They don't actually want to do it themselves, they want someone to sort it out for them, and so there is a bit of a task in actually helping people to understand that they can solve problems themselves, if indeed they have the competence to do that. But if they can't be saved and they go through a dispute resolution process, what they want are processes that are easy to use, they want things that are cheap, they want things that are quick within reason - speed isn't always the most important thing - they want something that is authoritative and they want something that is fair, and I am sure Charlie will say something else in a moment about that. Most of all, they want to get on with their lives. So they want to get through the issue, they want

to get a resolution that they feel is fair, they want to feel that they have been through some kind of fair process that's dealt with them properly and then they want to get on with their lives. Nobody wants to be embroiled in these things for ever. And so the question then is – how do we achieve that? Now I spent a bit of time in Australia, can't remember when, earlier in the year, talking to their Federal Government which has spent an awful lot of time thinking about developing a strategy for access to justice. If anyone hasn't seen it I would recommend it to you. I wouldn't say it's all perfect but they've tried to think quite hard from first principles about how you go about meeting the needs that are out there. They actually depended quite heavily on some of the legal need studies that have been done in Australia in order to guide them in this. What they have said is that you need to have an access to justice strategic framework rather than just kind of fiddling around with things at the edges. You need some guiding principles. The guiding principles that they have come up with are not that surprising: that the system should be accessible; that you should have appropriate procedures; that there should be principles of equity, efficiency and effectiveness in it. Those are all the kinds of things that you might expect somebody to say. What's interesting is the methodology that they have come up with and I have been trying to kind of use that sort of thinking to think about how we might rethink our dispute resolution processes here. They say that the way that you can implement those kinds of principles is:

- first of all by providing information, early intervention, the notion of triage which is a very important notion and it's one that one's hearing more and more here. In fact I heard the Master of the Roles talking a lot about triage recently, I'm going to say more about that in a moment.
- Helping people to find pathways to fair outcomes, although I have to say in Australia, as you read through it, everything becomes alternative dispute resolution. Actually the only thing they want anyone to do is to go to mediation so I have sort of sidelined that, but anyway, the idea of getting people on pathways to fair outcomes is good, and that there should be proportionate costs.
- The idea of, what they call 'developing resilience' in the population. I'm not sure that I like that term but actually what that means is skills development. It's the idea of public legal education and capability developing skills, thinking about addressing the real issues, understanding that legal problems come in clusters and identifying which are the problems, which are the critical problems, that need to be dealt and taking some sort of holistic approach to resolution.

So this issue of triage which I want to say something about, which I think is about proportionate or appropriate procedures for dispute resolution or redress. The term triage actually comes from the battlefield, it's the idea of sorting out bodies on the battlefield to decide what to do with them, so the people who are dead remain dead, the people for whom there is no hope are left and the people that you treat are the people who actually it is possible to save and that was the original concept of triage. Nowadays, we see it most often in Accident and

Emergency departments where the principle is if they are having a heart attack take them in immediately to see the doctor, if they've got a broken leg they can wait because they are not going to die of it and if they are malingerers just leave them there until they go home, so that's the way that it's used in medicine. It's not been used routinely in the legal system – I see Crispin disagreeing – not formally used in the legal system, but we do have those kinds of principles.

So how would triage work in legal services and how are the Australians thinking about the concept of triage? The problem for legal services is that not everyone enters the system in the same place. You haven't got everyone going into a hospital or everyone lying on the battlefield. The Australians' answer to this is that the responsibility should be on everyone to direct people to the appropriate path, so that everybody involved in the legal system, and from their point of view from first adviser, from the advice sector, lawyers, right through to the courts, tribunals, ombudsmen, whatever, everyone has a responsibility for thinking about the case that's come to them and asking themselves the question, 'is this actually the appropriate path for this person?' How this works in practice I don't know but that's the principle. So triage to be undertaken by everybody, advisers, courts and tribunals. The opportunity should always be built in for early resolution or settlement and that you should have active case management processes so that even when cases have turned up at courts or tribunals, there should be questions about whether this is the most appropriate path.

But the question then is 'what are the factors that determine the correct path'? So when we talk about triage, when we talk about directing people to the most appropriate path for dispute resolution, the most appropriate process, what are the factors that we should be taking into account? And the answer is that it's incredibly complicated deciding what the most appropriate path is. This is one of the reasons why I get into fights with mediators, though of course mediators never do fight, but one of the reasons why I get into fights with mediators is precisely because of the complexity of deciding what kind of dispute resolution process is appropriate for this kind of person with this kind of case, with these kinds of complexities, with these kinds of resources. These are some of the variables that I can think of that you would want to be thinking about in identifying what kind of dispute resolution process is appropriate. So who are the parties – citizen/citizen, citizen/state? What kinds of resources, and by that I mean what are the personal resources that the person has and what are the financial resources that they have? What's the balance of power between the parties? What kinds of subject matter are we talking about – are we talking about rights, what kind of rights, fundamental rights, are we talking about interests? What is the complexity of the issue – legal complexity, factual issue? What is the depth of the conflict, and that's another question. There are some conflicts that actually are so deep that the only thing that can sort it out is judicial ruling and even then you might not sort it out. What are the objectives of the parties, what are their preferences, what do they think that they want? Is it a legal problem or is it actually a social problem, because even though it's a social problem for which

there is a legal aspect, what kind of process would be most appropriate? Is it an issue of public importance? If it's an issue of public importance for which there is a significant public interest then you might want to go for one resolution process rather than another, and in particular a public resolution process, no matter that it might not be legally or factually all that complex. And does it have a precedent value because after all, in a common law system, we need that guidance. So which dispute resolution or redress process is most suitable and who should make that decision? Who should decide, who makes the choice? Is it the parties' choice, is it the adviser's choice? Whose choice is it? These are all questions, I'm not saying I've got the answers, but these are the questions.

If one was thinking about a responsive and accessible civil justice system, if one was trying to devise one, what are the kinds of elements that you would want to see in it? So on the left hand side of the screen you've got your sort of advice, information, representation services. I'm very much in favour of one-stop shops, multi-disciplinary practices where people can go and actually can get help that is appropriate to the cluster of problems that they have got. Advice, information, representation services should themselves be undertaking this kind of triage function: they should be seeking to look for early opportunities for early intervention when they can; they should be undertaking proper problem analysis and then identifying an appropriate path and then the path that you choose is not a path that's based on history. When we think about what kinds of cases go to which dispute resolution processes, often it's a matter of chance or history. There's not a logic, there's not necessarily a principle that underlies them. If you look at the various bodies involved in dispute resolution for both citizen/citizen and citizen/state, you've got courts, you've got tribunals, you've got ombudsmen services, you've got public sector ombudsmen, private ombudsmen, arbitration system, industry arbitration schemes, other kinds of arbitration schemes. There are all of these different processes and the fact that certain kinds of dispute go to one process rather than another is generally a matter of history, it's not a matter of contemporary design, which is I suppose what one might like to think about.

So if we are discussing what are the most appropriate processes, we don't have to limit ourselves to being inside certain kinds of boxes. What we can ask is what are the kinds of features of these different dispute resolution or redress processes that might be most appropriate to the kinds of issues that we are being faced with, and in the last few minutes I just want to suggest some of the features of those different processes and sort of leave you with wondering about which would be most appropriate for which kinds of problems. So as far as standard court processes are concerned, what you get from standard court processes is authoritative adjudication by a respected and legitimate decision maker. Generally adversarial procedure, merits-based decisions that should lead to substantive justice. The courts have coercive powers so the decisions can be enforced. These are public processes, they're not done in private, they're done in public. The downside –the words in red are the sort of downside – they tend to be costly although that's not absolutely inevitable, they have tended to be slow

and they have tended to be complicated. None of those features are absolutely inevitable.

Ombudsmen provide authoritative recommendations, they use inquisitorial, genuinely inquisitorial, procedures, people often misuse that but ombudsmen actually are inquisitorial. They provide merits-based decisions, they are accessible, they are relatively cheap to operate, they are not public processes and they don't have coercive powers but there's a lot to be said for ombudsmen services. A lot of people are very satisfied with the kinds of service they have had from ombudsmen.

Tribunals. People thinking about courts very rarely think about what goes on in tribunals. Now in England and Wales we're about to merge the courts service and the tribunal service and I think this is a marvellous opportunity for thinking about, you know, what kind of lessons, what kind of read across is there from tribunals into courts. What you have in tribunals - leaving aside the fact that they generally deal with citizen/state disputes, because there are cases where they deal with citizen/citizen disputes, for example employment tribunals - what they give you is authoritative specialist adjudication, they use interventionist procedures, it's not inquisitorial, they are interventionist procedures. What that means is that the tribunal judges are very active, that they do what they think they need to do to get to the heart of the problem, they make merits-based decisions, they have informal flexible procedures, they are accessible, they are pretty cheap to run, they are also public processes, apart from mental health review tribunals, and they have coercive powers. The only real drawback is that I think they can be deceptive for unrepresented parties who stumble in, think that they are going for a friendly chat and are surprised to discover that people are quoting regulations at them. But in terms of simplicity of procedures I think there is a lot to be said for tribunals and having recently been watching an awful lot of disability living allowance tribunals, I'm impressed with how well they work.

Mediation. What does mediation offer? This is settlement. The other things we've been talking about provide determinations. What mediation offers is settlement. It will only ever give you settlement. It may not succeed in giving you settlement but if successful, all you get is a settlement, you don't have a substantively just outcome, you have a settlement between the parties. It's accessible, it's informal. There are very good opportunities for participation. It's problem solving, it's not merits based. It's a flexible procedure. The downside of mediation, as far as I can see, is that it's private. The cost I think is pretty much unknown and it is unregulated. It's useful if what you feel is appropriate is facilitated settlement.

Arbitration provides authoritative binding determinations. Again, you get specialist arbitrators, so specialist decision makers; merits-based decisions; also generally informal, although not if we're talking about shipping arbitration; and accessible. But again, the downside of arbitration is that it's private and

confidential. It can be expensive if we are not talking about ordinary industry schemes and there may be few opportunities for review.

There is also the possibility of internal review and complaints mechanisms. Again, potential here. You can have authoritative recommendations, inquisitorial processes. They tend to be quite cheap and accessible. The downside of internal review and complaints mechanisms is questions about their independence. They tend to be private, they often can be quite lengthy and there are questions about their effectiveness. But there you have a vast range of different dispute resolution processes or redress systems with different strengths and weaknesses and what we have done historically is to allocate certain kinds of disputes to certain kinds of processes for reasons that have now become obscure. I think if what you are doing today is thinking about what are the most appropriate kinds of dispute resolution processes, what you need to think about, I think, are the features of different kinds of disputes. What are the features of the kinds of disputes or issues that you are most concerned with, and then to think again about how one could devise dispute resolution processes that would offer serious access to justice opportunities for people dealing with those kinds of disputes.

And, just my last slide, time for some clear thinking about objectives. What are the appropriate ambitions for civil justice? This actually echoes something that you started with. The civil justice system can't do everything. The justice system can't do everything. One needs to stand back and think about what's possible. Advisers can't do everything. I think sometimes advisers think that they can. You can't solve the problems of the world, and you can't solve all the problems in the lives of the people that come before you. The courts can't solve complex problems of disadvantage, health and those kinds of things. One needs to have some clarity in thinking about what the objectives are in developing dispute resolution processes. Ending with what the Australians have said that they are looking for, they want greater resilience in the public and they want to have systems that develop justice in everyday interactions. Well, I'm not a big fan of the idea of talking about resilience but I also think that we could be thinking about dispute resolution processes that actually do something to promote a greater sense of justice in everyday interactions. I don't think that that necessarily only comes from mediation, I think that can come from formal authoritative determination processes and with that, I think I will stop. Thank you.

**The Right Honourable Lord Coulsfield:**

Thank you very much indeed, Hazel. You've given us a great deal to think about, a great deal to absorb and a very fine platform for us to proceed with the rest of the discussion, so thank you very much indeed. Charlie Irvine who has already taken his place at the lectern is, as you will see, our mediation expert for today. He is a former solicitor and also a former professional musician though which of these two branches of experience is of more value to him in the mediation world he will perhaps tell us. As you will see from your notes, he is Chair of the

Scottish Mediation Network and a very experienced practitioner in this field.  
Charlie.

**Charlie Irvine:**

Thank you. And thank you Professor Genn for those insights which fascinated me. You might be interested to know, as a mediator I am not wedded to one type of process. Process pluralism is one of the buzzwords within our field and in fact I believe that the largest number of disputes dealt with in the world are dealt with by online dispute resolution on eBay. They claim to deal with 60 million disputes a year, and the online dispute resolution movement really did grow out of alternative dispute resolution, so I think we want to look very clearly. I wholeheartedly agree with almost everything that you said, in particular some of the sentiments about legal empowerment.

So what am I going to say today? Well, today my title is The Essential Elements of the Dispute Resolution System, suspiciously similar to the talk we've already had, and in fact the titles of the two first presentations tell us something of the wind of change that's sweeping through justice systems around the world. Dispute resolution is now very much the business of justice systems and that could be said throughout the English-speaking world and throughout the world. Whatever we may think of particular techniques, that seems to have firmly arrived on our doorstep. But it begs the question, resolution according to which criteria? If I have a dispute with my neighbour, as I did, and eventually move house in despair, there's resolution of sorts but it's hardly ideal. I think the keyword, the keyword for me, is justice. I think that's a central feature of any dispute resolution system and I suspect everybody here today works in it or for it or with it and I think all of us would be enraged by its absence.

I just want to do a quick thought experiment. If someone were to say to you, you'll get a resolution but it won't be just, it might tell you something of the intimate connection between dispute resolution and justice. However, as you might expect, I don't believe that justice is the sole domain of the courts. It's part of our cultural script, and one of our best writers, William McIlvanney, talked about the Scots' 'terrible sense of fairness', so we all have something. Anyone who's brought up a child will know how quickly that sense of fairness starts to appear in all of us. So most of us can be trusted to have some sense of justice most of the time. If, for example, my neighbour and I have a dispute over my leylandii hedge, I hasten to add that's not it, and we come to the agreement that it should be seven feet high then our version of justice is perfectly acceptable. That for us at that moment does not need any interference from anyone else. Businesses and individuals make millions of contracts every day without intervention, without trouble. So in a sense that idea of empowerment has to include this notion that justice is practised and comes from many sources all the time. So why does this matter? Well, we are here today to consider how the justice system best assists people of modest means. I am grateful to Lord Gill and his report for highlighting the cost of going to some of our courts, so modest

means could be a rather large amount, depending on which particular forum you choose to bring your action in. What I'm going to do, I'm going to describe one important but I think slightly neglected facet of justice, then I'm going to apply that to Scottish experience at the modest end of things, so we're talking about small claims in particular, those of modest means. I want to end on a third note which is a practical proposal for an improvement. One, I think, that has few drawbacks and several benefits.

So, which justice? Well, of course, disputes are as old as humanity itself, and I'm grateful to Derek Roebuck for a fantastic article about the roots of mediation and arbitration. Everywhere in the ancient Greek world arbitration was normal and in an arbitration the mediation element was primary. But things have moved on and the modern state provides dispute resolution on an industrial scale and the question remains the same, by what criteria do people evaluate? How do we judge justice? Well, intuitively, that's really easy, isn't it? Does it deliver fair or just results? And that's what we might call, as Professor Genn has already said, substantive justice. However, it's trickier than it looks. Not only is one man's floor another man's ceiling, sometimes quite literally, but even those who work within the legal system find it notoriously difficult to predict what the system will do. I bring you news, for example, of one fascinating study conducted in Iowa. The reason I often cite American studies is many of these have never been done here, as far as I can see. This particular law professor got forty experienced lawyers in the local area. Twenty were assigned to represent the plaintiff, twenty to represent the defendant. They were given identical sets of facts about a personal injury claim, identical case files and a set of recent precedents, just in case they might be under any doubt, and then they were also given two weeks to prepare for a negotiation. They then negotiated settlements and the law professor conducting the experiment described the results as 'sobering'. Out of the twenty pairs, six of them wouldn't permit their names to be used in the subsequent research. The settlements ranged from 15,000 dollars to 95,000 dollars with the remainder scattered randomly in between. There are many of these studies. A fascinating one recently involved law students who were also assigned a medical negligence case and asked to predict what the judge would decide between 0 and 100,000 dollars. The fascinating finding here was that those who had been assigned as plaintiffs on average predicted a finding 14,000 dollars higher than those who had been told they were defendants, so there are many ways in which it is not just unpredictable. There are influences. I am not here to dig at the system. I'm not here to have a dig at anyone, I think it's very tricky, it's very tricky for all of us.

However, there's another element to justice which turns out to be more stable and more predictable. It's known as procedural justice. So if substantive justice is to do with what you get, procedural justice is to do with how you are treated on the way to getting it. And it turns out that procedural justice, there's more consensus on that than on distributive or substantive outcomes - I think distributive maybe in Scots law has a different meaning - but there is more

consensus about the way we're treated than about the substantive outcomes. It also turns out that fair treatment in one setting appears to have a beneficial effect on our respect for the whole system. So this is quite important literature, in fact, it's a huge literature. I read that in the early 2000s there were 400-700 studies a year going on into this, so it's quite robust. It's been tested in numerous cultures. So what does procedural justice tell us? Well, the first thing I have to do, I have to own up as a mediator that there is one finding from these huge bodies of research that's slightly tricky for us, which is if you ask people to dream up their ideal dispute resolution system, they pretty much come up with the adversarial system. They want both sides to have an opportunity to put their case and for an authoritative impartial person to render a decision. However, if you look a little bit more closely, that's particularly true when disputes are binary, when they're quite simple and when there's no possibility of a continuing relationship between the parties, so it becomes a wee bit more nuanced.

I want to focus on the other aspect of procedural justice which is to do with the treatment that we receive. And these findings I think are very important; I think you'll see the significance as we move on through the day. Three elements have been identified consistently in terms of how people evaluate the procedural justice of the system. The first is voice; that is the opportunity to present our views, concerns and evidence to the third party, the authoritative person. The second is being heard, so this is related but not the same, the perception that that third party considered our views and evidence. And then the third probably relates to both – being treated in a dignified and respectful manner. So these are repeatedly identified as the key elements of procedural justice. In fact, even when people have lost substantively, it does appear that they will evaluate their experience more highly, and they will also sometimes accept lower outcomes, if they believe they have been treated fairly, so this is quite powerful.

My second point, I'm going to run out of time, very quickly, is how do we fare in Scotland? If we apply the procedural justice prism to particularly the lower value end of our processes, how do we fare? Well, one of the tricky issues is data is pretty hard to come by and I'm very grateful to Professors Genn and Paterson, both here, for Paths to Justice Scotland because that's one of the few things that actually tells us something about this. They found that in nine out of ten cases no legal proceedings were commenced, no ombudsman was contacted, no ADR process was used, so a lot of the time people are just, as they said, lumping it or dealing with it. However, some of their other findings were a little bit more challenging for us in Scotland. How many people saw a decision as fair? If you do a contrast between Scotland and England and Wales, in Scotland – I have the numbers here – 48% thought an adjudicated process was fair compared with 71% in England and Wales. And then, I think even more disturbing, out of that number 23% in Scotland said they had accepted it because of a general sense of powerlessness as against just 6% just down the road. A more recent perspective comes from an evaluation of a small claims mediation pilot in Aberdeen and Glasgow Sheriff Courts. Again I am very grateful that they have done this. They

observed small claims processes in the course of doing this and I think this bears looking at. One quote from Ross and Bain's research talks about the small claims court. 'A number of the parties showed clear signs of unease, trembling, flustered, whether claiming for business or personal debt. The layout of the court, lack of familiarity with its etiquette and its personnel were observed to be among the contributing factors.' Now I think it would be unimaginable that any court could remove a degree of anxiety from someone who's new, someone who had never been there before, that would be a counsel of perfection. But if you look a little bit further at what they had to say, in one of the pilot courts you have this, I have to say, to me, almost Dickensian portrayal of a clerk at one end and a lawyer, many of us have done this job and are familiar with it, perhaps representing many pursuers sitting near the Clerk and the bench, and the unrepresented parties were standing at the opposite end physically distanced from the clerk.

In another pilot, court party litigants were encouraged to step forward when the case called. One was told sharply about court etiquette, where and how to stand while addressing the court. After that he or she became more nervous and less coherent. Again, anyone who is involved in the delivery of justice might have some sympathy for sharpish case processing, but it would be fair to say that it's unlikely those people in that setting are going to score that system terribly highly on those aspects of voice and being heard and dignified and respectful treatment. Some will, some won't, but I think there's a question mark in our system about how it operates at the lower value end.

Now, it's possible that there are those in Scotland, particularly in the business sector, who perhaps have a more positive view of court experiences, in fact without a doubt that's true. Scotland has its fair share of able advocates who can make the adversarial system whirr like an efficient machine, but I want to make a modest proposal for improving the situation. Once again, at the end of things where the term proportionate starts to kick in we are not going to have the adversarial system whirring in all its glory when the values are perhaps £200-£300 or even £2,000-£3,000. Of course, the low value doesn't mean these things are unimportant and that's a point that has already been made. So I just want to look for a moment at a proposal. In Aberdeen and Glasgow there was a small claims pilot. It evaluated mediation. Once again, we have the difficulty how do we assess substantive justice. People did, by and large, feel that they got their cases settled to their satisfaction, but it's very tricky to compare the mediation group to the non-mediation group. If we start looking at procedural matters though, going back to procedural justice, what people quite consistently said in the small claims pilot was that they felt they had the chance to explain their side of the story, they liked the face to face meeting, they felt the process was fair, affordable - well they didn't pay anything so it would be, so that's a moot point - and they felt it moved them towards resolution. There was some evidence that a degree of pressure on the part of the mediators wasn't entirely a bad thing and was welcomed by some of the parties as a thing you need to get you

towards resolution. So it looks to me as if that particular small claims mediation pilot which happened in this country very recently delivers procedural justice relatively well. And again, it's slightly sobering but the number who said they were satisfied with their treatment in the non-mediation group was just over 30%; in the mediation group it was 80%. Interestingly, there were higher levels of satisfaction with the sheriffs' communications even among the mediation group, possibly supporting the hypothesis that a good, procedurally fair process enhances your respect for the whole justice system.

I would argue there are many benefits to be gained by a fair mediation process for the justice system. I think that's one of the things I want us to connect up here and these results are comparable to other jurisdictions, I believe, although I have to acknowledge having read some of Professor Genn's studies that there are some duff mediators out there, I think. Perhaps it's unfortunate for me to say that. We do need to be careful about quality - it's possible not to do it well. It has to be done well. It's also possible, I think, structurally to set up a mediation system to fail. Insufficient time and too much pressure in terms of case processing can rob mediation of some of the very benefits that it offers to people.

I'm going to turn for my last couple of minutes to what is actually offered to people. Well, the modest proposal is simply that, while the rest of today I think others who know far more than I are going to talk about the merits of particular reforms to the court system, let's when we think about justice turn our eyes somewhat outside the system. Let's think about the mixed economy. If mediation delivers procedurally fair processes and if it looks as if the results are comparable to those that are achieved in the adversarial system, and if it looks as if it doesn't cost any more, which according to Ross and Bain it doesn't, then why would you not integrate it into our justice system? Well, that rhetorical question probably has several answers. I just want to touch on one recent piece of research in attempting to answer that question. Sorry, I have one final, in my sweeping rhetoric here, one final finding from Ross and Bain in Aberdeen and Glasgow was that mediation did particularly well on compliance. I started my career as a lawyer on kind of small debts and I just remember the nightmare of Sheriff Officers etc. and the costs involved in trying to get something back for people who already thought they had won. The fact that the mediation pilot had these 90% compliance rates as against 67% is not insignificant and is another factor that we ought to weigh in the balance. Anyway, to return to my – I hope I'm OK for time – a woman called Tamara Rellis studied Canadian medical negligence mediation. So she talked to lawyers, she talked to plaintiffs, to defendants on both sides, and she came up with a fascinating hypothesis. She called it 'the parallel worlds' hypothesis, that essentially when talking about mediation, lawyers and their clients, whether they acted for the defender or for the plaintiff, were talking an entirely different language, almost about a different process. For lawyers on the whole, mediation was described as a vehicle for monetary settlement or case abandonment where strategy negotiation and money talk played out. Now this was very very consistent throughout the whole

group. When it came to disputants, mediation was seen as a place to treat human needs and preserve human dignity. Again and again the disputants talked about face to face, they talked about wanting an explanation, 'I liked the fact that somebody heard what I had to say'. It wasn't all nice, I have to say this, some of them liked the fact that they felt that the doctor was sitting squirming. There were obviously emotions other than benign cuddliness, there's vengeance, there's vindication, there's a need to be heard. Nonetheless it looks as if the plaintiffs, and defendants by the way, and the doctors did like mediation when they were allowed in, only 10% in Canada were allowed into the mediation, fascinatingly. What did the parties want? Well, 93% of the plaintiffs, 89% of physicians, discussed the importance of expressing themselves and being heard but when it came to lawyers, they said - I've done this myself - they said it's an invaluable adversarial tool. It's important to know who in the piece is the soft person. There is a sense of a fishing expedition going on in a lot of the description of how lawyers framed it. Then finally, it was a financial call, so I can say I believe I have got enough money that is within the range of numbers a court is likely to award. Now, I am not standing here saying lawyers good, plaintiffs bad or, sorry, plaintiffs good, lawyers bad, I am simply highlighting that it's possible that those of us who operate the justice system may not always have the clearest view of what its consumers most wish from it. And I think this piece of research somewhat reinforces that thought.

So to finish my modest proposal is really this, that the courts make it a requirement that anyone who raises an action simply states whether they have used mediation and if they haven't, what their thinking was in rejecting it. And all that would do – we are not proposing any kind of teeth with this in Scotland, that seems to be very unwelcome. We are suggesting simply that all that would do is ensure that it has been thought about. I don't want to go on any longer but there is evidence from around the world that mediation schemes tend to need to be kick started and that people tend to like them better after they have experienced it than before, although that may be not entirely universal. So in the interests of that, the proposal I'm suggesting is that a modest adjustment to the court rules would ensure that people had at least considered the option and would help to integrate people's sense of justice outside the justice system with their sense of justice inside the justice system. Just to recap, what I am saying is that procedural justice matters - how we're treated, whether we have voice, whether we're heard and the respect we are treated with - and it looks as if mediation scores well on all of those. If it does and if it scores substantively or equally well substantively then let's use it.

**The Right Honourable Lord Coulsfield:**

Thank you very much indeed. Now, we did build into the programme an opportunity for a question or two for the speakers, but I think it's a not unfamiliar situation but we find we're a little short of time and I think what we should do at the moment is have the break, a short break for coffee, and I would ask you to be back at your tables for the discussion session as soon as you can and we will try

to build an opportunity for a question or two into the feedback session afterwards. So we'll break now but please be back no later than 5 past 11.

**The Right Honourable Lord Coulsfield:**

It is obvious that there are intensive discussions going on which could go on for some time but if we are to keep somewhat in touch with our timetable I think we have to move on to the next stage of the proceedings, so that is of course to invite the facilitators to each of the tables to tell us the essential thing that has come out of the discussion, so in strictly numerical order I'm going to ask table number one to start. Table one.

**Delegate:**

Well, group one were looking at the question 'Drawing on the principles underpinning the review what should be the features of an appropriate, affordable and fair dispute resolution process or processes particularly for claims of low financial value, housing cases, family cases and children's hearing referrals?' and secondly 'What structures would best support such a process or processes? Sadly we ignored the advice that we were given and haven't come up with one big bang theory. I do apologise for that but we do have a few brief bullet points particularly in answer to the second part of this as to what structures would best support the process or processes. First of all, we had a lot of discussion about resourcing at the front end and what we mean by that is greater education for both members of the public and for the judiciary at a stage before people realised they needed to go to court. So actually going into schools and telling people how the civil court process works, not in any great depth, but you know, giving people as citizens an idea of what the Scottish courts in Scotland can achieve. We also talked about specialisation in the lower value courts so that all housing cases would be dealt with on Monday, family cases on a Tuesday, debt actions on a Wednesday so that there was a real degree of potential specialisation there. The most important thing that we thought could really alter things was an improvement in IT use in relation to websites, particularly the Scottish Court website. I do include the Law Society website in that, and also making available IT processes so that people could access courts through the use of IT. The requirement to take a piece of paper along to a Sheriff Court shouldn't be the only way of initiating a small claim action. And unless my group have got anything else to add I think that was really the bullet points of our discussion. Thank you.

**The Right Honourable Lord Coulsfield**

Thank you. Right. Table two.

**Delegate:**

We were discussing the same questions as group 1. We ignored even more instructions I'm afraid, haven't really looked at those questions at all and went slightly off piste. I think we did that mainly because we were discussing the point that Dame Hazel had made that actually 90% of problems are dealt with, maybe

being resolved, maybe not resolved, outwith formal processes. Our discussion really was focusing on the fact that we need to look at how we can support that 90% as well, rather than just focusing on what we should do around court processes. I think again one of the key points that came up with us was about education, ensuring people have access to the information about different ways of resolving disputes, so that they are actually aware that if they go to court it probably will be adversarial but that other methods might give them more of what they are looking for. One of the things that did come up was whether there could be more use of pre-action protocols in terms of dispute resolution, something that's been introduced for the Home Owner Debtor Protection Act. We were looking at whether that could be a procedure that could be applied more widely. We have had quite a lot of discussions about whether it's possible to have one particular portal that people, when they have a dispute, could access in terms of knowing about different forms of dispute resolution, actually get more information about their rights, means of redress. I think that's probably us. Thank you.

**The Right Honourable Lord Coulsfield:**

Table three.

We had the same questions as tables one and two. Again we didn't quite focus on just one or two issues but I think it sort of boiled down to three issues. One is the one-stop shop. This was something that we were very keen on. There should be some kind of gateway where people could get information about the problem and analyse it and online resources would be a good thing to have so that people could have access to the law. The issues round that were also about funding and making sure that those organisations which did provide these services were properly funded and that it was joined up which would require organisations to work together in partnership. One of the things that we identified was that the types of case that were mentioned in the question, low value financial, housing, family and children's hearing, although they were kind of bundled together in the review report, these were actually cases where the public require different types of process and we thought that there would have to be some kind of process gone through to analyse what the different needs of these type of cases would be. Customer segmentation was a phrase that came out which is apparently something that is used in the retail business which we thought could be applied here to work out what these different types of cases might need. The third thing that came out of our discussion I think was about how people are treated in court and how there is inconsistency about the way judges deal with people. There was perhaps a training issue here about judges becoming more interventionist, focusing on what the real issues are and also about developing skills which are perhaps more like the tribunal judges have, a more interventionist approach which might actually help these cases to be dealt with better. So that's our three issues.

**The Right Honourable Lord Coulsfield:**

Table 4.

**Delegate:**

Yes, we had the same question and we adopted the same strategy of ignoring the single point. Our first point was like the previous group. I should say we were greatly assisted by having the in-court adviser who was involved in the Aberdeen mediation pilot but also a former law centre worker who had experience in housing evictions so we had some experience to draw on. We were very keen on what Hazel Genn was talking about, about the need for early intervention and a one-stop shop and triage, because if you invest in this we might actually be able to stop some of the housing eviction cases which are the real blot on the housing landscape of the Sheriff Court. I mean, dealing with evictions in two minutes is hardly a good advert for our court system. There has to be another way of dealing with this, and one way is to pre-empt cases going there which would be much better dealt with by tackling the cascade effect, getting the debt problem, the social problem that underlies the eviction potential dealt with much earlier. A lot of our group also recognise that housing cases may require different expertise and because housing cases often involve multiple causes, cascade. Small claims often involve either debt or single issues which are more mediatable than the housing cases, so we thought these types of cases might need different routes. But we all agreed that the solution for the lower level cases that we're being asked to look at was tribunal-like attributes, the ones that Hazel listed. You can look at that list and we agreed with all of them. The question is does that have to be specialist tribunals which are expensive and government can't afford probably, or can we deal with it the way the Gill proposals were, which is to create a new lower tier district court? The problem with that is can the lower tier district court deal with the different specialisms that are required, particularly if our normal way of dealing with specialisms is to have specialist representatives which we can't afford either in the lower courts? So then if you have the judges doing it then are you having specialist district judges? And the final point is, to sell the new district court rather than tribunals, to sell its attributes to the public, we will need to rebrand courts as being not so effective or not so scary places. But that will be incompatible, I think, with the district court doing 70% criminal. OK?

**The Right Honourable lord Coulsfield:**

Now, all four of the groups reporting so far have been dealing with the same questions and the same issues about one-stop shop, tribunal-like procedure and housing cases have come up and I just wonder if I ask all four tables do you agree with the Gill recommendation that housing cases should not be separated out for a special tribunal?

**Professor Dame Hazel Genn:**

Can I say something on that, which is that district judges south of the border deal with the most astonishing range of cases. Of course they don't deal with crime but they deal with an astonishing range of civil cases – they deal with family issues, they deal with possession, they deal with small claims. So they deal with

a wide range. I think the training is absolutely critical and the district judges at that level display astonishing skills and astonishing ability to get through a very wide range of work so I think that it is possible for them to do that. With the right training, I think it's possible for them to do all those things, but actually ...

**The Right Honourable Lord Coulsfield:**

But there are housing tribunals in England and Wales also ...

**Professor Dame Hazel Genn:**

For possession proceedings, the district judges deal with possession.

**The Right Honourable Lord Coulsfield:**

Yes, but a lot of housing issues are dealt with by these tribunals.

**Professor Dame Hazel Genn:**

Yes, there are, but I would say that the skills that district judges use have more in common with the kinds of skills that tribunals use in that they have to be very hands-on, they have to be highly interventionist. They're often dealing with unrepresented parties and have to know how to get to the heart of the matter and that is a very different kind of judge job than where you're sitting back and waiting for your representatives, your advocates to tell you the story.

**The Right Honourable Lord Coulsfield:**

Well that, as [delegate] said, puts a question mark over the combination of crime and civil.

**Professor Dame Hazel Genn:**

Well, you see, I think crime and civil together is a real challenge because crime squeezes out civil anyway in the whole of the justice system. Actually I know from talking to some judges up here, the problem is that the imperatives of crime tend to kind of push everything else out.

**The Right Honourable Lord Coulsfield:**

Right, well we'll come back to this in a moment. Table 5.

**Delegate:**

We had a new set of questions to address and Hazel has just answered some of them. We were looking at whether the proposals in the review are the best means of resolving the cases identified as being for the third tier and whether there are any alternatives. I think, first off, we recognised round the table the difficulties in accessing the current sheriff court arrangements and that therefore the need for some change was clear to see, but that a third tier in and of itself wouldn't necessarily address those problems, and much would depend on how exactly the third tier operated. In terms of its jurisdiction, I think there was a view that having a family jurisdiction spread across a new third tier and the sheriff court and the Court of Session added to the complexity and the uncertainty of the

current system and was perhaps something that should be avoided. Crime came up, before we even asked the question whether crime was something that would be compatible with the effective operation of a third tier. As Hazel says, there was a great fear that crime would simply squeeze out the other business in the third tier and that in the name of addressing the problems that we see in the Sheriff Court, would simply import those problems into the third tier. The other business, the low level financial claims, the housing, the family business, wouldn't be given its fair shot because of the crime. There was a feeling that, for something like housing, as others have said, there was an opportunity to prevent some of those cases being in court in the first place and that might leave more time for the district judges to deal with them, but that it was appropriate for all housing issues to be dealt with together. And finally, we addressed the question of whether the district judge should be a legal or a lay post, and to be honest there wasn't a strong preference that came through. Recognition that many of the issues that would be addressed, some of them were social as much if not more than they were legal. Family issues were one of those where it was largely social but a legal background may nevertheless be something that's useful, particularly if there is a coercive power of the court at some point in resolving the disputes.

**The Right Honourable Lord Coulsfield:**

Thank you. That's table 5. What about table 6?

**Delegate:**

Thank you. We were dealing with the same questions as table 5, specifically focusing on the additional judicial tier and again a lot of the similar themes both from that group and the other groups came up. In terms of the additional judicial tier, there was a recognition that there were potential benefits from creating that new tier but with some fairly significant caveats and qualifications. We agreed the need for a fairly clear separation between the civil and summary business and there was some discussion about how you might achieve that in court programming rather than just separating out the role completely. We agreed the importance of judicial education and understanding clearly what the function and role of the new district judge and new judicial office was going to be. Although we didn't look at the idea of it being a non-legal post or a lay post, we were clearly focused on it being a judicial post. We also agreed there was a need to change the structure around the courts about the quality and content of the information that we provide to parties before they come to court and in court the support that's available there. We recognised the resource implications of that and part of the response to that might be looking again at when people need to actually come to court, how often they have to come to court, whether there are ways that we could do more through correspondence and through telephone links and keeping to an absolute minimum when people actually have to be physically in the court building. We agreed the importance of not looking at this issue in isolation in terms of the scope of the new judicial tier; that should be looked at alongside the reform of tribunals. A very important point was made at the end of

our discussion about not focusing purely on the structural changes and becoming very narrowly focused on what the right structure is, but keeping referring back to the points that were made by both the speakers before the session about thinking about what people actually want in the structures in the system. This might involve creating some variability and options within that in terms of the routes that people follow and not spending all our energy in creating just one single model that will work in all areas.

**The Right Honourable Lord Coulsfield:**

Right, thank you very much. Table seven, again the same set of questions.

**Delegate:**

We looked at the same questions as tables five and six and unlike my colleagues I will be brief, as I'm not a legal professional. I think the overwhelming opinion of table seven is that we feel that a third tier is a good starting point. I believe the proposals that are stated in the report are maybe not fully fleshed out, however, the consensus of opinion was that yes, it is good. However, the question was raised by one of our colleagues on the table in relation to whether we already have a third tier through the JP system. Could this potentially hold some of the answers to the third tier? We also thought that there should be greater clarity and definition between the criminal and civil business in the third tier because we feel there is a genuine fear that the criminal will push out all the civil business within that particular tier as it has done in the existing system. We also think that maybe the approaches and the estimations of the volume of civil business potentially, if we are going down the lines of improving information and access, will that potentially drive an increase in volume by people who feel more comfortable and willing to use the system. Once again, I think we liked the idea of having a differentiation in approaches between criminal and civil. Criminal, I think the phrase was 'If it isn't broke don't fix it'. Continue to use the adversarial approach. However, like a lot of other groups, I think for the civil, I think we need to recommend some sort of adaptation of an inquisitorial process to the proceedings and like all the other groups, I think the promotion of alternative resolution processes such as mediation or pre-action requirements on some of the smaller value cases would be a distinct advantage. Thank you.

**The Right Honourable Lord Coulsfield:**

Thank you very much. Now again, something that comes out of this, which again, I wonder what you think Hazel, the suggestion that there might be room for lay justices in the system has I think come up, or it's come up in two of the discussions and it's also surfaced, I think I heard it surfacing in one of the other tables as well, so it is a possible issue. As I understand it, the district judges in England are entirely professional.

**Professor Dame Hazel Genn:**

Yes, they are.

**The Right Honourable Lord Coulsfield:**

From what you were saying earlier, I would suspect that you would say that that was an essential aspect of their success.

**Professor Dame Hazel Genn:**

Have to be careful.

**The Right Honourable Lord Coulsfield:**

Well no don't, no-one's going to ...

**Professor Dame Hazel Genn:**

No OK, I don't have to be careful. I think that when we are dealing with the kinds of cases that would be coming to this third tier, that you need judges that have the legal background in order to understand the legal issues because these disputes arise within the legal framework. They're about rights that are legal rights and I think you need people who understand that. I think that they are going to need, as I said before, to be trained very differently so they are using different skills in terms of managing hearings and making sure that they get the information. But in terms of the knowledge base I think that, my own view would be that they would need that legal knowledge base, and I think that that would be quite important. Can I just say something on the question of whether more information would increase demand? I said earlier that people don't get involved in legal processes very often and that's because there are barriers but also because actually they don't really want to. What most people want is to get the problem sorted out early on and one of the advantages of better sources of information and advice is actually to help, to equip people in order to resolve their disputes or their issues at an early stage and also to provide to difficult – you know, if you're facing a difficult defendant – a kind of credible threat that if they don't resolve, that actually you will seek the coercive powers of the court. So I think giving people additional advice and information about their legal rights and about systems of redress doesn't mean everybody goes rushing off to court immediately. I think that in the first stage, first it stops people with no hope cases from clogging up procedures, but it also gives people the equipment that they need to actually resolve the dispute themselves.

**The Right Honourable Lord Coulsfield:**

Is there – you can tell us about experience in the provision of this sort of information. I know that in a different capacity, when I did a report for the Esme Fairbairn Foundation about alternatives to custody, one of the issues we looked at was education about, of course, the criminal justice system. I must say that the input we got for that was almost entirely negative on the view that you could go to schools until you were blue in the face and go round and talk to people, people were just not interested until they actually were faced with a situation in which they needed to use the information. So that I think the view that we came out with, it was marginal to the actual main issue we were considering, was that what mattered was not general education as a part, as it were, of the curriculum of

citizenship for everybody, but the availability of advice and information when somebody actually realised they needed it. Would you disagree with that?

**Professor Dame Hazel Genn:**

No, I don't disagree with that at all. I think that there is work that can be done in schools. I think that people are astonishingly ignorant about even the difference between civil and criminal courts. People don't even know that there are such things as civil courts because people think that a court is a criminal court. So I think that there is more that can be done at a basic level to give people in schools a sense of what the justice system does, that it doesn't only do one thing, which is send people to prison. As far as information is concerned, leaflets – nightmare. I chaired a public legal education taskforce. We spent a lot of time struggling over what do we mean by public legal education, what can you do. Everybody agrees that producing leaflets is completely pointless, just an amazingly expensive waste of money, and that actually what you need to be doing is helping develop skills and that has to be quite focused. If you're going to invest in this, you need to prioritise the kinds of people and the kinds of problems that you think are going to yield the most benefits. This is another case of kind of triage or kind of analysing issues. Where are the greatest benefits going to be? And we identified some particular groups that we thought could benefit. So young people could benefit from having a better knowledge base and developing certain kinds of skills and there would be other groups with certain kinds of issues. Of course, housing possession is an area where actually developing people's skills, working on projects that would develop skills when people are facing those kinds of issues could yield benefits in terms of avoidance. But sort of saying you are going to educate the public about law – pointless exercise. You've got to think about well-targeted activities.

**The Right Honourable Lord Coulfield**

Yes leaflets. Well leaflets are difficult for everyone. But in Nottingham I saw an extremely good interactive computer programme for young people who were involved with the youth court system and it took them in a very simple way right through the system and what was going to happen, with suitable illustrations and pictures of court rooms and ferocious looking judges and terrible advocates and all the rest of it, but it's an instance I think of the ways in which modern technology could be used much better. Anyway, can we come back to table 8 I think we had reached.

**Delegate:**

This table's question was 'Can and should greater links be made between different forms of dispute resolution, including courts, administrative justice and alternative dispute resolution.' In considering that question we had particular interest in the concept of triage that has been raised earlier on this morning and it appeared to us that triage could work on both the macro and the micro levels. If there is structural integration, the view we had is that there would be effectively structural triage which is that the retuned justice system would automatically

direct litigants to the appropriate forum. It also appeared to us that this is something that comes out of the Gill review as it stands and that, if implemented, this part of the Gill review would prevent certain cases being raised, for example, in the Court of Session and would direct them to the appropriate forum, whether that be the sheriff or the district judge. On the micro level, it appeared to us that there should be a requirement on those who enter the court to answer the question whether or not they have used some alternative dispute resolution. Now, clearly there would have to be certain exceptions to that, cases obviously affecting liberty or matters such as protective interdicts. It appeared to us that if the answer to that question was 'no, no alternative dispute resolution method has been tried or attempted', then people shouldn't be coerced about that but there should be a clear understanding that that failure may ring in expenses at the end of the day.

**The Right Honourable Lord Coulsfield:**

Thank you. Yes, well table 9, I think.

**Delegate:**

We were discussing the same questions as table 8. Most of our discussion focused on mediation. There was a general view that we certainly need more mediation in the system, that we need more education and more awareness raising about that, and not just with the public but that solicitors have got an absolutely vital role in this too. We thought there should be greater encouragement to consider mediation. There is a rule in family cases at the moment for discretionary referral. Some people felt we should have that in other cases. Some were actually more supportive of compulsory referral to mediation, but certainly there was support for Charlie's suggestion that people should have to state if they have considered mediation and why they are not going to use it at the beginning. Some concerns were raised about that perhaps ending up as a tick-box exercise and possibly being used by parties to delay the process and perhaps adding to the cost. We certainly felt that the ideal would be to deal with cases at as early a stage as possible, although people should always have a right to redress in court, and that the court process itself certainly needs to be made less stressful and less formal than it is at present. There was a recognition that mediation, as the previous table says, is not always appropriate in all cases, but certainly it's something that people should be aware of and should have the opportunity to explore. Within a very brief discussion about ombudsmen, some surprise was expressed at Hazel's positive comments about ombudsmen because some people felt that, in practice, it wasn't always that easy to get to an ombudsman because there are a number of obstacles in place. Unfortunately, we didn't get to discuss that any further.

**The Right Honourable Lord Coulsfield**

We'll come back on that one in a minute. Table 10.

**Delegate:**

Thank you. Bringing up the rear, always tricky because most of what needs to be said already has been, but to reiterate, we focused a good bit on the triage idea. It seems to have caught the imagination of a few folk but there are some practical issues, one being, of course, who does it. There was a recognition, I think, agreeing with Hazel that people access the justice system at lots of different points, so it's not like an A & E department. And there was just a little bit of a note of reality in that we all recognised that we would probably have to work with the funds that we have so new things with new costs are less likely to happen than things that actually work with the grain of what's already there. So there's an interesting issue about who would work it. Then within the triage system we thought there was an important issue about risk which is what happens in the NHS. There's an element of risk management within that and that would be a significant role for whoever does this and the perspective of, for example, [organisation] would say there are some really important assessments need to happen at that point. And then finally, on the triage thing, I think there was a sense that linking disputes to ADR would be part of the role of that. Just to touch on ombudsmen, that came up in our group as well, again quite positively, I have to say, and with one quite happy consumer of an ombudsman. There was a recognition that ombudsmen may have a role, particularly in some of the disputes between citizen and state where mediation isn't necessarily the right form of ADR; that someone who can do a form of casework work with people can help protect people against the advantages that repeat players have in the justice system. There's some evidence of ombudsmen working quite well with 'one-shotters', people who have one go in the system, so we were quite in favour of that. And finally ... well we just wonder, I mean this is just speculation, whether the legal aid budget might need to find room for mediation and whether that would set up some kind of unseemly competition between different groups, but we were reassured that it probably wouldn't and there are different budget headings.

**The Right Honourable Lord Coulsfield**

That last observation takes me back about 15 years to the time when I was President of the Lothian Family Mediation organisation and we struggled and struggled and struggled and failed to convince the Scottish Office, as it then was, that they would save money by supporting us. I hope there has been some advance on that. But can we come back to the ombudsman question.

**Professor Dame Hazel Genn:**

Yes, well it may be that I'm influenced by some ombudsman systems that I have looked at quite closely that seem to have very high rates of satisfaction and seem to be pretty easy for claimants or complainants to operate. One in particular that I have in mind is the Financial Services Ombudsman that does what I call early telephone dispute resolutions. They have a very good triage system which is they will talk to people at an early stage and actually try to get a sense of what this is about - is this something that really could be dealt with by a few quick phone calls

and just get rid of it, or is it something that's going to have to go further and further up the food chain. In the early stages they are not necessarily dealt with by trained lawyers, and it just has a system for allocating cases to appropriate bits of its own procedures. There are other ombudsmen now that are publishing their Annual Reports that seem to have very high satisfaction rates. They're easy to use, they're cheap for people to use, it comes out with a sort of authoritative decision. Whether or not you can make the offending body do anything about it is another question, that's why I raised it. And they are genuinely inquisitorial because they are collecting the evidence themselves. So I think that for certain kinds of issues, there are elements in those procedures that are really very good indeed.

**The Right Honourable Lord Coulsfield**

One of the things that perhaps people don't know is how many ombudsmen systems there are ...

**Professor Dame Hazel Genn**

Masses, masses.

**The Right Honourable Lord Coulsfield**

I went to a conference of the British and Irish Ombudsmen Association which was attended by about 300 ombudsmen and that's not counting Europe, that's just the British Isles. I think the Pensions Ombudsman also has a good reputation for resolution.

**Professor Dame Hazel Genn**

Very good, yes.

**The Right Honourable Lord Coulsfield:**

[Delegate]?

**[Delegate]**

Can I just quickly on that note - I was in the USA recently at the Conference of the Association for Conflict Resolution. I met an ombuds-mediator working for one of the largest deliverers of health in the West Coast of the USA, and so that was a fascinating model. They recognised that people needed someone to work with them, this was when things go wrong in a hospital and these would often be families. The ombuds-mediator meets the family, meets the surgical team, can bring them together but doesn't always. So it has both an investigative and mediative role. So that was an interesting hybrid that we might think is useful.

**The Right Honourable Lord Coulsfield**

Yes. Well that fits in, I think, with the observation that there are many health cases where what people are looking for is an apology almost more often than financial redress.

**Professor Dame Hazel Genn**

Maybe. In the early stages.

**The Right Honourable Lord Coulsfield**

I know, in the early stages, but there are cases in which the financial element is not so important, in which the satisfaction element is more perhaps. Anyway, was anyone in favour of compulsory ADR as a stage, either generally or in any particular respect? What then?

**[Delegate]**

I just feel that at the moment nobody is in the mind frame or mindset to accept alternative dispute resolution but hopefully if it becomes the norm then people become more aware of it. That seems to me to be a bigger education than as many leaflets as you want to put out. If you actually participate in it the benefits of it will come to the fore and word of mouth will spread. That was my view on it.

**Professor Dame Hazel Genn:**

Can I just say that I think you have to be quite careful about compelling people to go to mediation. If you compel them, you're not going to maximise the opportunities for settlement if people feel they have been pushed into a process. If they go into a process that they've been pushed into and they don't settle, what you're going to do is to increase the length and the cost of actually reaching a resolution, so I think one has to be very cautious about compulsory mediation.

**The Right Honourable Lord Coulsfield**

There was one hand up at the back.

**[Delegate]**

I would hasten to add that although I personally support compulsory mediation, my guess is that quite a lot of [Scottish Mediation Network members] would not. I think that I would support it on two grounds. First of all, on economic grounds. The cost to the country at the moment of litigating disputes is very, very high. We are at time where in every walk of life, whether it's in the public or the private sector, we are being asked to look at efficiency and effectiveness and look for cost savings and it strikes me if that is happening in every other walk of life it should also be happening in relation to the administration of justice. There are savings to be found in relation to mediation and to me it seems perverse not to pursue that, absolutely with great caution and you wouldn't necessarily do it in every case. Secondly, I think that there are some disputes, particularly in relation to family disputes, where if a Sheriff says 'You two need to go to mediation', there are potentially very positive outcomes of that for children and for other vulnerable family members round and about, but again I would say that you have to exercise caution and do it on a case-by-case basis.

**The Right Honourable Lord Coulsfield**

Thank you. Now there's just one more observation I think we can have.

**[Delegate]**

I think I am one of the [Scottish Mediation Network's] members who would not agree with the idea of compulsory mediation. I would, however, make the case that it should be obligatory for parties to say before they raise a court action that they have taken an informed decision as to whether or not to mediate. I think that's an important issue, whether or not they have truly informed themselves and indeed that would put their solicitors and advocates under an obligation to ensure that they had such knowledge. If they then raised an action and were not able to answer the simplest question from the judge about what mediation was then it could be deferred for a short period for them to find that information, and for the cost of that simple hearing to be for the person who failed to look at the possibility of mediation. So there is no compulsion to use mediation but certainly a compulsion to take an informed decision whether or not to mediate.

**Professor Dame Hazel Genn**

I don't have time to argue that point but I disagree. There is a quite important point of principle that underpins it and it comes from the diagram that I did before that mediation is about settlement and many of the other processes we have talked about are about determination on the merits. There is a big difference and it's not one simply of process. We will disagree. I also would challenge the question, that I would say we don't have the evidence about the cost savings on mediation. It was done on scale, what are we comparing it with, so it's very easy to make that assertion. It's much more difficult to actually substantiate it.

**The Right Honourable Lord Coulsfield**

Yes, very difficult. Well, that brings us to the end of the morning session. Hazel unfortunately has to leave us and return so can I again thank you very much indeed for coming and for your brilliant introduction to this, for all the valuable information you've given us and for all the valuable stimulus we have received. Thank you very much.

**Professor Dame Hazel Genn**

Can I say that one of the reasons that I always come to Scotland even though it's a long way and I have to rush back is because of the quality of discussion about these issues. One of the reasons I always like to come is because I always learn things and I am always impressed by the quality of discussion. I think people really think about these issues. So thank you very much, I've enjoyed the morning.

**The Right Honourable Lord Coulsfield**

Thank you. It's lunch time.

### **The Right Honourable Lord Coulsfield**

If you have now had your frugal lunch and reassorted yourselves - frugal and I may say non-alcoholic lunch at least for those that stayed in this hotel - so that you are all fit for the afternoon session and have all found your new places for the afternoon, we can continue. In introducing Sarah O'Neill to speak to you, for once one can say that no introduction is necessary because I don't think many of you would be here if you didn't actually know Sarah already. But in any case, she is going to talk to us on the subject of what users need from the system and we look forward to what she will tell us. Sarah.

### **Sarah O'Neill**

Thank you. I want to talk today, and Hazel has already covered some of this so I'll try not to repeat too much of what she said, I want to talk about what individual users need from the civil justice system. We need a system that's focused on the real needs of those who have to use it rather than the professional users: the solicitors, advocates, the judges or the repeat players such as local authorities and big business who are well versed in the operation of the system and whose interests are well represented. It's worth remembering that for most people their involvement with the system is not welcome. Those who find themselves involved in divorce or contact cases, who need to reclaim money they are owed, who have benefits or housing problems, who have fallen behind on their rent, their mortgage or their credit repayments, most individual users are not there through choice. Most of them are being sued for debt and even those who are pursuers are generally very reluctant to go to court. I know we have some individual users in the audience today and I hope that we can learn from their experiences, good or bad. Richard, who is speaking after me, will outline some of the practical difficulties that his clients face in more depth so what I want to focus on is what we know from the research about how people feel about the system and how we might address some of the issues that this raises.

This quote is from the foreword to Lord Gill's Review Report. Essentially it says the current system's not working well, it's not fit for purpose, it's not delivering justice for users. Lord Philip's report into the administrative justice system which was published last year also found that that system wasn't meeting the needs of users. It's worth pointing out at this point, and the Gill Review report also says this, that the courts provide a public service. This quote comes from the previous Justice Minister Cathy Jamieson who announced the Gill Review. 'If the civil justice system is a public service then its primary purpose should be to provide a service to the public and so it should be responsive to and designed around their needs'. At this stage I just want very briefly to make an important point that's already been made. The civil justice system is much wider than just the courts. The courts are only the tip of the iceberg of our civil justice system. Very few cases, as we all know, are actually decided on a court hearing. Within that vast area below the waterline are a complex and confusing raft of processes and agencies that operate within the shadow of the court and which have a dramatic effect on those with legal problems and on which cases actually do end up in

court. So civil justice reform can't be about the courts alone. The overriding objective must be to provide access to justice for all within a system that's proportionate, affordable and accessible rather than focusing on the current structures and processes.

So looking at the civil justice system in its broader sense, what do those with legal problems need from it? As Lord Gill essentially said, what they don't need is the current system. This picture, which I have taken from one of Hazel's books - I put the source in just in case she was upset about it but she's not here - I think sums up very well how most people see the courts and the wider legal system. The quotes which I've put on the side come from research into court users' experiences which we published jointly with the Scottish Legal Aid Board last year, and it's worth bearing in mind that the people who took part in this research had actually been to an in-court adviser or had legal aid, so they'd actually had advice and/or representation and these are the kind of quotes that they were still coming out with. The first comes from a defender in a rent arrears case and the second is from a pursuer in a small claim. Charlie already touched on this earlier about the wider civil justice system. Paths of Justice Scotland found that people in Scotland are more likely to feel a sense of powerlessness and have more negative views of the wider legal system than in England and Wales and crucially, as he also pointed out, they were much less likely to think that a court decision was fair than those in England and Wales. We know from that research that people are concerned about the cost, formality, legal language and that they find the system intimidating.

So what do they actually need? Well first of all, and this has been touched on too, people need, if they're going to access legal services, to make informed choices about which services best meet their needs. They need to be able to firstly recognise that they have a problem, secondly, recognise that that problem has a potential legal remedy and thirdly, be able to identify what to do next, whether that's taking action themselves or seeking help from an appropriate source. The evidence from Paths to Justice is that many people find it difficult to navigate these stages. They may not identify they have a problem, they may not have the skills to recognise that there is a potential legal remedy, and some people don't take action at all because they think that nothing can be done or that no-one can help them. We are delighted that the Gill report recognised the importance of promoting public legal education as an element of any strategy to improve access to justice. Now Hazel's already made this point but I need to emphasise that public legal education is not just about giving people information and bombarding them with leaflets, although they do have their place. It's about building people's skills and confidence in recognising and dealing with legal problems and building their legal capability, which is a concept that's been developed by the Public Legal Education Network in England and Wales. Legal capability is dependent on many interlinking factors, as shown in the diagram. People's personality, their circumstances, their behaviour, their confidence, their knowledge and understanding and their skills. All of these things are linked

together in terms of people's legal capability. Legal capability has essentially two steps. First of all, there's what the Public Legal Education Network calls the foundation level, which is a basic level of capability equipping everyone to recognise when they have a legal problem, to know where to go and get help and find out more and how to communicate effectively and confidently. Step 2 is what we tend to think of more often as public legal education, the problem level. That's when people have a specific problem and they need to have more detailed knowledge of a specific law or a specific process to deal with that problem.

People's capability will obviously vary from person to person and Gill recognises this, that self help is a very important part of this. Some people are able to deal with some aspects of the problem by themselves but they may need advice with others. Those who have adequate knowledge and capability to help themselves whether alone or with help, should be encouraged to do that. Hazel talked about unnecessary helplessness and that's what I'm talking about here. It's empowering people to actually take action for themselves, and that frees up resources for those whose need is greater. There will always be some people who may not be able to do it for themselves. Public legal education is a long term strategy but one that we think will pay dividends for all the reasons that Hazel talked about this morning. It should save stress and resources further down the line. It's not just about helping people make a choice once they have a problem but helping them to avoid problems in the first place by making the right choices to prevent those problems occurring, or at least ensure they don't bury their heads in the sand and resolve their problems earlier. One of the real attractions of public legal education and self help is that the work could start early here. We don't need to wait for major civil reform legislation to put some of that in place.

Secondly, this isn't central to the group's remit but it is important, very important for users as we have heard, and there's clear links to self help here. It's about having access to appropriate advice and assistance at the time that people need it. People need to have access to the most appropriate services to deal with their problem whether that be an advice agency, private practice solicitor, law centre or other agency. There's lots of work going on in this area. The Scottish Government, Scottish Legal Aid Board and others are looking at some of these issues. We also think the Legal Services Bill will help. That will allow advice agencies to employ solicitors and will enable solicitors' firms to be more flexible and client-focused. The key point that I want to illustrate with this slide I think, is about the key role of in-court advice services in particular, which demonstrates the importance of advice being available at whatever stage people need it. In-court advice services recognise the reality that many people involved in disputes tend to bury their heads in the sand and fail to seek advice until the last minute. This is a picture of me, by the way, when I was an in-court adviser which is quite a long time ago, but it's the only photo of an in-court adviser I could find. I was the first in-court adviser in Edinburgh in 1997. This quote from our research, I think shows very clearly why this is important because people do tend to leave

things to the last minute. This person is a rent arrears defender and is probably fairly typical. There is strong evidence that the services have been viewed as a great success by everyone involved. Clients, sheriffs, solicitors, advice agencies and court staff, and the Gill report recommended their expansion. We know that a number of new services have been set up recently by the Scottish Legal Aid Board with Scottish Government money. They will become even more crucial when the Home Owner and Debtor Protection Act comes into force next month in dealing with repossession cases. I think these are the ambulance at the bottom that Hazel referred to. The point I really want to make is we need to have both things in place to stop people getting into that situation but also to have the ambulance when they do have problems. My point is that these are important services whatever the new structure might look like. Whether we have courts or some other forum, we need to have something in place at every stage for people who need that advice.

Thirdly, we have had quite a lot of discussion about this already, people should have access to less formal means of dispute resolution. We know from the research, Paths to Justice and others, that as Hazel has said, people just want to get on with their lives. They are more interested in finding a resolution to their problem than enforcing their legal rights and most people would prefer not to become involved in legal and court processes if they can avoid it. We have heard all the reasons why mediation is a good idea: it focuses on what parties want to achieve rather than their legal rights, and can introduce non-legal solutions rather than the win-lose result imposed by a court decision. There are also, as we heard, some differences in the research results but it is likely to be quicker and also cheaper in many cases. It might not always be suitable but it is important that it is available. These bullet points just summarise, very briefly, some of the evidence. The first one Charlie spoke about already. The recent evaluation of the Glasgow and Aberdeen Mediation pilots was very positive, people felt it was fair. The procedural justice issues that Charlie spoke about are very important to people. Again, Charlie touched on the second point which comes from Paths to Justice that fewer than half of those whose dispute was resolved by a court or tribunal thought the outcome was fair compared to 80% of those who reached agreement. The third one comes from our own research which we carried out a number of years ago into awareness of mediation, that actually lots of people didn't know what mediation was but once it was explained to them, over half of them said that they would use it if they had a legal dispute. The point there I think that was confirmed by the Glasgow and Aberdeen research which found that those who didn't mediate, most of them said that was because they did not have information about it. There is a real issue of awareness about mediation, also amongst solicitors and advisors, not just the public, but there are also issues of availability. There is limited access to mediation. We welcome the Gill recommendation that there should be free mediation services for simplified procedure cases although clearly there are issues about how that would be funded.

I have spoken mainly about mediation but it is not just mediation that we should be thinking about. Arbitration may also be appropriate for some consumer disputes. Complaint handling processes and ombudsmen can be more accessible, quicker and less costly than the courts. The key issue there is about getting it right first time as the Administrative Justice Steering Group said in its report, so that cases do not end up in a tribunal or court at all if possible. We believe that the civil justice system should encourage the resolution of disputes as early as possible and that the court should be as a last resort as the Civil Justice Advisory Group said in its first report in 2005.

However some cases will inevitably end up in court or other formal dispute resolution mechanisms. The current system is intimidating and confusing for parties, even those who are well educated and articulate and I heard a bit about that in the group I was in this morning in fact.

Whatever system we have in place needs to be less formal with less legal jargon. People need more information about the process. It needs to be quicker, cheaper and less stressful. To illustrate these I have taken some further quotes from our court users' research. Whilst we welcome the Gill proposals for a simplified procedure with plain English rules, we would like to see the abolition of outdated practices in forms of dress, use of plain language and so on. I personally think the current problems are more fundamental than that, they are about the overarching culture of the court system. I have been a member of the Sheriff Court Rules Council for five years and every time we discuss a new set of rules I say those forms are really complicated, nobody is going to understand those. It is all part of the whole system because the forms have to be like that because the rules are worded like that and the system has these processes in place and everything has to fit within that. I think that is really what the big issue is here, that until we look at all of that, it is difficult to make individual processes or forms clearer than they are. We also have some concerns about the proposed District Judge in the third-tier court, and that, because of the criminal element, this has the potential to replicate the current issues in the sheriff courts that judges will be doing primarily summary crime. Civil cases may get pushed out. Also there is evidence that the public associate the courts with criminal cases and that this plays a role in deterring them from going to court. So perhaps we need to think in more radical ways. Hazel spoke this morning about the situation being a matter of history. I would say well why do we have to accept that the court should be along similar lines to present; why do we have to have civil cases and criminal together; why do we have to allocate court cases to a particular court forum based purely on the financial value of the claim. Could we look at other things? Could we do it by subject matter, for example? Could we look at links with the administrative justice system? One example which is often being discussed is housing cases, would they be better dealt with at a tribunal in a less formal, more specialised decision making environment?

At present, the sheriff courts deal with large volumes of housing cases in a variety of different processes. We also have tribunals that deal with housing cases. Experience suggests that in many housing cases, defenders do not turn up which often means that a court order is granted against them in their absence. If we had a less intimidating specialist housing forum, would that help to encourage people to turn up and have their case heard? I would say it is the quality of justice that matters, not the forum, and if it is a specialist forum then that should be better for the parties. The key to all of this though is to have a less adversarial system as we have already discussed this morning. A more interventionist system which is designed for users to negotiate without the need for representation and that was one of the recommendations of the Administrative Justice Steering Group. There is some research evidence from Mike Adler at Edinburgh University that actually what can make the difference in a more inquisitorial process is not representation but advice, and that actually people who have had advice but do not have representation do just as well, if not better, than those who do have representation.

More information about the process. This shows you the kind of thing that happens. Richard, no doubt, will be able to tell us more about this but people do not actually know when they are supposed to turn up, what is going to happen, how long they are going to have to sit in court, basic things like that. One of the main findings of our research was that most people found the court process wasn't actually as bad as they had feared but the lack of information they had received before and during their involvement in the case heightened their fear and anxiety. What the research cannot tell us is how many people were put off even getting that far because of their fear and anxiety. We need to make sure that people have enough information and advice early in the process so that they know what all the options are for dealing with their case and can make all the right decisions which could have very serious consequences for them. Finally, quicker, cheaper and less stressful is not always easy to achieve. If we make it less formal and more jargon free, that would certainly make things better for people but there are still other barriers to access, such as cost and fear of costs. We know from Paths to Justice cost is a major deterrent for people in pursuing their case. Having less need for representation and less formal dispute resolution may help but that is an issue that we certainly do have to address. People do find it stressful, the first quote illustrates that quite well and the second one that it does take a long time. There may be quicker ways of doing it, mediation or perhaps other ways.

Finally, I just want to go back to the point that I made at the beginning which is about the fact that the civil justice system is a public service and so the users should be central to that. The civil justice system is clearly not meeting the needs of those who use it at the moment. We need to find ways of engaging users and taking account of their needs and wants in designing any new system to make sure that we get it right this time and design a modern system fit for the twenty first century and for the people of Scotland. Thank you.

### **The Right Honourable Lord Coulsfield**

Thank you very much Sarah. That is a very clear exposition of the issues which have to be thought about in order to meet the needs of users. Richard Young, who has direct experience, is now going to tell us about some of the practical problems of providing that sort of advice and assistance, having functioned for some years as in-court advisor at Airdrie Sheriff Court. He has previous experience, as you will see from his CV, in this sort of field.

### **Richard Young**

Thanks folks. I'm just trying to see how I can do a slide show on this.

Thanks for the introduction. What I have been asked to do is give some practical experience of the issues faced by court users and I am going to talk about problems that people that I see every day face in court. Before I do that, I am going to give you a brief introduction on what in-court advice is and that is for the benefit of those of you who don't know. I have got a couple of disclaimers that I want to point out first. I could not find a picture of a disclaimer anywhere so you will have to make do with these guys. I am speaking on my own behalf from doing the job in Airdrie for seven years, not for all in-court advisors. There are in-court advisors dotted around the courts and you can speak to the ones that are here today to find out what they experience. Another thing that I don't want to do is to criticise unduly anyone involved in the court process in Airdrie and certainly not the sheriffs because I am back in front of them tomorrow. At the moment, we are funded by the Legal Aid Board. That funding started on 1<sup>st</sup> April 2009 and runs out on 31<sup>st</sup> March 2011. We are hoping that as a valued service and with economic downturn that will be continued but everyone is waiting to see what happens.

In Airdrie, we are managed by the CAB and being part of the CAB service is actually quite beneficial for me. It means that I can tie in with all the things they have going on there such as advice, welfare rights and the recently funded community legal services law centre.

This is where I am based in Airdrie. We are there to serve court hours, generally nine till five Monday to Friday. The objectives that we have are to help people smooth their journey through the courts and give them the help that they need. The remit is obviously to assist the ones that are attending the civil court who have not accessed any assistance; either they cannot pay for a solicitor, their case does not attract legal aid or for whatever reason they did not know there was help there. We assist in primarily small claims and summary cause cases but also in some situations we advise on ordinary causes. We help pursuers and defenders. The case load chart there outlines the sort of thing that comes to us. Up until about a year ago, it was always housing that was the main thing we dealt with and some of the other in-court advisors probably still have that. In Airdrie it has been debt for about the last fourteen months or so and I would imagine that

is a direct result of the economic downturn. When clients come and see us, we are generally approached about five minutes before their case calls in court. Most of the clients, two thirds as you can see, are defenders. That would roughly account for housing and debt cases. Most of those clients would probably be in court with the risk of losing their home or being made bankrupt or something like that and, of course, they will be up against a solicitor for the represented party. Thirty four percent are pursuers. They are usually the consumer cases that we deal with.

So what happens when clients come in and see us? Well, usually they are a bit drained by the system before they walk in my door. They have probably written a few letters and made a few phone calls. A couple of months after that, they have been to CAB and they have maybe done the same. A couple of months later they go to trading standards so by the time they come to us it could have dragged on for a few months or even a year. They are never too happy when I say to them they are getting into the legal proceedings now and it is probably going to slow down, if anything. That never goes down too great. However, most of our clients don't really want to go to court, they would rather we resolve the issue without having to do so. Certainly that is the case for consumer cases. If someone is involved in a debt case well frankly they do not have any other option. If they do not want a decree against them, they will have to go to court and, as I said before, they will probably be up against a solicitor. There is another category of client who are desperate to go to court, however they usually change their mind quickly once they get involved in it. Before someone raises an action, probably the main barrier, and I think Sarah spoke about it, is the forms. I am kind of used to them and I do not think they are that bad but our clients do not particularly like them. They usually ask questions about who do we raise proceedings against. Is it a Limited Company or Sole Trader? What information/evidence? Another thing they ask about is do they need to speak in court? Will lots of people be there? When they do the forms, they are often sent back and that is sometimes when clients approach us. This is roughly speaking what clients put in box four. For those of you who have not seen the forms, box four is where they ask for what they want. To me, that seems fine. This is what the Court wants them to do and, unfortunately, that is what that looks like to my clients. I do not suppose there is anyone who speaks Russian here.

During the action, people have difficulty understanding the complexity of procedures and legal jargon. Court is also perceived to be a place where criminals go and, of course, it is and most of the business that goes through Airdrie is criminal business. We have two civil court days a week and the rest is criminal and so people do not like being there. When people go into court, they often end up in tears, crying, unable to put their point across, shaking. They might have it all written down, they might have it all in their mind but they get there and just freeze and do not know what to say.

These are the common things that happen. People often in the court fail to respond. When you are taken to Court, you have a date on which you have to respond and a date on which you have to attend at court. Unless it is a housing case and you do not respond to the forms, the case does not call in court. So you end up with a handful of people at the back of court every second Tuesday waiting for their case to call and, of course, it doesn't because they did not respond. They thought they could just turn up and argue their case. That means we have to do a minute for recall. First of all, it takes up their chance for a minute for recall. Secondly, it brings things back into court and clogs up court time. Thirdly, it annoys the pursuer who thinks they have already won the case and it is particularly annoying for our clients who have taken someone to court and that person did not know that they had to respond. Of course, our client has got their decree now and are pretty delighted with it and are one their way to the Sheriffs Officer and are told a couple of weeks later that they have to come back in to Court to argue it again. One of my clients had even shredded all her evidence and she had to go back so that was difficult.

Post action. People have gone to court and won their case and they are just about to get their money and we say to them well that is really just the start of it. Now you need to go and get a Sheriffs Officer and that will probably cost extra. Sometimes they do not get their money so they think, well what was all that about. Another thing that people commonly complain about is that they have won their case and of course they have to receive it in dribs and drabs. That is fair to the party that has the right to apply for time to pay but, of course, my clients do not see it this way. That is an issue with the court system as a whole. Invariably, everyone that I see always thinks it is fairer on the other party.

These are my contact details and if anyone wants to speak to me after this, I will be happy to pass them around. Thanks for your time.

### **The Right Honourable Lord Coulsfield**

Thank you very much Richard. I couldn't help noticing that when you had the splendid photograph that Airdrie Sheriff Court was such a lovely place to go. I have to tell you that I was one of last people to appear in the old Airdrie Sheriff Court which was like Jimmy Porter's crack about the white tiled university except it was a green tiled Sheriff Court. We had to leave because the mine workings underneath it were collapsing and a crack had appeared in the wall. So you are actually quite lucky. Thank you very much for the practical illustrations you have given.

So Crispin Passmore, who is Strategy Director of the Legal Services Board is going to deal with the question of access to lawyers or access to justice which, of course, are entirely different. Thanks.

**Crispin Passmore:**

Thank you very much. There is something quite significant, I think, about the legal services market that when you scour around for a conference like this to get someone to come and talk about technology, you come to me. I think it says perhaps we do not have as much technology in the legal services market as perhaps we ought to have. What I am going to try and do is to think a little bit about how we use technology in legal services in England and Wales. So a big disclaimer on what I say: it is all applicable in England and Wales. It may or may not be up here, you may be light years ahead of us which I am often told by [delegate].

I will just talk a bit first of all about what was it like going into legal services? What was it like facing a lawyer in the past whenever that was? If we think back to post war, what was it like in England? If you needed to go and see a lawyer, what problems might you face? Well it is probably going to be a family dispute. It may have been a soldier coming back from war or you might be a woman whose partner has come back from war when you thought they were dead and perhaps you have gone off with someone else. How might you have overcome those circumstances and how might you have accessed that legal advice? Well you might have had problems reading or writing. You might have been quite deferential and might have been scared about seeing a lawyer. You might have had to go to somewhere on the edge of the town centre or the edge of the city, somewhere quite imposing into the offices and you would have to pluck up quite a lot of courage to go in. It is not something you would have done often in your life perhaps. You would put a lot of faith in your lawyer. Your lawyer would almost definitely have been a man. I think I would say he would have a limited choice of shirts but that is just a personal preference. He was almost definitely privately educated. He is almost certainly working in a partnership structure.

How much has it changed in fifty or sixty years since that? Well, the big huge typewriters have been replaced by a laptop and the people have grown a lot. It is alright to bring your children in to legal services. It is actually quite welcomed in a lot of legal services. It might still be a family dispute as the reason you go in. You are likely to be less deferential. You are actually more likely to be able to read or write. There is a pretty good chance that you will have found out a bit of information before you went to see your lawyer, either on the internet or asking a friend who has been through the service before. You have probably chosen your lawyer differently, you have probably chosen your lawyer not on the basis of the two or three who are in your town or nearby but you have probably chosen on a recommendation from a friend or family member or someone you have been to previously. Certainly not a concept of family solicitor like perhaps there was fifty years ago.

Your lawyers, as we say, are using technology perhaps much more than fifty or sixty years ago. There is a pretty good chance now that it might be a woman in England. More than half of the solicitors coming onto the role in England and

Wales in each of the last few years have been women and what a positive change in fifty or sixty years. But if it is a woman, it is unlikely to be a partner because partnerships are still dominated by privately educated white men. So some things have not changed and actually each solicitor will still be working in a partnership model. I think the really striking thing about looking back fifty or sixty years ago and looking now is how much things have changed on the client side, how much clients are less deferential, better informed, more able to ask challenging questions but how little has changed on the supply side. The man side changed, supply side not changed. I think it is hard to think of any other market in the professional service that has changed so little in that sort of way. We think how much medical services have changed, how much going to the opticians has changed, how much many other services have changed over fifty or sixty years. Isn't it remarkable how little has changed in the way that lawyers organise themselves, legal services organise themselves, courts organise themselves and the way they deliver to consumers?

So what might it look like in the future? It is always really dangerous to predict future and use of technology. I think one of the real things about technology is that our thoughts about it are always limited by what we have at the moment. When somebody first put a picture onto a mobile telephone to illustrate that one day it would be possible, they did it on a telephone that was about ten years old yet could only think about it in the limited sort of way going forward. I do not really want to speculate too much about what legal services may look like in the future because of technology, but perhaps just to point out a few of the things that are already happening, some of the things we can already see about the power of technology going forward and how it works at the moment and how it may impact.

This is from the Guardian last Thursday. You can guarantee it is genuine because he has the Guardian's own spelling mistake and I will leave you to find that while I talk. The very fact that a national newspaper, on its website, will have a headline that says the internet has arrived for lawyers again says something about the state of technology in the legal services market. But in some ways I think that it is really quite wrong because there are all sorts of different places using technology at the moment but often they don't touch on individual consumers or they don't touch on individual consumers in enough ways. I think that is partly because technology is neutral. It is how it is used that decides who gains from it. It is what the structures are, what the people are, what the cultures are that determines whether or not technology coming into the legal services system will work for consumers, work for providers or work for funders in some sort of way. It is worth just holding on and thinking about some examples. I know a law firm in England that specialises in remortgaging of services. It doesn't really do huge amounts for individual clients directly although it does a little bit of that. Most of its business comes from remortgaging by banks, building societies and mortgage companies. It is specialised. It worked out, following Richard Susskind's models, that you need to standardise and you need to

systematise so it looked at the systems and managed to reduce the cost of the remortgage to about £140 - £150.00. That is a lot cheaper than a lot of remortgages. That was three or four years ago. It came under pressure and started to need to reduce its costs much further. It was told by the banks that if it could not get its costs significantly lower, it would lose its contract and that would be the end of that law firm's bill on three or four very large clients. So it used technology and started to think about actually how can I reduce my costs? How can I actually reduce my costs to a level that clients are willing to continue to use me for these services? I think costs is going to be the real driver in all of this. What they did was they got rid of most of the lawyers. They kept a couple because they would need them for regulatory reasons and they paid an awful lot of money to an IT Director. They employed about seven hundred paralegals and they built a system and they built their system so that they can do remortgages. Now after the second iteration, they can do them for under £15.00 a go. That is how little the bank or building societies are paying them to do a remortgage. Quality has gone out of the window. Oh no it hasn't, they also reduced their insurance premium significantly because they made less mistakes. Their computer system did not have hangovers, it did not have bad days, it did not have Friday afternoons. It was able to spot the complicated cases and pull them out and put them on a different computer system and a different process, all based on algorithms, earning the IT Director more money than any of the lawyers were earning, showing what can actually happen.

The challenge, I think, for all of us is to think how can we have those stories in the future that impact on consumers rather than make gains for banks, building societies, investors, etc. When we looked at the telephones a minute ago, they were some really old telephones so let's think about what we can do with telephones now. I noticed when I came in from the station that I came past a house where Bell lived when telephones were first coming around so it was quite nice to talk about telephones here. But we introduced in a previous job of mine telephone advice into legal aid. We were told it would not work and to be very cautious about using new technology in the delivery of legal advice. It is not even last century for the telephone, it is the one before that. Technology moves quite quickly. Telephone advice is not something radical. Some of the numbers we will come back to later will really support that, about how clients are using technology and I will come to them in a few minutes. The i-phone is quite interesting because it is not the face time, it is not being able to see the person on the other end of the call that has started to radicalise the way that legal services is delivered. It is something that we could not have seen coming five or ten years ago. Perhaps it's apps that can do it. I have seen a few i-phones as I have wandered around today so hopefully there are quite a few people who favour apps. This is an app for a firm of solicitors called Barnetts in the north west of England which operates across most of England and Wales. You click on your app on your i-phone and put in your postcode, the price of the house you are buying and it instantly gives you a quote for the price of your remortgage. Not very exciting in many ways. You could pick up the phone and do that, you

could look on the internet and do that. What I think is interesting about that is that consumer facing and it enables consumers to make choices. There are not many steps on from this to a comparison app for conveyancing. This is actually really accessible while people are sitting on the train or bus on the way into work thinking about buying a house, browsing the pages of their property document or a website. To be able to use this sort of technology to really change the way they can engage with the market. I know that when I go and buy legal services, one of the most frustrating things that I find is that I cannot find out the price of them. If I go in and talk to them about something quite complicated, and obviously some things are quite complicated, by fact or law or whatever, you are half an hour into the conversation or an hour before you can really find out the price, and that is not a criticism of the law, that is just the nature of the system and the way we operate at the moment. Trying to get prices from lots of different people becomes even harder because you have to go through that with all of them. Conveyancing started to change because conveyancing has technology involved. Conveyancing has more competition perhaps. But if you can start to get these sort of transparencies through technology, you start to empower consumers to demand what they want, to make choices between different sorts of people, to trade quality, price, access and all of those different things. I think that is an interesting use of technology already.

I don't know how well you can see this one. This is a debt advice tool on the Legal Aid Community Legal Advice website in England and Wales. It is a website that is worth a look to see what it is doing well and what it does badly in terms of delivering legal advice and access to legal advice through the internet. This is a tool that allows you to manage your debts online, allows you to take away the services that are delivered by general advisors and even, to some extent, specialist advisors that work in advice services across England and Wales and replace them with technology. Again, it was said when this was first being set up, it can't be done, these are people who can't out the issues on their own. Huge numbers of people use this every single year and it has very good results with people. It gives outcomes for clients that can be used with technology in the delivery of legal services. It starts to use algorithms to not only just take information and give the people neutral information but it actually starts to give them advice using intelligent computer systems. There is one that probably quite a few of you already use as an example of this which is NHS Direct. NHS Direct started off as a telephone service with very clever, well trained, experienced people on the phone giving advice about health issues. As the pressure grew and the volume grew, it realised it needed to either limit the service or it needed to reduce its cost so it could deliver more with less. It chose to try the latter and it started to build an algorithm system that asks intelligent questions. It uses the collective knowledge of all of the people who work at NHS Direct and many other bits of expertise to build an intelligent system that helps the person answering the phone decide what the next question to ask is. You have probably seen all sorts of tools on websites where you put in some information and it asks a question. It has got to the point where it is so

sophisticated that doctors and nurses working in NHS Direct make less mistakes and less inappropriate diagnoses using this system than when working on their own. It is the sum of knowledge rather than people's individual knowledge. You might have come across something rare once or twice in your career. These computer systems come across everything lots of times because it is the sum of knowledge from lots of people. You can do that in legal advice. It is not difficult. The technology is there. This is the technology of the future.

You can do much simpler things using the internet as well. This is another piece from the Community Legal Advice website for England and Wales. I think this is interesting because it starts to give examples of how you can reach people you did not expect to be able reach and I will give you another example of that in a minute. When we first started using telephone advice, we were told it would work for some clients. It will work for those who are more empowered as they are more able to use the telephone and more confident doing those sorts of things. It will not work for the elderly, it will not work for the sick and disabled etc. We were neutral on it, we said consumers will decide, not lawyers, not commissioners, not funders, not government ministers. Consumers will decide whether they want to use it and if they are happy using it. What we found through that service is that people that are sick and disabled, people with caring responsibilities, elderly people are disproportionately represented. Not just disproportionately represented out of the population but disproportionately represented when compared to face to face legal aid services for the same areas of law. Quite interesting. What this allows you to do is to deliver access to people twenty-four hours a day, seven days a week, when they feel that they can face challenging those problems that they have standing in front of them. We all know that for the most poor and most vulnerable consumers, it is a big step to go and get legal advice. This helps people come over the step. When they are browsing information, when they are learning about their problems, when they feel tempted to get advice about their particular problems, from the information, they can go into the website and can book a telephone call back at a particular time from a specialist advisor in any one of the languages that is spoken in England and Wales. That is a lot of languages. You could not do that in most legal services practices across England and Wales. The technology is driving access in a way that was probably unthinkable ten or twenty years ago.

I wish I had technological skills to be able to animate this. This is a screen grab from the Royal Association for the Deaf website in England and Wales. The power of broadband now is such that you can actually just do video conferencing over the web really quite easily. You can actually get signed leaflets from the Royal Association website and on the legal aid website but the step beyond that is that you can use webcam to get advice signed to you. A level of access through technology that was just unthinkable five or ten years ago. I don't know how many people here have easy access to a signer for their legal practice or their advice agency but in my experience of trying to deliver legal services, it is

really hard to get that type of interpretation available to you quickly so there are all sorts of things that you can already do with technology.

Why do I think this is important? We have heard from Hazel this morning, just to re-quote some of those surveys that she mentioned. I think the numbers are probably very similar for Paths to Justice in Scotland as they are in England and Wales. One in three people experience a justiciable problem over a three year period. That is a huge number of people. Not all of them get legal advice. A significant portion of them do nothing, lots of them leave their problems to fester and grow. If you are in business, you would say that is an untapped market. You would not leave it alone, you would not say someone needs to fund me to deliver this. You would see the opportunity to go and deliver services. If you look at the distribution of who takes up advice, it is a very steep curve. The poorest get access to legal services and the richest get access to legal services. There is a huge hole in the middle, not middle class people but people on very moderate incomes who are not eligible for legal aid in England and Wales. I think that is again a really good opportunity to focus legal services on the people that are not getting them at the moment.

So why do they not get advice? Well they do not get advice because it is not available to them, it is not accessible to them. It might be that firms will say that I am quite happy to take those clients but the reality is that legal businesses are not set up in a way that attracts those clients and we know that because they are not going for advice. Someone said to me recently when I was talking about this that the reality is that most lawyers could not afford their own services. I think that is quite a challenging thing for us all to think about. If we can think about that untapped market, we can start to think about the technology that can help us tap it. It is not just about finding ways to get to new people, it is about focussing on costs. I think one of the things that really strikes me about a lot of discussions around legal justice is how little we focus on the cost of delivering. We focus on raising more money, that these services are expensive, access to justice is expensive. We sometimes focus on the different channels that exist and whether mediation is cheaper than other forms of ADR or whether ADR is generally cheaper than going to Court. What we all seem to assume is that those costs of any particular service are fixed. Most businesses focus on their costs. How can I lower my costs? How can I get my costs lower so I can get my prices lower, so I can attract more clients so I can make more profit so I can actually get some sort of relationship between myself and the market, maximise volume, maximise business. But we do not have that policy in legal services. When we talk about that sort of culture, we are told we are threatening professional services and we are threatening quality. I do not think that is the case. I do not think it is the case in most services that are already delivered through technology and I do not think it will be the case in the future.

So just to finish, what might drive change? I do not think it is just technology. Technology is a neutral thing. How it is used is what changes whether this works

for consumers, for lawyers, for other providers, etc. But consumers can demand it because where these services are available, they could choose to use them or not to use them and they are choosing to use them. The reality is for technology not to impact on the way that legal services works, it needs all providers to stand together and say we are not using technology. But for technology to have an impact, it only needs one lawyer to change their mind because those services will become available. That is the disruptive power, that consumers can use technology and use their power in the market.

Government's driver for change. The legal aid review in England and Wales may well lead to twenty five or thirty percent cut to the budget. That is £500m being taken out of legal aid expenditure. The Government is likely to do that elsewhere. I do not know what will happen in Scotland. I do not know what your public expenditure settlement will be. The Government has a choice. It can either say if we spend less money well we will cut services to clients because costs are fixed. We can only do things the same way as ever which is guaranteed that clients lose. Or it can say we are going to take the risk and invest in technology and we are going to see if we can do more for less. I understand there are risks on quality. I understand there are some risks on access for different groups but they are risks. If I cut services, it is guaranteed that the clients lose. So government can drive change. Investors will drive change. You may have forty nine percent of the law firm owned by external investors in the future in England and Wales from twelve months time, actually it will be open for full ownership of legal services businesses by external investors. Banks, finance companies, insurance companies, supermarkets are already looking at legal services and are already thinking what can I deliver? They Co-op deliver fantastic legal services in England and Wales. They understand the client's journey. They understand how to drive their costs down and their clients keep coming back to them for more. We can learn in the legal services market from those retail businesses about how to understand the clients and the journeys they make and the choices they make. Other sorts of new entrants can change it as well. Working in partnership with other people working with your clients. Not in partnership in the way that legal practices have done really well in the past but partnership in new ways, bringing businesses together in very different sorts of ways and of course technology can change it. The real question for technology is whether or not lawyers want to use technology to change legal services and create access to justice. Thank you.

**The Right Honourable Lord Coulsfield**

Thank you very much. Now, we have a couple of minutes before we start table discussions which is labelled questions in the programme. If there is anybody with a burning questions which they would like to have an answer.

**The Right Honourable Lord Coulsfield**

Can I ask Crispin about the application? I understand what you are saying about technology in the provision of services like remortgaging. I heard Richard

Susskind talking about this subject at intervals of two years over a period of twelve years. On each case, he said in two years time, everything will be coming over the internet and it didn't happen during that period. Now obviously that has moved on but how much experience is there of the application of the type of technology that you were talking about for a mass product like remortgaging to the initiation of litigation which we are accustomed to now as essentially a case by case process. What about that?

**Crispin Passmore:**

Unlike Richard, I try not to make predictions about the future as I might get held to account. Perhaps he thought he wasn't going to be here in two years time, I don't know. I suppose to me the issue is about attitude and the culture ultimately. We can either have a conversation where we say it cannot happen and there is no way of making this happen and therefore we do not need to think about this. I respect the right of every business and legal services business to say you can't do it for the area that I work in and therefore I am not going to waste money investing in it. It's your money, they are your decisions, and it's your business. But I suppose I would say that rest assured someone somewhere is thinking about how can I take that complicated personalised individualised process and how can I at least pull out the bits of it that are standard and the bits that can be systemised and how can I use clever technology to reduce my costs? And the focus isn't the obsession with technology, the obsession is how can I reduce my costs so I can compete more effectively.

**The Right Honourable Lord Coulsfield**

But it's the production of the algorithm which is the complicated issue.

**Crispin Passmore**

But I am not an expert. I suppose I would say look at personal injury. I don't know if it is the same in Scotland as in England and Wales but the best way to work out the quantum of damages is to go on the computer system that does it. As Richard would say, it is more accurate than lawyers anyway.

**The Right Honourable Lord Coulsfield**

But the question is, what is what is accuracy? You see, as [Charlie] was talking this morning about assessment of damages and the experiments which have been done with teams of lawyers and some of the experiments have been done with other people, the difficulty about that kind of experiment is to know who was actually right. To put it on the computer, the question is was the programmer right?

**Crispin Passmore**

Yes, I think that is absolutely right. I make no prediction whether it is right for litigation or not. What I would say is think about the two mobile phones that you saw pictures of. When that other mobile phone was around six years ago, did we imagine that in six years time we would have computers in our hands that also

made telephone calls? I go back to the time when mobile phones were the size of a brick. In five or six years time, the power of technology will have increased again by the same fold and five years after that again. There is no limit to the power of technology going forward.

**The Right Honourable Lord Coulsfield**

No. Well thank you. Well I suggest that we start the table discussions and again I would ask you to report on the points which strike you as really the ones which matter after this discussion while keeping a record of everything else. Thank you.

**The Right Honourable Lord Coulsfield**

Ladies and gentlemen. Most of us are back now so can we move on to the final stage of reporting. I was tempted to upset everybody by calling on table ten to report first but I don't think that table ten exists any more. I better stick to the same process and ask table one.

**[Delegate]**

Thank you very much. I was hoping you would start about two minutes ago then I could have said that table one had such confidence in their facilitator that none of them had come back but they have. Table one addressed the question does the package of measures/assistance to support citizens to have appropriate access to justice via the courts and other routes, as proposed in the civil court's review report (such as self help public legal education, in-court advice services) represent the best way forward? Now, facilitation is quite a difficult thing. That is my excuse. I am not actually sure whether we addressed the question properly but we did look at it and conclude there was a micro and a macro issue here and I thought that was sufficiently confusing to start with. On the micro level, we thought that the court experience really ought not to be an ordeal and we should be working towards ensuring that it is not. As far as getting to court, you have got to look at things like the timetabling of hearings. Why is it everything is timetabled for 10 o'clock and people wait there for three hours to be sent home? Why is it that form filling has to be so difficult? Why is it that language cannot be simple? When you are there, why is it that there are wigs and gowns on the bench and why is the bench set a number of feet above the ordinary mortal? And as the future, perhaps all that is irrelevant anyway because if Richard is right, then technology is going to render redundant much of the sacred cows of the present.

So when we are looking at what is being suggested, and is that sufficient for the future, we have to stop and say what is the future actually going to look like? Some of the things that we are perhaps spending time thinking about are actually going to be irrelevant in a very short time so the optic which you have to apply in this is one which allows for flexibility and change right from the start. So the micro level is today and the macro level is tomorrow. And if you are looking at the macro level, why is it that you can introduce McKenzie Friends in the Court of

Session in June and still be waiting, and it will be announced in January, and still be waiting for the Sheriff Court Rules Council to get their heads around it even as we sit here. We all know why it is, it is because the language isn't plain and the concepts are convoluted. We had [delegate] here as part of the group and we looked at the recent guidance from the Court of Session. In a short discussion we had on that, I think the rest of the group thought his comments in relation to the Lord President's guidance note were critical but he thought this was the best thing since sliced bread and the way for things to be done for the future. So we were hopeful. But there was a signpost in the issue of Sheriff Court and Court of Session rules that the two Councils have to be brought together. This is not something of direct and immediate interest to users but it provides the context in which a converged straightforward system can actually be crafted for the future. As an aside, I would add of course why leave it simply to courts, sheriff court and Court of Session? Why not add in tribunals? But nobody else was talking about that so I thought I better not raise it.

So you need rules to be radically reconsidered and it has to be done on the basis of a unified structure in Scotland. To do that, you have to have the Civil Justice Council which was mooted in the review report. When you are looking at rules and the function of a Civil Justice Council for the future, you cannot simply look at what the rules are. It cannot simply be judges and lawyers talking about what the rules of engagement are going to be for the future. It has to be a body which looks at the future of civil justice in Scotland and is able to take that broader view back to looking at the future again through a different optic than the one we have adopted up to date. I hope that that might have made some sense.

Thank you very much. Now table two.

**[Delegate]**

Thanks. We addressed the same question. I think slightly differently. But to pick up on the point of procedural change, I suppose a lot of energy could be put into developing the perfect forms of assistance for the system as it currently stands but then if the system moves on and improves in the way set out in the review, we may not have the right solutions for the future. I suppose we need to make sure that whatever we put in place is suited to procedures which should be making the courts more accessible. That is actually relevant for one of the concerns that came through the group. Generally, the range of measures that are set out in the review, there was broad agreement that there were the right sorts of things. There were points about what exactly the scope of a McKenzie Friend was and how different it was to an in-court advisor. The name was confusing and such like but broadly speaking the types of assistance that were set out were the ones that people thought were relevant. The concern was that if there is a significant investment required to make them a reality, that that should not be at the expense of the current assistance which exists. I think the challenge is that nobody is saying that the status quo is the ideal but if we want to invest either in the new technology that Crispin was talking about and

intelligent systems and algorithms such that we do not need as much human contact as it were, or even just the funding of ongoing services such as in-court advice, if that takes resource away from existing advice services or legal aid or whatever, people are concerned that there would be a diminution in what could be achieved. I suppose the point there is you need to do both for a period but the aim is that by investing upfront, you are making things easier in the future. You are diverting cases from court. You are making people more capable of resolving their own problems whether that is before or at court and therefore reducing demand on future resource but for an interim period, you are paying for both. That was really the concern that, in looking at a future with fewer resources, there is a short period where people felt you would need to have more investment and that is a challenge that is going to be facing us over the coming period.

**The Right Honourable Lord Coolsfield**

Thanks. Table three

**[Delegate]**

Yes, we are still dealing with the same two questions and on the question of is this the right package? I do not think anyone had any particular things they would take out of the list but there is a terrible tendency to add things on. We want everything we have already got as well. I think in relation to what else might be appropriate, our group focussed particularly on this triage point and tried to start to tease out some sort of idea around some sort of options hearing or some sort of process at the start of, I shouldn't even say a case, but a problem where one might go in front of somebody and agree where a case should go. And it doesn't necessarily have to be a judge at that stage but somebody might like to assist people to decide whether or not the case requires litigation, is appropriate for mediation, could be dealt with by an Ombudsman or some other informal resolution. Also, whether or not it is possible at that stage to pick up on the clusters point and identify people who may have more complex issues that are actually the presenting issue of the case and to work out how they could be referred on to appropriate sources for advice and help. So some kind of early triage was the main thing we focused on as being perhaps missing from the list. The other things we talked about were not just around mediation. Negotiation is a perfectly respectable thing and perhaps sometimes people just need help in order to negotiate a resolution for themselves. If people had more information, not just about the processes, but about the likely costs and likely outcomes, they would be able to make more informed decisions at the start. So a lot can be done perhaps to keep the system more predictable for people. The issue that Richard picked up around enforcements came up in our discussion that actually giving people lots of rights then telling them that nobody is going to help you enforce this perhaps isn't really increasing access to justice. It is another thing that we haven't really turned people's attention to.

**The Right Honourable Lord Coulsfield**

Enforcement was one of the things that was mentioned in our previous report and it is something which the Gill review did not pick up on. But to these three groups, the answer to this question may simply be no. Did any of you feel that you could prioritise between the various measures that are suggested or asked in that question? Is there any one or more of them that struck you as being the one to go for? If the answer is no, then the answer is no.

Well in that case, the buck passes to table four.

**[Delegate]**

We were answering the same question as the previous three and in relation to being from [advice agency], I support [delegate's] suggestion of more in-court advisors. In relation to the question that we were looking at in terms of the package of proposals, I believe our table were supportive of all those recommended and none should be taken out. However, we did recommend that public education is a very important part of these packages. I think the suggestion was made by several of the participants that there are proven models of public education probably available within other areas of the world and we would seriously recommend these be reviewed, analysed and the learnings of those used wherever applicable for this particular geography. In addition, a lot of the recommendations are based upon clients looking for the information themselves. We also believe that there should be an exercise or programme whereby public legal education should be promoted out to the public by various different measures. A suggestion was potentially allying with some sort of corporate sponsor, an ethical corporate sponsor I believe the phrase was, because there is a lot of people who go through checkouts at shops. There are advice agencies who could potentially promote information as a lot of the other awareness projects are. There are also self-help groups that could potentially be set up in communities to help themselves and inform themselves on the grass routes. So I would say from a prioritisation point of view, we would look towards the public education as the starting point but not the exclusion of any of the others.

**The Right Honourable Lord Coulsfield**

Thank you. Taking it slightly out of order but I happen to hear there is a good deal of discussion about public education going on at table seven.

**[Delegate]**

Well yeah, just to pick up that point on education, notwithstanding Hazel Genn's reluctance to get involved in it, we were looking at it much more from a primary school and secondary school kind of angle, in particular, the introduction of the new curriculum for excellence which school children in Scotland have just begun and there is citizenship element of that course. We kind of envisaged that there may be some element of that which discussed obligations, rights, civil courts and

criminal court which were just kind of providing information at the appropriate level. Thank you.

**The Right Honourable Lord Coulsfield**

Was there anything else you were going to report on?

**[Delegate]**

Well yes, we are jumping away because theoretically we are answering the same group as table six but I can't honestly say that we answered the questions. The themes that we came up with are very much in relation to IT and the designability of having a court website which either diagnosed where you were going in the same way the current NHS website allows you to. To say I have a pain in my knee and it takes you through various questions which could theoretically lead you to a self-help remedy or have you actually tried writing to these people asking them to give you the money back or, depending on what answer you gave to another question, would you like to try mediation or answering another question would take you to a yes you should go to court answer. We were looking very much at the use of IT and also the possibility of just giving more information to people when they arrived at court. Sheriff clerks must have a list of cases that they know are going to call on court on a particular day. Could that be on a screen somewhere so that when you turn up at court you could look at it? Could you even print it off and stick it to the wall so that someone can look at it to work out which court they were going to be in? Even very simple things like the problems in Edinburgh sheriff court of having a little glass window and not knowing whether to go into the court. A sign on the door saying if you think you have a case in this court, come through the door because a lot of people apparently stand outside the door without the confidence even to go through. There is a lot of sophisticated and less sophisticated methods that could be introduced to make the systems better. That covers everything.

**The Right Honourable Lord Coulsfield**

Thank you very much. Well now to go back to table five.

**[Delegate]**

I think that picks up quite well on the issues we were discussing. We were answering the same questions as the first few groups around the different options that were set out in the Gill review. We agreed that they looked like a sensible set of proposals and, in some ways, it is unfortunate that they are coming forward at this time of financial constraint. Having said that, we think some of them could be taken forward without any significant costs attached to them:

- McKenzie Friends.
- I think the Court Service recognise that its website isn't the best and is something it is looking again at improving.
- The quality of support that is available in the courts where there are a lot of pressures and restrictions on what staff within the courts can do. I think we again

recognise that there is more we could do so there are options that we could do that would not be of significant costs.

I think we also discussed that there is potential to make better use of the resources that are within the current system in legal aid and other areas. If we could look on a justice wide basis we could recycle resources to try and discourage people from getting into the court system at all before they come forward. So I think we thought there were a lot of possibilities.

Picking up on what the first group were talking about, this was not something we covered in the group but more a request I was thinking about this morning and again this afternoon of recognising that the end of the process ends up with a poor group of judiciary and lawyers and officials sitting in a darkened room somewhere trying to turn this into rules. There's a need to recognise the challenge that is involved in that and trying to create simplified forms and simplified processes within the legislative environment. If we are wanting a completely different approach to how courts are run and the atmosphere within courts we need to be clear about why it is we want to do that and that that is our expectation for that group of people. We need to try and do that on a practical way and not set unrealistic expectations unless we are willing to back that up in practice once the rules start coming back from that.

### **The Right Honourable Lord Coolsfield**

Thank you very much. Table six.

### **[Delegate]**

Thank you. Our table was very taken, I think, with the flights of technological fantasy that are possible and I think we thought...(interruption – I can see a head being shaken at the back which I take it means it is not fantasy)...yeah, absolutely. We found it quite inspiring, maybe not thinking too much about who might make this happen and we discovered that those of us from the mediation movement and those from the Citizens Advice movement share a commitment to empowerment as a main feature. It takes us right back to something you said at the beginning Lord Coolsfield about a sense of powerlessness. So kind of applying that principle, we began to talk about the fact that there are lots and lots of people in this country who are empowered by their access to the web, who do their business in the middle of the night, who deal with a number of things in a number of ways and for many people it is actually highly empowering. We are also inspired by DirectGov. Anyone who has renewed their car tax online will discover that it is incredibly simple and they know if you have got your MOT and know if you have got your insurance. By very simple parallel we thought that a portal could lead us, as the question rather asks, to the courts but also to the range of dispute resolution options. For example, the idea that has been floating that you might have to say whether or not you would consider mediation before going to court could easily be dealt with so you could have a little box that you check and that box could open with some advice and information about

mediation then you have done that bit. There is a number of options that the technology might present us with. However, and I can imagine people are thinking this, at the same time there's a recognition of the need for a human face and a sense that this actually might lend itself very well to going hand in hand with in-court advisors or citizens advice bureaux or others so that you people who are a bit like NHS 24 I suppose. People do need and welcome the human intervention but they also seem to like taking things into their own hands when they have the sufficient knowledge to do so. I think that is pretty much where we went with this and we thought that this was doable and probably not that insurmountable and not that complicated to do. I think that is as far as we went.

### **The Right Honourable Lord Coulsfield**

Thank you very much. I noticed one or two references to NHS 24. I can speak with a little experience about this over the past eighteen months because I have had to contact them more than once. It is a good service but even there you have to know how you should approach it because it makes a big difference as you go on to telephone contact with NHS 24 if you know what kind of advice to ask for. It may not be obvious to those who organise it but it actually takes just a little bit of familiarity and a little bit of acquaintance with it and it makes it very much easier to navigate. There are lots of people whom I have met also of a similar connection who have found that despite the quality of NHS 24, it is still, for them, very difficult. So there are issues about how this sort of thing should be provided and not all of them can immediately link to the eye when you sit down and say how are we going to do this. Now that is one bit off my chest. Table 8

### **[Delegate]**

Yes, well we kicked over the traces and did all sorts of things like, first of all, we amalgamated groups eight and nine just so that we could not have any rivals and then we said well nobody has said anything about legal aid or legal expenses insurance here but they clearly don't want us to so we won't talk about it. We thought we were in favour of all the listed things so we thought well lets see how we can put them together and we said well lets start with PLE. PLE divides people because some people want it, as we know, in the schools and we were told that it is compulsory in secondary education to have a legal rights course so maybe that is a route to go. We thought, however, that in terms of just in time-ness which is generally argued to be what people want in terms of the main need, it might be helpful to have a general awareness of citizenship, but in terms of when they have the problem, the questions of just in time-ness to help them to recognise the problem and what to do with it, you need to be able to deal with that. Technology obviously has a role here and Crispin has talked about that, but how do people recognise that they have a problem that the law can do anything about? That is partly what Paths to Justice was about and we have had some suggestions about how we could do even more. Often it is triggered by an official communication so maybe more could be done in the official communication not just to say who could help with this but to talk about the portal by which help might come. Maybe even more of what we see in the TV and radio programmes -

if you have been affected by anything you have heard in this programme, here is the number to contact - building up a kind of direction to the portal.

Now you might think by this stage that we are definitely going for a single gateway, the single gateway solution and the answer is no. We thought that the single gateway would not work, it would be impractical. In the Netherlands they have thirty what are called legal counters which are bright, airy offices in thirty different parts of the Netherlands but we are much more spread out and rural community and it would be expensive to set up. So we did not actually go for the one stop shop, we were in favour of the one stop shop for law and medicine in certain instances but we thought the other way to go was community legal services. Of course we did know that community legal services partnerships had run into the ground. I am sorry to tell you Chairman we did what you wanted, we chose the one big thing, the elephant in the room, resources. The whole big problem with community legal services was that it ran into the buffers because of the amount of resource it observed of the Legal Service Commission. Up to a third of his staff and his budget was going down there and it just became unviable. Secondly, the real problem is, and all our community legal services initiatives are going to hate this, eventually you have got the planning, you have got the Paths to Justice research of legal need, we did the research on what services are available, you put them together and you get a mis-match. Then you say how are you going to transfer resources from A to B? That is where politics comes in and that is where the buffers come in and it is the big problem of how you deal with the resource crunches. Then you have the problem that the only way to make the community services work is to change the culture of organisations, to make the referral work, to get away from referral fatigue, to encourage organisations to change their culture on referral. But if their KPI's are telling them that if you give away a case, or if you settle a case you get less for it than if you actually take it to a tribunal and get some money for it or even more money for it, we think that there are incentives built into the KPI's for voluntary organisations which is again going to get in the way of building this network which we need.

Finally, the strategy, I am surprised nobody has spoken about the strategy. You need the strategy to link all the partnerships that are being built all together and who is going to do that? Well a combination of stakeholders but, as somebody else has said, coming at the wrong time where there isn't the money for it so we have to do more for less but we do believe that in-court advisors have to be kept and they have to be driven forward and a message to the Scottish Government "whatever else chaps, leave the in-court advisors alone".

### **The Right Honourable Lord Coulsfield**

Thank you very much. Now I do not know whether anybody at the table at the extreme back wants to report. Have you got something to report [delegate]?

**[Delegate]**

Yes, I'll just be very quick following that. I think one of the things we discussed was we felt it was a danger to approach the structures and then the support to go alongside that as two different things. We actually felt we need much better integration. We felt the Home Owner and Debtor Protection Act offered a good model for that in terms of court rules, looking at advice needs, information needs etc. Again, following on from what [delegate] said, we felt there was a need to be much more pro-active in looking at innovative ways to target people to make sure there was early intervention and access to information, advice and whatever support they required. One thing that we did feel the review had missed was about increased use of lay representation which we didn't feel was entirely captured by the McKenzie Friends point. Again, there had been some discussion around a danger of designing a system to be entirely without representation because we did feel some people would always need that support and we felt that actually lay representation was a middle ground between McKenzie Friends and solicitors. That's us. Thank you.

**The Right Honourable Lord Coulsfield**

Thank you very much. Well I think we have now reached the point where it says wrap up and close in the programme and that is what falls to me to do. Can I say how immensely grateful I am and how immensely grateful we are to all of you for the time and trouble you have taken in coming here in joining in these discussions, in contributing in the way that you have. I did note, as I'm sure you did with some pleasure, what Hazel said about how satisfactory it is to come to Scotland and have things properly discussed. Thanks to you for all the contributions you have made. I will say, however, that we are not letting you off the hook entirely because we do hope that you will not think you have done everything you need to do just by coming here. There is also the consultation and we would welcome contributions, comments of all kinds and I think the comments you will be able to offer, having had the benefit of all of this discussion, may be of particular value to us so please, if you can, put something on the paper, however, short, and we will be delighted to have that.

Finishing off now, I think there is just one point left which will amuse me and perhaps interest you to make. I have tried on one or two occasions I think I have told members of the Consumer Focus Organisation about the late Lord Kissen as a Judge and some of you may remember him, I do vividly. Lord Kissen was a man of immense energy, immense enthusiasm and a short temper. He did not usually do this with witnesses but with the counsel. He used to, under extreme tension, pick up the pencil he was using and break it, shouting to counsel "Be fair to yourself Mr whoever it is. You are not making an argument like that in my court". And the strange thing was that litigants quite liked him and the reason he liked him was because he cared and that was why he could not stand a bad argument being presented to him. He would also prepare the case before, he always knew what it was all about and bad arguments which were bad for justice just drove him up the wall and it came across. I tell that because I think that one

of the important things which we have to keep in mind when we are discussing matters of this kind is that it is a system of justice that we are dealing with and justice matters and that is one target that we must not forget. So thank you all very much indeed. We are enormously grateful and we look forward to your further assistance and we hope that you will be able, I am sure on the basis of the discussion we have had, to make some useful contribution to this discussion. Thank you very much.