# Ensuring effective access to appropriate and affordable dispute resolution

## Response of the Scottish Legal Aid Board

1. Drawing on the principles underpinning the review, as outlined in section 4a, 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?
2. What structures would best support such a process or processes?

The research commissioned by the Board and Consumer Focus Scotland into the experiences of court users clearly described the trepidation with which many parties attempted to navigate the current court system. This was true even amongst those that had been advised by an in-court adviser or were supported by legal aid. The experience of those that had not sought or received such support might be expected to be worse. If those with low value claims are to be encouraged to pursue or defend them alone, or with limited support, the court process needs to be designed and operated in a way that enables them to do so.

Clearly the courts need to remain neutral in any dispute between parties, but this does not to us appear to mean that procedural assistance cannot be provided. The court should be able to remain neutral in terms of providing a judgement as to the merits of any claim before it while at the same time being more inquisitorial to ensure that its judgement is based on as complete an insight into the issues at dispute as possible. This is how many tribunals operate and, while it enables those without professional representation to participate fully in the proceedings, it does not seem to call into question the tribunal's impartiality.

Such an approach would facilitate participation, leading to a greater sense of fairness for litigants whatever the outcome. For some classes of case earmarked for the third tier, rates of participation are at present very low, such as repossession and eviction proceedings. Improving rates of participation is likely to lead to fewer cases being recalled as well as reducing the injustice of people losing their homes where this could have been prevented. The costs of providing professional representation for all of these people appears likely to be significantly higher than the cost of developing accessible court procedures such that representation is only required in more complex cases.

Court rules and procedures need to be able to accommodate a range of types of case from the very straightforward to the most complex. Nevertheless, it appears that much could be done to make rules and the procedures and forms that flow from them more transparent and user-friendly, in recognition of the fact that many of those following the rules may not be lawyers, but parties pursuing their own claims or defending those brought against them.

Seen from a user perspective, the information made available to those with cases in court, both in advance and on the day, could do far more to put people at ease while also making clear that rules exist and need to be followed. Simple, practical steps, could hugely improve the party litigant experience, such as better signage in court to

ensure that cases don't call while one of the parties is waiting outside the court room, unsure whether to enter.

Some of these measures could be adopted within the existing court structures, but the creation of a separate tier, dedicated to the cases most likely to involve self-represented litigants, offers an excellent opportunity to address the issues set out above.

3. Are the proposals in the review the best means of resolving the cases identified as falling within the remit of the proposed third tier and new simplified procedure? What are the strengths and weaknesses of the proposals? Can any better forum or procedure for these cases be identified?

The review's proposals for the third tier and the simplified procedure seek to address the problems identified above and in the current consultation. As such, they mark a welcome departure from the current system and offer hope that the cases most likely to bring members of the public to court will be dealt with in a way more suited to their probable lack of experience of such matters.

The arguments in relation to the inclusion of individual aspects of the proposed district judge's jurisdiction are finely balanced. For example, it remains arguable that a housing tribunal would be just as appropriate a forum for determination of eviction and repossession cases. The argument that these are matters of great importance cannot be denied. Whether that leads inescapably to a conclusion that a court rather than a tribunal must decide them is another matter. Few would argue that the kinds of employment matters dealt with by the employment tribunal, and especially the employment appeal tribunal, are either trivial or straightforward. Similarly, the issues dealt with by the immigration and asylum chamber of both first tier and upper tribunal are often matters of life and death.

The further argument against a separate housing tribunal is one of cost. Again, it is debatable whether the establishment and subsequent running of a new housing tribunal (or an expansion of the role of the Private Rented Housing Panel) would cost more or less than the creation and running of the third tier.

The Board is also concerned that the proposed concurrent jurisdiction with the sheriff court on most family matters may make the system more rather than less confusing. More broadly, the Board is concerned that child-related family actions, such as contact and residence, form the largest – and growing – categories within civil legal aid. These cases often seem to run on for a very long time and are costly, such that the recent increase in volumes is likely to be unsustainable in legal aid terms.

The Board does not feel that the review looked as broadly as it might at alternative means of resolving such family disputes. While the review proposes greater encouragement and facilitation of mediation, the underlying assumption is that any such alternative form of assisted negotiation and settlement can only be seen in the context of, and as complementary to, the courts. As quoted in the review itself, Hazel Genn has argued that "the background threat of litigation is necessary to bring people to the negotiating table". While this may be true, that does not mean that the civil

courts, either as currently structured or in the form proposed in the review, are the only possible forum for that litigation and, ultimately, adjudication.

Child-related disputes clearly take place within a well-developed legal framework of rights and responsibilities, but much of what is at issue is social rather than legal in nature. The Board questions whether the courts – or the approach the courts have traditionally taken to such matters – are the most effective or efficient means of bringing these disputes to a workable and sustainable conclusion (either negotiated or adjudicated). Given the nature of the issues, it seems strange that there has not been more debate about the development of an accessible, interventionist and inquisitorial forum for the resolution of child-related disputes. Such a forum could encourage the participation of the parties and lessen the need for legal representation, at least a far as child-related matters were concerned.

While recourse to the courts on appeal would still be available, a separate forum, perhaps in the form of a tribunal, would free the courts of the great bulk of these cases. It could also be avowedly settlement focused, encouraging mediation where appropriate but able and willing to provide an adjudicated resolution where no settlement was forthcoming.

Finally, the Board is concerned that the inclusion of summary criminal matters within the jurisdiction of the district judge could bring the same pressures on civil business currently seen in the sheriff court into the third tier. While the review's proposals on management of business and allocation of judges should alleviate this problem, the risk is still present.

In addition, the worrying levels of apprehension felt by many of the court users interviewed as part of the research quoted in the consultation paper are likely to flow at least in part from the association of criminal and civil courts in party litigants' minds. We agree that the courts require a degree of solemnity and respect to ensure that business is conducted in a proper manner and the judge is accorded the authority required. However, we do not feel that, for the kinds of business proposed for the third tier, these characteristics are more important than accessibility and openness. There is a risk that a continuing association with criminal business will lead those with cases in the civil third tier to the same fears and associations as appear prevalent in the sheriff court.

4. Can/should greater links be made between different forms of dispute resolution, including the courts, administrative justice and alternative dispute resolution? What would be the purpose of doing so, and how might it be done?

As suggested above, we see significant positives in the way in which business is conducted in some tribunals, and feel that these approaches could either form the basis for new fora and procedures to deal with much of the business proposed for the third tier or could make the third tier itself more accessible to party litigants. We have also observed that ADR can mean both various forms of assisted negotiation and settlement and other forms of adjudication. All of these approaches can be seen as part of a civil justice system, with each complementing the others to offer a pluralistic approach to dispute resolution.

5. Does the package of measures/assistance to support citizens to have appropriate access to justice via the courts or other routes, as proposed in the civil courts review report (such as self-help, public legal education, McKenzie Friends and in-court advice services) represent the best way forward?

Each of the measures proposed in the review has its place in ensuring that those seeking to resolve disputes and use the courts are better able to do so. The Board believes that promoting self-help, or assisted self-help, has much to offer as a cost-effective and proportionate means of helping court users. For claims of low value, it is not only the cost of the forum that should be seen as proportionate, but also the cost of accessing the forum to the parties. In other words, just as it may be seen as disproportionate for a fully trained sheriff to adjudicate over a broken kettle, so must it be disproportionate for the aggrieved consumer to have to pay for a professional to either represent or guide them through the process of being reimbursed.

Public legal education, well conceived and delivered, has great potential to equip people better to recognise both the existence of a problem about which something may be done, but also how to go about doing it. While often thought of in terms of school curricula and leaflets, PLE can be both more direct and more interactive. Well-written web materials can help those with problems to ‘self-diagnose’ and start the process of resolution, enabling action to be taken at a far earlier stage than most people would seek formal advice.

Similarly, proactive group advice sessions for tenants in areas of poor housing or endemic housing debt, or for employees in works that are about to close, can help people avoid problems, or recognise and address them as soon as they arise. Such strategies relate directly to current or imminent problem experience: this kind of ‘just in time’ PLE, rather than ‘just in case’ PLE, is likely to be of more direct (and measurable) benefit.

To the extent that problems are resolved at this stage – well before court proceedings may even be considered – the individual is helped to avoid consequential problems, the more formal civil justice system is able to reserve its capacity for other cases and no or reduced direct cost is incurred in assisting the person resolve their problem. Such measures are therefore both effective and cost-effective.

For those who have not been able to address their problems before they become formal disputes, in-court advice is a hugely valuable last-minute source of assistance. As the research quoted in the consultation paper demonstrates, many individuals are ill-equipped to navigate the court system without some assistance, yet many either choose to do so because they expect it to be easier than it turns out to be, or they have no choice but to get involved as defenders. While it would always be preferable for someone to seek advice before finding themselves in court (and this may be something that PLE improves), it is inevitable that many will put it off until the last possible minute.

The intervention of an in-court adviser can mean that a case is able to progress rather than being abandoned, or a defence can be lodged rather than decree being granted in absentia. As a form of assisted self-help, in-court advice (and Mackenzie friends) can reduce the burden of party litigants on the courts, helping cases run more smoothly. It

is to be hoped that the third tier adopts processes and procedures that are more accessible to the average citizen. While some will always need support, as even the simplest of procedures cannot compensate for what may be complicated circumstances, it is to be hoped that there may be some reduction in the pressing need for assistance demonstrated by the level of demand on existing in-court advisers.

6. Are there additional/alternative measures to those suggested that would be appropriate?

The discussion paper specifically avoids wider issues to do with legal aid and advice more widely. Nevertheless, these have to be seen alongside the types of assistance set out in the review. The various services complement and support each other: in-court advice picks up cases that don't make it to traditional advice agencies, but may refer cases back for further assistance once they have called in court; PLE may help people identify appropriate sources of help and advice; legal aid can support cases that cannot be resolved in other ways.

This is the approach the Board has taken to the development of its grant funding programme, which is specifically designed to help address the impacts of the economic downturn. We have sought to create a network of provision that promotes early intervention but ensures that court-based assistance is also available across the country. Different forms of lay and legal provision, including solicitors directly employed by the Board, complement each other and actively refer clients to other sources of assistance, including private practice lawyers operating within the traditional legal aid system.

However, we believe that an even more proactive and joined up approach can have greater benefits still. The development of the Home Owner and Debtor Protection (Scotland) Act 2010 provides a positive example of an approach that seeks to change substantive law, court procedures and sources of assistance as part of a joined up package. This approach promotes early resolution by requiring lenders to follow a pre-action protocol before bringing court proceedings.

The Repossession Advice Group, chaired by the Board, has brought together lenders, the courts, solicitors and advice agencies to identify ways in which the whole process can be coordinated to ensure that individuals struggling with mortgages are better able to participate in the process, with better information on their rights and responsibilities as well as sources of advice provided at an early stage. The aim of this approach is to reduce the number of problems that turn into court proceedings. This then enables the resources of the courts and more resource intensive forms of assistance to be targeted on those cases than have not proven amenable to earlier resolution.

The Board believes that this proactive approach can be replicated more widely by identifying the root causes of many of the actions that appear in court. For example, many rent arrears cases end up in court where earlier engagement between landlord and tenant may reveal that perpetual arrears are in fact technical i.e. the tenant is always late with payment (and therefore in arrears at some point every month) because the rent due date is a few days earlier than payment of housing or other benefits. This may be amenable to some form of resolution by adjusting one or other

date, but at present such cases are often in court before this information comes to light. Working with lenders, landlords, employers, public agencies, etc may be a fruitful and hugely cost-effective way or reducing the incidence of justiciable problems and increasing the early resolution of those that do arise. Such work, as part of a package that includes PLE, effective access to appropriate sources of advice and accessible court procedures has potential to free the courts of many of the high volume, relatively low value claims that are such a drain on resources at present.

7. Given the likelihood of future funding constraints, are any particular priorities for support required?

If one were starting with a blank sheet of paper, it would make sense to prioritise prevention and early intervention. Scarce resources are perhaps best spent on high impact, low investment activities. Lawyers and courts are expensive resources at a case by case level: if early, low cost intervention can obviate the need for at least some of the more expensive court cases supported through legal aid and the court system, it is likely to pay for itself several times over.

This is not to say that cheaper advisers can do the same job for less. Rather, by performing a different function at an earlier stage, the need for more expensive interventions is reduced. On the face of it, therefore, an increasing share of what are likely to become ever-scarcer resources should be targeted at early intervention and informal resolution of disputes.

However, we are not starting with a blank sheet of paper. It will take some time for PLE and other measures to have effect, and in the meantime cases will continue to come to court, calling out for higher intensity intervention. Reducing the level of resources available for this purpose would severely restrict the already over-stretched assistance for those within the formal civil justice system. The Board would suggest that such a shift in resource allocation must coincide with – and reflect – changes to the civil justice system itself. In other words, the measures set out in the review are most likely to have their desired effects if they accompany the reforms to court procedures etc set out in the review. At that stage, it might be hoped that the need for more formal assistance might itself reduce, enabling resources to be ploughed into preventative work.

8. How can we ensure that citizens have access to other appropriate routes to justice, for example through self-help remedies or alternative dispute resolution?
9. What relationship, if any, should there be between these services and the courts?
10. How should a strategy for such assistance be taken forward?

Options such as mediation need to be available and visible to those considering or in the middle of court action, preferably at an early stage. While mediation is not suitable for all cases, nor should it always be assumed that litigation is the gold standard, particularly as argued above in relation to child-related family matters. The proposals set out in the review seem to be a balanced way of facilitating and encouraging consideration of mediation without creating additional and perhaps unnecessary barriers for those who have made an informed choice to litigate.