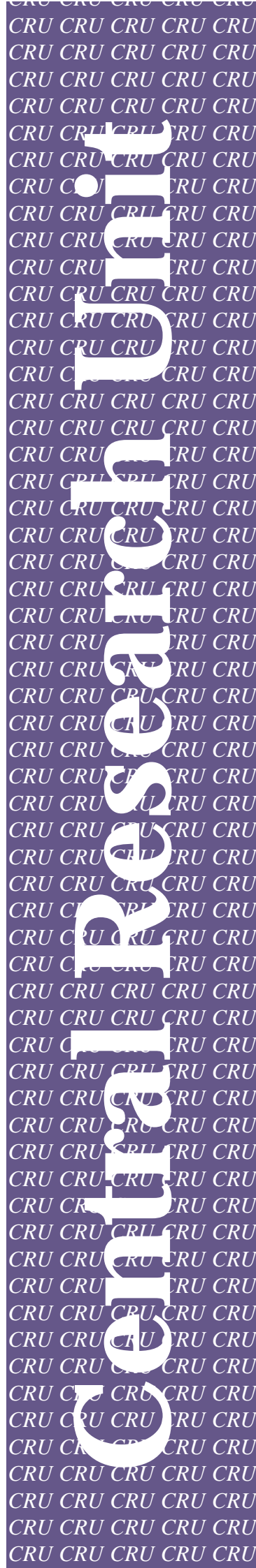


**SUPPORTING
COURT USERS:
The In-Court Advice and
Mediation Projects in
Edinburgh Sheriff Court**

RESEARCH PHASE 2



SCOTTISH EXECUTIVE



**SUPPORTING COURT USERS:
THE IN-COURT ADVICE AND MEDIATION PROJECTS
IN EDINBURGH SHERIFF COURT**

RESEARCH PHASE 2

Elaine Samuel

**Department of Social Policy
University of Edinburgh**

**Scottish Executive Central Research Unit
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EXECUTIVE SUMMARY

CHAPTER ONE THE IN-COURT ADVICE PROJECT

Introduction to the Research

The In-court Advice Project was introduced into Edinburgh Sheriff Court in April 1997, and was the first service to be established in a Scottish court that provided court users with legal and other advice. The Project was initially funded by the European Commission for a period of one year, and research was conducted to monitor the Project over the first nine ninths of its operation¹. Significant changes to the Project followed. A mediation service, (henceforth known as the Mediation Project) and Mediation Coordinator were formally linked to the In-court Advice Project in 1998, the Scottish Executive Justice Department took over Project funding in 1999 and the number of clients using its services increased substantially over the period. Phase 2 of the research took exactly one year from where Phase 1 left off and the Project was monitored for a period of nine months- from three quarters of the way through its second year to midway through its third year. This second phase of the research was conducted to inspect the new mediation component of the Project: to examine the Project's continued impact on court users, the sheriff court and the civil justice system, and to assess the Project for its achievements in its first three years.

Background to the In-court Advice and Mediation Projects

The need for a court based advice service was identified when small claims procedure was first introduced into the Scottish civil justice system in 1988. The disadvantages that unassisted litigants face in small claims and summary cause actions, as well as in housing repossession cases, have been well documented since then. In recent years, unassisted litigants have been appearing in court with increasing frequency as eligibility for legal aid and access to legal representation have become more difficult. These trends have had implications for efficiency in the sheriff court as well as for access to justice.

The proposal for a court based advice service was initiated by the Scottish Consumer Council and Citizens Advice Scotland. With support from Scottish Courts Administration, they were successful in securing funding from Directorate-General XXIV of the European Commission for a pilot project which, initially, was to run for one year. The establishment of a pilot project in Edinburgh Sheriff Court was triggered by the Sheriff Principal's intimation of his willingness for a court-based advice service to be based there.

Though located in Edinburgh Sheriff Court, the In-court Advice Project is independent of Edinburgh Sheriff Court and managed by both Citizens Advice Scotland and the Scottish Consumer Council. The Project is under the guidance of a steering group chaired by the Sheriff Principal of Lothian and Borders, Sheriff Principal Gordon Nicholson QC, and includes representatives of sheriffs and sheriff clerks in Edinburgh Sheriff Court, Scottish Executive Justice Department, Citizens Advice Scotland, the Scottish Consumer Council, Edinburgh Central CAB, Community Help and Advice Initiative (CHAI), Edinburgh Bar Association, Scottish Legal Aid Board and the Scottish Executive Central Research Unit.

¹ Samuel, E. (1999) *Supporting Court Users: The In-Court Advice Project in Edinburgh Sheriff Court*: Edinburgh: The Stationery Office. See also *Research Findings 22: Supporting Court Users*, www.scotland.gov.uk/cru/resfinds/1s22--00.htm

The Project first opened its doors to clients on April 7, 1997 and has employed a full time worker (managed by Edinburgh Central CAB) ever since. The main remit of the In-court Adviser is to offer advice to unassisted litigants in small claims, summary cause (including housing) and ordinary cause actions where The Debtors (Scotland) Act 1987 applies, and to refer them on to appropriate agencies when necessary. Court representation is only offered in emergencies.

In the following years, there were important changes to the In-court Advice Project. A mediation service - known as the Mediation Project - had been established in 1995 and was operating out of Edinburgh Central CAB. This was formally linked to the In-court Advice Project in 1998 with joint funding provided by Directorate XXIV of the European Commission. The Scottish Executive Justice Department took over the funding of the entire Project in 1999. In the meantime, the number of clients consulting the Project increased significantly. As the service grew, the Project also employed other part-time and voluntary staff. This included the coordinator of the Project's mediation services who was concurrently employed by Edinburgh Central CAB. These changes took place against a background of renewed efforts to promote access to justice while achieving value from the legal aid fund. Government proposals for distributing publicly funded legal services more equitably and rationally were disseminated for consultation through the Scottish Office's *Access to Justice—Beyond the Year 2000: A Consultation Paper on Civil Legal Aid*².

CHAPTER TWO PHASE 2 RESEARCH: AIMS AND METHODS

Background to Phase 2 research: Phase 1

Even as the In-court Advice Project was being introduced into Edinburgh Sheriff Court, research was designed to monitor its operation over its first nine months (April-December 1997). The study (henceforth referred to as Phase 1 research) was undertaken to assess the demand and need for the Project's services, to evaluate the Project for its capacity to deliver advice and support to unassisted litigants, and to explore its impact on the court, court practitioners and the civil justice system. The findings of Phase 1 research were reported in *Supporting Court Users*³ and may be briefly summarised, as follows:

- There was a large demand for the services of the In-court Advice Project, with the number of clients increasing dramatically over the first nine months of the Project.
- The Project was able to cope with demand by devising methods that encouraged clients to seek advice outwith court time.
- Clients provided the Project with a powerful endorsement, particularly for the court related support and assistance which they had received.
- Just under 80% of clients faced legally represented opponents.
- The Project promoted justice and efficiency in the Sheriff Court.
- The close working relationship that had developed between the Sheriff Clerk's Office and the In-court Advice Project was crucial for the success of the Project

² Scottish Office Home Department (1998) *Access to Justice-Beyond the Year 2000: A Consultations Paper on Civil Legal Aid*, Edinburgh

³ Samuel, E. (1999) *Supporting Court Users: The In-Court Advice Project in Edinburgh Sheriff Court*, Edinburgh: The Stationery Office. See also *Research Findings 22: Supporting Court Users*, www.scotland.gov.uk/cru/resfinds/1s22--00.htm

- The Project filled a gap in the civil justice system by offering services which few other agencies were providing.
- The Project contributed to the civil justice system by forging links between agencies and by promoting a sense of justice and inclusion through its support of court users.

Phase 2 research: Aims and objectives

Phase 2 research was undertaken to monitor the operation of the In-court Advice Project since its establishment in Edinburgh Sheriff Court as well as to provide information on the newly linked Mediation Project. Phase 2 research was more limited in scope than Phase 1 and focused on the volume of business, type of business and type of client dealt with by the In-court Advice and Mediations Projects, as well as the role which both Projects played in the sheriff court. It collected information on the In-court Advice Project relating to the business that it conducted three quarters of the way through its second year until midway through its third year (1 December 1998 and 31 August 1999), and made comparisons with Phase 1 findings relating to the Project's first nine months in Edinburgh Sheriff Court.

Phase 2 research: Information collected

Three main types of information were collected in Phase 2 of the research:

1. Information was collected from In-court Advice Project records relating to 1648 consultations conducted in the nine month period up to 31 August 1999. Comparisons were then made with information collected in Phase 1, which related to 893 consultations conducted in the first nine months of the Project. This information was collected to monitor the business of the In-court Advice Project over its first two and a half years.
2. Detailed information of services provided by the Mediation Project between 1 December 1998 and 31 August 1999 was collected. This comprised information on all In-court Advice Project clients referred to the mediation service and was collected from the In-court Advice Project's client records. It also comprised information collected from separate Mediation Project client records maintained by the Mediation Coordinator. This information was collected to monitor the business of the newly linked Mediation Project.
3. Interviews were conducted with In-court Advice and Mediation Project workers; sheriffs; sheriff court employees; sheriff court practitioners (solicitors and City of Edinburgh Council Housing Department); and representatives of advice agencies and mediation clients. Altogether, 23 interviews were conducted to supplement quantitative information collected in 1. and 2. above.

Research Findings

CHAPTER THREE IN-COURT ADVICE PROJECT BUSINESS

In the nine month period covered by Phase 2 of the research, the In-court Advice Project conducted 1648 consultations with 1017 clients. Compared with the Project's first nine months, this represents a 66% increase in consultations and a 50% increase in clients passing. The rise is particularly marked in housing repossession cases, with consultations increasing by 90% (from 452 to 857) and clients by 61% (from 382 to 615) over the two periods. Consultations and clients relating to summary cause procedure rose by over 100% (from 70 to 147) and just under 50% (from 46 to 66) respectively. The most marked increase was in consultations and clients

relating to The Debtors (Scotland) Act 1987 (rising from 4 to 129 consultations and from 3 to 63 clients). The slowest growth between Phase I and Phase II was amongst consultations relating to small claims procedure (from 326 to 436) with the number of clients showing very limited growth (from 211 to 225). These figures are reflected in the kinds of disputes brought to the In-court Advice Project. Over the two periods, there was a very marked increase in clients involved in cases brought by local authorities against their tenants and by finance companies against debtors. At the same time, there was some decrease in the number of clients involved in cases brought by consumers against businesses.

Almost two-thirds of Project clients consulted with the In-court Adviser only once and they were mainly defenders involved in housing repossession actions. 80% of all consultations were with defenders, compared with 73% at Phase 1. The proportion of Project clients facing legally represented opponents increased between the two research periods, from 79% (529) to 83% (834) of all clients. This reflects the increasing number and proportion of clients who were involved in housing repossession cases brought by the City of Edinburgh Housing Department.

Defenders in housing cases were mainly referred to the Project by information which the City of Edinburgh Housing Department agreed to insert into summonses. As the number and proportion of Project clients involved in housing repossession cases increased, so too did the number of clients referred to the Project by these inserts. Some time after the completion of Phase 1 research, the Ordinary Cause section of the Sheriff Clerk's Office began to insert information about the In-court Advice Project into summonses relating to the Debtors (Scotland) Act 1987. This was the chief source of referral of clients seeking advice on matters relating to the Debtors (Scotland) Act 1987, and made a very considerable impact on the number of these clients. As the first port of call for many persons raising - or thinking of raising- a small claims action, the Sheriff Clerk's Office continued to be the chief source of referral of clients with matters relating to small claims. In contrast with Phase 1, In-court Advice Project workers were more likely to refer clients attending court than the Clerk of Court. Improved resourcing provided the Project with an opportunity to approach most party litigants as they entered and departed from court.

The number of consultations conducted prior to cases calling in court and outwith court time doubled between the two research periods (from 409 to 814) and slightly increased as a proportion of all consultations (from 46% to 50%). There was some increase in the proportion of first consultations conducted prior to cases calling in court. This was more noticeable amongst pursuers (increasing from 58% to 66%).

Main Findings

- The demand for services provided by the In-court Advice Project increased steadily from the time it was first introduced. The most marked increase was in clients consulting on matters relating to The Debtors (Scotland) Act 1987. Clients involved in housing repossession cases showed a substantial increase and were responsible for one half of all consultations conducted with the In-court Adviser.
- Inserts in summonses were a most effective method of referral to the In-court Advice Project.
- The In-court Advice Project was successful in meeting rising demand for its services without significant expansion of its operation.
- This was made possible by more clients seeking advice prior to their cases calling in court and outwith court time and seeking advice only once.

CHAPTER FOUR MEDIATION SERVICES

In the nine months under review, the In-court Advice Project referred more than one quarter of all 372 small claims and summary cause clients (not including housing repossession cases) to its mediation service at the Mediation Project. Altogether, 151 clients were referred to the Mediation Project. Most of them were referred by the In-court Advice Project (99), almost two thirds of them prior to raising an action or prior to their cases calling in court. Some clients were referred by the Mediation Coordinator (18) and Edinburgh Central CAB (15) and a few were referred by sheriffs (5).

Referrals to the Mediation Project were most typically individuals involved in cases against small businesses (35%), individuals involved in cases against other individuals (26%) and small businesses involved in cases against other small businesses (19%). Only one client referred to mediation was legally represented, though 47 (34% of referrals) were involved in cases where the other party was legally represented. The large majority of cases involved monetary claims (over 80%), followed by disputes over products and services (9%), damages or personal injury claims (9%).

More than half of the 151 clients (or 'first parties') referred to the Mediation Project agreed to take up mediation while another 10% agreed to arms-length negotiation. Following agreement, the other party (or 'second party') was contacted. One half of all 'second parties' contacted agreed either to mediation or arms-length negotiation. Where both parties agreed to their involvement, the Mediation Coordinator usually attempted to facilitate a settlement prior to fixing a hearing date. The Mediation Project was successful in bringing to a conclusion one quarter of all cases referred to it.

Of the 151 cases referred to the Mediation Project in the nine month period under research, a settlement was negotiated by the Mediation Coordinator in 21 cases and a settlement reached at a mediation hearing in 20 out of the 22 cases that went to a hearing. Most mediation hearings took place in Edinburgh Central CAB and were conducted on a *pro bono* basis by mediators trained by the Centre for Dispute Resolution or by the Law Society of Scotland. A negotiated settlement was more likely to be reached by 'arms-length' negotiation when clients were individuals, and by a mediation hearing when clients were small businesses. Mediation hearings were found to be

most appropriate when parties desired to maintain relationships (whether personal or business) over the long term.

Main findings

- The mediation component of the Project provided unrepresented disputants in small claims and summary cause cases with an alternative to litigation.
- The Mediation Coordinator helped as many clients settle their disputes by arms-length negotiation as by fixing a mediation hearing.
- Almost all mediation hearings conducted were concluded with an agreement, and all agreements were thought to have been honoured.

CHAPTER FIVE THE WIDER CONTEXT

Sheriff Court Employees

Phase 2 research found that the In-court Advice Project had raised its profile in the sheriff court, particularly amongst sheriffs. Sheriffs reported that they now had greater confidence in the information that unrepresented litigants put before them. They were aware of the way in which the Project was helping clients to focus on issues relevant to the case and assisting them in presenting their case in court. They welcomed the Project for providing unrepresented litigants with the opportunity to achieve higher levels of participation, control and understanding of court procedure, and for promoting a level playing field in court.

The co-operative links established between the In-court Advice Project and the Sheriff Clerk's Office in the first months of the Project continued to thrive and were crucial for the Project's success. At the same time, sheriff clerks and other staff reported that the Project contributed to the streamlining of services provided by Clerks of Court and by the Sheriff Clerk's Office. Both sheriffs and sheriff clerks endorsed the Project for its contribution to the efficient use of court resources and court time.

Other Sheriff Court Players

The research found interesting attitudinal changes amongst solicitors who had faced Project clients. During Phase 1, their primary response was to hold the Project responsible for time wasted in court. By Phase 2, however, they not only acknowledged that court was proceeding at a quicker pace in view of the substantial number of unrepresented litigants being advised, but also that the Project was of assistance to them at several stages in the proceedings. This was because problems faced by solicitors in dispute with unrepresented litigants were being addressed by the presence of the Project. Through the In-court Adviser and Mediation Coordinator, the Project provided them with an opportunity to negotiate with unrepresented litigants both prior to cases calling in court and on the day.

The highest proportion of Project clients faced the City of Edinburgh Council's Housing Department and its in-house legal staff. The Housing Department reported that the Project was responsible for improving efficiency largely because of an increase in the proportion of defenders in housing repossession cases making contact with it before their cases called in court.

The Advice Sector

Most small claims and summary cause cases were dealt with by the Project without referring clients to other agencies. The Project mainly referred clients who were involved in housing repossession cases, as well as some defenders with debt problems. There were variations between advice agencies as to the quality and consistency of their information on the take-up of referrals. There was almost universal agreement between them, however, that higher take-up rates could be achieved through more directive referrals and an appointments system.

CONCLUSIONS

The In-court Advice Project continued to provide services designed to assist unrepresented court users, many of whom were facing legally represented opponents in court. The Project was successful in reaching a large number of court users and assisting them in understanding the issues that had brought them to court, the options that were now available to them, the ways in which they could present their case most effectively in the court, the implications of their court hearings and what actions they were now required to take. The In-court Advice Project therefore contributed to the promotion of active and inclusive citizenship in the population served by Edinburgh Sheriff Court.

The In-court Advice Project augmented its services to persons without legal assistance by formally introducing a mediation component. While the In-court Advice Project assisted unrepresented litigants in court, its mediation component was instrumental in assisting unrepresented litigants and claimants outside the court. The mediation service provided them with a non-litigating option for resolving their disputes and assisted them in taking this option either by 'arms-length' negotiation or at a mediation hearing. The success of the mediation service highlights a need that is less visible than the needs of unrepresented litigants appearing in court, namely the needs of claimants for assistance in initiating and conducting negotiation. Indeed, unrepresented litigants may often choose litigation over negotiation because negotiation is not perceived to be available to them. This perception is occasionally inaccurate and very often accurate. Paradoxically, lawyers usually opt for litigation only once negotiation has failed. They, too, often find it difficult and inappropriate to negotiate with unrepresented litigants. This explains why solicitors representing parties in dispute with Project clients often welcomed the opportunities for negotiation that the In-court Adviser and Mediation Coordinator provided.

The In-court Advice Project addressed problems raised for the court by the presence of unrepresented court users. The Project contributed to the performance of judicial duties by assisting unrepresented litigants in presenting their cases to the court. There was therefore greater confidence that judicial decisions were being made on the basis of accurate and relevant information. The In-court Advice Project also appeared to optimise court resources by smoothing the passage of unrepresented litigants through the sheriff court, by helping them to get quickly and accurately to disputed issues, and by diverting some cases from the court.

Many of the research findings reported here are of relevance to issues identified in the Scottish Office consultation paper *Access to Justice: Beyond the Year 2000*⁴. In particular, the research provides a basis for discussion about the provision of community legal services in Scotland and the arrangements that may be made for improving and strengthening the provision of accessible advice and assistance on legal problems within communities. The In-court Advice Project in Edinburgh Sheriff Court piloted new arrangements for targeting unmet need and delivering legal

⁴ As above

services in Scotland. With its new mediation component, these services related not only to assistance in court and assistance with litigation, but also to assistance in resolving disputes through negotiation.

CHAPTER ONE THE IN-COURT ADVICE PROJECT IN EDINBURGH SHERIFF COURT

1.1 THE IN-COURT ADVICE PROJECT: PHASE 2 RESEARCH

1.1.1 The In-court Advice Project is the first court based advice and mediation service to be established in Scotland and is substantially broader than any court-based advice and representation duty scheme previously established in England.⁵ The In-court Advice Project was introduced into Edinburgh Sheriff Court in April 1997, when it first began to offer its services from a room adjacent to Court 14, where hearings on small claims and summary cause actions are held. The Project was initially funded by the European Commission for a period of one year, and research was conducted to monitor the Project over the first nine months of its operation. The findings of this initial research phase were reported in *Supporting Court Users: The In-Court Advice Project in Edinburgh Sheriff Court* and is henceforth referred to as Phase 1 research.⁶

1.1.2 Significant changes to the In-court Advice Project followed. A mediation service was formally linked to the In-court Advice Project in 1998, the Scottish Executive Justice Department took over its funding in 1999 and the number of clients using In-court Advice Project services increased substantially over the period. The expansion of the Project, both in the volume of business and its scope, warranted a second phase to the research. The research now being reported here took up exactly one year from where Phase 1 research left off and monitored the Project for a period of nine months - from three quarters of the way through its second year to midway through its third year. This second phase of the research was conducted to inspect the new mediation component of the Project, to examine the Project's continued impact on court users, the sheriff court and the civil justice system, and to assess the Project for its achievements over its first three years.

1.1.3 The rest of this chapter documents the origins of the In-court Advice Project, describes the setting up and management the In-court Advice and Mediation Projects, charts the emerging links between both projects and concludes by examining their respective remits.

1.2 THE IN-COURT ADVICE PROJECT: CHARTING ITS ORIGINS

Small claims procedure and the identification of need

1.2.1 The need for a court-based advice service was identified at an early stage in the implementation of small claims procedure. This was introduced into the Scottish civil justice system in November 1988. Though small claims procedure was designed to give special support to unrepresented or 'party' litigants, research conducted to monitor its implementation showed that only a small proportion (less than 10%) of those raising actions under the procedure were small business or non-corporate litigants. Indeed, the majority of litigants were found to be represented by solicitors at all stages of their small claims actions (Jones et al, 1991). The research found problems encountered by party litigants relating to, amongst other things, raising

⁵ According to the National Consumer Council (1992, p.1) 30 schemes were operating in England's 267 county courts at the time of publication.

⁶ Samuel, E. (1999) *Supporting Court Users: The In-Court Advice Project in Edinburgh Sheriff Court*: Edinburgh: The Stationery Office. See also *Research Findings 22: Supporting Court Users*, www.scotland.gov.uk/cru/resfinds/1s22--00.htm

actions, 'contested' preliminary hearings and full hearings. Though sheriff clerks were found to play a supportive role, this was restricted by their remit to provide advice on procedural matters alone. Lay and legal advisers identified the need for "either a rota of advisers at the court or an in-court adviser to assist unrepresented litigants at preliminary hearings, and possibly even full hearings" (ibid.: 66). In reporting its findings on the implementation of small claims procedure, the research team proposed the introduction of an in-court adviser in one of the larger urban courts on an experimental basis.

1.2.2 Glasgow Sheriff Court was first identified as the location for a pilot in-court advice service. By December 1992, the Scottish Consumer Council and Citizens Advice Scotland, together with representatives of advice agencies serving Glasgow Sheriff Court, had agreed a basic format for an in-court advice project.⁷ It would provide emergency 'first aid' advice to court users attending the small claims and heritage courts in Glasgow Sheriff Court, and would be available to both pursuers and defenders on the five half days during which these courts were normally in session. The project would be serviced by two persons at each session, a "reasonably trained advice giver"(ibid.) provided by advice agencies in the Glasgow area, as well as a receptionist. The proposal for the pilot project was to be prepared by the legal advisory officer of the Scottish Consumer Council and the legal services adviser of Citizens Advice Scotland. Furthermore, all advice agencies in the Glasgow area were to be approached for their commitment to the project. The project would be operated by participating advice agencies on a rota basis and arranged around their preferences for serving the heritage or small claims courts. At the same time, each advice agency would be responsible for ensuring that the slot allocated to them was filled, and for making their own arrangements for insurance. It was agreed that the pilot would run over a period of four months, with a projected start date of April 1993.⁸ The proposal was subsequently rejected by the Lord Advocate and the project was not established in Glasgow Sheriff Court. When it was eventually piloted in Edinburgh Sheriff Court, it was to take on a quite different form.

Access to litigation and legal representation

1.2.3 The need for an in-court advice service did not abate in the decade that followed. Access to legal representation appeared to have become increasingly difficult for all but corporate litigants in the 1990s. Unassisted litigants were reported to be appearing with increasing frequency in the sheriff court in summary and ordinary cause cases, and this was thought to have been responsible for reducing access to justice as well as reducing efficiency in the sheriff court.

1.2.4 These trends were documented by official statistics and socio-legal research in the civil justice system as follows:

- The number of ordinary cause actions raised in the sheriff court decreased substantially between 1992 and 1994, while the number of summary cause actions showed a continuous decline since 1991.⁹ Applications for civil legal aid decreased and this concurrent decline in the number of actions and civil legal aid applications was partly, though not exclusively, due to new financial eligibility criteria for civil legal aid which were introduced in April 1993.¹⁰ As a result, the number of non-

⁷ Minutes of meeting of Lay Advisers in Glasgow Sheriff Court Group, December 1, 1992.

⁸ Though representation was thought to be desirable by the Group, it was decided to withhold these services during the period of a pilot project.

⁹ *Civil Judicial Statistics Scotland 1995*, Edinburgh: 1996

¹⁰ *Annual Report of the Scottish Legal Aid Board, 1994-5*, p.5

corporate litigants raising actions under ordinary and summary cause procedure decreased.

- Other explanations for the decreasing number of non-corporate litigants and the increasing number of party litigants were given. The rising cost of legal advice, representation, and sheriff court dues could have made litigation a risk not worth taking, especially for claims under summary cause procedure and the lower end of ordinary cause jurisdiction. Thus, for example, the number of ordinary cause actions raised in the sheriff court fell by 11143, or 20%, between 1993 and 1994.¹¹ The actual number of debt actions initiated fell by over 6000, accounting for over half of the total fall. The rising cost of pursuing a claim was held responsible by some for the falling number of debt actions (Samuel and Bell, 1997).
- Though the number of applicants for civil legal aid decreased, expenditure on publicly funded legal services increased. The increase in public expenditure was divided up amongst a decreasing number of publicly funded litigants. Spreading the publicly funded provision of legal services more equitably and rationally amongst those who needed them found its way up the policy agenda.
- Research commissioned by the Central Research Unit of the Scottish Office (LSRB) suggested that problems faced by small claims litigants arise at all stages in case trajectories, particularly in cases which are not straightforward payment claims (Samuel, 1998). Access to legal advice was restricted, lay advisers did not feel competent to give it, and claimants lacked negotiating power and skills in relation to those against whom their claim was made. Those who went on to litigate under small claims procedure knew little of what was required of them, whether they had a legal basis on which to proceed and, if so, what it was necessary for them to demonstrate in order to achieve success.
- Problems faced by party litigants are also wasteful of court resources and witnesses' time. The appearance of unassisted litigants in the sheriff court has implications for the administrative efficiency of sheriff courts as well as access to justice.
- Apposite research findings on the experience of unassisted litigants in housing-related cases also emerged. Research conducted by the National Consumer Council in England suggested that representation, even in the form of last-minute intervention, could make a significant impact on the judicial process in housing repossession cases: by providing judges with the information they need to make appropriate orders; by identifying a defence; by assisting defendants in making a more realistic offer to pay; and by ensuring that they are receiving the benefits to which they are entitled. Indeed, the existence of court-based schemes may encourage the attendance of more defendants in court, which was also found to have implications for the outcome of housing repossession cases.¹²

¹¹ *Civil Judicial Statistics, 1993 and 1994*

¹² National Consumer Council (1992), p.2. Research conducted by Shelter Scotland (see Mason, Steve, Rose-Troup Mike with Jones, Norma) (1995) *Rent Arrears Actions in the Sheriff Courts*, Edinburgh: Shelter Scotland) confirmed some of these findings. In actions for the recovery of heritable property, the appearance of defenders in court and the availability of advice and assistance was found to bring substantial benefits to those against whom actions were brought.

- In response to the identification of needs and to the success of court-based advice services in meeting them, more and more 'duty schemes' and other court-based advice services were set up in England and Wales in the 1990s.¹³ This led to proposals in 1997 to draw up a 'good practice guide' for advice schemes situated in courts in England and Wales.

1.3 THE IN-COURT ADVICE PROJECT IN EDINBURGH SHERIFF COURT

Setting up and funding

1.3.1 The establishment of a pilot project in Scotland was triggered in 1995, when Sheriff Principal Gordon Nicholson gave intimation of his willingness to introduce a court-based advice service into Edinburgh Sheriff Court, should funding be found. Principled support for the pilot project was later confirmed by the Scottish Office and Scottish Courts Administration. Citizens Advice Scotland (CAS) and the Scottish Consumer Council (SCC) were left to take the proposal forward, and they were subsequently successful in securing funding from the Directorate-General XXIV of the European Commission for a 15 month pilot project, commencing in January 1997 and becoming fully operational in April 1997.

1.3.2 The grant from the European Commission was equivalent to £34,632 and represented just over 75% of the Project's total budget. There were contributions in-kind of £8250 from Citizens Advice Scotland and the Scottish Consumer Council, and of £2500 from Edinburgh Sheriff Court. Funding was secured from the European Commission for a further year, from April 1998 to March 1999, when the Project also entered into a partnership with the Irish Department of Consumer Affairs, which ran a similar service for the Dublin courts in that year. The European Commission's funding of the In-court Advice Project in this second year included the Mediation Project which was then formally incorporated into the In-court Advice Project. Funding was reduced to 50% of the first year budget and the shortfall was made good by the Scottish Consumer Council, Citizens Advice Scotland and Edinburgh Sheriff Court. European Commission funding was not forthcoming for a third year and it was taken over by Scottish Courts Administration (latterly part of the Scottish Executive Justice Department).

Scope of the In-court Advice Project: Initial stage

1.3.3 The pilot In-court Advice Project was set up in Edinburgh Sheriff Court to provide advice and information to those raising or defending small claims and summary cause (including heritage) actions, as well as unassisted litigants involved in ordinary cause actions where The Debtors (Scotland) Act 1987 may be applied. Its aims were to provide clients with the necessary tools to construct a defence or argument in pursuing or defending a claim, as well as to direct them to agencies which might be able to provide them with further assistance on matters such as debt, which might have brought them to court in the first place. All unassisted litigants with cases within the remit of the Project were eligible for advice, though they were not to become the In-court Adviser's clients beyond the stage of initial advice. Clients requiring further assistance were to be referred by the In-court Adviser to advice agencies and solicitors, as appropriate. This included referral to mediation services where clients expressed a preference for alternative or complementary methods of dispute resolution.

¹³ Research funded by the Joseph Rowntree Foundation in 1996 (Hunter, C., Nixon, J. and Wishart, B. *Housing Cases in County Court*, Policy Press) reported a significant number of new schemes in the four years since the publication of NCC report (*op.cit.*).

Scope: Incorporating the Mediation Project

1.3.4 In-court Advice Project clients seeking alternative methods of dispute resolution were referred to the Mediation Project, which had been established in Edinburgh in January 1995. The Mediation Project was operating out of Edinburgh Central Citizens Advice Bureau and was being funded by the Development Fund of Citizens Advice Scotland. Close links were established between the Mediation Project and In-court Advice Project almost as soon as the latter was introduced into Edinburgh Sheriff Court in 1997. In April 1998, the Mediation Project was formally linked to the In-court Advice Project when joint funding was provided by Directorate-General XXIV of the European Commission. Since April 1999, both projects have continued to be linked by joint funding from the Scottish Executive Justice Department.

1.3.5 An evaluation of the Mediation Project conducted soon after the introduction of the In-court Advice Project into Edinburgh Sheriff Court identified important consequences for the Mediation Project (Cameron and Loughran, 1998). While referrals to the Mediation Project were sporadic prior to the establishment of the In-court Advice Project, the Mediation Project benefited from an increased flow of appropriate referrals following the introduction of the In-court Advice Project into Edinburgh Sheriff Court. Indeed, though the In-court Advice Project was not specifically designed to do so, it was found to have provided the Mediation Project with almost its entire client base soon after its introduction. This was subsequently responsible for drawing the Mediation Project more closely into the organisational framework and operation of In-court Advice Project, from Spring 1998 onwards.

Management and structure

1.3.6 The In-court Advice Project is managed by Citizens Advice Scotland and the Scottish Consumer Council and is independent of Edinburgh Sheriff Court. At the same time, Edinburgh Sheriff Court and Scottish Court Service support the Project by making available to it the facilities of the sheriff court. The In-court Advice Project has been under the guidance of a steering group which is chaired by the Sheriff Principal of Lothian and Borders, Sheriff Principal Gordon Nicholson QC, and which includes representatives of sheriffs and sheriff clerks in Edinburgh Sheriff Court, Scottish Executive Justice Department, Citizens Advice Scotland, the Scottish Consumer Council, Edinburgh Central Citizens Advice Bureau, Community Help and Advice Initiative, Wester Hailes (CHAI), Edinburgh Bar Association, Scottish Legal Aid Board and the Central Research Unit of the Scottish Executive. This steering group met on a bi-monthly basis since the In-court Advice Project was first introduced into Edinburgh Sheriff Court until September 1999. It then began meeting on a half-yearly basis, though a management sub-group of the steering group continued to meet more frequently. Prior to its incorporation within the In-court Advice Project, the Mediation Project operated under the guidance of its own steering group. It is now under the guidance of the In-court Advice Project's steering group.

1.3.7 The structure of the In-court Advice Project is quite different from that originally proposed for Glasgow Sheriff Court. The Project was initially staffed by one full time in-court adviser employed by the Project, working from an office in Edinburgh Sheriff Court. In the first year, responsibility for the management, performance and future development of the Project was shared by Susan McPhee (on behalf of Citizens Advice Scotland) and Lynne MacMillan (on behalf of the Scottish Consumer Council). Susan McPhee and Sarah O'Neill (on behalf of Scottish Consumer Council) assumed responsibility from the second year onwards. The day-to-day management of the project worker was sub-contracted to Edinburgh Central Citizens Advice

Bureau, which was also responsible for setting up and handling all office and payroll requirements.

1.3.8 From April 1998, when the Mediation Project was formally incorporated into the In-court Advice Project, Liz Cameron became one of the In-court Advice Project's paid employees as co-ordinator of the Mediation Project. She had co-ordinated the Mediation Project operating out of Edinburgh Central Citizens Advice Bureau since a few months after it was originally established in 1995. As Deputy Manager of Edinburgh Central Citizens Advice Bureau, she had also been responsible for the day-to-day management of the In-court Adviser ever since the establishment of the In-court Advice Project in Edinburgh Sheriff Court. Though no longer Deputy Manager of Edinburgh Central Citizens Advice Bureau, she continued to be responsible for the day to day management of the In-court Adviser.

1.3.9 Links between the two projects were facilitated by virtue of the Mediation Co-ordinator's role in Edinburgh Central CAB's line management of the In-court Adviser. Weekly meetings between the In-court Adviser and her line manager have been held ever since the In-court Advice Project was first introduced into Edinburgh Sheriff Court in April 1997. The Mediation Co-ordinator took the place of the In-court Adviser in her absence since the In-court Adviser had worked at Edinburgh Central CAB prior to taking up her post. Both the Mediation Co-ordinator and the In-court Adviser, therefore, were well acquainted with the operation of the each other's project and the constraints under which they were both working.

The In-court Adviser: Remit and recruitment

1.3.10 The main task of the In-court Adviser is to offer advice to unassisted litigants attending Edinburgh Sheriff Court and to refer them on to appropriate agencies for further advice, should this be necessary. Court representation was to be offered only in an emergency, though the matter was to be kept under review. The In-court Adviser was also to liaise closely with the Sheriff Clerk's Office and other agencies, such as local authority housing departments and other advice agencies, to set up mechanisms of referral to and from the Project. In addition, the In-court Adviser was to keep records of services provided and referrals made, and to provide the Steering Group with monthly reports on the Project.

1.3.11 The In-court Advice Project has employed a full time worker in Edinburgh Sheriff Court since 1997 and offers its services there throughout the week from a room adjacent to Court 14, where hearings on small claims and summary cause actions are held. Recruitment to the post began in January 1997 and the successful applicant was in position on 7 April 1997. Because the In-court Advice Project was not to operate as a legal practice, nor the In-court Adviser as a solicitor, criteria for selection did not include legal qualifications. Expertise with regard to court-related matters was required, however, and this was likely to be beyond the level of expertise of many advice agency workers. In the event, a qualified solicitor with experience both in private practice and in the lay advice sector was selected. The first In-court Adviser, Sarah O'Neill, was given a 12 month contract of employment and remained in post until the expiration of the European Commission's first 12 month period of funding. She was the In-court Adviser throughout the period covered by Phase 1 of the research on the In-court Advice Project. The second In-court Adviser, Beverley Klein, came to the post in April 1998 with a law degree and Diploma in Legal Practice as well as many years' experience of legal and other advice work in the voluntary sector. She remained in post for two years and was the In-court Adviser throughout Phase 2 of the research described in this paper. From June 1999, because of pressure of work on the In-court Adviser in heritage cases, the In-court Adviser was joined each Friday by the Deputy

Manager of Edinburgh Central CAB, Karen Sutherland, to give advice and assistance to party litigants attending the heritage court. As the service grew, it also employed other part-time and voluntary staff.

The Mediation Project: Remit

1.3.12 From April 1998, the In-court Advice Project was joined by the co-ordinator of the Mediation Project, who was concurrently the Deputy Manager of Edinburgh Central CAB over most of this period. Though formally incorporated into the In-court Advice Project, the Mediation Project continued to operate out of Edinburgh Central CAB.

1.3.13 The Mediation Project dealt with referrals from other advice agencies, as well as the In-court Advice Project. The Mediation Co-ordinator was also responsible for referring cases to mediation, both from the court and from Edinburgh Central CAB. All clients referred to mediation by the In-court Adviser or Mediation Co-ordinator were given or sent a leaflet explaining the service that was being offered, and these clients were referred to as 'first' parties. If 'first' parties agreed, then the Mediation Co-ordinator usually wrote to the other party to the dispute, commonly referred to as the 'second' party. In every case where both parties agreed to some form of assistance, the Mediation Co-ordinator conducted an investigation into the background of the dispute by speaking to both parties. Views as to what form of mediation or negotiation would best suit both parties emerged from these discussions. This involved taking into account the complexity of the dispute and how much time parties wished to invest in its resolution.

1.3.14 In many cases, both parties agreed to the Mediation Co-ordinator's assistance in negotiating a settlement on their behalf, often 'at a distance' or 'arm's length'. Mediation hearings were usually preceded by attempts to negotiate a settlement in this way. They were conducted by the Mediation Co-ordinator on behalf of clients who had been referred to the Mediation Project. Most mediation hearings were conducted by mediators trained by the Centre for Dispute Resolution (CEDR) or the Law Society of Scotland, and all volunteered for the task on a *pro bono* basis. Most mediation hearings took place at Edinburgh Central CAB though Edinburgh based mediators sometimes used their own offices. Mediation hearings were offered free to both 'first' and 'second' parties. The Mediation Co-ordinator was responsible for providing an after-care service to all those involved in the mediation process.

CHAPTER TWO THE RESEARCH

This chapter summarises the aims and findings of Phase 1 research and examines the background factors which preceded Phase 2 research. It then goes on to outline the objectives of Phase 2 research and to review the types and sources of data collected in Phase 2. It touches on some of the problems faced during Phase 2, particularly as they relate to comparability of data over the two phases of the research and between agencies.

2.1 PHASE 1 RESEARCH

Aims

2.1.1 Prior to becoming fully operational in Edinburgh Sheriff Court, Scottish Courts Administration was instrumental in commissioning independent research to evaluate the In-court Advice Project. While the main objective of the In-court Advice Project was to provide advice and information to court users, a second objective turned on its innovative and experimental features. A publicly funded in-court legal advice service is one of a number of possible models by which publicly funded legal advice may be provided. Until its establishment in April 1997 in Edinburgh Sheriff Court, however, it was an untested model of legal advice provision in Scotland. By piloting a new model of service delivery and provision, an opportunity was presented for evaluating the capacity of a new model to deliver publicly funded legal services more equitably and rationally amongst those who need them. It also provided the opportunity to assess the need for an advice service located in the sheriff court and to examine the capacity of that service to provide advice and support to those in need.

2.1.2 The Legal Studies Research Branch of the Scottish Office, on behalf of Scottish Courts Administration, commissioned Elaine Samuel of the University of Edinburgh to undertake research to evaluate the In-court Advice Project over the first nine months of its operation (April to December 1997) in Edinburgh Sheriff Court. Discussions were held between the In-court Adviser and the commissioned researcher during the first weeks in which the In-court Advice Project became fully operational as to the needs of the research and the information likely to be required. Records kept by the In-court Advice Project were modified in order to provide this information.

2.1.3 The study, henceforth referred to as Phase 1 research, was undertaken to assess the demand and need for the In-court Advice Project's services, to evaluate the Project for its capacity to deliver advice and support to unassisted litigants and to explore its impact on clients, the court, court practitioners and the civil justice system. Phase 1 research documented major changes in the volume of business conducted over this early implementation phase, how that business was conducted and the procedural stages at which business was conducted. It also undertook a survey of all clients who had sought advice from the Project and it made contact with all advice agencies to which clients had been referred.

Findings

2.1.4 Research findings testified to the success of the In-Court Advice Project in achieving many of the client-related and court-related objectives which the Project had been designed to

meet. The findings of Phase 1 research were reported in *Supporting Court Users* (Samuel, 1999)¹⁴. and may be briefly summarised as follows:

- There was a large demand for the services of the In-court Advice Project, with the number of clients increasing dramatically over the first nine months of the Project.
- The Project was able to cope with demand by devising methods that encouraged clients to seek advice outwith court time.
- Clients provided the Project with a powerful endorsement, particularly for the court related support and assistance which they had received.
- Just under 80% of clients faced legally represented opponents.
- The Project promoted justice and efficiency in the Sheriff Court.
- The close working relationship that had developed between the Sheriff Clerk's Office and the In-court Advice Project was crucial for the success of the Project.
- The Project filled a gap in the civil justice system by offering services which few other agencies were providing.
- The Project contributed to the civil justice system by forging links between agencies and by promoting a sense of justice and inclusion through its support of court users.

2.2 BACKGROUND TO PHASE 2 RESEARCH

Issues emerging from Phase 1 research

2.2.1 A number of issues arose from Phase 1 research, and these were partly responsible for the commissioning of Phase 2 research.

- Phase 1 research findings raised questions as to the future shape of the Project. Given its rapid business growth over the first nine months, it was particularly important to ascertain whether business had stabilised and whether the composition of that business was subject to change. In brief, information was needed to monitor the In-court Advice Project at a more mature phase of its operation.
- Some questions could not be asked during Phase 1 of the research because respondents had insufficient opportunity to work with or experience the work of the In-court Advice Project in its first nine months. As the In-court Advice Project worked its way into the fabric of the Edinburgh civil justice system, therefore, questions pertaining to the impact of the Project on those working in the Sheriff Court needed to be raised again.

¹⁴ Samuel, E. (1999) *Supporting Court Users: The In-Court Advice Project in Edinburgh Sheriff Court*, Edinburgh: The Stationery Office. See also *Research Findings 22: Supporting Court Users*, www.scotland.gov.uk/cru/resfinds/1s22--00.htm

- Phase 1 research was also responsible for raising additional questions. These could not be answered by the systems which had been set up to gather the information in the early phase of the Project. Thus, for example, there was concern that In-court Advice Project clients were not taking up referrals to other agencies on the advice of the In-court Adviser.

Changes to the In-court Advice Project: The Mediation Project

2.2.2 The report of the evaluation of the Edinburgh Mediation Project, established in 1995, was published in 1998 (Cameron and Loughran, 1998). 82% of the 23 mediation hearings conducted by the Edinburgh Mediation Project were successful in achieving an out of court settlement. Despite its apparent success, however, the research found that take-up of mediation services was slow. Service take-up was significantly speeded up once the In-court Advice Project came into operation in Edinburgh Sheriff Court.

2.2.3 These findings were partly responsible for establishing formal links between the two projects in 1998. Referrals from the In-court Advice Project to the Mediation Project were monitored in Phase 1 of the research. Once the Mediation Project was jointly funded and formally associated with the In-court Advice Project, however, closer examination of the operation of the Mediation Project, the effectiveness of its links with the In-court Advice Project, and its impact on the court and court users was required.

The wider context

2.2.4 Several other background developments influenced the second phase of the research. Publicly funded legal services were investigated in order to find new ways of distributing resources more equitably and rationally amongst those who need them. Some of the options proposed were disseminated for consultation in the Scottish Office Home Department's *Access to Justice—Beyond the Year 2000: A Consultation Paper on Civil Legal Aid*.¹⁵ Hence, the In-court Advice Project in Edinburgh Sheriff Court was operating against a background of renewed efforts to maintain and increase access to justice while simultaneously achieving value from the legal aid fund.

2.2.5 In 1998, a consultation paper was issued by Scottish Courts Administration on behalf of the Lord Advocate to seek views on proposals to vary jurisdiction limits in the Sheriff Court.¹⁶ The Consultation Paper presented several options for small claims and summary cause procedure, ranging from moderate to profound increases in the jurisdiction limits of small claims and summary cause procedure. Hence, were new jurisdiction limits to come into operation, they would be likely to have a moderate to profound impact on the number of litigants who might need to access the Sheriff Court without legal aid and without representation.

¹⁵ Scottish Office Home Department (1998) *Access to Justice—Beyond the Year 2000: A Consultation Paper on Civil Legal Aid*, Edinburgh.

¹⁶ Scottish Courts Administration, *Proposals to Increase Jurisdiction Limits in the Sheriff Court*, Edinburgh: SCA, 1998

2.3 PHASE 2 RESEARCH: SCOPE AND AIMS

2.3.1 Phase 2 of the research was undertaken between September 1999 and March 2000 to monitor the operation of the In-court Advice Project since its establishment in Edinburgh Sheriff Court and to provide information on the newly linked Mediation Project.

2.3.2 Phase 2 research was more limited in scope than Phase 1. It focused on the volume of business, type of business and type of client dealt with by the In-court Advice and Mediations Projects, as well as the role which both Projects played in the sheriff court.

2.3.3 Its main objectives were:

- To collect information on the In-court Advice Project relating to business conducted between 1 December 1998 and 31 August 1999 (three quarters of the way through its second year until midway through its third year)
- To compare these findings with Phase 1 findings (relating to the Project's first nine months in Edinburgh Sheriff Court)
- To monitor the operation of the Mediation Project in relation to the In-court Advice Project
- To assess the role played by both Projects in the context of wider civil justice resources and systems operating in Edinburgh.

2.3.4 Unlike Phase 1, Phase 2 research did not undertake major surveys of Project clients since their views were unlikely to have changed in the short time since Phase 1 research was conducted. Some Mediation Project clients were interviewed, however, mainly because the Mediation Project was a new component of the research. Even here, however, the main objective of Phase 2 research was to monitor Mediation Project business and its relationship to the In-court Advice Project, rather than to undertake a more comprehensive evaluation of the Mediation Project for the services it provided.

2.4 PHASE 2 RESEARCH: DATA

In-court advice project client records

2.4.1 One of the main objectives of Phase 2 research was to collect and analyse data on the operation of the In-court Advice Project over its life so far. The main source of information about the In-court Advice Project, its clients, type and volume of its business and the services it provided were provided by client records. These were completed by the In-court Adviser every time a client consulted with her, whether in person, by letter or over the telephone.

2.4.2 Client records were initially designed by Citizens Advice Scotland to conform to client records held by Citizens Advice Bureaux in Scotland and to be used by Edinburgh Central CAB as managers of the Project. There were additional information requirements, however, and a balance had to be struck between the needs of the research and the resources available to the In-court Adviser. From its earliest days, the In-court Advice Project aimed to achieve a high volume of clients passing through it and many clients were expected to require short

consultations. This meant that the collection of detailed and complex information would not only be time-consuming and detract from the In-court Adviser's main task, but it might also be inappropriate. Additional information was sought from the In-court Advice Project by the researcher and this was agreed in consultation with her in the first weeks following the introduction of the Project in Edinburgh Sheriff Court. This additional information was routinely collected by the In-court Adviser from May 1997 onwards, and it was entered into a database administered by Edinburgh Central CAB.

2.4.3 Client records were used to monitor the business of the In-court Advice Project in Phase 1 and 2, and to compare the Project at the earliest stage in its development with the more mature stage covered by Phase 2. In Phases 1 and 2 of the research, information was gathered from the In-court Advice Project client records to provide information on the following:

- name of client;
- date of consultation;
- initial or return case visit;
- type of consultation (in person, telephone, letter);
- timing of consultation (outwith or during court session);
- number of consultations per case;
- source of referral to the In-court Adviser;
- previous advice;
- procedural stage of consultation;
- if other party advised;
- housing status of client;
- type of procedure;
- if outwith remit–type of case;
- status of client (pursuer, defender);
- type of client (e.g. individual, business);
- type of opponent (e.g. individual, public body, private business);
- gender;
- relationship of litigants (e.g. business v consumer, consumer v business);
- type of claim (e.g. housing arrears, other monetary claim, damages);
- agencies to which clients referred by the In-court Adviser for advice
- agencies to which clients referred by the In-court Adviser for negotiation

2.4.4 During Phase 1 of the research, information was collected from the records of 893 consultations conducted with 674 clients between 7 April and 31 December 1997 in relation to 683 different cases. Because monthly consultations were known to have doubled since then, it was not possible to collect information on all consultations conducted after 31 December 1997. Rather than monitor consultations over the whole life of the project, it was decided to make a comparison between the first nine months of the Project and the nine months between 1 December 1998 to 31 August 1999.

2.4.5 Because data entered into the In-court Advice Project database were not transferable, information from the records of 674 clients had to be collected manually by the researcher during Phase 1 of the research in order to enter them into an EXCEL database and thereafter transport

them into SPSS (Statistical Package for the Social Sciences) for analysis. During Phase 2 of the research, information was collected manually from the records of 1648 consultations conducted with the In-court Adviser between 1 December 1998 and 31 August 1999. This represented a considerable replication of work, with implications for the accuracy of the data, the quality of the research and the time in which the research was completed. Should monitoring be conducted by external agencies, there is a need to make database systems accessible to agencies outwith CAS/CABx.¹⁷

2.4.6 Because comparisons were to be made with Phase 1 findings, client records were checked for consistency over the period covered by the two phases of the research. Conceptual difficulties emerged primarily because data entry in the period covered by Phase 1 of the research was devised in consultation with the researcher while data entry in the period covered by Phase 2 of the research was not. Thus, for example, the second In-court Adviser treated **all** consultations connected with particular clients as discrete and separate consultations, while the first In-court Adviser treated only consultations **with actual clients** as consultations. All client consultation records had to be re-examined so that only consultations **with** clients were recorded as 'client consultations' for the purposes of Phase 2 research.

2.4.7 The second In-court Adviser was also found to be treating consultations with clients who returned on the same day, (for example, before court and after court) as discrete and separate consultations - which the first In-court Adviser had not. In this instance, a decision was made to retain her change of recording practice since it more accurately reflected the intensity of daily business conducted by the In-court Advice Project. However, the research noted the frequency of return consultations made on the same day as previous consultations so that this changed recording practice could be taken into account to explain increases in the volume of business between Phase 1 and 2 research. This had implications for the complexity of the quantitative analyses that were conducted (see Chapter 3).

Mediation Project Client Records

2.4.8 In Phase 2, data were collected from both the clients' records of the Mediation Project and the In-court Advice Project to monitor the sources and type of business conducted by the Mediation Project. Information was collected from In-court Advice Project records on all referrals made by the In-court Advice Project to the Mediation Project between 1 December 1998 and 31 August 1999, and from Mediation Project records on all referrals made directly to the Mediation Project, either by sheriffs, by the Mediation Co-ordinator or by CABx.

2.4.9 Information on the progress of referrals and cases through the Mediation Project was collected from the Mediation Project's client records database. In total, information was collected on 151 referrals to the Mediation Project between 1 December 1998 and 31 August 1999. The following information was collected:

- source of referral (e.g. CAB, In-court Adviser, Sheriff)

¹⁷ It was also noted that the database into which the Project's business was recorded could not always accommodate the needs of the In-court Adviser. As the volume of business increased, for example, Project client records were no longer filed alphabetically but by the month in which their case file was closed. This meant that 'old' clients were sometimes marked as 'new' clients, particularly when a temporary replacement for the In-court Adviser was on duty. This also had repercussions for the research outwith the accuracy of the data. In Phase 2, unlike Phase 1, it was not possible to identify those clients who returned to the In-court Advice Project with new cases.

- 'first' party response (e.g. no response, yes, try negotiation first)
status (e.g. individual, small business)
representation
- 'second' party response (e.g. no response, agreement, try negotiation first)
status (e.g. individual, small business)
representation
- mediation type (arms-length or hearing), date, length, outcome,
agreement honoured

2.4.10 Synchronisation of data collected from the case records of In-court Advice and Mediation Projects was difficult. While the Mediation Project and the In-court Advice Project had a close relationship, both projects were administered independently, and client records were kept both by the Mediation Project and the In-court Advice Project. Different categories of data were collected by the two projects and entered in different formats. Where similar categories of data were collected, the criteria by which data were categorised were often found to be different. Moreover, the system by which information was categorised in the Mediation Project appeared to have evolved over time so that internal consistency was sometimes lacking. It was possible to construct consistency across the data in those cases where clients had been referred from the In-court Advice Project to the Mediation Project since two sets of records were available for the same client. This was not possible, however, where clients were referred to the Mediation Project either by Edinburgh Central CAB or by the Mediation Co-ordinator working in the Sheriff Court. Hence, where data were incomplete, monitoring and analysis remained partial.

Interviews

2.4.11 In Phase 2 research, 23 interviews were conducted with 22 persons between November 1999 and March 2000. Ten of these interviews were conducted in relation to the Mediation Project. Face-to-face interviews were conducted with four key players in the Mediation Project: namely, the Mediation Co-ordinator, the In-court Adviser and two mediators. Telephone interviews were conducted with six persons referred to the Mediation Project. They were selected towards the end of the research period on the basis of their potential to exemplify or further explore some aspect of the analysis.

2.4.12 To assess the operation of the In-court Advice Project in its 'mature' phase, three interviews were conducted with the In-court Adviser and the Deputy Manager of Edinburgh Central Citizens Advice Bureau who assisted the In-court Adviser one day a week in the court. To examine the impact of the In-court Advice Project on the sheriff court and those who work in it, three face to face interviews were conducted with two sheriffs and the Sheriff Clerk Depute (small claims and summary cause section). Three interviews were also conducted with parties and legal representatives of parties opposed in court by clients of the In-court Advice Project. These included a representative of the City of Edinburgh Housing Department and two solicitors.

2.4.13 To assess the structural role of the In-court Advice Project in relation to wider civil justice resources and systems operating in Edinburgh, four interviews were conducted with representatives of three other advice agencies (two voluntary and one local authority) located in the area served by Edinburgh Sheriff Court.

Altogether 23 interviews were conducted with 22 persons, as follows:

Table 2.1

	Number of Interviews
Mediation Co-ordinator	1
Mediators	2
Deputy Manager Central CAB	1
Clients referred to mediation	6
In-court Adviser (2 interviews)	2
Sheriffs	2
Sheriff Clerk Depute	1
Advice workers	4
Court practitioners	2
City of Edinburgh, Department of Housing	2
Total	23

Documentary evidence

2.4.14 All documentary evidence pertaining to the In-court Advice and Mediation Projects, their objectives and their implementation were collected, as well as documents pertaining to their on-going management. This included minutes of Steering Group meetings as well as periodic reports submitted to the In-court Advice Project Steering Group by the In-court Adviser and Mediation Co-ordinator. Information collected by this method assisted the research in monitoring the 'start-up' and 'bedding-down' periods of the In-court Advice Project as well as the periods both prior to and following the formal linkage of the Mediation Project to the In-court Advice Project. These documents were particularly useful for identifying the contribution of other agencies in the civil justice system to the operation of both projects. This aspect of the investigation was also assisted by attendance at all meetings held by the In-court Advice Project Steering Group.

2.5 PHASE 2 RESEARCH REPORT: CONTENTS

2.5.1 Phase 2 of the research was undertaken between September 1999 and March 2000 and covers the operation of the In-court Advice Project over a nine month period, from December 1998 to August 1999. This report sets out the findings of Phase 2 research.

2.5.2 This chapter follows an introduction to the background to the In-court Advice and Mediation Projects. It provides a brief summary of Phase 1 research findings and an outline of Phase 2 research. The chapters which now follow document the findings of the research. The next chapter examines the business handled by the In-court Advice Project in the period covered by Phase 2 of the research, and makes comparisons with Phase 1 findings. This is followed by a chapter documenting findings related to the Mediation Project. The subsequent chapter presents interview-based evidence as to the impact of both projects on the sheriff court and those who work in it. Finally, the report presents some conclusions of the research.

Chapter Three	The In-court Advice Project (I): Documenting the business
Chapter Four	The In-court Advice Project (II): The Mediation Project
Chapter Five	The Projects in Context
Chapter Six	Conclusions

CHAPTER THREE THE IN-COURT ADVICE PROJECT: DOCUMENTING THE BUSINESS

This chapter presents research findings relating to the business of the In-court Advice Project during Phase 2 and compares them with Phase 1. It inspects In-court Advice Project business over the two research phases for the number of consultations conducted with the In-court Adviser, as well as the procedural remit and substance of matters brought to the Project (3.2); the number and procedural status of In-court Advice Project clients, the kinds of disputes and claims that they brought to the Project and the types of opponents that they faced (3.3); how clients and cases were referred to the In-court Advice Project (3.4) and the procedural stages at which they were referred (3.5); monthly changes in the volume of business, and changes in the types and timing of consultations over Phase 1 and 2 (3.6). The chapter concludes with a summary of findings (3.7).

3.1 INTRODUCTION

3.1.1. This chapter monitors the business of the In-court Advice Project between 1 December 1998 and 31 August 1999, from 21 to 30 months following its establishment in Edinburgh Sheriff Court. It closely follows the monitoring schema employed in Phase 1 of the research project which examined the first nine months of the In-court Advice Project, from 1 April 1997 to 31 December 1997. In this chapter, the volume of business conducted by the In-court Advice Project and the type of business which clients brought to it are inspected. The mechanisms by which clients accessed the In-court Advice Project, the demand for the Project's services and the procedural stages at which that demand was exercised are also identified. The volume, scope and delivery of Project services over the nine months covered by Phase 2 of the research are compared and contrasted with the first nine months of the Project, with a view to monitoring the direction which the pilot project was taking as it approached the middle of its third year in Edinburgh Sheriff Court .

3.2 VOLUME OF BUSINESS: CONSULTATIONS

Consultations and clients

3.2.1 1648 consultations were undertaken with 1017 clients between 1 December 1998 and 31 August 1999, compared with 893 consultations with 674 clients over the first nine months of the project. Within 20 months, then, the In-court Advice Project appeared to have almost doubled the number of consultations that were conducted and increased the number of clients passing through it by 50%.

3.2.2 Of 1648 consultations conducted between 1 December 1998 and 31 August 1999, 59% (968) were initial consultations (clients bringing new cases to the In-court Advice Project) while 41% (680) were 'return' consultations with clients seeking further advice on the same case. This appears to represent a considerable increase in return consultations during the period covered by Phase 2 compared with Phase 1, when only 23% of consultations were with clients who returned to consult with the In-court Adviser after their initial consultation.

Table 3.1 Initial and return consultations

Consultations	Phase 1		Phase 2	
	No.	%	No.	%
Initial consultations	687	77	968	59
Return consultations	206	23	680	41
Total	893	100	1648	100

3.2.3 Closer inspection of Phase 1 data, however, reveals a steady increase in return consultations as the Project established itself, reaching a plateau of between 25-27% of all consultations, except for Month 8 when return consultations constituted 36% of all consultations. By the end of the first nine month period, therefore, the proportion of return consultations were not as dissimilar from Phase 2 as would first appear.

3.2.4 Much of the additional increase in return consultations between the two research phases can be explained away by changes to the monitoring and recording system employed by the In-court Advice Project (see previous chapter). In Phase 2 of the research, just under one quarter (156) of all return consultations were conducted on the same day as the initial consultation but after the client had appeared in court. These were identified as separate and additional consultations by the In-court Adviser in post during the period covered by Phase 2 of the research but not by the In-court Adviser in post during the first nine months of the Project. If we were to follow the first In-court Adviser's recording system for the period covered by Phase 2 of the research, then 1492 (and not 1648) consultations were conducted between 1 December 1998 and 31 August 1999 and 524 (and not 680) return consultations were conducted. Thus identified, return consultations comprise only 35% of all consultations in Phase 2 - not substantially higher than the last months of Phase 1, when return consultations fluctuated between 25% and 36% of all consultations.

3.2.5 Though it caused difficulties of comparability, a decision was taken to retain this change to the recording and monitoring system of consultations. The second In-court Adviser's recording of two visits by the same client on the same day as two consultations was retained because it was thought to reflect more accurately the volume and intensity of business conducted by the Project during the working day. Thus, unlike the period covered by Phase 1 of the research, all consultations with clients, whether they fell on the same day or not, were counted as separate consultations. However, only consultations conducted by the In-court Adviser directly **with** clients were counted as client consultations. Calls made on behalf of clients were not counted as consultations (see chapter 2).

Repeat consultations

3.2.6 1017 clients passed through the In-court Advice Project between 1 December 1998 and 31 August 1999. In the majority of cases (64% or 645 clients), only one consultation was conducted. Two consultations were conducted with 202 (20%) clients, three consultations with 80 (8%) clients and four or more consultations with a further 83 (8%) clients. 13 of these 83 cases involved 10 or more consultations. (Information was missing on 7 cases).

3.2.7 Compared with the first nine months of the In-court Advice Project, this represents a considerable increase in the proportion of clients with whom two or more consultations were

conducted (18% of all cases involved more than one consultation during Phase 1 compared with 36% during Phase 2). Much of this difference, however, could be explained away by differences in monitoring procedures (see 3.2.1-3.2.5 above).

Consultations and case procedure

3.2.8 Of 1648 client consultations conducted with the In-court Adviser between 1 December 1998 and 31 August 1999, 436 (26%) related to small claims procedure, 147 (9%) related to summary cause (non-heritage), 857 (53%) related to summary cause heritage procedure, 129 (8%) related to The Debtors (Scotland) Act 1987, 48 (3%) related to Ordinary Cause procedure outwith the remit of the In-court Advice Project and 31 (2%) were miscellaneous inquiries relating, for example, to wills, witnesses and victim support. While there was an overall increase in the number of consultations between Phase 1 and 2 of the research, this varied according to procedure.

Table 3.2 Consultations by procedural remit of case

Procedure	Phase 1		Phase 2	
	No.	%	No.	%
Small claims	326	37	436	26
Summary cause	70	8	147	9
Heritage	452	51	857	53
Debtors (Scotland) Act 1987	4	*	129	8
Ordinary Cause (outwith remit)	30	3	48	3
Other inquiries	11	1	31	2
Total	893	100	1648	101

*less than 1

3.2.9 Compared with the first nine months of the In-Court Advice Project, the greatest change was in the number of consultations relating to **summary cause (heritage) procedure** which increased from 452 to 857 consultations, (an increase of 90%). This also changed the balance of summary cause (heritage) consultations from 51% to 53% of all consultations.

3.2.10 The number of consultations relating to **The Debtors (Scotland) Act 1987** rose from four to 129, (from less than 1% to 8% of all consultations). Though cases relating to The Debtors (Scotland) Act 1987 were within the remit of both In-court Advisers, the first In-court Adviser could not prioritise development work in this area. Development work in most other areas had progressed considerably by the time the second In-court Adviser came into post, however, and this provided her with the opportunity to prioritise development of this aspect of her remit. It was also made possible by a change in the timing of the Ordinary (Miscellaneous) Court from Tuesday (the day of the small claims court) to Wednesday, and which occurred during the period covered by Phase 1 of the research. In addition, the Ordinary Cause section of the Sheriff Clerk's Office began the practice of inserting information into summonses pertaining to The Debtors (Scotland) Act 1987.

3.2.11 Another marked change was an increase in the number of consultations relating to **summary cause procedure**, rising from 70 to 147 (from 8% to 9% of all consultations). The number of consultations relating to **small claims procedure** rose from 326 to 436, though as a

proportion of all consultations, the proportion of small claims consultations actually fell from 37% to 27%.

3.2.12 Over half (848 or 53%) of all consultations in Phase 2 related to housing arrears while over one third (613 or 38%) related to other monetary claims, including claims relating to rental deposits (35 or 2% of all consultations).¹⁸

Number of consultations per client and procedural remit of case

3.2.13 The number of consultations which the In-court Adviser conducted with clients varied according to the procedure to which their dispute was related.

Table 3.3 **Number of consultations per client**

Procedure	No. of consultations					
	1	2	3	4	5	6 or more
Small claims						
No. (225)	108	56	22	12	2	25
% (100)	49	25	10	5	1	10
Summary cause						
No. (66)	35	12	9	3	1	6
% (100)	53	18	14	5	2	9
Heritage						
No. (615)	445	98	38	14	9	11
% (100)	73	16	6	2	1	2
Debtors (Scotland) Act 1987						
No. (63)	22	25	8	3	3	2
% (100)	36	39	13	5	5	3
Ordinary cause (outwith remit)						
No. (36)	25	9	2			
% (100)	70	25	5			

1 December 1998 to 31 August 1999

3.2.14 Clients seeking advice on heritage cases were most likely to consult only once, followed by clients seeking advice on cases which related to ordinary cause procedure and outwith the remit of the Project. Amongst 615 heritage cases, clients sought advice more than once in only 170 cases, representing 27% of all heritage clients. Compared with the first nine months of the Project, however, this represents a substantial increase in the number and proportion of heritage clients consulting more than once, from 45 (12%) heritage clients in Phase 1 of the research to 170 (27%) heritage clients in Phase 2. This may partly be an artefact of changes in the monitoring and recording system between the two phases (see 3.2.1). Indeed, 58 out of 174 return consultations relating to heritage procedure were on the same day as initial consultations. There may also have been a real increase in the capacity of the In-court Advice Project to see clients both before and after their court hearing during Phase 2 of the Project, as more staff came on board (see Chapter 5).

3.2.15 Clients seeking advice on matters related to the Debtors (Scotland) Act 1987 were far more likely than any other clients to consult more than once with the In-court Advice Project. Out of 63 clients, 41 (74%) consulted with the In-court Adviser two or more times. Clients

¹⁸ At the time at which Phase 2 research was conducted, there was some discussion as to the need for 3rd party measures to deal with rental deposits. A decision was therefore made to identify the number of persons seeking advice from the In-court Advice Project on the return of rental deposits.

seeking advice on matters related to summary (non-heritage) and small claims procedure were also more likely than heritage clients to seek advice more than once (47% and 51% respectively). Compared with the first nine months of the project, when only 28% of summary cause clients and 29% of small claims clients consulted with the In-court Adviser more than once, there is a marked increase in return consultations in Phase 2 of the research. Like heritage clients, however, this may partly be attributed to changes in the monitoring system.

Consultations, procedural status and case procedure

3.2.16 Of 1648 consultations conducted in the nine months covered by Phase 2 of the research, only 317 (19%) involved pursuers while 1310 (80%) involved defenders. Four in five consultations, therefore, were with respect to claims which had not been set in motion by clients of the In-court Advice Project but by others. There were considerable variations according to the procedural remit of the case, ranging from 100% in cases dealt with by summary cause (heritage) procedure and Debtors (Scotland) Act 1987 to just under half (45%) in small claims cases.

Table 3.4 Consultations by procedural status of client and procedural remit of case

Procedure	Consultations No.	Pursuers %	Defenders %	Other %
Small claims	436	55	45	0
Summary cause	147	41	58	1
Heritage	857	0	100	0
Debtors (Scotland) Act 1987	129	0	100	0
Ordinary Cause (outwith remit)	48	20	73	7
Other	31	28	43	29
Total	1648 (100%)	19	80	1

1 December 1998 to 31 August 1999

3.2.17 While consultations with defenders during Phase 1 constituted 73% of all consultations, this increased to 80% between 1 December 1998 and 31 August 1999. This may be explained by the increased number and proportion of Project clients with heritable cases and cases related to the Debtors (Scotland) Act 1987 at Phase 2. This made a significant impact upon what advice and assistance was sought by clients, in terms of both substance and the timing of consultations. The only other noticeable change was a decrease in the proportion (though not actual number) of consultations with defenders in summary cause (non-heritage) cases (from 67% to 58% of all summary cause consultations).

Number of consultations, procedural status and case procedure

3.2.18 The number of times clients consulted with the In-court Adviser depended upon their procedural status. In the nine month period commencing 1 December 1998, 66% of defenders consulted with the In-court Adviser only once, compared with 53% of pursuers. Defenders were therefore more likely to consult with the In-court Advice Project just once, and this was no different in the first nine months of the Project. However, between Phases 1 and 2 of the Project, the proportion of defenders consulting only once decreased from 85% to 66%, and the proportion of pursuers consulting only once decreased from 72% to 53%. This may partly be attributed to a

change in recording procedures (see 2.3 and 3.2.1-3.2.5) There was also an increase in the number of consultations conducted with any one client. Thus, in the first nine months of the Project, no more than 9 consultations were conducted with any one client while during Phase 2, five pursuers had consulted with the In-court Adviser more than 13 times. This may partly be attributed to the Phase 1 research cut-off date and the carry-over of consultations per client from previous months in Phase 2, as well as changes in recording procedures (see 2.3 and 3.2.1-3.2.5).

3.2.19 As we have already seen, (3.2.13-3.2.15) the number of times clients consulted with the In-court Advice Project also depended upon procedure. 51% of clients consulted with the In-court Adviser more than once in small claims cases, compared with 47% in summary cause (non-heritage) cases, 27% in heritable cases and 64% in cases relating to The Debtors (Scotland) Act 1987. Compared with Phase 1, more clients consulted more than once in Phase 2 than Phase 1, whatever the procedure. The magnitude of this increase, however, depended on the procedural remit of the case.

Table 3.5 Clients consulting the In-court Advice Project more than once, by procedure

Procedure	Phase 1 %	Phase 2 %
Small claims	34	51
Summary cause	27	47
Heritage	14	27
Debtors (Scotland) Act 1987	*	64
Ordinary Cause	13	33

* less than 1%

3.2.20 The proportion of clients who consulted with the In-court Adviser more than once doubled in cases relating to heritage, summary and ordinary cause procedure, and increased by 50% from an already high baseline in cases relating to small claims procedure.

3.3 CLIENTS AND THEIR CASES

Client profiles

3.3.1 Service users were only slightly more likely to be men, (50% compared with 45%). A further five per cent of service users sought advice on behalf of their clients, friends or relatives and their gender was not recorded. Most clients sought advice on personal matters (95%) while only 33 clients (3%) appeared to represent small businesses (though this may be an underestimate because of the difficulty of identifying this from client records). 13 clients (1%) sought advice from the In-court Advice Project on behalf of their own clients and they were mainly based in voluntary organisations.

3.3.2 The majority of clients (61%) were Local Authority tenants (616 clients) compared with 25 (3%) private tenancy clients and 66 (7%) house owners. The proportion of home owners amongst Project clients, however, is likely to have been underestimated as the housing status of more than a quarter of all clients was not recorded. They comprised a large proportion of all those clients who sought advice on matters other than housing.

Analysis of clients by matters on which advice sought

3.3.3 1017 clients sought advice over Phase 2. The majority of clients (90%) sought advice on matters related to housing arrears and other monetary claims, with actions for reparation, implement and eviction (unrelated to arrears) following far behind.

Table 3.6 Matters on which clients sought advice

Case type	Cases	
	No.	%
Housing arrears	613	60
Monetary claim (not housing-related)	300	30
Other	35	3
Damages/personal injury	22	2
Product/service claim	16	2
Rental deposit	15	2
Housing (not arrears-related, e.g. nuisance)	11	1
Implement	5	*
Total	1017	100

1 December 1998 to 31 August 1999

*less than one

3.3.4 Compared with Phase 1, the number of clients seeking advice on matters relating to housing arrears rose from 371 to 613, and on matters relating to other monetary claims from 182 to 300. They increased from 54% to 60%, and from 27% to 30%, of all clients, respectively. As the Project matured, therefore, an increasing number and proportion of clients sought advice on just two matters. There were no marked changes in the numbers of clients seeking advice on other matters between Phase 1 and 2.

Analysis of clients by procedural remit of case

3.3.5 Changes in the number of clients seeking advice from the In-court Advice Project between Phases 1 and 2 also varied by procedure.

Table 3.7 No. of Clients consulting the In-court Advice Project, by procedure

Procedure	Phase 1		Phase 2	
	No.	%	No.	%
Small claims	217	32	225	22
Summary cause	46	7	66	7
Heritage	390	57	615	61
Debtors (Scotland) Act 1987	3	*	63	6
Ordinary Cause (outwith remit)	22	3	33	3
Other	10	1	15	1
Total	688	100	1017	100

*less than one

3.3.6 There was little real increase between Phase 1 and 2 in the number of clients seeking advice on small claims. Compared with the first nine months of the In-Court Advice Project,

there was only a slight increase in the number of clients with small claims cases, rising from 217 to 225. This, however, constituted a decrease in the proportion of small claims clients dealt with by the Project, from 32% in Phase 1 to 22% in Phase 2.

3.3.7 There was an almost 50% increase in the number of summary cause (non-heritage) cases dealt with by the In-court Advice Project, from 46 to 66 cases, though the proportion of summary cause (non-heritage) cases remained stable.

3.3.8 There was a more than 50% increase in the number of Heritage cases dealt with by the In-Court Advice Project, from 390 to 615 cases. While summary cause (heritage) cases constituted 56% of all Project clients during Phase 1, they now comprised 61% of all clients in the nine month period beginning 1 December 1998.

3.3.9 The greatest proportional increase was in clients with matters relating to The Debtors (Scotland) Act 1987 (see 3.2.8-3.2.12 for full explanation), rising from 3 (.4%) of cases in the first nine months of Project to 63 (6%) in the nine month period beginning 1 December 1998.

Analysis of clients by parties to the dispute

3.3.10 The kinds of cases about which clients sought advice were also analysed by inspecting parties to the dispute. Clients who approached the In-court Advice Project for advice and assistance between 1 December 1998 and 31 August 1999 were mainly involved in disputes brought by local authority landlords against tenants (589), by finance companies against debtors (69), by individuals against individuals (53), and by businesses (including services and trades) against consumers (70). The number and distribution of these cases were compared with disputes brought by clients during the first nine months of the Project which were covered by Phase 1 of the research.

Table 3.8 Cases by parties to the dispute

Parties to the dispute	Phase 1		Phase 2	
	No.	%	No.	%
Local authorities v tenant	356	52	589	58
Finance v debtor	<i>Included in 'Other'</i>	<i>Included in 'Other'</i>	69	7
Consumer v business	62	9	33	3
Individual v individual	59	9	53	5
Business v consumer	50	8	70	7
Private landlord v tenant	34	5	22	2
Business v business	17	3	14	1
Housing Association v tenant	19	3	22	2
Local authorities v individual	14	2	11	1
Tenant v private landlord	9	1	19	2
Individual v local authorities	3	*	0	0
Other	60	9	115	12
Total	683	101**	1017	100

*Less than 1%

** More than 100% due to rounding off

3.3.11 Besides the remarkable increase in clients seeking advice on actions brought by local authorities against tenants, several other interesting differences between Phase 1 and 2 appear in Table 3.9. In particular, there is a decrease in clients seeking advice on claims brought by consumers against business, for which no immediate explanation comes to mind. Also, there is an increase in clients seeking advice on claims made by finance companies against debtors. This is partly explained by successful attempts, as the Project established itself, at reaching clients with matters relating to The Debtors (Scotland) Act 1987.

Analysis of clients by procedural status, type of claim and procedural remit of claim

3.3.12 Of 1017 clients who approached the In-court Adviser between 1 December 1998 and 31 August 1999, 16% (162) were pursuers and 83% (841) were defenders, compared with 22% pursuers and 77% defenders in the first nine months of the Project. This varied, however, according to the procedural remit of the case and the type of claim involved.

Table 3.9 Procedural status of client by procedural remit of case

Procedure	Clients		Pursuers	Defenders
	No.	%	%	%
Small claims	225	100	56	44
Summary cause	66	100	40	56*
Heritage	614	100	0	100
Debtors (Scotland) Act 1987	63	100	0	100
Ordinary Cause (outwith remit)	33	100	21	70*

1 December 1998 to 31 August 1999

** procedural status of some clients unknown*

Table 3.10 Procedural status of client by type of claim

Claim	Clients		Pursuers	Defenders
	No.	%	%	%
Housing arrears	613	100	*	100
Monetary claim	300	100	36	64
Damages/personal injury	22	100	50	50
Product/service debt	16	100	100	0
Rental deposit	15	100	80	20
Other housing matters eg nuisance	11	100	27	73

1 December 1998 to 31 August 1999

** Less than .5%*

Analysis of clients by opponents and their legal representation

3.3.13 The role played by the In-court Adviser on behalf of her clients, as well as in the larger civil justice system, may be assessed by examining the opponents which Project clients faced and how they were represented. In the period covered by Phase 1 of the research, 79% of all Project clients faced local authorities or businesses and at least 79% of all Project clients faced legally represented opponents. In the period covered by Phase 2 of the research, an even higher proportion of Project clients faced local authorities and legally represented opponents.

Table 3.11**Types of opponents**

Type of opponent	Phase 1		Phase 2	
	No.	%	No.	%
Local authorities	376	56	623	62
Businesses	152	23	109	11
Individuals	106	16	109	11
Non-profit organisation	not recorded		20	2
n/a	40	6	43	4
Total	674	101*	1017	101

*More than 100% due to rounding to whole number

3.3.14 The number of Project clients facing local authorities increased by over 50% and also increased proportionally. The number of Project clients facing business increased by over 40% and remained stable proportionally. The number of Project clients facing other individuals remained stable though decreased proportionally by over 30%.

3.3.15 When this is examined by procedure, 38% (85) of 225 small claims clients faced individuals during Phase 2 of the research, compared with 24% (16) of 66 summary cause clients, .2% (1) of 615 heritable clients and 2% (1) of 63 clients with matters pertaining to the Debtors (Scotland) Act 1987. Of the 109 Project clients facing individuals, 77 (70%) were pursuers.

Table 3.12**Opponents and their legal representation**

Representation	Phase 1		Phase 2	
	No.	%	No.	%
Legally represented	529	79	834	83
Not legally represented	35	5	58	6
Not yet known ¹⁹	62	9	74	7
Other	48	7	51	5
Total	674	100	1017	101

3.3.16 In Phase 2, at least 83% of all Project clients faced legally represented parties, while a further 7% of all clients (mainly potential pursuers) said their claim was at too early a stage in proceedings to know if this were to be the case. In Phase 2, only 6% of all Project clients (58 out of 1017 clients) identified themselves as involved in claims in which their opponents were not legally represented.

3.3.17 When this is examined by procedure, 42% (90) of 225 small claims clients faced parties who were legally represented during Phase 2 of the research, compared with 57% (37) of 66 summary cause clients, 100% of 615 heritable clients and 98% (62) of 63 clients with matters pertaining to the Debtors (Scotland) Act 1987. Of the 58 Project clients facing individuals who were not legally represented, 37 (64%) were pursuers. Of the 74 Project clients facing individuals whose legal representation was not yet known, 72 (97%) were pursuers. Most of these clients had first consulted with the In-court Adviser prior to raising an action. It was

¹⁹ Since many small claims clients sought advice prior to raising an action, it was not always possible to know whether those against whom they were making a claim would be legally represented should an action be raised.

therefore unsafe to predict at this stage whether or not their opponents would be legally presented should an action be brought against them.

Clients with cases outwith the remit of the Project

3.3.18 Clients also brought a small number of cases to the Project which were outwith its remit. These were monitored partly to inspect the accuracy with which referrals to the Project were being made and partly to assess the evidence for any obvious unmet need in the Sheriff Court. Only 36 clients, representing under 4% of all cases dealt with by the In-court Adviser in Phase 2, brought cases outwith the remit of the Project. This represented a slight numerical increase over the first nine months of the Project, (from 30 clients in Phase 1 to 36 clients in Phase 2), but a proportional decrease (from 5% of all clients in Phase 1 to under 4% in Phase 2) of all clients.

Table 3.13 **Clients outwith remit of the Project**

Case	Phase 1 No.	Phase 2 No.
Divorce	8	2
Criminal	7	0
Summary application	3	1
Property dispute	2	2
Reparation	2	1
Interdict	2	1
Debt (over £1500)	1	6
Child Custody	1	2
Judicial review	1	0
Will	1	0
Licence	1	0
Sequestration and poinding ²⁰	1	8
Maintenance & Child Support Agency	0	3
Outwith jurisdiction of Edinburgh Sheriff Court	0	2
Other	0	6
Total	30	36

3.3.19 Compared with the number of clients seeking advice within the remit of the Project, these clients are unlikely to have made a great impact on its business. Nevertheless, the elimination of referrals to the Project of criminal cases is indicative of the greater awareness amongst court staff (and mainly security guards) as to the role of the In-court Advice Project. The increase in the number of clients with debts outwith summary cause jurisdiction may be indicative of the impact of inflation on the business of the Ordinary Court and/or an inability to deal with Ordinary Cause procedure amongst an increasing number of 'party' debtors, that is, debtors who could not afford legal representation.

²⁰ As of 2000, these cases are now within the remit of the In-court Advice Project.

3.4 CLIENT REFERRALS

Analysis of referrals by main source of referral

3.4.1 Sources of referral to the In-court Advice Project were monitored. Inserts providing information as to services offered by the In-court Advice Project were introduced into the summonses of summary cause (heritage) actions raised by the City of Edinburgh Council in July 1997, and by Midlothian Council some months later. In the early months of the Project and almost immediately following their introduction, they became the most frequent source of referral of new cases to the In-court Advice Project. They became even more frequent during Phase 2 of the research.

Table 3.14 Sources of client referral

Source of referral	Phase 1		Phase 2	
	No.	%	No.	%
Inserts in summons	180	27	354	35
Clerk of Court	103	15	9	1
Other court staff	103	15	148	15
Sheriff Clerk's Office	83	12	109	11
In-court Advice Project staff	47	7	167	17
CABx & Advice Shop	24	4	38	2
Leaflets	22	3	13	1
Solicitors (own)	13	2	13	1
Other clients	7	1	5	1
Sheriffs	5	*	16	2
Solicitors (other side)	4	*	2	*
Self	<i>included in 'Other'</i>		37	4
Other	83	12	106	10
Total	674	100	1017	100

* Less than 1% of all clients

3.4.2 Inserts in summonses appear to have been responsible for recruiting 35% of the Project's clients in Phase 2, compared with 27% in Phase 1. As the Project established itself in the Sheriff Court, referrals from sheriffs show a small numerical and proportional increase over time. Interestingly, the number and proportion of referrals from the Clerk of Court decreased dramatically between the two research phases, from 103 (15%) in Phase 1 to 9 (1%) in Phase 2. There was a corresponding increase in the number and proportion of referrals from In-court Advice Project staff between Phase 1 and 2. This can partly be explained by the increasing number of staff associated with the Project during Phase 2. This allowed one or more staff members the opportunity to speak to many of the party litigants attending court as they went in and out of court, at the same time as the In-court Adviser was consulting with clients in the Project office next to the court. They are therefore likely to have been responsible for referring to the Project many of the clients whom the Clerk of Court would have previously referred.²¹ While the Clerk of Court had few opportunities to announce the availability of the In-court Advice Project and mainly took that opportunity prior to sitting, Project staff members had the opportunity to speak to party litigants throughout the sitting as they came in and out of the court.

²¹ Some responsibility may also be attributed to different methods of recording. Once assistants were in place, it was possibly assumed that all clients referred from the court had been 'caught' and referred by Project staff/assistants and not by the Clerk of Court.

However, it is not known how often and how consistently Project staff members were able to take that opportunity or what proportion of all party litigants attending court were referred by them. Comparison with the Clerk of Court cannot therefore be made.

Analysis of referrals by procedural remit of case

3.4.3 Sources of client referral depended on and varied with the procedural remit of cases.

Tables 3.15 Main sources of client referral by procedural remit of case

3.15a *Small claims*

Source of referral	Phase 1		Phase 2	
	No.	%	No.	%
Sheriff Clerk's Office	65	31	80	39
Clerk of Court	29	13	2	1
Court Staff	27	13	20	10
In-court Advice Project staff	18	9	30	15
CABx	<i>Included in 'Other'</i>		12	6
Solicitor (own)	<i>Included in 'Other'</i>		5	3
Self	<i>Included in 'Other'</i>		14	7
Other	72	34	62	30
Total	211	100	225	101

3.4.4 The Sheriff Clerk's Office was the main source of referrals of small claims cases in Phase 2 and was responsible for referring a small increase in these cases between Phase 1 and 2. In-court Advice Project staff were the second main source of referrals in Phase 2, though very much in second place to the Sheriff Clerk's Office. While the number of small claims referred by the In-court Advice Project staff increased between Phase 1 and 2, the number of referrals made by the court staff decreased and referrals by the Clerk of Court almost ceased. In Phase 2, In-court Advice Project staff appeared to be taking the place of the Clerk of Court in referring small claims cases to the Project.

3.15b *Summary cause*

Source of referral	Phase 1		Phase 2	
	No.	%	No.	%
Clerk of Court	12	26	0	0
Sheriff Clerk's Office	6	13	20	30
Court Staff	<i>Included in 'Other'</i>		13	20
In-court Advice Project staff	<i>Included in 'Other'</i>		6	9
CABx	<i>Included in 'Other'</i>		5	8
Insert in summons	7	15	1	2
Sheriff	2	4	1	2
Other	19	42	20	30
Total	46	100	66	101

3.4.5 The Sheriff Clerk's Office was the main source of referrals of summary cause (non-heritage) cases in Phase 2 and was responsible for increasing the small number of these cases referred to the In-court Advice Project between Phase 1 and 2.

3.15c Heritage

Source of referral	Phase 1		Phase 2	
	No.	%	No.	%
Insert in summons	168	44	306	50
In-court Advice Project staff	<i>Included in 'Other'</i>		125	20
Clerk of Court	61	16	2	*
Other court staff	57	15	102	17
Sheriff	<i>Included in 'Other'</i>		6	1
Other	96	25	73	12
Total	382	100	614	100

3.4.6 Inserts in summonses were the main source of referrals of heritable cases in Phase 2 and was responsible for referring a large numerical and proportionate increase in these cases between Phase 1 and 2. In-court Advice Project staff were the second main source of heritage referrals in Phase 2 though very much in second place to inserts in summonses. While the number of heritage cases referred by inserts, Project staff and other court staff increased between Phase 1 and 2, the number of referrals made by the Clerk of Court almost ceased. In Phase 2, Project staff appeared to be replacing the Clerk of Court in referring heritage cases to the Project.

3.15d Debtors (Scotland) Act 1987

Source of referral	Phase 1		Phase 2	
	No.	%	No.	%
Insert in summons	<i>Not recorded in Phase 1</i>		42	67
Clerk of Court			4	5
Other court staff			6	9
In-court Advice Project staff			3	5
Other			10	14
Total	3	100	63	100

3.4.7 Inserts in summonses were the main source of referral in Phase 2 for cases relating to The Debtors (Scotland) Act 1987. Because of the paucity of referrals (3 cases) in Phase 1, sources of referral were not computed. Inserts into the summonses of ordinary cause cases relating to The Debtors (Scotland) Act 1987 by the ordinary cause section of the Sheriff Clerk's Office commenced just prior to Phase 2 and was clearly largely responsible for the increase in referrals of cases to the In-court Advice Project.

3.15e Ordinary Cause (outwith remit)

Source of referral	Phase 1		Phase 2v	
	No.	%	No.	%
Clerk of Court	<i>Not recorded in Phase 1</i>		0	0
Other court staff			6	18
CABx			6	18
In-court Advice Project staff			3	9
Sheriffs			3	9
Sheriff Clerk's Office			3	9
Other, mostly self-referral			12	36
Total	23	100	33	99

3.4.8 The number of referrals of clients with matters within the remit of ordinary cause procedure and outwith the remit of the Project rose from 23 during Phase 1 research to 33 during Phase 2. Though sources of referral were not computed in Phase 1, these clients were believed to have been mainly self-referred or referred by court staff who were not aware of the Project's precise remit (see *Supporting Court Users*, p. 17). During Phase 2, these clients were referred by a large number of different sources of referral, including self-referrals and court staff.

Analysis of referrals by type of case

3.4.9 How clients came to be referred to the In-court Advice Project largely depended on the type of case in which they were involved. Since most clients (90%) were involved in claims involving housing arrears or other monetary claims, these cases will be examined more closely.

Tables 3.16 Impact of type of case on source of referral

3.16a Monetary claims (not rental arrears)

Source of referral	Phase 1		Phase 2	
	No.	%	No.	%
Sheriff Clerk's Office	44	25	71	26
Clerk of Court	30	17	5	2
Court staff	23	13	32	13
CABx & Advice Shop	13	8	17	6
In-court Advice Project staff	11	6	37	14
Insert in summons	9	5	47	17
Leaflet	7	4	10	4
Solicitor (own)	6	3	9	3
Solicitor (other side)	3	2	2	*
Sheriff	0	0	6	2
Other	33	18	39	14
Total	179	101	275	101

* Less than 1

3.4.10 In Phase 2, most clients with matters relating to monetary claims were referred to the In-court Advice Project by the Sheriff Clerk's Office, other court staff or by staff associated with the In-court Advice Project. Phase 2 also saw a substantial increase in the number (from 9 to 47) and proportion (from 5% to 17%) of clients with cases relating to monetary claims referred by inserts in summonses. This was due to the Sheriff Clerk's Office (Ordinary Cause section) which began

to insert information as to the services of the In-court Advice Project in summonses relating to The Debtors (Scotland) Act 1987 (see 3.4.2).

3.16b Rental arrears

Source of referral	Phase 1		Phase 2	
	No.	%	No.	%
Insert in summons	167	45	307	52
Court staff	55	15	101	17
Sheriff Clerk's Office	8	2	6	2
Clerk of Court	54	15	2	*
In-court Advice Project staff	26	7	124	21
CABx & Advice Shop	8	2	4	1
Solicitor (own)	6	2	3	1
Sheriff	0	0	4	1
Other	45	12	43	6
Total	369	100	594	101

* Less than 1

3.4.11 In Phase 2, more than half of all clients with matters relating to housing arrears were referred to the In-court Advice Project by inserts in summonses. Inserts were responsible for referring 307 housing arrears cases in Phase 2 compared with 167 in Phase 1. I-cA Project staff were responsible for referring 124 (21%) housing arrears clients in Phase 2 compared with 26 (7%) in Phase 1. There was also a corresponding decrease in the number and proportion of housing arrears clients referred by the Clerk of Court from Phase 1 to Phase 2.

Analysis of referrals by procedural status of client

3.4.12 How clients came to be referred to the In-court Advice Project also largely depended on their procedural status. In Phase 2, one half of all Project clients (50% or 76) who were pursuers were referred to the Project by the Sheriff Clerk's Office, compared with only 4% (33) of clients who were defenders. This is because party pursuers were far more likely than defenders to come into contact with the Sheriff Clerk's Office, usually making their initial approach prior to raising an action in order to obtain the necessary forms and seek advice on completing them. The Sheriff Clerk's Office was followed by Citizens Advice Bureaux, In-court Advice Project staff and court staff, each of which was responsible for referring 7% of all pursuers. This is because the majority of pursuers in the small claims and summary cause (heritage and non-heritage) courts are represented by solicitors while a large proportion of party pursuers would have already been referred on to the Project by the Sheriff Clerk's Office at an earlier stage. While the Sheriff Clerk's Office had referred more pursuers to the Project than any other source of referral in Phase 1, its share of referrals increased from 40% to 50% in Phase 2. CABx and the I-cA Project staff also increased their share of pursuer referrals in Phase 2. No differences between small claims and summary cause pursuers could be identified with respect to the source of their referral to the Project.

3.4.13 Defenders, on the other hand, were more likely to be referred by inserts in summonses. In Phase 2, almost half (44% or 354) of all Project clients who were defenders were referred by inserts in summonses. This was followed by I-cA Project staff (19% or 155) and court staff (17% or 135). While inserts in summonses were responsible for referring more defenders to the Project than any other source of referral in Phase 1, their share of referrals grew in Phase 2 (from

35% to 44%), as did the number of party defenders which the inserts referred. While the proportion of defenders referred by court staff remained steady over the two periods, there was a real numerical increase. The major difference between Phase 1 and 2, however, was the decreasing share of referrals of defenders from the Clerk of Court (from 18% to 1%) and the increased share of referrals of defenders by I-cA Project staff (from 7% to 19%).

3.4.13 Amongst defenders, substantial differences depending on procedure could be identified. Only 5% of small claims defenders were referred to the In-court Advice Project by inserts in summonses, compared with 3% of summary cause defenders and 51% of heritage defenders. Most importantly, 70% (42) of all defenders whose cases came under The Debtors (Scotland) Act 1987 were referred by inserts in summonses. This represented one of the most striking differences between Phase 2 and Phase 1 when just three referrals were made to the Project, none of which were by inserts in summonses.

3.5 REFERRALS AND PROCEDURAL STAGE

Implications of procedural stage of referrals

3.5.1 In-court Advice Project records were examined for the procedural stage at which clients were referred to the Project. The procedural stage at which clients are referred has implications both for the services which the In-court Adviser may offer, as well as for the impact of those services on clients and on the sheriff court. So, for example, pursuers in small claims and summary cause cases who are referred to the In-court Advice Project prior to raising an action may be offered advice as to the advisability of litigation, alternatives to litigation and what strategies to adopt at court hearings.—This is advice that is usually too late for small claims and summary cause litigants who make initial contact with the In-court Advice Project at the time of a court hearing. This has implications for the efficient use of court time. For example, advice given at early procedural stages allows the court to focus on the issues in dispute and may do away with the necessity of going to court entirely. Similarly, defenders in housing repossession cases who make contact with the In-court Advice Project prior to a court hearing, may be advised on what information to bring before the sheriff, how to avoid a court hearing, or they may be referred to another agency for assistance with debt or other problems prior to a court hearing. This has implications for how defenders present themselves in the heritage court and how matters are dealt with by the pursuer and the court.

Analysis of referrals by procedural stage of consultation

3.5.2 Clients consulted with the In-court Adviser at various procedural stages. More than 30 procedural stages were identified and were categorised according to their relationship to court callings. In Phase 2, 50% of all consultations were conducted prior to cases calling court compared with 46% of all consultations in Phase 1. However, since the proportion of consultations conducted prior to cases calling in court had steadily increased over the first nine months of the Project, from 13% in April 1997 (Month 1) to 47% in August (Month 5) and 52% in December 1997 (Month 9), consultations conducted during Phase 2 of the research were no more likely to be conducted prior to cases calling in court than during the latter months of Phase 1, that is, once the Project had established itself in Edinburgh Sheriff Court.

3.5.3 The number of consultations conducted with the In-court Adviser while client cases were being called in court almost doubled between the periods covered by the two phases of the

research, (from 340 to 630). At first glance, then, it would appear as if the proportion of consultations conducted when cases called in court actually rose between Phase 1 and 2, (from around 25-30% to 38% of all consultations). However, once the 'double accounting' of return consultations in Phase 2 is taken into consideration (see 3.2.1-3.2.5), any differences between the two research phases disappear.

Analysis of referrals by procedural stage of initial and return consultations

3.5.4 More significant, both for the impact of the In-court Advice Project on court-based resources and on case-related effectiveness, is the procedural stage at which clients first consulted the In-court Adviser. Altogether, 968 out of the 1648 consultations conducted with 1017 clients over the ninth month period covered by Phase 2 of the research were initial consultations, compared with 680 (41%) 'return' consultations in this period.

3.5.5 As already discussed (3.2.1-3.2.5), there was a considerable increase in return consultations between the two phases of the research, with initial consultations rising by 42% over the period (from 683 to 968), but return consultations rising by over 300%, from 210 to 680.

Table 3.17 Procedural stage of initial and return consultations

Procedural Stage	Initial consultations				Return consultations			
	Phase 1		Phase 2		Phase 3		Phase 4	
	No.	%	No.	%	No.	%	No.	%
Prior to raising an action	73	11	95	10	17	8	55	8
Prior to Preliminary Hearing/ First Calling	218	32	333	35	31	15	89	13
Prior to 'time to pay' hearing	0	0	43	5	0	0	25	4
Prior to continued Preliminary Hearing/First Calling	6	1	14	2	10	5	58	9
Prior to Full Hearing/Proof	14	2	18	2	20	10	60	9
At Preliminary Hearing/First Calling	225	33	247	26	24	11	96	14
At continued Preliminary Hearing/First Calling	23	3	46	4	17	9	55	8
At Full Hearing/Proof	14	2	14	2	17	8	25	4
At hearing/ minute of recall	10	1	13	1	9	4	13	1
At 'time to pay' hearing	0	0	16	2	0	0	35	5
Post decree	11	2	33	3	25	12	60	9
Other	91	13	96	8	40	19	109	16
Total	683	100	968	100	210	101	680	100

Initial consultation

3.5.6 In Phase 1, that is, during the first nine months of the Project, 311 (46%) initial consultations were conducted some time prior to the case calling in court. In Phase 2 of the Project, however, this increased to 503 or 54% of all initial consultations. The likelihood of clients first consulting the In-court Adviser at an earlier stage of their case thus increased as the Project established itself in Edinburgh Sheriff Court. The number of initial consultations handled by the In-court Adviser prior to the case calling in court increased between Phase 1 and 2 by 61%, from 311 to 503.

3.5.7 The number of clients who first consulted with the In-court Adviser on the day their case called in court, however, increased between Phase 1 and 2 by only 24%, from 272 to 336. Indeed, the proportion of clients who first consulted the In-court Advice Project on the day their case called in court actually declined from 39% of all initial consultations in Phase 1 to 35% in Phase 2 (of cold comfort to the In-court Adviser).

3.5.8 Therefore, the substantial (42%) increase in initial consultations between the two periods covered by Phases 1 and 2 of the research was mainly, though not totally, amongst clients consulting with the In-court Adviser some time prior to their case calling in court.

Return consultations

3.5.9 The data were inspected to identify the procedural stages at which the large increase of return consultations were conducted. Though there were strong increases in the number of return consultations between the two research phases at almost every procedural stage, return consultations conducted before cases called in court rose from 78 (38% of all return consultations) to 287 (43% of all return consultations), an increase of almost 400%.

3.5.10 Return consultations conducted when cases called in court rose from 67 (32% of all return cases) to 224, a rise of 300%. Of these return consultations, however, 156 were conducted with clients who had already seen the In-court Adviser on the day their case was calling in court (prior to calling) and who were following up their court appearance by returning to the In-court Adviser. This 'double accounting' was not undertaken in the period covered by Phase 1 of the research: where a client consulted both before and after their case called in court in Phase 1, these two consultations were recorded by the In-court Adviser only once (see 3.2.1-3.2.5). Had consultations been recorded in Phase 2 as in Phase 1, then the number of return consultations taking place on the day cases called in court would have risen from 67 to only 68.

3.5.11 The enormous (300%) increase in return consultations between the two periods covered by Phases 1 and 2 of the research, therefore, was mainly restricted to clients consulting with the In-court Adviser some time prior to their case calling in court.

Analysis of referrals by procedural stage of initial consultation and procedural remit of case

3.5.12 There were some differences in the procedural stage at which clients first consulted the In-court Adviser, depending on the procedural remit of the case.

Table 3.18 The impact of case procedure on procedural stage of initial consultation

Procedure	Prior to raising claim/ PH/ First Calling/'time to pay' Hearing		At Preliminary Hearing/ First Calling	
	Phase 1 (%)	Phase 2 (%)	Phase 1 (%)	Phase 2 (%)
Small claims	39	50	31	21
Summary cause	39	48	43	28
Heritage cases	48	49	41	40
Debtors(Scotland)	<i>not recorded</i>	70	<i>not recorded</i>	24

3.5.13 Thus, during the period covered by Phase 2 of the research, approximately half of all clients first consulted with the In-court Adviser prior to either raising a claim or prior to the Preliminary Hearing/First Calling. More than two thirds of all clients with cases calling under The Debtors Scotland Act, however, first consulted with the In-court Adviser prior to the 'time to pay' hearing. When Phase 1 and Phase 2 are compared, the proportion of initial consultations conducted prior to the case calling in court shows a rise of approximately 25% amongst small claims and summary cause clients and a very small rise amongst heritage clients.

3.5.14 During the period covered by Phase 2 of the research, only one in five (21%) small claims clients first consulted with the In-court Adviser at the Preliminary Hearing, compared with two in five (40%) heritage clients who first consulted with the In-court Adviser at the First Calling. Compared with Phase 1, the proportion of small claims and summary cause clients first consulting with the in-court Adviser at Preliminary Hearings and First Callings fell by over 33%, falling from 31% to 21% in small claims and 43% to 28% in summary cause. The proportion of heritage clients first consulting at First Calling remained steady between the two periods of research, (just falling from 41% to 40%). The actual number of heritage clients consulting with the In-court Adviser while the heritage court was in progress rose from 158 in the period covered by Phase 1 to 234 in Phase 2.

Analysis of referrals by procedural stage of initial consultation and procedural status

3.5.15 The procedural stage at which clients first consulted the In-court Advice Project also depended on their procedural status. Of the 1017 clients during Phase 2, 16% (162) were pursuers and 83% (841) were defenders, compared with 22% pursuers and 77% defenders in the first nine months of the Project.

Table 3.19 The impact of procedural status on procedural stage of initial consultation

Procedural status	Prior to raising claim/ PH/First Calling/ttp		At PH/First Calling	
	Phase 1 (%)	Phase 2 (%)	Phase 1 (%)	Phase 2 (%)
Pursuers	58	66	22	13
Defenders	38	41	40	34

3.5.16 Of the 162 pursuers who consulted the In-court Adviser in the period covered by Phase 2 of the research, 66% first approached the Project prior to raising a claim or prior to the Preliminary Hearing/First Calling, compared with 41% of defenders. Of the 841 defenders who approached the Project over the same period, 34% waited until the case first called in court, compared with 13% pursuers.

Analysis of referrals by procedural status and procedural remit of case

3.5.16 When procedure and status are considered together, the procedure under which pursuers make their claim appears to have little impact on the procedural stage at which they first consult with the In-court Adviser. Amongst defenders, however, procedure is significant. Heritable defenders and defenders with matters relating to The Debtors (Scotland) Act 1987 were far more likely to seek a consultation with the Project prior to their case calling in court (49% and 69% respectively) than small claims and summary cause defenders (30% and 32% respectively). This, of course, may largely be accounted for by the main mechanism by which clients involved in heritage actions and matters relating to The Debtors (Scotland) Act 1987 are referred to the

Project, namely, via the insertion of information about the In-court Advice Project into their summonses.

3.6 CHARTING THE BUSINESS OF THE IN-COURT ADVICE PROJECT: WORK LOAD AND WORK DISTRIBUTION

Number of consultations

3.6.1 Business was monitored over the nine month period beginning 1 December 1998, by identifying the number of consultations conducted. Changes in the volume of consultations were identified, and then compared with the first 11 months of the In-court Advice Project.

Table 3.20 Volume of business conducted

Number of consultations				
Phase 1			Phase 2	
1997		No.	1998	No.
April		52	December	142
May		64	1999	No.
June		85	January	201
July		83	February	172
August		135	March	215
September		120	April	166
October		134	May	215
November		119	June	167
December		105	July	170
1998²²		No.	August	200
January		157		
February		141		

3.6.2 When the Project was first established, the number of monthly consultations rose steadily from 52 in April to 134 in October, thereupon falling to 119 and 105 in November and in the shorter working month of December, respectively. November and December 1998 were unusual months, with fewer court sessions and fewer heritage actions raised. After the period covered by Phase 1 of the research, the trend in monthly consultations resumed its upward climb to 157 in January 1998 and 141 in February 1998.

3.6.3 During the period covered by Phase 2 of the research, the number of consultations conducted each month with the In-court Adviser never dipped below the level established in February 1998 and was often 50% higher. Like Phase 1, December saw business at its lowest, with 142 consultations. Thereafter, the number of consultations fluctuated between 166 and 215 consultations per month.

²² Though outwith the remit of Phase 1 of the research, information on business conducted in January and February 1999 was collected to inspect for the impact of the December break on business volume. Decrease in the volume of business in December was not found to be indicative of a real decrease.

Initial and return consultations during Phase 2

3.6.4 Business was examined for fluctuations in initial and return consultations over Phase 2.

Table 3.21

Year	Month	All		Initial consultations		Return Consultations	
		No.	%	No.	%	No.	%
1998	December	142	100	72	51	70	49
1999	January	201	100	137	68	64	32
1999	February	172	100	101	59	71	41
1999	March	215	100	115	54	100	46
1999	April	166	100	99	60	67	40
1999	May	215	100	113	53	102	47
1999	June	167	100	107	64	60	36
1999	July	170	100	100	59	70	41
1999	August	200	100	124	62	76	38

3.6.5 The quietest months, December and April, saw the lowest number of initial consultations. The highest months, January, March, May and August, saw the highest numbers of monthly initial consultations and sometimes (January and August) the lowest number of return consultations. Initial consultations were mainly responsible for monthly fluctuations in business over Phase 2.

Consultations and procedural remit of cases during Phase 2

3.6.6 Over the nine months of Phase 2, monthly consultations relating to small claims procedure fluctuated between 33 and 61, with no apparent trend revealing itself. There were even greater monthly fluctuations in consultations relating to summary cause procedure, from only five consultations in December 1998, rising to 34 in March 1999, falling to eight in June 1999 and rising to 14 in August 1998. Monthly consultations relating to summary cause (heritage) procedure fluctuated between 60 and 120 and, because of their greater number, made a substantial impact on work load and work distribution within the Project. Consultations relating to cases under the remit of The Debtors (Scotland) Act 1987, hovered between 14 and 20 consultations per month.

Types of consultation: Comparing Phase 1 and 2

3.6.7 How consultations were conducted and the form which they took were monitored over both research periods.

Table 3.22 How consultations were conducted

	Number of consultations			
	Phase 1		Phase 2	
	No.	%	No.	%
In person	563	63	889	54
By telephone	321	36	696	42
By letter	9	1	56	3
Total	893	100	1641	99

3.6.8 The number of consultations in person increased by over 50% between Phase 1 and 2, while the number of consultations by telephone increased by over 100%. Nevertheless, some qualifications should be made. Over the two periods, the proportion of consultations in person appears to decrease (from 63% to 54%) while the proportion of consultations by telephone appears to increase (from 36% to 42%). This masks changes in the patterns of consultation as the In-court Advice Project established itself during Phase 1 of the research. By Months 7, 8 and 9 of Phase 1, the proportion of consultations conducted over the telephone had actually reached 45%, 54% and 51% of all consultations, respectively, and the proportion of consultations in person had correspondingly decreased. It might therefore appear as if the proportion of telephone consultations actually decreased between the latter months of Phase 1 and Phase 2. When new monitoring practices implemented after Phase 1 are taken into account, however, (see 3.2.1-3.2.5) there is little difference between Phase 2 and the last three months of Phase 1 in the distribution of consultations in person, by telephone or by letter. This is because the 'double accounting' recording of return consultations only made an impact on consultations in person.²³ Thus, the major change between the two phases remains the rising number of consultations of every kind, rather than their distribution.

Time of contact

3.6.9 The times at which clients consulted with the In-court Adviser was related to how they consulted. Clients who consulted the In-court Adviser in person were more likely to consult with the Project at a time when court was in session and when the In-court Adviser was extremely busy. The capacity of the Project to meet the needs of an increasing number of clients largely depended on how many consultations could be conducted when the court was not in session. Hence, whether clients consulted with the In-court Adviser when court was in session or when court was not in session was closely monitored in Phase 2.

Time of contact: Analysis by procedural status

3.6.10 More than half of all consultations in Phase 2 (57% or 936) were conducted outwith court sessions compared with 43% (705) which took place when court was in session. Only 62 consultations with pursuers took place when court was in session (20% of all consultations with pursuers), however, compared with 641 consultations with defenders (49% of all consultations with defenders). Thus, though 41% of all consultations with pursuers were conducted in person, less than half (only 20% of all consultations with pursuers) took place when court was in session. While 57% of consultations with defenders were conducted in person, most of these consultations (49% of all consultations with defenders) took place when court was in session. This is both because of the different opportunity structure available to pursuers and defenders for referral to the Project as well as the more pro-active stance of pursuers in accessing the In-court Advice Project at a time which may be more beneficial for them.

Time of contact: Analysis by source of referral

3.6.11 Large differences also appear when consultations, and particularly initial consultations, are inspected for source of referral. Though 44% of all initial consultations took place when court was in session, initial consultations were far more likely to take place when court was in session amongst clients referred by court staff (90%), by the Clerk of Court (89%), by sheriffs

²³ Because of this, return consultations were more likely to be in person (56% of all return consultations) than initial consultations (54% of initial consultations) in Phase 2 of the Project. Also, consultations with pursuers were less likely to be conducted in person than consultations with defenders (41% compared with 57%).

(94%), by staff associated with the In-court Advice Project (96%) and by themselves (66%). Altogether, these sources of referral were responsible for referring 340 out of the 437 clients who first consulted with the In-court Advice Project while court was sitting. Though 56% of all initial consultations took place outwith court time, initial consultations were far more likely to take place outwith court time amongst clients referred by the Office of the Sheriff Clerk (88%), by inserts in summons (90%) and by CABx (90%). Altogether, these sources of referral were responsible for referring 448 out of 554 clients who first consulted with the In-court Advice Project outwith court time.

3.7 SUMMARY OF FINDINGS

Consultations and clients (3.2.1–3.2.20)

3.7.1 In the nine month period covered by Phase 2 of the research, 1648 consultations were undertaken with 1017 clients. When adjusted for differences in record keeping and compared with the first nine months of the Project, the number of clients and the volume of business (as measured by number of consultations) handled by the In-court Advice Project was found to have increased by 50% and 66% respectively.

3.7.2 There was an increase in the number of consultations and clients for all procedures, though the rise in consultations was greater than the rise in clients. This is partly accounted for by differences in record keeping between the two periods. The number of consultations relating to summary cause (heritage) procedure rose from 452 to 857 (a rise of 90%) and the number of clients rose from 382 to 615 (a rise of 61%). The number of consultations relating to summary cause procedure rose from 70 to 147 (a rise of more than 100%) and the number of clients rose from 46 to 66 (a rise of 43%). The number of consultations relating to The Debtors (Scotland) Act 1987 rose from four to 129 (a rise of more than 3,000%) and the number of clients from 3 to 63 (a rise of 2,100%). The number of consultations relating to small claims procedure showed the slowest rate of growth, rising from 326 to 436 (a rise of 33%), while the number of clients hardly changed at all (from 217 to 225). As a result, the proportion of consultations with defenders rose from 73% in Phase 1 to 80% in Phase 2. Of 1648 consultations conducted in the nine months covered by Phase 2 of the research, 1310 were with respect to claims which had not been set in motions by those who sought advice from the Project.

3.7.3 Almost two-thirds (64%) of clients consulted with the In-court Adviser only once, ranging from 36% of clients who sought advice on matters relating to The Debtors (Scotland) Act, to 49% of clients seeking advice on small claims procedure, and to 73% of clients seeking advice on matters relating to summary cause (heritage) procedure. Defenders were more likely to consult only once compared with pursuers. The proportion of clients seeking advice more than once rose from 18% to 26% between the two period, though the increase may partly be attributed to differences in record keeping.

Clients and cases (3.3.1–3.3.17)

3.7.4 Over 60% of clients were local authority tenants compared with 7% of house owners and 3% private tenants. While information was not collected on the housing tenure of 29% of clients (mainly in cases unrelated to housing), some of them – though not as many – are likely to have been local authority tenants. The majority of clients sought advice on matters relating to housing arrears (60%) and other debts (30%), while the proportion of clients who sought advice on

matters outwith the remit of the Project declined over the two periods. 58% of all clients were involved in cases brought by local authorities against tenants (compared with 52% of all clients in Phase 1), 2% in cases brought by private landlords against tenants, and 2% brought by housing associations against tenants. 7% of all clients were involved in cases brought by finance companies against debtors and 7% in businesses against consumers. There was a very noticeable increase in the number of clients involved in cases brought by local authorities against tenants (from 356 to 589) as well as a marked increase in clients seeking advice on claims made by finance companies against debtors. There was a noticeable decrease in the number of clients involved in cases brought by consumers against businesses (from 62 to 33).

3.7.5 The number and proportion of clients facing local authorities and other legally represented opponents was also higher in the period covered by the second phase of the research. The number of clients facing local authorities increased from 376 (56% of all clients) to 623 (62% of all clients) while the proportion of clients facing individuals declined from 16% to 11% of all clients. The number of clients facing legally represented opponents increased from 529 (79% of all clients) to 834 (83% of all clients).

Referrals and procedures (3.4.1–3.4.13)

3.7.6 The number of clients referred to the In-court Advice Project by inserts into the summonses doubled from 180 (representing 27% of all clients) in Phase 1 to 354 (representing 35% of all clients) in Phase 2. As the Project established itself in the court, there was a small numerical and proportional increase of referrals from sheriffs. Unlike Phase 1, when the In-court Adviser was mainly working alone, Project staff were now meeting court users at the doors of the court and were responsible for referring to the Project many of the clients whom the Clerk of Court would previously have referred. This displayed itself in a marked decrease in the number of clients referred by the Clerk of Court and a concomitant increase in the number of clients referred by Project staff, and amongst clients seeking advice on all procedures.

3.7.7 Like Phase 1, the largest proportion of small claims clients were referred from the Sheriff Clerk's Office (39% of small claims clients in Phase 2 compared with 31% in Phase 1) and the largest proportion of heritage clients were referred by inserts in summonses (50% of heritage clients in Phase 2 compared with 44% in Phase 1). While the Clerk of Court was the chief source of referral of summary cause clients in Phase 1 (26% of summary cause referrals), the Sheriff Clerk's Office and Project staff referred 30% and 20% of summary cause clients, respectively, in Phase 2. The chief source of referral of clients seeking advice on matters relating to The Debtors (Scotland) Act 1987 was information about the Project which was inserted into the summonses of ordinary cause cases by the Ordinary Cause section of the Sheriff Clerk's Office (67% of all referrals). This commenced just prior to the period covered by Phase 2 of the research and was clearly responsible for the dramatic rise in the number of these cases from Phase 1 (3 cases) to Phase 2 (63 cases).

3.7.8 The identification of procedural status was responsible for revealing the presence of an opportunity structure for referral to the In-court Advice Project. Amongst those clients who were pursuers, the Sheriff Clerk's Office was responsible for referring 40% in Phase 1 and 50% in Phase 2. Amongst clients who were defenders, inserts in summonses were responsible for referring 35% in Phase 1 and 44% in Phase 2. There was great variation between procedures, however, with only 5% and 3% of defenders amongst small claims and summary cause clients referred by inserts compared with 51% of heritage clients and 70% of clients with matters relating to The Debtors (Scotland) Act 1987.

Referrals and procedural stage (3.5.1–3.5.16)

3.7.9 The number of all consultations conducted prior to cases calling in court doubled (from 409 to 814) between the periods covered by the two phases of the research. It also increased proportionally from 46% to 50% of all consultations.

3.7.10 Amongst initial consultations, 503 (54%) consultations were conducted prior to cases calling in court, compared with 311(46%) in Phase 1. Amongst consultations relating to small claims and summary cause cases, there was a substantial increase in the proportion conducted before cases called in court (from 39% in Phase 1 to 50% in Phase 2 for small claims, and from 39% in Phase 1 to 48% in Phase 2 for summary cause). The number of consultations conducted on the day when cases were called in court rose from only 272 to 336 and fell proportionately from 39% to 35%. Amongst consultations relating to small claims and summary cause cases, there was a substantial decrease in the proportion of consultations conducted on the day cases called in court (from 31% in Phase 1 to 21% in Phase 2 amongst small claims cases, and from 43% in Phase 1 to 28% in Phase 2 amongst summary cause cases). Between Phase 1 and 2, the proportion of initial consultations conducted prior to cases calling in court rose from 58% to 66% amongst pursuers and from 38% to 41% amongst defenders. There were marked differences, however, between defenders. Amongst heritable defenders and defenders with matters relating to The Debtors(Scotland) Act 1987, initial consultations were sought prior to cases calling in court by 49% and 69% respectively, compared with small claims (30%) and summary cause (32%) defenders. The proportion of pursuers who first consulted on the day of a Preliminary Hearing or First Calling showed a marked decrease (from 22% in Phase 1 to 13% in Phase 2) compared with defenders (40% in Phase 1 to 34% in Phase 2).

3.7.11 Amongst return consultations, findings must be treated with some caution because of differences between Phase 1 and 2 in the recording procedures employed. When these are taken into consideration, the apparent increase in return consultations from 210 in Phase 1 to 680 in Phase 2 was largely though not entirely restricted to clients consulting with the In-court Adviser some time prior to their cases calling in court.

Charting the business: workload and work distribution (3.6.1–3.6.11)

3.7.12 The number of monthly consultations conducted during Phase 2 of the research was substantially higher than the monthly average of Phase 1, even accounting for differences in recording procedures. There were monthly fluctuations in the number of consultations relating to different procedures, and this was especially marked amongst consultations relating to summary cause (heritage) procedure.

3.7.13 While there were differences between the proportion of consultations conducted in person, by telephone and by letter between Phases 1 and 2, little difference remains when Phase 2 is compared with the latter months of Phase 1. The major change between the two phases is the rising number of consultations of every type, rather than their distribution.

3.7.14 More than half of all Phase 2 consultations (57%) were conducted at a time when court was not in session. Consultations with pursuers were far less likely to be conducted at a time when court was in session (20% of consultations with pursuers) than consultations with defenders (49% of consultations with defenders). Initial consultations were far more likely to take place when court was in session amongst clients referred by court staff, the Clerk of Court, sheriffs, or Project staff and clients themselves.

CHAPTER FOUR

THE MEDIATION PROJECT:

This chapter presents research findings relating to the operation and business of the Mediation Project during the period covered by Phase 2 of the research. It first examines the links between the In-court Advice and Mediation Project, particularly as they relate to referrals and the setting up of mediation services (4.1). It then documents the business of the Mediation Project by examining the sources of referrals to the Project, the kinds of cases referred and the procedural stages at which they are referred, the characteristics and responses of clients referred, and the outcome of these referrals (4.2). It then goes on to examine the role played by the Mediation Project in the context of the Sheriff Court and in relation to the In-court Advice Project, litigation, litigants and solicitors (4.3). The services offered by the In-court Advice Project are then documented and the conditions for successful 'assisted' negotiation and mediation hearings are considered from the perspective of clients and mediators (4.4). The chapter concludes with a summary of findings (4.5).

4.1 INTRODUCTION

The Mediation Project and Phase 1 research

4.1.1. Because the Mediation Project was independent of the In-court Advice Project during Phase 1 of the In-court Advice Project research, referrals to the Mediation Project were documented and treated in Phase 1 of the research in the same way as referrals to all other advice agencies (see Samuel, 1999: 80-87). This chapter monitors the Mediation Project between 1 December 1998 and 31 August 1999, in Phase 2 of the research.

The process of referral

4.1.2 Referrals to the Mediation Project over the period covered by Phase 2 of the research were made by the In-court Adviser, by Central CAB, by sheriffs and by the Mediation Co-ordinator who began attending the small claims/summary cause court in April 1998, soon after the Mediation Project was formally joined to the In-court Advice Project. The Mediation Co-ordinator also evaluated the appropriateness of cases for mediation by listening to cases as they were called up. Should they be deemed appropriate for mediation, she followed one or both parties out of the court and asked if she could speak to them. The In-court Adviser usually evaluated the appropriateness of cases for mediation during consultation with her clients. Sheriffs also began to refer litigants to mediation from court during Phase 2 of the research and litigants were directed either to the In-court Adviser or the Mediation Co-ordinator by sheriffs. Some referrals were made by Edinburgh Central CAB directly to the Mediation Co-ordinator at Edinburgh Central CAB. This was possible because the Mediation Co-ordinator was also a paid employee (Deputy Manager) of Edinburgh Central CAB.

4.1.3 All clients to whom mediation was suggested were given a leaflet about mediation by the In-court Adviser or Mediation Co-ordinator. Leaflets were sent out to those with whom consultations were conducted by telephone. A standard letter was then sent out to all clients with cases for which mediation was believed appropriate, as well as to those clients to whom mediation had been suggested should other proposed options not work out to their satisfaction. Clients referred to mediation in this way were categorised as 'first' parties, simply because they were the first party to the dispute to be contacted.

4.1.4 'First' parties responded on their own initiative. Because some were invited to consider mediation should other options fail, not all 'first' parties who responded in the negative or who failed to respond may be seen as 'failed' referrals. If 'first' parties agreed to a mediation hearing or, in some cases, to some form of assisted negotiation, then the Mediation Co-ordinator usually wrote to the other party to the dispute, henceforth called the 'second' party. If the 'second' party was legally represented, however, she called the 'second' party's agent directly. In some cases, both parties agreed to the Mediation Co-ordinator helping them negotiate a settlement 'at a distance' or at 'arm's length' rather than to a mediation hearing (see 4.4.1 for further details). In every case, the Mediation Co-ordinator conducted an investigation into the background of the dispute by speaking to both parties. Views as to what form of mediation or negotiation would best suit parties emerged from these discussions. This involved taking into account the complexity of the dispute and how much time parties wished to invest in its resolution.

4.1.5 An integral part of the service provided by the Mediation Project, according to its Co-ordinator, was access to free legal advice for any party who wished it: "*It is essential that anyone entering an agreement which involved giving up the right to have the case decided in court is fully aware of the implications*".²⁴ The Mediation Co-ordinator therefore ascertained from both parties as to whether legal advice had been received. Where it had not, or where it was old, advice was offered and given by a member of Edinburgh Central CAB's panel of volunteer lawyers. Information is not available on the number of parties agreeing to a mediation hearing who took up this offer.

Setting up mediations

4.1.6 Most mediation hearings took place at Edinburgh Central CAB. Occasionally Edinburgh mediators used their own offices. Mediation hearings were provided free for both 'first' and 'second' parties. It was rare for lawyers to accompany parties to mediation, though they could accompany their clients should parties so wish it. If parties were successful in coming to an agreement at a mediation hearing, the mediator drew up the terms in a 'Heads of Agreement' document. Though this was not a legally binding document, it was possible to make it so through a solicitor. There appeared to be no formalised 'After-care' provision offered to parties.

4.1.7 Most mediation hearings were run by mediators trained by the Centre for Dispute Resolution (CEDR) or the Law Society of Scotland, though not every mediator was a lawyer. All volunteered for the task on a *pro bono* basis. When the number of volunteers dipped, the President of the Law Society of Scotland contacted all those lawyers who had joined the Law Society of Scotland ACCORD²⁵ scheme and four further volunteers agreed to join. The number of mediators involved at any one time ranged from six in November 1998 to fourteen in July 1999. The number of mediators involved in the Project was low at precisely the time when referrals to mediation appeared to take off. Some mediators reported that they were not always able to undertake a mediation within the short notice (two to three weeks) sometimes given and, in June 1999, the Mediation Co-ordinator reported the first occasion on which the service was unable to provide a mediator within the time scale sought by one of the parties.²⁶

²⁴ Edinburgh Sheriff Court Advice Service Project-Mediation: End of Year Report July 1998 to March 1999

²⁵ The ACCORD scheme was set up by the Law Society of Scotland to accredit solicitors as solicitor-mediators.

²⁶ See Edinburgh Sheriff Court Advice Service Project-Mediation: Fourth Steering Committee Report (unpublished)

4.2 THE MEDIATION PROJECT: MONITORING THE BUSINESS

Databases

4.2.1 Data were collected on all referrals made by the In-court Advice Project to the Mediation Project between 1 December 1998 and 31 August 1999. Information was also collected on referrals made directly to the Mediation Project by sheriffs, by the Mediation Co-ordinator and by CABx. Synchronisation of the two databases was difficult (see 2.4).

Referrals from the In-court Advice Project: Phase 1 and 2

4.2.2 Data were inspected for information on referrals from the In-court Advice Project to the Mediation Project during the periods covered by the two research phases.

Table 4.1 Referrals from the In-court Advice Project

Phase 1 (674 clients)		Phase 2 (1017 clients)	
No.	%	No.	%
34	5	99	10

4.2.3 Between the periods April to December 1997 and December 1998 to August 1999, the number of clients referred from the In-court Advice Project to the Mediation Project increased threefold, from 34 to 99. Thus, if the impact of the In-court Advice Project on the Mediation Project was considerable during the first nine months of its introduction into Edinburgh Sheriff Court (see Cameron and Loughran, 1998), its impact on the Mediation Project was even more marked during the period covered by Phase 2 of the research. The proportion of all In-court Advice Project clients referred to the Mediation Project also increased over the two research phases, doubling from 5% of all clients in Phase 1 to 10% of all clients in Phase 2. The impact of the Mediation Project on the In-court Advice Project as an agency to which referrals could be made likewise increased between the two research phases.

4.2.4 The impact and increase in referrals from the In-court Advice Project must also be viewed in the context of client composition during the periods covered by the two phases of the research (see Table 3.3). Clients referred to the Mediation Project almost exclusively sought advice from the In-court Advice Project on matters pertaining to small claims and summary (non-heritable) procedure. Though the number of In-court Advice Project clients increased from 674 to 1017 over the periods covered by the two research phases, the number of small claims and summary cause clients increased from only 263 to 291. When clients seeking advice on matters pertaining to small claims and summary cause procedure alone are inspected, the referral role played by the In-court Advice Project is even more dramatic.

**Table 4.2 Referrals from the In-court Advice Project
(restricted to small claims and summary cause clients)**

Phase 1 (263 clients)		Phase 2 (291 clients)	
No.	%	No.	%
34	13	99	34

4.2.5 While just over one in ten of all small claims and summary cause In-court Advice Project clients was referred to the Mediation Project in the period covered by Phase 1 of the research, one in three (34%) of all small claims and summary cause clients was referred to the Mediation Project during Phase 2.

Referrals to the Mediation Project: Analysis by sources of referral

4.2.6 The contribution of the In-court Advice Project to the Mediation Project during Phase 2 was examined by inspecting Mediation Project records for the number and sources of all referrals between 1 December 1998 and 31 August 1999. Altogether, 151 clients were referred to the Mediation Project over the Phase 2 period, as follows:

Table 4.3 Referrals to the Mediation Project

Source of Referral	No.	%
In-court Advice Project	99	66
Mediation Co-ordinator (in court)	18	12
Edinburgh Central CAB	17	11
Sheriff	5	3
Another client	1	1
Don't Know	11	7
Total	151	100

1 December 1998 to 31 August 1999

4.2.7 Two-thirds (99) of all referrals to the Mediation Project were made by the In-court Adviser. These clients were monitored by both the In-court Advice and Mediation Projects. Another 12% (18) were referred by the Mediation Co-ordinator directly from the court, 11% (17) from Central CAB, 3% (five) by sheriffs and one client by a friend. The remaining 11 clients ('Don't Know') were referred to the Mediation Project either by the Mediation Co-ordinator or by the Mediation Co-ordinator in her capacity as line manager or temporary replacement of the In-court Adviser. These remaining 52 Mediation Project clients did not pass through the In-court Advice Project and were not monitored by the In-court Advice Project as its clients.²⁷ Incompatibility in database systems did not allow cases to be compared along many important dimensions.

²⁷ The In-court Advice Project saw 1017 clients between 1 December 1998 and 31 August 1999, 99 of whom were referred to the Mediation Project. The Mediation Project saw an additional 52 clients. If both Projects were to be seen as a unitary body, therefore, a total of 1069 clients were advised during this time period.

Referrals to the Mediation Project: Analysis by type of claim, procedural remit of case and procedural status of client

4.2.8 Information on types of dispute referred to mediation is incomplete (see 4.2.1 and 4.2.3). In 103 cases, mainly referrals made by the In-court Advice Project, monetary claims were by far the largest proportion of all referrals to the Mediation Project.

Table 4.4 Referrals to the Mediation Project by type of claim

Type of claim	No.	%
Product/services	9	9
Monetary claim	74	72
Damages/personal injury	9	9
Housing arrears	1	1
Rental deposit	10	10
Total	103	101*

1 December 1998 to 31 August 1999

**More than 100% due to rounding-off*

4.2.9 Most referrals to the Mediation Project were around matters under small claims procedure.

Table 4.5.1 Referrals to the Mediation Project by procedural remit

Procedure	No.	%
Small claims	115	76
Summary cause	34	23
Ordinary Cause	2	1
Total	151	100

1 December 1998 to 31 August 1999

4.2.10 Most small claims and summary cause referrals were made by the In-court Adviser while the two ordinary cause referrals were made by Edinburgh Central CAB.

Table 4.5.2 Referrals to the Mediation Project by procedural remit of case and source of referral

Source of Referral	Small Claims		Summary Cause		Ordinary Cause	
	No.	%	No.	%	No.	%
In-court Advice Project	73	64	26	77	0	0
Mediation Co-ordinator	15	13	3	9	0	0
Central CAB	13	11	2	6	2	100
Sheriff	4	4	1	3	0	0
Another client	1	1	0	0	0	0
Don't Know ²⁸	9	8	2	6	0	0
Total	115	101	34	101	2	100

1 December 1998 to 31 August 1999

**More than 100% due to rounding-off*

4.2.11 Clients referred straight from the court (by the Mediation Co-ordinator in court or by sheriffs) were more likely to be involved in disputes under small claims procedure than summary cause procedure. They were also more likely to be defenders than pursuers (61% defenders compared with 39% pursuers). This is likely to reflect the number of small claims and summary cause party litigants appearing in the court as defenders. Over two-thirds (67%) of all referrals made by the In-court Adviser were pursuers, however, as were over four-fifths (81%) of referrals made by Edinburgh Central CAB.

Referrals to Mediation Project: Analysis by procedural stage of referral

4.2.12 When referrals to the Mediation Project were inspected for the procedural stage at which they had been made, 70 (46%) clients were found to have been referred prior to raising an action, 14 (9%) after an action had been raised but prior to a Preliminary Hearing or First Calling, 47 (31%) at the time of a Preliminary Hearing or First Calling and 10 (7%) prior to a Full Hearing. The remaining 10 (7%) clients were referred at other procedural stages such as prior to a continued First Calling (2 clients), at the time of a continued First Calling (1 client), at the time of Full Hearing (1 client) and following decree (1 client).

Table 4.6 Procedural stage of referral to Mediation Project

	No.	%
Prior to raising action	70	46
Prior to Preliminary Hearing/First Calling	14	9
At Preliminary Hearing/First Calling	47	31
Prior to Full Hearing	10	7
Other	10	7
Total	151	100

1 December 1998 to 31 August 1999

²⁸ There are likely to be some errors in the quantitative analyses reported here because of occasional ambiguities in the data. Thus, for example, it is not always clear whether referrals have been made by the Mediation Co-ordinator in her role as Mediation Co-ordinator or in her role as replacement for the In-court Adviser (annual or sick leave). Where ambiguities occur and no In-court Advice Project client records are held, these cases were categorised as 'Don't Know'.

4.2.13 The procedural stage at which clients were referred to the Mediation Project was found to be related to the agencies referring them.

Table 4.7 Procedural stage of referral to Mediation Project by source of referral

Source of Referral	Prior to raising action		Prior to PH/1 st Calling		At PH/1 st Calling		Prior to Full Hearing	
	No.	%	No.	%	No.	%	No.	%
In-court Advice Project	52	53	12	12	18	17	7	7
Total 99 (100%)								
Mediation Co-ordinator (in court)	0	0	0	0	16	90	2	11
Total 18 (100%)								
Central CAB								
Total 17 (100%)	16	94	1	6	0	0	0	0
Sheriff								
Total 5 (100%)	0	0	0	0	5	100	0	0
Another client								
Total 1 (100%)	0	0	0	0	0	0	1	100
Don't Know								
Total 11 (100%)	2	18	1	9	8	73	0	0

1 December 1998 to 31 August 1999

4.2.14 *Prior to raising an action* The In-court Advice Project and Edinburgh Central CAB were most likely to refer clients to the Mediation Project before raising an action. Of the 70 clients referred to the Mediation Project at this stage, the In-court Advice Project referred 52 and Central CAB referred 16. Of the 17 clients referred to the Mediation Project by Central CAB, 16 (94%) were seeking advice on matters which had not yet gone to litigation. Of the 99 clients referred to the Mediation Project by the In-court Advice Project, 52 (53%) were seeking advice on matters which had not yet gone to litigation.

4.2.15 *Prior to Preliminary Hearing or First Calling* Of the 14 clients referred to the Mediation Project prior to the action calling in court (either at a Preliminary Hearing or First Calling) but after an action had been raised, 12 were referred by the In-court Advice Project. Of the 99 clients referred to the Mediation Project by the In-court Advice Project, 12 (12%) were seeking advice on matters which gone to litigation but had not yet called in court.

4.2.16 *At Preliminary Hearing or First Calling* Of the 47 clients referred to the Mediation Project on the day on which their case first called in court, 18 were referred by the In-court Advice Project (17% of all cases referred by the In-court Advice Project) and 16 by the Mediation Co-ordinator-in-court (90% of all cases referred by the Mediation Co-ordinator located in the court). All 5 referrals to the Mediation Project by sheriffs were made when cases first called in court.

4.2.17 *Prior to Full Hearing* Of the 10 clients referred to the Mediation Project prior to a full hearing, 7 were referred by the In-court Advice Project, two by the Mediation Co-ordinator in court²⁹ and one by a friend of the client.

²⁹ These clients may have been referred on the day of the Full Hearing but prior to their case calling in court. Uncertainties reside in possible inconsistent categorisation of information between the In-court Advice and the Mediation Projects.

4.2.18 These findings reflect the different opportunities for consultation and referral which are available to the different referring agencies.

'First' and 'second' parties: Profile

4.2.19 Almost two-thirds (104 or 65%) of all 'first' parties were pursuers and 35% (56) were defenders. The proportion of pursuers and defenders amongst 'second' parties is reversed: 36% pursuers and 64% defenders. Since 46% of all referrals to mediation were made prior to embarking on litigation (see 4.2.12-4.2.18 above), the high proportion of pursuers amongst 'first' parties was to be expected.

4.2.20 Clients initially referred to the Mediation Project ('first' parties) were categorised as either individuals or representatives of small businesses in 144 cases. Over two thirds (101 or 70%) of all 'first' parties were individuals and 43 (30%) were representatives of small businesses. Information was also collected as to the characteristics of 'second' parties, that is, parties against whom clients initially referred to the Mediation Project were opposed, in 143 cases. Just over one third of 'second' parties (53 or 37%) were 'individuals', 75 (52%) were representatives of 'small businesses' while 13 (9%) were large businesses. A further two 'second' parties were public bodies or non-profit organisations.

Table 4.8 Composition of 'first' and 'second' parties

	'First' parties		'Second' parties	
	No.	%	No.	%
Individuals	101	70	53	37
Small Business	43	30	75	52
Large Business	0	0	13	9
Other	0	0	2	1
Total	144	100	143	99*

1 December 1998 to 31 August 1999

**Less than 100% due to rounding-off*

4.2.21 Though 'first' parties were far more likely to be individuals and pursuers, this depended on agencies of referral to some extent. While 75% (63) of 'first parties' referred to the Mediation Project by the In-court Advice Project were individuals and 85% (11) of 'first' parties referred by Central CAB, only 39% (7) of 'first' parties referred by the Mediation Co-ordinator in court were individuals.³⁰ While 67% of 'first parties' referred to the Mediation Project by Edinburgh Central CAB were pursuers and 81% of 'first' parties referred by the In-court Adviser, only 39% of 'first' parties referred by the Mediation Co-ordinator in court were pursuers and the rest (61%) were defenders. Amongst 'second parties', pursuers were more likely to be small businesses than individuals (66% of all pursuers were small businesses while 34% were individuals) and defenders were only slightly more likely to be small businesses (47% of all defenders were small businesses while 42% were individuals).

4.2.22 While only 17% (3) and 23% (3) of 'second' parties in cases referred to the Mediation Project by the Mediation Co-ordinator and Central CAB respectively were individuals, almost half of all referrals by the In-court Adviser to the Mediation Project (38 cases or 46%) involved 'second' parties who were individuals. Most referrals by the Mediation Co-ordinator and Central

³⁰ This may reflect differences in coding practices between the In-court Adviser and the Mediation Co-ordinator or it could reflect differences between those who seek advice from the In-court Advice Project and those who appear in the small claims/summary cause court without first seeking advice from the In-court Advice Project.

CAB involved 'second' parties categorised as small businesses. Only the In-court Advice Project, however, made referrals to the Mediation Project which involved large businesses as 'second' parties (11 or 13% of all In-court Advice Project referrals).³¹

4.2.23 Amongst 'first' parties, individuals were more likely to be referred to the Mediation Project prior to raising an action than at any other procedural stage. Of 101 individuals referred to the Mediation Project, 52% were referred prior to raising an action compared with 26% at First Calling/Preliminary Hearing. In these cases, 'second' parties were more likely to be individuals than businesses. Amongst 'first' parties, small businesses were more likely to be referred to the Mediation Project at First Calling/Preliminary Hearing than at any other procedural stage. Of 43 small businesses referred to the Mediation Project, 44% were referred at the time of First Calling/Preliminary Hearing compared with 30% prior to raising an action and 9% prior to First Calling/Preliminary Hearing. 'Second' parties were far more likely to be small businesses in cases referred at this procedural stage.

'First' and 'second' parties: Composition of cases

4.2.24 The highest proportion of cases referred to the Mediation Project involved 'first' parties who were individuals against small businesses (35%), followed by individuals against individuals (26%). There was information on the characteristics of the disputants in 138 cases referred to the Mediation Project, as follows:

Table 4.9 Composition of Cases referred to Mediation Project

'First' party v 'second' party	No.	%
Individual v small business	48	35
Individual v individual	36	26
Small business v small business	26	19
Small business v individual	14	10
Individual v large business	12	9
Small business v large business	1	1
Total	139	100

1 December 1998 to 31 August 1999

'First' and 'second' parties: Representation

4.2.25 Differences in composition between 'first' and 'second' parties are reflected in their legal representation. There was information on the representation of 'first' parties in 142 out of 151 cases: 141 'first' party referrals were categorised as 'party litigants'. While only one 'first' party was legally represented, at least 47 (34%) 'second' parties were legally represented. The remainder of 'second' parties for whom there is information were either not represented or, because no legal action had yet been raised, it was either too early to know or the information was not recorded.

³¹ This may also reflect differences in coding practices between the In-court Adviser and the Mediation Co-ordinator

Table 4.10 Representation of 'First' and 'Second' Parties

	'First' parties		'Second' parties	
	No.	%	No.	%
Legal representation	1	1	47	34
No legal representation	141	99	78	56
Too soon to know	0	0	15	11
Total	142	100	140	100

1 December 1998 to 31 August 1999

4.2.26 Legal representation depended on party characteristics. Of the 47 'second' parties who were legally represented, only 10 were individuals while the rest were small and large businesses, public and voluntary bodies.

Table 4.11 Characteristics of 'second' parties and their representation

	Legal Representation					
	Yes		No		Not yet known	
	No.	%	No.	%	No.	%
Individuals Total 53 (100%)	10	19	38	72	5	9
Small business Total 74 (100%)	30	41	38	51	6	8
Large business Total 11 (100%)	5	46	2	18	4	36
Public body Total 1 (100%)	1	100	0	0	0	0
Voluntary org. Total 1 (100%)	1	100	0	0	0	0

1 December 1998 to 31 August 1999

4.2.27 Amongst 'second' parties, small businesses were twice as likely to be legally represented as individuals. Even amongst small businesses, however, only 40% were legally represented. Legal representation was only slightly higher amongst large businesses, but this was because most large companies were 'second' parties in cases referred to mediation before actions were raised. Hence, while they are most likely to have been legally represented had an action been raised, they have not been recorded as such.

4.2.28 Amongst 'second' parties, pursuers were twice as likely to be legally represented as defenders (51% compared with 25%). Indeed, parties most likely to be legally represented were 'second' party pursuers. 'Second' parties were most likely to be represented in cases involving rental deposit than any other dispute (43%), though these disputes represented only 10% of all cases referred to the Mediation Project. 'Second' parties were least likely to be legally represented in cases involving disputes over products and services. Most cases in which 'second' parties were legally represented involved disputes over debt (21 cases).

4.2.29 The In-court Advice Project was responsible for referring 25 of 47 cases in which 'second' parties were legally represented. Together with Central CAB, it was responsible for referring all 15 cases where it was too soon to know. This is because the In-court Advice Project and Central CAB have the opportunity to make referrals at an earlier procedural stage than other agencies of referral to the Mediation Project (see 4.2.12-4.2.18)

'First' and 'Second' Parties: Responses to mediation

Responses

4.2.30 All clients referred to the Mediation Project ('first' parties) were asked to make a formal response to their referral. More than half of all referrals (84 or 55%) confirmed their willingness to take up mediation while a further 13 (9%) agreed to allow the Mediation Co-ordinator to attempt to negotiate a settlement. Just over one quarter of all 'first' parties (41 or 27%) made no response to the request while a further 13 (9%) communicated their unwillingness to take up mediation.

4.2.31 'Second' parties were invited to mediation or negotiation in those cases where 'first' parties had agreed to mediation or negotiation. Of the 97 referrals to the Mediation Project who confirmed their willingness to take up mediation or negotiate through the Mediation Co-ordinator, there is information on the responses of 95 'second' parties. More than one quarter (29 or 31%) confirmed their willingness to take up mediation while a further 19 (20%) agreed to negotiate a settlement through the Mediation Co-ordinator. Just over one fifth (21) of all 'second' parties contacted made no response to the request while a further 24 (26%) communicated their unwillingness to take up the offer of mediation.

Table 4.12 Responses to mediation

Response	'First' parties		'Second' parties	
	No.	%	No.	%
Yes	84	55	29	31
Negotiation	13	9	19	20
No	13	9	24	26
No reply	41	27	21	21
Other	0	0	2	2
Total	151	100	95	100

1 December 1998 to 31 August 1999

'First' parties and responses to mediation

4.2.31 'First' parties were slightly more likely to agree to mediation if they were individuals rather than small businesses. Of 98 'first' parties categorised as individuals, 56% (55) agreed to mediation compared with 50% (20) of small businesses. Small businesses were slightly more likely to reject mediation than individuals (15% compared with 6%). Few differences between individuals and small businesses were found with regard to their willingness to negotiate or to non-response.

4.2.32 There were interesting differences between 'first' parties according to the type of dispute in which they were involved. In 103 cases for which there is information, eight out of ten referrals to mediation in cases involving rental deposit (80%) and five out of nine referrals in cases involving damages and personal injury (56%) agreed to mediation, compared with only three out of nine referrals in cases involving disputes over products and services (33%). However, the largest number of agreements to mediate arose from referrals in cases involving monetary claims in which 37 out of 74 referrals (50%) agreed to mediation.

4.2.33 The procedural stage at which 'first' parties are referred to mediation was found to make some impact on responses to their referral. 'First' parties were most likely to agree to mediation

or negotiation prior to a full hearing (80%), while they were most likely to refuse mediation, or make no reply, when actions had already been raised but prior to First Calling or Preliminary Hearing (43%). The largest numbers agreeing to mediation amongst 'first' parties, however, were those amongst parties referred to mediation prior to raising an action (39 [56%] of 70 referrals to mediation) and amongst 'first' parties referred at the time of a First Calling or Preliminary Hearing (28 [58%] of 48 referrals to mediation). Because more referrals to mediation were picked up prior to raising an action or at their first court appearance, more agreements to mediation arose at these procedural stages. The probability that 'first' parties would agree to mediation, however, was higher in those cases which had already reached later procedural stages.

'Second' parties and responses to mediation

4.2.34 'Second' parties were more likely to agree to mediation if they were individuals or represented large businesses, rather than small businesses. Of 32 'second' parties categorised as individuals, 41% (13) agreed to mediation compared with 24% (11) small businesses but 38% (only 3 in number) large businesses. Small businesses were more likely than large businesses or individuals to reject mediation, more likely to respond and slightly more likely to negotiate. Individuals, on the other hand, were slightly less willing to negotiate and were more likely to make no reply to the invitation to mediate.

4.2.35 There were interesting differences between 'second' parties according to the type of dispute in which they were involved. In those cases where 'first' parties had agreed to mediation or negotiation, there were 14 agreements to mediation amongst 'second' parties in cases involving monetary claims, two in cases involving damages/personal injury and one in cases involving rental deposits. The same pattern was found amongst 'second' parties for agreement to negotiate, with almost all agreements (12 out of 14) being in cases relating to monetary claims. There was a very high non-response rate amongst 'second' parties in cases involving rental deposits.

4.2.36 The procedural stage at which 'first' parties were referred to mediation was found to make some impact on the responses of 'second' parties. 'Second' parties were most likely to agree to mediation prior to or at a First Calling or Preliminary Hearing and were least likely to agree to mediation before an action was raised (43% and 41% compared with 22%) though they were slightly more likely to agree to mediation prior to an action being raised than at any other procedural stage. They were most likely to abstain from responding or reject mediation prior to an action being raised (in 56% of cases) and, surprisingly, although numbers are small, prior to a Full Hearing (57% of cases). The largest proportion of 'second' parties who agreed to mediation (13 out of 29 'second' parties) were involved in cases which were first referred to mediation at the time of the First Calling or Preliminary Hearing

Mediation Hearings: Number and duration

4.2.37 Of the 151 referrals to mediation made between 1 December 1998 and 31 August 1999, dates were fixed for a mediation hearing in 24 of the 29 cases where 'second' parties had agreed to mediation. Though mediations were fixed for every month throughout 1999, more were set for February, March and October 1999 than other months. Altogether, 22 of the 24 mediations fixed took place. The length of each mediation hearing was recorded, with 14 taking half a day or more, and 8 taking less than half a day.

Outcome of referrals to the Mediation Project

4.2.38 Mediation was successful in almost all cases where a mediation hearing took place. Of the 22 cases which went to mediation, only two disputes were not successfully resolved at mediation. Of the 41 referrals to the Mediation Project which were resolved either by mediation or by the Mediation Co-ordinator conducting 'arms-length' negotiation, 31 (76%) settlements were known to have been honoured. There is no information on the remaining 10 negotiated or mediated settlements. All settlements on which there is information were known to have been honoured.

4.2.39 Case outcome was identified for 60 of the 151 cases in which referral was made to the Mediation Project, comprising the 48 referrals in which both 'first' and 'second' parties agreed to mediation or negotiation, and 12 referrals in which the 'first' or 'second' party had not agreed to them. Mediation was not solely responsible for resolving disputes outwith the courtroom. Disputes were resolved by the Mediation Co-ordinator, the In-court Adviser and by the parties themselves. Out of 151 referrals, 41 (27%) were successfully mediated or negotiated by the Mediation Co-ordinator.

Table 4.13 Case outcomes

	No.	%
Successful mediation	20	33
Unsuccessful mediation	2	3
Successful negotiation by Mediation Co-ordinator	21	35
Unsuccessful negotiation by Mediation Co-ordinator	1	2
Unsuccessful negotiation-went to proof	4	7
Successful negotiation by In-court Adviser	1	2
Settled by parties	11	18
Total	60	100

1 December 1998 to 31 August 1999

4.2.40 The success rate of referrals to the Mediation Project might be even higher if cases settled by the parties themselves were included. Referral to the Mediation Project could have played some part in 7 of the 11 cases in which settlement was eventually negotiated by parties themselves. In four out of 11 cases, however, 'first' parties had either refused mediation or had not replied to the invitation. Hence, 'first' party refusal to mediate may tell us little about the eventual outcome of any case. Any conclusion as to the impact of referral to the Mediation Project must include comparison between parties which took up the offer of mediation or 'assisted negotiation', parties which did not take them up, and small claims and summary cause litigants who were not referred to the Mediation Project in the first place.

4.2.41 The Mediation Co-ordinator was responsible for bringing as many disputes to a successful conclusion by 'arms-length negotiation', as actual mediation hearings. In many cases, this was where 'second' parties had not agreed to a mediation hearing but were willing to negotiate. Whether cases were brought to a successful outcome by mediation or by negotiation appeared to depend on the characteristics of 'second' parties. Where 'second' parties were individuals (23 cases), disputes were more likely to be resolved by a mediation hearing (52% of cases) and less likely to be resolved by the Mediation Co-ordinator undertaking 'arms-length negotiation' (26%) or by the parties themselves (13%). Where 'second' parties were small businesses (32 cases), disputes were less likely to be resolved by a mediation hearing (19%) and more likely to be resolved by the Mediation Co-ordinator negotiating 'at-a distance' (38%) or by

the parties themselves (22%). Thus, even amongst 'second' parties who indicated an agreement to mediate or negotiate, as was mainly the case in the 60 disputes on which information is available, it would appear that small businesses either have a preference for negotiation or are more likely to negotiate a settlement before their cases reach mediation. On the other hand, the only cases known to have gone to proof after unsuccessful mediations or negotiation involved 'second' parties which were small or large businesses.

Outcomes and sources of referral

4.2.42 Altogether, 151 referrals were made to the Mediation Project. Of these, 53 were known to have resolved their dispute outwith the courtroom, either through mediation, by negotiating a settlement through the Mediation Co-ordinator or by negotiating a settlement themselves.

4.2.43 Of 20 successful mediations, 12 (60%) had been referred to the Mediation Project by the In-court Adviser, three (15%) by Edinburgh Central CAB, two by the Mediation Co-ordinator in court and two (10%) by sheriffs.

4.2.44 Of 21 referrals to the Mediation Project which were successfully negotiated by the Mediation Co-ordinator, 15 (71%) were referred by the In-court Adviser, two (10%) by the Mediation Co-ordinator in court and one by Edinburgh Central CAB.

4.2.45 Of 11 referrals to the Mediation Project which were successfully negotiated by the parties themselves, 10 had been referred by the In-court Adviser and one by Edinburgh Central CAB.

4.2.46 The contribution of different agencies to referrals which were successfully concluded by dispute resolution outwith the court room, whether by mediation, negotiation by Mediation Co-ordinator or by the parties themselves, is presented below.

Table 4.14 Dispute resolution and agencies of referral

	All referrals	'Successful' referrals
In-court Advice Project	99	37
Mediation Co-ordinator (in court)	18	4
Edinburgh Central CAB	17	5
Sheriff	5	2
Another client	1	1
Don't Know/Other	11	3
Total	151	52

1 December 1998 to 31 August 1999

4.2.47 Between December 1998 and August 1999, the highest number of 'successful' referrals was made by the In-court Advice Project. Sheriffs, however, appear to have had the highest rate of success, though the numbers of referrals made by sheriffs was low in comparison.³² This is interesting because 'first' parties referred by the In-court Adviser were more likely to respond negatively or not at all to the offer of mediation (43% of all referrals by the In-court Advice Project compared with 22% of referrals by the Mediation Co-ordinator in court). 'Second' parties in cases referred by the In-court Adviser were no more and no less likely to refuse or fail to reply to an offer to mediate than 'second' parties in cases referred by other agencies.

³² The numbers involved are too small to draw safe conclusions.

Outcomes, party characteristics and legal representation

4.2.48 In 62 cases where both 'first' and 'second' parties responded to the invitation to mediate: party characteristics and legal representation made some impact upon the outcome of these cases.

4.2.49 Out of 42 individual 'first' party referrals to mediation, 11 (26%) cases were resolved with the help of a mediation hearing while 15 (36%) were resolved with the help of the Mediation Co-ordinator. Out of 20 small business 'first' party referrals to mediation, 8 (40%) were resolved with the help of a mediation hearing while only 4 (20%) were settled with the help of the Mediation Co-ordinator. 'Second' party characteristics also made an impact on outcome. Out of 23 individual 'second' party referrals to mediation, 12 (52%) were resolved in a mediation hearing while 6 (26%) were settled with the help of the Mediation Co-ordinator. Out of 32 small business 'second' party referrals to mediation, only 6 (19%) were resolved in a mediation hearing while 12 (38%) were settled with the help of the Mediation Co-ordinator. Thus, amongst 'first parties', dispute resolution was more likely to be aided by a mediation hearing in the case of small businesses and with the help of the Mediation Co-ordinator negotiating 'at a distance' in the case of individuals. Amongst second parties, however, dispute resolution was more likely to be aided by a mediation hearing in the case of individuals and with the help of the Mediation Co-ordinator negotiating 'at a distance' in the case of small businesses.

4.2.50 Whether or not 'second' parties were legally represented appeared to have some impact on the outcome of referrals to mediation. Out of 35 'second' parties **without** legal representation, 40% (14) of disputes were resolved in a mediation hearing, 26% (9) were settled with the help of the Mediation Co-ordinator and 14% (5) were settled by the parties themselves. Out of 22 'second' parties with legal representation, only 18% (4) of disputes were resolved in a mediation hearing though 23% (5) were settled by the parties themselves and 32% (7) were settled with the help of the Mediation Co-ordinator. Disputes in which 'second' parties were without legal representation were more likely to be resolved in a mediation hearing than were 'second' parties with legal representation. Disputes in which 'second' parties were without legal representation were less likely to settle them themselves than 'second' parties with legal representation. Surprisingly, they were more or less equally likely to settle with the help of the Mediation Co-ordinator negotiating "at a distance". There was no obvious relationship between 'second' party representation and unsuccessful mediation or negotiation.

4.2.51 There is information on type of dispute in only 44 of the cases in which both parties agreed to mediation or negotiation. Since most of these cases involved monetary claims, no conclusions may be drawn as to the implications of dispute type for successful mediation or negotiation.

Outcomes and procedural stage of referral

4.2.52 Whether referrals were brought to a successful outcome in a mediation hearing or with the help of the Mediation Co-ordinator in negotiating a settlement – 'assisted negotiation' – appeared to depend on the procedural stage at which disputes were initially referred to the Mediation Project. In 56 cases in which 'first' and 'second' parties had agreed to mediation or negotiation, referrals made prior to raising an action were more likely to be settled with the help of the Mediation Co-ordinator negotiating 'at-a-distance' than in a mediation hearing. Thus, of 24 cases referred to the Mediation Project prior to raising an action, nine (38%) were settled with the help of the Mediation Co-ordinator. Referrals made after an action had been raised (either before or at the time of First Calling or Preliminary Hearing) were more likely to be resolved in a

mediation hearing than by 'assisted' negotiation or 'arms-length' mediation. Of seven cases referred to the Mediation Project after actions were raised but prior to calling in court, four were settled in a mediation hearing compared with one by 'arms-length' mediation. Of 25 cases referred to the Mediation Project at First Calling or Preliminary Hearing, nine (36%) were settled in a mediation hearing compared with six (24%) by 'arms-length' mediation. This suggests that where actions are in their earliest stages, that is, where they have not even been raised, 'assisted' negotiation should always be attempted before the mediation process is embarked upon.

4.3 THE MEDIATION PROJECT IN THE SHERIFF COURT

The Mediation Project and the In-court Advice Project

4.3.1 The Mediation and In-court Advice Projects were closely associated with each other through funding and personnel, and this had clear benefits for the co-ordination of the two Projects.³³ It was also, however, responsible for presenting problems in the operation of the Mediation Project. The maintenance of neutrality throughout the mediation process was reported to be a basic requirement of mediation. Because of this, so the Mediation Co-ordinator reported, she was not permitted to offer legal advice of any kind to those parties she followed out of the court. She therefore would introduce herself by saying that she could help them, if they so desired, but that any help she could give them had to be restricted to procedural matters. If they wanted legal advice, they could see the In-court Adviser since she was under no such obligation to maintain neutrality. This division of labour, in turn, allowed the Mediation Co-ordinator to speak directly to those referred to mediation about the mediation process.

4.3.2 Some difficulties arose, however, when the Mediation Co-ordinator was standing in for the In-court Adviser. The Mediation Co-ordinator reported that she had to be certain that there was no possibility of mediation before she gave legal advice because this would otherwise compromise her position of neutrality. This could mean, therefore, that those seeking legal advice were not offered it when there was some possibility of referral to mediation. Since the Mediation Co-ordinator did not stand in for the In-court Adviser routinely, it is unlikely that this occurred frequently. What the problem illustrates, however, is the importance of keeping the role of the In-court Adviser and Mediation Co-ordinator entirely separate. While benefits may arise from the close organisational relationship between the two projects, either neutrality is compromised or legal advice cannot be offered when the separation of roles is blurred.

The Mediation Project, litigants and litigation

4.3.3 The Mediation Project was promoted in court in several ways. Firstly, the presence of the Mediation Co-ordinator in the courtroom while the small claims and summary cause court was in session brought the Mediation Project within the court's purview. The Mediation Co-ordinator and In-court Adviser also made a special point of bringing to the attention of the court the role which the Mediation Project was playing outwith the court. Thus, for example, where cases were dismissed after a successful referral to the Mediation Project, one of them was in attendance in court to report on the grounds for dismissal: *"In this way, the word 'mediation' impinges and, sometimes after that, the sheriff may twig"*.

³³ Neither mediator interviewed during the course of Phase 2 research knew of the In-court Advice Project and its relationship with the Mediation Project.

4.3.4 In the Sheriff Court, the In-court Adviser was mainly responsible for referring clients to mediation prior to raising an action or before their action called in court. The Mediation Co-ordinator was responsible for referring parties from the court. This often involved following parties out of the court after their case had called for a Preliminary Hearing or First Calling. According to the Mediation Co-ordinator, parties were not receptive to mediation where the Mediation Co-ordinator was required to speak to both parties at the same time: *"probably due to the level of antagonism between them"*. Parties with whom she managed to speak prior to going into court and who then informed the bench of their interest in mediation when their case was called, however, were most receptive. This also prompted sheriffs to suggest mediation to other parties whose cases were subsequently called.

4.3.5 While many of the litigants approached in court were found to be receptive, some rejected the offer of referral to the Mediation Project on the grounds that it was a "soft" option and not enforceable. These were often litigants, so the Mediation Co-ordinator explained, who had typically *"tried eight letters and six telephone calls and had "psyched" themselves up for court"*. Nevertheless, some of those making the most vociferous objections did eventually accept the offer of referral. Some litigants found the role which referral to mediation played in the court as particularly persuasive: *"You can tell the court that you have also offered mediation and that has been rejected. And you may get a 'brownie' point - especially in front of some sheriffs who are keen on mediation"*. In other words, even amongst litigants with no intention of participating in a mediation hearing, acceptance of the offer of referral to mediation and the offer of mediation to their opponent was seen as an important device for self-presentation in court. As one member of the In-court Advice Project staff explained, parties wished to be seen as reasonable and wanted to demonstrate that they have tried negotiation and mediation before resorting to court action; *"They also see it as a point in their favour, and envisage drawing the sheriff's attention to the intransigence of the other side"*. Referral to the Mediation Project served a similar function amongst 'first' parties where there was little hope that 'second' parties would agree: *"You can mention it in your statement of claim and score some points. It's helping and empowering party litigants by giving them a way to play the system which their opponents know so well"*.

4.3.6 Mediators, however, were not convinced as to the success of this gambit in court. One mediator thought that while *"holding out an olive branch cannot be seen to do any harm"*, it was nevertheless a deeply cynical view. Though containing a grain of truth, it was not wholly acceptable to him on the grounds that *"courts are there to let people pursue their rights"*. Indeed, all those involved in the Mediation Project found the relationship of mediation to litigation to be an issue of extreme complexity (though, as we might say in the trade, it raised empirical rather than ontological questions). Mediation could operate in the shadow of litigation, as complementary to litigation and instead of litigation. The Mediation Co-ordinator suggested, however, that mediation was often successful in the shadow of the court, in those cases where there was some certainty that: *" unless the problem is worked out, there will be a return to court where the decision rests with an external authority, the sheriff, and not the parties concerned"*. This was confirmed by some parties to a mediation hearing.

4.3.7 Mediation could also play a role at any stage of the litigation process, depending on the dispute itself and on the disputants. In one mediator's view: *"There is always room for shuttle diplomacy and this is what lawyers do anyway - but without a mediator"*. This may explain, for example, why so many individuals without legal representation and before raising an action opted for referral to the Mediation Project, whether for a mediation hearing or for the assistance of the Mediation Co-ordinator in negotiating a settlement. Unassisted parties were sometimes unaware that negotiation was an option, they were uninformed as to how to go about negotiating

a settlement, and they lacked the capacity to negotiate successfully. For this reason, many parties were found to have resorted to litigation before negotiation and in place of negotiation (see also Samuel, 1997). The Mediation Project provided unassisted litigants and would-be litigants with a means to negotiate, whether by 'shuttle diplomacy' or in a mediation hearing. Indeed, one mediator conceptualised mediation as "assisted negotiation".³⁴ The Mediation Project functioned to divert litigants and potential litigants who had not tried negotiation away from litigation and from the court room, at least until such time as negotiation was found to be unsuccessful.

4.3.8 Mediation also had a place once litigation was embarked upon. Indeed, contrary to popular wisdom about mediation, it could even speed up litigation. In the view of one mediator-lawyer *"It sometimes takes a party three years to come around to make offer which the other party proposed three years before. Mediation can help that process - it can even speed it up"*.

4.3.9 The relationship of mediation to litigation also depended on what the different parties to the dispute wanted out of the dispute. While litigation permitted people to pursue their rights, so one mediator argued, mediation held out the promise of a greater range of desired outcomes than litigation: *"There are so many things that mediation can do and so many different kinds of resolutions which they can come up with which a sheriff cannot and would never let you do"*. The relationship of mediation to litigation also depended on the circumstances of different parties. While mediation provided choice and an alternative to litigation for some, choice was illusory for others:

At present, there is only court, with or without a lawyer. But party litigants may be so terrified of court that they try mediation. What they should be able to choose between is a court system with proper representation or mediation, depending on how they think the dispute can best be resolved. At the moment, they may try mediation because they are too terrified of the alternative. That's not proper choice- though it does sometimes work.

4.3.10 Most interviewees were of the opinion that since the relationship between mediation and litigation was not straightforward, guidelines for referral to mediation should never intervene in any party's wish for mediation:

I would like to turn the question on its head. Rather than 'Why mediation?', let's ask 'Why not mediation?' If a dispute is not appropriate for mediation, then you could always try litigation.

The Mediation Project and solicitors

4.3.11 Both solicitors interviewed during Phase 2 research identified *"at least four or five sheriffs keen on mediation"*. Both independently reported that Mediation had *"taken off"* in the small claims/summary cause court five to six months prior to interview (November - December 1999). One solicitor had been involved as agent for the pursuer in several cases in which

³⁴ Because the Mediation Co-ordinator did assist negotiation as well as arrange mediation hearings, 'assisted negotiation' has been left in this study to refer to the "shuttle diplomacy" undertaken by the Mediation Co-ordinator.

defenders had been referred to the Mediation Project. In these cases, defenders had been approached by or consulted with the Mediation Co-ordinator or In-court Adviser prior to appearing in court: *"They then stand up in court and some sheriffs really like it"*. As the agent for 'second' parties, he did not usually suggest to his clients that they agree to a mediation hearing. This is because *"we don't think there is a defence in any of the cases we go to litigation on.....I'm not a big fan of it because we often see it as a delaying tactic"*. In one case, however, there was no choice in the matter: *"there was nothing we could do because the Sheriff referred it to mediation"*. One solicitor acknowledged the usefulness of mediation

where neither party (for whatever reason) have managed to get together between receiving the summons and calling in court to talk through a possible resolution".

Her clients (mainly pursuers), however, were not usually agreeable to mediation since defenders had been given ample opportunity to negotiate and this had not been taken.

4.3.12 The Mediation Co-ordinator reported resistance to offers of mediation in cases in which 'second' parties were represented by lawyers. She was of the view that some lawyers confused mediation with arbitration while some were of the opinion that mediation was unlikely to be successful because there was already *"too much bitterness and bad faith"*. Lawyers were also often afraid that mediation could delay matters. If so, the Mediation Co-ordinator was able to assure them that mediation could be arranged while their client was awaiting the next procedural stage. The Mediation Co-ordinator also reported that lawyers tended to be more enthusiastic in small claims cases, particularly if they were representing individuals rather than businesses and the case was going to a full hearing. Some lawyers, however, were reported to welcome the prospect of settlement over shrieval adjudication, whatever the procedure or monetary value of the claim involved.

4.4 THE MEDIATION PROJECT IN OPERATION: CLIENTS AND MEDIATORS

'Assisted' negotiation and mediation hearings

4.4.1 Settlement was negotiated with the assistance of the Mediation Co-ordinator in many of the disputes between those referred to the Mediation Project. This was partly because the Mediation Co-ordinator reported that she sometimes actively encouraged negotiation over mediation:

If the two parties say there are arguments on both sides, then I will ask them to tell me their side of it, and then go to the other side to discuss it. It may be that they both agree that if they went to court, they would have a problem proving the case.

Indeed, 'full' mediations were encouraged only under special circumstances:

The ones I would push on to a mediation hearing are the ones who still say that though they are not prepared to compromise in any way or to alter their perceptions of the dispute, they would nevertheless like to sort it out.

4.4.2 Some clients, however, expressed a wish from the outset to avoid proceeding to a full mediation hearing. One client, for example, was concerned as to the amount of time which could be spent at a mediation hearing. Another was concerned as to the amount of time it could take before a mediation hearing was set up. Geography also played a role in the preferences of some clients referred to the Mediation Project. While one of the main attractions of both assisted negotiation and mediation was that they were free, there was therefore also considerable concern amongst clients as to the opportunity costs of a mediation hearing. The time involved could be very costly for some clients, for example, tradesmen. In those cases where a negotiated settlement was assisted by the Mediation Co-ordinator, the indebtedness and gratitude of clients to the Mediation Project for the avoidance of a mediation hearing was often very apparent.

The Mediation Hearing

4.4.3 Due to the limited scope and resources of the research project, only a very superficial glimpse of the mediation process operated by the Mediation Project was obtained during the research period. The sample of clients selected for interview may be illustrative of some of the processes at work, but there are no grounds for questioning their representativeness.

4.4.4 Mediation is often considered to be the centre piece of alternative dispute practices because of its commitment to disputant empowerment and party control of the settlement process. Indeed, as both mediators interviewed during the course of the research argued, that was why most lawyers do not want cases decided by an external authority in the courts. Mediation is intended to give the parties concerned ownership of the dispute so that any outcome is not a reflection of third party intervention but of the third party's (the mediator's) facilitation of joint authorship. This might explain why the Mediation Co-ordinator was able to report that mediation usually ends up better for most cases, even in those where parties feel they have lost: *"The loser leaves mediation often saying that it could have been worse"*.

4.4.5 Ownership and empowerment as a key principle of mediation is best illustrated when mediation is not freely entered into. In one case, a tenant had signed a lease which contained a clause agreeing to some form of alternative dispute resolution should any dispute arise. A dispute did arise at the end of the rental period, namely, over the return of the deposit. At that point, mediation did not feel as if it had been freely entered into:

We would never have otherwise gone to mediation because as far as we can see, we have nothing to negotiate with her. We have witnesses as to the state of the flat when we left. Mediation tries to bring two sides nearer to each other but we do not want the two sides to be brought closer to each other because we want our whole deposit back. Our hand was forced by the lease.

Under this condition, mediation was unable to promote dispute ownership or to permit parties to retain ultimate voice in the process and outcome.³⁵

4.4.6 This was also found to occur when cases were "sent" by the sheriff to mediation. These cases provide further illustration of the conditions under which mediation hearings may be inappropriate. Mediation is designed to preserve long term relationships. One mediation hearing was successful, for example, because the 'second' party reported that he wished to continue his working relationship with the first party, even though he believed there was little to negotiate in the particular case. Where long-term relationships are irrelevant, however, as is usually the case on the termination of tenant-landlord contracts, the mediation process is designed to bring closure to the case "through a mutually acceptable solution that allows all parties to move forward positively" (Clinton and Cuzzo, 1999). This is unlikely to occur when parties have not opted for mediation but feel themselves to have been forced into it.

4.4.7 Mediation as a process of empowerment was stressed by all those involved in the operation and management of the Mediation Project who were interviewed. Properly conducted, mediation was able to provide adequate checks and balances where there were likely to be inequalities in power. This was less likely to be provided in the court room, particularly where party litigants were concerned. Mediators believed that experienced mediators were able to empower party litigants in ways which were not available to sheriffs. They could be more inquisitorial than sheriffs and they could help all parties to the dispute to identify their interests. Indeed, while mediation or 'empowerment by participation' may be seen as an alternative to a professional representation model of client empowerment (Myers and Wasoff, 2000), its function where no professional representation is available may be even more crucial to the empowerment of litigants. As we have already seen (see Table 4.10), all except one 'first' party referred to the Mediation Project were without legal representation. Whether or not parties to mediation felt more empowered by the process was not within the remit of Phase 2 of the research and could not be ascertained from the interviews conducted with clients referred to the Mediation Project, not least because those who had participated in a mediation hearing could not compare it with a court action.

The Mediation Project in Action: The Mediators

4.4.8 Two mediators were interviewed and both expressed the importance of careful preparation and experienced handling at every stage of the mediation process. Investment in training was needed to cover every stage of the mediation process: dealing with first inquiries and the initial paperwork; handling the actual mediation hearing; and providing 'after-care'.

4.4.9 Both parties and mediators needed preparation. Successful mediation hearings, so one mediator argued, partly depended on parties being prepared for mediation with a full understanding of their rights prior to mediation. Without this knowledge or understanding, mediation was likely to disempower rather than empower parties. While mediation hearings conducted under these conditions may lead to settlements, they were not always satisfactory:

The party had an unrealistic view. Basically, he did not have a case. The other side was willing to pay him something because they wanted to work with him again but he was unhappy because he felt he could have had more. So he

³⁵ *ibid.*

asked me at the end, when the other side had gone, whether he had done the "right thing?"

It was the mediator's view, however, that it was not necessary for all parties to take legal advice prior to mediation:

It depends on the nature of the dispute. Sometimes, the issues in dispute render the legal issues irrelevant to the dispute. Sometimes the legal advice is wrong and this can make things worse. It will depend upon each case and how important the legal issues are in each case.

4.4.10 Mediators were also dependent for successful mediation on preparation undertaken prior to the mediation hearing. One of the mediators interviewed felt there was a need for each party to prepare a statement prior to the hearing "so that mediation is not taken entirely cold". Another mediator mentioned the need for further attention to the gathering of paperwork by the Mediation Project prior to the mediation hearing: "You can't get a full picture if one person has documents but the other party comes without their documents".

4.4.11 Finally, successful mediation was dependent upon both parties having the authority to mediate at all stages of the mediation process. This required care in the invitation of parties to mediate and the setting up of mediation hearings. Indeed, both mediators interviewed reported involvement in hearings which ultimately failed because one party to the mediation did not have the necessary authority to bind the party which it was representing at the mediation hearing.

4.4.12 At the mediation hearing itself, the experience of the mediator was crucial for the success of the hearing. Mediation, so it was pointed out, is a delicate and sensitive business:

The mediation failed due to the incompetence of the mediator who made some fundamental mistakes. They were retrievable - but the moment passed! He misrepresented the situation from one party to another. He gathered them around the table for the denouement, and it all fell flat because the other side said that they had not said that at all. It was a very simple error but he had failed to accurately convey from one party to another what the position was. As a mediator, the one thing you cannot do is misrepresent the position of one party. You can perhaps not reveal all that you were told- but you cannot misrepresent.

4.4.13 The delicacy of the mediation process was emphasised by one mediator in her call for a rigorous post mediation after-care service. This, so she felt, was difficult for the Mediation Project to provide, as currently funded and organised. She made the general observation that mediations often fail because of the absence of a well-resourced service to deal with last minute doubts and late reservations.

4.4.14 Some concerns as to proportionality were also raised. Since all mediation hearings were undertaken on a *pro bono* basis, the issue was of time and not money. Precisely because no money was changing hands, so it was suggested, the principle of proportionality was not being

observed: *"If you allow a small claims case one full day, it will take that. If it does not deserve to go beyond half a day, it should not be allocated more"*.

4.5 SUMMARY OF FINDINGS

The Mediation and In-court Advice Projects (4.1.1–4.1.7)

4.5.1 The Mediation Project was brought more closely into the organisation and operation of the In-court Advice Project from April 1998 onwards. This was facilitated by operational linkages between the two projects. Clients were referred to the Mediation Project by both the Mediation Co-ordinator and the In-court Adviser who evaluated the appropriateness of mediation in each case. All clients to whom mediation was first suggested, (categorised as 'first' parties), were given a leaflet about mediation. If 'first' parties agreed to mediation, "second" parties or their agents were subsequently contacted by the Mediation Co-ordinator. All parties were offered access to free legal advice from the panel of voluntary lawyers serving Edinburgh Central CAB, though it was not known how many took this up.

4.5.2 In many cases where both parties agreed, the Mediation Co-ordinator first attempted to facilitate a negotiated settlement between the parties. Where this was not possible, or where negotiation failed, a hearing was conducted. Most mediation hearings took place at Edinburgh Central CAB and were conducted on a *pro bono* basis by mediators trained by the Centre for Dispute Resolution or the Law Society, though not every mediator was a lawyer. The number of mediators involved at any one time ranged from six to fourteen though there were occasions when no mediator was available to conduct a hearing at short term notice.

Monitoring the business (4.2.1–4.2.52)

4.5.3 During Phase 2, 99 clients of the In-court Advice Project – constituting 34% of all small claims and summary cause clients – were referred to the Mediation Project, compared with 34 clients during Phase 1. The Mediation Project therefore constituted an important agency to which the In-court Advice Project was able to refer its small claims and summary cause clients for assistance. Two thirds (66%) of all Mediation Project clients were referred by the In-court Advice Project, with a further 12% (18) referred by the Mediation Co-ordinator in court, 11% (17) by Edinburgh Central CAB and 3% (5) by sheriffs. Information is available mainly on the 99 clients referred to the Mediation Project by the In-court Advice Project.

4.5.4 Of 103 cases referred to the Mediation Project during Phase 2 of the research, most (72%) involved monetary claims while 10% involved disputes over rental deposits, 9% involved disputes over products and services and 9% involved disputes over damages and personal injury. Most 'first' parties referred to the Mediation Project were involved in small claims disputes (76%) and a large proportion of them (65%) were pursuers. Clients referred directly from the court, whether by the Mediation Co-ordinator or sheriffs, were more likely to be defenders. Because pursuers were likely to seek advice at an earlier stage and because 'first' parties were dominated by pursuers, referrals to the Mediation Project were more likely to be made prior to cases calling in court (58%) or prior to a full hearing (7%) than on the day when the case called in court (31%). Almost two thirds of the 99 clients referred by the In-court Advice Project were referred prior to raising actions or prior to their cases calling in court.

4.5.5 'First' parties were most likely to be individuals (70%), the rest (30%) being categorised as representatives of small businesses. 'Second' parties, however, were most likely to be representatives of small businesses (52%), though 9% were categorised as large businesses and the rest (37%) as 'individuals'. Where 'second' parties were pursuers, however, they were far more likely than defenders to be small businesses (66% compared with 47%). Amongst 'first' parties, individuals were most likely to be referred to the Mediation Project before actions were raised than at any other procedural stage while small businesses were more likely to be referred to the Mediation Project on the day of a Preliminary Hearing or First Calling.

4.5.6 When 'first' and 'second' parties are looked at together, the highest proportion of cases referred to the Mediation Project involved individuals as 'first' parties against small businesses as 'second' parties (35% of all cases referred). This was followed by individuals against individuals (26%) and small businesses against small businesses (19%). Only one 'first' party was legally represented compared with 47 (34%) 'second' parties. 'Second' parties which were legally represented were more likely to be pursuers rather than defenders, and to be businesses rather than individuals.

4.5.7 More than half of all 'first' parties referred to the Mediation Project (55% of 84 clients) confirmed their willingness to take up mediation while a further 9% (13) agreed to allow the Mediation Co-ordinator to attempt a negotiated settlement. Small businesses were more likely to reject mediation than individuals. In cases involving rental deposits and claims for damages, there was a marked willingness amongst 'first' parties to go to mediation. 'First' parties were most likely to agree to mediation or negotiation prior to a full hearing while they were least likely to agree when an action had already been raised but prior to the Preliminary Hearing or First Calling.

4.5.8 Of the 97 'second' parties contacted following the agreement of 'first' parties, 31% confirmed their willingness to take up mediation, while a further 20% agreed to attempt a negotiated settlement through the Mediation Co-ordinator. A higher proportion of individuals (41%) were willing to take up mediation than small businesses (24%). Small businesses, however, were more willing to try negotiation than individuals. Amongst 'second' parties, there was a greater willingness to mediate or to negotiate in cases involving monetary claims while there was a very high non-response rate in cases involving rental deposits (that is, amongst the landlords who had kept them).

4.5.9 Of 151 referrals to mediation in the nine month period covered by Phase 2 of the research, dates were fixed for a mediation hearing in 24 cases and 22 mediation hearings were conducted. Eight took less than half a day while 14 took a half a day or more. Only two of them were unsuccessful in that no settlement was reached. A further 21 cases were successfully concluded by the Mediation Co-ordinator using 'arms-length' mediation, that is, 'assisted' negotiation. Where 'first' parties were individuals, disputes were more likely to be brought to a successful conclusion by 'arms length' mediation. Where 'first' parties were small businesses, however, they were more likely to be brought to a successful conclusion through a mediation hearing. The opposite was the case amongst 'second' parties. Where 'second' parties were individuals, disputes were more likely to be brought to a successful conclusion through a mediation hearing. Where 'second' parties were small businesses, however, they were more likely to be brought to a successful conclusion through 'arms-length' negotiation. 'Second' parties without legal representation were more likely to resolve their disputes at a mediation hearing than those with legal representation. Referrals to the Mediation Project made after the action had been raised were more likely to be resolved at a mediation hearing than through 'arms-length'

negotiation while referrals made prior to raising an action were more likely to be resolved by 'assisted' or 'arms-length' mediation.

4.5.10 Cases referred by the In-court Adviser to the Mediation Project not only constituted the majority of referrals but also the majority of 'successful' referrals (of 99 cases referred to the Mediation Project by the In-court Adviser, 37 were successfully concluded). Of the 41 cases resolved either in a Mediation Hearing or by the Mediation Co-ordinator during Phase 2, all cases for which there is information (76%) are known to have been honoured.

In the Sheriff Court (4.3.1–4.3.12)

4.5.11 The In-court Adviser was mainly responsible for referring clients to the Mediation Project as they came in to her office to consult with her, while the Mediation Co-ordinator was responsible for referring parties from the court. While close association between the two projects had clear benefits for their co-ordination, it also presented problems in the operation of the Mediation Project, most noticeably with regards to the maintenance of neutrality. This arose particularly on those occasions when the Mediation Co-ordinator was standing in for the In-court Adviser.

4.5.12 Parties approached in court were most responsive to mediation when they were apart from their opposing party. Some litigants rejected the offer of mediation on the grounds that it was a 'soft' option while others might have accepted it as an important device for enhancing self-presentation in the court. There was some agreement that mediation was often successful in the shadow of litigation. It was suspected, however, that many individuals were litigating in place of negotiating, often because they did not know how to negotiate. Hence, it was often individuals without legal representation who were the first to respond favourably to the offer of 'arms-length' mediation.

4.5.13 Solicitors who observed the In-court Adviser and Mediation Project in the court were of the view that mediation was "taking off" in the court, with an increasing number of sheriffs showing an interest in it. They acknowledged the usefulness of the Mediation Project in those cases where, for whatever reason, parties had been unable to negotiate.

Clients and mediators (4.4.1–4.4.14)

4.5.14 The Mediation Co-ordinator encouraged full mediation hearings only under special circumstances and usually tried to negotiate a settlement prior to the fixing of a mediation hearing. Some clients, however, wished for an 'arms length' mediation from the outset, mainly because of the opportunity costs of a full mediation hearing.

4.5.15 Mediation hearings were found to be appropriate and successful where they could offer empowerment to the disputants. They were found to be inappropriate in those cases where disputants had been obliged to attend a mediation hearing. Mediations hearings were also found to be appropriate where the maintenance of long term relationships was desirable. Properly conducted, so mediators believed, mediation was well able to deal with inequalities of power. Indeed, mediators were able to empower party litigants in ways often not available to sheriffs.

4.5.16 Mediators called for greater investment in mediator training to cover every stage of the mediation process, from those dealing with first inquiries through to those offering 'after-care' services. Good preparation was needed by both mediators and parties while the experience of

mediators was crucial for the success of the mediation. One mediator called for care to ensure that those invited to the mediation had the authority to bind the parties while another mediator called for a rigorous post mediation 'after-care' service. Some concerns were raised as to proportionality which, since all mediation hearings were undertaken on a *pro bono* basis, was an issue of time rather than money.

CHAPTER FIVE: IN THE SHERIFF COURT

This chapter looks at the context in which the In-court Advice and Mediation Projects operate. It first examines the impact of both projects on those who work in the court: on sheriffs (5.1), and then on sheriffs clerks and other court based personnel (5.2). It then goes on to explore the impact of the In-court Advice Project on those litigants and their representatives who are raising or defending actions against clients of the In-court Advice Project. In particular, it examines the impact of the Project on solicitors (5.3) and on the City of Edinburgh Housing Department (5.4). Finally, it considers the position and role of the In-court Advice and Mediation Projects in the network of advice agencies serving Edinburgh Sheriff Court (5.5). The chapter concludes with a summary of findings (5.6).

5.1 SHERIFFS

The In-court Advice and Mediation Projects: Establishing a profile in the Sheriff Court

5.1.1 Phase 1 of the research reported that sheriffs had difficulty in identifying the impact of the In-court Advice Project on the performance of their duties. This was partly linked to the infrequency with which individual sheriffs had sat on the bench in the small claims/summary cause courts over the first year of the In-court Advice Project. It was also due to the observability of the work of the In-court Advice Project which was mostly outwith the view of the court at that time.

5.1.2 By Phase 2, however, there was direct and indirect evidence to support the view that the In-court Advice and Mediation Projects had become well established amongst sheriffs in Edinburgh Sheriff Court. Both solicitors and advice workers reported that sheriffs were more often asking unassisted litigants whether they had been to see the In-court Adviser, or were mentioning the possibility of mediation. Their increased awareness was partly due to the presence of both Projects' staff in court. On Tuesday morning, at the time of the small claims/summary cause court, the Mediation Co-ordinator was now frequently in court. On Wednesday, the In-court Adviser was able to attend the Miscellaneous Ordinary Court where time to pay cases under The Debtors (Scotland) Act 1987 were heard. On Fridays, the In-court Adviser was now joined by the Deputy Manager of Edinburgh Central CAB to deal with the increasing numbers of clients seeking advice when the heritage court sat. This permitted one of them to sit in the court for some of the morning so as to participate in the proceedings of court in those cases where further information could help the court.

5.1.3 Sheriffs were reported by solicitors and advice agency workers to have referred party litigants to the In-court Adviser and Mediation Co-ordinator after noting their presence in court. As one solicitor observed:

Sheriffs are now referring on a regular basis. To begin with, there were fewer but lately, awareness has really grown. Eighteen months ago I hardly heard sheriffs doing this but now I hear the sheriffs saying frequently: 'Do you know we have an In-court Adviser here? It may be in your interests to go and speak to her'. And they will often recall them at the end of the roll, or offer them a continuation of a week or two to take advice.

Sheriffs were also made increasingly aware of the In-court Advice Project in court by clients who often addressed the court by reading from a script prepared with the help of the In-court Adviser or made some reference to the advice they had received from the In-court Advice Project.

5.1.4 The Sheriff Principal was also responsible for increasing awareness of both Projects. In particular, reference was made by the In-court Advice Project staff to a meeting in the summer of 1999 when all Edinburgh Sheriff Court sheriffs were invited to a presentation of the work of the Project in the Sheriff Court. This was thought to have been responsible for an increasing number of referrals from sheriffs to the Project in the following months and subsequently. The In-court Adviser also reported that she made a point of introducing the work of the Project to any sheriff newly appointed to Edinburgh Sheriff Court. This was somewhat more difficult, however, with regard to temporary sheriffs. During the period covered by Phase 1 of the research, few temporary sheriffs had sat in the small claims/summary cause or heritage courts. During the summer months of 1998 and 1999, however, they made quite frequent appearances, particularly in the heritage court.³⁶ Given the relative inexperience amongst some temporary sheriffs in the heritage court, the In-court Adviser reported making a special effort in the short space of time prior to temporary sheriffs coming on the bench to introduce herself and the role which she was able to play in that court - to which they had responded positively.

The In-court Advice and Mediation Projects: Referrals from sheriffs

5.1.5 An increased awareness of the In-court Advice Project amongst sheriffs is reflected in the rising number of referrals from sheriffs to the In-court Advice and Mediation Projects between Phase 1 and 2 (see 3.4.1 and 4.2.3). Only five clients were referred to the In-court Advice Project by sheriffs during Phase 1 of the research while 16 were referred during Phase 2. At least five sheriffs were cited by the two civil law practitioners interviewed as "*keen on mediation*", and it is likely that more sheriffs would have been cited had interviews been conducted with more civil law practitioners. Only five litigants were recorded in the Mediation Project database as having been referred to the Mediation Project by sheriffs. It was generally agreed, however, that figures derived from the Project database are likely to be an underestimate of shrieval referrals because Project clients do not always volunteer the information. Thus, for example, clients who were identified as referred by court staff might very well have been referred by sheriffs via their bar officers. As one In-court Advice Project staff member explained:

This is something which has been building up over the past year as sheriffs have gradually realised the role of the I-CA. And the bar officers are the link between the sheriff and the outside world.

5.1.6 Both the In-court Adviser and other staff members reported an increased number of referrals from sheriffs to the In-court Advice Project during the course of proceedings in court. Project staff reported that least four sheriffs were asking party litigants with some frequency whether they had consulted with the In-court Advice Project. Others were doing so sporadically. Referrals were particularly noticeable when party litigants '*were not coming across clear*' and sheriffs were '*keen to check up on the facts before coming to a decision*'. In one case, for

³⁶ This is no longer the case since September 1999.

example, a litigant defending a claim by the Child Support Agency was referred from the Ordinary Court to the In-court Advice Project after he had informed the sheriff that his solicitor had recently withdrawn on the grounds that *"he did not know very much about the Child Support Agency"*. The defender was referred by the sheriff when he had arrived in court with a great deal of paperwork but without the means to present the relevant aspects of his case to the court.

5.1.7 Sheriffs were also reported to be referring party litigants when they had reason to believe that party litigants were not understanding proceedings *"when they are seen to be struggling or simply don't have a clue"*. Thus, in the midst of a proof hearing, one sheriff referred a party litigant to the In-court Advice Project when the litigant *"suddenly blurted out that he had not understood anything of what was going on"*. Another sheriff was reported to have asked a party litigant whether he knew why he was in court. When the response was in the negative, he was referred to the In-court Advice Project.

5.1.8 Sheriffs were also reported to be referring party litigants when they had reason to believe that party litigants did not understand the consequences either of shrieval decisions or of their own position. Thus, after making a decree for eviction against a party litigant, one sheriff referred the defender to the In-court Advice Project so that the implications and consequences of that decree could be properly explained to the party outwith the court. Another sheriff referred a party litigant to the Project after granting a pursuer's request for sequestration and asking the party defender if he understood what this meant. A third sheriff referred a party defender to the In-court Advice Project from the Ordinary Court so that the potentially serious implications of her refusal of child visitation rights could be spelled out.³⁷

5.1.9 While there was some consistency between sheriffs in the circumstances under which they referred litigants to the In-court Advice and Mediation Projects, the research could not evaluate whether all sheriffs took the opportunity of referring party litigants to the Projects when these same circumstances were met.

The In-court Advice and Mediation Projects: The views of sheriffs

5.1.10 The two sheriffs interviewed testified to the difficulties which sheriffs sometimes faced when dealing with unrepresented litigants in court. This was partly because party litigants *"often lack the sense of relevance which a lawyer has"*. While parties may want to win their cases or defend their actions,

they don't know what to say and how to go about it. Either they say very little- or give you a misleading selection of facts. Or they say a lot and it's difficult to winnow out what is relevant and what is not.

Apart from the issue of relevance and knowing what to say in court, sheriffs recognised the strain which party litigants are under when they *"stand up in court, in a totally unfamiliar setting, before the sheriff and a court full of people"*.

5.1.11 Neither of the sheriffs interviewed had unrealistic expectations of party litigants. At the same time, they were well aware of the helpfulness of articulate, confident presentations, particularly in the context of a large, busy court. Where unassisted litigants were unable to

³⁷ Interestingly, in this case, the defender complained of the circumstances under which the original court order was made, viz., her ex-husband had been in court with legal representation but she had been unable to afford legal representation.

present clearly the relevant information, it was left to the bench to ascertain both what they were trying to say and issues relevant to the case. In heritable actions, for example, it was often first necessary to establish how much defenders were in arrears and this was likely to be difficult if they had not brought with them the relevant documentation. Because unassisted defenders were usually trying to do everything to avoid being ejected from their accommodation, they often had to be encouraged to make realistic offers to the Council - and this was very difficult to help them do in the tense atmosphere of their short appearance in court. The In-court Advice Project had made a useful contribution to the bench and to the court with regards to these matters, helping its clients to calculate their arrears and their offers prior to appearing in court, and informing them of the documentation which they should produce on their appearance in court.

5.1.12 Unassisted litigants were also unable to identify any technical and/or legal flaws in the summons which had been taken out against them. While sheriffs may check every summons and application for jurisdiction and competency, they are still

liable to miss things which are not patently obvious when you are dealing with a large body of cases in court which you have never seen before.

Hence, for example, one sheriff cast his mind back to a case in which the Council had raised an action for ejection against a tenant, but had failed to note there was a joint tenancy in existence. He put this forward as a good example of

a sheriff not noticing the legal flaws in the summons. The In-court Adviser would have picked it up, however, and a legal representative would have brought it to my attention.

As one sheriff said,

You know there's an imbalance between professionally represented pursuers and corporate bodies and the unrepresented litigant - but it's not always possible for sheriffs to tip the balance. This is partly because you do not know what the facts are - you know the pursuer's side from the summons but you cannot be as confident as you would be if the defender were professionally represented.

Besides the information available, it was also difficult to adjust the balance because of the need to preserve shrieval impartiality: "You cannot take over the defender's case for him and give the impression that you are taking up cudgels on his behalf against the pursuer" (see also Samuels, 1998). The In-court Advice Project contributes to the court, therefore, by helping to adjust the imbalance between professionally represented and unrepresented litigants while allowing shrieval impartiality to be maintained.

5.1.13 This was also cause for professional satisfaction. As one sheriff put it:

It's all to do with if you have got it right. That's all one is trying to do - to get it right. And it's unsatisfactory from a sheriff's point of view if you have to give a decision against an unrepresented party because they have not taken certain steps, such as lodging the right documents or bringing enough witnesses.

5.1.14 Despite the more interventionist role which small claims and summary cause (heritage) procedure provided for sheriffs, sheriffs were still in an unsatisfactory position because they were still operating within the context of an adversarial system:

We are not given full inquisitorial powers. The rules help by suggesting that you should be more interventionist...but it is not as if you are setting out as an investigator to get the facts for yourself. You are still dependent on the material which litigants bring to the court.

The In-court Advice Project provided sheriffs with greater confidence that relevant material was being brought before the court so that they could make decisions on the basis of the best possible information.

5.1.15 Interestingly, the In-court Adviser may also have played a socialising role when temporary sheriffs were operating in the sheriff court. Thus, for example, temporary sheriffs were occasionally on the bench in the summary cause (heritage) court over the summer of 1999. The In-court Adviser reported that she wrote her clients' scripts according to her perception of the expertise of whichever temporary sheriff was on the bench:

I will give the litigant something to read such as "I would urge you not to grant decree. I have eight children and eviction is unreasonable under The Housing (Scotland) Act 1987.

5.2 SHERIFF CLERKS AND OTHER COURT STAFF

The contribution of sheriff clerks and other court staff

5.2.1 A new Sheriff Clerk Depute was appointed to the small claims/summary cause section in March 1999 and remained there until November 1999. Duties were transferred by the outgoing Sheriff Clerk Depute to the incoming Sheriff Clerk Depute who reported receiving comprehensive information as to the operation of the In-court Advice Project and the In-court Adviser's role in the Sheriff Court in the transfer period.

5.2.2 As Clerk of Court, the new Sheriff Clerk Depute continued the practice before the sheriff came on the bench of announcing to the court the availability of the In-court Advice Project, particularly in the heritage court. He reported that it was often unnecessary in the small claims and summary cause court because most party litigants were now waiting outside the door of the In-court Advice Project before the sheriff came on the bench. When party litigants queued up to see him, however, he reported always asking them if they had taken advice and, if not, whether *"they are happy about going forward without it or whether they want to see the In-court*

Adviser". The Clerk of Court also continued taking the names of clients waiting to see the In-court Adviser while court was in session and putting them to the back of the roll. This practice had first been introduced in the Friday morning heritage court and Tuesday morning small claims/summary cause court before the commencement of Phase 2 research. In both cases, a volunteer acted as a 'receptionist' outside the court, recorded the names of those who wished to see the In-court Adviser, and handed that list over to the Clerk of Court. According to one In-court Advice Project staff member,

this made all the difference, because no-one is now worrying, as they were in the early months of the Project, that they would miss hearing when they are called in court.

5.2.3 The Clerk of Court also attempted to bring forward to the front of the roll all those whom the In-court Adviser was known to have seen prior to the sheriff coming on the bench. In this way, the Clerk of Court sought to give them an opportunity to consult with the In-court Adviser after the hearing and "to work it so that the In-court Adviser is seeing clients right through the morning, rather than having a rush of clients towards the middle and end of the morning." The Clerk of Court was therefore instrumental in helping to distribute the business of the In-court Adviser more evenly while court was in session.

5.2.4 During Phase 2 of the research, the sheriff clerk in the Wednesday morning Ordinary (Miscellaneous) Court, also began to announce the presence of the In-court Advice Project before court commenced. This, together with the presence of the In-court Adviser, was partly responsible for the large increase in clients with matters relating to the Debtors (Scotland) Act 1987 in the second research phase (see 3.2.8-3.2.12). It was also responsible for the large proportion of these clients who consulted with the In-court Adviser both before and after court was in session (see 3.2.13-3.2.15). Like the Sheriff Clerk Depute of the small claims/summary cause section, the sheriff clerk of the Ordinary (Miscellaneous) Court took the names of parties waiting to see the In-court Adviser and put them to the end of the roll. As a staff member of the In-court Advice Project explained: "It's a very short court and, because so many solicitors are there, it's a very intimidating one". The offer of advice was therefore taken by many.

5.2.5 Co-operation between staff in the Sheriff Clerk's Office and the In-court Advice Project ensured that a large number of those appearing in court received advice if they so required it. By the end of the period covered by Phase 2 of the research, a well planned and co-ordinated system based on co-operative links between staff in the Sheriff Clerk's Office and the In-court Advice Project was in place, particularly as it related to the courts. Because a system was now in place which reduced the extent to which the Project impinged on court time, the In-court Adviser reported that the Project was less dependent on sheriffs for accommodating to the requirements of the In-court Advice Project. As one Project staff member added:

It's also much more professional. Clients can see now that we have a system and that this is co-ordinated with the court.

However, the In-court Adviser reported that Clerks of Court were also receptive to less professional modes of communication when necessary, such as accepting and relaying "semaphore" messages while court was in session. This was confirmed by a Clerk of Court:

So if, for example, things are at a standstill and the In-court Adviser is in court, she may make me a hand sign and I can tell the Sheriff that this may be a case which could be put to the end of the roll because the In-court Adviser would like to speak to the party.

By doing so, sheriff clerks acted as a medium of communication between the In-court Adviser and the sheriff on the bench, to the benefit of the court and court users.³⁸

Referrals from court staff

5.2.6 The contribution of referrals to the In-court Advice Project from court staff, including staff in the Sheriff Clerk's Office, and the changes in patterns of referral have been examined in some detail in Chapter 3 (3.4.1-4). These may now be linked to some of the changes which were introduced in the intervening period (as described in the previous section). The In-court Advice Project was less dependent on the Clerk of Court for referrals because receptionists were in place outside the court to take the names of parties requiring the services of the Project. Bar officers and messengers were now taking a more active role in referring clients to the In-court Advice Project, though this was probably offset by a decrease in the number of referrals from security guards. The elimination of referrals to the Project of criminal cases (see 3.3.18-3.3.19) is indicative of the greater awareness amongst security guards as to the role and remit of the In-court Advice Project.

5.2.7 One member of the In-court Advice Project staff believed that she had detected a falling off in the pro-activity of the Sheriff Clerk's Office in certain areas, for example, the Project was less likely to be informed by the Sheriff Clerk's Office in advance of full hearings involving one or more party litigants. Referrals from the Sheriff's Clerk Office were found to have increased over the two research phases, however, and they remained stable as a proportion of all referrals (see Table 3.15).

Court staff and the In-court Advice Project

5.2.8 Interestingly, the new Sheriff Clerk Depute (small claims/summary cause department) admitted that, before taking post, he had some concerns as to how the In-court Advice Project would impact upon him: *"I wasn't sure if it was a good idea before I started and I wondered how it might benefit myself and the section"*. Now he was of the opinion, however, that:

we would not know what to do if it were taken away from us. It's one of those services whereby you do not know how you managed before it came into being.

While he acknowledged that members of his section *"would survive, because we always have done so without it"*, he believed that the In-court Advice Project embodied

³⁸ This might occur, for example, if the Sheriff had asked the party whether or not he had consulted with the In-court Adviser.

much of what we are trying to achieve now in all of the sheriff courts. It's giving customer care and that's a very big issue for Edinburgh sheriff court. And we are also promoting team-building and a more friendly organisation, and the In-court Advice Project is partly how this can be achieved.

5.2.9 Like Sheriff Clerk Deputes before him, he pointed to the role which the In-court Advice Project played in diverting conflict which was likely to arise because staff in the Sheriff Clerk's Office were not allowed to give advice or take sides. Because of this, he felt that it was very important to stress to parties that though the In-court Advice Project is located in the court, it is absolutely independent of it. This made parties far more receptive to the information given. As one sheriff clerk related:

It's sometimes hard to get our point across because we are seen as linked with court. So, for example, I was trying to tell two party litigants about some problem regarding the lodging of papers while the sheriff was off the bench and because I was dressed in black robe and am an employee of court, it might have looked as if I had an ulterior motive. I tried to explain to them that whether or not they decided to proceed today, it would make no difference to me - I would still be here, dealing with the next case. Then the In-court Adviser came in and took them out and they understood.

5.2.10 The In-court Advice Project made an impact on the work of the sheriff clerks both in the Sheriff Clerk's Office and in the court. The Sheriff Clerk Depute reported finding it helpful to refer parties to the Project from the counter in what he referred to as 'grey' areas:

where people come to the counter and say they are going to be suing eight different people for different amounts...or when they live in Edinburgh and the defender lives somewhere else and we are just not absolutely sure in this case as to in which court the action must be raised.

The input of the In-court Advice Project was also reported to reduce the number of party litigant summonses which sheriff clerks were obliged to return because they were incompetent or incorrectly completed, as well as making party litigants summonses easier for sheriffs to follow: "*...so the In-court Advice Project streamlines the whole process of checking, registering and putting a summons before sheriff*". The In-Court Advice Project was also reported to have been instrumental in helping sheriff clerks to organise their daily business, for example, by advising them well in advance if cases marked down for proof had settled.

5.2.11 The contribution of the In-court Advice Project to streamlining court services was also evident in the court. The most obvious cases, according to the Clerk of Court, were those in which unassisted parties were facing solicitors and

know nothing about pursuing or defending. In ten minutes, Beverley can often put them right by helping them focus on just what they are there for. So these are the kinds of cases which I would put to the back of the roll.

The Clerk of Court noted that it was usually possible for him to recognise those parties who had taken advice from the In-court Adviser:

they tell the court what they want, they deliver an oral motion rather than a long 'shpil' as to what has happened. And they know what is expected of them in the court.

Interestingly, the same Clerk of Court had recently moved into the Ordinary (Miscellaneous) Court and had witnessed the same streamlining impact of the In-court Advice Project in that court. *"So at the end of the day", he concluded, "we are all in it together — sheriffs, sheriff clerks and solicitors — and we all benefit from the courts being run well and efficiently".*

5.3 THE IN-COURT ADVICE PROJECT AND 'THE OTHER SIDE': SOLICITORS

Introduction

5.3.1 In this and the following sections, the In-court Advice Project is assessed for its impact on the 'other side', that is, those parties or their agents who face the In-court Adviser's clients. While 'the other side' comprised pursuers and defenders, corporate bodies and individuals, most clients of the In-court Advice Project faced either the City of Edinburgh Housing Department or solicitors who were pursuing an action against them (see 3.3 13-3.3.15). Interviews were conducted to reflect this. Two City of Edinburgh Housing Department officials were interviewed as well as two solicitors representing firms dealing with monetary claims on behalf of pursuers. Their experience of the In-court Advice Project was as opponents of clients advised by the Project. Observations of other court users and practitioners as to the evolving relationship between solicitors and the In-court Advice Project are also included.

Solicitors and the In-court Advice Project

5.3.2 Phase 1 research found that though solicitors had acknowledged certain advantages which the In-court Advice Project afforded them, they had been reluctant to endorse it fully. This was mainly because the Project was sometimes responsible for making them wait in court longer than they would have otherwise have expected. In the period covered by Phase 2 of the research, systems appeared to have evolved so that there was less need for solicitors to wait until the end of the roll for their cases to call again. At the same time, some of the advantages of facing defenders advised by the In-court Advice Project were becoming more apparent.

5.3.3 This was particularly the case in the Ordinary Court and the heritage court where many of the same solicitors had regularly been appearing on behalf of pursuers since the In-court Advice Project was first introduced into Edinburgh Sheriff Court. This provided an opportunity for a relationship of trust to develop between solicitors and the In-court Advice Project staff. As one Project staff member reported:

At first, they were not aware of our existence. But in the two and a half years since we have been here, it's really noticeable how solicitors have got to know us better, especially those representing Housing Associations. And proof of this is how they pass on defenders in their cases to us.

Because solicitors were now aware of In-court Advice Project: *"they also want to speak to us as 'agents for the other side'".* The In-court Adviser presented this as indicative of a changing relationship between the In-court Advice Project and solicitors who were also appearing in the Ordinary Court: *"though sometimes, if partners come instead and they don't know me, they 'just don't want to know'."*

5.3.4 The In-court Adviser reported that it had been more difficult to build up the same trust with solicitors operating in the small claims/summary cause court:

They are mainly trainees and because they are always changing, you need to re-introduce yourself to the next batch. Until they know who I am, they can be a bit wary and a tad resistant.

Attitudes were changed by their observation of the Project at work and by shrieval attitudes to the Project:

I come to them and tell them I am acting on behalf of the defender and I have a proposal. Occasionally I assist them by telling them that Sheriff X is on the bench today and he will not want to hear what you are saying. So I tell them 'maybe it would be a good idea if you call your client and take instructions before going in to court.' And the change can come if I have to appear, perhaps because I am getting a little more skilled in my appearance skills, and because the Bench appear to think highly of the service.

Solicitors

5.3.5 There were fewer complaints regarding time spent waiting for defenders to take advice from the In-court Advice Project. This was particularly so in the small claims/summary cause court where a more efficient system had evolved since the Project was first introduced into Edinburgh Sheriff Court (see 5.2.1-5.2.5). Cause for concern, however, was noted by one solicitor who regularly represented Housing Associations in the heritage court. Because City of Edinburgh Council dominated this court, all other cases are usually put to the front of the roll to allow solicitors to leave once their cases have been called. Where defenders in actions brought by Housing Associations were waiting to see the In-court Adviser, however, one solicitor reported that he had been required to wait until just before 'proof call-over' for his case to re-call. He suspected that clients were not consulting with the In-court Adviser in the order by which they were called in court. He thought that consultations should, if possible, follow that order, though he had not requested that they do so.

5.3.5 In other respects, the In-court Advice Project was acknowledged as being responsible for saving solicitors' time, particularly in the small claims/summary cause court. As one solicitor explained:

You can usually tell if party litigants have seen the In- court Adviser prior to the hearing. They keep things to a minimum and realise it is not proof. The biggest hurdle for them is to realise that this is a procedural matter. If they don't, they can extend the Tuesday court, in particular, because they want to give all of their information then and it is not the appropriate time.

5.3.6 As another solicitor observed: "If you get two party litigants in a case, then they conduct a full hearing almost every time they are in court". From his vantage point in court, the Clerk of Court confirmed solicitors' observations. Thus, though solicitors were sometimes kept waiting for their cases to call again while defenders consulted with the In-court Adviser, at the same time they reported that the court was proceeding at a quicker pace.

*You can tell if someone has been in [to see the In-court Adviser] **and** listened...They will state their defence very briefly. They will also identify what the disputed issues are rather than tell a rambling story and they will identify what is in dispute between the two stories. It's being able to encapsulate it more precisely.....So you see less bags of documents in the Tuesday court. They know it is not going to be decided there and then.*

5.3.7 The In-court Advice Project was found to be of assistance to solicitors representing the 'other side' at several stages in the proceedings. Firstly, solicitors reported that there was now someone with whom they could speak, if necessary, before cases called in court. As one solicitor explained: "It's a good point of contact for me, because the In-court Adviser will tell me before going into court 'This is where we stand and this is our position' ".

5.3.8 It was standard for solicitors to call each other prior to a hearing to ask, for example, whether quantum or liability could be agreed, or even to settle the matter before going to court. This was not possible when party litigants were involved, partly because party litigants were thought not to understand what was involved. Solicitors found it useful in cases involving party litigants to have someone designated with whom they may speak: "We can try to 'test the waters', state our position and have her explain to the defender what we are going to be asking for".

5.3.9 The In-court Adviser sometimes had information about the case which they, as agents and not principal solicitors, did not have. As the In-court Adviser explained:

I can tell them, for example, that regular payments have been made for x amount of time - and then they can go and call for instructions before the case calls, while I send a note to the sheriff clerk to put it to the end of the roll

5.3.10 According to one solicitor, the In-court Adviser is helpful:

because there is then someone on the other side for me to discuss the case with, someone who is familiar with the law, familiar with the process and someone who knows that no-one is trying to pull a fast one.

The In-court Advice Project therefore made it possible to negotiate in cases involving party litigants prior to them calling in court. Sometimes this involved negotiation with the In-court Adviser, though more often the In-court Adviser facilitated the negotiation by reassuring her client as to what was standard practice. Solicitors, and particularly those representing Housing Associations, took the opportunity to negotiate with Project clients. This was confirmed by the In-court Adviser: "*with the result that sometimes all that needs to happen in court is that they have to go up to ask for a continuation to monitor the arrangements*".

5.3.11 Solicitors' time and litigants' costs, as well as court time, were also saved by the presence of an independent advice service administering to party litigants. As one solicitor explained:

It's definitely an aid to the party litigant because sometimes the legal concept can be very different from the moral or principle. So where I feel the In-court Adviser has been very useful (both for party litigants and me) is explaining to them, for example, the legal consequence of signing a document in debt cases, or that the onus is on them to provide the evidence if they are a pursuer, or what they must prove to the court if they are a defender. And if they really do not have a case, the In-court Adviser can tell them this while we, the opposition, cannot.

5.3.12 The importance of the presence of an independent source of advice for party litigants was re-iterated by another solicitor:

I always have to say to them that I represent the other side. As such, there is only so much contact you can have with them since they don't have a legal background and we could be seen to be presenting the case to them in a way which is not in their best interests. Also we don't want to prejudice our case and that's a danger too.

5.3.13 The presence of the Project in the Sheriff Court was sometimes responsible for avoiding proof and while this was not always in solicitors' interests, it was almost always in the interests of their clients, particularly in small claims cases where the full cost of a proof to legally represented litigants was rarely recovered. It was also responsible for saving court and solicitors' time because, as one solicitor said:

at the end of the day, sheriffs would have to explain this to them and base their decisions on this. And in the long term, it saves my time since I am not having to take it right through to proof for them to get the message.

Though, as the same solicitor pointed out, this all depended upon clients taking the advice of the In-court Adviser.³⁹

5.4 THE IN-COURT ADVICE PROJECT AND 'THE OTHER SIDE': THE CITY OF EDINBURGH HOUSING DEPARTMENT

Introduction

5.4.1 The number of heritage clients grew from 452 in Phase 1 of the research to 857 in Phase 2. Most of them were defenders in eviction actions raised by the City of Edinburgh Council. In Phase 1 of the research, the Council had pointed to the benefits brought by the In-court Advice Project, such as the acceptance of offers or the investigation of housing benefits before cases called in court. It also pointed to the responsibility of the In-court Advice Project for the additional time spent waiting in court.

Referrals

5.4.2 In the period covered by Phase 1 of the research, over one third of all clients were referred to the City of Edinburgh Council Housing Department, either to the Court Section or a local office, for clarification and/or negotiation. The number of Project clients referred to City of Edinburgh Housing Department rose considerably in the period covered by Phase 2 of the research.

5.4.3 Of 1017 clients who approached the In-court Adviser between 1 December 1998 and 31 August 1999, 288 (28% of all clients but 34% of all defenders) were advised to make contact with the parties which had raised an action against them for further clarification and negotiation. Most of those referred for further negotiation or clarification were defenders in heritage actions brought by the City of Edinburgh Council (264 or 91%). Of these, 245 (93%) were told to contact the Court Section of the Housing Department of City of Edinburgh Council and 8 (3%) to contact their local housing office. In the period covered by Phase 2 of the research, therefore, a very large number (245) and proportion (24%) of all Project clients were advised to contact the City of Edinburgh Housing Department for clarification and/or negotiation before their case called in court.

Responses to the In-court Advice Project

5.4.4 By Phase 2, the Court Section of the City of Edinburgh Council Housing Department was finding the In-court Advice Project making less of a direct impact on its time. Because the Sheriff Clerk now received a list of those consulting with the In-court Adviser early on Friday morning, these cases were laid aside at the start of the morning for calling later in the morning. The system therefore differed from Phase 1 when many cases were set aside only once they had been called.

5.4.5 Nevertheless, the Housing Department believed that the In-court Advice Project made an indirect impact on their time, by being responsible for an increasing number of continuations –

³⁹ One solicitor related a case in which her opponent, a party litigant, refused to take the advice of the In-court Adviser, appealed the sheriff's decision and lost: "*We won and got expenses*". In another case in which the same solicitor was involved, her opponent did not understand that he had no defence until he had spoken to the In-court Adviser. He accepted the In-court Adviser's advice and the case was settled out of court.

mainly amongst defenders first consulting with the In-court Adviser on the morning their case was calling: *"Because she can't give the proper advice they need then, she has to ask for a continuation because the only thing she can do is tell them to go and see a CAB"*. It was suggested that many defenders were waiting until the day their case called as a delaying tactic. The Housing Department was of the opinion that a strong warning should be issued in the insert of heritage summonses so that *"they cannot come only on the day of court and get a continuation on that basis"*. Indeed, the insert in the summons should be changed to *"tell them to come in to see the In-court Adviser on the day they get the summons"*. Advice agencies strongly disagreed with this proposal in view of its likely impact on diverting clients from the advice agencies nearer their home as well as away from the opportunity to be represented in court by those advice agencies.

Housing Policy and the In-court Advice Project

5.4.6 In the report of Phase 1 research, it was suggested that Policy shifts in the City of Edinburgh Council's Housing Department were very likely to be responsible for changes in the volume and type of business conducted by the In-court Advice Project (see *Supporting Court Users*, 8.3.2.). Since August 1999, the City of Edinburgh has been involved in co-ordinating a city-wide rent arrears policy. The impact of this policy is not reflected in the quantitative findings emerging out of Phase 2 data which covers the nine month period to August 1999. The likely impact of the Council's new policy was mentioned in interviews with the City of Edinburgh Council's Housing Department, however, as well as with other court practitioners. Observations and predictions as to its impact, as well as some background to changes in policy, are therefore of relevance to this report.

5.4.7 Until mid-1999, each local housing office had been responsible for developing its own rental arrears strategy. In August 1999, however, the Council embarked on introducing a central policy along the lines of a strategy which had already been piloted by one of the local housing offices and had been deemed successful. The strategy was described as a 'minimum framework' around which city-wide policy was to be co-ordinated. After missing three rental payments, tenants are visited by area teams, with a view to reducing the number of "no contact" cases before raising an action against them and to providing tenants with the opportunity for discussing extenuating circumstances, housing benefits and other debt problems. All tenants so contacted are then obliged to make a financial arrangement with the Council. This financial arrangement is based on a standardised formula rather than, as previously arranged, at the discretion of local housing officers. It does not take into account other debts and commitments, though it does take into account fuel and other housing costs, and tenants are given the opportunity to consult with the Advice Shop should they so require. Should the Advice Shop suspect that the financial statement which has already been signed cannot be met, it may request an interim arrangement from local offices.

5.4.8 A decree for eviction will be sought as soon as there is default on these arrangements, as well as in those cases where no contact has been made. The decision to raise an action will be made by each local office. At the time at which interviews were conducted with the Council (October 1999), the Council was phasing in the signing of financial statements with those in arrears. More actions were already reported to have been raised during this period, though the Council did not know whether this was because arrangements had not been kept or because there were more 'no contacts'. Why more actions were being raised, however, was about to be monitored by the Council *"as part of the new monitoring system which we are putting in place to monitor this new minimum framework in Edinburgh"*.

5.4.9 Just as the decision to seek decree lies with each local office, so another aspect of the new policy is the termination of the Court Section's remit to negotiate with tenants once an action has been raised. This was likely to reverberate on tenants' negotiating power and to make referral by the In-court Advice Project to the Court Section for negotiation a non-viable option. The In-court Adviser also predicted an impact on the heritage court and on the In-court Advice Project :

Previously, clients were able to make an offer after receiving their summons since they could contact the Court Section before their cases called in court to see if they could get a continuation. Now there are likely to be more people coming to court and a larger role for the In-court Adviser to play in court.

This was indeed the case in November and December of 1999, with the morning heritage court reported to be lasting well into the afternoon on some Fridays.

5.4.10 The new policy was also thought likely to make an impact on the kinds of cases coming before the bench. Since local offices do not bring cases to court, they do not face the sheriffs and they may not understand 'reasonableness' under The Housing (Scotland) Act 1987. The Court Section officer of the Housing Department is now taking instruction from local housing offices to move for decree, with little room left for discretion at court and before court. As one advice agency worker suggested: "*Housing officers will be negotiating who haven't a clue as to how the court works*". The success of the new housing policy, therefore, will partly depend on whether the bench considers actions raised by the Council for eviction are reasonable. As she went on:

It could work if the housing officers in charge have some kind of experience of the courts, that is, if there is some agreement between what they deem reasonable and what the court deems reasonable. The South Side pilot is not what they think it has been because there has been negotiation and the Council thinks that there hasn't

5.4.11 Another advice worker suggested that, with more cases coming into court,

the best thing that can happen is that the sheriffs will complain....because they may say to the Council's solicitors: 'What are you doing'? 'Why is the Court Section not allowed to negotiate or to have discretion?' Then the Council will have to listen to the advice agencies.

With the potential for negotiation eliminated, the new housing policy makes the In-court Adviser's advice even more crucial since what the defender brings to court and what the defender is able to demonstrate to the court is the only thing between the tenant and eviction.

5.4.12 The City of Edinburgh's housing policy and its implications for tenants, the In-court Advice Project and the advice agency sector may be contrasted with Midlothian Council's method of handling rent arrears. Actions raised by Midlothian Council for eviction were

noticeable by their absence in the period covered by Phase 2 of the research. According to one advice agency in the Midlothian area, the Council was referring tenants with arrears to the two Citizens Advice Bureaux which served Midlothian. This presented CABx with the possibility of negotiating arrangements with Midlothian Council on behalf of their clients before actions were raised and before they were brought to court: *"We have a good relationship with them (the Council) and this means we are usually able to negotiate realistic payments for our clients"*.

5.5 ADVICE AGENCIES

Referrals to Advice Agencies: Comparisons between Phase 1 and 2

5.5.1 In the period covered by Phase 1 of the research, just over one half of all clients (307) had been referred to advice agencies for further advice and assistance. Altogether, the In-court Advice Project had made 308 referrals to advice agencies, mainly in the voluntary sector. In the period covered by Phase 2 of the research, nearly one half of all clients (502) were referred to advice agencies, with 514 referrals to advice agencies made altogether (some clients were referred to more than one agency). In the period covered by Phase 2 of the research, a far higher number of clients were referred to advice agencies in the statutory sector (Advice Shop and Trading Standards) and to the Mediation Project than in Phase 1, while the number of clients referred to advice agencies in the voluntary sector doubled. Amongst referrals to the voluntary sector advice agencies, increases in the number of clients referred to CHAI and Leith CAB were particularly marked.⁴⁰

⁴⁰ See following two footnotes

Table 5.1 Number of referrals from the In-court Advice Project

Advice Agencies	Phase 1		Phase 2	
	No.	%	No.	%
CABx	104 ⁴¹	56	159 ⁴²	31
CAB solicitor	0	0	10	2
Mediation Project	34	18	117	23
Granton Information Centre	25	13	47	9
Shelter Housing Aid Centre/ Shelter Housing Law Service	14	7	7	1
CHAI	(included in CABx)		81	16
Advice Shop	10	5	75	15
Trading Standards	0	0	8	1
Other	0	0	10	2
Total	187	99	514	100

Phase 2 Referrals: Analysis by procedural remit of case and procedural status

5.5.2 Clients referred by the In-court Advice Project to other agencies for advice and assistance were mostly involved in heritage cases. Almost 60% of all the referrals made by the In-court Advice Project were amongst clients involved in heritage cases, 24% amongst clients involved in small claims, 8% amongst clients involved in summary cause and 5% amongst clients involved in ordinary cause actions connected with the Debtors (Scotland) Act. Almost two thirds of all small claims clients were referred by the In-court Adviser to other agencies were referred to the Mediation Project. Very few small claims clients were referred to other advice agencies for advice and assistance (11 clients in all). As in the period covered by Phase 1 of the research, then, the In-court Adviser was able to handle and deal with almost all enquiries by small claims clients without referring them on to other advice agencies.

5.5.3 Clients referred by the In-court Advice Project to other agencies for advice and assistance were mostly defenders (80% of all referrals). Though 20% (102) referrals were pursuers, over two thirds of them were referred to the Mediation Project. Only a very few pursuers (7 clients in all) were referred to other advice agencies. As in the period covered by Phase 1 of the research, then, the In-court Adviser was able to handle and deal with almost all enquiries from pursuers without referring them on to other agencies, except for mediation.

Phase 2 Referrals: Take-up of referrals

5.5.4 The take-up of referrals constitutes an important criterion of the In-court Advice Project's effectiveness. *"Where take-up of advice and assistance is really crucial "*, according to one advice agency worker, *"is between the first and continued hearings - for sorting out and chasing up housing benefit issues, backdating letters and so on"*. The quality of information which could be provided on take-up, however, was found in Phase 1 of the research to vary considerably between advice agencies. Amongst specialist agencies and where appointments had been made, information had not only been forthcoming but a high proportion of take-up had been noted. It was more difficult to ascertain take-up of referrals amongst agencies where appointments were not made and where traffic was heavy.

⁴¹ Comprising Wester Hailes (31), Pilton (18), Portobello (17), Central Edinburgh (12), Leith (11), Gorgie (8), Other (7)

⁴² Comprising Pilton (19), Portobello (37), Central Edinburgh (25), Leith (49), Gorgie (17), Other (12). Wester Hailes CAB became CHAI.

5.5.5 Steps were undertaken by the In-court Advice Project to provide greater feedback on the take-up of referrals during the period covered by Phase 2 of the research. Lists of persons referred by the In-court Advice Project were sent out from the In-court Advice Project to advice agencies from July 1999 onwards. Advice agencies were asked to follow up those persons who had been referred to them but who had not taken up their referral. Not all advice agencies appear to have been targeted, however, and some were targeted only once or twice between July 1999 and March 2000. Since this initiative began in July 1999, moreover, it was too late for referrals made in the period covered by Phase 2 of the research to be identified and analysed using the research database.

5.5.6 Though they had not been requested to do so and though it was not undertaken consistently, a few advice agencies (2) reported back to the In-court Advice Project as to initial and subsequent take-up of referrals. Of the eleven persons referred to the Advice Shop in September and October 1999, for example, six were reported to have taken up their referral. Of the eight persons referred to the Advice Shop in November and December, three took up their referrals. Later referrals to the Advice Shop were checked by different personnel and the information was not available. The rate of take-up to an advice agency somewhat further afield appears to have been considerably lower. Of ten referrals between September and December 1999, just two were identified as taking up their referral.

5.5.7 Because advice agencies were not expected to report back to the In-court Advice Project, contact was made with most advice agencies during the research period. Some agencies reported that they had written to 'no-show' referrals while others had kept a "watchful" eye but had not attempted to communicate with them. One advice agency had not done so because it was felt to be in breach of their privacy. Some agencies reported that, because the lists of referrals received constituted confidential information, they were either shredded fairly shortly after they were received or after those listed were contacted. They were therefore not able to provide the research with exact figures as to the rate of initial or subsequent take-up. Of those agencies which had written to 'no-show' referrals, however, three advice agencies reported that this was successful in bringing in clients who had not initially taken up their referral. One agency reported that it was often difficult to follow up those who had not made contact because addresses given were incorrect. Representatives of three agencies, at least, were supportive of the initiative, whatever rate of subsequent 'take-up' was achieved: *"even if it were just one client, it would be worth it"*. One advice agency reported that though the exercise had been unproductive so far, it was nevertheless useful. Other agencies felt that they had a duty of care to those people whom they already were dealing with. They could ill-afford to recruit more clients. There were therefore clearly differences between advice agencies on several different levels as to the appropriateness and/or effectiveness of this initiative.

5.5.8 There was near consensus, however, as to how higher rates of 'take-up' could be achieved. Referrals needed to be more directive and an appointments system was recommended. Some advice agencies believed that an appointments system was more in evidence in the first months of the In-court Advice Project, when the In-court Adviser had fewer clients and more time to book an appointment on behalf of the client while the client remained in the office:

The In-court Adviser would book an appointment for them with us, give them our card, and write details of the appointments at the back of the card.....they are not people who carry diaries. This way, we were not yet another vague office.

5.5.9 This was also believed to be a more professional way of going about business: *"They are given a named person and a real appointment"*. An appointment system also provided better advice, both quantitatively (*"We can't give 'walk-ins' more than half an hour"*) and qualitatively (*"We can tell them what to bring with them and what to prepare before seeing us"*). The Advice Shop, however, did not subscribe to this position since the debt and consumer advice section of the Advice Shop was providing a drop-in service for debt and consumer advice, and not operating on an appointments system.

Advice Agencies and the In-court Advice Project

5.5.10 The relationship between the In-court Advice Project and advice agencies was not always a one-way process. Some advice agencies were reported to be referring clients to the In-court Advice Project with some regularity. In some cases, there was justification for doing so, for example, *"when there's a 'time to pay' order coming up and then it's helpful to know someone in the court"*. In some cases, however, the In-court Advice Project was called for advice when *"they could well manage it themselves if they looked at their information systems"*. By showing them where and how the information could be accessed, the In-court Adviser appeared to function as an agent of empowerment and socialisation in the advice agency sector.

5.5.11 The use by advice agencies of the In-court Advice Project as a resource centre was most common amongst the smaller advice agencies. A manager of one smaller CAB, for example, reported that the In-court Advice Project was used mostly for getting advice for its workers. This was particularly the case in relation to small claims:

We don't have anyone particularly skilled in it. Even though we have people who do tribunals, they (tribunals) are different primarily because they are not adversarial. And the difficulty in CABx is that even if you have someone who does that kind of work, they don't stay with you unless you have a paid adviser skilled in that. But for the small amount of work which would be done, this would not be feasible for each CAB. And even if it were feasible, they would never develop the skill to the same level as the In-court Adviser.

5.5.12 The In-court Advice Project was also of use to the advice agency sector in the sheriff court. As the In-court Adviser suggested: *"We can give them tips about the court such as which sheriff is on today and how they are likely to act"*. This was confirmed by a CAB manager:

She gathers the kind of experience which is only possible if you are in the court on a day to day basis. She knows the sheriffs and how to play the court. At the same time, she understands how clients are feeling and she is very supportive and approachable. And what is very important, she is supported by the sheriffs. And I think that if we are going to get the best for our clients, that is the kind of service we have to provide. I am only too aware that lay reps do have a tough time in court.

"On occasion", so another advice agency manager reported, "we can ask her to look after a client when we cannot get up to court".

5.5.13 By Phase 2, the In-court Advice Project had become well established in the network of advice agencies serving the Edinburgh area. One advice agency manager reported that the In-court Adviser had spoken to all of the agency's workers and *"had done a session with them"*. She reported that this was not only responsible for promoting the Project but was a key factor in building up a relationship of trust between the two agencies. *"As a result", so she believed, "our advice workers can seek advice from her, and this has been of great benefit to the Bureau and our clients"*.

5.6 SUMMARY OF FINDINGS

Sheriffs (5.1.1–5.1.12)

5.6.1 A far greater awareness of the presence of the In-court Advice Project was found to have developed amongst sheriffs by Phase 2, compared with Phase 1. This was partly due to the increasing visibility of Mediation and In-court Advice Project staff in the court, made possible by a growth in the number of staff, a changed court timetable and by clients addressing the court. It was also due to a presentation of the work of both projects which was organised by the Sheriff Principal and attended by all sheriffs in the summer of 1999.

5.6.2 Growing awareness of both projects is reflected in the increasing number of referrals by sheriffs between the two phases of the research. There was good reason to suspect, moreover, that these figures underestimated the number of referrals by sheriffs. Sheriffs were also reported to be asking party litigants with some frequency as to whether they had consulted with the In-court Advice Project. They were referring them to the In-court Advice Project when they had reason to believe that party litigants had not understood either the proceedings or the implications of their actions as well as when they needed clarification or further information before coming to a decision.

5.6.3 Sheriffs reported that the In-court Advice Project was able to address some of the problems faced by the bench by unrepresented litigants. Despite greater interventionist powers provided by the rules, sheriffs were still dependent on the information put before them. By helping litigants to focus on issues relevant to the case and by assisting them in presenting their case to the bench, sheriffs had greater confidence in the information which unrepresented litigants were putting before them.

Sheriff clerks and other court staff (5.2.1–5.2.11)

5.6.4 The Clerk of Court was instrumental in informing party litigants as to the availability of the In-court Advice Project. During Phase 2, this was extended to the Ordinary (Miscellaneous) Court and was responsible for the large increase in referrals of clients with matters relating to this court. The Clerk of Court also helped to distribute the business of the In-court Adviser more evenly over the time when court was in session while at the same time ensuring that no litigant missed being called in court. By Phase 2, a tightly co-ordinated system based on co-operative links between the Clerk of Court and the In-court Advice Project was found to be in place. This meant that the In-court Advice Project was less dependent on sheriffs for accommodating to the requirements of the Project.

5.6.5 Compared with Phase 1, bar officers and messengers were found to be taking a more active role in referring court users to the In-court Advice Project while security guards were found to have a clearer idea of the remit of the Project. Like previous occupants of his position, the Sheriff Clerk Depute (small claims/summary cause department) found the work of the In-court Advice Project contributed to streamlining the services provided in his department and well as in the court. This was most obvious in court, particularly when party litigants were facing solicitors. It was less obvious but nonetheless helpful for staff in the Office of the Sheriff Clerk to refer party litigants to the In-court Adviser. The perception of the In-court Adviser as independent from the court was emphasised in this respect.

The 'other side': Solicitors (5.3.1–5.3.13)

5.6.6 By Phase 2, it was becoming more apparent to solicitors that there were advantages to facing defenders who were being advised by the In-court Advice Project. In the Ordinary Court, in particular, a relationship of mutual trust appears to have developed more so than in the small claims and summary cause court where there was a fast turnover of trainees. Even here, however, there were fewer complaints by solicitors as to waiting around and wasting time, possibly because a more efficient system had evolved since the In-court Advice Project was first introduced. Solicitors also acknowledged that the Project was responsible for saving their time in other respects, particularly since court was proceeding at a quicker pace now that party litigants were being advised.

5.6.7 Solicitors found the In-court Advice Project to be of assistance to them at several other stages in the proceedings. Where they were facing unassisted litigants, it was useful having a point of contact before cases called in court. When they were acting as agents for principal solicitors, information was often available to the In-court Adviser which was not available to them. While it was standard for solicitors to call each other prior to a hearing in attempt, for example, to agree quantum or liability, this was not possible where party litigants were concerned. The In-court Advice Project, however, provided an opportunity for negotiation in cases involving party litigants prior to cases calling in court, and the In-court Adviser reported that solicitors had taken that opportunity on many occasions. In sum, solicitors found it problematic to deal with the 'other side' when party litigants were involved, and the presence of an independent legal advisory service in the court helped to address the difficulties which faced them under these circumstances.

The 'other side': Local Authority Housing Departments (5.4.1–5.4.12)

5.6.8 The number of heritage clients rose from 452 in Phase 1 of the research to 857 in Phase 2. A large proportion of all In-court Advice Project clients were defenders in heritage cases brought by The City of Edinburgh Council. The City of Edinburgh Housing Department reported that the In-court Advice Project was now making less of a direct impact on its time in court since cases were now being laid aside earlier on in the morning for calling back. However, because of the increasing number of continuations, mainly amongst defenders first consulting with the In-court Adviser on the morning their case was calling, the Project was making an indirect impact on the Council's time. The Council reported on the continuing benefits brought by the In-court Advice Project through the large number of its heritage clients who contacted the Housing Department for clarification and/or negotiation before their case called in court.

5.6.9 Since August 1999, the City of Edinburgh has been involved in co-ordinating a city wide rent arrears policy whereby the decision to seek decree and the remit to negotiate with tenants is restricted to each local office. It was predicted that the new policy would make an impact on the number of individuals coming to court and the role which the In-court Adviser plays in the court. In particular, it was predicted that since the responsibility of raising actions would be restricted to local offices which were not themselves responsible for taking cases into the court, actions for eviction would be raised which the court was likely to find unreasonable, should tenants be able to present their case effectively.

Advice agencies (5.5.1–5.5.13)

5.6.10 Altogether, nearly half of all clients (502) were referred to advice agencies in Phase 2. The number of clients referred to agencies in the voluntary sector doubled from Phase 1 to Phase 2 while the number of clients referred to advice agencies in the statutory sector and to the Mediation Project showed an even greater increase in number. Most referrals to other advice agencies were amongst heritage clients and defenders while most small claims and summary cause referrals were to the Mediation Project. Like Phase 1, the In-court Adviser was able to deal with most enquiries by small claims clients and by pursuers without referring them on to other advice agencies.

5.6.11 There was variation between advice agencies as to the quality and consistency of their information on the take-up of referrals, and differences between them as to the appropriateness of initiatives to monitor take-up. There was near consensus, however, as to how higher take-up rates could be achieved, namely, through more directive referrals and an appointments system. This was thought to have been more in evidence in the first months of the In-court Advice Project, when the In-court Adviser had fewer clients to see her.

5.6.12 Advice agencies also referred clients to the In-court Advice Project for information and assistance. This was particularly the case amongst smaller advice agencies, and particularly for small claims cases. Advice agency staff called on the In-court Adviser if they were unable to accompany their clients to court. They also sought advice from the In-court Adviser when they were in court, using her experience of the court and its sheriffs to assist their own business in the court.

CHAPTER 6 CONCLUSIONS

6.1 THE IN-COURT ADVICE PROJECT

6.1.1 In the nine month period covered by Phase 2 of the research (Months 21-30 of the In-court Advice Project), 1648 consultations were undertaken with 1017 clients. When adjusted for differences in record keeping and compared with the first nine months of the In-court Advice Project, the number of clients was found to have increased by 50% and the volume of business (number of consultations) handled by the In-court Advice Project had increased by 66%. The increase in business was absorbed by the Project with the support of an additional adviser on the day of the heritage court.

6.1.2 The large increases in the number of consultations and clients primarily related to advice and assistance sought with regard to heritage actions raised by the City of Edinburgh Council. Compared with Phase 1, however, there was also a very marked rise in the number of clients and consultations relating to The Debtors (Scotland) Act 1987 and summary cause procedure, while the number of consultations and clients seeking advice relating to small claims procedure showed the slowest rate of growth. Though small claims clients were most likely to consult with the In-court Adviser more than once, they were a minority and almost two thirds of all clients consulted with the In-court Adviser only once.

6.1.3 During Phase 2, therefore, the In-court Advice Project was successful in providing services across a wider spectrum of the procedures within its remit. This was partly due to innovations such as the insertion of information about the In-court Advice Project into summonses of ordinary cause cases relating to The Debtors (Scotland) Act 1987. Compared with Phase 1, the In-court Advice Project was also successful in reaching a larger population of persons requiring advice and assistance, a higher proportion of whom were facing legally represented opponents. It was also successful in reaching an increasing number and proportion of clients prior to their cases calling in court.

6.2 THE MEDIATION PROJECT

6.2.1 New arrangements, which formally linked the Mediation and In-court Advice Projects, were successful in offering more court users an alternative to litigation. During Phase 2, more than one third of all In-court Advice Project clients with matters relating to small claims and summary cause cases were referred to the Mediation Project. Over two thirds of all clients referred to the Mediation Project were referred by the In-court Advice Project. Compared with other sources of referral to the Mediation Project, the In-court Advice Project was more likely to refer individuals and pursuers. It was also more likely to refer them prior to raising actions or prior to their cases calling in court.

6.2.2 When parties to the dispute were examined together, just over a third of all cases referred to the Mediation Project involved initial clients (or 'first' parties) that were individuals and 'second' parties that were small businesses while a quarter of all cases involved 'first' and 'second' parties who were individuals. 'First parties' referred to the Mediation Project were most likely to agree to mediation or a negotiated settlement either prior to a full hearing or prior to raising an action. They were least likely to agree when actions had already been raised but had not yet been called.

6.2.3 Less than one in six referrals to the Mediation Project led to a mediation hearing. Where they did so, they were mainly successful in reaching settlement. However, settlement was reached in almost as many cases by the 'assisted negotiation' service provided by the Mediation Co-ordinator. Disputes were more likely to be brought to a successful resolution by 'assisted negotiation' where 'first' parties were individuals and where clients had been referred to the Mediation Project prior to raising actions. Disputes were more likely to be brought to a successful resolution by a mediation hearing where 'first' parties were small businesses and where clients were referred to the Mediation Project after raising actions. A more rigorous 'after-care' service was called for by one mediator, though the research itself did not uncover any instance where this was lacking.

6.2.4 Just as the In-court Advice Project was successful in extending access to advice, so the Mediation Project was responsible for extending access to negotiation, whether at arms-length or at a face-to-face mediation hearing. In addition to providing litigants with alternative methods of resolving disputes once litigation had been embarked upon, the findings suggest that the Mediation Project also offered unassisted litigants an opportunity to avoid litigation altogether by assisting them in negotiating a settlement prior to raising an action.

6.3 THE SHERIFF COURT

6.3.1 Shrieval awareness as to the presence and capacity of the In-court Advice Project to address some of the problems presented by unassisted litigants in court was found to have increased over the 30 months under review. This was reflected in the increasing number of referrals made by sheriffs to the In-court Advice Project. By Phase 2, the In-court Advice Project was also less dependent on sheriffs for accommodating to the organisational requirements of the Project. This was largely due to the emergence of a system, based on co-operative links between the In-court Advice Project and Clerks of Court, which helped to ensure that the In-court Adviser's business was more evenly spaced over the time that court was in session and that no litigant missed being called in court. This was also responsible for streamlining the business of the court and the business of solicitors.

6.3.2 By Phase 2, the advantages of facing defenders advised by the In-court Advice Project were also becoming apparent to solicitors. Like sheriffs, solicitors found that the In-court Advice Project helped them address some of the problems presented by having to deal with party litigants. In particular, the In-court Advice Project provided solicitors with an opportunity to negotiate with unassisted litigants. This was particularly so for the City of Edinburgh Housing Department, which mainly faced unassisted litigants in the heritage court, many of whom were clients of the In-court Advice Project. There were some doubts, however, as to whether the opportunity for negotiation provided by In-court Advice Project could be sustained under the new rent arrears policy adopted by the City of Edinburgh Council in August 1999.

6.3.3 Nearly half of all In-court Advice Project clients were referred on to other agencies for advice and assistance during Phase 2. Heritage clients and defenders were mainly referred on to other advice agencies while small claims and summary cause clients were mainly referred on to the Mediation Project. Like Phase 1, however, the In-court Advice Project was able to deal with most clients seeking advice on small claims without referring them on to other agencies. Compared with Phase 1, there was very little improvement in the quality and consistency of information as to take-up of referrals. There was close agreement between advice agencies,

however, as to the importance of more directive referrals and an appointments system for achieving higher take-up rates.

6.4 THE WIDER CONTEXT

6.4.1 The In-court Advice Project continued to provide services designed to assist unrepresented court users, many of whom were facing legally represented opponents in court. The Project was successful in reaching a large number of court users and assisting them in understanding the issues that had brought them to court, the options that were now available to them, the ways in which they could present their case most effectively in the court, the implications of their court hearings and what actions they were now required to take. The In-court Advice Project therefore contributed to the promotion of active and inclusive citizenship in the population served by Edinburgh Sheriff Court

6.4.2 The In-court Advice Project also addressed problems raised for the court by the presence of unrepresented court users. The Project contributed to the performance of judicial duties by assisting unrepresented litigants in presenting their cases to the court. This promoted confidence that judicial decisions were being made on the basis of accurate and relevant information. The In-court Advice Project also appeared to optimise court resources by smoothing the passage of unrepresented litigants through the sheriff court, by helping them to get quickly and accurately to disputed issues and by diverting some cases from the court.

6.4.3 The In-court Advice Project augmented its services to persons without legal assistance through its formal affiliation with the Mediation Project. While the In-court Advice Project assisted unrepresented litigants in court, the Mediation Project was instrumental in assisting unrepresented litigants and claimants outside the court. The mediation service provided them with a non-litigating option for resolving their disputes and assisted them in taking this option either by 'arms-length' negotiation or at a mediation hearing. The success of the mediation service highlights a need that is less visible than the needs of unrepresented litigants appearing in court, namely the needs of claimants for assistance in initiating and conducting negotiation. Indeed, unrepresented litigants may often choose litigation over negotiation because negotiation is not perceived to be available to them. This perception is occasionally inaccurate and very often accurate. Lawyers, paradoxically, usually opt for litigation only once negotiation has failed. They, too, often find it difficult and usually find it inappropriate to negotiate with unrepresented litigants. This explains why solicitors representing parties in dispute with Project clients often welcomed the opportunities for negotiation that the In-court Adviser and Mediation Co-ordinator provided them.

6.4.5 Many of the research findings reported here of relevance to issues identified in the Scottish Office consultation paper *Access to Justice: Beyond the Year 2000*.⁴³ In particular, the research provides a basis for discussion about the provision of community legal services in Scotland and the arrangements that may be made for improving and strengthening the provision of accessible advice and assistance on legal problems within communities. The In-court Advice Project in Edinburgh Sheriff Court piloted new arrangements for targeting unmet need and delivering legal services in Scotland. With its new mediation component, these services related not only to assistance in court and assistance with litigation, but also to assistance in resolving disputes through negotiation.

⁴³ As above

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GLOSSARY

Assisted/ 'arms-length' negotiation

In this report, assisted or 'arms-length' negotiation refers to the Mediation Co-ordinator's attempt to settle a dispute prior to, or instead of, conducting a mediation hearing. Unlike a mediation hearing, 'arms-length' negotiation does not require disputants to communicate directly with each other.

Case procedure

In this report, case procedure refers to the type of civil procedure (small claims, summary cause or ordinary cause) under which actions are raised in the Sheriff court.

Debtors (Scotland) Act 1987

Legislation providing debtors with the opportunity to pay the sum due in instalments or a lump sum when a decree for up to £10,000 was granted against them. Since July 2000, the court has had power to grant a time to pay direction or time to pay order for a sum of up to £25,000.

Defender

The party against whom a court action is raised in civil procedure.

First calling

The first sitting of the court in summary cause procedure.

'First' party

In this report, 'first party' refers to the party to the dispute who was first invited by the In-court Adviser or Mediation Co-ordinator to consider mediation as an alternative to litigation.

Full hearing or 'Proof'

The hearing in small claims cases at which evidence is presented to prove or deny the pursuer's claim. The full hearing (sometimes referred to as the 'proof') may involve the testimonies of witnesses and expert witnesses, as well as documentary evidence.

Heritable/heritage action

Refers to summary cause actions that are raised to return property to its owners and evict tenants from the property.

Heritage court

In Edinburgh Sheriff Court, all first callings of summary cause heritable actions were heard together on a Friday morning, separately from small claims and other summary cause actions.

Mediation

May refer to several methods of resolving a dispute, such as 'arms length' negotiation or a 'mediation hearing'. In all cases of mediation, a third party is responsible for facilitating negotiation between disputants, either by communicating with them one at a time or by bringing them together face to face.

Mediation hearing

A face to face encounter between disputants at which a third party attempts to facilitate a negotiated settlement.

Ordinary cause

A court action where the pursuer claims more than £1500, or services of the same value, from the defender. Ordinary cause also includes family actions. Only ordinary cause procedure involving The Debtors (Scotland) Act 1987 (see above) was within the remit of the In-court Advice Project.

Ordinary cause procedure

A civil procedure that requires pleadings to be made and allows amendments to be made to the pleadings until such time as the record of pleadings must be closed. Due to the complexity of the procedure, both parties to the dispute are usually, though not necessarily, legally represented.

Party litigant

A pursuer or a defender who appears in court without legal representation.

Procedural status

In this report, procedural status refers to the status of parties as either pursuers or defenders.

Preliminary hearing

The first sitting of the court in small claims procedure, at which the court identifies the issues that are in dispute. At the preliminary hearing, the sheriff may ask both sides whether they can resolve their differences without proceeding further. If they cannot, the sheriff writes down on the summons the main points of each side's case, and this becomes the main focus of the subsequent full hearing or 'proof', which is usually fixed for four to six weeks later.

Proof hearing

The hearing in summary cause cases at which evidence is presented to prove the pursuer's claim or to deny it. The proof hearing may involve the testimonies of witnesses and expert witnesses, as well as documentary evidence.

Pursuer

An individual or organisation that brings a case to court by raising an action or claim against another.

Second party

In this report, 'second party' refers to the party who is in dispute with the party that was first invited by the In-court Adviser or Mediation Co-ordinator to consider alternatives to litigation. The 'second' party was only contacted if and when the 'first' party agreed to consider an alternative to litigation.

Small claim

A court action whereby the pursuer makes an application for a court decree for a sum of money up to £750, or services of the same value.

Small claims procedure

Small claims procedure was introduced in Scotland in 1988 and was designed to support and encourage pursuers to raise actions, and pursuers and defenders to present their cases in court, without legal representation. Under small claims procedure, pursuers may claim up to £750. Litigants are protected from heavy losses and from incurring a large legal bill should they lose the case by limiting expenses in small claims procedure to a maximum of £75.

Small claims/summary cause court

In Edinburgh Sheriff Court, all first hearings in small claims and summary cause (excluding heritage) cases were heard on the same morning, with small claims following summary cause procedure.

Summary cause

A court action in which the pursuer makes a claim for a monetary sum over £750 and up to £1500, or for services of the same value.

Summary cause procedure

Summary cause procedure is less attractive than small claims procedure for those who are risk averse since, unlike small claims procedure, expenses are not predictable.

Summons

The form completed by the pursuer in both small claims and summary cause cases, detailing the claim and served on the defender.