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Organisation: Which?

Q1: As a consumer organisation we will focus on the issue of consumer claims.

We agree with the principles underpinning the review in Chapter 1 of the review, and 'the objective of ensuring that the civil courts provide the public with a high quality system of civil justice.' We also agree with the principles identified (as below).

- It should be fair in its procedures and working practices
- It should be apt to secure justice in the outcomes of disputes
- It should be accessible to all and sensitive to the needs of those who use it
- It should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice
- It should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and values of the issues at stake
- It should have regard to the effective and efficient application of the resources of others³⁸

Q2: Which? believes that the principle of proportionality is the best way to provide a fair, efficient, understandable system and affordable system.

We support the introduction of third tier judicial office to deal with claims up to the value of £5,000.

We support the idea of more specialisation, with the proposed new judicial office of District Judge ushering in a more inquisitorial rather than adversarial process, particularly in the case of consumer claims for sums under £5,000.

Our own research carried out in 2009 found that more than eight in ten (83%) of the public agreed that legal services in Scotland should be less formal and more user friendly.

Seventy percent told us that legal services should be easier to access.

More than eight in ten (83%) thought that a relatively informal method of dealing with small claims disputes about poor quality goods and services would be suitable, with no wigs and gowns and no need to hire a lawyer.

Seventy-nine percent of the people we asked said they would like to have the option of accessing less formal 'problem-solving' courts where people could get redress without having to use a lawyer.

Around half of the Scottish population (52%) said they were aware of the small claims system in Scotland. More than two fifths (45%) thought it would be appropriate for legal services for small claims to be available in the evenings.

Which? believes that the current formality of the Small Claims system is inappropriate and causes unnecessary stress and indeed trauma for litigants, particularly where they are unrepresented. The limit is currently set too low at just £3,000. Many 'routine' consumer claims fall outwith this ceiling, but are too modest for a member of the public to feel justified in engaging a lawyer, as they fear a hefty legal bill. Therefore in our experience, some redress cannot be obtained by consumers under the present system.

Although the current small volume of claims of low financial value has been cited as a reason for District Judges to hear both civil and criminal cases, we would much prefer to see the separation of civil and criminal cases, so that civil cases are not 'squeezed' and receive fair space and focus within the system.

The civil system needs to be redesigned to place the court user at the heart of the process, with the litigant's journey designed so that he/she understands the process before coming to court, so they are no longer disadvantaged by unfamiliarity.

Litigants in these instances would be far better served by the chance to have privacy (ie not having their case heard in front of a courtroom full of lawyers and other onlookers). They would also benefit from changes in court dress for this particular process, to introduce less formality. The litigant would greatly benefit from being able to sit down and arrange their papers more effectively, rather than standing at the front of the court in front of the Sheriff and being forced into a 'public speaking' role for which many are unprepared and ill equipped.

Overall, the modernisation of the treatment of small claims up to the value of £5,000 would 'normalise' and help create a useful separation in the public's mind from criminal cases. This would go a long way to clearing up some of the misunderstanding people tend to exhibit about the differences in civil and criminal justice.

We agree that the procedure be designed for routine use by unrepresented litigants, and that the simplified procedure rules be drafted for use by unrepresented litigants.

District judges would need appropriate training, and we support the idea of a forum of family sheriffs and district judges so that experience and knowledge may be shared.

Q3: 3. Are the proposals in the review the best means of resolving the cases identified as falling within the remit of the proposed third tier and new simplified procedure? What are the strengths and weaknesses of the proposals? Can any better forum or procedure for these cases be identified?

Our focus is on the consumer cases, rather than on housing and family cases, in which we have no direct locus. But many of the traits of the tribunal system seem more appropriate in all of these cases, and therefore they may be seen to share some of the properties of consumer cases.

Because of this, we are strongly in favour of an inquisitorial, rather than adversarial, approach for the proposed third tier, with justice and fairness being delivered in the most proportionate way, to support the public's access to justice.

We see the third tier as being much more about a change in the climate of legal service provision; with the public at the centre of the process. The system should be so designed that it can be navigated by a user without previous or specialist knowledge. All the accepted ideas about 'How it's always been done' should be challenged. If there is no good reason for them, why have them?

Technology can be used (and should be regularly updated) to keep abreast of effective communications with the public. Online resolution of disputes may be appropriate for some consumer issues. Some court users may prefer to see a short video online of how the court will operate, rather than just read written advice.

Q4: Evidence from The Paths to Justice Scotland research shows greater satisfaction with the decision from those who reached an agreement, than those whose dispute was resolved by the courts. (80% thought it fair, compared with less than 50%.)

Mediation is clearly favoured by some sections of the public and should be made available whenever possible. All advisors, including solicitors, should be under a duty to inform clients about the possibility of using mediation services in the first instance, to prevent unnecessary escalation.

For this to be successful, of course, mediation services would need to be available. In court mediation services would therefore need to be rolled out.

Similarly, the widely-agreed success of the in-court advice centres should be harnessed to improve court users' experience of the process and access to justice.

Q5: We agree that the legal processes in civil justice be made as user-friendly as possible, so that where possible, those who can help themselves through it, should be enabled to.

We agree that appropriate levels of public education regarding legal education should be enabled, so that citizens develop an understanding of their rights and responsibilities. As a consumer organisation, we believe in helping the public to be as powerful as the organisations they have to deal with.

We are strong supporters of the McKenzie Friends system and believe it will help address the 'equality of arms' issue.

We believe that while justice may not change, processes should, and that these will need regular updating and should be actively managed in the future.

Q6:

Q7: The ceiling on small consumer claims should immediately be raised from £3,000 to £5,000, to prevent the system withering and dying. We need to protect this vital avenue for consumer redress and the system should be publicised.

Small claims courts could be overhauled without much expense; with a new part of the Courts Website designed for the public, to help litigants through the process more clearly.

The process could be held privately and simply, with no court dress, in an inquisitorial manner. Sheriff courts could be opened in the evenings or at weekends for this process.

The climate of change must start somewhere!

Q8: Everyone seeking initial legal advice from any source should be informed about the possibility of mediation. It should be viewed as a regular first stage in the resolution of a dispute, while accepting that people have a right to turn it down if they do not feel it is appropriate in their case.

All information on the Courts website should be in plain English, non-jargon and easy to understand so that those who can help themselves, will be encouraged to do so.

Q9: Court advice services should be rolled out to ensure fair access to justice. In-court mediation services should be offered wherever feasible.

Q10: As above.

Q11: