



# **Consumer Focus Scotland's response to the Scottish Government's consultation the Creation of a Scottish Civil Justice Council**

**December 2011**

# About Consumer Focus Scotland

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Consumer Focus Scotland is the independent consumer champion for Scotland. We are rooted in over 30 years of work promoting the interests of consumers, particularly those who experience disadvantage in society.

Part of Consumer Focus, our structure reflects the devolved nature of the UK. Consumer Focus Scotland works on issues that affect consumers in Scotland, while at the same time feeding into and drawing on work done at a GB, UK and European level.

We work to secure a fair deal for consumers in different aspects of their lives by promoting fairer markets, greater value for money, improved customer service and more responsive public services. We represent consumers of all kinds: tenants, householders, patients, parents, energy users, solicitors' clients, postal service users or shoppers.

We aim to influence change and shape policy to reflect the needs of consumers. We do this in an informed way based on the evidence we gather through research and our unique knowledge of consumer issues.

# Creation of a Scottish Civil Justice Council

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## Consumer Focus Scotland Response to the consultation

### Introduction

1. Consumer Focus Scotland welcomes the opportunity to respond to this consultation. Consumer Focus Scotland, and previously the Scottish Consumer Council (SCC), one of Consumer Focus Scotland's predecessor bodies, have had a longstanding interest in civil justice reform. In 2005, the SCC published the first report of the Civil Justice Advisory Group,<sup>1</sup> a group chaired by the Right Honourable Lord Coulsfield, which concluded that while some parts of the civil justice system were working well, there was a need for review of a number of aspects of the system. The SCC was therefore delighted when the first four of the six areas identified in the report formed the basis of the remit for the Scottish civil courts review, which reported in 2009. Sarah O'Neill, Director of Policy at Consumer Focus Scotland, was a member of the policy group which advised Lord Gill's review.
2. The civil courts review report made far-reaching recommendations aimed at improving access to the civil courts in Scotland, covering both structures and procedures in the Scottish civil courts. The review's assessment of the current court system was that in delivering a system that is slow, inefficient and expensive, the courts do not deliver 'the quality of justice to which the public is entitled.'<sup>2</sup> We are therefore pleased that the Scottish Government is beginning to give consideration to how the review's recommendations might be implemented. The establishment of a Scottish Civil Justice Council will be an important means of taking elements of the reforms forward.

### General Comments

3. An important feature of a just and inclusive society is the ability of all of its members to enforce their rights, meet their responsibilities and resolve their disputes. The costs of doing so should be affordable, while the processes available should be both appropriate and free of undue delay.
4. While a well-functioning court system undoubtedly plays an essential part in the creation of such a society, we share the view of the Civil Justice Advisory Group that the courts should be a remedy of last resort. We believe that the civil justice system should encourage and facilitate the resolution of problems as early as possible and in the most appropriate way. For example, effective intervention by an adviser at an early stage will often be sufficient to resolve a dispute before it escalates into a more

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<sup>1</sup> Scottish Consumer Council (2005) *The Civil Justice System in Scotland – A Case for Review? The Final Report of the Civil Justice Advisory Group*, Glasgow: Scottish Consumer Council

<sup>2</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

serious problem, requiring more costly and time consuming dispute resolution processes. There may also be alternative forms of resolution which may be more appropriate in achieving the outcomes desired by parties, or which would be better placed to consider particular types of cases, such as housing or family issues, where many of the complexities can be social rather than legal.

5. As was explicitly recognised by the previous Scottish Executive<sup>3</sup> and by the civil courts review,<sup>4</sup> the civil justice system provides a public service. The focus for reforming the system must therefore be to design it around those who use it, addressing the various needs which users have at each stage in resolving their disputes, to ensure that these are resolved as effectively and as early as possible. We therefore fully support the recent recommendation of the Civil Justice Advisory Group that a system-wide, user-focused approach should be taken to reforming how civil disputes are dealt with in Scotland, looking beyond the courts to the wider civil justice system.<sup>5</sup>
6. We welcome the establishment of the Scottish Government's 'Making Justice Work' programme, and its recognition of the importance of a system-wide approach in reforming the justice system. However, it is our view that if such a system-wide approach is to be translated into practice, there requires to be a cultural change in the civil justice system. We would note, for example, that discussions around different methods of dispute resolution can often be sidetracked by debates around which methods of dispute resolution offer the 'best' version of justice, rather than recognising that a 'one size fits all' approach to justice is not appropriate.
7. We support the proposed establishment of a Scottish Civil Justice Council, which we believe has a potentially integral role to play in ensuring a genuinely system-wide approach to reforms resulting from the civil courts review and other relevant reviews. We are in broad agreement with the Scottish Government's proposals as outlined in the consultation paper. In taking forward the development of these proposals, however, we would emphasise a number of key points:
  - **Aim:** An overarching aim of the Scottish Civil Justice Council ('the Council') should be expressly outlined. In order to ensure the needs of users are central to the work of the Council, we believe this overarching aim should be to improve the operation of the civil justice system to the benefit of its users.
  - **Remit:** It is essential that the Council is wider than a rule-drafting body, and that its remit includes a policy role. We believe the policy role should be the Council's primary function. In addition, the civil justice system is wider than the courts, and it is therefore appropriate that the

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<sup>3</sup> Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*, Edinburgh: Scottish Executive

<sup>4</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

<sup>5</sup> Consumer Focus Scotland (2011) *Ensuring effective access to appropriate and affordable dispute resolution: the final report of the Civil Justice Advisory Group*, Glasgow: Consumer Focus Scotland

remit of the Scottish Civil Justice Council should include other issues relevant to the efficient operation of the system, such as administrative justice and alternative dispute resolution. The inclusion of such issues within the remit of the Council should not be regarded as secondary, and should be given equal weighting to the courts.

- **Resources:** In order to ensure that the Council is able to undertake the full range of its functions effectively, it is essential that it is adequately resourced, with appropriate expertise. If insufficient funding is provided, there is a danger it will exist only as a rule drafting organisation.
- **Membership:** We welcome the intention that a significant number of the Council should be non-legal members. Our preference is that the total number of members of the Council, and the proportion from each category, should be set out in legislation. It is our view that there should be equal numbers of legal and non-legal members of the Council, and the Council should be chaired by a non-legal member.
- **Engagement:** It is essential that the Council should be responsive to the needs of all interested parties, including users. An essential element of its work must therefore be communication and engagement. It must regularly seek the views of relevant parties, for example by consulting on its work programme and draft rules, and should also develop a consumer engagement plan, which would for example set out steps for ensuring the views of harder to reach groups, such as users of the system, are heard. It will also be essential that the work of the Council, including the introduction of new court rules, is appropriately communicated to relevant parties. Such rules, and accompanying forms, should be straightforward, easy to understand and written in plain English.

## Answers to specific questions

### Question 1: Do you agree or disagree that there should be a Scottish Civil Justice Council?

8. We agree there should be a Scottish Civil Justice Council. As noted within the consultation paper, a majority of respondents to the civil courts review consultation thought the current arrangements for making rules were unsatisfactory. We believe the establishment of a single Scottish Civil Justice Council, merging the functions of the Sheriff Court Rules Council and the Court of Session Rules Council, has the potential to improve on the current situation, particularly if given a broader function than the current rules councils.

### Question 2: Do you agree or disagree with the proposed functions of the Council, including that it should have a policy remit? If you disagree, please give reasons for your answer.

9. We agree with the general functions of the Council outlined in the consultation paper, including that it should have a policy remit. In outlining

its rationale for recommending the establishment of a Scottish Civil Justice Council, the civil courts review noted that reforms to the civil justice system were largely piecemeal reforms, representing a form of 'legislative crisis management.' Such an approach has left a system widely recognised to be unfit for the 21st century, and it is essential that reforms are undertaken on a more strategic basis. We believe that tasking the Council with strategic oversight of the functioning of the system, and the ability to make policy recommendations with the benefit of this overview, will be a key means of achieving this strategic approach and avoiding similar piecemeal reforms.

10. We believe it is necessary, however, that this general function to keep the system under review be more explicitly spelled out within the current drafting. As currently drafted, the Council's function to 'consider how to make the civil justice system more accessible, fair and efficient,' appears to be subsidiary to its functions of reviewing the practice and procedure followed in civil proceedings, and preparing the draft rules of procedure for the courts, rather than a standalone function of the Council. The current drafting also leaves this policy function as a predominantly reactive one.
11. We would therefore suggest that the general function of keeping the system under constant review should be added. We also believe that this function should be the primary function of the Council. The original recommendation by the civil courts review was that the Council should undertake its functions by anticipating problems rather than reacting to them. This seems also to be the Scottish Government's intention, given its desire that the Council foster a culture of continuous improvement. It would therefore seem to us that the primary function of the Council should be to keep the system under review, making recommendations for improvements where appropriate. It is through the undertaking of this function that the drafting of new rules would likely be required.
12. We would also like to see the inclusion of an overarching aim of the Council. In keeping with the civil justice system's purpose as a public service, we believe this overarching aim should be to improve the operation of the civil justice system to the benefit of its users. The inclusion of such an aim would ensure that users would be at the heart of the Council's work in undertaking all of its different functions.
13. We are pleased that the functions as outlined enable the Council to 'consider broader issues of dispute resolution and avoidance, for example, how to develop mediation.' As outlined in our general comments, and as discussed below at question 3, the 'civil justice system' is wider than simply the courts, and there are many other possible forms of dispute resolution, including the administrative justice system and various alternative dispute resolution mechanisms such as mediation, arbitration, tribunals and ombudsmen.
14. We believe it is entirely appropriate that the Council's remit should reflect this fact and should not be confined to the civil courts. Indeed, one of the key benefits of establishing a body such as the Scottish Civil Justice Council is its potential to consider and oversee all different elements of the civil justice system, including how they are functioning together as a whole.

The Civil Justice Council in England and Wales, for example, has played an important role in considering wider policy issues such as full cost recovery, pre-action protocols and mediation.

15. In order to ensure that the broader role of the Council to consider the wider civil justice system is given sufficient weight, we would suggest that this should be included as a separate function. As currently drafted, consideration of issues such as mediation could be interpreted as secondary functions, and to be linked only to the 'principal' function of reviewing the courts.
16. While we support the Council having a broad remit for the reasons outlined, we would emphasise that if the Council is to have such functions, it is essential that it has sufficient resources, powers, skills and knowledge in place to ensure it is able to undertake those functions effectively.
17. The issue of resources is particularly acute. We are aware that the Rules Councils have only limited resources available at present to make rules of civil procedure, and to draft and revise rules and court forms. We believe that but for the high levels of commitment and hard work by the Chairmen and other members of the Councils, and the under-resourced secretariat, the current system would collapse under the weight of its increasing workload. As the consultation paper itself notes, it is expected that in the first few years, the Council will be almost entirely devoted to taking forward the procedural changes to implement the civil courts review reforms. We do not think the Council will be able to undertake the range of functions outlined in the consultation without significant additional resources being committed by the Scottish Court Service. Without the commitment of such resources, we find it difficult to see how the Council would realistically be able to serve as anything more than a rule drafting body. However, we think that making the Council's primary function the strategic oversight of the civil justice system will help to prevent more costly wholesale reforms being required again in the future. Therefore, while we recognise the current economic climate makes the provision of additional resources difficult, we think that providing sufficient resources to enable the Council to undertake its policy functions effectively will save resources in the longer term.

**Question 3: Should the Council be able to make recommendations in relation to administrative justice and tribunals? Please give reasons for your answer.**

18. Yes. As outlined above, we believe the Council should take a 'whole system approach' to reviewing civil justice, and its remit should therefore include both administrative justice and tribunals.
19. There are a number of reasons why it is particularly important that administrative justice and tribunals are included within the Council's remit. Firstly, many more people make use of the administrative justice system in Scotland than the court system<sup>6</sup> and it therefore acts as a hugely important means for consumers to resolve their disputes.

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<sup>6</sup> There were 126,304 cases initiated in the sheriff courts in 2008-09. Source: Scottish Government (2010) *Statistical Bulletin: Crime and Justice Series. Civil Judicial Statistics Scotland, 2008-09 and*

20. Secondly, the tribunals system is also currently subject to potentially significant reforms. Following the establishment of the Scottish Tribunals Service in December 2010, the Scottish Government's programme for 2011-12 outlines an intention to integrate further tribunals into a single, more efficient and user-focused Scottish Tribunals Service.<sup>7</sup> The Scottish Government has also begun discussions with the UK Government about devolving responsibility for all tribunals operating in Scotland to Scottish Ministers. These developments emphasise the need in Scotland for an organisation to keep the administrative justice system under review, offer advice and expertise to government, and in particular to ensure that the user voice is appropriately represented. This will be particularly important throughout any transitional periods during which the UK Government retains responsibility for some or all reserved tribunals operating in Scotland.
21. Thirdly, the organisation with current responsibility for keeping the administrative justice system in Scotland under review, the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC), is currently intended to be abolished by the UK Government. We have previously expressed concerns about the impact that abolishing the SCAJTC could have on users of the administrative justice system in Scotland. It is therefore vital to ensure that the functions of the SCAJTC, particularly in relation to making administrative justice and tribunals increasingly accessible, fair and effective by ensuring that the needs of users are central,<sup>8</sup> are transferred to another organisation.
22. We therefore strongly support the inclusion of issues relating to administrative justice and tribunals within the Council's remit. In considering what this means in practice, however, we would emphasise that the administrative justice system is wider than simply tribunals, and broadly includes:
- initial decision-making by public bodies affecting citizens' rights and interests, including the substantive rules under which decisions are made and the procedures followed in making decisions;
  - systems for resolving disputes relating to such decisions and for considering citizens' grievances.<sup>9</sup>

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

<sup>7</sup> Scottish Government (2011) *Renewing Scotland: The Government's Programme for Scotland 2011-12*, Edinburgh: Scottish Government

<sup>8</sup> Administrative Justice and Tribunals Council Framework Document, Ministry of Justice, November 2007

<sup>9</sup> Consumer Focus Scotland (2009) *Administrative Justice in Scotland – The Way Forward: The final report of the Administrative Justice Steering Group*, Glasgow: Consumer Focus Scotland

23. We believe it is a strength of the SCAJTC that its remit enables it to examine the full range of issues relevant to administrative justice, including the initial decision-making by public bodies affecting citizens' rights and interests. One of our concerns about the decision to abolish SCAJTC is the risk that this wider function may be lost, together with the associated ability to ensure the effectiveness of the system as a whole. It is therefore essential that the Scottish Civil Justice Council's remit should include the ability to examine the full range of issues relevant to administrative justice, including earlier decision making by a wide range of public sector organisations, including those outwith the justice sector, as well as tribunals.
24. Should the decision be taken not to include issues relating to administrative justice and tribunals within the Scottish Civil Justice Council's remit, it is essential that the Scottish Government find some other solution to ensure that SCAJTC's functions are adopted by some other organisation. If suitable alternatives are not put in place, we believe the abolition of the SCAJTC will result in the needs of users of administrative justice being insufficiently represented and taken into account.

**Question 4: Do you consider that the Council should have the ability to make rules of court? If so, what process should be adopted for making them? Please give as much details as possible.**

25. We have for a long time advocated for rules of court and court forms to be written in simple and accessible language, in order to ensure that ordinary court users, particularly those who are unrepresented, can understand and use them. We therefore welcomed the recommendation of the civil courts review that the rules for the proposed new simplified procedure be based on a problem-solving or interventionist approach, written in plain English, and be as clear and straightforward as possible. This recommendation was reiterated by the Civil Justice Advisory Group in its recent report.<sup>10</sup>
26. As currently proposed, the Scottish Civil Justice Council has responsibility for the drafting of court rules, though not the actual making of those rules. This requires consideration of where responsibility for making such rules might appropriately lie.
27. While we can see the attraction in retaining the current position, whereby the rules are drafted by the Lord President's office and made by the Court of Session, we have concerns about the impact of this, given the current formality of the rules, and the desired simplification of court rules in future. We have, for example, expressed concerns about the complexity of recent Court of Session rules relating to 'lay support' and 'lay representation' which we felt were too formal for the sheriff court.
28. Our concerns would be compounded if conferring the Council's full rule-making powers on the Court of Session meant that part of its role would be

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<sup>10</sup> Consumer Focus Scotland (2011) *Ensuring effective access to appropriate and affordable dispute resolution: the final report of the Civil Justice Advisory Group*, Glasgow: Consumer Focus Scotland

to make rules for tribunals. We consider one of the advantages of tribunals to be their relative informality as compared to the courts, together with the more inquisitorial approach adopted. We would endorse the view of the Administrative Justice Steering Group that the characteristics of tribunals should be retained where possible, even if there is greater cohesion of administrative functions.<sup>11</sup> We are uncomfortable with the potential for the Court of Session to make rules for tribunals, and have concerns that this may result in tribunals taking on more court-like characteristics.

29. For these reasons, we do not think that it would be appropriate for the Court of Session to have the power to make all rules concerning issues within the Scottish Civil Justice Council's remit, particularly as regards rules for tribunals, which are currently made by the tribunal's sponsoring department.
30. On balance, we consider that it would be appropriate for the Council itself to be able to make rules of court. However, as this would result in the Council having both a policy remit and a rule-making role, we believe it is essential to put appropriate safeguards in place. These safeguards would be needed to guard against situations whereby the Council could unilaterally recommend potential reforms and then introduce accompanying rules. We would recommend two key safeguards.
31. Firstly, regardless of whether the rules are made by the Council itself or the Court of Session, we believe there should be a period of consultation for all significant proposed rules changes, to enable all interested parties, including court users, the opportunity to comment on the proposals. We recently welcomed the Lord President's decision to consult on the proposals for lay representation in the Court of Session and sheriff court, and believe there is no reason why such consultation should not be more commonplace. While we recognise that some changes are relatively minor and may need to be done quickly, we think it would be good practice for all significant changes to court rules to be subject to consultation. We would ask the Scottish Government to give consideration to how such best practice could be encouraged.
32. Secondly, there should be a suitable procedure in place to sign off the rules. We would suggest such a suitable procedure would be that a specified number of members of the Council should be required to sign off the rules. This number should include the chair of the Council (who we consider should be a non-legal member), and the consumer representative(s). It would be sensible to formally set out the categories of membership required to sign off the rules. Such categories may be different for different types of rules; it would seem appropriate, for example, for rules relating to tribunals to be signed off by all administrative justice members on the Council.
33. We would reiterate our point that should the Council be given such rule making powers, it is essential that it is adequately resourced in order to do so.

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<sup>11</sup> Consumer Focus Scotland (2009) *Administrative Justice in Scotland – the Way Forward*, Glasgow: Consumer Focus Scotland, at paragraph 8.53

34. As a general point, it is also vital that effective means of communicating changes in the rules to advisers and court users, as well as to members of the legal profession, are put in place by the Council. At present, there is no formal requirement or clear mechanism for doing so, and rules changes are frequent, making it difficult for those who need to use them to keep abreast of the changes. There is little point in making changes to the rules if no-one is aware of them because they have not been publicised.

**Question 5: Do you agree or disagree that overall responsibility for the Council should lie with the Lord President rather than Scottish Ministers?**

35. We agree that overall responsibility for the council should lie with the Lord President. Though of course the Scottish Government has a vital role in overseeing policy development to ensure the effective operation of the civil justice system, as the Head of the Scottish Court Service, we believe it is appropriate that the Council is accountable to him. However, as noted above, we believe it should be possible for the Council to make its own rules, subject to sign off by a defined number and category of Council members, rather than requiring rules to be made by the Court of Session.
36. In addition, as discussed at questions 6 and 13 below, we believe the Council's policy role means that it should be able to make recommendations to Scottish Ministers as well as to the Lord President, and that it should lay its annual report before the Scottish Parliament.

**Question 6: Do you agree or disagree that the Council should be able to make recommendations to the Scottish Ministers as well as the Lord President?**

37. We agree that the Council should be able to make recommendations to the Scottish Ministers as well as the Lord President.
38. As currently proposed, the Council will have a key strategic oversight role, and the ability to make recommendations for the improvement of the civil justice system. While many of these recommendations may be implemented through procedural rules of court, others may require legislative change. In order for the functions of the Council to be fully realised, therefore, it is essential that the Council is able to make recommendations to Scottish Ministers.
39. We would note, however, that there is no reference within the consultation paper to what, if any, obligations the Scottish Ministers and Lord President will have to respond to, or implement the recommendations of the Council. We believe the legislation establishing the Council should clearly set out the Scottish Ministers' and Lord President's obligations in responding to such recommendations.

**Question 7: Do you consider that the role and functions of the Council should be conferred upon any other body or bodies instead? If so, which? Please give reasons for your answer.**

40. No. We agree that the Scottish Civil Justice Council would be the appropriate body upon which to confer such functions.

**Question 8: Do you consider that the proposed membership is appropriate? If not, what alternative would you suggest?**

41. On the whole, we think the proposed membership is appropriate, subject to our comments at question 9 below on additional members. We are particularly pleased that the membership comprises a number of different categories of 'non-legal' members, including representatives from the tribunals sector, the lay advice sector, those with knowledge of consumer affairs, and persons able to represent the interests of particular kinds of litigants. The current Sheriff Court Rules Council only has two non-legal or 'lay' members out of a total of 16 members and the Court of Session Rules Council has no non-legal members. Non-legal members can provide valuable insight into issues that are of particular importance to non-professional users of the courts and the inclusion of a number of different categories of such members is therefore to be welcomed.
42. We welcome the commitment to ensure that the membership will reflect the Council's general function of developing a fairer, more accessible system for all types of persons from across Scotland, and therefore will try to foster equal opportunities and protect the interests of rural communities.
43. We are disappointed, however, that although the consultation sets out an estimated total number of members of the Council, estimates for the number of members to be drawn from each category have not been provided. It would have been useful, for example, to know whether it is intended that both legal and non-legal representatives from the tribunals sector might sit on the Council.
44. We are unclear why it is intended that the Lord President should set the overall number of members that the Council should have, including the overall number to be drawn from each category. Given that the membership of the current Court of Session Rules Council and the Sheriff Court Rules Council is set out in statute, we see no reason why the membership of the Scottish Civil Justice Council should not also be placed on a statutory footing.
45. Given the potentially wide remit of the Council, encapsulating a policy function as well as the drafting of rules, and potentially covering the civil justice system as a whole rather than simply the civil courts, we would urge that the membership should not be dominated by judicial and legal members. As noted in the introduction, the civil justice system is a public service, which should be designed around the needs of those who use it, rather than those who provide the service. We do not agree with the consultation paper that it is necessary for the Council to be chaired by a member of the judiciary in order to provide 'the leadership and credibility

necessary for such a body.’ It is our view that the Council should have at least equal numbers of legal and non-lawyer members, and should be chaired by a non-lawyer. This would follow best practice, and would be in keeping with similar bodies within the justice field, such as the Judicial Appointments Board and the Scottish Legal Complaints Commission.

46. We would hope that providing for a significant proportion of non-legal members on the Council will make applying for such a position more attractive for potential applicants. We believe that all appointments, of both legal and non-legal members, should be made through a transparent public appointments process. We would suggest that a broad approach should be taken to the advertisement for non-legal members, to ensure that as wide a spectrum of eligible applicants as possible has the opportunity to apply. We have some concerns as to how easy it may be to recruit suitable non-legal members. We are aware that the Sheriff Court Rules Council has recently had to undertake a second round of recruitment for a lay member following a lack of suitable applicants during the initial round of recruitment. We would suggest that the Scottish Government should be alert to such issues and should make provisions for contingencies should there be a lack of suitable or eligible applicants.

**Question 9: Should any other person/category of person be included in the membership? Please give reasons.**

47. As outlined in the consultation, it is currently intended that the Council’s general functions will include the consideration of broader issues of dispute resolution and avoidance, for example how best to develop mediation. As outlined in our response to question 2, we therefore consider that the consideration of such issues should be expanded into a specific function of the Council. We therefore think it would be appropriate for the Council’s membership to include at least one person with knowledge of an alternative dispute resolution process, such as mediation.
48. In addition, as we have emphasised at question 3, the administrative justice system is wider than simply tribunals. We therefore think it would be appropriate for there to be more than one administrative justice member on the Council, and should include a member with knowledge of the wider administrative justice system, such as an ombudsman or complaints handling process, as well as one with tribunals knowledge.
49. As part of the commitment to include non-lawyer members on the Council, we would like to see the widest possible range of suitable applicants to the Council being sought. It is important that all of the main stakeholder groups with an interest in the civil justice system have the opportunity to be represented on the Council, and that would include those who use, or have used, the system, or who might use the system in the future.
50. We would emphasise however, that membership of the Council should not be limited only to those who can bring the perspective of different elements of the civil justice system. There is an opportunity for the Scottish Civil Justice Council to be set up in a way which ensures that a real diversity of views and experiences are brought to its work. If this is to be achieved, it

will be necessary to look outwith those categories of membership traditionally appointed, or backgrounds frequently sought. For example, our perception is that 'lay' members of organisations/boards often have a working knowledge of/ background in the sector within which the organisation functions. It is common, for instance, for 'lay' members of organisations operating in the justice system to have law degrees or even a solicitor qualification, or some experience of working in another branch of the legal sector. It can also be common for 'lay' members of organisations to come from another 'professional' background. In order to ensure that the Council can benefit from the insight brought by those from different walks of life, we would suggest that it is highly desirable that membership of the Council includes some 'public interest' members, who come from non-traditional backgrounds and do not have any legal expertise.

51. It is vital, however, that Council members, particularly non-legal or public interest members without a legal background, are provided with sufficient training and support to allow them to carry out their roles effectively.

**Question 10: Do you agree or disagree that the Lord President and Scottish Ministers should be able to appoint other members to the Council as they see fit? If not, why not?**

52. We are concerned about the proposal that all judicial and legal members of the Council, as well as a member of the Scottish Court Service, should be appointed by the Lord President, and that non-legal members should be appointed by the Lord President after consultation with Scottish Ministers.
53. Given the proposed functions of the Council, we believe that all members of the Council, including judicial members, should be appointed by means of a selection panel, operating within the principles of fair and open competition and best practice for public appointments. We would note that a selection panel has been used to appoint members of the Scottish Court Service, Judicial Appointments Board and Scottish Legal Complaints Commission. We therefore think that a similar approach would be appropriate for the Scottish Civil Justice Council, albeit we recognise that the Council is not intended to be a non-departmental public body.

**Question 11: Do you consider that members should receive expenses only, or should members be paid?**

54. It is our preference that members of the Council should be paid, especially given that the time commitment involved is likely to be considerable, given the experience of the current rules councils, and the fact that the new Council will have a wider remit than these. It seems likely that in practice, restricting payment to members to travel expenses and out of pocket expenses will mean that only those in a financial position to work for free, or whose employers will allow them to attend in work time, would be in a position to apply. We therefore believe that ensuring members are appropriately remunerated is a key means of opening up the membership to people not otherwise in a position to apply for such a post. This could result in a potential widening of the range of people who apply to be

members, and in particular, could be an important means of encouraging diversity in appointments.

55. We recognise, however, that payment for all categories of Council member may not necessarily be appropriate. We would note, for example, that it is common for judicial members of bodies not to be remunerated. We agree that it might be appropriate to provide for certain exemptions from remuneration, and that this might extend to other categories of member or to those from certain backgrounds, such as those employed within the public sector. It is important to note, however, that remuneration need not necessarily be substantial. Research previously undertaken by the SCC<sup>12</sup> into the involvement of lay people in the inspection of public services, found that while some felt that lay people should be paid a market wage for what they do, others felt that this would compromise their independence. There was general consensus, however, that a small daily rate (£15-£50) should be payable, though consideration would be required in individual cases where this would affect benefits.
56. Where expenses are also to be paid, we would suggest that consideration should be given to what is included as payable categories of 'expenses.' The SCC research found there was almost universal agreement that agencies should cover the cost of care for children or other dependents, for example.

**Question 12: Do you agree or disagree that there should be a general requirement for the Council to consult and work with other groups and bodies with an interest in the civil justice system?**

57. We agree. We welcome the statement in the consultation paper that the Council is designed to be more naturally adaptive, taking into account regular feedback and fostering a culture of continuous improvement. In order to achieve this, we strongly agree that there should be a requirement to consult, and work with, groups and bodies with an interest in the civil justice system.
58. As noted above at question 4, we believe the Council should be required to consult on all significant changes to court rules prior to them being made. In order to ensure that the Civil Justice Council is focusing on the most appropriate issues, we believe it would be desirable for the Council to consult widely on its work programme. This would be in keeping with the current practice of other relevant organisations, such as the Scottish Law Commission.
59. In order for the Council to undertake its functions effectively, we would emphasise the need to engage directly with users of the civil justice system, including potential future users of the system. The overall finding of the civil courts review was that the system did not currently provide the quality of justice to which the public is entitled. The only way the Council will ensure its work is addressing the needs of users of the civil justice system is to proactively engage and consult with them.

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<sup>12</sup> Scottish Consumer Council (2004) *Layman's terms? The involvement of lay people in the inspection of public services*, Glasgow: Scottish Consumer Council

60. We would therefore like the requirement to consult, and work with, groups and bodies with an interest in the civil justice system, to make specific reference to individual users as one group it should consult and work with. We would emphasise the need to engage with consumers as early as possible in the decision-making process. Consumers are often only involved when key decisions have already been made, making it difficult to act on feedback that would suggest a fundamentally different approach. A recent Consumer Focus Scotland report into best practice in consumer engagement found that engaging with users as early as possible helped to ensure that services adequately addressed their needs.<sup>13</sup>
61. A requirement to consult with users would be in keeping with one of the recommendations of the Civil Justice Advisory Group. The Group's final report<sup>14</sup> was prepared following a consultation process, which involved a consultation paper and consultation seminar, attended by members of the judiciary, solicitors, advice agencies, policy-makers and members of the public. The Group was of the view that seeking such a broad range of views was hugely beneficial to the development of its recommendations, and in its report it acknowledged the importance of ensuring that policy and reform are discussed in a forum which is not limited to the judiciary and lawyers. In doing so, it not only recommended that any future Scottish Civil Justice Council should have significant user and lay representation, but also that some means should be found to regularly bring together the full range of different interests, including regular court users and members of the wider public, to debate and discuss civil justice issues in the future as the Group did at its consultation seminar.
62. We think this could be a potential role of any future Scottish Civil Justice Council. It would be particularly important to seek innovative ways to seek the views of individual users of the civil justice system, who likely to be members of 'seldom heard' or harder to reach groups. We would therefore suggest that in order to build a culture of communication and engagement into how the Council undertakes its functions, the Council should develop a consumer engagement strategy. Such a strategy should include the provision of resources for deliberative engagement with users, including undertaking research. Our report on best practice when engaging consumers in decision making in public services<sup>15</sup> sets out seven principles of best practice, which were developed by a panel of experts. We would suggest that the development of any such consumer engagement strategy should be made with reference to these principles. We have included a copy of this report together with this response, for information.

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<sup>13</sup> Consumer Focus Scotland (2011) *Consumer Engagement in Decision Making: Best Practice from Scottish Public Services*, Glasgow: Consumer Focus Scotland

<sup>14</sup> Consumer Focus Scotland (2011) *Ensuring effective access to appropriate and affordable dispute resolution: the final report of the Civil Justice Advisory Group*, Glasgow: Consumer Focus Scotland

<sup>15</sup> Consumer Focus Scotland (2011) *Consumer Engagement in Decision Making: Best Practice from Scottish Public Services*, Glasgow: Consumer Focus Scotland

**Question 13: Do you agree or disagree that the requirements for the provision of an annual report are appropriate?**

63. We agree that that the Council should be required to provide an annual report to the Lord President, setting out its progress over the year and its intended agenda for the following year.
64. We also agree that the Council should be required to lay a copy of the report before the Scottish Parliament. As was explicitly recognised by the previous Scottish Executive<sup>16</sup> and by the civil courts review,<sup>17</sup> the civil justice system provides a public service. We therefore think it is appropriate that the body with strategic oversight of the system, and the ability to draft (and potentially make) procedural rules, and produce policy recommendations designed to improve the operation of the system, should be publicly accountable to the people in whose interest it acts. The requirement to lay the annual report before the Scottish Parliament would be in keeping with the requirements on other bodies which undertake similar functions, such as the Scottish Committee of the Administrative Justice and Tribunals Council.

**Question 14: Do you consider that any additional or alternative reporting arrangements would be appropriate? Please give reasons for your answer.**

65. We would note that the Scottish Committee of the Administrative Justice and Tribunals Council is currently required to submit a report to Scottish Ministers. If the Council is to assume the functions of SCAJTC, it may be appropriate for a copy of the Council's annual report to be provided to Scottish Ministers.

**Question 15: Do you agree or disagree that the Scottish Ministers and the Lord President should be able to direct the Council to consider and advise upon any matter falling within its general remit?**

66. We agree that the Scottish Ministers and the Lord President should be able to direct the Council to consider and advise upon any matter falling within its general remit. This would seem a sensible way of ensuring that the Council is responsive to matters of particular concern regarding the operation of the civil justice system.
67. We would also suggest that the Council should be able to consider matters suggested by other parties, as it sees fit. As discussed at question 12, we think the Council should seek the views of a range of different interested parties through a wide consultation on its draft work programme. However, we consider that interested parties should also be able to raise issues of concern with the Council at any time, as such issues arise.

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<sup>16</sup> Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*, Edinburgh: Scottish Executive

<sup>17</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

**Question 16: Do you have any other comments on the proposals outlined in this paper?**

68. The paper proposes that one of the Council's functions should be to make recommendations for change to the civil justice system. These recommendations might be made to either Scottish Ministers or the Lord President. As we noted in our response to question 6, the paper does not make clear what, if any, obligations the Scottish Ministers and Lord President are under to respond to such recommendations. In further developing the proposals for the Scottish Civil Justice Council, we believe it will be important to set out clearly what, if anything, the Scottish Government and Lord President would be expected to do in response to the recommendations of the Council.
69. As regards the Council's rule drafting functions, while we broadly welcome attempts to simplify the current complex set of procedures within the courts, we consider it essential that these take fully into account the different environments that exist in the sheriff court and the Court of Session. For example, we recently responded to a consultation issued by the Lord President on lay representation in the Court of Session and the sheriff court. The proposals outlined in this consultation were prepared by a working group comprising members of the Court of Session Rules Council and Sheriff Court Rules Council. In our response, we expressed concern that despite the Working Group's stated aim to take due account of the different circumstances of the two courts, whilst maintaining, where possible, consistency of overall approach, in our view, no such concessions had been made. The result was proposals which we considered to be inappropriate for use in the sheriff court, and which failed to take due account of either the differences in case type, complexity and formality of proceedings in the sheriff court, or the significantly higher proportion of unrepresented litigants appearing in sheriff court proceedings. Further to our comments at question 4, we would be concerned if attempts to create a more consistent approach to court rules resulted in increasing formality rather than simplification of court rules. We therefore think that in undertaking its rule-drafting function, the Council should be required to take into account the different environments which exist in the sheriff court and Court of Session.

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