

Scottish Government Proposals for a Scottish Civil Justice Council: Consultation Report

SCOTTISH GOVERNMENT PROPOSALS FOR A SCOTTISH CIVIL JUSTICE COUNCIL: CONSULTATION REPORT

Part 1 - Introduction

1. Lord Gill, in his *Scottish Civil Courts Review*,¹ made a total of 206 recommendations for reform of the civil court system. Some of these are structural (such as the creation of a new sheriff appeal court and the creation of a third tier of judiciary in the sheriff court), and many of them are procedural (such as case management, modernisation of the civil procedure rules, judicial specialisation and simplified procedures for lower value cases). The majority of the recommendations will require changes to the civil procedure rules of court. As the responsibility for that rests with the Court of Session, some form of body or group of persons is required to assist with the making of those rules. Arguably, the reforms could be taken forward by the two existing rules councils. However, Lord Gill argued that they were not well placed to do this; to provide the necessary overview and to achieve harmonisation of the rules, Lord Gill recommended the establishment of a single rules Council, with a remit similar to that of the Civil Justice Council in England and Wales alongside responsibility for drafting the rules of court.

2. The Scottish Government, agreeing that a new body was required to take all of this work forward, published its *Consultation on the Creation of a Scottish Civil Justice Council*² in September 2011. The objective of the consultation was to seek out views from stakeholders on proposals for the establishment of a Scottish Civil Justice Council (“The Council”) – a single civil rules council to replace the existing Court of Session and Sheriff Court Rules Councils and with an additional policy role to make recommendations for the improvement of the civil justice system.

The Consultation

3. The consultation comprised of 16 questions, separated by explanatory text, setting out the present system, the proposed changes and the reasons why these changes were being proposed. All of the questions looked for the selection of one given answer from a list; either by choosing from a yes/no/no preference option or by indicating which of the given options was the respondent’s preference. Questions either offered a ‘comment’ field or, in some cases, allowed elaboration by further offering a ‘why’ field, in which the respondent could explain their reasoning and offer any other relevant insight.

4. Although the 12 week consultation period ended on 22 December 2011, late responses were accepted. The stakeholders who responded to the consultation included bodies within the legal profession, umbrella bodies of legal advice suppliers in the voluntary sector, justice system agencies, and user representatives from the insurance industry, local authorities and trades unions. These responses are varied

¹ <http://www.scotcourts.gov.uk/civilcourtsreview/>

² <http://www.scotland.gov.uk/Publications/2011/09/28125601/0>

and informative, shedding light onto the aims and concerns of the bodies involved in providing justice and their opinions on the proposals set out in the consultation.

5. In addition to the public consultation exercise, the Scottish Government held a discussion event, titled: *Think Tank on the Role of a Civil Justice Council in Reforming Civil Procedure*, in Glasgow on 30 June 2011, under the auspices of Strathclyde University. That sought stakeholders' views on the proposal to create a new Scottish Civil Justice Council. The event was attended by members of the judiciary, representatives from the Court of Session and Sheriff Court Rules Councils (which included members of the legal profession), representatives from the Scottish Government, the Scottish Legal Aid Board and Consumer Focus Scotland.

6. As well as being engaged in an extensive programme of stakeholder engagement around civil courts reform, the Scottish Government is working closely with justice agencies, including the Scottish Court Service, the Lord President and his judicial office, on developing detailed plans in this regard. As part of that work, the Scottish Government has sought views on its proposals for the Scottish Civil Justice Council, from a range of different interests including consumer representative agencies, professional associations, NGOs, business representatives and key delivery partners in the justice system.

7. All of these views have been taken into account in developing the Scottish Government's policy on the creation of the proposed Council.

The Respondents

8. In total there were 40 responses from a varied selection of stakeholders. A list of those who responded and their interest group is at the **Annex**. Of the 40 respondents, 2 organisations wished their responses to be withheld from the public.

9. 34 organisations and 6 individuals responded to the consultation. For the purposes of analysis, the responses have been grouped into categories as follows:

Category	Number of responses		
	Organisation	Individual	Total
Legal Profession	7	1	8
NGO	7	-	7
Public body	6	-	6
Insurance interest	6	-	6
Judiciary	3	1	4
Alternative Dispute Resolution interest	1	1	2
Trades Union	2	-	2
Local Authority	2	-	2
Individual	-	3	3
TOTAL	37	3	40

10. Lord Hamilton, the then Lord President indicated in his response to the consultation that in many respects he was in agreement with the response submitted by the Senators of the College of Justice (“the Senators”), but made a number of supplementary comments. The Sheriffs Principal responded to the consultation to the effect that they supported the consultation response of the Sheriff Court Rules Council. These have been treated as four separate responses in the analysis.

Analysis of responses

11. In all but one of the questions the respondents were asked to indicate their view in either a positive or negative manner with a third option of no preference also being available. For some of the questions this led to a misleading quantitative result: in some instances it is clear from the comments that the respondent wished either to indicate what the Senators of the College of Justice called a ‘yes but’ answer (or even a ‘no but’ response). Care has been taken when performing the analysis to look beyond the tick box selected into the comments offered, so as to accurately garner the opinions of the respondents on the issues consulted on.

12. Nevertheless, any interpretation of the proportion of responses in agreement or disagreement must be undertaken with caution. Due to the relatively small number of submissions, it is not considered appropriate to present the results in percentage form.

13. The final question of the consultation offered respondents the opportunity to express any views they felt had not been touched upon in the questionnaire. As these make up an eclectic mix, it is hoped to develop these themes within the areas of the analysis where they best fit. The rest are dealt with at the end of the analysis.

14. Where respondents gave permission, their responses have been published on the Scottish Government website at <http://www.scotland.gov.uk/Topics/Justice/legal/Civil/Scottish-Civil-Justice-Council>.

15. All non-confidential responses are available in hard copy at the Scottish Government Library, K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD. Charges for photocopies are made on a cost recovery basis. To request copies by post, enquire about charges or make an appointment to view responses, please telephone the Library on 0131 244 4552.

For further information, please contact:

**Ondine Tennant
Scottish Government
2W St. Andrew’s House
Regent Road
Edinburgh
EH1 3DG**

Tel: 0131 244 3839

Email: Ondine.Tennant@scotland.gsi.gov.uk

Part 2 - Overview of Themes Identified

16. Broadly speaking, the consultation document attempted to identify stakeholders' feeling on issues encapsulated into three themes summed up in the questions: Should there be a Scottish Civil Justice Council? What should be the remit for any Council? Who should sit on the Council? By way of introduction to the more in-depth analysis responses to these three questions can be broadly summarised as follows.

Should there be a Scottish Civil Justice Council?

17. Respondents overwhelmingly welcomed the proposed creation of the Council and the need to both create a more coherent rules structure and to implement the wider recommendations of Lord Gill's report. The Council was seen as a tool for the modernising of civil justice in Scotland by improving its efficiency and keeping the wider system under review.

What should be the Remit of the Council?

18. As a general rule, respondents were in favour of a council that had a rules function, a policy remit and a role to play in administrative justice and tribunals. There were some reservations, which are dealt with in the more detailed analysis but there was an acceptance of these general principles. A policy remit was regarded as required if the council was to meet the challenges set out in *The Scottish Civil Courts Review* and with the proposed abolition of the Administrative Justice and Tribunals Council the inclusion of administrative justice and tribunals within that remit was also broadly welcomed. Most respondents were keen to see an independent body, free from the control of Ministers in its working and direction.

Who should be on the Council?

19. This was possibly the most commented on subject in the consultation with stakeholders eager to offer comment and thoughts on the composition of the Council. There was a commonly held belief that the composition of the proposed council should reflect the broad spectrum of people and interests who encounter the civil justice system. The weight of any lay component was discussed by many respondents, some favouring a lay chair or lay majority, others believing more in a heavily judicial and profession-based composition. There was a belief from many respondents that the Council would have to remain small as a larger body would become too cumbersome to operate effectively. To that end, there was acceptance in a committee approach to allow wider representation without enlarging the Council. There was a belief that a more detailed outline of membership was required, with some respondents keen to see such an outline placed into the body of the legislation.

Part 3 – Responses to Specific Questions

Question 1

20. In its consultation document the Scottish Government stated that:

“[the] current councils [the Sheriff Court and Court of Session Rules Councils] perform a largely technical role in considering specific changes to rules of court in response to specific procedural issues arising in the courts or policy changes driven by the Scottish Government, or legislative change in the Scottish or Westminster Parliaments or the EU. Critically, they do not consider the whole court system (their remits are confined respectively to the Court of Session and sheriff courts). Lord Gill considered the new body should have a whole system viewpoint and a different approach to the existing rules councils.”

21. The first question of the consultation were designed to identify stakeholders opinions on whether they also saw a need for the proposed Scottish Civil Justice Council and asked “Do you agree or disagree that there should be a Scottish Civil Justice Council?”

22. There were 36 responses to this question. Of those, 35 agreed that there should be a Scottish Civil Justice Council and 1 indicated “no preference”.

23. Many respondents chose to echo the words of Lord Gill’s report, saying that a new Council was necessary for the development of the civil justice system in Scotland. The Forum of Scottish Claims Managers offers insight into the general feeling of the majority of respondents when they called it “*a catalyst for reform*”.

Question 2

24. In its consultation the Scottish Government listed the functions of the proposed Council as:

- to review the practice and procedure followed in civil proceedings in the Court of Session and sheriff court;
- to prepare and submit to the Lord President draft rules of procedure for the courts;
- in carrying out these functions, the Council should consider how to make the civil justice system more accessible, fair and efficient, and to also consider broader issues of dispute resolution and avoidance, for example how best to develop mediation; and
- where appropriate, to make other recommendations for change.

25. Question 2 asked “Do you agree or disagree with the proposed functions of the Council, including that it should have a policy remit?”

26. Of the 35 responses to this question, 33 agreed that the proposed Council should have a policy remit as well as rule making functions and 2 respondents disagreed with the Council's proposed functions.

27. Of those that did not agree with the policy remit, the individual commented that the Council should simply be able to deal with any matter relating to civil law, and the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) commented that the policy function should be the body's primary function and that its primary concern should be to make the functioning of the civil justice system more adaptive, with rules creation being secondary.

28. Several of the 'positive' responses to this question were qualified – delivering a 'yes but' answer, as the Senators termed it - and there was not a consensus of opinion on the role of a policy remit. The comments offered indicated that respondents wished to understand more clearly the proposed policy remit of the new Council, with many respondents keen to know whether the rule-making or policy function would become the primary focus of the new Council. The Sheriff Court Rules Council although choosing not to return a specific yes or no response, indicated that it saw practical and resourcing problems in creating a single body to carry out the work of the two existing rules councils with an additional a policy remit, a rule creation function.

29. A more common concern was a lack of certainty as to what was proposed as the primary function of the Council. The Lord President supported the creation of a Council with policy and rule making functions, but limited to rule making functions until it "has sufficient capacity and resources to make it potentially more effective in a wider policy role". The Royal Faculty of Procurators in Glasgow echoed this point. The Forum of Insurance Lawyers expressed the view that the body's policy remit should initially be limited to implementation of *The Scottish Civil Court Review* recommendations, that being its initial task.

30. The Senators' response was not unanimous but most were in favour of the Council having a policy as well as a rule making function. Both the Lord President and the Senators sought more clarity as to the scope of the proposed Council's remit.

31. Citizens Advice Scotland saw the role of review of the whole system as taking priority, with rule making 'secondary to this function'. Also of this opinion were the SCAJTC, the Forum of Insurance Lawyers and Consumer Focus Scotland, which suggested an additional function of "keeping the system under constant review" and an overarching aim to "improve the operation of the civil justice system to the benefit of its users".

32. North Lanarkshire Council was not atypical in suggesting that any body with both a rules and policy remit would have to function within a committee structure, so as to mitigate against unwieldiness and make it fit for purpose.

Question 3

33. The consultation proposed that in light of the UK Ministry of Justice's intention to abolish the AJTC, and thereby the SCAJTC, that tribunals and administrative justice should be included in the Scottish Civil Justice Council's remit. Question 3 asked "Should the Council be able to make recommendations in relation to administrative justice and tribunals?"

34. 35 respondents answered this question. 30 thought there was a role for the new Council in relation to administrative and tribunal justice, 2 indicated no preference and 3 respondents did not agree that the Council should take on this role.

35. Of the 3 that did not agree, The Lord President and the Sheriffs' Association did not disagree with the proposition in principle, but felt that inclusion of administrative and tribunal justice was premature while major changes were being planned in the spheres of both civil and administrative justice. The Royal Faculty of Procurators in Glasgow suggested that an alternative body to liaise with the Civil Justice Council of England and Wales would be more appropriate, given "the majority of rules / practice directions in relation to the tribunals are UK wide."

36. Families Need Fathers indicated no preference, but commented that although it seemed logical for the Council to take on some of the SCAJTC's functions, it had some concerns that the Council's remit could become unwieldy.

37. Of those that responded in the positive, repeated reference was made to the need to put measures in place in light of the UK Government's proposal to abolish the AJTC. Some respondents pointed to an opportunity for the Council to take a holistic approach. As Friends of the Earth Scotland put it:

"If the Administrative Justice and Tribunals Council and its Scottish Committee is abolished, it would make sense for its functions to be taken on by the new Civil Justice Rules Council to enable a fuller 'whole system' viewpoint.

Including administrative justice and tribunals under the purview of the new Council would also help to ensure that the importance of this area of justice is more formally recognised and acknowledge that some areas of law may cross into both systems."

38. The SCAJTC in its response to the consultation highlighted that administrative justice is fundamentally important to citizens, with cases before tribunals regularly dealing with "matters of life, liberty, health and financial security". For that reason it commented that is important for the review function presently executed by the SCAJTC in be continued by another body if the proposed abolition were to take place.

39. The SCAJTC believed that the proposed Council should be that body. It did so with some reservations about the membership of the Council which will be considered in later questions, however in line with many respondents' belief that policy review would require a separate committee from rules formation in the

proposed new Council, the SCAJTC also saw a need for a separate administrative justice committee within the structures of the SCJC. Alongside the belief that the abolition of the SCAJTC required the proposed SCJC to have a remit which extended to administrative justice and tribunals there was also support for the holistic approach that having one body with such a broad overview would provide.

40. Several respondents noted that any extension of the Council's remit would incur additional costs.

Question 4

41. As already mentioned, the proposals suggested that one of the functions of the SCJC would be *to prepare and submit to the Lord President draft rules of procedure for the Courts*. Although not included in proposals for the SCJC, the consultation asked a related question seeking respondents' views on whether the Council should have responsibility for making, as opposed to only preparing, court rules. Question 4 asked consultees; "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?"

42. There was broad support for the Council having a remit in the making of rules of court with only 5 of the 35 respondents that provided an answer selecting the 'no' option. However, a quantitative analysis does not adequately express the opinions expressed, as many respondents returned a qualified answer. Also, in several instances it was not clear whether respondents were of the opinion that the Council should take over the Court of Session's role in this regard or simply be responsible for the drafting of court rules.

43. Broadly speaking there were three bodies of opinion recorded.

44. Many respondents saw the role of the SCJC very much in line with the proposal, favouring the Council drafting rules of court in a similar fashion to that of the present rules councils. Amongst others the Sheriffs' Association, the Faculty of Advocates and the Senators offered this opinion which would see the final responsibility for the creation of rules of court remain with the Lord President.

45. A second, smaller, group advocated that the proposed Council not simply draft the rules but rather write and implement them. ASLEF (the Associated Society of Locomotive Steam Enginemen and Firemen, the trade union for Train Drivers), Consumer Focus Scotland and the Law Society of Scotland indicated that they would wish to see the Council as the creator of the rules of court. ASLEF highlighted the importance of consultation and political consideration in the Council's execution of this role while Consumer Focus Scotland regarded the Council as being the best body for the writing of rules which are in plain English and easily understood by court users. The Law Society of Scotland proposed a three tier process, with the Council making proposals which are consulted on, with a secretariat drafting a proposal which would finally be approved by the proposed Council. Alongside the belief that a rules remit should be secondary to a review function, the SCAJTC and Citizens' Advice Scotland regarded rule writing to be the subject of a sub-committee.

46. A third body of opinion expressed the view that the Council should only take on a legislative function under certain conditions. This included suggestions that there should be some parliamentary process, even if only notification, or the adoption of transparent and democratic mechanism before rules could be formally made – this latter point was made highlighted by Friends of the Earth Scotland alongside the insurer Esure and the Forum of Scottish Claims Managers.

Question 5

47. Paragraph 27 of the proposals stated that it is intended that the emphasis and balance of the Council, particularly in terms of governance, accountability, appointments and direction, should remain with the Lord President rather than Ministers and question 5 of the consultation asked respondents “Do you agree or disagree that the overall responsibility for the Council should lie with the Lord President rather than the Scottish Ministers?”

48. Of the 36 responses to this question, 4 respondents disagreed with the proposal and 32 were in favour.

49. The most common reason for supporting the proposed arrangement was that it was an important means of ensuring the Council’s independence from Ministerial influence and maintaining the separation of powers between the executive and the judiciary.

50. Of the 4 respondents who disagreed with the proposal, 3 (Citizens’ Advice Scotland, the Scottish Legal Action Group and an individual) were of the opinion that the body should be independent, with neither Ministers nor the Lord President being directly responsible. Core Solutions was of the opinion that, given the Council’s proposed remit went further than court-related matters, Ministers should have ultimate responsibility for the body but that the Lord President should “retain responsibility for that part which is related to the court system”.

Question 6

51. The Scottish Government proposals included that the Council’s role should include actively making recommendations to the Lord President and Scottish Ministers as to how the Scottish civil justice system may be improved and sought consultees views on this. Question 6 asked “Do you agree or disagree that the Council should be able to make recommendations to the Scottish Ministers as well as the Lord President?”

52. 36 consultees responded to this question, with 32 agreeing with the proposal and 4 disagreeing.

53. The Sheriff’s Association, Sheriff Court Rules Council and the Sheriffs Principal were of the opinion that the Council should only make recommendations to the Lord President as it would be inappropriate “in the context of the work to be carried out by the Council for [the Lord President] to be sidestepped in any way.”

54. The ability to make recommendations to Ministers was seen by most respondents as a practical necessity if the Council is to have a policy remit. It was noted by The Royal Faculty of Procurators in Glasgow, the Forum of Insurance Lawyers, Consumer Focus Scotland and the Law Society of Scotland that implementation of the proposed Council's recommendations would likely require primary and subordinate legislation, making the ability to recommend to ministers essential. Other responses pointed out that the ability to make recommendations to both the Lord President and Ministers would help ensure an effective line of communication between government and the courts.

Question 7

55. The consultation paper indicated that the Scottish Government had considered whether some, or all, of the Council's proposed functions should be conferred on a different body, such as the Scottish Law Commission. Question 7 asked "Do you consider that the role and functions of the Council should be conferred upon any other body or bodies instead? If so, which?"

56. 34 consultees answered this question. 30 chose the 'no' option, 3 indicated no preference. Although 1 respondent indicated 'yes', no respondents identified any other body that the Council's proposed functions should be conferred upon.

57. The SCAJTC noted that even were the AJTC not to be abolished, the Council should have regard to administrative justice and tribunals and liaise with the AJTC.

58. Friends of the Earth Scotland believed that the body should not have a policy function if appointments were not to be regulated by the Public Appointments Commissioner.

Questions 8 and 9

59. Questions 8 and 9 sought consultees' views on the Scottish Government's proposed membership outlined in the consultation paper

60. Most respondents chose either to submit a single set of comments in response to both Questions 8 and 9, or used the comments box under question 9 to supplement the comments made at Question 8. Although some respondents selected yes and others no, all used either the comments box of questions 8 and 9 to record interest and make suggestions as to the Council's composition. These questions have therefore been taken together for the purposes of qualitative analysis.

61. Question 8 asked "Do you consider that the proposed membership is appropriate? If not, what alternative would you suggest?".

62. 39 respondents chose to answer Question 8. 10 respondents were in agreement with the proposed membership, and 29 were not.

63. Question 9 asked “Should any other person / category of person be included in the membership?”.

64. A total of 37 respondents answered Question 9, with 32 suggesting alternative or additional categories of membership, 3 indicating that the existing categories were sufficient and 2 respondents indicating they had “no preference”.

65. The key themes emerging from responses to the questions about membership were around: who should sit on the Council, and to what extent that should be set out in the establishing legislation; what the most appropriate balance of representation should be; and how many members should be appointed to the Council.

66. Only 2 respondents, South Lanarkshire Council and Simpson & Marwick believed the proposed membership to be suitable and did not offer an alternatives to the composition outlined in the consultation paper.

67. Many respondents wished to see their interest, or the group for which they speak, better represented on the Council. Looking at all the responses to Questions 8 and 9, there were calls to add the following groups to the proposed membership: the Scottish Legal Aid Board (“the Board”), individuals able to represent people with disabilities or other protected characteristics under the Equalities Act 2012, the Scottish Law Commission, clerks of both the Court of Session and the sheriff courts, insurers, personal injury lawyers, claims managers, family lawyers, commercial lawyers, tribunals interests, employment lawyers, trades unions, alternative dispute resolution representatives covering both arbitration and mediation, solicitor advocates, local authorities and academics.

68. The SCATJC, noting the possibility of extending the Council’s remit to take over some of its on functions, commented that the proposed membership only reflects civil justice needs and that there should be specific recognition of the Council’s remit in administrative and tribunals justice in its membership. This point was echoed by the Sheriffs’ Association, the Board, the Senators, Citizens’ Advice Scotland and the Association Personal Injury Lawyers. The Lord President, however, being of the view that the Council should not take on functions in relation to administrative justice and tribunals prior to the Scottish Government legislating for this, did not wish to see this function reflected in the Council membership prematurely.

69. Individual insurers and organisations representing the insurance industry and insurance lawyers were of the view that the high proportion of civil cases involving insurers suggests that this requires a permanent place in the membership of the council. The Association of British Insurers, commented that the Civil Justice Council in England and Wales comprises a wide body of opinion and that the Scottish Council should model itself on that, also stated that:

“The proposed membership should reflect a fair representation of the actual users of the court system...Insurance companies are the single largest body of civil court users in Scotland and have an interest in 80% of cases going through the courts. In addition, the rules that the council implement also

impact cases that can be settled without the need for litigation, for which insurers are of paramount importance.”

70. The Association of British Insurers, ASLEF, Scottish Trades Union Council, Forum of Insurance Lawyers and Association of Personal Injury Lawyers all commented that membership should include a trades union representative.

71. Core Solutions commented that to avoid the Council being “too litigation– or court-centric”, a broader range of members with experience of non-court dispute resolution is required:

“For example, an economist or other financial analyst, more than one leading business figure (not necessarily a litigation user), a representative of the public sector, a member with detailed understanding and experience of dispute resolution outside the courts, an academic with good practical and research experience of dispute resolution in other jurisdictions, and perhaps others with a broader perspective on dispute prevention and resolution as a whole.”

72. Other supporters in support of an alternative dispute resolution representative were Families Need Fathers, the Royal Faculty of Procurators in Glasgow, the Scottish Arbitration Centre, Consumer Focus Scotland and Citizens’ Advice Scotland.

73. 7 respondents commented that the proposed membership was overly inclined towards those who operate within the court system, and that this might tend towards maintaining the status quo or lead to a heavy focus on issues of practice and procedure. The respondents of that view were primarily organisations representing court users, however, 2 individuals made this point, as did the Board and Core Solutions.

74. Consumer Focus Scotland welcomed the inclusion of lay members, but argued for membership to include “at least equal numbers of legal and non-lawyer members” as the system should be “designed around the needs of those who use it, rather than those who provide the service”.

75. Of an alternative view, however, were 6 respondents, mainly organisations with a legal or judicial interest, who either commented that the membership should have a greater proportion of legal, or service provider members. The Law Society of Scotland was of the opinion that there should be at least 6 solicitor members. The Sheriffs’ Association were of the view that with a third ‘non-legal’ input into the Council greater judicial and legal representation on the Council was necessary, that there should not be a civil servant member, and that court clerks should be included as members. The Faculty of Advocates similarly supported the addition of clerks to the Council and was of the view that given “the lay representation should reflect the [technical] nature of the Council’s work and should not be a majority.”

76. North Lanarkshire Council went further, commenting

“The proposed membership broadly reflects the situation in terms of the Civil Justice Council (CJC) in England and Wales. The CJC has been reviewed

and it was found that this provides an environment for useful dialogue and demonstrating different parties interests, considering separate interests. That said, it is considered that the proposal is slightly imbalanced in favour of lay persons and it may be better that the status quo remains with the option of lay representatives making representations that the new body should be obliged to consider. “

77. The Senators offered a detailed response as regards the composition. They wished to see the Council made up of members of the judiciary from both the Court of Session and sheriff courts and representatives from the Faculty of Advocates and the Scottish Law Society. Members of the Scottish Court Service should also be on the Council as should at least two members drawn from the tribunal judiciary. They believed that there should also be a lay component (of 3 members) representing consumer affairs, the lay advice sector and similar. However the senators were not in favour of representation from particular interest groups, believing that these views could be garnered through consultations or sub committees. They believed that a civil servant and a member from the Scottish Legal Aid Board (“the Board”) should also be represented.

78. The Board believed it should have a representative on the Council, for the following reasons:

The Board has a key role in the funding, provision and monitoring of publicly-funded legal assistance, much of which relates directly to court business, or the resolution of problems such that court proceedings can be avoided...The Board also has a new statutory role in monitoring and advising Ministers on the accessibility and availability of legal services generally i.e. not just those funded by the Board. The legal aid rules and their application by both the Board and solicitors have a significant potential to impact – both positively and negatively – on the accessibility and smooth running of the justice system.”

79. Many respondents expressed an interest in the size of a Council with as large a remit as proposed and with such practical functions. 3 respondents (the Sheriffs’ Association, the Forum of Insurance Lawyers and an individual) commented that the proposed membership was too small to cover the range of interests across the civil justice system. 4 (the Lord President, Senators the Faculty and the Royal Faculty of Procurators in Glasgow) commented that if the Council were too large it would become less capable of carrying out its functions.

80. The Sheriff’s Association regarded the proposed composition as too small, requiring more court based representatives. The Sheriff Court Rules Council, in its response, noted the small number of proposed members when it is remembered that the joint rules councils would number 26 alone, a point echoed by the Forum of Insurance Lawyers. However, it also noted that:

“the Council would be hopelessly unwieldy if it included all those whom we think it ought to include in order properly to discharge the various tasks that would be allotted to it. So either these tasks should be distributed among different bodies, each with a manageable number of members, or else the

Council should be constituted in such a way as to require the presence at any meeting of a manageable number of members.”

81. Lord Hamilton, the then Lord President, and the Faculty noted that the proposed number of 15 would seem quite right as a larger body could reduce efficiency and, like many other respondents, thought that there may be a need for a committee structure.

82. The Scottish Legal Action Group and Consumer Focus Scotland both wished to see more detail on composition with a breakdown of the numbers of each identified group. To that end Consumer Focus Scotland recommended that there be equal numbers of lay and legal representatives and that there should be no requirement that the Council is chaired by a member of the judiciary. Citizens Advice Scotland was broadly in support of the proposed membership (although wished to see a member with experience and knowledge of the Citizens' Advice Bureau service) but called for a lay Vice-Chair and sought more specificity in the legislation as regards the Council membership.

83. 2 respondents commented that the appointment of members should not rest with the Lord President. Simpson and Marwick solicitors suggested the Judicial Appointments Board Scotland as an alternative and Friends of the Earth Scotland suggested the Public Appointments Commissioner should take on this role. Consumer Focus Scotland were of the opinion that all members should be appointed through a fair and transparent process. The Senators commented that the Law Society of Scotland and the Faculty should have a role in relation to the appointment of the solicitor and advocate members, as it was important these members should have the support of their representative bodies.

Question 10

84. The Scottish Government proposed that the Lord President and Scottish Ministers, each having consulted the other, should be able to appoint such other members as they consider appropriate. Question 10 asked "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?"

85. There were 37 responses to this question. 12 respondents felt it appropriate for ministers and the Lord President to be able to appoint other members to the Council as they see fit. 22 were not in favour and 2 indicated no preference.

86. Most of those that supported this proposal believed it would allow a degree of necessary flexibility. Which? for example, stated that "Some latitude and flexibility should be allowed, as gaps in expertise and new policy areas are uncovered." 4 of the respondents that supported ad hoc appointments were of the view that these should be subject to some procedure (such as setting out criteria for membership, or a process for reviewing appointments).

87. Of those that disagreed with the proposal, 6 considered that only the Lord President should be able to make further appointments. Of the remaining 15, 7

commented that appointments should be subject to a fair and transparent process and 2 (both NGOs) called for appointments to be subject to OCPAS procedures. The remainder saw no need for further appointments to the body.

88. The Scottish Legal Action Group indicated no preference, commenting that the appointments process should be fair and transparent, and not at the discretion of the Chair of the body.

Question 11

89. The consultation suggested that members of the Council should be reimbursed for reasonable travelling and out of pocket expenses. Question 11 asked “Do you consider that members should receive expenses only, or should members be paid?”

90. 34 consultees responded to this question. 19 were of the view that members should be paid expenses only, 10 believed those members who were not appointed by virtue of their professional position should be paid and 5 indicated no preference.

91. Arguments in support of an expenses only system included that there should be no financial incentive to sit on the Council, it was not expected that absence of payment would prevent the most appropriate persons becoming involved and that this would be appropriate in the current economic climate.

92. The reasons given by those in support of a system of remuneration included that there should be no socio-economic barrier to membership of the Council, that payment would allow for the broadest possible membership, and that membership of other public bodies such as the Scottish Legal Complaints Commission and the Board is paid.

93. The main argument presented for such payment was that there should be no financial disincentive to anyone becoming a member of the Council and only fair payment could ensure this.

94. The Sheriff Court Rules Council did not indicate a preferred option, but noted that “consideration will have to be given to the question how best to attract the right quality of private practitioners to serve on the Council. The level of fees payable to members could well have an impact on who might express an interest in appointment to the Council”

Question 12

95. The Consultation document noted that in order to ensure a proactive and inclusive approach to civil justice matters, it is considered that it would be appropriate to require it, where appropriate, to consult, and work with other organisations. Question 12 asked “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?”

96. This proposal was broadly welcomed, with 31 of the 36 respondents who answered the question supporting a remit to consult. It was generally felt that working and consulting with others would strengthen the work of the Council, and several consultees believed that consultation would be crucial to the Council's success. Some respondents pointed out that the CJC in England & Wales was required to consult.

97. 2 respondents were not in favour of a requirement to 'work with' other bodies, being unclear as to what this might mean in practice.

98. Some respondents expressed a view as to which organisations or groups the Council should consult or work with. These included: charities working with vulnerable people, groups with an interest in alternative dispute resolution, individual and certain groups of court users. QBE Insurance Europe commented that "The Council should have the remit to consult as widely as required to make informed decisions and change for the benefit of all court users and interested parties."

99. 5 respondents (the Sheriff Court rules Council, the Faculty of Advocates, the Lord President, Senators and Sheriffs Principal) were not supportive of a requirement to consult, favouring a more fluid attitude with an ability to consult where appropriate. The Sheriff Court Rules Council had reservations in this area, noting that "if a general requirement to consult is imposed on the Council, particular decisions made by it could be open to challenge by groups who were not consulted but considered that they ought to have been."

Questions 13 and 14

100. The consultation document proposed 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. It went on to suggest that the body should also be required to lay a copy of the report before the Scottish Parliament. Those consulted were asked whether they agreed with these provisions and whether they believed that any further additional reporting was required.

101. Question 13 asked "Do you agree or disagree that the requirements for the provision of an annual report are appropriate?"

102. Question 14 asked "Do you consider that any additional or alternative reporting arrangements would be appropriate?"

103. 32 of the 35 respondents who answered question 13 were in favour of a requirement for the Council to submit an annual report. 1 consultee was not in favour, and 2 indicated no preference.

104. Those positive responses were however, qualified, as can be seen from the fact that of the 32 responses to question 14, 11 indicated contentment with the proposals as outlined in the consultation document, whereas 18 included suggested amendments to those arrangements. 3 respondents to this question indicated no preference.

105. There was near unanimous support for the creation of an annual report and it a copy being placed before the Scottish Parliament. The Solicitors firm Irwin Mitchell was not alone in talking of such a report offering a level of accountability for the Councils work, while Which? also encapsulated a common view that such a report helped keep the work of the Council transparent. The Senators of the College of Justice raised concerns with the expense of an annual report, but believed, if such a report were to be drawn up, that it should be addressed to the Lord President. The Faculty of Advocates suggested it may be appropriate for the Council to lay a copy of its annual report before Westminster also.

106. When asked whether any other reporting should be required, 5 respondents with an interest in insurance were in favour of the Council publishing a business plan setting out its objectives and a code of conduct which would, in the words of the Association of British Insurers, “set out the goals and guiding principles of the body” and which can be “cross referenced when the council drafts or amends the business plan”. Core Solutions suggested that the Council “should have a 5 year plan for the re-assessment of the delivery of civil justice/dispute prevention and resolution in Scotland”

107. Some respondents expressed the view that Council documents (such as its annual report, agendas and minutes of meetings) should be made publicly available, either by publishing these online or by providing them on request.

108. 3 respondents to questions 13 and 14 suggested that a copy of the report should also be provided to the Scottish Ministers.

Question 15

109. Question 15 asked “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?”

110. 37 consultees responded to question 15. 26 agreed with the Scottish Government proposal and 11 disagreed.

111. Here again, however, a quantitative analysis alone would be misleading. A study of the 26 who were in favour shows that 7 had reservations with the degree of influence that Scottish Ministers should have on the Council. The 10 respondents who disagreed with the proposal believed that only the Lord President should be able to direct the Council, returning to the argument for ensuring the separation of powers. Those respondents included South Lanarkshire Council, North Lanarkshire Council, the Society, the Senators, the Scottish Legal Action Group, QBE Insurance Europe and the Sheriff Court Rules Council.

112. 9 respondents noted that the Council would not have what the SCAJTC called a “monopoly on wisdom” and considered it appropriate that the Scottish Ministers amongst others could request that the council consider an issue but not direct it.

Question 16

113. Question 16 of the consultation asked respondents “Do you have any other comments on the proposals outlined in this paper?”

114. 24 respondents provided additional comments. Where the respondent offered a comment which reiterated a point already made in their response, that has been taken account of above.

115. 6 respondents (the Lord President, the Faculty of Advocates, Consumer Focus Scotland, the Sheriffs’ Association, Scottish Court Service and an individual) raised the issue of resourcing, noting that the proposed Council would require considerable resource to carry out its functions. The Faculty of Advocates looked to the immediate work of the Council in the delivery of Lord Gill’s proposals, highlighting that this would be a sizeable task necessitating considerable resource.

116. The Lord President, viewed the establishment of a Council with a wide remit as “at this time, a luxury, not a necessity” and noted that significant costs would come with either of its proposed functions. The Lord President pointed to the costs associated with the Civil Justice Council in England & Wales and the costs of implementing the new civil procedure rules and family rules following the recommendations of Lord Woolf’s Access to Justice review. He further noted that any remit for administrative justice and tribunals would incur even greater costs. The Lord President believed that considerable extra central government resourcing will be required if the proposed Council goes ahead, even with his envisaged reduced brief.

117. 2 respondents (Capability Scotland and an individual) expressed the view that the Council’s approach should focus on court users, or certain categories of court user.

118. The Board chose to comment on the appointments process, stating that organisations with a position on the Council should nominate a representative member, the Lord President should appoint judicial members and other appointments should be made following an open and transparent process.

119. The Upper Tribunal offered no views on the creation of the new Council but noted that it would be inappropriate for the Council’s remit to include those functions of the AJTC which extend to reserved tribunals.

120. Two organisations (Which? and the Scottish Legal Action Group) believed that the proposed Council provided the opportunity to promote public involvement in civil justice improvements.

121. Citizens’ Advice Scotland thought the Council should have power to conduct relevant research into operation of civil justice system and monitor the impact of civil courts reform.

122. Consumer Focus Scotland urged that any changes to court rules should not increase formality, or fail to take into account necessary differences between the

Court of Session and sheriff court, on the basis that the latter has a higher proportion of party litigants.

123. The Forum of Insurance Lawyers thought it should be possible for Council meetings to take place remotely.

124. The Association of British Insurers suggested that if the Council was to have wide remit and meet only several times per year, consideration could be given to adopting a structure similar to the Criminal Procedure Rules Committee and the Civil Justice Council in England Wales.

Part 4 – Decisions Taken Following Consultation

125. Following careful consideration of the findings of the consultation and discussions with stakeholders, the Scottish Government introduced a Bill to the Scottish Parliament in May 2012 for the establishment of a Scottish Civil Justice Council.

126. The Bill and its accompanying documents can be found on the Scottish Parliament website at:
<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/50220.aspx>.

Should there be a Scottish Civil Justice Council?

127. Arguably, the changes required to implement civil courts reform could be taken forward by the existing civil rules councils. However, the Review argued that they were not well placed to do this. To provide the necessary overview and to achieve harmonisation of the rules, Lord Gill recommended the establishment of a Civil Justice Council for Scotland, with a remit similar to that of the Civil Justice Council in England and Wales alongside responsibility for drafting rules of court.³

128. Consideration was given to adopting in Scotland a model similar to that in England and Wales, with a policy body separate and distinct from the technical rule-making body. However, the Scottish Government considers, given the scale of the Scottish jurisdiction and the need for a co-ordinated package of major reforms, that a single body should be responsible both for the strategic overview and for taking forward the technical changes to achieve their strategic aims.

129. The Scottish Government considered whether some, or all, of the Council's proposed functions should be conferred on a different body. The Scottish Government considered in particular conferring additional functions on the Scottish Law Commission.

130. The Scottish Government, however, favours conferring new functions on the Council only. Although the Scottish Law Commission's ("the SLC") functions include keeping "under review all the law with which they are respectively concerned with a view to its systematic development and reform", the SLC is required to report to Ministers.⁴

131. The Lord President, as head of the Scottish judiciary and Chair of the Scottish Court Service, already has various statutory responsibilities in relation to the efficient disposal of business in the Scottish courts.⁵ The responsibility in terms of governance, accountability, appointments and direction of the Council, will largely rest with the Lord President rather than Ministers. The Council (which will be a statutory advisory body) will not therefore fall to be classified as a non-departmental public body (NDPB).

³ Recommendation 206, *Report and Recommendations of the Scottish Civil Courts Review (2009)*:
<http://www.scotcourts.gov.uk/civilcourtsreview/>

⁴ Under section 3 of the Law Commissions Act 1965

⁵ Section 2 Judiciary and Courts (Scotland) Act 2008

132. The Scottish Government considers the more effective line of accountability for taking forward reforms to the civil justice system, including procedural reforms, is to have a body accountable to the Lord President. It may be appropriate, however, for the Council and the SLC to work together on particular projects.

133. The Scottish Government also considered whether it would be appropriate to set up a non-statutory body. However, a formal statutory basis and remit will give the necessary authority and direction to drive forward civil court reform and other changes needed to the civil justice system.

134. The overwhelming majority of respondents to the consultation supported the creation of a single body to draft court rules and to implement civil courts reform.

135. The Scottish Government agrees that a new body is required to take all of this work forward and as such, introduced legislative proposals to Parliament for the establishment of a Scottish Civil Justice Council earlier this year.

Functions

136. In line with the *Scottish Civil Courts Review* vision that the new Council should ultimately do more than draft rules of court, the Scottish Government intends that the Council should have a wider function of contributing to the ongoing improvement of the civil justice system

137. The Scottish Government is therefore of the view that the proposed Council should have the following functions:

- to keep the civil justice system under review;
- to review the practice and procedure followed in the Court of Session and in civil proceedings in the sheriff court;
- to prepare draft civil procedure rules and submit them to the Court of Session;
- to provide advice and make recommendations to the Lord President on the development of and changes to the civil justice system; and
- to provide advice on any matter relating to the civil justice system as the Lord President may request.

138. In carrying out its functions, the Scottish Government has proposed that Council must have regard to any guidance issued by the Lord President, and to the following principles:

- the civil justice system should be fair, accessible and efficient;
- rules relating to practice and procedure should be as clear and easy to understand as possible;
- practice and procedure in the civil courts should be as similar as possible, where appropriate; and

- alternative methods of dispute resolution should be promoted where appropriate.

139. Consultees were generally in favour of a Council with a rules function, a policy remit and a role to play in administrative justice and rule making functions for tribunals, however, a number expressed concerns around the timescales for which the Council would take on a policy role, and which of the Council's functions would have primacy.

140. The Scottish Government's intention is that once implementation of the Review's court reform recommendations is complete, the Council will be able to focus on the functions of keeping the civil justice system under review and advising and making recommendations for future change.

141. Most consultees were in favour of a remit to consult, and some suggested the Council should be able to commission research. The Scottish Government has considered these views, and although it has decided not to confer on the Council a statutory duty in these respects, it should have an explicit power to "consult such persons as it considers appropriate; and co-operate with, and seek the assistance and advice of, such persons or bodies as it considers appropriate." The Council is expected to consult and work with others where necessary, but it is considered in light of the significant volume of work that civil courts reform will bring, a statutory duty to do so could hinder this work.

Administrative justice and tribunals

142. Although respondents generally supported transferring at least some of the functions of the Scottish Committee of the Administrative Justice and Tribunal Council to the new body, some had concerns about prematurely conferring this additional responsibility on a body which will initially concentrate on civil rules revision and prior to the transfer of judicial leadership for tribunals to the Lord President.⁶ It is therefore proposed that the Council should not take over functions in that regard at this time.

143. The Scottish Government is currently considering the findings of a consultation on proposals for tribunals reform, and will announce plans in that respect in due course.

Membership

144. The Scottish Government has proposed that membership of the Council will be between 14 and 20 members. Scottish Ministers will have the power to vary the numbers of members, but not the categories themselves.

⁶ Further information is available at: <http://www.scotland.gov.uk/Topics/Justice/legal/Tribunals>

145. The proposed that membership will include at a minimum:

- The Lord President;
- the Chief Executive of the Scottish Court Service;
- the Chief Executive of the Scottish Legal Aid Board;
- a person appointed by the Scottish Ministers;
- four members of the judiciary;
- two advocates;
- two solicitors; and
- two consumer representative members.

146. The Scottish Government believes it is necessary to keep the Council membership to a workable limit and that there should be flexibility in the membership in order that it may reflect the Council's changing priorities. The Scottish Government considers that the range of views expressed in the consultation and the lack of consensus, around this issue, is indicative of the need for flexibility. That flexibility is to be achieved by allowing the Lord President up to six further discretionary appointments. The table at page 25 summarises the Scottish Government's proposed arrangements for Council membership.

147. It is considered appropriate that, in addition to the originally proposed membership, a representative of the Scottish Legal Aid Board should sit on the Council. It is not considered necessary to extend the membership further, given that the Lord President will have a number of discretionary appointments.

148. It is anticipated that others will contribute to the Council's work through its committees, which the Scottish Government would expect to reflect the full range of interests across Scotland's civil justice system.

Appointments

149. Some consultees sought a role for the Public Appointments Commissioner in appointments to the Council, however, the Commissioner has no role in relation to non-Ministerial appointments.

150. The Scottish Government considers it appropriate that the Lord President should appoint all members, except those who are not members by virtue of their office and the Scottish Ministers' appointee, who will be a member of Scottish Government staff. In order to ensure that the most suitable individuals are appointed to the Council, the Scottish Government considers it appropriate that the Lord President set out an appointments process for the non-judicial members that the Lord President appoints. In addition, the Scottish Government has proposed that the Lord President must consult the Law Society of Scotland, the Faculty of Advocates and the Scottish Ministers prior to appointing solicitor members, advocate members, and any additional discretionary members.

151. Around half of the consultees were not in favour of Ministers being able to make discretionary appointments. The Scottish Government has decided that only the Lord President should be able to make such additional appointments.

152. Appointments are for 3 years (except for office holder members and the Scottish Ministers' appointee). Members are eligible to be reappointed.

Chair

153. The Scottish Government believes that judicial leadership of the new Council is necessary. The Lord President currently chairs the Court of Session Rules Council and under the proposals may chair the new Council or designate a judge of the Court of Session as chair. The Lord Justice Clerk, whether or not a member, may deputise for the Lord President at Council meetings, including chairing duties and members are to elect a judicial member as deputy chair. It might be necessary to delegate chairing duties, which have the potential to be onerous, for example, during the period of civil courts reform.

Remuneration and expenses

154. It is proposed that the Scottish Court Service may pay such expenses as it thinks fit to members of the Council or persons serving on committees. Although the Scottish Government recognises that it might be appropriate in certain circumstances to pay remuneration, it is expected that Council and committee members (who are not members by virtue of their office) would normally be unpaid. Members of the Civil Justice Council and the Civil Procedure Rules Committee in England and Wales are not remunerated; it is envisaged that volunteers would generally be recruited to the Scottish Council on the same basis.

Reporting Arrangements

155. The Scottish Government has proposed that the Council is to prepare an annual report and business programme and lay copies before the Scottish Parliament. This is a standard requirement of transparency and accountability for many public bodies and it is considered that it would also provide a good opportunity for the Council to promote and publicise its work.

Resourcing

156. Issues of resourcing were raised by several consultees. The estimated cost of the body is around £313k - £375k p.a. (representing additional costs of between £87k - £149k on top of the existing rules councils) which will be met by the Scottish Court Service.⁷ The total costs of civil courts reform for the Scottish Court Service, including for the Council, are expected to be significantly higher. Scottish Ministers intend to increase civil court fees later in 2012, covering the three year period up to 2014-15.⁸ The Scottish Government expects the overall increase in fees, if approved by the Parliament, to enable the Scottish Court Service to meet the additional costs associated with the Council as well as other aspects of civil courts reform over the three years.

⁷ Further information is at paras. 100 – 147 of the Financial Memorandum to the Scottish Civil Justice Council and Criminal Legal Assistance Bill, available at: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/50220.aspx>

⁸ The Scottish Government is currently considering the results of a consultation on revisions to court fees. The consultation paper is available at: <http://www.scotland.gov.uk/Publications/2012/05/7547>

157. The following table summarises the Scottish Government's proposed arrangements for Council membership.

Member(s)	Appointed by	Appointment	Tenure	Eligible for payment?
The Lord President (Lord Justice Clerk may deputise)	n/a	n/a*	n/a	No
The Chief Executive of the Scottish Court Service (who may nominate a representative from SCS staff)	n/a	n/a*	n/a	No
The Chief Executive of the Scottish Legal Aid Board (who may nominate a representative from SLAB staff)	n/a	n/a*	n/a	No
At least 4 judicial members from both the Court of Session and the Sheriff court, including at least 1 Senator and at least 1 sheriff or sheriff principal.	Lord President	None	3 years, unless replaced or removed	No
At least 2 practising advocates	Lord President, after consulting Faculty of Advocates	Est. by Lord President	3 years	Yes
At least 2 practising solicitors	Lord President, after consulting Law Society of Scotland	Est. by Lord President	3 years	Yes
At least 2 consumer representatives, who between them have: <ul style="list-style-type: none"> • experience and knowledge of consumer affairs, • knowledge of the non-commercial legal advice sector, and • awareness of the interests of litigants in the civil courts. 	Lord President after consulting Scottish Ministers	Established by the Lord President	3 years	Yes
1 member of Scottish Government staff (or a nominated representative)	Scottish Ministers	None	Until Scottish Ministers appoint a replacement	No
A maximum of 6 other persons	Lord President, after consulting Scottish Ministers	Est. by Lord President	3 years	If not Scottish Administration or SLAB staff

List of Respondents

G Anderson
Association of Personal Injury Lawyers
Associated Society of Locomotive Engineers and Firemen
Association of British Insurers
AVIVA
Capability Scotland
Citizens Advice Scotland
Consumer Focus Scotland
Core Solutions Group
Esure
Faculty of Advocates
Families Need Fathers Scotland
P Foreman
Forum of Insurance Lawyers
Forum of Scottish Claims Managers
Friends of the Earth Scotland
D Gallant
Irwin Mitchell Scotland LLP
Law Society of Scotland
Lord President
LV=
North Lanarkshire Council
QBE Insurance Europe
C Reid
Royal Faculty of Procurators in Glasgow
Scottish Arbitration Centre
Scottish Committee of the Administrative Justice and Tribunals Council
Scottish Court Service
Scottish Legal Action Group
Scottish Legal Aid Board
Scottish Legal Complaints Commission
Scottish Trades Union Congress
Senators of the College of Justice
Sheriff Court Rules Council
Sheriffs' Association
Sheriffs Principal
Simpson and Marwick
South Lanarkshire Council
Upper Tribunal (Administrative Appeals Chamber sitting in Scotland)
Which?



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