

ANNEX B CONSULTATION QUESTIONNAIRE

Response by the Scottish Legal Aid Board

Consultation question 1

Do you have any comments on the approach taken to splitting the Simple Procedure Rules into two sets of rules?

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| Comments The two-set approach seems wholly appropriate in the circumstances. |
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Consultation question 2

Are you content with the use of the following terms in the rules?

- **Claim** – for a standard simple procedure case

Content Not content No Preference

- **Claimant** – for pursuer

Content Not content No Preference

- **Responding party** – for defender

Content Not content No Preference

- **Freeze** – for sist

Content Not content No Preference

Consultation question 3

Do you have any comments on the approach taken to updating hard to understand terminology in the simple procedure rules?

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| Comments The approach taken is reasonable, effective and useful |
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Consultation question 4

Is there any terminology remaining in the draft simple procedure rules which you think is unfriendly or difficult for the lay user to understand and, if so, what alternatives would you suggest?

Yes No

Comments

No Comment

Consultation question 5

Do you have any comments about the approach taken to the numbering and layout of the rules?

Comments

The numbering of the rules may become confusing given that the numbering system does not separately carry the information about which part of the rules is being referred to. So, simply referring to “Rule 2.1” is not enough.

It is not unwieldy to prefix rules with the part number so that “Part 4 rule 3.6” becomes “4.3.6”, as occurs in other sets of court rules perhaps to good effect.

Consultation question 6

Do you have any comments about how, and where, the rules should be presented on the internet?

Comments

It clearly makes sense for the rules to be published on the SCTS website, alongside the various forms etc. Given the inevitable length of the rules, and the number of associated forms etc, a format that allows hyperlinking between sections would make them more user-friendly. In due course, and as the mygov.scot platform is developed, it would be helpful for the rules to be integrated with other online information (for example relating to the substantive issues in the types of cases subject to simple procedure) and to allow interactive routing and completion of forms etc.

Consultation question 7

Do you have any comments on the approach to headings in the Rules?

Comments

The approach of “question headings” and “answering” rules is good.

Consultation question 8

Do you have any comments on the approach taken to minimising the number of hearings?

Comments

No Comment

Consultation question 9

Do you have any comments on the approach taken to alternative dispute resolution in the rules?

Comments

No Comment

Consultation question 10

Do you have any comments on the proposed principles of simple procedure as set out in Part 1 Rules 2.1 – 2.5?

Comments

No comment beyond agreeing that the principles seem apt

Consultation question 11

Do you have any comments on the proposed duties on sheriffs, parties and representatives?

Comments

No comment

Consultation question 12

Do you have any other comments on the approach taken in Part 1: The simple procedure?

Comments

1. Might it be useful to indicate expressly in the rules that nothing in the rules limits or otherwise detracts from the powers of the sheriff arising by virtue of his or her office? An incidental benefit of this would be avoidance of any misplaced arguments (and even appeal points) in relation to a perfectly competent order by the sheriff which did not happen to meet any of the existing provisions in the Part 1 Section 7 listing of powers.

2. Separately, although by no means unrelated, it is noted that the rules do not make it clear that the sheriff has the power to make orders in relation to the recovery of evidence/documents from third-party havens, e.g. specification procedure (whether by commission and diligence or alternative procedure). While it is understandable that these do not lend themselves to significant simplification, the option to seek orders in this connection is important, and there is a real risk to access to justice, and the proper determination of issues if parties are not aware of the option (even presuming the right still exists at common law, irrespective of omission from the rules). It is noted that 7.2 is clearly focussed on things “necessary to determine the dispute” and that is more restricted/restrictive than may be of assistance to the overall resolution of the case, or in facilitating the effective presentation of the parties’ respective positions. And Rule 7.1 is clearly focused on orders to the parties, not third parties.

It is noted that both the current summary cause and small claims rules have such provisions.

3. Part 1 Section 3.8 – as drafted is there an ambiguity? Should it perhaps read “A party may be assisted by a lay supporter” to avoid the suggestion that a lay supporter is a joint appointment?

Consultation question 13

Do you have any comments on the approach taken in Part 2: Representation and support?

Comments

1. Is there a lacuna in the definitional split between legal and lay representatives as defined?

It will not be unheard of for a person who is a solicitor or an advocate to be asked, say, by a friend or family member or voluntary organisation where they help out, to assist them (without any remuneration) with a small claim, in circumstances where the solicitor or advocate could not do so professionally (i.e. the solicitor is non-practising, or is employed in the public sector, or there is no instructing solicitor permitting instruction of an advocate).

Such a solicitor or advocate could not act as a legal representative in the professional sense, and would appear excluded from the definition of lay representative, and so could not represent at all. However they could be a lay supporter. Is that aligned with the intended objective?

Consultation question 14

Do you have any comments on the proposed timetable for raising a simple procedure claim?

Comments

No comment

Consultation question 15

Do you have any other comments on approach taken in Part 3: Making a claim?

Comments

No comment

Consultation question 16

Do you have any comments on the flowchart (at Part 4 Rule 2.4) setting out the options available to the responding party when responding to a claim?

Comments

The desire to maintain simplicity is understood. However there may be a slight complication that is not adequately addressed by the four-way split at Part 4 Rule 2.4., or at least in the use of the phrase “admit the claim” as the head question for the respondent.

The option of a counterclaim is, by the format of the rules, available to one who denies “all the claim”. What about one who “admits the claim”, per se, i.e. they admit the accuracy of the claimant’s position, but lawfully and properly refuse to pay by virtue of the application of compensation (a “set-off”) which includes, potentially a counterclaim if it exceeds the value of the claim?

It perhaps comes down to whether the rules are clear enough about what “admitting all of the claim” means – not just accepting the claimants narration of facts and circumstances, but that the money claimed (or other order sought) is not resisted.

As it stands there may be a danger that a responding party “thinks” they admit a claim and so cannot/should not lodge a counterclaim, when in fact they could (in the sense that they don’t actually admit payment is due, only that the claimant’s narration of that side of things is accepted.)

Consultation question 17

Do you have any other comments on the approach taken in Part 4: Responding to a claim?

Comments

There is no provision for the claimant responding to a counterclaim.

See comment re question 20 below.

Consultation question 18

Do you have any comments on the approach taken in Part 5: Sending and service?

Comments

No comment

Consultation question 19

Do you have any comments on the proposed procedures for settlement and for undefended actions?

Comments

No Comment

Consultation question 20

Do you have any comments on the proposed model for case management conferences?

Comments

1. It may be appropriate to specify that case management can or will deal with any matters that arise as a result of the lodging of the response and or any counterclaim in that these may raise matters that the claimant has not dealt with in the claim form, as well as raising issues or requirements in connection with further documents to be used in evidence or further witnesses not listed in the original claim or response forms.

The amendment procedure of Part 8 rule 6 is not ideally suited to the claimant's response to new issues raised by the response or a counterclaim as it allows for objection by the opponent to the effect of excluding amendment, as well as the permission of the court, and is more or a distinct process, with possible distinct expenses ramifications, even in simple procedure.

2. As indicated previously at Q/Response 12(2) there is no provision anywhere in the rules for formal recovery of documents by way of specification/commission, etc. The need for procedure to deal with the recovery of documents in the hands of havers, whether parties or third parties is essential, and simple procedure rules should make adequate provision (as the summary cause and small claims rules did). This should include the usual provision for confidentiality protections.

Consultation question 21

Do you have any other comments on the approach taken in Part 6: The first consideration of a case?

Comments

No comment

Consultation question 22

Do you have any comments on the approach taken in Part 7: Orders of the sheriff?

Comments

See comment at question 20 for point about procedure for recovery documents. Presumably this is something that could be covered by orders.

Consultation question 23

Do you have any comments on the proposed model for freezing and unfreezing cases?

Comments

No comment

Consultation question 24

Do you have any other comments on the approach taken in Part 8: Applications by the parties?

Comments

No comment

Consultation question 25

Do you have any comments on the approach taken in Part 9: Documents and other evidence?

Comments

- 1. Under reference to prior comments there should be more scope for parties to give notice of, and use, further documents that they may learn about or uncover once the case has started, or to respond to new matters arising, and that they could not refer to in their originating documents, without having to use the dispensation of the sheriff under rule 2.3, but always providing adequate notice has been given.**
- 2. As above, there should be provision for recovery of documents from party or third party havers, and also for evidence on commission. Se Q12 and 22**

Consultation question 26

Do you have any comments on the approach taken in Part 10: Witnesses?

Comments

Other than as arising in previous comments re witnesses (at q.20(1), no further comment.

Consultation question 27

Do you have any comments on whether the detailed provisions on documents, evidence and witnesses are necessary in the Simple Procedure Rules?

Comments

Yes they are necessary, but do not go far enough for the reasons stated above.

Consultation question 28

If you think that any of this provision could be dispensed with (or any additional provision is necessary), please identify that provision.

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| Comments |
| No comment |

Consultation question 29

Do you have any comments on the approach taken in Part 11: The hearing?

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| Comments |
| No comment |

Consultation question 30

Do you have any comments on the approach taken in Part 12: The decision?

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| Comments |
| Should there be provision about expenses, and what can happen, or what parties can ask for/what the court can order, both where there is legal representation and where a party litigant wins? |

Consultation question 31

Do you have any comments on the approach taken in Part 13: Other matters?

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| Comments |
| No Comment |

Consultation question 32

Do you have any comments on the approach taken in Part 14: Appeals?

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| Comments |
| No comment |

Consultation question 33

Do you have any comments on the approach taken in Part 15: Forms?

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| Comments |
| No comment |

Consultation question 34

Do you have any comments on any individual forms?

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| Comments |
| Response form – the general trend elsewhere in the suite of forms is for tick-boxes to be on the right side of the page. On the response form the tick boxes are on the left – should they be moved to the right? |
| There is no order form for a specification of documents or recovering documents from a haver, etc. (Including also provisions about confidentiality). See 12, 22 and 25 |

Consultation question 35

Do you have any comments on the proposal to include standard orders in the rules?

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| Comments |
| No comment |

Consultation question 36

Do you have any comments on the terms of the standard orders included in the draft rules?

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| Comments |
| No comment |

Consultation question 37

Do you have any comments on the approach taken in Part 18?

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| Comments |
| No comment |

Consultation question 38

Do you have any other comments on the draft Simple Procedure Rules?

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| Comments |
| No further comment |