

ANNEX B CONSULTATION QUESTIONNAIRE

Consultation question 1

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

<p>Comments</p> <p>Shelter Scotland is supportive of splitting the Simple Procedure Rules into two sets of rules. We are particularly supportive of there being special claims rules for actions for the recovery of heritable property, however, we note with concern that the Scottish Civil Justice Council do not intend to consult on the content of these. Large volumes of summary cause heritable cases call in civil courts on a regular basis and in some courts the heritable court can take up almost a whole day of the court's time. Heritable actions are actions for ejection, which can have severe consequences for responding parties and their families. This can involve interferences with parties' human rights, articulated well in <i>McCann v UK</i> (2008) 47 EHRR 913: 'The loss of one's home is the most severe form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under [article 8], notwithstanding that, under domestic law, his right of occupation has come to an end.' Given the volume, importance and complicated nature of heritable cases we strongly encourage consultation on this particular set of special claim rules with stakeholders who have experience of actions of this type.</p> <p>Shelter Scotland strongly recommends that the Scottish Civil Justice Council consults separately on the special claims rules for heritable cases.</p>
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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?

Comments

“Claim”: Shelter Scotland is of the view that the use of the word “claim” to describe the pursuer’s legal action could cause confusion in actions for eviction and recovery of possession of heritable property. In rent arrears cases standard practice is for a landlord to seek both an action for payment in respect of the arrears and an action for ejection to secure the vacant possession of the property. While the word “claim” may suit the part of the action which refers to the payment of arrears, it does not accurately reflect the nature of the action which seeks to give the landlord the power to remove the occupier from the property in question. This could lead to confusion in certain circumstances, particularly for party litigants, who may admit the part of the claim which relates to the arrears – agreeing to pay some amount towards these – while unwittingly admitting the pursuer’s case in relation to the eviction. For matters such as these we feel that “case” better-reflects the issues of both arrears and ejection.

“Responding party”: Shelter Scotland is of the view that “defender” is a more user-friendly term when it comes to describing the position of the party responding to the claimant’s case.

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

Consultation question 5

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

Comments

The numbering and layout of the rules is, in general, sensible.

Consultation question 6

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

Comments

In relation to how the rules should be presented on the internet Shelter Scotland makes the following recommendations:

1. The Scottish Civil Justice Council should adopt a similar approach to presenting the Simple Procedure Rules on the internet as Shelter Scotland take in presenting our online advice on housing and homelessness. See here for a link to Shelter Scotland's advice webpages:

<http://www.shelterscotland.org/renting-privately>

2. The Scottish Civil Justice Council undertake usability testing on both the draft webpages and the final copy to ensure that court users can navigate the website hosting the rules effectively.

Consultation question 7

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

Comments

In general the approach to headings in the draft rules is sensible. There is a risk, however, that by presenting the rules as questions users may not be able to identify the particular question they have in relation to their case. In some instances more general headings may better-aid users to locate the relevant information they seek.

Consultation question 8

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

Comments

Shelter Scotland recommendation that, given the severity of the sanction of eviction Shelter Scotland, all cases where a pursuer is seeking an action for eviction should call in court.

Shelter Scotland have no difficulty in case management conferences taking place in heritable cases. However, we feel that it is important for there to be provision for such case management conferences/procedural hearings to be continued on more than one occasion at the Sheriff's discretion before a Proof/Evidential Hearing is assigned. We appreciate that case management conferences can be helpful to focus minds.

In our experience, most heritable cases can be resolved by way of an agreement between parties and do not normally require to be determined by a Sheriff at a Proof/Evidential Hearing. However, tenants normally require sufficient time to resolve their difficulties to the satisfaction of their landlords. For example, tenants regularly require time to resolve their benefit problems and seek money advice. It is therefore important that Sheriffs have discretion to continue a case on more than one occasion to avoid unnecessary Proofs/Evidential Hearings being assigned.

Consultation question 9

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

Comments

Shelter Scotland welcome the approach to alternative dispute resolution. In particular, as we set out in our answer to Question 8 above, we are of the view that case management should form part of heritable cases to ensure that parties take all steps they can to come to an agreement in relation to the repayment of arrears. This is essential both in terms of court time but also to ensure that eviction is avoided wherever possible, ensuring that this sanction is only used as a last resort.

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

Shelter Scotland caution against the emphasis on actions for the recovery of possession of heritable property being resolved as quickly as possible, we are concerned that that this could lead to a rise in evictions across all tenures. Consequently, we recommend that the special claims rules for heritable actions take into account the severity of the sanction of eviction, in particular where an eviction is being sought due to rent arrears an emphasis should be placed on enabling pursuers and defenders to come to arrangements via negotiation.

Consultation question 11

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

Comments

Shelter Scotland welcome the emphasis on negotiation and alternative dispute resolution. In particular we are of the view of that in actions for the recovery of possession of heritable property due to rent arrears should be resolved by negotiation and alternative dispute resolution, avoiding eviction wherever possible.

Consultation question 12

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

Comments

In relation to actions for the recovery of heritable property we strongly recommend that sheriffs do not decide a dispute without a hearing (Rule 7.7) given the severity of the sanction of eviction.

Consultation question 13

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

Comments

Shelter Scotland welcome additional clarity around the process for appearing at court as a lay representative. However, we fear that the Simple Procedure Rules may simply add an extra layer of rules and administration for lay representatives. We recommend that a comprehensive review of the rules governing lay representation and support is carried out.

Consultation question 14

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

Comments

No comment on this section.

Consultation question 15

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

Comments No comment on this section.

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?

In relation to rent arrears cases Shelter Scotland is concerned that by asking the responding party whether they admit the claim made against them, they could be put at risk of eviction where a pursuer is seeking both an action for payment and an eviction order. This is because the responding party will have admitted liability for the arrears. For example, where a responding party offers to pay off arrears but does not want a decree of ejection to be granted. Shelter Scotland strongly recommend that in the special rules for heritable cases a specific response form is drawn up which enables a responding party to request that the part of the case which relates to arrears is settled, and the part which relates to the action for eviction is defended. Shelter Scotland would be happy to be consulted on the content and layout of such a form.
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Consultation question 17

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

No comments.

Consultation question 18

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

No comments.

Consultation question 19

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

No comments.

Consultation question 20

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

Shelter Scotland welcome the proposed model for case management conferences. This should be a key factor in seeking to resolve rent arrears actions too, avoiding the use of hearings as a debt management tools wherever practicable and seeking to agree repayment arrangements between parties as early in the process as possible.

Consultation question 21

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

With respect to rent arrears actions Shelter Scotland would like to see a strong emphasis on negotiation at first consideration with the use of case management conferences wherever practicable. Ideally we would want to see rent arrears cases automatically referred for case management, avoiding eviction wherever possible.

Consultation question 22

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

Comments

No comments.

Consultation question 23

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

Comments No comments.

Consultation question 24

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

Comments No comments.

Consultation question 25

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

Comments No comments.

Consultation question 26

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

Comments No comments.

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?

No comments.

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.

Comments

No comments.

Consultation question 29

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

Comments

Shelter Scotland strongly welcomes the emphasis on resolving disputes by way of negotiation and settlement. However, we are concerned that where this fails the emphasis on resolving the dispute at the hearing could have significant consequences for people who may be at risk of losing their home. Where negotiation breaks down the responding party would need to be ready for the case to run at the hearing, with documents lodged, witnesses called etc. In situations such as this we would encourage the rules to enable sheriffs to continue cases, in particular where responding parties are not prepared for cases to run in full on the day of the hearing.

Consultation question 30

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

There is a need for clarity in relation to the hearing specified in Rule 6.1. What is to be expected of the parties at this hearing? Will this in effect be a proof, with parties required to provide evidence and call witness etc?

Consultation question 31

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

Comments No comments.

Consultation question 32

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

Comments No comments.

Consultation question 33

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

Comments No comments.

Consultation question 34

Do you have any comments on any individual forms?

Comments In relation to the Simple Procedure Response Form Shelter Scotland are of the view that a response form specific to heritable actions should be drawn up, in particular for actions for rent arrears. We recommend that this: 1. Enables the responding party to make arrangements to repay arrears without admitting liability for the whole claim, i.e. not just the action for payment but also the action for eviction. 2. Removes references to witnesses and documents, or at least makes it clear that documents and witnesses can be introduced later in the proceedings. This is because many people who are threatened by eviction will not have the time, or knowledge, to carry out all the necessary preparations for a case before the first hearing takes place. In general the reference to the various forms of representation in part C.1 could cause confusion by using the wording "I want" as this could be interpreted as a request on behalf of the responding party. A better form of words might be "I intend to be represented by someone from an advice or advocacy organisation who is not a solicitor".

Consultation question 35

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

Comments No comments.

Consultation question 36

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

Comments No comments.

Consultation question 37

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

Comments No comments.

Consultation question 38

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

Comments No comments.
