

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?

We agree with splitting the Simple Procedure Rules into two set of rules.

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~~

We prefer the term “respondent”. We think the SCJC correctly assume that it is unnecessary to describe the pursuer as the “claiming party” as the term “claimant” is either well-known or its meaning would be understood intuitively. The same is true, we think, of “respondent”. It is the term used in some forms of court procedure already, and also in the Employment Tribunal, where appearances by unrepresented parties are commonplace.

- *Freeze – for sist*

Content Not content** ~~No Preference~~

The term “freeze” is used in the rest of the UK in the term “freezing injunction” (for preventing the dissipation of assets by a defendant). There is a risk of confusion, either from those involved with proceedings both within and outwith Scotland, and perhaps more commonly, with those who attempt to research court procedure on the internet. We would suggest “pause” and “unpause”.

Consultation question 3

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

We have no comment beyond the specific issues raised in this response.

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

We have no comment beyond the specific issues raised in this response.

Consultation question 5

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

The method of numbering (Dividing each Part into numbered paragraphs starting at “1.1”) is unwieldy, confusing and potentially problematic. The rules are of such length that users will often just check the particular rule that they are concerned with at any particular point (often online) and print this off. A reference simply to the rule number, without reference to the Part, is liable to cause confusion. A party might cite, eg, “rule 2.1” without it being clear which rule 2.1 is meant.

This could be avoided by adding the Part number to the numbering of the rules, in the manner presently done with chapters in the rules of the sheriff court and Court of Session. That would still allow new rules to be added to an end of a part (or a division with a part), without disrupting the numbering of provisions, as anticipated by the SCJC. Perhaps the Parts could be denominated by letters, so that Part 1 became Part A. Thus, employing this method, the rule 2.1 in Part 2 would be denoted as Rule B.2.1.

Whilst we appreciate the concern about amendment, we think that rules should be added in the manner that makes most logical sense. So if a new collection of rules cannot be conveniently tacked on at the end of an existing part, then the present practice should be continued of inserting a new part between existing parts. We doubt whether party litigants would have any appreciable difficulty in referring to Part 14A, &c. We do not see that our suggestion for incorporating a reference to the Part in the number for the rule has any implications for ease of amendment.

Consultation question 6

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

We agree with the suggestion that the rules should contain hyperlinks to related provisions, forms, &c.

Consultation question 7

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

We agree with the SCJC's suggested approach to headings.

Consultation question 8

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

We agree with the SCJC's suggested approach to minimising the number of hearings.

Consultation question 9

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

We have no comments.

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?

We think the status of Part 1, and the principles in rules 2.1-2.5 especially, is unclear and requires to be clarified, as we explain below in answer to question 12.

Consultation question 11

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

We think there should be slightly more expansive and explicit references to parties and representatives' duties. Rules 5.3 and 6.2 should state that persons must not *knowingly* make *untrue or misleading* statements to the court, or the parties, rather than just referring to an obligation to be "honest". Rule 6.6 should refer to the obligation not to make a claim or argument which *knowingly* has no basis, and the obligation should extend to not making claims or arguments without a *factual* basis as well as a *legal* basis.

We suggest deleting rule 6.10. Solicitors and counsel will have their obligations set out by the Law Society of Scotland and the Faculty of Advocates. For non-legally qualified representatives, we think it is too much to expect that they will in practice be able to properly reconcile such an obligation with their obligations to their client.

As rules 7.12 and 7.13 (transfers to another court) have been included in Part 1, the power of the sheriff under Part 13, para. 2.1 to transfer the case out of simple

Consultation question 12

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

The purpose of Part 1 is not clear from the face of the rules. The intention appears to be that it is a summary description of the nature, principles and terminology of simple procedure. It might be that Part 1 does not contain rules in the strict sense, intended to stand alone and to be applied directly, but rather statements which explain or guide the application of other rules. This is especially so with rules 2.1-2.5 on the one hand, which are said to be "principles", and on the other hand, for example, rules 7.7 and 7.10, which seem to set out substantive stand-alone powers. Their status and their relationship with the other rules should be explicitly set out. The function of Part 1 should be stated at the beginning, in like manner as is done with the other Parts.

Consultation question 13

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

We think rule 4.5 should make clear that the sheriff could prevent a lay representative from acting or continuing to act for reasons other than financial interest, previous convictions or status as a vexatious litigant as rule 4.6 might be taken to suggest. For example, we consider that a representative's behaviour in the conduct of a case might demonstrate his/her unsuitability to continue as a representative.

The relevant form is missing a question regarding the potential representative's previous convictions.

We think the form should at least also draw attention to the relevant provisions of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, as some (but not all) spent convictions must be disclosed. This is intended to be a procedure used mainly by non-lawyers, and we apprehend that the blanket reference to disclosure, without further guidance, may lead to some confusion and anxiety.

Consultation question 14

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

We have no comment on the timescales envisaged.

We think it would be simpler to calculate the deadlines counting forwards from the date on which the claim is registered, rather than backwards from the date of first consideration.

Consultation question 15

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

Although Part 3 is said to be about “Making a claim”, rules 2.1 to 2.6 are actually an overview of the procedure that would be of relevance to both claimant and responding party, and refer to actions required by both of those parties. It would be preferable to have this set out in a separate Part.

We think Step 1 at rule 2.1 should refer in terms to the claimant completing the form legibly, with the information referred to under the heading “What has to go in the Claim Form” and paras 3.1 – 3.7, and to sending in two copies of that completed form.

We think cross-references in the far-right column do not read easily. We think this illustrates the disadvantages of the numbering system adopted which we have discussed in our answer to question 5.

We also think a separate table giving a worked example of how to complete the form would assist those not used to completing legal documents. We think this is preferable to the method employed in the draft of interspersing within rules 3.1-3.7 references to an example.

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?

We have no comments on the flowchart.

Consultation question 17

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

As with the claim form, we think it would be helpful to have a worked example of a response set out in a separate table.

Also, in rule 3.3, we think this should ask for any details as to any alternative way the responding party might offer to settle the dispute, *eg* replacement or repair of faulty goods.

Consultation question 18

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

We have no comment.

Consultation question 19

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

We have no comment apart from one point about drafting.

At rule 4.3, in the phrase “before from the date”, the word “from” should be omitted.

Consultation question 20

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

We have no comment.

Consultation question 21

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

We wonder whether 6.4 should be amended. While we note the concerns expressed in *ASC Anglo Scottish Concrete Ltd v Geminax Ltd* 2009 SC 93, we think that consideration ought to be given to whether, in the interests of the efficient management of business, the Summary Sheriff should have power to dismiss a case at the case management stage where, having heard parties, it is clear that the case is manifestly without foundation.

Consultation question 22

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

In our view, rule 2.2 should be amended so that “may” is replaced with “must”. Where lay parties or unqualified representatives are involved we think all orders should be intimated or confirmed in writing, so that there can be no confusion about what is required of them.

In rule 2.4, the reference to Part 17 should be to Part 16.

Consultation question 23

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

We have no comment.

Consultation question 24

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

We have no comment.

Consultation question 25

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

We suggest changing rule 1.1 to the following: “This part is about how parties may use documents and other evidence at a hearing and when and how they should be lodged.” (new wording underlined).

We think the order of the rules would be improved by being re-ordered as follows: 1.1; 3.5; 3.2-3.4; 2.1-2.3. It makes sense to address what needs to be done with documents in advance of the hearing first, then address what can be brought to the hearing. Also, the deadline for lodging being crucial, it makes sense to set this out as the first rule.

We think rule 2.3 should be rephrased along these lines: “Any document can be lodged but if it is not lodged before the hearing (in accordance with para 3.5) the party will need permission from the court to lodge it at the hearing”.

We think rules 3.2-3.4 should make provision for photographs to be provided for bulky productions (eg defective goods), and allow the sheriff to dispense with its production in court and to allow its inspection elsewhere.

Rule 3.5 should be re-worded as follows: “All documents and other evidence which a party wants to use at a hearing must be lodged with the court at least 14 days before that hearing.” (new wording underlined).

In rule 5.4, after “14 days” there should be added the words “the sheriff clerk”.

Consultation question 26

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

We suggest rewording rule 1.1 so that it reads: “This Part is about the citation of witnesses to ensure their attendance at hearings.” (new wording underlined) This helps explain the meaning and purpose of citation.

We think definitions of “child” and “vulnerable witness” should be provided.

Regarding rule 8.2, we think there should be provision for parties to provide a list of questions to be asked by the independent person, or topics to be covered by them, to be approved by the sheriff. The rule is also silent on whether parties’ representatives can be present; this should be clarified one way or another.

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?

We have no comment to make beyond our answer to questions 25 and 26.

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.

We do not think any of this provision can be dispensed with. We have made suggestions for additional provisions in our answer to question 26.

Consultation question 29

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

We think guidance should be provided as to how they will be expected to conduct the hearing, how evidence should be taken from witnesses, when documents should be referred to, and so on. It might be appropriate to warn of the evidential consequences of not questioning a witness on a relevant point, or a relevant document, that a party is relying on.

Consultation question 30

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

We have no comment.

Consultation question 31

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

In our view, considering the significance of the matters covered by Part 13, there should be specific reference to its contents in the heading to ensure that the parties are alerted to its importance.

Consultation question 32

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

We have no comment.

Consultation question 33

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

We have no comment.

Consultation question 34

Do you have any comments on any individual forms?

In our answer to question 13, we have commented that the lay representative form lacks a question about previous convictions. We have no other comment.

Consultation question 35

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

We have no comment.

Consultation question 36

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

We have no comment.

Consultation question 37

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

We have no comment.

Consultation question 38

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

We have no other comments.