FORUM OF INSURANCE LAWYERS

Informing Progress – Shaping the Future

A Response by the Forum of Insurance Lawyers to the Scottish Civil Justice Council's Consultation on the draft Simple Procedure Rules

March 2016

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FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

The consultation has been drafted by a working group including Lynn Livesey of Brodies Solicitors; Karina Manson of bto solicitors; Garry Ferguson of bto Solicitors; and Laura Brain of Brodies Solicitors, following consultation with the membership in Scotland.

Any enquiries in respect of this response should be addressed initially to:
Shirley Denyer
Shirley Denyer LLP
FOIL Knowledge Services (Consultant)

shirley.denyer@foil.org.uk

2 Old College Court
29 Priory Street
Ware
Hertfordshire
SG12 0DE
0844 5567213

FOIL is content for its response to be made available publically and is happy to be contacted again on the issues.

A Response by the Forum of Insurance Lawyers to the Scottish Civil Justice Council's Consultation on the draft Simple Procedure Rules

FOIL notes that this consultation is concerned only with the 'core' Simple Procedure Rules as they are described in the consultation paper – the rules that will apply to straightforward actions for payment and delivery, and actions ad factum praestandum. A "*more complex, case-flow approach'* is to be adopted for more complicated claims, which will be set out in the Simple Procedure (Special Claims) Rules.

FOIL is concerned that, as indicated in the consultation paper, no further consultation on the Special Claims Rules is planned, as they will adopt the "*style and approach*" of the draft Simple Claims Rules and it is felt there is *"less room for innovation in the drafting of the rules for the special claims procedures."*

FOIL believes that, in addition to this consultation, there should be an opportunity to comment on the draft Simple Procedure (Special Claims) Rules when they become available.

Major rule change is a ripe source of lacuna and unintended consequences. Following the introduction of the new rules in England and Wales, as a result of the Jackson recommendations, the CJC in England and Wales found itself dealing with a large number of issues which became known as the "Jackson snagging list", highlighting how easily loose ends and tiny variations in phrasing can create real problems in the implementation of reform.

By way of example of the problems, FOIL members in England and Wales have high-lighted problems with the rules on the new Provisional Assessment procedure. Without wishing to give unnecessary detail, the short excerpts below, from a letter from FOIL Costs Sector Focus Team to the CJC, illustrate the problem:

"Issue 1: What documents should be returned by the court?

There is a discrepancy between the rule and the Practice Direction.

Rule 47.15(7) says:

When a provisional assessment has been carried out, the court will send a copy of the bill, as provisionally assessed, to each party with a notice stating that any party who wishes to challenge any aspect of the provisional assessment must, within 21 days of the receipt of the notice, file and serve on all other parties a written request for an oral hearing.

Practice Direction 47 14.4(2) says:

Once the provisional assessment has been carried out the court will return Precedent G (the points of dispute and any reply) with the court's decisions noted upon it. Within 14 days of receipt of Precedent G the parties must agree the total sum due to the receiving party on the basis of the court's decisions.

The rule requires a provisionally assessed bill to be sent, whereas the PD requires the completed Precedent G to be sent.....

Time limits. Also, there are different triggers. The time to request an oral hearing under the rule runs from receipt of a notice of the right to challenge; whereas the time to agree the arithmetic under the Practice Direction runs from the receipt of the Precedent G.

The time limit under the Practice Direction is thrown into confusion when the court sends Precedent G only to the claimant, so that the claimant has to forward it to the defendant. The parties thus have different deadlines for completing a task that requires them to liaise.

Issue 2: filing papers

There is confusion in Practice Direction 47 concerning what should be filed for a provisional assessment. Under Practice Direction 47 14.3(b) (quoted below), the documents to be filed are those listed in Practice Direction 47 13.2. They do not include correspondence and attendance notes. However, Practice Direction 47 14.2 incorporates Practice Direction 47 13.12 which lists documents to be filed which do include correspondence and attendance notes. Often a claimant just files the documents under Practice Direction 47 13.2 and waits to see if the full file is requested under Practice Direction 47 13.12.

The confusion arises because the rules were drafted originally to reflect a two stage detailed assessment process with an application and then a hearing. Practice Direction 47 para 14 attempts to splice the two stages together, but that has created the uncertainty which results in only part of the file being available for provisional assessment. On the basis that the costs officer should have the full file available, and that was intended by leaving in Practice Direction 47 13.12, then a tweak is needed to PD47 14.3(b).

Despite the rule changes in England and Wales having been introduced in 2013, in the past week there has been a Court of Appeal decision in the case of *Broadhurst v Tan*, to clarify how the new rules on costs fit together. The issue rests on the interpretation of a few lines of the rules but a very significant number of cases have been affected, with contrary decisions from Circuit Judges around the jurisdiction.

Whilst FOIL appreciates the need for the new rules to be developed and introduced to a workable timeframe, in view of the problems that can arise it believes that time should be found for a consultation on the Special Claims Rules.

An issue of particular concern with the draft Simple Rules included within the consultation (and therefore also with the Simple Procedure (Special Claims) Rules to follow) is the issue of expenses. It is vital that process and expenses are considered together: behaviours are inevitably driven by expenses and the court procedure needs to take account of the expenses rules to avoid introduction of perverse and unintended incentives.

FOIL suggests the opportunity should be taken to cap all recoverable expenses as part of the new regime.

Q1 Do you have any comments on the approach taken to splitting the Simple Procedure Rules into two sets of rules?

In addition to the issues highlighted above, regarding the need to consult on both sets of rules it is important that the expenses rules are considered in tandem with this approach. Issues such as the application of Qualified One Way Cost Shifting in Simple Procedure for personal injury actions have to be addressed. It would be highly detrimental if, as a result of the reforms, claims became more expensive. FOIL therefore strongly recommended a further consultation is conducted for Simple Procedure for Special Claims.

Q2 Are you content with the use of the following terms in the rules?
Claim – for a standard simple procedure case
Claimant –for pursuer
Responding Party – for defender
Freeze – for sist

Whilst use of the words 'Claim', 'Claimant' and 'Freeze' would make the process easier for lay users to understand, FOIL believes that 'Defender' is a straightforward term which should be retained.

Q3 Do you have any comments on the approach taken to updating hard to understand terminology in the simple procedure rules?

In principle, FOIL agrees that terminology ought to be easy to understand to make the court process more accessible.

Q4 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?

FOIL considers that the use of "Responding Party" is unnecessary. It would propose that the use of "defender" is maintained. It is not aware of any evidence that this terminology is hard to understand.

FOIL considers the words "absolves" and "absolvitor" are too complex for a lay person. If used, FOIL suggests an explanation is provided, such as at the end of 7.5 the words "which means the action cannot be raised against them in the future" are added. Reference is also made to answer 37.

Q5 Do you have any comments about the approach taken to the numbering and layout of the rules?

It would be helpful for parties to be able to click on a hyperlink contained in the relevant section of rules which directs them to the appropriate form. This would minimise the risk of the wrong form being completed.

Numbering of the forms in chronological (or anticipated chronological) order would also be useful.

Q6 Do you have any comments about how, and where, the rules should be presented on the internet?

The rules should be easily identifiable on the home page of the court's website to allow anyone unfamiliar with the court rules to obtain a copy without any difficulty. In addressing this, the courts may avoid having to field a number of telephone calls from parties seeking to locate a copy of the relevant rules. Reference is made to answer 5 regarding hyperlinks.

Q7 Do you have any comments on the approach to headings in the Rules?

FOIL suggests the heads of the rules should be numbered. In addition, FOIL suggests the forms and standing orders would also benefit from being numbered.

Q8 Do you have comments on the approach taken to minimising the number of hearings?

FOIL supports the approach taken to minimising the number of hearings. FOIL agrees that hearings should be restricted to only those which are strictly required to resolve the dispute. Examples of unnecessary hearings currently fixed under the Summary Cause procedure are the automatic fixing of Incidental Application hearings prior to establishing whether the application is opposed and the need for both a Diet of Assessments and Diet of Approval. Under the current regime, often hearings take place even when parties are in agreement as to how the matter should proceed. This results in unnecessary use of the court's and parties' time and incurs expense. Unless the court considers there is a requirement for judicial intervention, such hearings should be avoided. Further comment is provided in answer 24.

Q9 Do you have any comments on the approach taken to alternative dispute resolution in the rules?

FOIL has no comments to make.

Q10 Do you have any comments on the proposed principles of simple procedure as set out in Part 1 Rules 2.1 – 2.5?

FOIL welcomes the principle that parties should normally only have to come to court when it is necessary to do so to resolve their dispute. Reference is made to answer 8.

Q11 Do you have any comments on the proposed duties on Sheriffs and Parties and Representatives?

At 6.6 representatives must not make any claims or arguments which have no legal basis. Rule 4.3 in part 3 of the draft rules provides that the sheriff clerk

must ask for the approval of the sheriff before entering a Claim Form in the Register of Simple Procedure Claims if… (c) the sheriff clerk thinks that the claim requires the attention of the sheriff. FOIL proposes that additional wording is inserted following the words "attention of the sheriff" as follows "in particular if the competency of the claim as presented is in question".

Q12 Do you have any comments on the approach taken in Part 1: The Simple Procedure?

At 7.1 it is noted the sheriff may give orders to the parties either orally or by written order. FOIL submits that intimation of written orders issued by the sheriff must be received by each party within a reasonable time period of being issued. It may be best that written orders are sent by email in the first instance on the day that they are issued. If any party does not have an email address then written orders must be issued by post within e.g. at least 3 days of being made to avoid any unnecessary delays.

Q13 Do you have any comments on the approach taken in Part 2: Representation and Support?

At the outset it must be made clear by the parties whether they intend to represent themselves or wish to involve legal representation/a lay representative. Any person either principally instructed or involved in their capacity as lay representative must provide their name, address and contact details such as an e-mail address in order that all parties are clear who to contact. In the absence of such information being provided, the claim ought not to proceed. We therefore agree with the proposed section B of the Claim Form.

Q14 Do you have any comments on the proposed timetable for raising a simple procedure claim?

The proposed timetable seems in order but the intimation of written orders issued by the Sheriff must be received by each party within a reasonable time period of being issued. It may be best that written orders are received by email in the first instance on the day that they are issued. If any party does not have an email address then written orders must be issued by post within e.g. at least 3 days of being made to avoid any unnecessary delays. The court must have sufficient resources in order to implement this.

Q15 Do you have any other comments on the approach taken by Part 3: Making a Claim?

The last date for service and last date for a response should be clearly marked on the claim form to ensure compliance with draft rules 2.4 and 2.5. This will assist to avoid response forms being out of time. FOIL suggests parties should be issued with a document of all court deadlines to ensure the rules are complied with.

For expediency and to provide fair notice to a responding party (defender) FOIL submits that any documents being relied upon and listed on the claim form

should also be lodged with the court and intimated to the defender along with the claim form at the time of service. Similarly, a responding party (defender) should do the same.

Q16 Do you have any comments on the flow chart at Part 4 (Rule 2.4) setting out the options available to the responding party when responding to a claim?

It should be made clearer in the response form that the responding party (defender) is not obliged to complete and return the form in person, but that they can opt to have this done on their behalf by their appointed representative.

There appears to be no option for the responding party (defender) to ask for more time to respond to the certain questions asked in a response form. FOIL considers that it may, in some cases, be unrealistic to expect a responding party to be in a position to list their witnesses and documents to be relied upon when drafting the response form. In the absence of an option to seek more time to respond, there ought to be a section within the response form to allow the responding party (defender) to explain why they are unable to provide the names of all witnesses/documents to be relied upon at the response stage.

FOIL considers there should be additional options available to a responding party when returning the response form as follows:

(a) an option available for admitting liability but disputing the value of the claim. The only available options at the moment are either disputing the claim in full or admitting it and making a time to pay application, neither of which are correct where only the amount payable is in dispute; and

(b) an option for the Responding Party to seek to introduce a Third Party into the court action if appropriate. The draft rules are currently silent on the potential for Third Party Procedure.

For completeness, while claims for personal injury actions fall out-with the scope of this consultation, a responding party (defender) may need to instruct e.g. a medical report. The identity of the expert preparing the medical report may not be known at the time of drafting the response form and it is unlikely the responding party (defender) will have their medical report at the time of lodging any response form for intimation. FOIL would submit that further time is allowed in the claim timetable to allow parties to further investigate the claim following the response form being lodged with the court for special claims.

Q17 Do you have any other comments on the approach taken in Part 4 responding to a claim?

Guidance ought to be issued on the claim form/response form to advise what ought to be done in the event that a response form is late. There also ought to be a provision in the draft rules to allow a responding party to seek to lodge a response form, although late, either by consent of the claimant or on cause shown.

Q18 Do you have any comments on the approach taken in Part 5: Sending and Service?

The identity and contact details of any principal parties/representatives ought to be established at the outset of any court action. Addresses and e-mail addresses ought to be provided to ensure an efficient progress of any court action. In the absence of such information being provided, the claim ought not to proceed. We therefore agree with the proposed forms.

Q19 Do you have any comments on the proposed procedures for settlement and for undefended actions?

FOIL has no comments to make.

Q20 Do you have any comments on the proposed model for case management conferences?

FOIL members' past experience of case management conferences has been positive and so they welcome their use. In FOIL members' experience, active engagement of the sheriff focuses parties' minds and can lead to narrowing the issues in dispute at an earlier stage. FOIL suggests that cases management conferences ought to be capable of being conducted by telephone/video conference to restrict the courts and parties' time and expense.

Q21 Do you have any other comments on the approach taken in Part 6: The first consideration of the case?

FOIL would encourage the use of telephone and video conference facilities for hearings to avoid parties having to attend court in person.

Q22 Do you have any comments on the approach taken in Part 7; Order of the Sheriff?

FOIL would propose the following amendment of rule 2.1 "orders are the way that the sheriff uses their power to manage and decide a case".

FOIL would propose the following amendment of rule 2.5 "the sheriff may give any order" and wording to be included to encourage sheriffs to use the standard orders to encourage consistency. Reference is made to answer 35.

Q23 Do you have any comments on the proposed model for freezing and unfreezing cases?

FOIL would propose requiring a party to apply for the case to be frozen for a specific length of time.

Q24 Do you have any other comments on the approach taken in Part 8: Applications by the parties?

FOIL suggests it should be clarified whether Part 8 applies to the current party minuter procedure: FOIL recommends it should apply.

In terms of the entitlement to amend either the Claim Form or Response Form, FOIL suggests that in the event the application is granted, a period for answers should be allowed and thereafter an automatic period of adjustment should be afforded to both parties, in line with the current Court of Session amendment procedure. FOIL would also recommend an automatic period of adjustment is allowed following receipt of the Response Form to enable parties to consider and expand their pleadings. This should result in parties finalising their pleadings at an earlier stage, restricting the need for further amendment and avoiding the consequent delay and expense of the amendment procedure.

Regarding the rules on abandonment of the claim, FOIL recommends a further provision is made for procedure where parties have agreed expenses to avoid the need for an unnecessary expenses hearing. FOIL proposes that where an application to abandon is made with an agreement regarding expenses then the application should be passed to the sheriff to consider. If the sheriff grants the application there would be no need for the case to call in court. The proposed rules and forms do not provide for more than one responding party (defender). Should such a provision be introduced the rules and forms need to be amended to reflect that.

There is currently no provision in the rules to enable either party to bring another party into the court action (i.e. third party procedure). FOIL submits that such a provision should be included in the rules. The entitlement is currently available under the Summary Cause rules. It enables parties to be brought into the one action, thus avoiding further unnecessary procedure and unnecessary expense of a party having to raise a separate court action for recovery/contribution.

Under the current proposed rules there is no general entitlement for a party to apply/make a motion to the court for an order. FOIL recommends such a provision is included. FOIL recommends the current provision under Summary Cause procedure (for Incidental Applications) is not adopted in Simple Procedure or Simple Procedure for Special Claims. The current process of automatically fixing a hearing prior to determining whether the application is opposed causes unnecessary delay and expense. Often applications are heard in court when they are unopposed. FOIL suggests where a party applies to the court for something to be done the procedure should follow the proposed procedure for applications to amend, i.e. the application is made and intimated, if the other party wishes to oppose they must do so within 7 days, after which point the sheriff will consider the application and any opposition and determine whether to grant/refuse the application or fix a hearing to be addressed further on the matter.

Q25 Do you have any comments on the approach taken in Part 9: Documents and other evidence

FOIL suggests the wording in 3.1 "sending them to the sheriff clerk" should be expanded upon to state how the documentation can be sent. The rule should allow for documentation to be lodged electronically.

In FOIL's submission, the timescales proposed for lodging documentation do not assist with settlement and resolution of cases. At present, the responding party (defender) will wish to make a settlement offer, however, they are unable to do

so as insufficient documentation has been produced to support the claim. By only requiring documentation to be lodged within 2 weeks of the hearing, often cases are incapable of being settled until close proximity of the hearing. FOIL therefore proposed that the claimant is required to lodge documentation which they wish to rely upon within 14 days of the Response Form being received. The respondent should be entitled to lodge documentation up to 14 days of the hearing to provide them sufficient time to consider the claimant's evidence and obtain their own.

Both parties should be entitled to apply to the court to vary the deadline for lodging productions. The application should set out the reason why a party needs to vary the deadline. The sheriff can then determine whether to grant/refuse the application on the basis of cause shown. Separate deadlines for productions for each party would be appropriate. This would restrict the ability of another party benefitting from the party's application for which, if they had made an application for variation, would not have satisfied the "cause shown" test.

Q26 Do you have any comments on the approach taken in Part 10: Witnesses?

The current wording of "unable otherwise to arrange for the person to appear" in para 2.1 may be unclear to unrepresented parties. FOIL suggests it may be worth either providing examples of how to arrange and/or explaining the circumstances when a citation might be appropriate (e.g. if concern over whether the witness will attend or if citation is required e.g. by the witness's employer, before they will be granted leave).

FOIL suggests a longer period of time should be provided for the citation of witnesses. FOIL proposes 14 days would be more appropriate to ensure the non appearance of witnesses does not cause unnecessary delay.

There is an extra "for" in 4.3 and an extra "what they are" in 8.4.

Q27 Do you have any comments on whether the detailed provisions on documents, evidence and witnesses are necessary in the Simple Procedure Rules?

FOIL supports the inclusion of these provisions. The rules have been designed with particular focus on parties pursuing/defending their own actions and so, provision of a well-defined structure with greater but simplified information for party litigants/lay representatives will help to ensure parties are clear on what is required of them. For further clarity, FOIL proposes parties are issued with a court timetable – in similar terms to the timetable issued in personal injury cases.

Q28 If you think that any of this provision could be dispensed with (or any additional provision is necessary), please identify that provision.

FOIL has no comments to make.

Q29 Do you have any comments on the approach taken in Part 11: The Hearing?

FOIL suggests the use of the term "the hearing" may cause some confusion for unrepresented parties. Firstly, where appearance at a case management conference has been ordered under rule 6.2, it is possible unrepresented parties will think that appearance at the case management conference is a "hearing" and turn up, for example, with their witnesses.

Further in rule 6.2 of Part 12, a procedural hearing "for consideration of an application to revoke" is also called "a hearing" but is of course entirely different from "the hearing" in Part 11. The Simple Procedure Order of the Sheriff [Response Form received: ordering a case management conference] refers to the Part 11 hearing as "a formal court hearing" which is a different definition that again may confuse unrepresented parties.

FOIL therefore proposes the Part 11 hearing it is renamed "the evidential hearing" and referred to as such where it appears throughout the Rules, standard orders and forms.

In addition, the definition of the Hearing in rule 2.1 of Part 11 does not expressly state that it is at this hearing parties have to attend court with any witnesses and documentary evidence they wish to rely on. Although evidence is referred to in rule 4.4 of Part 11 and covered in the Claim and Response forms, for completeness, it would be helpful to include this in 1.1.

An explanatory section here, or earlier in the rules, as to where a party should stand and how they should address the sheriff would also be helpful.

Q30 Do you have any comments on the approach taken in Part 12: The Decision?

For clarity, FOIL suggests rule 5.5 in Part 12 is amended to say "within 14 days of the date on which the claim was dismissed". This would avoid any dubiety over whether the 14 days started on the date the claim was dismissed or the date the party received notification the claim was dismissed.

Q31 Do you have any comments on the approach taken in Part 13: Other Matters?

In relation to a case transferred out of the simple procedure, no adjustment period is allowed prior to the Options Hearing. It is suggested that an adjustment period, in line with ordinary procedure, should be included.

Q32 Do you have any comments on the approach taken in Part 14: Appeals?

FOIL has no comments to make.

Q33 Do you have any comments on the approach taken in Part 15: Forms?

It would be helpful for parties to be able to click on a hyperlink contained in the relevant section of rules which directs them to the appropriate form. This would minimise the risk of the wrong form being completed.

Numbering of the forms in chronological (or anticipated chronological) order would also be useful.

The introductory paragraph of each form defines "Simple Procedure" as being for disputes with a value of less than £5,000. For clarity, it is submitted that reference to the excluded claims should be made here, on the assumption that the forms under the Simple Procedure Rules and those under the Simple Procedure (Special Claims) Rules will differ.

Q34 Do you have any comments on any individual forms?

There are some typographical errors which will no doubt be picked up on review but, for example, both the Response and Counterclaim Forms ask at D3 what steps have been taken to settle the dispute with "the responding party".

The Claim and Response forms do not provide for claims involving multiple responding parties (defenders). It is proposed that the Claim form be amended to say that in the event there is more than one responding party (defender), another sheet of paper should be attached to the Claim Form providing the information requested in section C for any further responding party (defender). Further comment on additional responding parties (defenders) is given in answer 24.

It would be preferable if the Confirmation of Service Notice included a section to define "the something" which was served.

FOIL considers that there ought to be additional options available to a Responding Party when returning the response form as follows:

(a) an option available for admitting liability but disputing the value of the claim. The only available options at the moment are either disputing the claim in full or admitting it and making a time to pay application, neither of which are correct where only the amount payable is in dispute; and

(b) an option for the Responding Party to seek to introduce a Third Party into the court action if appropriate. The draft rules are currently silent on the potential for Third Party Procedure.

FOIL considers it would be preferable, having regard to the focus on expediency, for the Application to Freeze form to include a section on the period being sought and why.

Q35 Do you have any comments on the proposal to include standard orders in the rules?

Paragraph 67 of the Consultation Report suggests that the standard orders will not be prescriptive but can be used, not used or varied by sheriffs. Whilst ongoing review of their fitness for purpose and the potential for amendment to those orders is envisaged, FOIL is concerned at the possibility of a divergence between sheriffs and/or sheriff courts on their application. Lack of consistency of application may result in confusion for court practitioners. Rule 2.5 could perhaps be amended to encourage sheriffs to depart from the terms of the standard orders only where absolutely necessary.

Numbering of the standard orders would allow easier reconciliation between the table and the standard orders themselves.

Q36 Do you have any comments on the terms of the standard orders included in the draft rules?

To avoid confusion, it may be sensible for the order assigning a case management conference to include a direction to parties that this is not "a hearing" and witnesses will not be required to attend.

FOIL suggests that a standard order is added which allow the sheriff to order that a claim, erroneously raised under the Simple Procedure Rules, proceeds in accordance with the Simple Procedure (Special Claims) Rules.

Q37 Do you have any comments on the approach taken in Part 18?

It is understood this is a typographical error and should read Part 17.

FOIL submits that the approach in Part 17 could lead to confusion. The significance of certain words or phrases having a "special meaning" may not be clear to unrepresented parties. Certain definitions, for example, "claim", "response" and "ordinary procedure" may be of assistance to unrepresented parties, however, confusion may arise where the special meaning provided is the traditional legal term, for example, "a decree *ad factum praestandum*".

It is considered that a more extensive glossary of terms would be of benefit to unrepresented parties. If such a glossary were included, FOIL would recommend the introduction of hyperlinks for defined words where they appear in the rules. The hyperlinks, when clicked, should take the user directly to the glossary definition.

Q38 Do you have any other comments on the draft Simple Procedure Rules?

<u>Expenses</u>

Paragraph 17 of the Consultation Report sets out the anticipated approach to expenses for Simple Procedure actions. Given the rules are intended to guide unrepresented parties, in particular, step by step through the process, FOIL

would propose that a section on expenses and Court fees is included within the rules, even if that is simply to direct parties to a separate document/s.

Consultation on the Simple Procedure (Special Claims) Rules ("the SCR")

As set out more fully in the introduction to this response, FOIL is disappointed to note that the SCJC does not intend to consult on a draft set of the SCR.

The SCJC's Consultation Paper sets out the rationale for having two sets of rules and, in particular, the rationale for excluding certain types of action from the Simple Procedure Rules (SPR). The Paper states that these excluded actions are likely to be more complex and do not lend themselves to the accessible approach underlying the proposed SPR. The SCJC, however, goes on to say that it does not consider a consultation on the SPR is necessary on the basis that, although the SCR will reflect the "style and approach" of the SPR insofar as possible, there is less scope for innovation in the special claims procedures.

FOIL members are concerned that they will not have the opportunity to provide a response to the SCR. A large percentage of cases handled by FOIL members will fall under the SCR and so the content of those rules is, naturally, of particular importance to them. Furthermore, FOIL considers there is potential for heightened confusion and dubiety over the terms of the SCR, if they are, as the Consultation Paper would suggest, intended to be a hybrid of the SPR and the current rules.

FOIL therefore invites the SCJC to reconsider its position on consulting on the SCR.