



Response to the Scottish Civil Justice Council Consultation on the Draft Simple Procedure Rules

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Introduction

Money Advice Scotland is the national umbrella organisation in Scotland, which was set up in 1989 to promote and champion the development of free, independent, impartial, confidential money advice and financial inclusion. Our three objectives are:

- Leading and improving the education and training of money advisers in Scotland
- Leading and improving the financial health and wellbeing of the people of Scotland
- Leading and improving public and social policy in Scotland.

We welcome the opportunity to respond to this consultation paper. This response is largely based on the views and opinions expressed by some of our members who attended a consultation event on 27 January 2016 to discuss the consultation. Our members include many experienced money advisers, with significant experience of representing clients throughout the court process, primarily in relation to small claims, debt, rent arrears, mortgage repossessions and sequestration cases. This response aims to reflect the views of those advisers in relation to both the likely impact of the proposals on their day to day work and the impact they will have on the individual court users whom they advise and represent.

We are particularly concerned with the impact which the changes will have on individual users, who are not generally legally represented, and may only come into contact with the courts once or twice in their lives. They may be pursuers - for example in small claims cases involving consumer issues, but are also very often defenders - in debt or rent arrears cases, for example. Regardless of whether they are pursuing or defending a case, the vast majority are reluctant court users, and the system must be as straightforward as possible for them to navigate their way through.

We welcome the intention that the simple procedure should be accessible and understandable for unrepresented litigants. The starting point for improving the court process should be a clear recognition, as set out in both Lord Gill's review report and the Strategy for Justice in Scotland, that the courts provide a vital public service. Like any other public service, ultimately they are there for the benefit of the public who need to use them, and they should be focused on the needs of their users.

At our consultation event, we asked advisers to describe their own experiences of the courts. The main thrust of their responses was that the courts are currently intimidating, formal, legalistic, complex, outdated, remote, inaccessible and like a 'conveyor belt'. The second key theme to emerge was the lack of consistency in how processes are applied, in terms of both differing attitudes and approaches of individual sheriffs and different cultural approaches between different sheriff courts.

When asked what they thought court processes should be like, advisers said they should be modern, flexible, fair and reasonable, clear and accessible, with rules which are easy to understand. Another important point they made was that the

courts should be balanced, and 'firm but fair'. In other words, advisers felt that it was important to strike an appropriate balance between achieving an accessible and user-friendly process and ensuring that parties appreciate the seriousness of the court process and its implications.

General comments

While we welcome the intention behind the draft rules, we have a number of general concerns about the proposals.

The need for culture change in the courts

Firstly, it must be recognised that new court rules alone will not ensure a more accessible and user-friendly process. While we welcome the intention that sheriffs and summary sheriffs will develop a new style of judging, based on a problem solving, inquisitorial approach, past experience suggests that an intention to ensure more user-friendly operation of the courts does not always translate into practice. The existing small claims procedure was intended to be used by unrepresented consumers, and to be more informal and user-friendly than other court procedures. The procedure has, however, operated more formally than intended, placing unrepresented litigants at a disadvantage.¹ Changes designed to make the procedure more user friendly were introduced in 2002, but the experience of advisers suggests that, while many sheriffs do try to assist litigants where possible, these changes have not greatly improved the situation for users.

We have previously argued that all consumer cases should be dealt with under the simple procedure, rather than basing the procedure primarily on the financial value of the case. While the approach adopted continues to be based on financial value, whether cases are debt actions or consumer claims, it will remain difficult to design a process which is truly accessible to consumers.

If court processes are to be truly user friendly, there is a need for a radical culture change within the courts. There is considerable evidence that the public perceive the courts as intimidating, formal and complex, and that this plays a role in deterring them from going to court.² We believe that there are a number of straightforward changes which could help to make going to court a less frightening ordeal for individual users. These include adopting the recommendations made in the 2006

¹ See, for example, Scottish Consumer Council (1989) Report of a Study to Investigate the Attitudes of Advisers to the Small Claim Procedure in Scotland, Glasgow: Scottish Consumer Council; Scottish Office Central Research Unit (1991) Small Claims in the Sheriff Court in Scotland: an assessment of the use and operation of the procedure, Edinburgh: Scottish Office; Citizens' Advice Scotland (1998) Lay Representation in Courts and Tribunals, Edinburgh: Citizens' Advice Scotland

² See for example Genn, H. and Paterson, A. (2001) Paths to Justice Scotland: What People Do and Think About Going to Law, Oxford – Portland Oregon: Hart Publishing; Consumer Focus Scotland/Scottish Legal Aid Board (2009) The views and experiences of civil sheriff court users, Edinburgh: Consumer Focus Scotland/Scottish Legal Aid Board; Scottish Consumer Council (1997) Civil Disputes in Scotland, Glasgow: Scottish Consumer Council

Osler report,³ which recommended a review of historic practices, conventions and forms of dress within the courts. We would also point to the kinds of issues mentioned in the 2011 report of the Civil Justice Advisory Group, which were raised by participants at its consultation seminar.⁴ Those present discussed litigants being made to feel like ‘outsiders’ in the process, unfamiliar with its customs and language; for example, solicitors can sit in the well of the court near the sheriff, but individual litigants are only allowed to go there when their case calls and have to sit at the other end of the table. Others noted that many litigants wait outside the court room because they do not know whether they are allowed to go in, pointing out that something as simple as a sign telling people to come in if they think their case is being heard in that court would improve the situation. Other suggestions included the sheriffs removing their wigs and gowns when hearing civil cases, and greater openness in court processes, by ensuring for example, that there is a nameplate on the court bench, so that party litigants and witnesses know the name of the sheriff who is hearing their case.

If the simple procedure is to be truly focused on its users, we would also suggest that hearings should be arranged to be convenient for users, rather than for the court. At present, parties attending court are expected to fit in with the courts’ way of working. This means that people need to take time off work to attend court, or may have difficulty in securing childcare, for example, and may not always be able to attend as a result. Changes such as introducing evening hearings and perhaps weekend hearings, as some tribunals already offer, would have a number of advantages for users. This would make it easier for many parties to attend court, and may encourage witnesses to attend court. It may also be easier for lay representatives to appear in court, and may even be more convenient for some summary sheriffs.

Under the current system, all of those involved in small claims and summary cause cases calling on a given day are asked to attend at the same time, and may have to wait for hours for their case to be called. One of the recommendations from 2009 research commissioned by Consumer Focus Scotland and the Scottish Legal Aid Board into court users’ experiences⁵ was that consideration should be given to the introduction of an appointments system, so that parties are given a specific time when they have to appear in court. It was suggested that this may reduce the frustration people felt at being requested to arrive in court at 10am and then having to wait their turn alongside other litigants to have their case heard.

It is vital that training is provided for sheriffs and summary sheriffs on the proposed new inquisitorial approach. One of the clear themes emerging from our consultation day was that there is a real inconsistency between different sheriff courts and even between different sheriffs in the same court in the way that they currently deal with

³ Osler, D. (2006) Agency Review of the Scottish Court Service, Edinburgh: Scottish Executive Justice Department

⁵ Consumer Focus Scotland/Scottish Legal Aid Board (2009) The views and experiences of civil sheriff court users, Edinburgh: Consumer Focus Scotland/Scottish Legal Aid Board

small claims and summary cause cases. It is also important that sheriffs and summary sheriffs are familiar with, and have experience of, the types of simple procedure cases they are likely to be dealing with. In housing cases, for example, the sheriff should have knowledge of housing law, and an understanding of the underlying issues which have resulted in rent arrears, and which need to be addressed in order to deal with such cases effectively.

Complexity of the proposed rules

Secondly, with regard to the proposed rules themselves, we welcome the fact that clear attempts have been made to simplify the language used. It appears to us, however, that the structure of the proposed process does not differ significantly from the current small claims and summary cause rules. The rules retain most of the same features, albeit with different wording, and they remain long and complex, and are accompanied by a myriad of forms. The draft rules, together with forms etc, come in at 91 pages, and there are a second set of rules and further forms still to come. We would question whether this is likely to significantly improve the experiences of litigants in practice.

While we appreciate that this is a result of the primary legislation, we would also question whether there is a need to retain complex concepts such as multiplepointing and furthcoming in a simple procedure. In the experience of advisers, these types of case arise very rarely, if ever, in small claims and summary cause cases.

One of the main reasons for introducing the simple procedure was to replace the two existing small claims and summary cause procedures with one procedure. It is therefore disappointing that it is felt necessary to retain two differing expenses levels within the simple procedure according to current small claims and summary cause levels. This will be confusing for parties, and is not conducive to making the system simpler.

We note that the consultation paper states that there were concerns that having one simple procedure would not fit well with certain more complex forms of action. We express our disappointment that it is felt necessary to retain more complex processes for any type of case. The approach taken seems to have been to try to fit the existing processes within a simpler procedure, rather than trying to create an entirely new simple process.

Answers to the consultation questions

SECTION 2 KEY ASPECTS OF THE DRAFT SIMPLE PROCEDURE RULES

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

As noted above, it seems that the intention of introducing one simple procedure to replace the existing small claims and summary cause procedures has been deemed to be unworkable in practice. Given the approach that has been taken, it is difficult to see how one set of special claims rules will be able to incorporate all of the different complex types of actions which it is envisaged they will cover, without these becoming very complicated. If there are to be two separate sets of rules, there would also be a need to set out at the start of each set of rules exactly which types of cases they apply to, making them even longer and more complicated.

We would suggest that, rather than producing two entirely separate sets of rules, and bearing in mind question 6 about how the rules should be presented online, the best approach would be to have one set of rules, with links to any special rules that apply to specific types of case, such as personal injury or housing actions.

Particular concerns were expressed at our consultation event by advisers who represent parties in heritable cases. Given the major consequences for parties involved in such cases, who may be evicted from their home, some advisers felt that there was merit in having a separate process for these. At present, for example, such cases must always call in court, whether a defence has been lodged or not, and it was seen as vital that this continues to be the case. There was considerable concern that, given their importance, there does not appear to be any intention that the rules for heritable cases will be consulted on separately. We would like to see some form of consultation on these draft rules before they are finalised.

There was also concern that when the new First-Tier Housing Tribunal takes on responsibility for private rented housing cases currently dealt with in the sheriff court, now scheduled for December 2017, advisers and parties will need to become used to two separate forums and processes, depending on who the landlord happens to be.

2. *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

Overall, advisers supported the use of the terms 'claim' and 'claimant', but there was general agreement that the term 'responding party' could be improved upon. Some suggested replacing this with 'respondent', although it is acknowledged that this may be confusing, given the use of this term in relation to appeals. Another suggestion was that the term 'defendant' should be used. This would reflect the terminology used in the European small claims procedure, which uses the terms 'claimant' and 'defendant'. The advantage of this would be consistency, as these terms are widely recognised across Europe.

The term 'freeze' had a mixed reception, as did 'unfreeze.' Other suggestions made were 'put on hold' or 'pause'. Some advisers pointed out that 'freeze' is also used in relation to diligence and the freezing of bank accounts or wages, and may therefore cause confusion.

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

The reference to 'updating hard to understand terminology' emphasises our point that rather than being entirely new, the new process is very similar to the existing small claims and summary cause procedures, retaining the same concepts. In addition to 'freezing', for example, we now have an 'application to revoke' instead of 'a minute for recall.'

Some of those at our consultation event felt that while the new terminology may be easier for advisers to understand, it would still be difficult for parties. Some felt it was still hard to understand, and that there was a need for a glossary. This suggests that the intention of the Rules Rewrite Working Group that there should be no need for complementary guidance has not been achieved in the draft rules.

We would suggest that the final version of the rules should be checked and approved by an organisation such as the Plain Language Commission or the Plain English Campaign, to ensure that they are written in plain language which users will understand. We would also urge the Council to carry out user testing with members of the public before the rules and forms are finalised, as recommended by the Scottish Civil Courts Review.

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. We think that there are numerous examples of terminology which will be difficult for people to understand. Again, this is largely due to the retention of legal concepts which appear in the current rules, and we would question whether this is necessary in a procedure that is intended to be simple and straightforward. Examples include

'serve' (parts 3 and 5); 'lodge' (part 9); 'citation' (Part 10); and 'vulnerable witness' (part 10).

'Alternative dispute resolution' is also not defined anywhere in the rules - it is very important that both parties and sheriffs understand what this means, given its centrality to the rules.

We also consider that new concepts, such as 'date of first consideration', which are explained in the rules are also likely to be difficult for parties to understand. Again, we would suggest that the draft rules should be sent to a plain language organisation for review and suggestions as to how to improve on the language used.

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

We welcome the 'user's journey' approach taken in the rules, which means that, in general, they are presented in a logical sequence. There was, however, a clear view amongst advisers at our consultation event that while this may make it easier for advisers to follow, parties may still find them difficult to navigate. There was a broad view that the numbering was generally easy to follow, and it was noted that the system used made the rules easier to update in a logical fashion, to reflect any future changes. Again, there were suggestions that a simplified version of the rules, or a summary document, may be necessary for parties, which suggests that the draft rules are not as simple as intended.

The view was also expressed that there appeared to be an assumption that parties would actually read the rules; it was suggested that "rules are for courts, not people". There was a suggestion that a tick box could be added to both the claim form and the response form, asking parties to confirm whether they have read the rules.

Another important point was that the approach used would make the rules easier to navigate online, by clicking on the relevant link to take people to the parts of the rules they needed to know about. Not everyone will be willing or able to access the rules online, however, and some felt that the numbering system was quite complex and confusing. Each part has the same numbering system, making it necessary to cite a part number followed by a rule number in order to differentiate e.g. Part 2 rule 1.1 from Part 6 rule 1.1.

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

How the rules are presented online will be very important in ensuring that the rules are as accessible as possible for parties. While not everyone uses the internet, most people do - eight in ten Scottish households now have access to the internet. It will be important to ensure that the rules and links are readily accessible on

smartphones and tablet computers, with ownership of these devices currently standing at 63% and 53% of adults in Scotland respectively.⁶

A user-friendly approach, with clear hyperlinks to the relevant rules and forms, appropriate use of graphics, and 'help boxes' to explain words or phrases which users can click on at appropriate places in the text, will be necessary if parties are to be able to navigate the rules.

It is important that there is sufficient investment in designing the website on which the rules will appear to ensure that it is as accessible and easy to navigate as possible. Presenting information to users in a more straightforward and intuitive format - for example, allowing them to click on a link titled 'How do I....', rather than simply listing the rules will be important. The website should be easier to navigate than the current Scottish Courts and Tribunals Service website, which presents the rules on one page and then requires the user to search for the relevant form on another part of the website rather than being able to click straight through.

The website should also follow accessibility guidelines such as the Scottish Accessible Information Forum guidelines on making websites and electronic documents accessible. These can be found at: <http://www.saifscotland.org.uk/information-and-advice/electronic-accessibility/#sthash.nHmDcAC7.dpbs>

Hyperlinks should also be placed on external websites that users are likely to go to, where they can click through to the rules. These would include mygov.scot, Money Advice Scotland, Citizens' Advice Scotland, Shelter Scotland and other advice agencies.

In addition to presenting the rules online, we would like to see the introduction of a system which allows people to lodge forms online. While small claims and summary cause forms can currently be downloaded from the Scottish Courts and Tribunals Service website, it is not possible for users to lodge the form or pay the fee online. If this facility was available, together with improved interactive information for users, this would be much more convenient for many people, as well as their advisers/representatives.

It will also be important that hard copies of the rules are made available to advice agencies which may be assisting parties involved in simple procedure cases.

⁶ Ofcom (2015) The Nations and Regions Communications Market Report Scotland: London: Ofcom <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr15/scotland/>

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

In general, advisers felt that the headings would assist parties to navigate the rules, and were a real improvement on the headings in the current rules. While they saw merit in framing the headings as questions, following the ‘user’s journey’ approach, it was noted that this did not always work. It is difficult to imagine, for example, that many unrepresented parties are likely to ask most of the questions posed in part 10 (witnesses) or to ask questions like ‘How can the sheriff make a reference to the Court of Justice of the European Union’? (Part 13: Other matters). This tends to suggest that some of these issues should not be included in the core rules, as this may confuse parties in the vast majority of cases where they will not apply.

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

We welcome the general principle set out in Part 1 rule 2.5 that parties should only have to come to court when it is necessary to do so to resolve their dispute. The Consumer Focus Scotland/ Scottish Legal Aid Board research previously referred to⁷ found that some litigants had turned up to court on the appointed day, expecting to appear in front of the sheriff with their opponent, only to discover that they did not actually need to attend, and that the matter had been dealt with in private by the sheriff on the basis of the papers. Other parties were annoyed when they arrived in court for their hearing, only to find out that it had been postponed without them having been notified of this. An improved case management process may help to reduce the need for a case to call in court prior to a final hearing, reducing the need to travel to court and take time off work.

It appears to us, however, that in practice the process may end up being little different from the current system, where there is a preliminary hearing /first calling, followed by a full hearing/proof where necessary.

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

We believe that court should be viewed as a last resort, and that encouraging the use of alternative dispute resolution processes is an important means of improving access to justice. Research has shown that those involved in disputes are more interested in finding a resolution to their problem or getting on with their lives, than necessarily enforcing their legal rights.⁸ We also know that people would generally

⁷ See footnote 5

⁸ See for example Genn, H. and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing; Consumer Focus Scotland (2012) *Facing up to legal problems: towards a preventative approach to addressing disputes and their impact on individuals and society*, Glasgow: Consumer Focus Scotland

prefer to avoid becoming involved in legal and court processes. They are apprehensive about involvement with lawyers and also the potential costs, formality, delay and trauma they associate with legal processes.⁹

While we welcome the recognition in the rules that informal ways of resolving disputes should be encouraged, we have a number of concerns about this. Firstly, the term 'alternative dispute resolution' is not defined anywhere in the draft rules. We assume it is envisaged that this will include mediation and arbitration, but would also point out that it should include negotiation, which appears to be viewed as something entirely separate. It may also be appropriate in some cases for a dispute to be referred to a sector specific ombudsman, such as the Financial Ombudsman Service, or other informal dispute resolution scheme.

Secondly, the rules appear to envisage that alternative dispute resolution should only be considered and/or encouraged once a claim has already been lodged in court. We believe that provision should be made for the use of alternative dispute resolution before a court action is raised, in order to avoid the stress and expense of a court process where possible. We wonder whether there might be a role here for the sheriff clerk when parties come to the court to initiate an action. There is also an important role here for in-court advisers, where these exist. Some advisers already negotiate on behalf of parties, or refer them to appropriate mediation services. Where a party approaches an in-court adviser about raising a claim, there may be an opportunity to negotiate the matter, or refer it to mediation, before a claim is even raised.

We would also suggest that rather than simply asking parties to state what steps they have taken to try to settle their dispute,¹⁰ the forms should ask parties whether they have considered another form of dispute resolution and whether they would be interested in resolving their dispute in this way. If the parties indicate that they would be willing to consider this, there could be an important role for the sheriff clerk in referring the parties to an appropriate dispute resolution process. This would be similar to the model used by the homeowner housing panel. In that forum, once a case is identified as being ready for referral to a homeowner housing committee for decision, the parties are generally asked whether they would consider mediation.

In cases involving consumer debt, we would also like to see the introduction of a pre-action requirement on creditors along the lines of that imposed on mortgage lenders

⁹ See for example Scottish Consumer Council (1997) *Civil Disputes in Scotland: a report of consumers' experiences*, Glasgow: Scottish Consumer Council; Genn, H. and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing; Consumer Focus Scotland (2012) *Facing up to legal problems: towards a preventative approach to addressing disputes and their impact on individuals and society*, Glasgow: Consumer Focus Scotland

¹⁰Section D5 of the claim form and response form respectively. Note; section D5 of the response form incorrectly refers to the responding party rather than the claimant.

by the Homeowner and Debtor Protection (Scotland) Act 2010.¹¹ This requires the lender to make reasonable efforts to agree proposals for future payments with the debtor. Where a debtor has a money adviser acting on their behalf, that adviser will usually have tried to negotiate with the creditor before the case reaches court. Creditors are not always amenable to such negotiations, however, while some debtors may not have sought money advice. Introducing such a protocol in simple procedure cases would encourage negotiation before a case goes to court in the first place.

Where cases do reach the court stage, it is important that sheriffs and summary sheriffs are aware of the various alternative dispute resolution options which are available, and when these might be most appropriate. While the focus in relation to ADR tends to be on mediation, the courts should be aware of other appropriate processes, including sector-specific consumer arbitration schemes and ombudsmen. Sheriffs and summary sheriffs should be given training in this area, to ensure that the aims behind the inclusion of ADR in the rules are achieved.

It is likely, however, that in most cases mediation will be the obvious form of dispute resolution to which parties will be referred. This raises a fundamental question as to how appropriate mediation services will be provided. If the intention behind the rules is to be achieved, there is a need to ensure that appropriate services are in place. The civil courts review recommended that the Scottish Government should consider establishing a free mediation service for simple procedure cases. At present, such court-based mediation services exist only in Edinburgh, Airdrie and Glasgow, and are provided by volunteer mediators. Otherwise, mediation services are primarily provided by private mediators at a significant cost. It is vital that appropriate mediation services are established in other areas as quickly as possible. If such services are not available, the courts are likely to be deterred from referring parties to mediation.

We support the points made with regard to alternative dispute resolution in the response submitted by the Scottish Mediation Network to this consultation.

¹¹ Section 24A(2) to (6) of the Conveyancing and Feudal Reform (Scotland) Act 1970, as amended by the Homeowner and Debtor Protection (Scotland) Act 2010

SECTION 3 OVERVIEW OF THE RULES

Part 1: The Simple Procedure

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 broadly support the principles set out in Part 1, but would make the following points. Firstly, we consider that there should be an additional principle to the effect that a decision by the sheriff should be the last resort, and that parties should be encouraged to resolve their dispute informally before they are considered by the sheriff. Secondly, we note that rule 2.2 makes reference to the approach of the court taking into account the 'nature, importance and complexity of the dispute', but does not say how this is to be determined. Who is to decide on the importance or otherwise of the dispute? Does this mean the importance to the parties, or how important the sheriff deems it to be? Thirdly, we would suggest that, the parties should be treated fairly' by the court, rather than 'even-handedly'. Finally, we note that principle 2.4 states that the parties should be encouraged to settle their disputes by negotiation, and makes no reference to alternative dispute resolution, which is mentioned in conjunction with negotiation elsewhere throughout the rules.

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

We have a number of comments on the proposed duties set out in Part 1, as follows:

Rule 4.4- what does 'encourage that' mean? We think that this should this explicitly state that, where appropriate, the sheriff should refer parties to an appropriate dispute resolution service.

We consider that references to 'the court' rather than to 'the sheriff' (e.g. in rules 2.2, 5.2, 5.3, 6.2 and 6.3) may be confusing to parties who are not legally represented.

Rule 6.4- what does 'efficiently' mean? This requires further explanation.

Rule 6.6- we think that is unreasonable to expect a representative who is not legally qualified to necessarily know or understand whether their argument has a legal basis or not.

Rule 6.9- we would suggest that in the interests of clarity this should say 'where *they* have a conflict of interest', rather than 'where there is a conflict of interest'.

Rule 7.3,- while the consultation paper states that this is intended to allow creativity to the sheriff, we have some concerns over the breadth of the power which this

gives to the sheriff to 'do anything necessary considered necessary to determine the dispute'.

Rule 7.11- we would suggest that it would be helpful for unrepresented parties or their non-legally qualified representatives to explain what 'protect the claimant's position' means.

We also note that there is no reference in Part 1 to the role of the sheriff clerk. While there is some mention of the sheriff clerk's duties and powers in Part 17, this essentially relates to his/her administrative duties. Consideration should be given to whether they may have a role to play in providing information to the parties on ADR or negotiation and /or identifying cases to the sheriff that may be suitable for ADR or negotiation.

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

We would suggest that Rule 1.1 should make reference to 'resolving' disputes, rather than 'settling or determining' them.

Part 2: Representation and Support

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

We have two comments to make on Part 2. Firstly, we consider that the definition of a lay representative in this part is confusing, and is likely to be difficult for an unrepresented party to understand. We would suggest that this might be clearer if rule 2.3, which appears to us to be unnecessary and confusing, were simply deleted. Rule 2.3 states that 'a lay representative is a person entitled to act as a lay representative'. This is immediately confusing, as it begs the question as to who is entitled to act as a lay representative. This is answered in some detail in rules 4.1 - 4.8, but rule 3.1 also describes what a lay representative is. Rule 4.1 says a person authorised by a party to act on their behalf 'may' act as a lay representative for that person. Is 'may' the same as 'is entitled to'?

Secondly, we note that, as with the current small claims rules, there is a requirement for a lay representative to complete a 'lay representation form', and bring this to court on the day. While we understand the reasons behind this, we believe that there are difficulties with this approach. This does not allow for the situation where an adviser is approached by a party for assistance and representation at a very late stage in the process. This is not uncommon in heritable cases, for example, and could also present particular problems for in-court advisers, who often provide ad hoc representation for a party who has approached them immediately before the hearing.

We think that provision should be made to allow for this situation, particularly as the adviser is assisting the court as well as the party involved.

It is also not uncommon for a family member or friend to turn up to represent a party on the day, or perhaps to request a continuation on their behalf if they are unable to attend. Such a person may not have completed a form beforehand - they may not have been aware of the requirement to do so, or the arrangement may have been made at short notice. It is important that where a party has authorised such a person to act on their behalf, that person is given the opportunity to do so, unless there is a good reason not to.

Part 3: Making a Claim

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

We are concerned that unrepresented parties may find the 'three important dates' confusing, and may fail to understand the significance of these. It is not uncommon at present for parties to confuse the return day and the calling date, and there are now three dates for parties to be aware of and understand. We do not consider that either the concept of the 'date of first consideration', or the explanation of what this means in rule 2.2, are straightforward for parties to understand.

Rule 2.3 states that the three dates will be identified by the sheriff clerk when registering a case, but it does not state that these dates will be communicated to the parties.

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

We think that the examples given in Part 3 to assist the claimant in completing the form are helpful.

We note that the rules do not provide guidance for parties on jurisdiction, which is an important issue, particularly in relation to consumer contracts, where the rules on jurisdiction are different from the usual rules.

We do not consider the phrase 'essential factual background' to be plain English, and would suggest that this is replaced by something along the lines of 'the main facts'.

Rule 4.2 states that, where there are no problems with the claim form, the sheriff clerk *may* enter the claim in the Register of Simple Procedure Claims- we assume that this should say '*must*'.

Rule 4.5 states that the sheriff clerk must serve the form on the responding party *if asked to do so*, unless the claimant is a company or partnership, or is legally represented. It is our understanding that, while the current wording in the small claim

rules is similar, in practice the sheriff clerk serves the summons where the pursuer is an individual. This is not clear from the wording of the draft rules- we would suggest that the rules should clearly state that where the claimant is an individual, the sheriff clerk will serve the summons *unless* the claimant does not wish him/her to do so.

Part 4: Responding to a Claim

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 think that the flowchart makes the options open to the defender clearer than the current rules. We think, however, that references to being 'able to settle the claim' require clearer explanation i.e. whether the responding party is able to pay all of the money which the claimant is seeking.

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

We would suggest that it would be helpful to provide examples of the wording which might go into a response form and/or a counterclaim, in the same way as examples are given for the claim form.

Rule 5.2 states that the responding party may only make a counterclaim that could have been made as a claim in a separate simple procedure case. There is a need to explain what this means - it cannot be assumed that a responding party knows the types and value of claims which fall within the simple procedure.

Rule 6.3 requires the responding party to set out 'the essential factual background to the dispute' on the counterclaim form. We would suggest that this should refer to the facts of the *counterclaim*, rather than the dispute.

Rule 7.1- we note that no time to pay application form is included in the draft rules, but will be included in the final rules. We would point out that it is vital that these allow for an application to be made for time orders under the Consumer Credit Act, as well as time to pay directions or orders under the Debtors (Scotland) Act, as is currently the case under the small claims and summary cause procedures.

Part 5: Sending and Service

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

We do not consider that the positioning of this section within the rules sits well with the 'user's journey' approach. We would suggest that it might be better placed towards the end of the rules. We would also question whether the level of detail included in this section is actually required, when in most cases where the claimant is an individual the sheriff clerk will serve the claim form. The wording of rule 4 could

also potentially mislead an unrepresented claimant into thinking that they may have to pay a solicitor or sheriff officer to serve a claim form on the responding party.

Part 6: The First Consideration of a Case

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

We note that in terms of rule 4.3, where no response is received by the court by the last date for a response, and the claimant does not send an Application for Decision to the court before the date of first consideration, the sheriff must dismiss the claim. Firstly, there is no cross-reference to the Application for Decision form which is contained in Part 15 - we think that there should be, and that there should be a hyperlink in the online version of the rules, in order to make the application easy for parties to find.

Secondly, we note that this puts the onus on the claimant to take action proactively, or their claim will be dismissed. We understand that there is a need to protect the interests of the responding party, particularly where a matter may have been settled before the date of first consideration, by preventing a decree passing automatically against them. Under the present small claims procedure, there is a similar provision where the pursuer must contact the court after the return day, and where there has been no response, must then 'minute for decree'. In the experience of advisers, it is not uncommon for a pursuer to fail to do this, as it is not made clear enough to them that they are required to do so. In order to avoid this problem occurring under the new simple procedure, we would therefore suggest that it should be made much clearer to the claimant, whether in the rules or any accompanying guidance, that they must do this.

Rule 4.3- the word 'from' at the end of the first line appears to be a typing error and should be deleted.

Rule 5.2- if the claimant has asked for the claim to be dismissed, we assume that this should state that the sheriff *must* dismiss the claim, rather than '*may*'.

Rules 5 and 6- we would question the need for the use of the term 'first written orders'. This term is confusing, particularly when there is reference to 'orders' of the sheriff in Part 7. Why does there need to be more than one order? Could this, which appears to primarily concern fixing a hearing date, not be referred to as the sheriff's 'first order'?

We note that there is no reference to the possible outcomes where the responding party applies to the court for time to pay. We consider that this should be included.

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

We welcome the proposed case management conferences, which could provide an opportunity for the parties to discuss the issues, agree on matters which are not disputed and possibly achieve a negotiated settlement. We consider, however, that in practice, the introduction of case management conferences may have little effect in streamlining or simplifying the process. We can envisage a situation where the default position, particularly where there are two unrepresented parties, becomes case management conference being arranged under rule 6.2, and if the matter cannot be resolved there, a further hearing being arranged. If this happens, we would ask whether parties should be expected to turn up at the case management conference with all of their witnesses and other evidence ready just in case the sheriff ends up making a decision at that hearing, albeit with the parties' consent.

There is also a question as to how case management conferences will work in practice - will they be held in open court or in the sheriff's chambers? How will cases be timetabled to ensure that sufficient time is allowed for the sheriff to deal with the case effectively, while avoiding delay and making the best use of the available court resources?

One advantage that we can see with the routine use of case management conferences is the opportunity to settle the matter informally at that stage and/or refer the parties to alternative dispute resolution or for further advice as appropriate. We would again suggest that the sheriff clerk might be given a clearer role in identifying disputes which might be suitable for mediation, for example, and/or suggesting appropriate referral routes for particular disputes.

We also note that in terms of rule 6.4, the sheriff may make a decision at a case management conference with the consent of the parties. We wonder how this might work in practice - would the parties need to consent to this before, or during, the case management conference?

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

We note that there is no provision for the sheriff to make a decision on the basis of written submissions by the parties. We would suggest that this might be considered, where both parties consent to this and the sheriff considers that it would be in the interests of justice to do so.

Part 7: Orders of the Sheriff

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

We think that including this as a separate part, which is very brief, is confusing and unnecessary. We would suggest that this could be brought within Part 6, which is largely about case management.

We would also question the value and usefulness of including examples of standard written orders in Part 17. While it might be helpful to the courts from an administrative point of view to have a range of standard order templates, it is less likely to be helpful to the parties and may in fact be confusing, particularly as there may be cases in which no such orders are issued at all, aside from the ‘first written orders’.

Part 8: Applications by the Parties

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

We would suggest that it would be helpful to provide examples of situations in which a party may wish to ask for the progress of a case to be frozen.

We welcome the provisions in Rule 3.4, which allow the sheriff to grant or refuse the freezing of the progress of a case, rather than always holding a hearing, which is required under the current rules.

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

With regard to rule 7, we consider that the provisions for a hearing on expenses will mean that there is a perverse incentive on claimants not to abandon a claim. In the experience of advisers, where a dispute is settled, the parties will usually agree that no expenses are due to or by either party. If they abandon under the proposed rules, there will be a hearing on expenses and an award of expenses will be made. We think that, in order to save court time, it would be preferable to provide for a joint motion to be submitted by both parties, agreeing that the matter has been resolved, and that no expenses are due to or by either party.

With regard to rule 8 on additional responding parties, it would be helpful to set out some examples of situations in which someone may wish to become an additional responding party.

Part 9: Documents and Other Evidence

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

We note that rules 3.1 and 3.2 provide that parties *may* lodge documents or other evidence with the court by sending them, along with a list, to the sheriff clerk. Rule 3.5 states, however, that all documents and other evidence *must* be lodged with the court at least 14 days before the hearing. This is a bit confusing- presumably, the

intention is that any documents or other evidence which the parties wish to rely on at the hearing must be lodged with the court in advance. We think that this needs to be clarified.

We also note that, while parties must list the documents/other evidence which they intend to rely on in the claim form or response form, there is no requirement on parties to send copies of documents or other evidence to the other party. The rules appear to place an onus on the other party to borrow documents or evidence from the court, or where a party is not legally represented, to inspect these at the sheriff clerk's office. This may not be convenient or even possible for the other party, and we would suggest that consideration is given to ensuring that this information is communicated to the other party, by electronic means where possible. Where a party does need to make physical copies of documents, it should be made clear whether there is a charge for doing so.

There appears to be an emphasis on hard copy documents in the rules. There should be clear provision for electronic copies of document to be sent to the court and to the other party.

There appear to be some words missing in rule 5.4, which does not state *who* must send a warning to the party about documents which have not been collected. Presumably, this should be the sheriff clerk.

Part 10: Witnesses

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

It is not clear from the terms of rule 2 *who* will serve a Witness Citation Form on a witness, and the relevant form is not included in the draft rules. It should be made clear in rule 2 who cites the witness.

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

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

We think that the procedure, which is intended to be simple, should be as straightforward as possible. The detailed rules on child and vulnerable witnesses and special measures in particular are unnecessarily complex and detailed. It seems unlikely that these issues will arise in the overwhelming majority of simple procedure cases, and if they do, it could be argued that the case is not simple enough to be dealt with under the simple procedure. Where they do arise, a link could be provided to more specific rules on this - or alternatively, it may be appropriate to transfer any case involving such witnesses to the ordinary cause procedure.

Part 11: The Hearing

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

We think that it will be helpful to parties to set out the purpose of the hearing, how the dispute will be resolved, and what the sheriff will do at the hearing, as set out in Part 11. As noted elsewhere, however, while it is important that parties have the opportunity to resolve their dispute by alternative means at all stages of the court process, it is important that they are asked about their attitudes to negotiation/ADR at a much earlier stage, rather than leaving this until the hearing.

Part 12: The Decision

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

It should be made clear what the difference is between dismissing and absolving a claim.

Part 13: Other Matters

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

As stated earlier, we do not think that these issues are likely to arise in many cases, and including the matters set out in this part may simply confuse unrepresented parties. In any case where parties do need to be aware of these matters, it will be important that they are clearly directed to the appropriate rule. The heading 'Other Matters' is unlikely to alert them to the fact that rules on the transfer of cases are contained here, for example.

Part 14: Appeals

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

We do not consider that 14 days is a reasonable timescale for submitting an appeal. We note that this is not a requirement set out in the primary legislation, but appears to have been taken from the existing small claims and summary cause rules.

We do not believe that the time limit set out in the draft rules is long enough, particularly where unrepresented parties are concerned. A party may be ill, for example, or may have been away on holiday when the sheriff's decision is issued. An unrepresented party may have difficulty in understanding and negotiating the appeals, and it may take time for them to obtain assistance from a citizens' advice bureau or other advice agency, or to obtain legal aid.

We note that draft regulations recently consulted on by the Scottish Government propose a 30 day time limit to seek permission to appeal a decision of either the First-tier tribunal or the Upper Tribunal for Scotland. The draft regulations also provide for the First-Tier tribunal or the Upper Tribunal, as appropriate, to extend the time limit on cause shown, if it considers this to be in the interests of justice.¹²

If such provision is to be made in respect of tribunals, we consider that the rules for sheriff court actions should be along the same lines, in the interests of access to justice. If the time limits are not aligned in this way, we would note that appellants in private rented housing cases, once these are transferred to the First-tier tribunal, will have more than twice as long to lodge an appeal than those involved in cases involving social tenancies, which will continue to be dealt with in the sheriff court. This appears to us to be manifestly unfair.

Part 15: Forms

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

34. Do you have any comments on any individual forms?

We are not convinced that including all of these forms within the rules is helpful, particularly as there are still many more forms to come. These simply add to the length of the rules, which is already likely to be off-putting for unrepresented parties. What is most important is to ensure that there are clear links within the rules to the relevant forms, which parties can simply click through to directly.

Part 16: Standard Orders

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

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

As stated in our response to question 22, we question the value and usefulness of including examples of standard written orders in Part 17. While it might be helpful to the courts from an administrative point of view to have a range of standard order templates, it is less likely to be helpful to the parties, makes the rules even longer and more off-putting, and may actually be confusing. We do not consider that the

¹² Scottish Government (2015) The Tribunals (Scotland) Act 2014: Consultation on 2 sets of Draft Regulations which make provision for: 1) a time limit within which to seek permission to appeal a decision of the Scottish Tribunals and Rules of Procedure for the Upper Tribunal; and 2) Offences in the Scottish Tribunals. <https://consult.scotland.gov.uk/tribunals-administrative-justice-policy/first-consultation-tribunals-scotland-act-2014>

parties will have any need to see templates of these orders; they will receive any actual orders issued in their case as and when necessary.

Part 17: The interpretation of these Rules and administration of the simple procedure

37. Do you have any comments on the approach taken in Part 17?

Firstly, it is not clear to us why the rules on the administration of the simple procedure have been placed together with the section on interpreting the rules.

Secondly, with regard to the interpretation section, we note the intention of the Rules Rewrite Working Group that there should be no need for complementary guidance. We consider that if there is thought to be a need for a glossary, the rules are not drafted in sufficiently plain language.

We are also unclear as to why it is felt necessary to define certain terms in section 17, when there is an attempt to define others within the main body of the rules (for example 'lay representative' and 'date of first consideration'). We have also pointed in our response to question 4 to examples of other terminology in the rules which require to be explained more clearly. There is a need for a clear and consistent approach.

Finally, we do not consider that the definitions of the 'special meanings' of the terms set out in rule 1.2 are clearly explained in a way which will be understood by members of the general public. 'A decree of absolvitor' is defined, for example, as 'a decree absolving the responding party', while the term 'sist', which does not appear in the draft rules, still appears in the definitions of 'freezing' and 'unfreezing' the progress of a case.

Again, we strongly suggest that the draft rules are reviewed by a plain language organisation and user tested with the public before they are finalised. Otherwise, an important opportunity to ensure that the rules achieve the aims of the civil courts review, the Rules Rewrite Working Group and the Council itself, to make the rules as clear and understandable as possible to ordinary people, may be lost.