ANNEX B CONSULTATION QUESTIONNAIRE

Consultation question 1

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

Comments

One of the key intentions behind the new simple procedure was to replace the two existing small claims and summary cause procedures with one procedure. We therefore are concerned that, by having two sets of rules, the proposals fall short of this important aspect of simplification. While we recognise that certain areas of law are more complex, we do not necessarily agree that there needs to be a separate, more complex, process to deal with these areas. The decision to have two sets of rules reflects one of our core concerns about the current proposals: that they simply try to fit the existing processes within simpler language, rather than trying to create an entirely new simple process.

If the intention is to proceed with two separate sets of rules, then both sets of rules need to make it very clear at the outset (i.e. at Part 1, rule 1.1.) which cases they apply to. For example, in the Simple Procedure Rules as drafted this could be done by setting out a list of circumstances in which the rules do not apply, referring to the Simple Procedure (Special Claims) Rules.

We are very concerned that there are no plans to consult on the Special Claims Rules. Consultation is vital to ensure that the procedure is as accessible as possible for unrepresented litigants, particularly as the current consultation paper gives limited detail on what these rules would look like. This is particularly important for parties involved in heritable cases given the consequences involved. In 2014/15, evictions for rent arrears made up 32% of new issues relating to summary cause actions dealt with by bureaux, representing a 46% increase since 2013/14. Consulting on these rules would be the only opportunity for people with experience of heritable cases to have any meaningful input.

Consultation question 2

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

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

Content ☒ Not content ☐ No Preference ☐

- ***Claimant** – for pursuer*

Content ☒ Not content ☐ No Preference ☐

- ***Responding party** – for defender*

Content ☒ Not content ☐ No Preference ☐

- ***Freeze – for sist***

Content ☒ Not content ☐ No Preference ☐

Consultation question 3

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

Comments
While overall we are content with the terms in question 2 above, further improvements could be made. In particular, while freeze is an improvement on sist, unfrozen is not a term commonly used. A better option might be 'pause' and 'restart'. Further, while we are content with responding party, we think the rules should make clear the relevant terminology in relation to counterclaims – will the person making a counterclaim be referred to as a claimant or respondent in that context? Also, while we welcome the simplified language within the rules, we would reiterate that this does not reflect a new simplified process. Although much of the new language in the rules is an improvement, many of the rules themselves simply replicate the existing and often complex procedures. Therefore, we do not envisage that the rules will be significant clearer for the vast majority of unrepresented litigants.

Consultation question 4

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

Yes ☒ No ☐

Comments
Yes. There remain a number of terms in the rules which will be unfamiliar to unrepresented litigants. We would like to see a clear definitions section at the beginning of the rules. The terminology set out at Part 17 is of no real practical use to unrepresented litigants in helping them understand the process – it simply sets out the phrases that have replaced the old language such as sist, without giving any practical explanation of what is meant. Many legal concepts are retained, such as 'serve', 'lodge' and 'citation', which do not support the intention of a simple procedure. We also have concerns about the use of the term 'may' throughout. An example is in Part 9 (documents and other witnesses). We are concerned that this may be misleading for many unrepresented litigants: 'may' is used in many instances suggesting a choice where as in practice the rule needs to be followed.

Consultation question 5

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

Comments
Overall, we think that the rules are set out in a logical and chronological order. However, we do not think that the current numbering system makes the rules easy to navigate. Each part has the same numbering system, making it necessary to refer to both the part number and the rule number in order to differentiate, e.g. Part 1 rule 4.1 from Part 2 4.1. We would prefer sequential numbering throughout all Parts. Also we would prefer there not to be a mixed use of letters and numbers – this could add to confusion for unrepresented litigants. So, for example, we would prefer 4.1.1 as opposed to 4.1(a).

Consultation question 6

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

Comments
We would welcome rules online which are as user-friendly as possible. This could include, 'help boxes' to give additional information on each rule including practical examples, definitions of terms displayed when hovered over, and the use of graphics and flowcharts.

The website needs to be easier to navigate than the current Scottish Court and Tribunals Service website. There should be a clear and separate section 'For the Public'. Also, each page must contain links to all other relevant and necessary information. For example, if a user is on a rule page, there should be a link to the relevant forms.

We would also welcome information online about where people can access advice and representation, such as in-court advice projects. While the intention behind the rules was to enable unrepresented litigants to use them, we believe that the vast majority of people will still need advice and representation to navigate the system. Despite the new rules, the procedure remains relatively complex and the process of going to court is for many inherently daunting. Every opportunity should be taken to signpost people to appropriate advice and support.

While online access is appropriate, there needs to be other ways for users to access the rules, particularly those who have limited access to the internet. For example, hard copies should be provided in advice agencies who support people with cases under the new simple procedure rules.

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

Comments We believe the approach to headings is positive and should help parties to navigate the rules.

Consultation question 8

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

Comments We welcome the intention to ensure that parties are not brought to court unnecessarily. However, we would question whether in practice the rules will make any difference to the current system, where there is preliminary hearing/first calling, followed by a full hearing/proof where necessary. It is not clear from the rules how it is proposed to reduce the number of times people are brought to court unnecessarily. While we generally welcome the intention to deal with matters quickly and without too many hearings, in some cases it may be beneficial to a party that a case does come back to court; for example, in rent arrears cases, an undue emphasis on reducing the number of hearings could disadvantage a party by a decree being issued.

Consultation question 9

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

Comments

Court should be a last resort and we support the intention of encouraging alternative dispute resolution. However, ADR provision remains patchy across Scotland and we believe that the rules should allow more flexibility to reflect that ADR often may not be available. If the intention behind the rules is to be achieved, then there must be appropriate funding and arrangements to ensure services are in place and are accessible to litigants.

Further, in some circumstances, it may not be appropriate; particularly by the point the parties have reached a final hearing it may be frustrating and counter-productive for them to be sent for ADR. By this stage, parties have often incurred expenses and are more emotionally invested in the outcome. If ADR is to be effective, it should be made available as early in the process as possible, ideally before a case has even reached court. The rules seem to suggest that ADR should only be encouraged once a claim has been lodged. Further, the rules need to reflect that ADR is usually only effective where both parties are willing participants. We would therefore not wish to see parties ordered by the court to undertake ADR where that is not appropriate. This could ultimately undermine access to justice.

Consultation question 10

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

Comments
Generally we support the principles set out in Part 1.
We understand from the consultation paper that court fees and expenses will be determined after this consultation. However, we are concerned that the rules as they stand may mislead a party as to the costs and risks of litigation. For example, the emphasis in Part 1 1.1 and 2.1 is on the procedure being 'inexpensive'. For many parties, that is not the reality.

In 2.3, 'fairly' may be a better term than 'even-handedly'.

2.5 could potentially be misleading and should be clearer on when parties have to come to court. This could be assisted with practical examples in supplementary guidance (see further below).

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

Comments
Rules 6.1 – 6.11 – It is not clear who the drafters had in mind for these particular rules. 'Representatives' seems to suggest they would cover both legal and lay representatives. However, many of the current rules would only really be appropriate in relation to legal representatives. For example, a lay representative, such as a family member, may not recognise the person they are representing as their 'client' (rule 6.5). We also think it is unreasonable to expect a representative who is not legally qualified to know whether their argument has a legal basis (rule 6.6). Further, how would the duties of client confidentiality apply to a family member acting as a representative? Rule 7.3 – We are concerned about the breadth of this power, particularly as in our experience there is considerable variation in the approach taken by different sheriffs. If such a broad power is to remain, then there must be a focus on training for sheriffs to improve consistency.

Consultation question 12

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

Comments

Consultation question 13

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

Comments
We have a number of concerns about Part 2:
- the definition of lay representative at 2.3 and 3.1 is confusing; rule 2.3 should be deleted – it is circular and it is not immediately clear who is entitled to act as a lay representative (you have to read on to rules 4.1-4.8)
- that the Part needs to distinguish between two very different types of lay representatives – those who undertake the role as a one-off and those who undertake the role as part of their career/on behalf of an organisation; this should be reflected in the definition of lay representative
- it is not clear from the current layout that a lay representative must meet all the requirements set out at 4.1-4.8; this may lead to some thinking that if they meet one then they qualify
- while we think that the form that is required to be filled out is relatively simple, there should be sufficient flexibility to allow a person to act as a lay representative at the last minute where appropriate , for example, when in court and a party decides they want representation from a family member
- it is not clear what is envisaged by a 'lay supporter'
- rule 7.2 may lead a party to believe that they can't have both a lay representative and someone there to support them, such as a social worker
- it is also not clear from the rules whether lay representatives can only make submissions on behalf of parties and not companies or other non-natural persons.

Beyond the rules, CAS believes there needs to be reform to the current system of lay representation including additional rights of appearance in civil courts, accreditation and training.
(http://www.cas.org.uk/system/files/publications/lay_representation_in_scotlands_civil_courts_0.pdf)

Consultation question 14

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

Comments CAS is concerned that rule 2.2 concerning the 'three important dates' will be confusing for many unrepresented litigants. The terms 'service', 'response' and 'first consideration', particularly 'first consideration', are not concepts which are clearly understandable for people with no or limited experience of the court system.

Consultation question 15

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

Comments
We would welcome a flowchart similar to that in Part 4 which sets out the normal process for making a claim.

While examples are helpful, we think the way they are currently laid out makes that section of the rules difficult to follow. We would prefer to see separate guidance, and help boxes online, in relation to each of the rules which contain practical examples.

3.4. – It is not entirely clear what is required of claimants here to show why they think they should be 'successful'. We assume that points of law should be covered here but we think further guidance needs to be given to make it clear what sort of arguments are expected.

We welcome rule 4.1 which states sheriff clerks must provide a note explaining any problems with a claim form but we question whether they will have the capacity to do this effectively in practice.

We note that there is no rule which states how to add to the initial list of documents and evidence provided in the claim form. At the moment a further inventory can be lodged after the first. Our experience is that, in many cases, parties do not have all the evidence they need at the beginning of the claim and need to add to their initial list once, for example, a response form has been received or the issues have been clarified by the sheriff.

It is not clear from the rules that the onus is on the claimant to check whether a response has been received.

We note that the rules do not provide any guidance for the parties on jurisdiction, which can be an important issue, particularly in relation to consumer contracts.

Consultation question 16
Do you have any comments on the flowchart (at Part 4 Rule 2.4) setting out the options available to the responding party when responding to a claim?

Comments We welcome the flowchart in Part 4. However, we have some concern about the Part's approach to 'Time to Pay'. Firstly, 'able to settle a claim' needs to be clearer – i.e. whether the responding party is able to pay all of the money which the claimant is seeking. Secondly, the rules do not set out clearly the consequences of a 'Time to Pay' application, in that it can lead to a decree if you miss payments and enforcement action can be taken. This needs to be made clear in the flowchart and/or the rules themselves.

Consultation question 17

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

Comments We note that there is no guidance on how to respond to a counterclaim; we think this is needed to ensure clarity.

Consultation question 18

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

Comments We think this Part has the potential to confuse unrepresented litigants. It may be better placed later in the rules. It distinguishes between sending and service but it would not be clear to an unrepresented party why that distinction is made, or what can be sent and what must be served. We would welcome more flexibility around serving – for example, can you service in person? We also think that the process for serving should recognise technological and digital advances.

Consultation question 19

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

Comments

Consultation question 20

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

Comments
We remain unclear as to how case management conferences will work in practice. If they are held in open court, then 'conference' may be a misleading term for the parties.

Consultation question 21

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

Comments Overall, we find this Part very unclear. The concept of 'first consideration' is not straightforward and it is difficult to tell from this part what is involved. For example, it does not make clear that parties do not need to attend. Rule 2.1. is confusing: 'When will the sheriff **first consider** a case? The sheriff must consider a case as soon as possible after the date of first consideration'. This suggests that there are two separate considerations: the date of first consideration and then the consideration. You would have to go back to Part 3 to remind yourself that the 'date of first consideration' is not actually when the case is first considered but when the sheriff *may* first consider the case. We would like to see a final deadline in rule 2.1 ('at the very latest') for considering a case after the date of first consideration. Rule 3.1 – it is not clear what is meant by 'first written orders'. The rules do not flow in a logical order here. For example, we would suggest that 6.1-6.4 would follow 3.1, when 'first written orders' is mentioned.

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

Comments
We think that including this as a separate part is unnecessary; this should be included in Part 6, which is about orders and case management.

Rule 2.3 – It needs to be made clear that 'in person' means verbally. Often unrepresented parties do not take a note of, or fully understand, orders given verbally at a hearing and may be confused as to what needs to be done. Ideally, we would like to see all orders in written form from the sheriff, either at the hearing or confirmation in writing as soon as practicable after. This would prevent confusion and potentially save court time at future dates.

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

Comments We are unclear whether 'freezing/unfreezing' replaces both the current sist and continuation processes or whether continuation remains. Part 11 rule 3.4 suggests continuation remains as a separate process. This needs to be clarified. We would welcome guidance on the common factors that a sheriff will take into account when deciding whether to freeze the case.

Consultation question 24

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

Comments
We think that this Part could be reworked to make it clearer and avoid duplication. For example at the beginning of the Part, there could be a section which sets out the rules applicable to all applications. The Part could then move on to explain what each type of specific application is and whether there are any additional requirements.

We think there needs to remain a provision for a general application for example, to deal with unavailability of the parties. At the moment, it is not clear from the rules whether such a general application could be made.

We note that there is no provision in relation to joint applications, which in our experience are used relatively frequently. The rules as drafted suggest that an application can only be made by one party; the other party may not object but sheriff will still consider the application. At the moment if a joint application is made it is usually granted without consideration. We think there should still be provision to allow this.

Further, it is not clear whether parties could still make a joint application to dismiss a claim without expenses. Rule 7 suggests that it will be for the sheriff to assess expenses. This could create a perverse incentive on parties not to abandon a claim.

Rules 3.3, 4.3, 6.5, refer to 'within 7 days' but do not say from what date/event.

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

Comments
This is a clear example of where the use of 'may' be confusing for unrepresented litigants. Rules 3.1 and 3.2 say parties 'may' lodge documents or other evidence with the court; this could lead to parties thinking that they do not *have* to lodge documents which they intend to rely on at the hearing. This needs to be clarified. This confusion is compounded by the fact that rule 3.5 states that all documents and other evidence 'must be lodged' with the court at least 14 days before the hearing.

Rule 3.5 is the key deadline and therefore should be more prominent – i.e. at the beginning of the section headed 'How can you lodge documents and other evidence with the court'.

As noted above, there is no provision to allow a party to add to their initial list of evidence. Rule 2 seems to suggest that a party can only lodge evidence listed in the initial Claim Form, otherwise they will have to ask the sheriff on the day of the hearing for permission to rely on other evidence.

We think that the rules could go further in requiring parties to send a copy of the documents or evidence they have in their possession, rather than the onus being on the other party to borrow or inspect documents lodged at the court (rule 4).

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

Comments
The language in this Part remains technical and it will not necessarily be clear to an unrepresented litigant what is meant by 'citation' and when it is used. It is also not clear from the rules who will serve a Witness Citation Form or the potential expenses involved for party.

Consultation question 27

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

Comments

Consultation question 28

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

Comments

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

Comments
Rule 1.1 – it is not clear what this hearing involves: 'consider a case' is an insufficient explanation for unrepresented litigants. Rule 3.5 – hearing continuing despite non-appearance of witnesses – it may be useful to reference this in Part 10, as it could inform a party's decision as to whether to cite a witness. Rules 3.1 – 3.2 – as discussed above, ADR is usually more appropriate when it takes place early on in proceedings. We are concerned that these rules suggest ADR should be considered for the first time at the hearing. Also, as noted above, by the time the case has reached this stage it may be inappropriate to require ADR and parties may be much less willing to negotiate.

Consultation question 30

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

Comments 4.1.(c) – 'do something' – guidance/examples needed on this to make it clear to parties what this can entail. 5.1 Revoking decisions: Clear example of where procedure has not been changed but the language has simply been replaced. If anything, the rules in 5.1-5.7 make the process more complex. 5.5 – this is a key time limit but again is not prominent in the rules. 6.1. – it is not clear whether this is a hearing under Part 11.

Consultation question 31

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

Comments
The rules are intended to be used by unrepresented parties. If the case is to proceed to ordinary cause then it is likely the party will want to seek legal advice and representation. The 14-day-time limit in 2.2 is unlikely to be long enough to allow them to do so, particularly if legal aid is required.

Consultation question 32

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

Comments
The rules are intended to be used by unrepresented parties. If the case is to proceed to appeal then it is likely the party will want to seek legal advice and representation. The 14-day-time limit in 2.1 is unlikely to be long enough to allow them to do so, particularly if legal aid is required.

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

Comments We would welcome a statement at the beginning of all forms that signposts the party to appropriate advice and representation. Further, we think that it should be made clear that the party needs to keep a copy of every form it sends. For the forms to be effective and to make the process simpler for unrepresented parties, then solicitors and other representatives must be encouraged to use the forms and fill in the information in the format set out, rather than stating 'see attached' and providing the requisite information in an alternative format.

Consultation question 34
Do you have any comments on any individual forms?

Comments

Lay representation form: this should distinguish between a person acting as a lay representative on a one-off basis and those doing it as a career/on behalf of an organisation.

Claim form: At B1 the options 'I want to be represented by a family member or friend' and 'I want to be represented by someone from an advice or advocacy organisation who is not a solicitor'. This could be confusing in that it suggests that the option might be available from the court. It could lead to parties selecting this even though they have no representative in place, but will then expect a representative to be provided.

Notes in margin next to B3: should read 'If your representative works for a solicitors firm or an advice or advocacy organisation, please give the name and address of that firm or organisation'.

D2: The margins suggest that D2 ('Where did this take place') that this box is meant to deal with jurisdiction, but that is not necessarily determined by where event happened. Where the event took place could be included as one of the details in D1, with a separate box to cover information relevant to jurisdiction.

D3: Confusing and potentially problematic in relation to alternative orders. It needs to be clear that if you are asking the court to do/deliver something you must ask for an alternative order of money.

E: Could ask to lodge documents if in possession rather than just listing.

Response form: the last date for response needs to be highlighted. As discussed above, the consequences of a Time to Pay application should be clear. Also, it is not clear whether or not companies can apply for Time to Pay – at the moment they usually fill out a separate form, but assuming both natural persons and non-natural persons are using the same form then any differences need to be made clear.

C1: same issues as for claim form.

Warning at end should be at beginning.

Confirmation of service form – it is not clear whether a Confirmation of Service must be signed by either the party's solicitor, a sheriff officer or the sheriff clerk (the three people who are able to serve a form or notice – see Part 5 rule 4.2).

Counterclaim form – should set out at top of form what a counterclaim is.

Consultation question 35

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

Comments
We do not think that the standard orders should be included in the rules, but should instead be in a schedule/appendix.

Consultation question 36

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

Comments

Consultation question 37
Do you have any comments on the approach taken in Part 18?

Comments

Consultation question 38

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

Comments

We would emphasise that new rules alone will not ensure a simpler and more accessible procedure. Our experience in the past has been that the policy intention to make courts more accessible to unrepresented litigants does not always easily translate into practice. For example, the existing small claims procedure was intended to be more informal and user-friendly; in our experience it has often operated more formally than intended, and remains intimidating and complex for unrepresented litigants. To improve accessibility, there must be a concerted effort to change the culture and practice within courts. There must be training for sheriffs and summary sheriffs on the new simple procedure, which focuses on improving accessibility and enhancing consistency across courts in Scotland.

As regards to the rules themselves, while we welcome the clear effort that has been made to simplify the language used, we are concerned that the actual process and procedural structure does not differ significantly from the current small claims and summary cause rules. The rules may have different wording, but in essence reflect the same complex process. We therefore are not convinced that the rules will make a significant difference to unrepresented litigants in practice.

As such, we envisage that many litigants will still need appropriate advice and representation. Moreover, there will always be a significant number of litigants who, regardless of how 'simple' the rules are, will need that support. A number of our bureaux run effective in-court advice projects which offer such support. This ensures that litigants have access to justice and can also have benefits for the court by, for example, helping to weed out weak cases or ensuring forms are filled in correctly and cases are properly prepared. However, the availability of such projects remains piecemeal and funding time-limited and insecure. As Lord Gill recommended in his review (chapter 11, paragraph 36), we believe that such projects need to be developed and extended as a matter of priority.

Comments

We note that the intention is that the rules should stand alone and that there should be no need for separate guidance. However, we have identified a number of rules which would benefit from additional guidance, particularly in the form of practical examples. As we discussed above in relation to Part 3, we do not think that these examples are best included in the text of the rules themselves, which can make them difficult to follow, but could be provided in complimentary guidance or in help boxes online. As an alternative, we would suggest guidance/examples in the margins of the text, as has been done with the forms in Part 15.

One issue that runs throughout the rules is that important timescales or deadlines are often not upfront. We have highlighted examples above but in reviewing the rules, consideration should be given as to how to ensure such key information remains prominent and is not 'lost' among other rules.

We are also not clear whether these rules have been 'road-tested' by the people they were intended for: i.e. members of the public with little/no experience of the courts. If not, we would strongly recommend this is done as matter of priority and feedback used to inform changes to the rules as drafted.