



THE LAW SOCIETY  
of SCOTLAND  
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# Consultation Response

## **Scottish Civil Justice Council: Consultation on the draft Simple Procedure Rules**

**The Law Society of Scotland's response**  
**March 2016**

## Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's legal profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Scottish Civil Justice Council consultation on draft Simple Procedure Rules. This response has been prepared on behalf of the Law Society of Scotland by members of our Civil Justice committee.

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

The approach is a sensible one. It has long been recognised that there are certain categories of case that are unsuitable for party litigants. To preserve equality of arms, it makes sense that the more complex type of case is withheld and a separate simple procedure (special claims) rules constructed. This will prevent legalising the simple procedure to accommodate the more complex type of case.

In addition, we would suggest that there should be consultation around the Simple Procedure (Special Claims) Rules on the basis that they will be, by definition, sufficiently different from the core rules. . Although it is true that many of the "special claims" rules will be dictated by existing primary legislation, without consultation, there is the risk of unforeseen and unintended consequences in areas of law which will likely involve thousands of actions each year.

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

A claim - for a standard Simple Procedure case.

Claimant - for pursuer

Responding party - for defender

Freeze - for sist

Yes, although pause may be preferable to freeze.

3. Do you have any comments on the approach taking to updating hard to understand terminology in the Simple Procedure Rules?

The terminology should be road-tested by lay court users before final implementation. The simplification of language is to be welcomed.

4. Is there any terminology remaining in the Simple Procedure Rules which you think is unfriendly or difficult for the lay-user to understand and, if so, what alternatives would you suggest?

No. However, the draft proposed rules should be road tested to ensure that all language is comprehensive to a lay-user.

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

The accessibility of the table of contents is critical. A help number for assistance in navigation may be of assistance. A user-friendly search engine within the rules would also help.

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

The Scottish Courts and Tribunals Service website along with the other rules is the natural location for the Simple Procedure Rules. The rules should be available in a number of accessible formats, including large print and in reader format. The user should be able to read the rules easily without having to scroll to navigate.

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

The approach is novel and again should be road-tested with lay persons prior to proceeding. It does make the rules very comprehensive. However, the use of questions as headings may make the search engine option more difficult to use. However, this could be overcome if the search engine searched through the entirety of the text. The style of headings is likely to assist the user understand the rules.

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

The minimising of hearings is appropriate in simple procedure cases. Consideration should be given to the use of telephone conference or Skype rather than appearance in person, if appropriate. If a judicial decision is to be made without hearing then full written

reasons ought to be given as to why the Sheriff did not consider a hearing necessary and that it is only a point of law that required to be considered. For the purpose of the consultation, it may be useful for fuller examples to be given on the circumstances in which it is envisaged that a judicial determination could be made without the need for a hearing.

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

We would want fuller information about what evidence the parties are required to produce that demonstrates that they have considered ADR. It has long been accepted that there can be no compulsion to undergo ADR; to be successful, it must be willingly undertaken by both parties.

10. Do you have any comments on the proposed principals of Simple Procedure as set out in part 1 rules 2.1 – 2.5?

There will be a lot of responsibility on the adjudicating Sheriff in relation to case management and determining how many (or if) hearings are necessary. It is essential that those making the decisions are properly trained. It will be an essential part of the process that parties are encouraged to negotiate but they are entitled to adjudication if that is their preference.

11. Do you have any comments on the proposed duties of Sheriff's parties and representatives?

The Sheriff is afforded a wide range of powers to case manage the Simple Procedure cases. The ability of the Sheriff to communicate with the parties and or representatives - to ensure that parties are aware of the case management role of the Sheriff – should mean that no step is a surprise. With the simplification of language and the reduction of informality, parties should feel empowered.

13. Do you have any comments on the approach taken in part to representation and support?

The critical feature of these roles is that the lay representative cannot be remunerated and must be an appropriate person.

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

The timetable appears reasonable.

15. Do you have any other comments on approach taken in part 3: making a claim?

The use of examples and common mistakes will assist in completion. These can be developed as the rules are put into practice.

16. 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?

These should be road-tested with lay persons to ensure that the actions required of them are easily understandable.

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

No.

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

This is a step in the process that some may find challenging. An in-court advisor who could assist with this may be of some benefit.

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

There is undoubtedly a danger that a claimant may not send an application for a decision to the court for decree. It would be useful to know whether the clerk in a covering letter will be providing the dates for response and a list of what the claimant can do if the responding party does not produce a form of response.

The timescales suggested for the issuing of written orders in cases where the responding party has indicated they wish to settle seem appropriate.

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

The case management conference in its style will be driven largely by the personality of the Sheriff conducting it. Again, it is essential that the Sheriffs are all given sufficient training to enable them to carry out their function consistently. The informality suggested is to be welcomed to enable parties to discuss their claim and response. From this, the Sheriff will be able to identify what orders the claimant is likely to be seeking. It is essential that the parties are asked about their attitudes to negotiation and alternative dispute resolution. This is a neutral enquiry. Parties should be clear that the court is there for them and to adjudicate in their claim should negotiation or alternative dispute resolution not be suitable to both parties in the case.

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

No.

22. Do you have any comments on the approach taken in part 7: orders of the Sheriff?

The simplicity of the part 16 standard orders is to be welcomed.

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

It seems sensible that there is a mechanism for the ordering of a hearing if a case has been frozen for 6 months. It must be within the power of the court if no party responds to order for a hearing to dismiss the action.

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

No.

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

The approach taken to documents and other evidence appears simple. However, some examples on the website may be of use to court users.

26. Do you have any comments on the approach taken in part 10: witnesses?

No.

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

We believe that they are necessary. If a case is proceeding to this stage then inevitably there will be a requirement for an increase in information to ensure that the rules are complied with. What is unclear is whether there requires to be an exchange of each parties list of witnesses.

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?

This part may be an appropriate part which deals with whether or not the list of witnesses needs to be exchanged between parties.

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

Again, full training for the Sheriffs will be essential to ensure that there is a consistent approach taken by Sheriffs to the hearing. The evidence is that unless both parties are willingly undertaking ADR then it is of limited success. Therefore, both parties must be genuinely prepared to defer the decision making to an alternative dispute resolution forum rather than have the Sheriff make the decision at the hearing or at a subsequent hearing.

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

The requirement for a decision to be made within 28 days is to be welcomed.

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

No.

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

No.

33. Do you have any comments on the approach taken in part 15: forms?

The use of questions seems user-friendly.

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

No.

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

This would appear to be a sensible conclusion.

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

The language appears simple but should be road-tested.

37. Do you have any comments on the approach taken in part 18?

No.



**For further information and alternative formats, please contact:**

Andrew Alexander

Head of Policy

Law Society of Scotland

DD: 0131 226 8886

E: [andrewalexander@lawscot.org.uk](mailto:andrewalexander@lawscot.org.uk)

[www.lawscot.org.uk](http://www.lawscot.org.uk)