



**Scottish
Civil Justice
Council**

Summary of Responses to the SCJC Consultation on the Simple Procedure Rules

November 2018

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SECTION 1 INTRODUCTION AND BACKGROUND

Background

1. In 2007, the Rt Hon Lord Gill, at that time Lord Justice Clerk, undertook a wide-ranging review of the civil court system in Scotland. The Report of the Scottish Civil Courts Review ('the Review') identified that *'there is a particular need for changes to court practices and procedures in cases of low monetary value ... so that people who do not have legal representation can enter and move through the court process effectively.'* The Review recommended that *'[s]ummary cause and small claims procedure should be replaced by a new simplified procedure for all actions with a value of £5,000 or less ... The procedure should be designed with unrepresented litigants in mind.'*
2. The Scottish Government accepted this recommendation and made legislative provision giving effect to it in the Courts Reform (Scotland) Act 2014 ('the Act'). Section 72 of the Act created a new form of civil procedure in the sheriff court known as simple procedure and provided under section 104(1) that rules of court for simple procedure were to be made by Act of Sederunt.
3. The Scottish Civil Justice Council ('the Council') has responsibility for developing rules for the civil courts and tasked its Access to Justice Committee ('the Committee') with taking forward the work on developing the rules for simple procedure.
4. On 28 November 2016, simple procedure replaced small claims in its entirety and largely replaced summary cause procedure. The effect of this is that simple procedure must be used to make a claim which has a monetary value of £5000 or less and seeks payment, delivery, the recovery of moveable property or an order for someone to do something specific. The court rules and procedure for these types of claims are set out in the Act of Sederunt (Simple Procedure) 2016 ('the Simple Procedure Rules'), which is the focus of this report.
5. It is intended that simple procedure will be extended to include other types of claim at a later date. These claims are referred to collectively as 'special claims' and will include personal injury claims, actions of multiplepoinding, aliment, furthcoming and the recovery of possession of heritable property. These types of claim were out with of the scope of this consultation.
6. On 20 February 2018 the Council approved the methodology for its post-implementation review of the Simple Procedure Rules by correspondence.

The focus of this review is primarily on the operation of the rules, forms and standard orders. It does not consider the underlying policy. This is to allow any problems with the current rules, forms or standard orders to be considered and amended as required, in advance of the introduction of the special claim rules.

7. A further review will be carried out by the Council at a later date in order to ascertain whether the policy intentions of simple procedure have been met.
8. As part of the review, the Council has commissioned the University of Glasgow to carry out research into the accessibility and usability of the Simple Procedure Rules by party litigants. The Council intends to carry out focus groups with interested parties, likely to include both private practice and third sector organisations, to obtain further feedback on the Simple Procedure Rules. This report therefore provides a summary of the responses to the consultation exercise. Any proposed changes to the Simple Procedure Rules as a result of the consultation will be considered by the Committee once the research conducted by the University of Glasgow has concluded.

Approach to the consultation exercise

9. The consultation document set out some overarching questions for consultees to consider in connection with the Simple Procedure Rules. The open questions set out in the consultation were designed to facilitate discussion and obtain a broad spectrum of views. Whilst the questions focused on the most commonly used parts of the rules (e.g. making and responding to a claim), they were not exhaustive and consultees were given an opportunity to comment on any part of the rules and to make any general comments. Thus, the feedback obtained was intended to be qualitative in nature.

Responses

10. The consultation ran from 27 February 2018 to 31 May 2018. The Council received 25 responses to the consultation. The consultees are listed at Annex A and included advice agencies, the judiciary, the legal profession, the insurance industry as well as a number of individuals. The responses can be broadly grouped into the following categories:

| Category | Number of responses | | | |
|--------------------|-----------------------------|--------------------|------------|-----------|
| | Representative organisation | Firm/ Organisation | Individual | Total |
| Judiciary | 1 | 1 | 1 | 3 |
| Legal profession | 2 | 9 | 1 | 12 |
| Insurance industry | 3 | - | - | 3 |
| Advice agencies | - | 1 | - | 1 |
| Local authority | - | 1 | - | 1 |
| Other | - | 2 | 3 | 5 |
| Total | 6 | 14 | 5 | 25 |

11. Twenty two [responses](#) to the consultation were published on the Council website on 16 July 2018. Two individual consultees asked to remain anonymous and two organisations and one anonymous individual asked for the content of their responses not to be published.

SECTION 2

SUMMARY OF THE CONSULTATION RESPONSES

12. This section summarises the main comments made in the consultation responses.

Question 1 – do you have any comments on the way in which a claim is made using simple procedure or the forms associated with this stage?

13. Most of the comments received related to the simple procedure Claim Form (Form 3A). It was generally felt that the Claim Form was too lengthy and cumbersome and that it should be abbreviated. A number of consultees observed that, in their experience, the Claim Form is not easily understood by party litigants.
14. Some consultees commented that parties will often use a separate paper apart instead of using some parts of the Claim Form as the relevant text boxes provided in the form are too small to adequately capture all of the required information for a claim.
15. Several consultees felt that the key information was not easily accessible in the Claim Form and that it would be helpful if the Claim Form contained a summary page, containing key information such as the details of the parties and the sum claimed for.
16. Several consultees observed that the question in the Claim Form relating to jurisdiction (section D2 of the form) could be clearer. It was commented that this question, which asks where the event took place, is not appropriate for all cases. For example, in relation to consumer credit agreements, jurisdiction would normally be based on domicile of the respondent. It was also suggested that asking the claimant, where one of the parties is a company or other type of organisations, to specify 'company type' was unclear and often lead to a description of the work done by the company (e.g. window cleaner) rather than, as is intended, setting out the corporate structure of the company (e.g. a limited liability partnership or public limited company).
17. Some consultees did not support the expectation that a claimant should, at the outset, give details of the evidence and witnesses which they may intend to rely upon. It was commented that the evidence required in a claim will depend to some extent upon how much of the claim is going to be disputed and that evidence and witnesses may change as a case progresses.
18. One consultee commented, however, that whilst the new procedure requires more input in the Claim Form and the Response Form than the procedures it

replaced, this was a positive feature as it means parties' respective positions are more readily apparent at an earlier stage. It was also commented that section D8 of the Claim Form, which asks a claimant what steps he or she has taken, if any, to try and settle the dispute was also a positive feature as it forces litigants to consider clearly whether they are raising court proceedings as a last resort or whether there may be an alternative means of resolution to their dispute.

19. One consultee suggested that it is unnecessary to require a claimant to send two copies of the Claim Form to the court and the requirement to do so, where that form is completed on paper, has a negative environmental impact.
20. It was suggested that it would be helpful to include a section in the Claim Form in which the claimant can ask for any incidental orders, reducing the need for the Claim Form to be accompanied by separate application forms (e.g. in order to ask for a shortened period of notice in cases of urgency).
21. Two consultees stated that the provision of Further Claimant and Further Respondent Form should be reconsidered. It was observed that it ought to be possible to include the details of all parties in the Claim Form.

Question 2 - do you have any comments on responding to a claim, the way in which time to pay may be requested or the corresponding forms?

22. Most of the substantive comments received in relation to this question related to the Response Form (Form 4A). Many comments echoed the observations received in relation to the Claim Form, particularly in relation to the length of the form, the size of the text boxes and the need to give the details of evidence and witnesses. It was observed by several consultees that, when compared to previous procedures, respondents have more paperwork served on them. It was noted that the paperwork a respondent receives, and is expected to consider, is voluminous and may overwhelm some respondents.
23. Several consultees indicated that the requirement on the respondent to send the claimant a copy of the completed Response Form should be more prominent on the face of the form. One consultee indicated that claimants often submit an Application for a Decision, as they have not been sent a Response Form, only to discover that the respondent has sent a response to the court. On the other hand, one consultee submitted that the requirement on the respondent to send copies of their completed forms to the claimant by the last date for a response could deter some respondents from responding to a claim if they do not have the facilities to print, copy or upload the forms, or the financial means to pay for next day, recorded delivery postage to send the documents. This consultee proposed an alternative option whereby the

respondent could hand their documents to the sheriff clerk's office to copy and send to the claimant.

24. In relation to the Time to Pay Application (Form 5A), several consultees noted that the form does not make clear the distinction between a Time to Pay Order under the Debtors (Scotland) Act 1987 or a Time Order under the Consumer Credit Act 1974. It was commented that it is often unclear from a completed application which order the respondent is seeking and that this can lead to confusion between the parties. The type of order sought may be relevant when a claimant is deciding whether to object to the application.
25. Two consultees called for clarification in relation to counterclaims in simple procedure. Whilst the consultees accepted that, in the absence of express provision for counterclaims, separate claims could be brought and conjoined, it was submitted that separate provision for counterclaims would be preferable.
26. Two consultees commented that the respondent has a limited time in which to respond to a claim, which may be problematic given the detailed information that is expected to be included in the Response Form. Similarly, two consultees suggested that it would be useful to have a period of adjustment to allow the claimant to respond to the Response Form and the respondent to obtain all the information required to complete the Response Form fully.
27. One consultee suggested that the guidance in the Response Form should encourage the respondent to write in numbered paragraphs. These paragraphs should correspond to any paragraphs used by the claimant.
28. Another consultee commented that the financial information requested in the Time to Pay Application should be aligned with the information required in the Common Financial Statement developed by the Money Advice Trust.
29. It was also suggested that the Time to Pay Notice (Form 5B) should include a section where the claimant can explain why the application is objected to, or to ask for additional orders such as amending the sum claimed to account for any recent payments to the debt after the claim was initiated.

Question 3 – do you have any comments in relation to the ways in which forms and documents may be sent or formally served in a simple procedure case?

30. In response to this question, three consultees suggested that service by way of email would be a much welcome development in simple procedure.

31. One consultee considered that, where the respondent's whereabouts is not known, the ability to formally serve a Claim Form by advertisement on the Scottish Courts and Tribunals Service website was an 'excellent development'.
32. A number of consultees called for the requirements in rules 18.2(1) and (4) to be reconsidered. One consultee commented that the requirement that the first attempt at formal service must be by a next-day postal service which records delivery adds unnecessary cost to sending documents. This consultee submitted that to ensure that documents are delivered the next day, parties must use special delivery on top of envelope postage costs. A number of consultees also suggested that rule 18.2(1) should be amended to allow for service by way of sheriff officer in the first instance. Those consultees did, however, note that, where service is executed by a sheriff officer in the first instance, the outlays for such service ought not to be recoverable.
33. A number of consultees expressed difficulty in practice with rule 18.2(4), which requires a Confirmation of Formal Service to be sent to the court with any evidence of delivery attached to it. One consultee suggested that the Rules should be amended to require proof of 'service' as opposed to delivery. Two consultees suggested that the Rules should be amended to clarify what was suitable evidence of delivery, noting that there are sometimes difficulties using the Royal Mail's Track and Trace service in certain cases.
34. Two consultees commented that parties often fail to intimate documents to the other side. This causes confusion and uncertainty at case management discussions and hearings, which potentially hinders settlement prospects.

Question 4 – do you have any comments on what can happen to a case after the last date for a response, or the Application for a Decision Form?

35. Two consultees expressed support for the current procedure by which a claimant may apply for a decision in an undefended claim. The procedure was viewed to be 'straightforward'. It was, however, suggested by one consultee that rule 7.2(2), which sets out what a sheriff may do upon receipt of an Application for a Decision (Form 7A), should be widened so that a sheriff may do anything else considered necessary.
36. In relation to disputed claims, some consultees expressed concern about rule 7.6(1), which sets out the five things which the first written orders may provide. Two consultees suggested that the five options do not reflect the powers of the sheriff under rule 1.8(3) (i.e. that a sheriff may give any order considered necessary to decide a case) and so should be widened. Another consultee stated that the Rules should not permit a sheriff to dismiss a claim

or decide a case in chambers. It was suggested that the parties must be given an opportunity to address the sheriff before a decision is taken.

37. Three consultees expressed support for the purpose and procedural flexibility of case management discussions. It was noted that sheriffs take a proactive approach to the issues in dispute in appropriate cases. Case management discussions were described as a useful forum to raise matters which may have prevented pre-litigation settlement and that often information is provided during these discussions, or shortly afterwards, which leads to the parties reaching settlement. Two consultees noted, however, that hearings were often fixed a very short time after the last date for a response, providing limited time in which the parties can explore settlement and lodge documents.
38. Two consultees submitted that the effectiveness of alternative dispute resolution ('ADR') is negatively impacted by the availability of ADR services in the majority of sheriff courts. One consultee suggested that, where a case management discussion is fixed, the sheriff's order should require the parties to meet beforehand to discuss settlement and the issues in dispute.
39. It was suggested that the Application for a Decision should be amended to include the date that the claimant sent the application to the court, given the time limit in which an application can be made, and to include the details of any reasonable outlays which may have been incurred by the claimant.
40. One consultee asked for the rules to clarify the procedure to follow where an additional respondent is introduced to a case.
41. It was also commented that there is often confusion about when a claimant should use an Application for a Decision or an Abandonment Notice.

Question 5 – do you have any comments on the way in which applications can be made in simple procedure, including any of the prescribed forms?

42. Two consultees felt that the current procedure for applications worked well. However, the overall consensus was that there are too many application forms and the forms are often cumbersome and lengthy. One consultee suggested that a generic application form would benefit parties. An example was given of a claimant being required to complete more than one application form to ask the sheriff for several orders at the same time (e.g., to complete an Application to Amend to amend the Claim Form and an Incidental Orders Application to ask the sheriff to remit the case to a different sheriff court).
43. Two consultees submitted that the ten day objection period for applications was too long and can lead to unnecessary delay. It was also observed that

there may be no need for the court to hold an application for ten days until the objection period expires where the whereabouts of the other party is not known and so it has not been possible to send them a copy of the application. Another consultee suggested the Rules should provide that a copy of any response to an application should be sent to the other party.

Question 6 – do you have any comments on documents, evidence or witnesses, or the forms associated with Parts 10 and 11?

44. A number of consultees commented that the forms associated with Parts 10 and 11 were lengthy and cumbersome. It was also suggested that the List of Evidence and List of Witnesses Forms (Form 10A and 11A) should be amended to include larger text boxes and for more than the current ten spaces for evidence or witnesses to be listed. It was also suggested that these forms should be amended to clearly show which list belongs to which party and whether it is the first such list by that party, for ease of reference.
45. It was suggested that the timescales in rules 10.2(1) and 11.2(1), which provide that parties must send each other and the court a List of Evidence Form and List of Witnesses Form at least two weeks before the hearing, should be lengthened to provide parties with more time before the hearing to fully consider their positions and engage in settlement discussions. It was also suggested that rule 10.2(4), which sets out how documents and other evidence may be lodged with the court, should be amended to set out that copies of documents and other evidence should be sent to the other party.
46. The text boxes contained in a Recovery of Documents Application (Form 10B) were said to be insufficient to specify all documents sought. It was said by one consultee that very regularly a paper apart is required in these circumstances.

Question 7 – do you have comments on the rules and forms relating to hearings and decisions, including the recall of a decision?

47. Three consultees reported no difficulty with the rules and forms relating to hearings and decisions. One consultee felt that the process for recall of a decision in simple procedure is an improvement on the previous procedures.
48. It was suggested by one consultee that it would be useful if a mechanism could be introduced to allow parties to indicate to the court whether or not diets of assessment or approval are required. It was commented that it is common practice for represented parties to negotiate expenses without the need for a court hearing and an amendment to the rules providing a period of 30 days to agree expenses would be useful, failing which the sheriff could

issue an order arranging an expenses hearing (see rule 14.5).

49. It was suggested that rule 13.5, which sets out when a decision of a sheriff can be recalled, should be amended to provide that the sheriff may recall a decision if it appears to the court there has been a mistake or administrative oversight by the court in making the decision.
50. Two consultees commented that some guidance around how long a simple procedure case may take would be useful to parties, with particular reference made to when a hearing to decide the case may be arranged by the sheriff.

Question 8 – do you have any comment on any other aspect of the Simple Procedure Rules, or any general comments about the rules or forms?

51. A number of consultees used this question to reiterate their views that the simple procedure forms are too time consuming to complete. It was felt overall that there are too many forms and that these forms should be amended so that they are more straightforward to use. Several consultees put forward suggestions in relation to how the forms may be improved (e.g. it was suggested that all forms should state, in a prominent position, to whom they must be sent and any time limits that apply to the sending of such a form).
52. Three consultees expressed concern with rule 15.2(1), which provides that after the Decision Form (Form 13A) is sent, a successful party must wait four weeks before enforcing the decision. It was submitted that if the court is experiencing a backlog preventing a Decision Form being sent promptly, this can significantly delay enforcement. Another consultee submitted that in cases such as those seeking return of an asset, a delay in enforcement can result in the asset being moved or hidden. It was suggested that Part 15 should include provision to allow a decision to be enforced immediately, if ordered by the sheriff.
53. One consultee suggested that there ought to be a restriction on the number of times a case management discussion may be continued.
54. Three consultees strongly encouraged greater use of technology to hold case management discussions, such as by conference telephone call.
55. Five consultees requested that the Council considers what should be the expenses position where a respondent has disputed a claim and that claim has settled prior to a hearing. These comments relate to the interpretation of section 81(5)(a)(ii) of the Act, which dis-applies the capping provision contained in the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 ('the Order') in cases where a defence is stated but is

not proceeded with. The effect of dis-applying the cap in such a case is that expenses are payable on the usual scale. The relevant provisions re-enact the equivalent provisions in section 36B of the Sheriff Courts (Scotland) Act 1971 and the Small Claims (Scotland) Order 1988. This matter was considered by Sheriff McGowan in *Graham v Farrell* [2017] SC Edin 75, who considered that previous case law supporting a strict interpretation of the provisions should be followed. The Order was promulgated by the Scottish Ministers using a power conferred on them under section 81 of the Act. The Council and the Court of Session do not have the power to amend the Act or the Order.

56. Five consultees criticised the level of expenses in simple procedure generally and the lack of any reference in the Rules to the Order or the Act of Sederunt (Fees of Solicitors in the Sheriff Court (Amendment and Further Provisions) 1993. The focus of this review is primarily on the operation, accessibility and usability of the rules, forms and standing orders. A further review will be carried out at a later date in order to ascertain whether the underlying policy intentions of simple procedure have been achieved (i.e. whether it is a speedy, inexpensive and informal way to resolve disputes). The Council is very grateful to consultees for their views on this matter and will consider those comments when carrying out its policy review.
57. In addition, five consultees asked the Council to consider whether outlays and value added tax ought to be recoverable in addition to expenses capped under the Order. Whilst any amendment to the definition of expenses in terms of the Order is a matter for the Scottish Ministers, the Council is again grateful to consultees for their views on this matter and will consider those comments when carrying out its policy review at a later date.

SECTION 3 NEXT STEPS

58. The Committee will consider the consultation responses alongside the research report from the University of Glasgow and any output from the planned focus groups. The Committee will then be in a position to consider making recommendations to the Council for any changes to the Simple Procedure Rules. Any recommended changes will be considered by the Council in due course.

59. The Council is very grateful to consultees for taking time to respond to the consultation and for providing their views.

60. If you have any queries in relation to this report please contact Lauren Keillor on 0131 240 6781 or scjc@scotcourts.gov.uk.

ANNEX A - CONSULTATION ON THE SIMPLE PROCEDURE RULES -

LIST OF THOSE WHO RESPONDED

- Anderson Strathern LLP
- Brodies LLP
- Citizens Advice Scotland
- Clyde & Co
- Credit Services Association
- Dentons UK and Middle East LLP
- Dundee City Council
- Forum of Insurance Lawyers
- Forum of Scottish Claims Managers
- Glasgow Bar Association
- Graham Fordyce
- Harper Macleod LLP
- James Macfarlane
- Law Society of Scotland
- Lindsays Solicitors
- Morton Fraser LLP
- Nolans Solicitors
- Scottish Mediation
- Sheriff G Bonnar
- Shoosmiths LLP
- Society of Messengers-at-Arms and Sheriff Officers
- Summary Sheriffs at Glasgow Sheriff Court
- Summary Sheriffs Organisation
- Two individuals who asked for their names to be withheld