Scottish Civil Justice Council

CONSULTATION ANALYSIS: Ordinary Procedure Rules

Issued: 14 December 2023

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SECTION 1 - INTRODUCTION

Purpose

1. To provide the secretariats analysis of the 13 responses received to this Targeted Consultation on a draft of the Ordinary Procedure Rules.

Timing

2. This consultation was opened 18 July 2023 to run for a standard 12 week consultation period through to 10 October 2023. Following requests from the consultees that closing date was initially extended by 3 weeks to 31 October 2023 and then by a further 4 weeks to 30 November 2023.

Background

3. This consultation was undertaken by the Rules Rewrite Committee of the Scottish Civil Justice Council, with the aim of supporting the comprehensive rewrite of the court rules that support civil proceedings in Scotland.

Why was a targeted consultation undertaken?

4. Respondent's views were being sought at a very early stage of the policy cycle, on the draft rules that will continue to evolve over time, by using a series of several consultations to get to a workable solution that would be suitable for implementation. As this is about shaping initial policy a Targeted Consultation[1] was undertaken with selected users of the existing rules, with feedback accepted from anyone who did choose to engage with the proposals made.

5. The views sought were about the general direction of travel when consolidating the four separate sets of court rules as currently enacted. Answering such a broad request did require the targeting of those specific users who hold specialist professional and technical expertise in the law, along with significant day to day experience of the multiple existing procedures in use.

What were the consultation objectives?

6. The supporting papers provided those targeted respondents with a draft of the Ordinary Procedure Rules as one "worked example" of the rules being proposed. Those draft rules had been prepared to align with the general approach set out by the Committee when it published the Procedural Narrative in August 2022. The policy objectives set for this consultation exercise were:

[1] *The alternative of running a wider Public Consultation was considered inappropriate at such an early stage of the policy cycle, given the high potential for unnecessary resource impacts on occasional users of court rules.*

- To **simplify, harmonise and consolidate** the rules for progressing straightforward civil actions so that they are easy to use and understand**;** and
- To **promote consistency** between courts in the way straightforward civil actions are progressed.

7. The expected scope for a consolidation of these rules was conveyed to the respondents as including:
   - Removing the distinction between ordinary and petition procedure in the Court of Session;
   - Removing the distinction between ordinary cause and summary applications procedures in the sheriff courts;
   - Providing one generic consolidated ordinary procedure that could be used by any party who was initiating a straightforward "ordinary" civil action in either the Court of Session of the sheriff courts; and
   - Seeking any initial views on which parts of the four existing court procedures might be revoked or retained as part of a consolidation.

Responses

8. A total of 13 responses were received. Of those 11 responses were from organisations and representational bodies, with a further 2 responses received from individuals:

NUMBER OF RESPONSES				
CATEGORY	RESPONDENT	Organisations	Individuals	COMBINED TOTAL
Judiciary	Senators of the College of Justice	1	1	1
	Sheriffs Principal	1		1
	Sheriffs & Summary Sheriffs Association	1		1
Practitioners	Faculty of Advocates	1		1
	Law Society of Scotland	1		2
	Society of Solicitor Advocates	1		1
	Scottish Law Agents Society	1		1
	Law Firms	1		1
Officials	Scottish Courts and Tribunals Service	1		1
	Officials within the Scottish Government	1		1
Other	General public	1	1	1
	TOTALS	**11**	**2**	**13**

9. Of those 13 responses: 2 were submitted confidentially and 11 gave their permission for publication. The latter 11 responses can be viewed online via the consultation section of the Councils website.

Next Steps

10. Following the online publication of this analysis the next steps will be:

- *Drafting Instructions* – having considered the analysis provided by this paper the Rules Rewrite Committee will a) agree the direction of travel b) confirm their instructions for developing the next version of the draft rules and c) summarise those views in a Consultation Response paper for publication online;

- *Revised Draft Rules* – once drafted, the next version of these draft rules will be tabled with the Committee for their consideration and approval; and

- *Consultation* – the Committee will then consult again on that next version of these draft rules in late 2024.

11. If any reader wishes to provide feedback on this analysis, or feedback on how the consultation process for these rules is being conducted, they are welcome to email the secretariat at scjc@scotcourts.gov.uk.

Secretariat to the Scottish Civil Justice Council
December 2024

SECTION 2 – FEEDBACK ON THE CONSULTATION QUESTIONS

12. The draft version of Ordinary Procedure Rules (OPR) that was used for this consultation was flagged as an early and incomplete version. It was intended for use as an illustrative tool only - to promote "discussion and comment" with a view to helping the Committee to shape the "general direction of travel". It was not intended as an "implementable" set of rules.

13. To make the policy rationale for each rule more evident to a reader they were asked to read the draft version of the rules in conjunction with the Procedural Narrative that was published in August 2022. In practice some respondents found the time to follow that instruction whereas those with more limited time could only read and respond to each rule as drafted. For the Committees next consultation exercise it may be preferable to cut and paste the content of the Procedural Narrative into something more comparable to an Explanatory Note, as a mechanism for making it easier for readers to access the policy rationale behind each rule as numbered.

14. The feedback was provided relative to 3 consultation questions.

Question 1 – Will the "look and feel" of these consolidated rules provide court users with the simplified, harmonised and user friendly procedure sought?

15. One respondent did question whether this proposed change is even necessary "in the absence of evidence that the current rules are defective, or productive of injustice". If the answer to that question was yes then they suggested adopting one of the existing ordinary procedures as the standard as that different approach might produce less disruption and difficulty than the wholesale change that would be required to implement these draft rules as consulted on.

<u>The policy objectives</u>

16. The stated policy objectives were:
    - To **simplify, harmonise and consolidate** the rules for progressing straightforward civil actions so that they are easy to use and understand; and
    - To promote **consistenc**y between courts in the way straightforward civil actions are progressed.

17. For some respondents that 'simplification' aim was only seen as a valid objective in the context of developing the Simple Procedure Rules. In that context informality is appropriate as the issues are simple, the sums involved are small and the users are likely to be party litigants. They perceive there is a real danger in adopting simplification as one of the aims for this more fundamental change. In practice that is more likely to lead to 'oversimplification' as the existing ordinary procedures are inherently more complex for good reason. Litigation is a formal process and a degree of formality in the rules that govern that procedure is appropriate.

18. It may well work for cases under £5,000 to have a simplified and automated process with elements of case management within an inquisitorial approach. For cases over £5,000 several respondents took the view that entirely different considerations apply:
    - The proceedings have a higher claim value and are likely to be more complex;
    - The pursuers and defenders are far more likely to be legally represented, and they are much less likely to be party litigants; and
    - There is a less pressing need to simplify compared to a procedure that is inquisitorial in nature and specifically designed for use by party litigants.

19. One suggestion was to reset that aim as "flexibility"; in the context of a presumption of simplicity in the pleadings made with sufficient flexibility to require more detailed pleadings in appropriate cases.

The level of consolidation sought

20. The proposed level of consolidation was conveyed as:
    - Removing the distinction between ordinary and petition procedure in the Court of Session;
    - Removing the distinction between ordinary cause and summary applications in the sheriff courts;
    - Providing one new consolidated court procedure for use when initiating any ordinary action in either the court of Session or the sheriff courts; and
    - Determining which parts of the four existing court procedures should be revoked, and which parts should be retained.

21. Some of the relevant feedback on that general approach was:

Consistency:

- We see no reason why procedural rules should not be the same or similar in both courts.
- It is helpful for the rules to provide clarity on options that may otherwise rely on Practice Notes, local knowledge, or simply how a court likes things done.
- There appears to be no provision made for "Practice Directions" to supplement the rules.

Consolidation:

- There is no intrinsic reason for having an Ordinary Procedure and a Summary Applications procedure in the sheriff court.

Content:

- The rules do follow a logical layout and are relatively easy to navigate.
- There is a balance to be struck between brevity and detail. Getting that balance wrong can lead to uncertainty and a lack of uniformity.
- There is inadequate detail on what is required within a summons. Sheriffs and judges will have difficulty if that lack of focus means the key points in a case cannot be identified easily by the judiciary.

- We welcome the requirement to engage in pre-action correspondence, the word limits for summons and defences, and 4 months to serve a summons.

- Whilst acknowledging this is an early stage draft of the rules it is difficult to provide further detailed comment on the merits of each rule:
    - Without sight of the forms that are yet to be developed; or
    - Without knowing exactly where the line will be drawn between the procedures to be retained and those that will be revoked.
- The main issues we would highlight are the impact of the pre-action steps, and the shorter timescales envisaged, on certain groups.

Case Management:

- The model of case management as currently envisaged will lead to unworkable burdens on judicial resourcing and court staff, create unchallengeable discretion, and it will lead to uncertainty in decision making.
- The codification of 'case flow management', with only an option to move to 'active judicial case management' for selected cases, would be a more fruitful direction of travel.
- The retention of pleas in law would actively expedite judicial case management.
- Whilst putting a word limit on the parties' pleadings might not be a bad idea, a rule about what they should be saying would be a real benefit for case management

The layout of the rules

22. The design chosen when drafting this version of the draft rules was:
    - PART 1 - INTRODUCTION.
    - PART 2 - PROGRESSING A CASE.
    - PART 3 - MATTERS ANCILLARY TO PROGRESSING A CASE.
    - PART 4 - OPTIONS TO JOIN OR TRANSFER A CASE.
    - PART 5 – THINGS TO DO WITH ENFORCING A CASE.
    - PART 6 – ONLINE APPLICATIONS, FORMS AND OTHER OPTIONS, INTERPRETATION ETC.

23. That design gave some items such as the statement of purpose (rule 2) prominence at the beginning, with the items that would only be referred to occasionally (such as the interpretation clause at rule 87) relegated to the end. The core elements that a practitioner might refer to on a daily basis were set out in Part 2 (Progressing a case) which is focused on case management and the revised steps in legal process. The information that a practitioner refers to less frequently can then be found in Parts 3 to 6 as and when required.

24. The limited feedback received on this layout included:
    - The approach is pragmatic. Whilst this version of the rules is a useful starting point, there are a number of points where further consideration is required.

- The use of two different forms of words in the heading for a chapter and in the one rule within that chapter unnecessarily complicates matters; with rule 17: Summary Decree providing an example.
- The "Parts and Chapter" arrangement is not helpful. There may be scope for adoption of a "Parts and Title" arrangement (along the lines of the Civil Procedure Rules in England and Wales (CPR)) with rules numbered according to Part, with new "Parts" added when specialised rules are added.
- The reference to "thing" in the title of chapter 5 seems odd.
- The contents of Part 6 are too much of a miscellany. The rules about forms and interpretation require their own Parts. We would put them at the beginning, not the end of the rules.

The content of the rules

25. For this version each rule had been drafted as succinctly and concisely as possible, with some rules retaining more complex legal terminology where that was needed to provide legal certainty. There is a balance to be achieved and the feedback received was:
    - Some agreed with the proposal that a summons must be raised within four months rather than within a year and a day, whilst others disagreed.
    - Several agreed with the proposal that summonses and defences should not ordinarily exceed 5000 words.
    - Some agreed that the same judge or sheriff should, if possible, hear the case from start to finish but recognised that this aim would come at a potentially unsupportable cost.
    - To the extent these rules do not provide predictable procedure, they would not be perceived as "user friendly" as agents and clients will be ceding their control to uncertain case management by the court.
    - The rules introduce case flow management across the board, however:
        - Some types of actions lend themselves to this more than others; and
        - Some saw this as being overly inquisitorial in nature, which does not sit well in an adversarial system.
    - Whilst judicial continuity might appear sound in theory it will be difficult (if not impossible) to implement without significant additional resourcing (which is unlikely to be made available).
    - Any rule in an ordinary procedure that tasks the court with actively assisting a party litigant does have the potential to create unfairness, which may run counter to recent judgments[2].

The size of the rules

26. This initial example of the draft rules (which excluded forms, revocations, savings provisions, or explanatory notes etc.) conveyed a notional rule book with a heavily abbreviated 33 pages of procedure organised into 90 rules in total.

27. There was limited feedback on that implied size of the rules book other than:

[2] *Aslam v Royal Bank of Scotland [2018] CSIH 47 and the opinion of the Supreme Court in Barton v Wright Hassall LLP [2018] 1 WLR 1119).*

- Calls for more detail to be retained from OCR regarding some specific rules such as interim diligence; and
- Flagging the potential dangers that can arise where there an oversimplification of a rule.

Modernising the terminology

28. When updating legal terminology there is always a danger of "throwing the baby out with the bathwater". Some respondents have a legitimate fear that the language used in these draft rules is less clear and less precise than that which currently appears in ordinary procedure.

29. It was suggested that the modernisation of language should not be seen as an end in itself, as that approach runs the risk of obscuring long established and well-understood rules of procedure. Comments included:
    - I appreciate the importance of providing access to justice for all and the concern that lay persons should not be excluded from a litigation by the language and complexity of the rules, but in many places the attempts to simplify the language will cause more problems than they solve.
    - It should be accepted that the primary "users" of the rules are judges and solicitors representing clients.

30. Where terms are well-established, some respondents queried whether it would be seen as "helpful" or "dumbing down" to make proposed changes such as:
    - To refer to "evidence" as "information" particularly as those words are not synonymous, nor are they interchangeable;
    - To refer to "motions" as "applications";
    - To refer to "minutes of amendment " as "applications";
    - To refer to "substantive hearing" rather than "proof" or "debate" or "proof before answer";
    - Whether to continue phrasing where you would "lodge" documents; and
    - Whether to refer to a "written case".

31. One respondent commented that properly construed the term "evidence" encapsulates the matters relevant to decisions on the merits of a case, whereas "information" is a descriptor for all other matters put before the court. Using "information" as a substitute for "evidence", such as in rule 33, runs the risk of misleading users. That lack of focus would inevitably add unnecessary expense and delay into the system.

Risk management

32. The perceived upside with case management by a sheriff or judge is that the judiciary gain an element of control over the pace and conduct of cases. The underlying presumption is that cases can be progressed more quickly and at lower costs overall.

33. Some respondents take an entirely opposing view. They perceive that ceding control over pace and conduct to the judiciary could expose the parties to a far greater financial risk if sheriffs and judges were to order unnecessary procedure or allow unnecessary time for others to present information.

Question 2 – Are there any individual rules you think users might find difficult to implement and comply with, and if so what would you do differently?

34. Where a respondent's feedback was specific to an individual rule it has been collated under each rule as numbered in section 3.

Question 3 – Can you suggest any additional rules, or changes in layout, that would improve these consolidated rules?

Digitisation

35. With digitisation any IT system can be vulnerable to software bugs, system crashes or attacks by hackers so there should be some provision made in rules to maintain fairness if that should happen - such as providing for extensions to time limits in the event of system failures.

36. The procedural narrative (para. 3.36 and 3.41) suggests that the electronic filing of productions may not be mandatory in every case. One respondent thought that was an unhelpful suggestion, except in exceptional cases.

Adding a Glossary

37. As an alternative to modernising the terminology; one respondent did suggest inserting a glossary into the rules a) to meet the policy aim of explaining technical legal terms to lay people and b) to avoid the unnecessary confusion / unintended consequences / legal challenges that may arise from efforts to redefine legal terms that are already well known and well understood by the legal profession.

Alternate Approaches

38. One respondent suggested a structure whereby there is one comprehensive "Rule Book" for all types of civil litigation. Their preference was to have the general procedural rules and administrative rules that can be applied to all civil litigation, followed by individual chapters on the specific rules for ordinary, Personal Injury, Family Actions etc. The suggested that an underlying aim should be to avoid the proliferation of Acts of Sederunt and the need to search through them as that is neither simple or user friendly and it can be confusing even for experienced users.

Suggestions on additional rules

39. Without yet knowing fully where the Committee would intend to draw the line between the procedures retained and those revoked, respondents suggested that the new rules might also usefully include:
    - Appeal routes at first instance;
        - Abolishing summary applications procedure provides an opportunity to outline discrete procedures in the new rules for the appeal routes from a) statutory appeals and b) statutory and common law applications (given the different considerations that apply to each);
        - A simpler procedure could apply where there is need for urgent resolution or little in the way of contested evidence;
    - Appeal routes for onward appeals to the appellate courts;
    - Amendment of pleadings;
    - Citation of witnesses;
    - Devolution issues;
    - Expert witnesses being required to have a meeting to identify the points where they agree or disagree;
    - Evidence of the intimation of documents;
    - Evidence of the service of documents;
    - Group procedure;
    - Interdict;
    - Joint statements of the issues in a case:
    - Judicial review;
    - Jurisdiction;
    - Sisting of cases; and
    - Wasted costs orders.

40. Some consideration might also be given to adding:
    - A “fast track” procedure;
        - Following the abolition of petitions procedure there will still be a need to deal with company petitions, reductions of capital, schemes of arrangement, restoration to the register etc.;
    - A statement of what is required for a case to be “relevant” such that:
        - Fair notice is given to the other parties of the case they face; and
        - If the facts are proved the remedy claimed may be granted;
    - The purpose statement (rule 2) does reference “economy” and “proportionality” so does achieving those aims warrant further rules to help control the costs of litigation;
    - The grounds of jurisdiction in a summons;
    - The insertion of guidance in forms;
    - The retention of the requirement for pleas in law, so that precise and focused pleadings are received against a background of relevancy and specification;
    - Making “unless orders” (similar to those in Simple Procedure);
    - A procedure for the remit or transfer of novel or complex cases; and

- A procedure for a debate on the relevancy and specification of pleadings.

41. Some respondents did reference procedures they think should remain outside the Ordinary Procedure Rules:
    - Actions of division and sale; and
    - Multiplepoinding.

The business and regulatory impact assessment (BRIA)

42. An initial BRIA was included as part of the overall consultation package and several respondents provided comment. For the Committees next consultation a specific question on the content of the BRIA may help to prompt further feedback.

Advice providers

43. When introducing these new rules, there is an opportunity to develop more effective joint working and referral mechanisms between the courts, the local and national advice providers and solicitors.

Legal Aid – Pre Action Communications

44. The new rules mirror the approach taken with the personal injury pre-action protocols and require communication prior to the commencement of proceedings. The regulated fee tables already accommodate that work but there will be an increase in the total amount funded. The proposed changes may give rise to an issue with the Special Urgency provisions, where a person qualifies for civil legal aid but not advice and assistance. It is difficult for individuals to navigate that step without help from a solicitor so additional provision may need to be made in rules.

Legal Aid – Reform

45. There is an interrelationship between these rule changes and wider legal aid reform. These new rules may add weight to the arguments for inserting a simplified block fee structure into the fee tables for the Court of Session.

46. Some of the proposed changes will be significant enough to realign the block fees and counsel fees in the sheriff courts, and potentially to look at alternative types of ADR beyond mediation and arbitration.

47. All previous changes to the legal aid regulations have involved extensive modelling and negotiation. The Council will need to liaise with SLAB to build in sufficient time (and budget) to accommodate the level of negotiation required.

Terminology

48. Any steps taken to modernise the terminology used in the rules should trigger comparable changes in the legal aid regulations and the court fee orders.

The equality impact assessment (EQIA)

49. An EQIA was provided as part of the overall consultation package and several respondents provided comment. For the Committees next consultation a specific question on the content of the EQIA may help to prompt further feedback. As a link was provided to the EQIA for attendance at hearings, it may be helpful to include a link to the EQIA for Civil Online.

Access to solicitors

50. There are gaps in the availability of legal aid solicitors to undertake certain types of cases. That does make it more difficult for certain groups to instruct a solicitor at an early stage, which particularly impacts on people within rural areas and those with protected characteristics.

Access to “advice and assistance”

51. The subset of individuals who are eligible for Civil Legal Aid but not eligible for advice and assistance could be negatively impacted by the shorter timescales and additional preliminary steps involved.

Digital Inclusion

52. Several respondents reiterated the points flagged in the EQIA:
    - The need to provide for digital inclusion, and assisted digital services; and
    - The need to retain paper based options, to complement the shift online.

53. It is easy for readers to miss the provision already made in rule 85 for non-electronic alternatives. Signposting rule 85 within other rules that would otherwise be read as mandating online submission could help minimise misunderstandings.

54. Given there are rules that require the mandatory use of Civil Online when making an application under Simple Procedure, asking the SCTS to provide an updated EQIA for that service may be informative.

Lodging a Summons

55. As the rules do mandate for the summons and defences being lodged online, it would be helpful for the EQIA to provide comment on those specific rules.

SECTION 3 - FEEDBACK ON EACH DRAFT RULE

56. This section summarises each respondent's feedback on the specific changes that were set out within this version of the "draft rules". Further detail is available within the individual responses which can be viewed online.

PART 1 – INTRODUCTION

Chapter 1 - Purpose and overarching duties

Rule 1 - The rules:

57. No rule specific feedback.

Rule 2 – Purpose:

58. Rule 2 (1) confirms that the purpose of these rules is to enable the "just resolution" of a case and rule 2 (2) goes on to define what that means. Whilst the term is appropriate when defining overall purpose there is a risk when reusing it in other rules (such as rule 19, 22, 31 and 62) as that might mislead users if they conflate issues of procedure with the substantive outcome sought.

59. Rule 2(c) appears to say that fairness (or justness) may be compromised, or informed, by questions of economy, proportionality and resources. Might it be better to state separately that the court is enjoined to deal with the proceedings in a manner which is proportionate having regard to (i) what is at stake between the parties; (ii) the complexity of the issues; and (iii) the resources of the parties.

60. Rule 2 (4) (b) creates a positive obligation to assist the court in line with the purpose of the rules. Are there any limits on how far that obligation would extend, and would there be consequences for noncompliance?

Rule 3 – Alternative dispute resolution:

61. The expectation is that ADR is permissive rather than mandatory, so the wording should reflect that.

Chapter 2 - Consequences of not complying

Rule 4 – Sanctions where a party is in default:

62. No rule specific feedback.

Rule 5 – Relief from failure to comply:

63. No rule specific feedback.

PART 2 - PROGRESSING A CASE.

Chapter 1 - Commencing a case

Rule 6 – Intimation of potential case

64. It would be helpful to clarify the interaction between:
    - The intimation that "must" be made via rule 6; and
    - The subsequent commencement of that case under rule 8 which anticipates parties providing reasons for any non-compliance with rule 6.

65. For consistency there is a need to clarify what is required. The procedural narrative (2.28) implies pleadings in an abbreviated form whereas this pre-action step requires a summary of the factual basis.

66. Some respondents queried whether the rules should include sanctions for noncompliance with pre-action steps. Others noted that prior intimation before the commencement of proceedings is already sound practice and if not followed it may have repercussions in the question of expenses.

67. Rule 6 (3) (a) references the word "inappropriate". That may require further clarification in order to stop practitioners relying on that paragraph more than is perhaps intended.
    .
68. Rule 6 (3) (b) requires a verbal discussion which is potentially vague. How is that to be evidenced, particularly in cases with animosity between the parties?

Rule 7– Response to intimation of potential case

69. It is not clear why a defender, who has not yet had proceedings raised against them, should be legally bound to engage in pre-litigation correspondence.

70. Where intimation does take place, it needs to make very clear what the respondent needs to do in response.

71. Where there is non-compliance with the pre action steps:
    - It is not clear if sanctions will apply; and
    - Presumably the next step is for the pursuer to lodge the summons anyway.

Rule 8 – Commencing a case

72. All existing rules and case law provide for civil proceedings to commence on service. The proposed rules shift that to registration, in the expectation that most future applications are likely[3] to be made online. Feedback included:
    - Changing to the point of registration will add unwanted uncertainty.
    - This raises questions regarding prescription and the limitation of actions.
    - This raises questions around the substantive law.
    - The court should be able to order expedited procedure at this commencement stage rather than waiting to the stage for making a case management order.

73. If the 5,000 word limit covers both the factual basis and the legal basis, then adding the words "in total" would put that beyond doubt.

74. The rule requires a "reason" to be given. For comparability with other rules should that be further qualified as "sufficient reason" or "on cause shown".

75. The rule should define a mechanism for providing the reasons why you might need to exceed the 5,000 word limit. How quickly will a decision be taken bearing in mind the prescription limits?

76. The rule uses "may" which implies an element of discretion. That may create issues for the purposes of "prescription"?

77. The rule should additionally cover what happens if the online system is not working. Addressing that point may initiate a change to the law as set out in the Prescription and Limitation (Scotland) Act 1973.

78. Is the intention to do away with "competency and relevancy" in ordinary cases?

79. Rule 8 requires a party to have an arguable case in order to be given permission to proceed. That means an unarguable case would be rejected so should there not be an equivalent provision made regarding an unarguable defence?

80. The requirement at rule 8 (1) for clerks to check the pre action information that's been supplied is new, and will require additional staff resource.

Rule 9 – Registration of summons

81. If rule 8 has been complied with, what would provide a basis for then refusing to register a summons lodged by a solicitor?

82. The requirement for the summons to be served within 4 months is a substantive change to the existing system of working. The feedback received was:
    - This shortened timeline may be problematic when arranging service overseas, particularly where a country sits outside the Hague convention.

[3] *Subject to the availability of suitable digital services*

- Rule 9 (2) reflects the reduction of the period of service from a year and a day to 4 months. There is a risk that this change may increase the number of applications to vary or amend that date.

83. Rule 9 (2) adds a new requirement on the court to determine whether there is an arguable case, which will require additional judicial resource.

84. Rule 9 (2) implies the addition of a sift procedure which may impinge on access to justice issues for those who are unrepresented, particularly as the courts decisions cannot be appealed. That change requires a fuller assessment of the legal implications and risk.

85. In terms of providing permission to proceed; if there is no opportunity to make representations will that not lead to article 6 issues?

86. Rule 9 (3) appears to (unfairly) provide differential rights of appeal between party litigants and represented parties. It is not clear what would happen if a party's status was to change from represented to unrepresented (or vice versa)?

Rule 10 – Order for service of a summons

87. There is a need to clarify the interrelationship between rule 10 and rule 15 (6). Where service is not effected within time then would it be deemed dismissed under rule 15 (6), and would any sanctions be applied under rule 4?

Rule 11 – Service of a summons

88. Rule 11 does opt for substantially less detail than the comparable OCR rule particularly regarding service furth of Scotland.

89. There is a need to clarify the interrelationship between:
    - Rule 11 (1) (a) which permits electronic transmission of a summons;
    - Rule 40 which requires consent to use electronic transmission; and
    - Rule 85 which provides for non-electronic alternatives.

90. There is a need to consider whether a potential for valid service by electronic transmission could remain in the absence of defender consent under rule 7 (c).

91. Subsection 11 (d) is confusing - it could be read as implying the court could specify a method of transmission that would not otherwise be legally competent?

92. It would be beneficial for the rules on electronic transmission to be accompanied by a Practice Note.

93. Rule 11 (4) (e) makes provision for evidence of service. Presumably it could usefully add something to cover evidence of receipt (if available).

Chapter 2 - Responding to a case

Rule 12 - Defences

94. There is a need to clarify the interrelationship between:
    - Rule 12 (2) which requires electronic transmission of defences;
    - Rule 40 which requires consent to use electronic transmission; and
    - Rule 85 which provides for non-electronic alternatives.

95. There is a need for clarity. A rule that requires parties to state both what is in dispute and what is not in dispute, may be preferable to the rule as currently written (which details that failure to deny does not amount to an admission).

96. Rule 12 (5) represents a fundamental change to the current system of pleading. Some respondents queried whether that is that desirable, whereas others view it as an innovation worth having. In their view having matters within knowledge and not denied as deemed admitted will have the very positive effect of narrowing the items in dispute.

97. The procedural narrative (para. 2.28) expects defences to be focussed on the matters in dispute. Rule 12 (5) appears to go against that aim so perhaps an alternate form of words could restate what is required (in the positive).

Rule 13 - Counterclaim

98. For the initial step of seeking permission to make a counterclaim, the rule does not set out what is required for such an application.

99. For the next step of lodging the counterclaim itself the rule sets out a requirement for greater specificity than rule 8 requires for the claim itself.

100. At present counterclaims are stated within the defences when lodged. The practical effect of this change will be to establish a new step in process for the courts, which may require additional staff and judicial resource.

Rule 14 - Time to pay application

101. No rule specific feedback.

Chapter 3 - Handling an undefended case

Rule 15 - Undefended cases and decree in absence

102. Under existing procedure, a case will fall where no application is made for a decree in absence. This new rule would set an expectation that the court will now monitor all undefended cases, which will require additional staff resource.

103. Rule 15 (3) (a) requires a statement made on "the basis on which the decree is sort". What will that mean in practice and is it the intention to broaden the current circumstances in which a court may refuse to grant decree?

104. Rule 15 (5) allows the court to grant a decree in absence or dismiss the case after a period of 10 months and the court currently takes that significant decision without recourse to the parties. That does beg the question of a) whether an intimation step should be added to put the parties on notice of that imminent decision by the court or b) whether an intimation step is not appropriate and the current practice should remain.

Rule 16 - Recall of decree in absence

105. Rule 16(2) could usefully state that any application to recall should state the terms of any defence / reasons for recall.

106. The rule is silent on the test to be applied by the judiciary when considering any application for recall of a decree in absence.

Chapter 4 - Early decision or disposal of a defended case

Rule 17 - Summary decree

107. The rule permits summary decree on either ground listed, which differs significantly from the historic approach. Is that what is intended?

108. The existing rule has a 14 day time limit for intimation. It would seem reasonable to incorporate that same time limit for intimation within the new rule.

109. Whilst the rule provides for the court to grant summary decree at its own hand, that is unlikely to happen in practice. If it ever did the parties are likely to find that undesirable.

110. The powers in rule 17 (1) allow for summary decree if the judge is satisfied solely that "there is no compelling reason for the case to proceed'. That implies a judge would have an inquisitorial function in relation to the merits of the dispute. That would create considerable uncertainty for all concerned in a litigation.

Chapter 5 - Case management

111. There may be benefit in stating the purpose of case management.

Rule 18 - Judicial continuity

112. Some respondents noted that that this rule would only apply where "practicable and appropriate". That said, there was a wide range of feedback to the effect that whilst "judicial continuity" is fine in theory, its implementation is likely to prove unworkable given the scale of the additional judicial resources required to make it work. Such attempts to provide judicial continuity in practice could result in major scheduling issues, delay the court programmes and remove the flexibility sought through the use of floating sheriffs and temporary judges. Over time that is likely to become unworkable for the judiciary and court officials, and the resultant delays would become untenable for practitioners and parties.

113. One respondent noted that applicants and opponents often express frustration where the court inadvertently facilitates delays in case progression. They did support continuity throughout a case if it could help remove that frustration.

114. Reference was made to the introduction in 1993 of the options hearing within the Ordinary Cause Rules (OCR). Over time that change became largely ineffective as the judiciary were never allocated sufficient time to prepare for those hearings.

Rule 19 - Case management orders: general

115. There is a significant balance to be struck between the selective use of *active judicial case management* which is resource intensive for the judiciary, and *case flow management* which would be much less so. The draft rules do not yet convey how that balance should be struck.

116. As a package, rules 19 to 21 will require a lot to happen within a 14 day period, requiring significant judicial availability and additional judicial resource.

117. With the existing rules the parties can say with reasonable certainty what the steps in a litigation are, and what the timescales for those steps are. The same cannot be said for the consultation version of the draft rules as:

- It is not certain that a case management hearing will be held?
- There is no mention of a "closed record"? and
- It is difficult to comment in the absence of the forms?

118. One respondent did query the availability of statistics for defended cases, in order to better understand how many defended ordinary actions might actually require case management in this way. There are brief rules already in place for case management in commercial actions and there would appear to be remarkably few reported cases of problems with the operation of those rules.

Rule 20 - Case management questionnaire

119. Moving the requirement for the questionnaire at rule 20 before the orders at rule 19 might allow this chapter to flow more chronologically.

120. The requirement is to lodge the questionnaire at the same time as defences. As the timing for lodging defences is back in rule 12 it may be beneficial to provide signposting to that earlier requirement.

121. It is not clear why the defender must lodge a case management questionnaire when a pursuer only needs to do so if ordered by the court?

122. The completion of a questionnaire is new and will require time for practitioners and users to familiarise themselves with what is required. In practice the 7 day time period may be too short.

123. The use of the term "information" instead of "evidence" is problematic as information is not necessarily evidence. Would an associated change to the law of evidence be required?

124. To the extent that information is provided over and above the parties normal pleadings, this change will impact on the time required by clerks and the judiciary.

Rule 21 - First case management order

125. Rule 21 (2) does not detail what is meant by "expedited procedure". There may be a need to add a definition.

126. It may be helpful if rule 21 was part of rule 19; as they both relate to orders.

Rule 22 - Case management hearings: purpose

127. To avoid an excessive number of hearings - there may be benefit in stating explicitly that case management hearings are only to be conducted with a view to the substantive hearing being fixed and all parties working towards that goal.

Rule 23 - Case management hearings: general

128. No rule specific feedback.

Rule 24 - Case management hearings: procedure

129. Rule 24 (2) signposts chapter 7 but the chapter title shown is wrong.

130. Rule 24 (3) provides for attendance by electronic means as the default. That may need reworded to fully align with the rules on attendance at hearings.

Rule 25 - Case management hearings: information

131. There is a risk of duplicated effort if the note to be lodged 7 days prior to the hearing overlaps with the information provided previously in the case management questionnaire.

132. To the extent further time is required to consider the note lodged under rule 25 (1), this change will impact the time required from the judiciary and court clerks.

133. A word count limit for the note lodged could help to minimise undue impacts on the duration of hearings.

134. It is confusing to use "information" in its everyday sense in the title of the rule, whereas in rule 25 (1) (c) (ii) it is being used in the context of "evidence".

Rule 26 - Case management hearings: options

135. There is a need to clarify the drafting, so that party litigants can better understand what they are required to provide.

136. How would an order for the production of documents fit with rule 34 on the recovery of information?

Rule 27 - Fixing a substantive hearing

137. No rule specific feedback.

Chapter 6 - Substantive hearings

Rule 28 - General

138. For rule 28 (1) the word "be" should be inserted as the ninth word.

139. To reflect case precedent[4], open justice requires the court to take the least restrictive step necessary to provide for the administration of justice. This rule may need reworded for compatibility with the principles set out in those cases. There is a wealth of jurisprudence about closed courts and the abrogation of the principle of open justice. This statement made in rule 28 does not appear to recognise this.

140. Rule 28 (2) needs to clarify what would require an oath or affirmation. The definition of "Information" does extend beyond "items and oral evidence" and not everything said requires to be taken on oath (or affirmed).

[4] Dring v Cape Intermediate Holdings Ltd [2019] 3 WLR 429; A. Secretary of State for the Home Department 2014 SC UKSC 151; A v PF, Dundee 2017 HCJAC 91; MH v The Mental Health Tribunal For Scotland 2019 SC 432.

Rule 29 -Request for more time to present information or make submissions

141. No rule specific feedback.

Rule 30 - Expression of decision

142. No rule specific feedback.

Chapter 7 - Handling of supporting information

Rule 31 - Lodging of supporting documents

143. No rule specific feedback.

Rule 32 - Orders about presenting information

144. One respondent reads rule 32(2) as suggesting that a judge can tell a party who to call as a witness and what to ask them. In their view that is unacceptable in an adversarial system.

Rule 33 - Agreeing information

145. If the expectation is that notices to admit will be lodged then the cost of doing that may be incompatible with the principle set out in rule 2(2).

146. It is not clear whether the word "information" is being used for rule 33 in its everyday sense or specific to providing "evidence".

Rule 34 - Recovery of information (commission and diligence)

147. This rule may need to provide for:
- A procedure for maintaining confidentiality, which may include the lodging of documents in a confidential envelope;
- The procedure and rights when documents are lodged voluntarily;
- The procedure for recovery of documents by a commissioner; and
- The procedure for examination of witnesses by a commissioner.

148. It may be helpful to make this rule specific to "documentary information" rather than general information.

149. In rule 34 (3) (a) in may be helpful to reference 'when' information is to be provided to the Lord Advocate / Attorney General.

150. Rule 34 (5) has a 7 day limit which may prove to be insufficient time for taking client instructions.

151. The safeguards for havers are inadequate as:
- The haver has no notice of the application and cannot provide input before an order is made;
- There is no provision for review of an order, the payment of the costs reasonably incurred by the haver, or the interests of the haver; and
- The nature of the information held by havers with an example being the definition of information held by a GP that is not in the medical records.

Rule 35 - Disclosure of information

152. There is no definition of the term "specific information" as used in rule 35 (1) so issues could arise where it is the court (rather than the parties) that wants to define what information is required. There is a need to clarify:
- Why the 8 week and 2 week limits only apply to disclosures ordered by the courts;
- What would be considered "reasonable steps"; and
- What limits (if any) are on the courts powers to order presentation of information.

Rule 36 - Late information

153. This rule may need reworded as its meaning could change depending on the situation:
- Information not ordered by the court;
- Information ordered by the court, and lodged; and
- Information ordered by the court, and not lodged.

PART 3 - MATTERS ANCILLARY TO PROGRESSING A CASE.

Chapter 1 - Intimation and lodging of things

154. Some respondents do not like the reference to "things". It was suggested that "intimation and lodging" would provide a more succinct chapter heading.

Rule 37 - Requirements for intimation

155. No rule specific feedback.

Rule 38 - Method of intimation

156. Some respondents have reservations about using first class post for intimation, as that method is unrecorded.

Rule 39 - Timing of intimation

157. The wording would need further work to avoid intimation taking place on non-working days such as Saturdays, Sundays or a public holidays.

Rule 40 - Electronic transmission

158. Inferring there is a willingness to communicate electronically may pose difficulties. A suggestion for rule 40 (2) is to replace "may" with "will" or "must".

Rule 41 - Intimation by messenger-at-arms or sheriff officer

159. No rule specific feedback.

Rule 42 - Lodging of documents

160. No rule specific feedback.

Chapter 2 - Applications to court during a case

Rule 43 - Intimation of proposed application and response

161. No rule specific feedback.

Rule 44 - Lodging of application etc. and late response

162. The procedural narrative *(para. 4.16)* sets an expectation for having a shorter period for urgent applications. As yet there appears to be no mechanism for this?

Rule 45 - Content and signing of application

163. Should rule 45 (1) say more on the applicant supplying reasons for their application?

164. Rule 45 (1) envisages the applicant stating their views on expenses, which is a departure from current procedure where expenses are not routinely discussed. If discussion did arise at the point of application then this additional step could have resource implications.

Rule 46 - Hearings on applications: general

165. Rewording may be required if a shorter period for urgent applications was added into rule 44.

Rule 47 - Hearings on applications: procedure

166. No rule specific feedback.

Rule 48 - Application made without proper authorisation or agreement

167. Some respondents were unclear on the circumstances this rule looks to address and whether any time limits should apply. Normally an application is only made by a party, or a legal representative acting on instructions.

Chapter 3 - Being represented or supported

Rule 49 - Application of Chapter

168. No rule specific feedback.

Rule 50 - Lay representation: application process

169. No rule specific feedback.

Rule 51 - Lay representation: functions, conditions and duties

170. No rule specific feedback.

Rule 52 - Lay representation: withdrawal of permission to act

171. No rule specific feedback.

Rule 53 - Courtroom supporter: application process

172. No rule specific feedback.

Rule 54 - Courtroom supporter: conditions and duties

173. No rule specific feedback.

Rule 55 - Courtroom supporter: withdrawal of permission

174. No rule specific feedback.

Rule 56 - Withdrawal of legal representation

175. Changes to this procedure may have resource impacts on the courts. There is a request already logged for a wider Rules Review as part of the Councils Annual Work Programme.

176. Rule 56 (4) could benefit from:
- Inserting a 14 day time limit, or such other period as the court orders; and
- Allowing the court to be addressed on the matter prior to making a disposal.

Chapter 4 - Dealing with witnesses

Rule 57 - Witness statements

177. Some respondents were unclear on what difficulty this new procedure for court ordered witness statements was trying to address, whether the procedure is optional, and whether the right to cross examine is maintained.

178. If the court requires a party to lodge written questions or lines of enquiry 8 weeks before a substantive hearing then non-compliance issues are likely, particularly given the way matters evolve in that 8 week period up to a hearing. A shorter 4 week deadline may be more practical to tie in with the other documents being lodged which can influence the lines of enquiry. Rule 57 (4) could be reworded to provide the court with the discretion to vary that 8 week time limit.

179. For the witness statements not ordered by the court:
- The rules do not set a time for lodging; and
- Any late lodging would drive the need for a very tight turnaround by the responding party.

180. For rule 57 (2) (b) a declaration is being made so would signing be required?

181. The rule gives a lot of detail about witness statements, which should be in a Practice Direction, but says nothing about the function of a witness statement, which is to stand as the evidence-in-chief of the witness. The rule appears to conflate the provision of a witness statement with a process that includes the cross examination of that same witness, which will not be practicable.

182. It was noted that if there is to be a rewording of this rule, the drafter should refer to the guidance available from the Court of Session.

Rule 58 - Child witness notice

183. No rule specific feedback.

Rule 59 - Vulnerable witness applications

184. No rule specific feedback.

Rule 60 - Orders in relation to a child or vulnerable witness

185. No rule specific feedback.

Rule 61 - Presumption against need for written questions for information on commission

186. The heading of this rule is confusing. It adds a gloss that does not really reflect the content of the rule. The rule itself merely indicates that written questions are not used unless the court orders them to be.

187. A lot of detail will be lost when this abbreviated rule replaces RCS Rule 35.11.

Rule 62 - Expert information

188. Rule 61 (1) requires a declaration as to the "accuracy" of the information provided in the report, but that will be contingent on the accuracy of information provided to the expert witness by others. That declaration might more appropriately cover confirmation that an unbiased opinion is being made which complies with that experts duties to the court. The suggestions made were:
    - To include "a standard declaration to be used by all expert witnesses" to drive up the quality of all reports;
    - Adding provision for lodging questions;
    - Adding provision for encouraging meetings between experts; and
    - Adding provision for the option of using a single joint expert

189. A time limit is set for lodging the experts note, but not the report itself. The late lodging of lengthy reports would create unfairness.

190. There is a need for clarity on "opinion" evidence, the form of declaration, and any circumstances that could stop cross examination.

Chapter 5 - Death or inability of party to continue

Rule 63 - Application for substitution

191. This rule could provide for the court to deal with the case if no application is made in a specified period.

Rule 64 - Application for transfer

192. This rule could provide for the court to deal with the case if no application is made in a specified period.

Rule 65 - Death of party: notification

193. This rule could provide for the court to deal with the case if no application is made in a specified period.

PART 4 - OPTIONS TO JOIN OR TRANSFER A CASE.

Chapter 1 - Request by defender for person to join a case

Rule 66 - Application for order for service of third party notice

194. No rule specific feedback.

Rule 67 - Service of third party notice

195. No rule specific feedback.

Rule 68 - Lodging of answers by a third party

196. No rule specific feedback.

Rule 69 - Application by defender for finding, order or decree against a third party

197. No rule specific feedback.

Rule 70 - Applications by pursuer subject to counterclaim or third party

198. No rule specific feedback.

Chapter 2 - Request by person other than defender to join a case

Rule 71 - Application to become a third party to case

199. It is unclear whether an application to be a third party would stop an applicant otherwise becoming involved as a defender.

Chapter 3 - Transfer of a case involving the Court of Session

Rule 72 - Transfer from sheriff where exclusive competence of sheriff court does not apply

200. No rule specific feedback.

Rule 73 -Transfer from sheriff where exclusive competence of sheriff court applies

201. No rule specific feedback.

Rule 74 - Transfer from sheriff under an enactment other than section 92 of the Courts Reform (Scotland) Act 2014

202. No rule specific feedback.

Rule 75 -Transfer from sheriff on ground of contingency

203. No rule specific feedback.

Rule 76 - Referral to the Inner House of the Court of Session

204. Rule 76 (4) envisages having no right of appeal. That may conflict with permission to appeal to the UKSC under section 40 of the Court of Session Act 1988.

Rule 77 - Transfer from Court of Session to sheriff

205. No rule specific feedback.

Chapter 4 - Transfer of a case from simple procedure or between sheriff courts

Rule 78 - Transfer from simple procedure

206. No rule specific feedback.

Rule 79 - Transfer to another sheriff court

207. No rule specific feedback.

PART 5 – THINGS TO DO WITH ENFORCING A CASE.

Chapter 1 - Getting an extract of a decree

208. In terms of the chapter title; it was suggested that "Enforcement" would provide a more succinct heading. Whilst referring to "…the thing…" is appropriate in procedures aimed at party litigants, some respondents did see that approach as inappropriate in procedures aimed at lawyers.

209. In terms of the content of this chapter:
- Interim diligence is arguably about security for a debt, not enforcement, which is diligence in execution;
- It excludes consigned funds and decrees in foreign currency; and
- It excludes a lot of the detail on interim diligence that exists in OCR.

Rule 80 - Extract of decree: timings

210. It may be helpful for this rule to cover the position where an extract decree is delayed beyond the standard minimum. For example it is common in a mortgage repossession case to lodge a motion for delay so that the extract cannot be enforced. That provides the owner with a final opportunity to sell the house or make arrangements to move their family out.

211. The application of rule 80 is subject to the question of expenses being reserved under paragraph 4. That will be clear to those that read the rule in its entirety, but may be missed when looking at one paragraph. That begs the question of whether the phrase "subject to paragraph 4" should be inserted into the other paragraphs.

Rule 81 - Extract of decree: early extract

212. No rule specific feedback.

Rule 82 - Extract of decree: content and authentication

213. No rule specific feedback.

Chapter 2 - Interim diligence: online applications

Rule 83 - Interim diligence: online applications

214. No rule specific feedback.

PART 6 – ONLINE APPLICATIONS, FORMS AND OTHER OPTIONS, INTERPRETATION ETC.

Rule 84 - Online applications and forms

215. Referring to "…the thing…" feels odd. It may have been appropriate in procedures aimed at party litigants but seems inappropriate in procedures aimed at lawyers.

Rule 85 - Non-electronic alternatives

216. No rule specific feedback.

Rule 86 - Electronic signature

217. No rule specific feedback.

Rule 87 - Interpretation

218. The interpretation given for "applications" may actually hinder a readers understanding rather than help them.

219. The interpretation given for "information" includes items and oral evidence. It may be helpful to replace that with "physical, documentary and oral evidence".

Rule 88 - Books of Sederunt

220. Placeholder only – for Act of Sederunt.

Rule 89 - Commencement

221. Placeholder only – for Act of Sederunt.

Rule 90 - Citation

222. Placeholder only – for Act of Sederunt.

BIBLIOGRAPHY

Publications – by the Council:

New Civil Procedure – First Report – the Overarching Objectives *(May 2017, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/the-new-civil-procedure-rules---first-report-and-annex.pdf?sfvrsn=4b295bd2_2

New Civil Procedure – Second Report – the Procedural Narrative *(Aug 2023, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/paper-4-1b---the-new-civil-procedure-rules---second-report.pdf?sfvrsn=26c0bae3_2

Consultations – by the Council:

TARGETED CONSULTATION: on the Ordinary Procedure Rules *(Jul 2023, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/targeted-consultation--ordinary-procedure-rules

Existing Rules:

Court of Session:

- Rules of the Court of Session (RCS)

Sheriff Courts:

- Ordinary Cause Rules (OCR)
- Summary Applications, Statutory applications and Appeals etc. Rules

Justice Reforms:

Report of the Scottish Civil Courts Review – Vol 1 – Chapters 1 to 9 *(Sep 2009, Scottish Government)*
https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=30b62fd3_4

Report of the Scottish Civil Courts Review – Vol 2 – Chapters 10 to 15 *(Sep 2009, Scottish Government)*
https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=3ab62fd3_4