



Scottish  
Civil Justice  
Council

## **BUSINESS & REGULATORY IMPACT ASSESSMENT: FOR THE PROPOSED ORDINARY PROCEDURE RULES**

PREPARED BY: The Secretariat to the Scottish Civil Justice Council (SCJC)

REGARDING: The new Ordinary Procedure Rules, which are being developed as part of the comprehensive *Rules Rewrite* being undertaken by the Council

LAST UPDATED: **17 July 2023**

### Step 1 – POLICY BACKGROUND

#### **Purpose and intended effect**

##### Background

The option of consolidating rules into one harmonised court procedure is a proportionate means of reducing the complexity of the rules and improving their readability.

##### Policy Objectives

The policy objectives are:

- 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.

##### Rationale for this intervention

The need for a comprehensive *Rules Rewrite* was recommended by the Scottish Civil Courts Review in 2009. Progressing that review became a key deliverable for the Council following its establishment in 2013. The Council published a paper on the overarching principles to be used when shaping the new rules in 2017. A Procedural Narrative outlining how the revised steps in legal process could work was published in 2022.

The reasons for taking further action now are:

- To provide the judiciary and the profession with a working draft of the consolidated rules aligned to the vision set out within the Procedural Narrative;

- To improve the readability and the usability of the information provided to users; and
- To support a more consistent approach being taken across the courts

## **Consultation**

Providing feedback on the general approach being taken to consolidating these rules requires a mix of specialist technical expertise along with good practical working experience of the multiple existing rules in use. As that expertise sits with the regular recurrent users of the courts, a Targeted Consultation is considered appropriate.

The alternative of running a full Public Consultation has been rejected. Occasional court users are unlikely to have interacted sufficiently with all four existing court procedures so seeking their views at this early stage is likely to result in disproportionate resource impacts.

## **Sectors and groups affected**

### Who is affected?

The 'recurrent users' who interact with the court on an almost daily basis:

- The judiciary, and the court staff who support them;
- The legal practitioners who routinely appear in civil court and/or generate the case documentation used within proceedings;
- Expert witnesses, who routinely appear in civil court; and
- Third sector organisations who provide advice to court users, may assist with preparing documents and may appear in court

The 'occasional users' who interact with the court on very few occasions during their lifetime:

- Most represented parties
- Most unrepresented parties (i.e. party litigants)
- Most witnesses called under civil court procedure

### How are they affected?

These consolidated rules will:

- Amend and restate the generic information any litigant requires to progress a straightforward case through the Scottish civil justice system.

The more complex civil cases will continue to be progressed through the existing specialised procedures, which will continue to operate alongside the new *Ordinary Procedure Rules*.

## **Options**

### Option 1 - Do Nothing

The do nothing option maintains the status quo. Straightforward civil proceedings would continue to be progressed under the most relevant of the existing court procedures, foregoing the opportunity and benefits of shifting to one consolidated set of rules.

### Option 2 – New Rules

Adopting one consolidated and harmonised set of rules would see the straightforward civil cases over £5,000<sup>1</sup> being progressed in the same manner across the sheriff courts, with the same procedure also applying to straightforward civil cases over £100,000 in the Court of Session.

## **Benefits**

### Benefits - Option 1 - Do Nothing

The justice system would continue to make use of a) the training investment already made by the profession and judiciary in understanding the multiple existing court procedures and b) the body of case precedent that has helped to clarify those rules since their introduction.

### Benefits - Option 2 – New Rules

The expected benefits from adopting one consolidated procedure are:

**COMPARABLE RULES** - the principle is that court procedures should be similar across all court fora where practicable. Adopting harmonised rules contributes towards that by simplifying and consolidating four of the main court procedures currently in use. The outcome is a sizeable reduction in the total page count of the statutory rule book which will:

- Minimise the time required for the judiciary, officials, the profession and parties to familiarise themselves with the harmonised procedure; and
- Avoid the legal arguments or requests that might otherwise arise when inconsistencies between the four existing procedures are challenged.

**IMPROVED USER EXPERIENCE** – having rules presented to users in a succinct and user friendly manner meets the principle for rules being easy to use and understand. The style used should make the tasks required under the harmonised procedure more accessible for both party litigants and the profession.

**IMPROVED CASE MANAGEMENT** – these rules drive the judiciary taking a more active role in case management to focus each party's attention on the matters in dispute and to manage the pace and conduct of cases. That will facilitate the steps in legal process taking place timeously, and in a manner proportionate to the matters in dispute.

## **Costs**

### Costs - Option 1 - Do Nothing

Nil

### Costs - Option 2 – New Rules

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<sup>1</sup> Cases of £5,000 or less would normally be progressed under the Simple Procedure Rules (unless remitted to ordinary procedure)

The expected costs in adopting one consolidated procedure are:

**DRAFTING COSTS** – the existing budget of the Lord Presidents Private Office will be used to meet the costs of preparing, making and laying these new rules (including the cost of any drafting that may be outsourced).

**TECHNOLOGY COSTS** – there will be sizeable software development costs required to incorporate this new consolidated procedure into the way in which the courts case management system (ICMS) needs to work.

**FAMILIARISATION COSTS** – The judiciary, legal profession and court officials will need sufficient time and training to familiarise themselves with the consolidated rules; and the associated changes for judicial taxations, legal aid court fees etc.

**TRANSITION COSTS** – older cases initiated prior to the commencement of these new rules will continue to be progressed under the four existing court procedures. They will take several years to work their way through the system.

## Step 2 – ASSESSMENT OF LIKELY IMPACTS – ON BUSINESS

What feedback has arisen from business engagement?

Engagement to date has been via the members of the Rules Rewrite Committee (RRC), as one of the key channels available to the Council for stakeholder engagement. This next tranche of feedback from the legal profession more widely will add further evidence on the likely impacts.

How has that feedback fed into the development of this proposal?

The content of the Procedural Narrative, along with the discussion and input from the five working groups that developed that narrative, was used to generate the worked example of the consolidated rules that is being used to support this consultation.

## Step 3 – ASSESSMENT OF LIKELY IMPACTS – ON COMPETITION

To support initial screening for competition impacts, the Council uses the checklist of four questions recommended<sup>2</sup> by the Competition and Markets Authority (CMA):

Will the measure directly or indirectly limit the number or range of suppliers?

NO – a shift to consolidated rules would not drive a change in the number of suppliers within the legal services market

Will the measure limit the ability of suppliers to compete?

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<sup>2</sup> [Competition impact assessment: part 1 overview \(Sep 2015, CMA\)](#)

NO – all suppliers can access and use the same consolidated rules.

Will the measure limit suppliers' incentives to compete vigorously?

NO – all suppliers can access and use the same consolidated rules

Will the measure limit the choices and information available to consumers?

NO – irrespective of whether a consumer chooses to be represented or unrepresented; for straightforward cases their litigation will need to follow the same consolidated rules.

#### Step 4 – ASSESSMENT OF LIKELY IMPACTS – ON CONSUMERS

To support initial screening for consumer impacts, the Council mirrors the best practice<sup>3</sup> guidance from Scottish Government which uses the following six questions:

Does the policy affect the quality, availability or price of any goods or services in a market?

NO

Does the policy affect the essential services market, such as energy or water?

NO

Does the policy involve storage or increased use of consumer data?

NO – the consumer data the courts need to progress civil proceedings will not change

Does the policy increase opportunities for unscrupulous suppliers to target consumers?

NO

Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?

YES – the consolidation into one harmonised procedure will make the information provided within these rules more accessible to consumers

Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?

NO

#### **Test run of business forms**

Does this proposal introduce new legal Forms that are materially different in style and content to the existing legal forms in general use?

YES - the consolidated procedure will generate new downloadable forms, and new online applications. Those forms may warrant some user testing.

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<sup>3</sup> [BRIA Guidance \(Oct 2015, SG\)](#)

## Digital Impact Test

Public services are increasingly being delivered online. To test for relevant opportunities the Council mirrors the best practice<sup>4</sup> guidance from Scottish Government and uses the following five questions:

Does the measure take account of changing digital technologies and markets?

YES – the rules reflect the changes made to date under the SCTS Digital Strategy.

Will the measure be applicable in a digital/online context?

YES – the rules support online applications, virtual hearings etc.

Is there a possibility the measures could be circumvented by digital / online transactions?

NO – the rules support the use of both online and offline options

Alternatively will the measure only be applicable in a digital context and therefore may have an adverse impact on traditional or offline businesses?

NO – the rules support the use of both online and offline options

If the measure can be applied in an offline and online environment will this in itself have any adverse impact on incumbent operators?

NO – the incumbent operators already make good use of both online and offline options

## Step 5 – ASSESSMENT OF LIKELY IMPACTS – ON REGULATIONS

### Court Fees

Will the proposal require changes in court fees regulations?

YES – collapsing four procedures into one procedure will generate adjustments to the court fees regulations, to align the fee narratives with the amended steps in legal process.

### Legal Aid

Will the proposal require changes in legal aid regulations?

YES – collapsing four procedures into one procedure will generate adjustments to the legal aid regulations, to reflect alignment with the amended steps in legal process.

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<sup>4</sup> [BRIA Guidance \(Oct 2015, SG\)](#)

## Recovery of Costs Awarded

Will the proposal require changes in Judicial Taxation regulations?

YES – collapsing four procedures into one procedure will generate adjustments to the rules for Judicial Taxations, to reflect alignment with the amended steps in legal process.

## Enforcement and/or sanctions

Will compliance be enforced, and if so how?

YES – the enforcement measures in the new rules will mirror those available under existing procedures.

Are there sanctions for non-compliance?

YES – the sanctions in the new rules will mirror those available under existing procedures.

## Step 6 – ASSESSMENT OF LIKELY IMPACTS – WITH IMPLEMENTATION

### Implementation Plan

What is the timescale for this proposal be implemented?

TO BE AGREED - The current assumption is that any implementation is unlikely to take place before 2025. Several further iterations of this *worked example* of the rules will be required as we have yet to:

- Develop the accompanying suite of Forms;
- Specify the revocations and consequential amendments required; and
- Update accompanying regulations (for court fees, legal aid, and taxations).

How will this proposal be implemented?

Once an implementable set of rules is to hand:

- The Committee will consider those draft rules, and propose them to the Council;
- If content, the Council will propose those draft rules to the Court of Session; and
- The Court of Session will consider and approve the finalised rules.

Following approval and signing by the Court of Session:

- A Scottish Statutory Instrument (SSI) will be laid in the Scottish Parliament and published on [legislation.gov.uk](http://legislation.gov.uk);
- The new rules will be made available for download via the SCTS website; and
- To support familiarisation across the profession, along with the development of guidance and IT systems, a period of 3 to 6 months will be factored in prior to these rules come into force (or longer if required).

## **Monitoring**

Will the resultant changes be monitored, and if so how?

YES – The arrangements for monitoring include:

*Qualitative Monitoring:*

- Monitoring any requests lodged for clarification or amendment of the consolidated rules;
- Monitoring any media coverage on the transition to the consolidated rules; and
- Monitoring the feedback on the 'rules in use'.

*Quantitative Monitoring:*

- Monitoring the increasing volumes of cases under the new consolidated rules; and
- Monitoring the decreasing volume of cases under the old court procedures.

## **Post Implementation Review**

Will a post implementation review need to be undertaken, and if so when?

POSSIBLY- if there is a material evidence base of negative user experience following implementation, the secretariat would trigger a Rules Review exercise.