



Scottish Civil Justice Council

CONSULTATION RESPONSE: for the Inner House Rules

Issued: 1 March 2023

CONTENTS

	<u>Page</u>
SECTION 1 - INTRODUCTION	3
SECTION 2 - THE DECISIONS TAKEN	5
SECTION 3 - THE NEXT STEPS	9

Appendices:

Appendix 1 - Bibliography

Appendix 2 - Table of Amendments Made

Appendix 3 – Relevant Data

SECTION 1 - INTRODUCTION

Purpose

1. Having undertaken a [targeted consultation](#) and provided an [analysis of responses](#), this paper documents the changes to be taken forward in rules.

Background

2. The existing rules regulating the business of the Inner House are set out across six chapters of the Rules of the Court of Session (RCS) 1994:

Chapter	Title	Page Count	Last updated w.e.f.	SSI
RCS - CH 37A	Procedural business in the Inner House	1	27 Sep 2011	2011/303
RCS - CH 38	Reclaiming	9	27 Sep 2011	2011/303
RCS - CH 39	Applications for new trials or to render jury verdicts	5	27 Sep 2011	2011/303
RCS - CH 40	Appeals from inferior courts	10	27 Sep 2011	2011/303
RCS - CH 41	Appeals under statute	22	27 Sep 2011	2011/303
RCS – CH 41A	Appeals to the Supreme Court	1	27 Sep 2015	2015/228

The scope of this rules review:

3. The first four chapters (37A, 38, 39 and 40) are in scope for this Rules Review. They originated in 1994, were rewritten in 2010, and were last amended in 2011.
4. The last two chapters (41 and 41A) were kept out of scope for the main review exercise. Some consequential amendments will be made.

The consultation timeline:

5. The timeline for this consultation was:

JUL 2022 - the Council initiated a Targeted Consultation with the regular users of the Inner House Rules. That consultation opened 5 July 2022. It closed 11 October 2022 with seven responses received;

OCT 2022 – the seven Consultation Responses were made available for viewing online via the consultation tab on the website;

JAN 2023 – The Analysis of Responses report was published online summarising the feedback received; and

MAR 2023 – The online publication of the Consultation Response (this document).

The feedback from respondents:

6. There were seven responses received from those targeted:

NUMBER OF RESPONSES				
CATEGORY	RESPONDENT	Organisations	Individuals	COMBINED TOTAL
Judiciary	Inner House User Group	1	0	1
	Commercial Judges of the Court of Session	1	0	1
	Sheriffs Principal	1	0	1
	Sheriffs & Summary Sheriffs	1	0	1
Practitioners	Faculty of Advocates	1	0	1
	Law Society of Scotland	1	0	1
Officials	Scottish Courts and Tribunals Service	1	0	1
TOTALS		7	0	7

The objectives set for this consultation:

7. The policy objectives for consultation were:

To capture lessons learned – to access the lived experience of regular users to identify opportunities for improvement.

To consolidate and simplify the content – to make minor edits that reduce and simplify the wording where that can help to deliver improved readability.

To remove redundant provisions – to withdraw any rules that have become irrelevant due to the changes made by this review, or other enactments.

To depersonalise tasks - where a rule places an obligation on the court to do something, the Councils' preference is to state that obligation as resting on the court itself; rather than the judicial office holder or court official who may be delegated that task on the courts behalf.

The user perspective:

8. An overview of the feedback received is:

- The existing rules work well.
- The Inner House is operating efficiently. Cases are handled proactively, there are no delays, most procedural business can be dealt with on the papers, hearings are allocated promptly, substantive hearings are usually completed within two days and judgements are issued expeditiously.

- The existing urgent disposal procedure is reserved for cases of exceptional and genuine urgency such as cases on the welfare of children, interim interdict or urgent commercial deadlines. The procedure is rarely used and judgements are issued without delay.
 - There will always be room for minor improvements to the rules but respondents see no issues that warrant more fundamental rule changes.
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SECTION 2 – THE DECISIONS TAKEN

9. Having considered users views, the Council has withdrawn some proposals and amended others. This section sets out the changes to be made.

Changing the “look and feel” of these rules:

The drafting methodology

10. To minimise duplication; the core rules will be set out in chapter 38. The interpretation clauses within each subsequent chapter will then signpost which core rules will apply within subsequent chapters.

The depersonalisation of tasks

11. The Council’s policy position is that where a rule places an obligation on the court to do something, it should ideally state that obligation as resting on the court itself rather than a judicial office holder or court official who may be delegated that task. Some exceptions will apply where needed to provide legal certainty; such as who is responsible for administering the oath. Users did not express a view on the policy position taken.

12. The Council will use the phrase “the court” to replace several references to:

- Inner House Judges; the Deputy Principal Clerk of Session, the Keeper of the Rolls, the Clerk; and the General Department.

Modernising the terminology

13. In line with user feedback, the Council will amend the following terms to modernise the language used:

Inferior Courts – this term will be withdrawn. The replacement term “*lower courts*” will be used within the title for Chapter 40, the rules within that chapter, and Form 40.11.

Marking / marked – this term will be withdrawn. It reflects the historic practice of borrowing the process and manually adding a written note onto an interlocutor. That becomes redundant in an increasingly digital world where specifying the use of a form will often be more appropriate (*rules 38.5 / 38.12 / 38.20 / 40.5 / 40.10 / 40.15*).

Summar Roll – this term will be withdrawn. The drafter will propose options for a modern term. The Council will take a final decision on the right term to be used (*rules 38.6 / 38.14 / 38.16 / 38.19 / 40.9 and form 40.11*).

Single Bills – this term will be withdrawn. The drafter will propose options for a modern term. The Council will take a final decision on the right term to be used (*rules 38.6 / 38.12 / 38.24 / 40.3 / 40.9 and form 40.11*).

14. The following traditional terms are retained, as users do perceive value in their retention:

Reclaiming Motion – this traditional term is readily understood by practitioners. It has utility by differentiating ‘appeals from the decision of judges’ from ‘appeals from the decisions of sheriffs’.

Reclaiming Print – this traditional term is retained for the same reasons. It can be made self-defining by using “an appeal print containing...”.

Recognising other enactments made:

15. The enactments made since these rules were last updated included the commencement¹ of the civil jurisdiction of the Sheriff Appeal Court with effect from 1 January 2016. As that change was by primary legislation, practitioners are well sighted on the revised appeal routes. In practice, users disapply those rules that predate the jurisdiction change and follow the primary legislation.

16. The Council will:

- Withdraw rule 39.1A and 39.9A as applications for new trials, or to enter jury verdicts, are being lodged with the Sheriff Appeal Court from 2016 onwards; and
- Revise the wording in rules 40.1 to 40.4:
 - To signpost users to the Sheriff Appeal Court rules if appealing the first instance decisions of a sheriff;
 - To have a revised process for the small number of onwards appeals from the Sheriff Appeal Court to the Inner House;
 - To recognise these onwards appeals will be from final judgements only; and
 - To recognise that it is mandatory to seek permission to appeal from the Sheriff Appeal Court (which will require amendments to Form 40.4).

¹ Via section 113 of the Courts Reform (Scotland) Act 2014

The changes that will impact on working practices:

Shifting some Practice Note requirements into these rules

17. Some flexibility does come with putting guidance within Practice Notes which can be quickly modified, compared to Rules with their more protracted process that involves making updates via secondary legislation. There is a trade-off to be made. The competing arguments are that putting those requirements within the rules can a) increase compliance and b) provide comparability with the rules that apply in the Sheriff Appeal Court. The Council has decided to proceed with the transfer of certain requirements into these rules.

18. The Council will:

- Insert the requirements for Authorities, Core Bundles and Notes of Argument as core rules in Chapter 38, then use the interpretation clauses to apply those across Chapter 39 to Chapter 41; and
- Update and reissue the Practice Note at the same time as the new rules.

Removing the prohibition on chairs being procedural judges

19. The current rules prohibit the Lord President and Lord Justice Clerk from sitting as procedural judges. Respondents did not express a view on that prohibition.

20. For rule 37A.2 the Council will remove the prohibition, and simplify the wording.

Rationalising the time limits for reclaiming

21. The Council agrees with the user feedback. A threshold of 7 days can leave insufficient time for practitioners to provide advice on reclaiming, obtain instructions and draft the necessary pleadings.

22. For rule 38.2 the Council will:

- Set 14 days as the minimum time limit in this rule;
- Reorder the content to state the time limit (14 or 21 days) that applies alongside each relevant type of interlocutor;
- Indicate whether that step in process will require leave; and
- Amend rule 38 (2) (3) so that it reads as "...an order for expenses (including any additional fee)".

Objecting to the reports of the Auditor can take longer:

23. The Council agrees with the user feedback; 14 days would provide a more workable time limit. For rule 38 (3) (4) the Council will set a 14 day time limit (replacing 7 days).

Commercial actions will still require leave

24. The Council agrees with the user feedback. For commercial actions, the requirement for leave does aid the speedy determination of commercial actions and it acts as a brake on appeals being used tactically for delay. The Council will retain rule 38.3 (5) and (6).

Amending the method of reclaiming – grounds of appeal

25. The policy aim was to have the detailed information on grounds of appeal provided at an earlier step in the legal process, to help the procedural judge tailoring the timetable to the circumstances of each case.

26. The user feedback was that requiring that detail along with the reclaiming motion itself is too early. It could prove counterproductive if it results in too many motions seeking permission to lodge amended grounds of appeal. The Council accepts that point but delaying submission until after the timetable is issued would not achieve the aim set for this change.

27. The Council will:

- Amend rule 38 (5) 2 to require the detailed grounds of appeal to be lodged 28 days after the reclaiming motion itself; and
- Remove the requirement to lodge answers to grounds of appeal.

Reclaiming out of time

28. For rule 38.10 the Council will add flexibility by removing the requirement to show “mistake or inadvertence”.

Establishing a fast track procedure, and withdrawing urgent disposal

29. The user feedback was that the urgent disposal procedure was well understood. It needs to be used rarely and is working as intended. Given that level of user support the Council is withdrawing this proposal. The existing procedure will remain.

30. The Council will:

- Retain the urgent disposal procedure in existing rules 38.11 and 38.11A; and
- Add Permanence Orders as a case type where urgent disposal is required.

Appendices

31. For rule 38.19 the Council will amend the wording:

- To clarify that an appendix should only consist of material that was before the Lord Ordinary, except on cause shown; and

- To set an expectation that parties should attempt to agree a joint appendix or core bundle.

Consequential Amendments

32. Whilst Chapter 41 (Appeals under statute) was out of scope for this rules review, some consequential amendments will arise:
- To bring through the Practice Note requirements that were transferred into rules (for Authorities, Core Bundles and Notes of Argument); and
 - To use “lower courts” rather than “inferior courts” within rule 41.1.

SECTION 3 – THE NEXT STEPS

Drafting the Inner House Rules 2023:

33. Drafting instructions have been issued in line with section 2 and the legal drafters are currently preparing the amended rules and an updated Practice Note. The aim is for the Council to consider those draft rules, and the updated Practice Note, at the next scheduled meeting on 22 May 2023.

Approving the Inner House Rules 2023

34. Once agreed by the Council, the new rules will be proposed to the Court of Session for consideration and approval. If approved, an Act of Sederunt will be laid with the Scottish Parliament and published via legislation.gov.uk.

Implementing the Inner House Rules 2023

35. For practitioners, court officials and the judiciary; to familiarise themselves with the changes made, there will be a 3 month period provided between a) the date the instrument is made and b) the date it comes into force.

**Secretariat to the Scottish Civil Justice Council
March 2022**

ANNEX 1 - BIBLIOGRAPHY

Primary Legislation:

Courts Reform (Scotland) Act 2004:

Part 5: Civil Appeals:

- Section 113: Appeal from the Sheriff Appeal Court to the Court of Session
- Section 114: Appeal from the sheriff principal to the Court of Session
- Section 115: Appeals: granting of leave or permission and assessment of grounds of appeal
- Section 116: Effect of appeal
- Section 117: Appeals to the Supreme Court

Court of Session Act 1988:

Part IV Appeals and Review:

- Section 28: Reclaiming
- Section 29: Application for new trial
- Section 30: Restrictions on granting of application for new trial
- Section 31: Verdict may be returned subject to opinion of Inner House on point reserved.
- Section 31A: Power to provide for single judge of Inner House to determine leave or permission and assess grounds of appeal
- Section 32: Appeals
- Section 33: Transmission for sheriff to court on grounds of contingency
- Section 40: Appeals to the Supreme Court
- Section 40A: Permission for appeal under section 40

Rules of the Court of Session (RCS):

The Court of Session rules are available [here](#).

The chapters within scope for this review of the Inner House Rules are:

- CHAPTER 37A Procedural business in the Inner House
- CHAPTER 38 Reclaiming
- CHAPTER 39 Applications for new trials or to render jury verdicts
- CHAPTER 40 Appeals from inferior courts

The chapters that are out of scope for this review are:

- CHAPTER 41 Appeals under statute
- CHAPTER 41A Appeals to the Supreme Court

Practice Notes:

- [No.3 of 2011](#).- Causes in the Inner House
- [No.2 of 2021](#) - Causes in the Inner House – hearings by video conference

ANNEX 2 – TABLE OF AMENDMENTS MADE

SEP 1994 - The Rules of the Court of Session 1994 were commenced via:

<i>Statutory Instrument</i>	<i>SSI</i>	<i>W.E.F</i>	<i>Commentary</i>
Act of Sederunt (Rules of the Court of Session 1994) 1994	1194/1443	05 Sep 1994	

Within the original Rules of the Court of Session 1994, the principal Inner House rules were set out in three chapters:

- RCS CH 38 (reclaiming)
- RCS CH 38 (applications for new trials or to enter jury verdicts)
- RCS CH 40 (appeals from inferior courts)

APR 2010 – Following a review the existing chapters 38, 39 and 40 were replaced and a **new chapter (37A) added**

- RCS CH 37A (procedural business in the inner house)
- RCS CH 38 (reclaiming)
- RCS CH 38 (applications for new trials or to enter jury verdicts)
- RCS CH 40 (appeals from inferior courts)

<i>Statutory Instrument</i>	<i>SSI</i>	<i>W.E.F</i>	<i>Explanatory Note</i>
Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Causes in the Inner House) 2010	2010/30	05 Apr 2010	<p>It introduces new rules of procedure for causes in the Inner House. These rules relate to the quorum of the Inner House for dealing with procedural business, as well as the procedures for dealing with reclaiming motions, applications for new trials or to enter jury verdicts and appeals from inferior courts.</p> <p>Consequential amendments are made to the rules on the lodging of documents in Inner House causes and on the issuing of Inner House interlocutors.</p>

ANNEX 2 – TABLE OF AMENDMENTS MADE ...*continued*

SEP 2011 – A new chapter (41) was added to cover appeals under statute. The principal Inner House rules were now set out across five chapters:

- RCS CH 37A (procedural business in the inner house)
- RCS CH 38 (reclaiming)
- RCS CH 38 (applications for new trials or to enter jury verdicts)
- RCS CH 40 (appeals from inferior courts)
- RCS CH 41 (appeals under statute)

<i>Statutory Instrument</i>	<i>SSI</i>	<i>W.E.F</i>	<i>Explanatory Note</i>
Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Causes in the Inner House) 2011	2011/303	27 Sep 2011	<p>It introduces new rules of procedure for causes in the Inner House. These rules relate to appeals under statute. A new Chapter 41 is substituted into the Rules. Some amendments are also made to the rules relating to the quorum of the Inner House for dealing with procedural business, and the procedural rules for dealing with reclaiming motions, applications for new trials or to enter jury verdicts and appeals from inferior courts.</p> <p>Appeals under statute which are lodged before 27th September 2011 will be governed by the rules of procedure in force prior to that date.</p>

ANNEX 2 – TABLE OF AMENDMENTS MADE ...continued

SEP 2015 – A new chapter (41A) was added to cover appeals to the UK Supreme Court. The principal Inner House rules are now set out across the following chapters:

- RCS CH 37A (procedural business in the inner house)
- RCS CH 38 (reclaiming)
- RCS CH 38 (applications for new trials or to enter jury verdicts)
- RCS CH 40 (appeals from inferior courts)
- RCS CH 41 (appeals under statute)
- RCS CH 41A (appeals to the supreme court)

<i>Statutory Instrument</i>	<i>SSI</i>	<i>W.E.F</i>	<i>Explanatory Note</i>
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 3) (Courts Reform (Scotland) Act 2014) 2015	2015/228	27 Sep 2015	<p>Paragraph 5 of this Act of Sederunt inserts a new Chapter 41A into the Rules in consequence of amendments to the Court of Session Act 1988 ("the 1988 Act") made by the 2014 Act.</p> <p>Previously, appeals from decisions of the Inner House of the Court of Session could be made to the Supreme Court under section 40 of the 1988 Act without any requirement to seek prior permission to appeal from the Inner House. Section 117 of the 2014 Act replaces the provisions of section 40 of the 1988 Act with a new section 40, so that permission to appeal must be granted by the Inner House or, if the Inner House refuses permission, by the Supreme Court.</p> <p>New Chapter 41A sets out the procedure to be followed by an applicant who wishes to seek permission to appeal to the Supreme Court. A new Form 41A.2 (application for permission to appeal to the Supreme Court) is prescribed for this purpose.</p>

ANNEX 3 – RELEVANT DATA

The following statistics reflect the volume of appeals initiated within the Inner House over the last 4 years:

Appeals initiated in the Inner House of the Court of Session, by case type 2017-18 to 2020-21					
Case Type	2017-18	2018-19	2019-20	2020-21	% Mix
Reclaiming Motions	64	73	93	107	56%
- <i>general department</i>	28	35	33	61	
- <i>petition department</i>	36	38	60	46	
Sheriff Court Appeals	31	21	21	9	5%
<i>Damages</i>	3	0	1	0	
<i>Debt</i>	1	0	1	0	
<i>Family: Divorce</i>	0	0	0	0	
<i>Family: Other</i>	0	1	0	0	
<i>Land / Heritable</i>	1	0	0	0	
<i>Personal Injury</i>	0	0	0	0	
<i>Other</i>	26	20	19	9	
Other Courts / Tribunals Appeals	87	92	117	74	39%
All Appeals	182	186	231	190	100%

Note - this data is sourced from the [supplementary tables](#) to the latest [Civil Justice Statistics](#) in Scotland publication, as published by the Scottish Government on 22 April 2022: