



**Scottish
Civil Justice
Council**

**TARGETED CONSULTATION: On changes to
the Inner House rules**

June 2022

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Supporting Documents:

Respondent Information Form

Draft Rules

Draft Rules with tracked Changes

SECTION 1: RESPONDING TO THIS CONSULTATION

This is a targeted consultation to gather feedback from selected users of the Inner House including the judiciary, the legal profession and court officials.

The consultation will be open for twelve weeks.

Written responses are invited by **27 September 2022**.

To respond please email scjc@scotcourts.gov.uk with your response, along with a completed **Respondent Information Form**.

How your response will be handled

Your response will be handled in line with the information you provide within the Respondent Information Form. If you are content for your response to be published it will be uploaded to the SCJC website. If you ask for your response not to be published, we will regard it as confidential, and treat it accordingly.

All respondents should be aware that the SCJC is subject to the provisions of the Freedom of Information (Scotland) Act 2002. If the SCJC receives a Freedom of Information (FOI) request about the responses to this consultation, any of the consultation responses (including those not published) may have to be made available when responding to that FOI request.

Why this is a targeted consultation

Providing feedback on the Inner House rules requires specialist technical expertise, along with good practical working experience of the rules in use. The Council expects that expertise to sit with the regular recurrent users of these rules such as:

- Outer House judges whose decisions may be reclaimed against;
- Appeal Sheriffs and Appeal Sheriffs Principal whose decisions within the Sheriff Appeal Court (SAC) may be appealed onwards to the Inner House;
- Advocates and solicitor advocates who hold rights of audience to appear within the Inner House;
- Instructing solicitors with experience across the range of civil business that can be initiated within the Inner House;
- Other members of the legal profession who may need to keep abreast of Inner House judgements; and
- Court officials with an in-depth understanding of these particular court rules.

The alternative of running a full Public Consultation was rejected. Occasional court users are unlikely to have interacted sufficiently with the Inner House rules to form a view on their effectiveness and, given the very technical nature of these proposals, the council would want to avoid any disproportionate resource impacts for any other potential respondents.

Who are we consulting with?

The Council is seeking responses from the following representative bodies that have expertise in the operation of the Inner House rules:

The Judiciary:

Senators of the College of Justice
Sheriffs Principal
Sheriffs and Summary Sheriffs Association

Practitioners:

Faculty of Advocates
Law Society of Scotland

Court Officials:

Scottish Courts and Tribunals Service

Comments and complaints

If you wish to provide any feedback on how this consultation is being conducted then please email scjc@scotcourts.gov.uk.

SECTION 2: EXECUTIVE SUMMARY

The policy objectives for this Rules Review:

1. In undertaking this rules review, the Council is seeking to embed learning rather than fundamentally rewrite these court procedures. The policy objectives are:

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

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

To remove redundant provisions – we will withdraw any rules that have become irrelevant due to the changes made, or due to 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 or court official who may be delegated that task on the courts behalf.

The scope of this Rules Review

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

3. Those first four chapters (37A, 38, 39 and 40) originated in 1994, they had entirely new content substituted in 2010, and were last amended in 2011. It is those four chapters that are in scope for this Rules Review.
4. The last two chapters (41 and 41A) were established more recently as entirely new chapters. As they are operating as intended they were excluded from the scope of this Rules Review.

The improvements suggested to date

5. To capture the learning from the rules in use, some initial views on desired changes were sought from the Inner House user group.

6. The outcome of those discussions can be seen in the proposals made within section 3 of this paper and the draft rules which accompany it.
7. Further background context can be found within the annexes:
 - *ANNEX 1: BIBLIOGRAPHY* – provides hyperlinks to relevant supporting legislation and practice notes;
 - *ANNEX 2: TABLE OF AMENDMENTS MADE* – provides a chronology for all previous rule changes; and
 - *ANNEX 3: RELEVANT DATA* – provides government statistics on the volume of appeals being initiated within the Inner House.

SECTION 3: THE PROPOSED CHANGES

8. The new rules for the Inner House are set out in the supporting documents which accompany this Consultation Paper; the Draft Rules and the draft Rules with Tracked Changes. This section summarises the key proposed changes across the four relevant RCS chapters.

Proposed changes in - CHAPTER 37A: Procedural business in the Inner House

Removing the prohibition on chairs being procedural judges

<i>Original Number</i>	<i>Revised Number</i>	<i>Cross Heading</i>
37A.2	No change	Procedural judges in the Inner House

9. Under existing rule 37A.2 the Lord President and Lord Justice Clerk are prohibited from sitting as procedural judges. The proposed change removes that prohibition, and simplifies the overall wording of rule 37A.2.
10. In practice that change will increase the available pool of procedural judges from eleven to thirteen. That in turn will provide the court with greater operational flexibility for the initial consideration of reclaiming motions and appeals lodged.

Proposed changes in - CHAPTER 38: Reclaiming:

Rationalising the time limits for reclaiming

<i>Original Number</i>	<i>Revised Number</i>	<i>Cross Heading</i>
38.2	No change	Reclaiming days

11. The existing wording of rule 38.2 gives rise to some confusion in terms of whether a particular step in process should be taken within 7, 14 or 21 days, and whether or not that step requires leave.
12. The proposed change reorders the content so that the number of reclaiming days is clearly stated along with the types of interlocutor for which that number of days is applicable. The main outcomes are:
 - An increase in the specified interlocutors that can now be reclaimed, without leave, within 21 days; and
 - Other interlocutors can be reclaimed, with leave, within 7 days.
13. The ongoing requirement to seek leave when reclaiming procedural decisions is in line with a policy objective for 'discouraging unmeritorious appeals'.

Amending the method of reclaiming

<i>Original Number</i>	<i>Revised Number</i>	<i>Cross Heading</i>
38.5	No change	Method of reclaiming

14. Existing rule 38.5 (2) sets out the documents a claimer should lodge at the same time as they lodge their reclaiming motion.
15. To reduce the overall timelines for progressing appeals, the proposal made within rule 38.5 (2) (d) will additionally require the grounds of appeal to be lodged with the reclaiming motion. That avoids the delay from waiting to receive those grounds on the date otherwise specified in the timetable issued by the keeper.
16. To assist the procedural judge in determining future procedure the proposed changes also include:
 - Rule 38.5 (2) (e) - which requires the claimer to estimate the likely duration of a hearing; and
 - Rule 38.5 (2) (f) - which requires the claimer to indicate their preference for the procedure to be used (standard or fast track).

Establishing a fast track procedure, and withdrawing urgent disposal

17. To modernise the terminology used, the proposal is to introduce a fast track procedure by inserting the new rule 38.6:

<i>Original Number</i>	<i>Revised Number</i>	<i>Cross Heading</i>
-	38.6	Allocation of reclaiming motion to fast track procedure

18. The courts expectation is that:
 - Most reclaiming motions and appeals will continue to be progressed under standard procedure; and
 - The fast track procedure will be used rarely.

19. As a consequence of introducing this fast track procedure, the existing procedure for urgent disposal is withdrawn:

Original Number	Revised Number	Cross Heading
38.11	-	Urgent disposal of reclaiming motion.
38.11A	-	Required application of certain reclaiming motions for urgent disposal

Simplifying the procedure used for lodging objections

20. Rule 38.12 has been reworded to simplify how you can lodge and intimate objections to the competency of reclaiming motions:

Original Number	Revised Number	Cross Heading
38.12	38.12	Objections to the competency of reclaiming

The depersonalisation of tasks

21. 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 a judicial office holder or court official who may be delegated that task on the courts behalf. Consequential changes are made within the following rules:

Original Number	Revised Number	Heading
38.12	38.12	Objections to the competency of reclaiming
38.13	38.14	Timetable in standard procedure
38.14	38.17	Sist or variation of timetable in reclaiming motion
38.15	38.18	Failure to comply with timetable in reclaiming motion
38.19	38.22	Lodging of appendices in reclaiming motion

Referral of reclaiming motion for allocation

22. The proposal is to insert a new rule 38.13 to set out the timings within which a reclaiming motion should be placed before a procedural judge. Those timings are specified as 7 days under standard procedure, and 'the next court day' under fast track procedure.

Original Number	Revised Number	Cross Heading
-	38.13	Referral of reclaiming motion for allocation

Notes of Argument

23. The existing requirements for lodging Notes of Argument are set out within the Practice Note (at paragraph 89). The proposal is to now specify that requirement within the body of the rules, by inserting rule 38.15:

Original Number	Revised Number	Cross Heading
-	38.15	Notes of argument

Authorities

24. The existing requirements when lodging Authorities are as set out within the Practice Note (at paragraphs 90 to 91). The proposal is to now specify that requirement within the body of the rules, along with a new requirement for permission if lodging more than ten authorities. That change is achieved by inserting rule 38.16:

Original Number	Revised Number	Cross Heading
-	38.16	Authorities

Appendices

25. The existing rule on lodging appendices has been amended to make it clearer that an appendix can only consist of material that was before the Lord Ordinary, unless on cause shown.

Original Number	Revised Number	Cross Heading
38.19	38.22	Lodging of appendices in reclaiming motion

Proposed changes in - CHAPTER 39: Applications for new trials or to render jury verdicts:

Removal of redundant rules

26. The civil jurisdiction of the Sheriff Appeal Court (SAC) was commenced from 1 January 2016, and applications for new trials or to render jury verdicts in the sheriff courts have been directed to the SAC since then. To recognise that change in the routes of appeal, the following redundant rules will be withdrawn:

Original Number	Revised Number	Cross Heading
39.1A	-	Applications for new trial: sheriff court cases
39.9A	-	Application to enter jury verdict: sheriff court cases

Other rules being withdrawn

27. Simplifying and consolidating these rules has resulted in the relocation of some procedural information within Chapter 39. As a consequence the following rules can be withdrawn:

Original	Revised	Heading
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Number	Number	
39.3	-	Objections to the competency of application
39.5	-	Sist or variation of timetable in application for a new trial
39.6	-	Failure to comply with timetable in application for a new trial
39.8	-	Lodging of appendix
39.10	-	Single Bills

The depersonalisation of tasks

28. The changes within this chapter that put an obligation to do something onto the court (rather than the Keeper) are evident in the following rule:

Original Number	Revised Number	Heading
39.4	39.5	Timetable in application for a new trial

Proposed changes in - CHAPTER 40: Appeals from lower courts:

Modernising the terminology

29. The existing rules refer to appeals from the “inferior courts” which is now perceived as being a somewhat archaic term. To modernise the language used; the proposed change is to replace “*inferior courts*” with “*lower courts*” within the chapter title, and wherever that term appears within a relevant rule.

Establishing a fast track procedure and withdrawing urgent disposal procedure

30. The changes made at rule 38.6 (Allocation of reclaiming motion to fast track procedure) establishes a new fast track procedure. Rule 40.3 (application of rules to this chapter) enables that same requirement (with necessary modifications) to apply for appeals from the lower courts.

31. As a consequence of fast track procedure being made available, the existing rules in this chapter covering urgent disposal are withdrawn:

Original Number	Revised Number	<i>Cross Heading</i>
40.9	-	Urgent disposal of appeal.
40.9A	-	Required application for urgent disposal of appeal against certain interlocutors

Other rules that can be withdrawn

32. The process of simplifying and consolidating rules results in the relocation of some procedural information. As a consequence the following rules are able to be withdrawn from Chapter 40:

Original	Revised	Heading
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Number	Number	
40.8	-	Sist of process of appeal
40.10	-	Objections to the competency of appeals

The depersonalisation of tasks

33. Within chapter 40 the proposed changes that put an obligation to do something onto the court (rather than the clerk of the lower court, the Deputy Principal Clerk or the Keeper) are evident in the following rules:

Original Number	Revised Number	Heading
40.3	40.4	Determination of applications for leave to appeal from lower court
40.4	40.5	Time and method of appeal
40.5	40.6	Leave to appeal out of time
40.6	40.7	Transmission of appeal process
40.7	40.8	Procedure following transmission of appeal process
40.11	40.9	Timetable in appeal from lower court
40.15	40.10	Appeals deemed abandoned

34. Situations where an obligation to do something does remain with a named court official can be seen in the following rules and forms:

Original Number	Revised Number	Heading
40.1	40.1	Interpretation
40.6	40.7	Transmission of Appeal Process
FORM 40.11	FORM 40.15	Form of certification by Deputy Principal Clerk on retransmitting abandoned appeal

Notes of Argument

35. Changes were made at rule 38.15 (notes of argument in reclaiming motion) to transfer the requirement to lodge notes of argument from the Practice Note into the rules. That same requirement will also apply in appeals from the lower courts by virtue of Rule 40.3 (application of rules to this chapter).

Authorities

36. The changes made at rule 38.16 (authorities) transferred the requirement to lodge authorities from the Practice Note into the rules. That same requirement will also apply in appeals from the lower courts by virtue of Rule 40.3 (application of rules to this chapter).

Appendices

37. The changes made at rule 38.22 (appendices) made it clear that an appendix can only consist of material that was before the Lord Ordinary, unless on cause shown. That same requirement will also apply in appeals from the lower courts by virtue of Rule 40.3 (application of rules to this chapter).

SECTION 4: THE CONSULTATION QUESTIONS

38. The targeted consultees are invited to consider the draft Act of Sederunt and keeling schedule which accompanies this consultation, along with the summary of the proposed changes set out within section 3 of this paper.

39. The Council is inviting consultees to provide responses to the following questions:

Question 1 – Given your experience of the practical operation of the rules in use, can you tell us what has worked well, and what has worked not so well?

Question 2 – Do you wish to provide comments on any of the proposed changes to the Inner House rules as set out within section 3 of this paper?

Question 3 - Can you suggest any other specific rule changes that might further improve the procedures used by the Inner House?

SECTION 5: THE NEXT STEPS

40. Following the closing date for this consultation, the next steps will be:

- *Publication of responses* - as soon as practicable the individual consultation responses will be uploaded to the consultation page of the Council's website (where respondents have given their permission);
- *Analysis of responses* - the Council's staff will prepare an Analysis of Responses paper. Having considered that analysis, the Council will issue instructions for any further amendments to the draft rules as consulted on;
- *Rules finalised* - following the consideration of the finalised rules by the Council, they will be submitted to the Court of Session for their consideration and approval; and
- *Rules published* – assuming the proposed rules are approved by the Court of Session, an Act of Sederunt would then be laid with the Scottish Parliament and published via legislation.gov.uk.

**Secretariat to the Scottish Civil Justice Council
June 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 relevant to this review of 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	
					<i>% Mix</i>
<u>Reclaiming Motions</u>	64	73	93	107	<u>56%</u>
- <i>general department</i>	28	35	33	61	
- <i>petition department</i>	36	38	60	46	
<u>Sheriff Court Appeals</u>	<u>31</u>	<u>21</u>	<u>21</u>	<u>9</u>	<u>5%</u>
<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	
<u>Other Courts / Tribunals Appeals</u>	<u>87</u>	<u>92</u>	<u>117</u>	<u>74</u>	<u>39%</u>
All Appeals	182	186	231	190	<u><u>100%</u></u>

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: