Scottish Civil Justice Council

RESPONDENT INFORMATION FORM0

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

Please note **this form must be completed** and returned with your response

Are you responding as an individual or an organisation?

	INDIVIDUAL
X	ORGANISATION

Your details:

Full name or organisation's name

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Your views on the publication of your response

Please indicate your preferences with regard to the publication of your response

X	Publish response with name
	Publish response only (without name)
	Do not publish response

Providing your response

If you chose to provide a separate written response, then please complete the first page of this Respondent Information Form and attach it to your response.

If you chose to include your responses within this Respondent Information Form, then please insert your responses within the editable boxes that follow:

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?

The requirement to lodge answers to grounds of appeal in a reclaiming motion is often an unnecessary expense. Whilst the draft rules appear to delete the requirement for answers, Form 38.14 still refers to them. Consideration should be given to revising Form 38.14 to reflect the terms of the proposed new rules. Consideration should also be given to addressing specifically the fact that the requirement for answers has been deleted in the Explanatory Notes to the Act of Sederunt.

In general terms, the current rules are adequate and work well in practice.

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?

Faculty makes the following observations on the proposed changes:

- Proposed RCS 38.1(a): It is proposed to add "including a commercial judge" after "the Lord Ordinary". Since "commercial judge" is not a term found in primary legislation, it is questionable whether that insertion is necessary; but if it is, then "intellectual property judge" should also be inserted.

- Proposed RCS 38.2(4): the proposed change reduces the period for reclaiming with leave from 14 days to 7 days. The interaction of 38.2(4) with 38.1, 38.4 and 38.5 is that permission must be obtained from the Lord Ordinary within that period, and that grounds of appeal will require to be framed by the end of that period. That is a very tight timescale for providing advice on whether to reclaim, obtaining instructions and drafting the necessary pleadings. It is respectfully suggested that a period of at least 14 days would be more suitable. If it were thought desirable, the 14-day period could be split into two parts: 7 days to seek leave from the Lord Ordinary (which would

include the provision in 38.4(3) that any days during which a motion is continued were not taken into account), with a further 7 day period following the grant of leave for a reclaiming motion to be enrolled. The current draft could be revised to give effect to that proposal by requiring a motion for leave to reclaim under 38.4(1) to be enrolled within 7 days of the date of the decision, and by revising the timescale in 38.2(4) to 14 days.

- Proposed RCS 38.3: As above, this represents a very tight timescale for providing advice on whether to reclaim and drafting necessary pleadings. It is respectfully suggested that a period of at least 14 days would be more suitable.

- Deleted RCS 38.3(6): The effect of the existing deletion is to remove the control which the commercial judge has over the ability of a party to reclaim an interlocutor which does not dispose of the merits of the case. It would allow a party to reclaim a wider range of interlocutors without leave (the list in proposed 38.2(2), including significantly the allowance of proof/limiting of proof (proposed 38.2(2)(d) and (e)) and decisions relating to recall of interim orders (proposed 38.2(2)(g)). This represents a significant shift in commercial procedure which is not discussed in the Consultation Paper (CP). It has the potential to slow commercial procedure significantly. Consideration should be given to consulting with the commercial court user group, as well as the commercial judges, for their views on the effect on commercial actions. Consideration should also be given to creating a presumption of fast track procedure in commercial cases if this deletion is to be made.

- Proposed RCS 38.6(5): the proposed change appears to require that the default will be fast track procedure for almost all reclaiming motions, unless the procedural judge so directs on cause shown. That appears to conflict with the CP at paragraph 18, which states that it is envisaged that fast track procedure will be used rarely (similar to urgent disposal) and proposed rules at 38(1) – (4). An alternative interpretation is that the rule means to convey that if a party seeks fast track procedure then that request should be granted, unless on cause shown, the court considers it to be inappropriate. If that is the intended meaning then the rule requires revision to make it clearer. The CP contains no explanation of why such an approach would be considered necessary. This appears to be a drafting error.

- Proposed RCS 38.6(6): Consideration should be given to including interlocutors granting or refusing to make a permanence order under the Adoption and Children (Scotland) Act 2007, as well as interlocutors concerning orders under section 11(1) of the Children (Scotland) Act 1995.

- Proposed RCS 38.11(1): The removal of the requirement to show "mistake or inadvertence" provides the court with more flexibility and discretion to allow a reclaiming motion to proceed out of time.

- Proposed RCS 38.12(2): The proposed change in terminology from "period of 14 days after" to "within 14 days of" (in proposed RCS 38.12(2)) may cause confusion about whether the first day (the date of decision) is or is not included, particularly where it is not adopted consistently throughout the whole section (see proposed RCS 38.12(4)). Also in 38.12(2) the use of the word "marked" is retained- in other sections it has been replaced with "enrolled" (see e.g. proposed RCS 38.5(1)).

- Proposed RCS 38.13(a): this refers to 38.12(4) in circumstances where no note of objection is lodged. However, 38.12(4) deals with circumstances where a note of objection is lodged. The intention should be clarified.

- Proposed 38.14(1)(c): provides that the court will allocate a diet for a hearing on the Summar Roll at the same time as the procedural hearing is allocated. It is not clear whether that diet will be allocated based on counsel/agents' availability, and what the status of an allocated diet is, noting that the Summar Roll date will not be appointed until the procedural hearing (proposed RCS 38.19(2)(a)). Is it likely that the allocated date will routinely be subject to change at the procedural hearing? If notional dates are pencilled in which are likely to change this raises the potential for difficulty in managing other court commitments in counsel's diaries, an increased workload on agents to ascertain counsel availability and to advise the court of the same at the point at which the reclaiming motion is enrolled, and generally seems to be a less efficient way to proceed.

- Proposed RCS 38.14(2)(c). it is suggested that the date for the reclaimer's note of argument should be assigned 3 weeks before the date for lodging the respondent's note of argument. This ensures a respondent has notice of the reclaimer's argument and should result in more focused notes of argument. It also limits the potential need for supplementary notes of argument. Given the importance which the court attaches to notes of argument, this change would ensure that a respondent is able properly to address the reclaimer's arguments in advance of the hearing. It is appropriate for this important provision to be codified in the rules where the clear expectation of the court is that parties will exchange notes in advance. The UKSC operates a similar staggered approach to lodging notes of argument: UKSC Practice Direction 6 at para 6.3.9 and 10.

- Proposed RCS 38.15(3:) consideration should be given to whether this provision has any practical utility. It is suggested that it does not as nothing is required of parties. A more effective provision is the provision of the reclaimer's note of argument in

advance of the respondent's. See above. A requirement in the rules or one imposed by a court interlocutor is generally necessary to obtain payment from SLAB for a particular piece of work. This underlines the importance of the rules imposing mandatory requirements on parties in line with the court's expectations.

- Proposed RCS 38.16: It is not considered necessary to set a default limit for the number of authorities to be lodged. The requirement not to lodge authorities for uncontroversial propositions and not to lodge multiple authorities for more than one proposition ought to be sufficient. There is no such default rule in the UKSC. In any case in which excessive reference to authority is made the procedural judge can make whatever order is necessary to address this. It is suggested that to set a default rule of 10 for all cases is unnecessarily to set a presumption that the court will not be assisted by greater reference to authority in appropriate cases. It is undesirable that court time is taken up, and expense is incurred, in debating whether extra authority is necessary beyond the arbitrary limit of 10. Such time and expense may be disproportionate to the difference which brief citation to the desired additional authorities would make.

- Proposed RCS 38.19(2)(b): this rule seems unnecessary and has the potential for confusion standing the terms of proposed 38.16 and 38.19(c). Proposed 38.19(2)(iii) is in potential conflict with 38.16 – which allows for more than 10 authorities to be lodged. It is suggested that it is deleted for clarity. This will not prevent the procedural judge making such an order should it be appropriate/expeditious to do so. Reference is made to the previous point.

- Proposed RCS 38.22: If the intention is to make it clearer that only documents which were before the LO may be included in the appendix (CP, para 25), then consideration should be given to revising the proposed rule in more explicit terms. It is not currently obvious, and there is no reference to a requirement for special cause shown in the rules as currently drafted.

General comments:

- The adoption of a single set of rules on e.g. sisting/notes of arguments etc for all reclaiming motions/appeals makes sense. The comments which are made in respect of Chapter 38 apply equally to Chapters 39 and 40, in so far as those chapters rely on the rules which are set out in Chapter 38.

- If there are to be shorter timescales and a requirement to formulate grounds of appeal at the outset it is even more important that written reasons are issued promptly in order that proper consideration can be given to potential grounds of challenge. We mention in particular judicial review, where it is quite often the case at present that the judge's note is not available at the time of enrolling the reclaiming motion against

refusal of permission to proceed. Framing grounds of appeal in the absence of the Note would be especially challenging.

- The proposed changes significantly 'front load' the written work required for the preparation of a reclaiming motion/appeal. This may disadvantage those litigants that require legal aid funding, if that funding is not immediately available. The ability to revise grounds of appeal, and to seek a sist for the purpose of obtaining legal aid funding, will remain important aspects of the rules to promote access to justice.

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

The draft Rules, like the extant Inner House practice note, prohibit parties from lodging authorities for propositions which are not in dispute. In order to assist parties to achieve this and the court more generally, consideration should be given to requiring parties to agree, and lodge, at the same time as the list of authorities, a joint statement of uncontroversial legal propositions.

Consideration should be given to removing the reference to both Single Bills and Summar Roll hearings, standing the desire to modernise the language used in the rules.

If the court intends to mark its displeasure at non-compliance with the rules by restricting (or modifying) awards of expenses (see proposed RCS 38.16(6)), consideration should be given to how that fits with the general principle that expenses follow success and the court's general reluctance to modify awards to reflect mixed or partial success.

In general terms, consideration should be given to providing further clarity on how the fast track procedure is intended to operate. In addition, consideration should be given to a provision which requires parties to be heard by the commercial judge within a short, fixed time period, before the appeal is appointed to proceed under the fast track procedure.

In light of the proposed changes to the rules, it is respectfully suggested that a new practice note ought to be issued to accompany them. Faculty would welcome the opportunity to have sight of the draft of the practice note before it was issued.

Consideration should be given to consulting on the proposed changes with both the Inner House Users Group (which provided initial views on desired changes), as well as the commercial court users group, in light of the impact of the proposals on commercial procedure.