Scottish
Civil Justice
Council

The New Civil Procedure Rules

First Report

May 2017

Contents

Foreword

by

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Lord President of the Court of Session

An advocate from the 19th century would find the Edinburgh of 2017 a bewildering place: the way people dress; the way they communicate with each other and socialise; the way they travel around the city and further afield; and, maybe more than anything else, the way in which they work. If they tried to take a bus, or visit a café or book a theatre ticket, they would be lost. If they were to make their way to Parliament House, however, they would, once recovered from the shock of seeing women at the bar and on the bench, find our courts to be comfortingly familiar. They might even feel up to the task of taking some instructions.

Can this be right? Have we fallen into the trap of thinking that, because the present court system is fair, it is the only way to achieve fairness? At the heart of the ambitious project, which this report introduces, is this question: what will fairness mean in our courts in the year 2020 and beyond? Court rules seem to last for 25 or 30 years (a generation) before they are replaced, albeit largely repeated from what has gone before. If the new civil procedure rules are introduced in 2 or 3 years' time, we can expect them to last until nearly the middle of the 21st Century.

The courts must provide a system of justice to the public. The public's changed expectations of what services should look like, and how they should work, are therefore key to understanding what fairness will mean in 2020. The public has become used to services which are increasingly swift and responsive, automated, available anywhere and accessible in a variety of different ways. Platitudes about justice being seen to be done are not a complete response to a generation that sees no unfairness in transacting some of its most important business entirely online.

This first report of the project to prepare new civil procedure rules sets out the initial thinking of the Scottish Civil Justice Council on a number of important and over-arching matters. The form and structure of the rules is addressed. A bold vision for active judicial case management of defended actions is set out. A set of principles for civil procedure is recommended.

Some of the changes that must be made challenge existing ways of working, business structures and habits. I am, nevertheless, confident that Scottish lawyers will respond to these challenges with the same vigour and creativity that they have to every other reform in the last 200 years: by treating them as opportunities. The concrete improvements to the experiences of all those that want to, or have to, use the courts should be the guide to the success of these changes. But that success will depend also on the profession: their flexibility, their imagination and their active participation in contributing to the debate, and making their voices heard. This is an opportunity to reshape civil justice and the Scottish

Civil Justice Council needs to know what you think about those topics identified, in Chapter 11, as forming the focus of our next year of work.

The task is an ambitious but a necessary one: to build a civil justice system which makes more sense to someone born at the turn of the millennium than to someone born in the previous two centuries.

May 2017

Chapter 1. Introduction

Background to the rules rewrite project

1.1 The report of the Scottish Civil Courts Review ("the SCCR") recommended a comprehensive review and rewrite of Scotland's civil procedure rules[1]. It also made a number of recommendations relating to the purpose, structure and content of the new civil procedure rules. For example, it recommended the abolition of the distinction between summons and petition procedure in the Court of Session[2], the incorporation into the rules of a guiding principle[3], the adoption of a general approach to case management[4], sanction for non-compliance[5], and the harmonisation, where possible, of the rules in different courts[6].

1.2 The report also recommended the establishment of a single Rules Council for both courts, with the resources and professional support required to undertake this task[7].

The Acts

1.3 The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 ("the 2013 Act") established the Scottish Civil Justice Council ("the SCJC"). The SCJC's functions include keeping the civil justice system under review[8] and preparing draft civil procedure rules for submission to the Court of Session[9].

1.4 The SCJC is required to have regard to certain principles when exercising these functions[10]. These are that:

- the civil justice system should be fair, accessible and efficient,
- the rules relating to practice and procedure should be as clear and easy to understand as possible,
- practice and procedure should, where appropriate, be similar in all civil courts, and
- methods of resolving disputes which do not involve the courts should, where appropriate, be promoted[11].

[1] The Report of the Scottish Civil Courts Review ("SCCR Report"), September 2009, Chapter 15.

[2] SCCR Report, Chapter 5, paragraph 69.

[3] SCCR Report, Chapter 9, paragraphs 11 – 13.

[4] SCCR Report, Chapter 5, paragraph 48.

[5] SCCR Report, Chapter 9, paragraphs 146 - 148.

[6] SCCR Report, Chapter 15, paragraphs 27 – 37.

[7] SCCR Report, Chapter 15, paragraphs 51 – 56.

[8] Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(1)(a).

[9] Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(1)(c).

[10] Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(2).

[11] Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(3).

1.5 The Courts Reform (Scotland) Act 2014 ("the 2014 Act") made significant changes to the structure and powers of Scotland's civil courts, including a comprehensive replacement, restatement and expansion of the Court of Session's powers to make civil procedure rules by Act of Sederunt[12].

1.6 The new powers allow rules to be made "for or about (a) the procedure and practice to be followed in proceedings in the court", and "(b) any matter incidental and ancillary to such proceedings". The 2014 Act contains illustrative lists of ways in which these powers may be used[13], including by making provision for or about:

- avoiding the need for, or mitigating the length and complexity of, proceedings,
- other aspects of the conduct and management of proceedings, including the use of technology,
- simplifying the language used in connection with proceedings or matters incidental or ancillary to them,
- the form of any document to be used in connection with proceedings, or matters incidental or ancillary to them,
- the steps that a court may take where there has been an abuse of process by a party to proceedings.

The Rules Rewrite Working Group

1.7 The Rules Rewrite Working Group ("RRWG") was established in order to develop and submit to the SCJC a rules rewrite methodology. This project was carried out as part of the Making Justice Work programme. Its remit included considering the vision and objective of the new rules, reviewing the approach taken by other jurisdictions to similar projects, creating a style guide for rules, and agreeing the format for drafting instructions[14].

1.8 In March 2014, the RRWG published its Interim Report. It analysed the approach taken to rules rewrite projects in other jurisdictions, including the decision to produce one or more civil codes, and whether they included in their rules an overriding objective. Its recommendations included that:

- separate rules for the sheriff court and the Court of Session should be retained, with harmonisation of procedures where appropriate,
- ambiguous language in rules should be clarified,

[12] The power relating to the Court of Session is in section 103 of the Courts Reform (Scotland) Act 2014 and the power relating to the sheriff courts and Sheriff Appeal Court is in section 104.

[13] Courts Reform (Scotland) Act 2014, sections 103(2) and 104(2).

[14] Rules Rewrite Working Group, Interim Report on the 'Making Justice Work 1' Rules Rewrite Project ("Interim Report on the Rules Rewrite Project), March 2014, paragraphs 1 – 3.

- the rules should contain a statement of principle, in preference to an overriding objective,
- consultation on draft rules should not be the norm, but should be considered on a case-by-case basis.

1.9 In April 2015, the RRWG published its Final Report. It endorsed the recommendations in the Interim Report[15], established a style guide for new rules[16] and a model for instructing new rules[17]. Following the publication of the Final Report, the RRWG was re-established as the Rules Rewrite Committee of the SCJC with a remit that included the comprehensive review of civil procedure rules.

The Rules Rewrite Drafting Team and implementation of the 2014 Act

1.10 In Summer 2014, the Lord President's Private Office established a dedicated rules-drafting team to support the Court of Session and the SCJC in their rule-making functions. The team comprises lawyers on secondment from the Government Legal Service for Scotland with experience in the development and drafting of secondary legislation.

1.11 The early focus of the Rules Rewrite Drafting Team has been the rules required to implement the principal structural reforms in the 2014 Act. Instruments have, so far, been made which:

- provide a sheriff court procedure for actions of reduction and proving the tenor,
- support the national personal injury jurisdiction of Edinburgh Sheriff Court, including jury trials in that court,
- support the increase in the exclusive competence of the sheriff court to £100,000,
- replace entirely the chapter of the Rules of the Court of Session 1994 concerning judicial review procedure,
- establish the Sheriff Appeal Court in its criminal and civil jurisdictions,
- provide for statutory pre-action protocols in some personal injury cases,
- supporting changes to the law on vexatious litigants,
- allow lay representation of non-natural persons, and
- provide rules for the new simple procedure.

[15] Rules Rewrite Working Group, Final Report on the 'Making Justice Work 1' Rules Rewrite Project ("Final Report on the Rules Rewrite Project"), April 2015, paragraphs 8–10.

[16] Rules Rewrite Working Group, Final Report on the Rules Rewrite Project, paragraphs 14–16.

[17] Rules Rewrite Working Group, Final Report on the Rules Rewrite Project, paragraphs 23–32.

The Rules Rewrite Project

The scope of the project

1.12 The proposal is that there should be a comprehensive rewrite of Scotland's civil procedural rules. The suggestion of a single, procedural code covering both of Scotland's principal civil courts – the Court of Session and the sheriff court – was rejected by the RRWG, in favour of separate but harmonious codes covering each court[18]. The approach to the number of instruments is discussed more fully in chapter 7 (form, style and language of court rules). The SCJC will consider all options for the arrangement of the instruments containing court rules.

1.13 At present, the Rules of the Court of Session 1994[19] are a self-contained procedural code. Indeed, they strictly go further than regulating the procedure only of the Court of Session: part 6 of chapter 41 concerns the Registration Appeal Court and chapter 69 concerns the election court[20]. They also contain, in chapter 42, provision regulating the fees of solicitors. There is very little procedural provision relating to the Court of Session out with the Rules of the Court Session 1994[21].

1.14 The civil procedure rules relating to the sheriff court are more dispersed. They include:

- The Company Director Disqualification Rules 1986[22]
- The Company Insolvency Rules 1986[23],
- The Debtors (Scotland) Act Rules 1988[24],
- The Ordinary Cause Rules 1993[25],
- The Summary Suspension Rules 1993[26],
- The Child Care and Maintenance Rules 1997[27],
- The Summary Applications Rules 1999[28],

[18] Rules Rewrite Working Group, Final Report on the Rules Rewrite Project, paragraphs 8-10.

[19] Act of Sederunt (Rules of the Court of Session 1994) 1994, schedule 2.

[20] Lands Valuation Appeal Court cases are also within the scope of the Rules of the Court of Session 1994 (see rule 3.2(3)(d)) but the rules contain little provision relating to that Court.

[21] Examples of which include the Act of Sederunt (Contempt of Court in Civil Proceedings) 2011 and the Act of Sederunt (Expenses of Party Litigants) 1976.

[22] Act of Sederunt (Company Director Disqualification) 1986.

[23] Act of Sederunt (Sheriff Court Company Insolvency Rules) 1986.

[24] Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988.

[25] Sheriff Courts (Scotland) Act 1907, schedule 1.

[26] Act of Sederunt (Summary Suspension) 1993.

[27] Act of Sederunt (Child Care and Maintenance Rules) 1997.

- The Devolution Issues Rules 1999[29],
- The Summary Cause Rules 2002[30],
- The Small Claim Rules 2002[31],
- The Debt Arrangement and Attachment Rules 2002[32],
- The Caveat Rules 2006[33],
- The Chancery Procedure Rules 2006[34],
- The Adoption Rules 2009[35],
- The Money Attachment Rules 2009[36],
- The Commissary Business Rules 2013[37],
- The Simple Procedure Rules 2016[38],
- The Sheriff Court Bankruptcy Rules 2016[39].

1.15 There is a separate fees instrument for the sheriff court[40]. The rules of the Sheriff Appeal Court are also contained in a separate stand-alone instrument[41].

1.16 Both the Summary Cause Rules and the Small Claim Rules are being replaced by the Simple Procedure Rules[42]. The unitary Rules of the Court of Session 1994 cover matters which are dealt with in separate sets of rules in the sheriff courts: statutory applications, for example, are dealt with either under chapter 41 or by bespoke provision, the rules relating to adoption are in chapter 67 and the equivalent of the

[28] Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999.

[29] Act of Sederunt (Proceedings for Determination of Devolution Issues Rules) 1999.

[30] Act of Sederunt (Summary Cause Rules) 2002, schedule 1.

[31] Act of Sederunt (Small Claim Rules) 2002, schedule 1.

[32] Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002.

[33] Act of Sederunt (Sheriff Court Caveat Rules) 2006.

[34] Act of Sederunt (Chancery Procedure Rules) 2006.

[35] Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009.

[36] Act of Sederunt (Money Attachment Rules) 2009.

[37] Act of Sederunt (Commissary Business) 2013.

[38] Act of Sederunt (Simple Procedure) 2016, schedule 1.

[39] Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.

[40] Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993

[41] The Act of Sederunt (Sheriff Appeal Court Rules) 2015.

[42] The Small Claim Rules were revoked by the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 4) (Simple Procedure) 2016, paragraph 3(1).

bankruptcy rules is found in chapter 72. Each of these types of procedure has its own instrument and set of rules in the sheriff court.

1.17 If the SCJC's guiding principle that procedure and practice should, where appropriate, be similar across Scotland's civil courts is to be respected, there is no reason why two different approaches to the arrangement of court rules should be maintained simply because of the way acts of sederunt have historically been organised. If the Rules of the Court of Session 1994 are to be considered and rewritten in their entirety, then all of the equivalent rules in the sheriff court will also be addressed.

> **The SCJC considers that the rewrite should encompass the Rules of the Court of Session, the Ordinary Cause Rules, the Summary Application Rules, the Child Care and Maintenance Rules and the Adoption Rules, and every other set of civil procedural rules relating to the sheriff court with a direct equivalent in the rules of the Court of Session.**
>
> **The SCJC has decided that, where appropriate, sheriff court rules should be contained in a single instrument.**

1.18 Similarly, the Sheriff Appeal Court Rules 2015, though newly made, are logically within the scope of the rewrite. The rules are broadly modelled on chapter 40 of the Rules of the Court of Session 1994, so in order for appeals provision to be harmonised in both courts they will have to be considered.

1.19 The SCJC has recently begun, as part of its programme of evaluating all newly-produced sets of rules, a review of the Sheriff Appeal Court Rules 2015[43].

Matters out with the scope of the project

1.20 The Simple Procedure Rules 2016 are out with the scope of the rewrite. They have only recently come into effect and the intention is for simple procedure to operate separately from ordinary civil business. The RRWG explicitly recognised the separate status of simple procedure[44]. The Access to Justice Committee of the SCJC has recently begun a review of the effectiveness of the Simple Procedure Rules 2016.

1.21 There are some matters regulated by act of sederunt, and even some matters presently contained within the sets of rules relating to the Court of Session and the sheriff court, which it has been decided properly lie out with the scope of rewrite.

1.22 The SCJC's remit presently only extends to three courts: the Court of Session, the Sheriff Appeal Court and the sheriff court[45]. Properly understood, some of the matters in the Rules of the Court of Session 1994 relate to courts other than the Court of

[43] SCJC, Minutes of the Scottish Civil Justice Council, 21 November 2016, paragraph 15.

[44] Rules Rewrite Working Group, Interim Report on Rules Rewrite Project, paragraph 53.

[45] Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, section 2(6).

Session; for example, the Registration Appeal Court[46] or the election court[47]. The civil procedure relating to these courts is therefore outside the scope of the rewrite, though will necessarily need to be addressed by the Court of Session and the officials who advise it on its legislative functions as a result of the project.

1.23 The SCJC has assumed responsibility for the preparation of procedural rules for Fatal Accident Inquiries[48]. These rules will be outside the scope of the rewrite project.

1.24 An amendment made by the 2014 Act to the 2013 Act clarified that the preparation of rules regulating the recoverable expenses of solicitors was one of the functions of the SCJC[49]. Preparing these instruments falls within the remit of the Costs and Funding Committee, as successor to the Lord President's Advisory Committee on solicitors' fees. The Costs and Funding Committee is presently deciding on which of the recommendations in the Report on the Cost and Funding of Litigation[50] should be taken forward.

1.25 It will be necessary to coordinate changes to the regime for solicitors' (and others) fees with the new processes, systems and feeing points introduced in the new civil procedure rules.

> **The SCJC has decided that Fatal Accident Inquiry Rules and the Simple Procedure Rules are out with the scope of the rules rewrite.**

Purpose of this report

Discussion papers

1.26 At its meeting in January 2016, the Rules Rewrite Committee agreed on a plan for how to approach the rewrite project[51]. This plan was approved by the SCJC at its meeting in March 2016[52].

1.27 The first phase of the plan involved the Rules Rewrite Committee and, where appropriate, other Committees of the SCJC considering and agreeing discussion papers on over-arching matters of significance or principle. These discussion papers involved practical, historical and comparative research into matters identified by the Rules Rewrite Committee as requiring to be explored before the more detailed, practical business of instructing and drafting new codes of rules began.

[46] For more on the Registration Appeal Court, see the Representation of the People Act 1983, section 57.

[47] For more on the election court, see the Representation of the People Act 1983, section 123.

[48] The functions of the Scottish Civil Justice Council set out in section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 were amended to include the preparation of draft inquiry procedure rules.

[49] Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, section 2(1) and (6A).

[50] Report of the Review of Expenses and Funding of Civil Litigation in Scotland, September 2013.

[51] SCJC, Minutes of the Rules Rewrite Committee, 19 January 2016, paragraphs 8 – 9.

[52] SCJC, Minutes of the Scottish Civil Justice Council, 14 March 2016, paragraph 30.

1.28 Beginning at its meeting in May 2016[53], the Rules Rewrite Committee considered these discussion papers and came to conclusions on the recommendations and questions contained in them. This report records these conclusions.

Engagement with the public and the professions

1.29 The Rules Rewrite Committee and the SCJC agreed that open and constructive engagement with the public and the professions throughout the development of the new civil procedure rules would be an important way of improving the quality of the SCJC's decisions and ensuring the success of the project.

1.30 The publication of this report, which distils and records the SCJC's consideration of the discussion papers, begins that engagement with the public and the professions. Chapter 11 contains more detailed proposals about public engagement.

[53] SCJC, Minutes of the Rules Rewrite Committee, 31 May 2016, paragraphs 9-20.

Chapter 2. A statement of principle

Background

The Scottish Civil Courts Review

2.1 The SCCR Consultation Paper, issued in November 2007, considered that the adoption of a guiding principle for civil procedure would "bring Scotland into line with countries with similar legal systems which have recently carried out major reviews and reforms of their civil justice system."[54] It posed this question to consultees:

> "Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?"[55]

2.2 Nearly three-quarters of respondents were in favour of including a statement of principle[56]. The SCCR recommended that:

> "A preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court."[57]

The Rules Rewrite Working Group

2.3 The RRWG considered this recommendation and concluded that:

> "there should be a statement of principle and purpose in both the sheriff court and Court of Session rules, to which the court should have due regard, but that it should not override the other rules of court. The statement should be founded on recommendation 112 of the Scottish Civil Courts Review, and should indicate that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, within a reasonable time, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court, and that parties are expected to comply with the rules."[58]

2.4 The SCJC agrees that the rules should set out principles for civil procedure. The reasons for including such a statement are:

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[54] Scottish Civil Courts Review: A Consultation Paper ("SCCR Consultation Paper"), paragraph 5.3.

[55] SCCR Consultation Paper, paragraph 5.50.

[56] SCCR Report, Chapter 9, paragraph 4.

[57] SCCR Report, Recommendations, paragraph 112.

[58] Rules Rewrite Working Group, Interim Report on the Rules Rewrite Project, paragraph 71.

- assisting the court and litigation in interpreting and understanding the rules,
- improving case management,
- increasing access to justice by incorporating ideas of proportionality and costs into the courts' understanding of fairness, and
- bringing Scotland into line with comparable legal systems.

2.5 The SCJC has considered two aspects of the proposed inclusion of a statement of principle:

- how such a principle should be expressed in any rules of court, including its effect on the interpretation of the rules, and
- the content of a statement of principle, and which matters it should cover.

Discussion

The effect of a statement of principle

2.6 Both the SCCR and the RRWG concluded that a statement of principle should not have an overriding or binding effect over other provisions of the rules of court. The RRWG considered that "placing an objective within the rules would be essential to ensuring effective case management but that were it to have an overriding and binding effect that that might cast doubt on the applicability of individual rules and lead to satellite litigation."[59]

2.7 The SCJC agrees with this view, and has considered the experience of the courts in England and Wales following the adoption of an "overriding objective" in the Civil Procedure Rules 1998. It has noted the litigation that followed the adoption of the overriding objective and, in particular, the cases of *Mitchell v News Group Newspapers Ltd*[60] and *Denton v TH White Ltd*[61]. It has also considered the comments in the Final Report of the Chief Justice's Working Party established to consider civil procedure in Hong Kong, which suggested that the introduction of an overriding objective was likely to give rise to unnecessary and misguided subsidiary argument. In any event, following the decision in *Denton*, the SCJC has noted that one commentator, Deirdre Dwyer, has suggested that the term "overriding" does not mean "all-defeating". She suggests that "the concerns of the Hong Kong reformers were misplaced, since the overriding objective, correctly construed, is not intended to be used to override existing provisions. Rather, it is a device to interpret the Rules, and to resolve inevitable conflicts in interpretation."[62]

2.8 The SCJC considers that, rather than focusing on the overriding (or otherwise) character of the statement, what will ensure the success of such a statement is the

[59] Rules Rewrite Working Group, Interim Report on the Rules Rewrite Project, paragraph 70.

[60] [2013] EWCA Civ 1537.

[61] [2014] EWCA Civ 906.

[62] Deirdre Dwyer, The Civil Procedure Rules Ten Years On, Oxford University Press, 2009, page 73.

way in which it interacts with other key provisions of the new civil procedure rules. For example, in the Civil Procedure Rules in England and Wales, rule 1.2 requires the court to "seek to give effect to the overriding objective" when exercising its powers or interpreting the rules. Rule 1.3 places a duty on parties to assist the court in this. Similar provision can be found in the Simple Procedure Rules[63], which sets out the five principles of simple procedure. Sheriffs to take these principles into account "when managing cases and interpreting these rules"[64]. Similarly, parties and representatives are required to "respect the principles of simple procedure"[65].

2.9 A statement of principle will only be an effective influence on the civil justice system if it is given strong effect in the rules, applied appropriately by the judiciary and respected by litigants. All of these aspects should feature in the new civil procedures.

> **The SCJC considers that the new civil procedure rules should set out, at the beginning of the rules, a statement of principle. Judges should be obliged to take account of this statement of principle when interpreting the rules and when making any case management order under the rules. Parties, and their representatives, should be obliged to assist judges in respecting the statement of principle.**

The content of a statement of principle

2.10 The statement of principle should set how the Court of Session intends that civil litigation in Scotland should be conducted and should set out the values that the Court considers should guide everyone involved in civil justice, from judges to the legal professions and those litigating.

2.11 The introduction of a statement of principle should signal a change in approach. One commentator said this, of the introduction in England and Wales of an overriding objective:

> "Under the CPR the aim of the civil process remains, of course, to decide disputes on their merits, i.e. to determine the litigants' rights and enforce them. As before, the court must strive to establish the true facts and correctly apply the law to them, thereby giving effect to substantive rights. This objective is sometimes referred to as doing substantive justice, or justice on the merits. But, unlike the preceding rules, the CPR recognise that substantive justice is not the sole aim of the civil process. Or, put differently, that substantial justice is more than just the correct application of the law to the true facts. The overriding objective recognises that justice is not done unless it is obtained at proportionate cost and within reasonable time. …..[This] calls for a complex balance to be struck in practice because it is subject to internal tensions. The more accuracy of fact finding we

[63] Simple Procedure Rules 2016, rule 1.2.

[64] Simple Procedure Rules 2016, rule 1.4.

[65] Simple Procedure Rules 2016, rules 1.5 and 1.6.

> desire, the more resources would need to be invested in the investigation of the issues and in the decision making process, which may well lead to higher costs. Higher costs may be avoided only by a sacrifice in accuracy or by accepting longer duration of the proceedings. Clearly, the imperatives of truth finding, of economy of resources, and of delivering expeditious judgment pull in different directions. The resolution of this tension is at the heart of case management since it is only through active case management that the court can achieve an optimal balance between the three imperatives and deliver a satisfactory adjudicative service."[66]

2.12 The SCJC agrees with this perspective. Whatever other values are set out in a statement, the core job of the courts is adjudication according to the law. Properly understood, any other values included in a statement of principle are aspects of this. A proportionate approach to costs, for example, is a legitimate aim because it is *part* of good adjudication: it promotes access to justice. A demand for greater efficiency is a legitimate aim because delays are themselves a threat to the adjudicative process. The incorporation of a statement of principle requires these values because they are essential to justice, not because they conflict with it. The Court of Appeal in *Mitchell* endorsed the approach to compliance with the rules set out by the Master of the Rolls in the 18th implementation lecture of the Jackson Reforms, where he said that:

> "The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so"[67].

2.13 The SCJC considers that the content and structure of the statement of principle should reflect this, and should make explicit that any concepts of proportionality that are incorporated into the statement of principle are, properly understood, important aspects of the courts' responsibility to do substantive justice between the parties.

2.14 The RRWG endorsed a statement of principle which contained the considerations set out in SCCR Report[68]. The SCJC has considered this, as well as recent relevant examples of similar provision. These include the five principles of simple procedure, which are tailored to a procedure designed with informal resolution and lay

[66] Adrian Zuckerman, A Tribute to Lord Dyson's Conception of a Just Process, Civil Justice Quarterly, 2015, 34(3), page 231.

[67] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at paragraphs 38 and 39.

[68] SCCR Report, Recommendations, paragraph 112.

representation in mind. It has also considered rule 2(2) of the Supreme Court Rules 2009, which provides that "the overriding objective of these Rules is to secure that the Court is accessible, fair and efficient." The rules for the Mental Health Tribunal for Scotland provide that "the overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible."[69] The rules for the Immigration and Asylum Chamber of the First-Tier Tribunal contain an instructive definition of dealing with a case fairly and justly. They set out that:

> "Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."[70]

The SCJC considers that the statement of principle should have as its core consideration the doing of substantive justice between the parties. It should also set out that doing substantive justice means taking account, in a proportionate way, of the cost of doing justice, and that efficiency is an important aspect of doing substantive justice.

Draft provision

2.15 The SCJC therefore considers that the new civil procedure rules should open with a chapter containing a statement of principle, along the following lines:

> **Chapter 1**
>
> *The principles of civil procedure*
>
> **The purpose of these rules**
>
> **1.1**—(1) The purpose of these rules is to provide parties with a just resolution of their cause.
>
> (2) A just resolution of a cause is one that is—

[69] Mental Health Tribunal for Scotland (Practice and Procedure)(No.2) Rules 2005, rule 4.

[70] Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 2(2).

(a) in accordance with the substantive rights of the parties,

(b) arrived at within a reasonable time, and

(c) conducted in a fair manner, taking account of—

(i) economy,

(ii) proportionality, and

(iii) the efficient use of the resources of the parties and of the court.

The duty of the judge

1.2 The judge must take into account the purpose of these rules when—

(a) interpreting these rules, and

(b) making case management orders.

The duty of parties and representatives

1.3 Parties and representatives must respect the purpose of these rules by—

(a) taking into account the purpose of these rules when seeking a case management order, and

(b) assisting the judge with performing the duty in rule 1.2.

Chapter 3. Initiating an action

Background

The Scottish Civil Courts Review

3.1 The SCCR recommended that the historic distinction in Court of Session procedure between actions commenced by summons and those commenced by petition should be ended, with the new civil procedure rules providing a single form of initiating document for all civil actions. The SCCR concluded that:

> "[T]he distinction between ordinary actions and petitions could be done away with, since the essential procedural elements of the two types of action are the same: there is a writ containing an application to the Court to make an order; the writ must set out the names of other parties who have an interest in the application, the facts on which the application is based and the legal justification for the order desired; the Court gives its authority for the writ to be served on the other parties; the other parties have a specified time in which to respond to the writ; and in the absence of any response it is open to the originating party to ask the Court to make the order requested.[71]"

3.2 The distinction between petition and summons procedure is explained in the Report of the Royal Commission on the Court of Session:

> "The object of the summons is to enforce a pursuer's legal right against a defender who resists it, or to protect the legal right which the defender is infringing; the object of a petition, on the other hand, is to obtain from the administrative jurisdiction of the court power to do something or to require something to be done, which it is just and proper should be done, but which the petitioner has no legal right to do or require, apart from judicial authority.[72]"

3.3 The distinction also expresses itself in procedural rules of court. For example, chapters 13 and 14 of the Rules of the Court of Session 1994 contain codes for the commencement of causes by summons and by petition respectively. Different forms of initiating writ are prescribed for each. Chapters 19 (decrees in absence) and 21 (summary decrees) only apply to actions raised by summons.

3.4 Some rules have been made which directly address or resolve difficulties caused by the distinction. The limited scope of remedies available in a petition has been addressed for judicial reviews by rule 58.13 of the Rules of the Court of Session 1994. The problem identified by the cases of *Ruddy*[73] and *Docherty*[74] has also been addressed by rules 58.15 and 58.16 of the Rules of the Court of Session 1994.

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[71] SCCR Report, Chapter 5 paragraph 69.

[72] Report of the Royal Commission on the Court of Session, 1927 CMND 2801, pages 49-50.

[73] *Ruddy v Chief Constable of Strathclyde* [2011] S.C. 527.

Petition and summons procedure

Research

3.5 To assist the SCJC with its consideration of the SCCR's recommendation to abolish the distinction between petition and summons procedure, Dr Stephen Thomson was commissioned to prepare a discussion paper on the subject. The purpose of this paper was to consider the history of the distinction between petition and summons procedure as well as the legal and principled basis for that distinction. The research was to consider any difficulties likely to be presented by the proposal to remove the distinction as well as the difficulties caused by the distinction in present practice. The research was also to take in a comparative analysis of the approach taken to such matters in similar jurisdictions.

3.6 Dr Thomson's paper can be found at **Annex A** to this Report.

The abolition of the distinction

3.7 The SCJC considers that the policy reasons for allocating some causes to petition procedure and some causes to summons procedure no longer justify the division of actions between the two procedures, as that division currently operates. Petition procedure is intended to be a more flexible, summary jurisdiction, particularly suited to actions which seek the discretionary application of one of the court's powers, and which might commonly not have a contradictor. This is reflected in the greater discretion given to the court to order procedure in petition cases and in the less strict approach to the mode of proof.

3.8 Two developments have eroded the coherence of this distinction and, therefore, the basis for its justification. Judicial reviews comprise a significant proportion of petition business in the Court of Session, yet in practice exhibit few of the characteristics which would justify their treatment as such. They are almost always disputed and proceed according to established bodies of law, and the procedure in a judicial review is detailed and prescribed by both primary legislation and rules of court. Similarly, in a commercial action, though raised by summons, the rules have very successfully provided for a process which exhibits two of the most significant characteristics of the petition: considerable procedural discretion for the court and a relaxation of the rules regarding the mode of proof.

3.9 Particularly given the decision to introduce a case management model in all defended actions, the SCJC is of the view that retaining the distinction between the petition and summons, and the division of actions between them, would not support the principles of the new civil procedure rules.

3.10 This decision applies equally to the distinction in sheriff court procedure between actions commenced (by initial writ) as an ordinary cause and those commenced (by initial writ) as a summary application.

[74] *Docherty v Scottish Ministers* [2012] S.C. 150.

> **The SCJC considers that the new civil procedure rules should not continue the historic distinction between petition and summons procedures.**
>
> **The SCJC also considers that ordinary actions and summary applications in the sheriff court should be commenced in the same manner.**

A fast-track procedure

3.11 There will continue to be actions which require to be disposed of swiftly, flexibly and simply. While it would be possible for a judge, using case management powers, to identify these cases and make an appropriately urgent order for the cause to be disposed of summarily, the SCJC does not consider that this would be an efficient use of judicial time. The categories of case which need to be disposed of in a summary manner can and should be identified in the rules and automatically allocated by the rules to a more flexible and speedy procedure.

3.12 The following descriptions of action have been identified by the SCJC as those that should be allocated by the rules to the 'fast-track procedure':

- actions which are typically *ex parte*;
- actions which only seek the exercise of a statutory or discretionary power;
- actions which commonly require speedy or urgent disposal;
- actions which are unlikely to require formal proof.

3.13 The SCJC also considers that judges should have the power to allocate any other action to the fast track at the initial case management stage, after considering any views expressed by the parties[75].

3.14 Since a case might develop in unexpected ways, or be incorrectly categorised initially, it will important for the judge to have the power, either on the application of a party or otherwise, to transfer actions between the fast-track and case-managed procedures.

3.15 The fast-track procedure would have allocated to it by the new civil procedure rules any actions in the sheriff court considered appropriate, most likely those currently proceeding as a summary application and any others which meet the tests set out in paragraph 3.12.

> **The SCJC considers that the new civil procedure rules should provide for certain actions to be allocated to a fast-track procedure, and that the judge should be able to transfer cases between fast-track procedure and active case management.**

[75] For more information on this, see chapter 4 (initial case management).

Remedies

3.16 A significant aspect of the historical distinction between petitions and summons procedure is the different remedies available, or considered most properly sought, under each. This is another feature of judicial review procedure which has been elided by rules: rule 58.13 of the Rules of the Court of Session 1994 and its predecessors provide that in a petition for judicial review all remedies, including those traditionally most associated with the summons, are available to the court.

3.17 The SCJC does not consider that there is a principled reason why every lawful remedy should not be competent in every action, where the substantive law provides that a party is entitled to it. This could be achieved without affecting the basis on which a remedy may be granted, the order in which remedies can competently be sought, or the court's power exceptionally to refuse to provide a remedy.

> **The SCJC considers that the new civil procedure rules should provide that all remedies are available under both the fast-track and case-managed procedures.**

The mode of proof

3.18 The flexibility afforded to the court in petition procedure has its most significant expression in the ability of the court to consider matters 'proved' in the absence of their having been demonstrated in court by the traditional means: oral testimony, with the possibility of cross examination and the application by the court of the rules of evidence to exclude otherwise reliable information (for example, the best evidence rule). The SCJC has noted that in some of the most serious cases which come before the court – for example, a judicial review of the legislative competence of an Act of the Scottish Parliament or a challenge to an immigration decision by the Secretary of State – the court typically proceeds on entirely 'unproved' material. Indeed, in many public law judicial reviews, the unproved material lodged by parties can be voluminous and decisive.

3.19 The SCJC considers that the flexible approach to the mode of proof in petition cases should be adopted for those cases allocated to the fast track. The default position should be that no formal proof is required, except on specific matters as ordered by the judge.

3.20 Chapter 6 contains further conclusions about evidence and the mode of proof.

> **The SCJC considers that the new civil procedure rules should provide for proof in fast-track procedure to be limited to matters ordered by the judge.**

Pleadings

3.21 The SCCR recommended the widespread introduction of abbreviated pleadings:

> "For all actions in the Court of Session and sheriff court, with the exception of those subject to Chapter 43 procedure, pleadings should be in an abbreviated form. A docketed judge or sheriff should

> determine whether adjustment of the pleadings is necessary to focus the issues in dispute and should have the power to determine what further specification is required and how that should be provided."[76]

3.22 The SCJC has considered this recommendation and agrees that, in general, shorter, more focused and more concise pleadings are highly desirable.

3.23 If parties are to be encouraged by the rules to commence proceedings with more focused pleadings, it will also be necessary for the rules to provide for appropriate focusing of the points in dispute by adjustment and for the judge to have the power to require adjustment or clarification on particular issues. This would be consistent the ambition of the statement of principle set out in chapter 2.

> **The SCJC considers that the rules should encourage concise and focused pleading, with a power for the judge to order adjustment, narrowing, clarification and expansion of pleadings.**

[76] SCCR Report, Recommendations, paragraph 116.

Chapter 4. Initial case management

Background

The Scottish Civil Courts Review

4.1 The SCCR identified that some degree of management by the court of all types and value of case is an essential feature of an effective civil justice system but that the present system was piecemeal and lacked judicial control throughout the procedure[77].

4.2 On the assumption that all cases should be case managed, the SCCR went on to suggest a model for case management[78]. The model would apply generally to all defended civil cases in the Court of Session and the sheriff court.

4.3 That model, with 3 stages, promotes early and active consideration by the court of the appropriate procedure. It is as follows:

- On the lodging of defences, a case would be allocated to a particular judge or sheriff, creating judicial continuity.
- A case management hearing would then be fixed at an early stage. It would not require formal attendance at court and would usually take place by telephone conference. The factual and legal issues are identified at this stage and the court decides what form of case management is appropriate.
- In complex cases the court may use active judicial case management (similar to commercial actions) tailoring what should happen next whereas, in more straightforward cases a timetable with procedural steps, might be issued (similar to personal injury actions). In some cases, a mixture of the two might be adopted.

4.4 The Review made recommendations and observations about some specific aspects of Scottish civil procedure. It considered that the approach in the commercial court worked well[79], and recommended that active case management should be included as an option in personal injury procedure[80]. This recommendation has now been implemented in both the Court of Session and sheriff court.

Active judicial case management

4.5 The SCJC agrees with the SCCR that, in appropriate cases, the active management of cases and their progress by judges is strongly in the interests of the court, in managing its time efficiently. This is also in the interests of the parties, in achieving a speedy determination of their disputes. However, there are significant resource implications involved in active judicial case management. Not only does this model

[77] SCCR Report, Chapter 5, paragraph 1.

[78] SCCR Report, Chapter 5, paragraphs 48 and 49.

[79] SCCR Report, Chapter 5, paragraph 12.

[80] SSCR Report, Chapter 4, paragraph 80.

involve the front-loading by parties and their representatives of much of the effort involved in the procedural management of cases, but it requires judges to become familiar with a case and its issues earlier, and very often to do much of this familiarisation in advance of hearings, on the papers.

4.6 The SCJC is therefore of the view that the active case management model will have to be implemented in a way that protects the court's resources and judicial time, so that the effort involved in active judicial case management can be directed to the cases which need it the most. There are two principal methods of achieving this: making available appropriate, less resource-intensive alternative procedures in suitable categories of case, and allowing active judicial case management to take place in a form that is as flexible and efficient as possible.

4.7 The SCCR specifically suggested that the initial case management conference would "normally take place by means of a telephone conference call"[81]. The SCJC has noted and approves of recent moves towards flexibility. The Simple Procedure Rules 2016, for example, allow an early 'case management discussion' to "take place in a courtroom, by videoconference, conference call, or in any other form or location ordered by the sheriff"[82]. The experience of the commercial court in Glasgow has also been that, in suitable cases, case management by conference call is effective and efficient. It is considered that the judge will normally be in the best place to decide how case management should take place and, after seeking the views of the parties, should be able to make any order about the form and location of a case management hearing. This power will be important in ensuring that the effort involved in active judicial case management is proportionate, efficient and effective.

4.8 The SCJC has noted the increasing tendency towards the specialisation of the judiciary and considers that this may assist in ensuring an effective and consistent approach to case management in certain areas of practice. It may even be possible to introduce a system of docketing of cases in specialist areas, ensuring judicial continuity[83]. The SCJC will explore options for specialisation and judicial continuity with the judiciary and officials within the Scottish Courts and Tribunals Service.

> **The SCJC considers that parties should be able to set out their views on the form and location of any case management hearings. Taking these into account, the judge should have the power to make any order about the form, location and conduct of a case management hearing, including the power to hold them by conference call, by email exchange or in a courtroom.**

[81] SCCR Report, Chapter 5, paragraph 48.

[82] Simple Procedure Rules 2016, rule 7.7(1).

[83] For an example of judicial docketing in court rules, see the Fatal Accident Inquiry Rules 2017, rule 2.5.

Forms of case management

Alternatives to active judicial case management

4.9 As noted above, the SCJC considers that active judicial case management should be reserved for those cases where it is most necessary, in order that the resources involved in actively managing cases are deployed most proportionately. The new civil procedure rules will therefore have to provide the judge with a range of alternative approaches, with each involving less use of judicial and court time than active judicial case management.

4.10 In some cases, for example in any category of case which is case-flow managed, there will be very little judicial resource involved in managing the litigation: the case management model will be written into the rules, and will apply automatically. In other cases, there may be some judicial involvement in allocating the case to a timetable or procedure other than active judicial case management. A number of approaches are set out below. In each defended case, it will be necessary to have the initial views of the parties about which form of case management they think is most appropriate for their dispute. This is so that the judge is best able to make a decision about the form of case management, and best able to make a decision about the form of a case management hearing

> **The SCJC considers that, in all cases not allocated by the rules to a case-flow management model, parties should have the ability to set out, at the same time as they give the court their views on the form of any case management hearing, their views on the appropriate form of case management for their cause.**
>
> **The judge will then make a decision, after taking account of parties' views, about the appropriate form of case management.**

Case-flow management

4.11 In a case-flow management model, defended cases of a particular description are automatically assigned by the rules to a timetable which parties are obliged to follow. Judicial intervention, especially early in the process, is limited. Judges typically become actively involved only late in the process, when determination of the issues in dispute becomes necessary. The rules are able to provide for highly particularised steps, tailored to the nature of the dispute. For example, in case-flow managed personal injury procedure, a statement of claim tailored to personal injury claims replaces the condescendence. Case-flow management is therefore particularly suitable for categories of cases which:

- are reasonably routine and predictable, such that the rules are able, with confidence, to set out a series of steps or requirements which are likely to be useful in most cases,
- are commonly encountered, such that the effort involved in developing a set of case-flow management rules is justified, and

- do not require much active judicial case management.

4.12 It will be noted that these are very similar to the considerations which would make the use of a pre-action protocol most effective, and it is suggested that it will be in these most predictable, and most specialist, forms of procedure that a pre-action protocol will most likely be provided.

4.13 The personal injury "case-flow" procedure within the Court of Session and the sheriff courts followed recommendations of a Working Party under the chairmanship of Lord Coulsfield, and was introduced into the Court of Session on 01 April 2003. Case-flow management of personal injury cases is now the norm in the Court of Session and sheriff court. Nonetheless, the Lord Ordinary may instead, taking into account the likely complexity of the action and whether efficient determination of the action is served by doing so, apply Chapter 42A of the Rules of the Court of Session 1994.

4.14 The purpose behind Chapter 42A is to:

> "..allow the court, at a procedural stage, to identify and resolve issues that are known reasons for seeking variation of the timetable or the discharge of the proof diet at a later date. This "frontloading" of the action will allow the court to make more informed case management decisions when it comes to fixing further procedure at the hearing on the By-Order (Adjustment) Roll."[84]

4.15 Chapter 42A is therefore intended to allow the court to become involved in judicial case management with the aim of identifying and seeking to resolve issues which arise at a procedural stage. This option was extended recently from Court of Session procedure to apply in the sheriff courts.[85]

4.16 Case-flow management, set out in rules of court, involves parties taking steps largely without the active involvement of the court or a judge. It therefore represents the most efficient way of ensuring that the courts' resources and judicial time is most proportionately deployed to those cases which would benefit most from active judicial case management.

4.17 Where a case is allocated by the rules to case-flow management, however, it may become clear to parties or, exceptionally, to the courts, that the efficient determination of the case requires active case management. A power to order cases out of a case-flow will therefore be an important aspect of ensuring justice is done, and that the ambition of the statement of principle is met, in each case.

> **The SCJC considers that the new civil procedure rules should contain case-flow management provisions for all suitable categories of case, including personal injury cases. The rules should provide for cases to be able to be ordered out of any case-flow management procedure.**

[84] Court of Session Practice Note No 2 of 2014 (Personal Injury Actions), paragraph 7.

[85] Chapter 36A was added to the Ordinary Cause Rules 1993 by the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 2) (Personal Injury and Remits) 2015.

Fast-track procedure

4.18 In some cases, active judicial case management would be an inappropriate and inefficient use of judicial resource, because parties do not want it and it is unnecessary given the characteristics of the dispute. Where the issue in contention is straightforward and there are no or few preliminary matters requiring resolution, parties may simply be interested in being allocated a hearing at which their dispute will be decided and the court's role is properly limited to making the orders necessary in order to allow the dispute to be determined at that hearing.

4.19 The SCJC has decided that a fast-track procedure should be created, replacing much of existing petition procedure and summary application procedure, as well as any other categories of actions considered by the SCJC appropriate for summary disposal. In addition, it will be necessary for the new civil procedure rules to contain some provision allowing the judge, in appropriate cases, to make a case management order which allows even a complex dispute to be disposed of urgently, where the circumstances require it or where parties ask for it.

> **The SCJC considers that the new civil procedure rules should contain powers allowing the judge to order the urgent disposal of any dispute, as well as the fast-track procedure.**

Standard orders

4.20 The court's authorial role in active judicial case management is time consuming: considering the procedural requirements of each case, creating and setting out a realistic timetable, providing parties with the procedural options they require and the court with the information it needs. For some cases, which raise highly particular issues or which are complex, the case management orders required will be necessarily bespoke and the court will have to fully apprise itself of the issues in the case at an early stage in order to make the appropriate procedural orders. For many categories of case however, similar issues are raised regularly. While the argument may not be made for providing full case-flow management in the rules for these cases, the SCJC considers that it should be possible for the rules to assist the judge and provide some guidance and certainty to parties about the case management orders which they might expect to be made in certain categories of case.

4.21 The SCJC has noted the approach of the Simple Procedure Rules 2016 to 'standard orders'. These are examples, provided for in the rules, of orders which the sheriff might make in typical situations. For example, a standard order is provided for cases which require a case management discussion, or for cases which the sheriff considers can be resolved without a hearing. Rule 8.3 of the Simple Procedure Rules 2016 provides that the sheriff may, in a typical situation, give parties a standard order, customise a standard order, or give parties an entirely bespoke order[86].

4.22 A standard orders model is a refinement of, or supplement to, full active judicial case management, rather than a complete alternative. The judge retains the power to

[86] The standard orders of the sheriff are in the Act of Sederunt (Simple Procedure) 2016, schedule 3.

exercise complete authorial control over the procedure in the case. All of the case management powers remain available. The benefits of the model include an increased level of predictability. In a description of case where a standard order is provided, parties will be aware going on of the sort of orders which a judge may make. The judge will also not have to invest as much resource in crafting the individual terms of a case management order: a standard approach, including a standard timetable, will have been identified, which can be adjusted or supplemented as required, if any individual features of the particular dispute demand it.

4.23 A standard orders model might also assist the SCJC in meeting the ambition of the SCCR to reduce the number of specialised procedures in the various rules of court[87]. Much of the Rules of the Court of Session 1994, for example, is devoted to particular rules designed to implement a specialised form of action. Chapters 62 to 106 are largely devoted to specialised rules designed to implement and support the requirements of various statutes. It is hoped that the adoption of a general case management model would reduce the necessity of resorting this regularly to specially drafted provision. This would, however, reduce the predictability of litigation, and deny judges the benefit of being able to rely on the guidance of rules in order to be satisfied that an approach compatible with the demands of a particular statute or application was being adopted. If standard orders were instead prescribed for many typical situations and for many of these specialised forms of procedure, then parties and judges would be able to take advantage of both the benefits of considered, specialised provision as well as the potential of active judicial case management.

4.24 In order for a standard orders model to be effective, and for the ambition of the statement of principle to be met in full, the judge would need to know the views of parties as to whether there was a standard order prescribed in the rules which was suitable for their cause, and whether parties considered that the standard order needed to be adjusted or supplemented. If parties were required to express views at the same early stage as they as express views on the form of any case management hearing and the appropriate case management approach, judges could take these into account when making any initial case management, or allocation, order. If, for example, no views were expressed on the need for bespoke provision, judges and parties would be able to take confidence that the terms of an existing standard order were considered by everyone to be appropriate.

> **The SCJC considers that the new civil procedure rules should contain a suite of standard orders, providing default case management orders for (i) categories of case which typically arise, and (ii) specialised types of action.**
>
> **Parties should have the ability to set out, at the same time as they give the court their views on the form and type of any case management, their views on (i) whether any standard order should be issued, and (ii) whether that standard order needs to be supplemented or adjusted in any particular way.**

[87] SCCR Report, Chapter 5, paragraph 70.

> **The judge should have the power to issue one of these standard orders, supplement or adjust the terms of a standard order, or issue an entirely bespoke order using the judge's case management powers.**

A case management questionnaire

4.25 At a number of points, the SCJC's suggested model for initial case management requires parties to inform the court of their preferences or suggestions for the form of case management that should be adopted: whether an action should be allocated to the fast-track, whether an action is appropriate for a particular standard order (and whether that standard order should be varied), whether a case management hearing is required and, if so, what form it should take.

4.26 The SCJC considers that parties should be expected to apply their minds to all of these questions in a considered way in advance of litigating. The best way for the court to be apprised of parties' views would be for both principal writs – the originating document and any form of defence or answers – to be required by the rules to be accompanied by a case management questionnaire, taking parties through their case management options and seeking their explanation of their preferred case management approach. This questionnaire would ask:

- whether any required pre-action protocols have been followed and, if not, why not,
- whether the type of action is allocated by the rules to either fast-track procedure or a case-flow procedure,
- whether the party considered that, although it is not allocated to it by the rules, fast-track procedure was appropriate for the action,
- whether there needs to be an initial case management hearing and, if so, what form it should take (court hearing, videoconference, exchange of emails),
- whether any of the standard orders set out in the rules are appropriate for the action and, if so, whether the timetables in the standard order need to be adjusted or not.

> **The SCJC considers that parties should be required to lodge a case management questionnaire with their originating writ and defences.**

A model for initial case management

4.27 The SCJC has concluded that the rules should provide for a suite of case management options, all designed to ensure:

- that judicial and court time is protected, so that the resources involved in active case management are reserved for the cases which require it the most,
- that judges have the ability to hold case management hearings in a form which is effective and proportionate, and

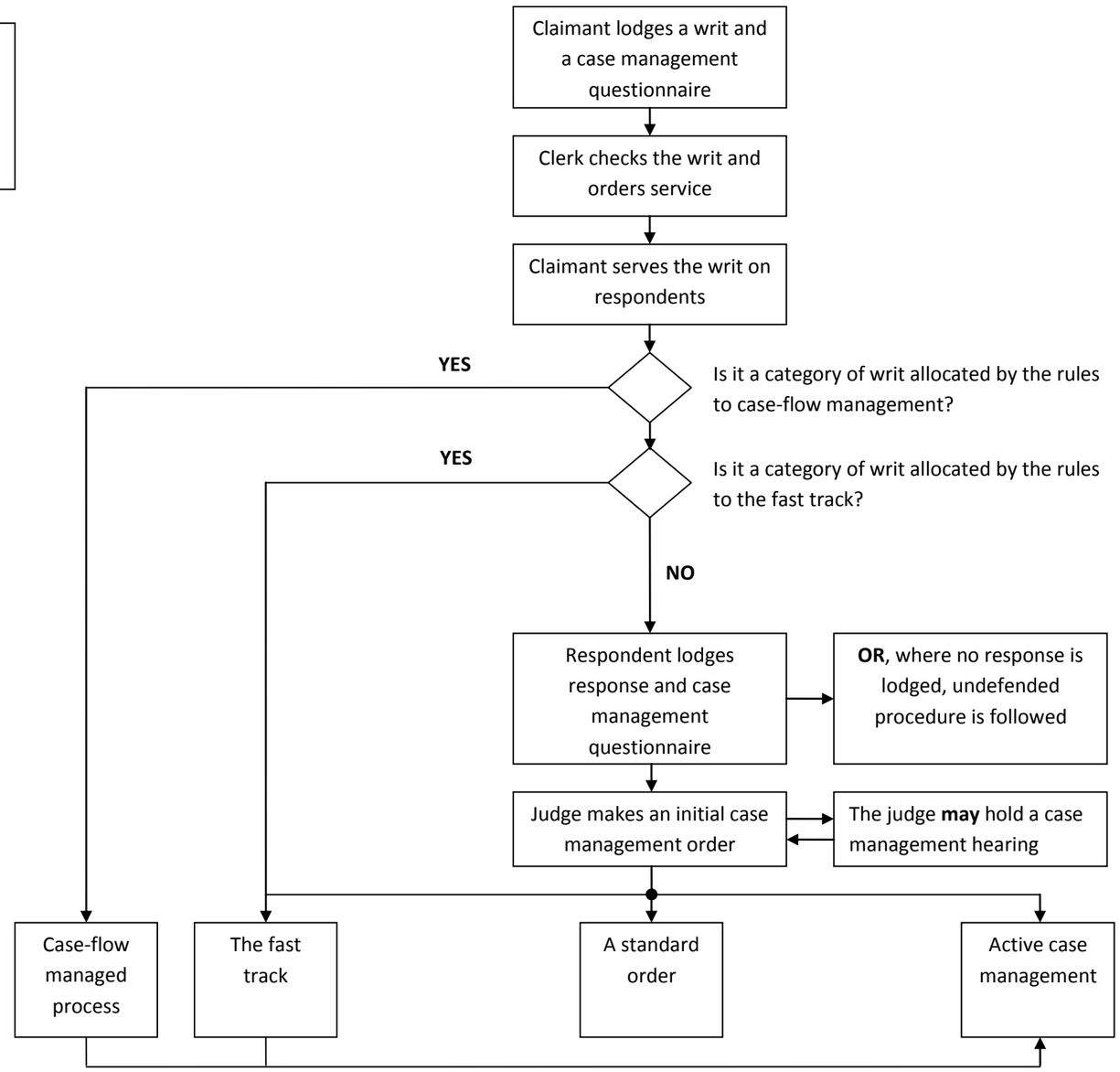
- that parties are able to express views about the form and type of case management which is applied to their case.

4.28 The SCJC considers that an initial case management model for disputed or defended cases along the following lines should feature in the new civil procedure rules:

THE NEW CIVIL PROCEDURE RULES

A CASE MANAGEMENT MODEL FOR ORDINARY PROCEDURE IN THE COURT OF SESSION AND SHERIFF COURT

Note: no decisions have been taken about terminology. This table uses 'claimant' for the party bringing the action, 'respondent' for all other parties, and 'judge' for the Lord Ordinary or sheriff.



If an action has become too complex for case-flow or fast-track, it can be ordered to proceed under active case management.

Chapter 5. Case management powers

Background

The Scottish Civil Courts Review

5.1 The SCCR considered that the courts should have enhanced case management powers and discussed these under the headings of:

- identifying the issues in dispute,
- managing time efficiently, and
- having effective sanctions for non-compliance.

5.2 The SCJC agrees that a strong, flexible and creative set of case management powers will be essential if the implementation of the statement of principle is to be effective. Judges will be expected to take account of the statement of principle when exercising their case management powers and the suite of powers should be sufficient to empower judges to manage cases in a way which lives up to the ambition of the statement.

Identifying the issues in dispute

Background

5.3 The identification and narrowing of the issues genuinely in dispute was identified by the SCCR as essential if the aims of minimising costs, prompt resolution, and making the best use of the courts' finite resources were to be achieved[88].

5.4 The principal method by which the issues genuinely in dispute will be identified and narrowed will continue to be by the preparation and adjustment of pleadings by the parties. However, in order that the ambition of the statement of principle is met the court must be empowered both to encourage and to require parties to take steps to narrow their cases and to perform actions which encourage or support such narrowing.

5.5 The SCJC considers that, in the interests of both the efficient use of court time by the identification and narrowing of the issues in dispute, the judge should have considerable powers to demand, shape and limit the information presented to the court and the evidence which requires formal proof. The SCJC's initial conclusions on this matter are set out in chapter 6 (evidence).

Pre-action protocols

5.6 The use of pre-action protocols has been identified as a way of ensuring parties focus on identifying issues in dispute before an action is even raised in court. A voluntary protocol in personal injury cases has operated for a number of years, and

[88] SCCR Report, Chapter 9, paragraph 16.

an adaptation of this was recently incorporated into court rules[89]. The SCJC is currently considering whether other such protocols should be provided for in rules.

5.7 There is a pre-action protocol in asylum and immigration cases imposed by practice note[90], and the commercial court expects a level of pre-action communication between parties before a commercial action is commenced[91].

5.8 The 2014 Act for the first time allows the Court of Session to make provision about steps to be taken by parties in advance of litigating. This includes the promulgation of statutory pre-action protocols and the ability to provide, in rules, for their application and enforcement, by sanctions if necessary, by the courts[92].

> **The SCJC considers that pre-action protocols should be provided for all classes of case where the court has a reasonable expectation of certain steps and disclosure being made by the parties in advance of litigation, in the interests of narrowing the issues in dispute in a cause.**

The disclosure of evidence

5.9 The SCCR noted an appetite for earlier and wider disclosure of evidence and the recovery of documents. The SCCR recommended that there should not be radical reform of the Scottish system but that that the process of disclosure should be exercised proportionately and subject to judicial controls. It also identified that this might be done as an aspect of initial case management, where the court could establish what additional information might be necessary, and how long the parties would require to obtain it.

5.10 The SCCR recommended that:

- "the court should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover documents either generally or specifically;
- the court should be entitled to order the lodging of documents constituting, evidencing or relating to the subject matter of the action, or any invoices, correspondence or similar documents relating to it within a specified period;
- the normal procedures for recovery of evidence should also be available to parties;

[89] The Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016; also see, Stephen Feltham, Courts Reform: A Call to Pre-Action, Journal of the Law Society of Scotland, September 2015.

[90] Court of Session Practice Note No. 5 of 2015 (judicial review), paragraphs 14-20.

[91] Court of Session Practice Note No. 6 of 2004 (commercial actions), paragraph 11.

[92] The power of the Court of Session to make provision about action to be taken before proceedings in court are commenced is contained in the Courts Reform (Scotland) Act 2014, sections 103(2)(b) and 104(2)(b).

- recovery of documents should be competent at any stage in the proceedings;
- any documents founded on in the pleadings should be lodged in advance of the first case management hearing.[93]"

5.11 The recommendations are very similar to the powers currently afforded to the Court in commercial actions. The party raising the action is required to prepare a schedule listing the documents founded on, which is to be appended to the summons and lodged as an inventory of productions.[94] In commercial actions the court may order:

> "disclosure of the identity of witnesses and the existence and nature of documents relating to the action or authority to recover documents either generally or specifically;
>
> documents constituting, evidencing or relating to the subject-matter of the action or any invoices, correspondence or similar documents relating to it to be lodged in process within a specified period;"[95]

The SCJC considers that the court should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover specific documents.

The court should be able to order the lodging of documents constituting, evidencing or relating to the subject matter of the action, or any invoices, correspondence or similar documents relating to it within a specified period.

The normal procedures for recovery of evidence should also be available to parties.

The recovery of documents should be competent at any stage in the proceedings. Any documents founded on in the pleadings should be lodged in advance of the first case management hearing.

Summary disposal

5.12 The SCCR recommended that:

> "At any stage in proceedings either party should be able to seek summary disposal. The test should be whether the pursuer or the defender has no real prospect of success and where there is no other compelling reason why the case should proceed. The court should have the power *ex proprio motu*, and as part of its active case

[93] SCCR Report, Chapter 9, paragraph 38.

[94] Rules of the Court of Session 1994, rule 47.3(1).

[95] Rules of the Court of Session 1994, rule 47.11(1).

> management function, summarily to dispose of an action or defence by applying the same test.[96]"

5.13 The current position is that the court, on the application of the pursuer, may grant summary decree where it is satisfied that there is no defence to the action, or to any part of it to which the motion relates. Generally, the summary decree procedure applies only to the pursuer and a defender who wishes to argue that the summons or writ discloses no cause of action must take the case to debate once the time for adjusting has expired.

5.14 The SCCR recognised that in most other jurisdictions, there is power for allegations to be struck out or for a decision to be made, where the court is satisfied that the pleaded claim does not disclose a cause of action or where a defence does not disclose an answer[97]. The SCCR recommended that the court should also have the power, of its own initiative, and as part of its active case management function, summarily to dispose of an action or defence by applying the same test. In that circumstance the court should fix a hearing to hear parties.

> **The SCJC considers that parties should, on appropriate notice, be able to seek summary disposal of any action. The test for summary disposal should be the opposing party having no real prospect of success and there being no other compelling reason why the case should proceed. The court should, on giving appropriate notice, be able to summarily dispose of an action, or part of an action.**

Managing time efficiently

Background

5.15 Most respondents to the SCCR's consultation considered that the court should have greater control in the allocation of hearing time[98]. The SCCR recommended that:

> "The court should expect parties to agree on a timetable for presentation of the evidence or submissions so that the most effective use is made of court time. A judge or sheriff should, as part of his case management functions, have the power to time limit hearings in particular types of case where he considers it appropriate.[99]"

5.16 The SCCR also focused on the use of outline, or skeleton, arguments as a tool to ensure that the court's time is used efficiently. It was considered that they give the judge appropriate notice of matters, allowing a focused and informed use of case management powers. It was also noted that they assist parties in their duty to narrow the scope of submissions to points genuinely in contention. For example, if properly

[96] SCCR Report, Recommendations, paragraph 123.

[97] SCCR Report, Chapter 9, paragraph 98.

[98] SCCR Report, Chapter 9, paragraph 112.

[99] SCCR Report, Chapter 9, paragraph 117.

prepared, a skeleton argument might expose parties' agreement on all relevant statutory provisions in advance of a hearing, limiting the necessary submissions.

Discussion

5.17 The SCJC considers that judges should have the strongest possible powers to control the scope and pace of litigation in the courts, in the interests of the efficient administration of justice. In particular, judges should be able to require parties to prepare and lodge timetables and should have powers allowing the court to keep parties to these timetables. Judges should have effective control over the conduct of a hearing and should have a strong power to control the pace of litigation by the use of deadlines and time limits.

5.18 All of these powers, of course, would only be capable of being exercised compatibly with the statement of principle. Any use of these powers which conflicted with the statement, and in particular with the pre-eminence given to doing substantive justice between parties, would not be proper. However, in order that the court is able to ensure that justice is done within a reasonable time, and that the interests of economy, efficiency and proportionality are properly respected, the judge must be given a set of powers that put that ambition within judicial control.

> **The SCJC considers that judges should have the power to impose a time limit on any hearing or any part of any hearing, impose a time limit on any step to be taken by a party, vary any deadline or time limit set out in these rules, require a party to provide a written estimate of the length of time it will take to complete a step or take any action, and require a party to submit a written note of argument in advance of any hearing or step with permission having to be sought by motion to raise any other matters.**

Effective sanctions for non-compliance

Background

5.19 The SCCR recommended that:

> "Where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the court to impose such sanctions as it considers appropriate.
>
> The rules of court should entitle the court to:
>
> a) dismiss the action or counterclaim, in whole or in part;
>
> b) grant decree in respect of all or any of the conclusions of the summons , or of the craves of the initial writ, or counterclaim;
>
> c) refuse to extend any period for compliance with a provision in the rules of an order of the court;
>
> d) make an award of expenses;

e) disallow a party from amending or updating part of its claim;

f) disallow a party from calling one or more witnesses, including expert witnesses;

g) deprive a claimant who is in default of all or some of the interest that would otherwise have been awarded;

h) order caution for expenses; and

i) order immediate payment of expenses incurred in procedural matters and assess them summarily. Payment of the sum would be a condition precedent of further procedure.

We do not propose this as an exhaustive list."[100]

5.20 The SCCR noted, however, that the primary object of a sanctions regime is not punishment but the prevention of non-compliance and encouraging efficiency[101].

Discussion

5.21 The SCJC agrees with the analysis of the SCCR. In order to give effect to the statement of principle and to any improvements to civil procedure made by the rules, the enforcement of any orders and of the rules must have real teeth. The SCJC agrees that it is the judges who are best placed to assess the gravity of any non-compliance, weigh up whether it is non-compliance that could be or ought to be excused, and decide whether to provide relief, impose a sanction, or both.

> **The SCJC considers that the new civil procedure rules should provide judges with a broad and general power to relieve parties from non-compliance with rules and orders and to sanction parties for such non-compliance. This power should be wide enough to include all of the possible sanctions identified by the SCCR.**

Draft provision

5.22 The SCJC considers that the general case management powers of the judge should be set out at the beginning of the rules, directly after the statement of principle.

5.23 The way in which the powers are organised within the rules should guide the reader as to the ways in which the powers might be exercised and the purposes for which the powers might be applied. The general power of the judge to do anything necessary will be broken down into illustrative examples of its possible application.

5.24 Draft provision might therefore be along the following lines:

Chapter 2

[100] SCCR Report, Recommendations, paragraphs 127 and 128.

[101] SCCR Report, Chapter 9, paragraph 143.

Case management

Case management powers

2.1—(1) The judge may make any order necessary to provide a just resolution of a cause, including—

(a) an order made to assist the court in identifying the issues, such as an order—

(i) requiring a party to disclose the existence and nature of documents related to the cause,

(ii) granting authority to recover documents related to the cause,

(iii) requiring the lodging of any document related to the cause,

(iv) fixing a hearing and specifying a purpose for that hearing,

(v) requiring a party to address the court for any purpose,

(vi) requiring parties to agree certain matters in advance of a step or hearing (such as the relevant statutory provisions) or formally notify the court of their disagreement,

(b) an order made to allow to manage time efficiently, such as an order—

(i) imposing a time limit on any hearing or any part of any hearing,

(ii) imposing a time limit on any step to be taken by a party,

(iii) varying a deadline or time limit set out in these rules,

(iv) requiring a party to provide a written estimate of the length of time it will take to complete a step or take any action,

(v) requiring a party to submit a written note of argument in advance of any hearing or step and limiting matters which may be raised to those contained in the note of argument,

(c) an order dealing with a party's non-compliance with a rule or order, such as an order—

(i) dismissing the cause in whole or in part,

(ii) granting decree in whole or in part,

(iii) disallowing a party from leading a witness or leading particular evidence,

(iv) relieving the party from the consequence of not complying with an order,

(v) imposing conditions on that relief from non-compliance,

(vi) requiring caution for expenses,

(vii) awarding expenses.

(2) The judge may make orders—

(a) of the judge's own accord, or

(b) on the application of a party.

Chapter 6. Evidence

Expert witnesses

The duties of expert witnesses

6.1 The SCCR, noting Part 35 of the English and Welsh Civil Procedure Rules, recommended that a rule be introduced clarifying that the overriding duty of an expert witness was to the court. The Review also supported the disclosure, on request, of all written and oral instructions to the expert and the basis upon which the expert is remunerated, including whether the expert is retained on a contingency basis, has agreed to defer his fees, or has a continuing financial relationship with the agent of the party instructing him.

6.2 The SCJC has considered the recommendations of the SCCR and supports the introduction of statutory duties for expert witnesses. It will consider the introduction of a code of practice for expert witnesses, and guidance as to the form of experts' reports. The SCJC does not consider, however, that the case has been made for requiring experts to disclose their otherwise private arrangements with the party that instructed them.

> **The SCJC considers that the duties of expert witnesses should be set out in the new civil procedure rules. But the SCJC is not satisfied that experts should be required to disclose the terms of their instruction.**

Case management powers

6.3 The SCCR noted the terms of rule 47.12(2)(h) of the Rules of the Court of Session 1994 which provides there should be consultation between skilled persons with a view to agreeing about any points held in common. The commercial judge:

> "..may direct that skilled persons should meet with a view to reaching agreement and identifying areas of disagreement, and may order them thereafter to produce a joint note, to be lodged in process by one of the parties, identifying areas of agreement and disagreement, and the basis of any disagreement."

6.4 The SCCR recommended that:

> "In all cases to which the active case management model applies, the court should have power to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements.[102]"

> **The SCJC considers that judges should be given the power to make orders about expert witnesses, including a power to require them to confer in advance of proof, in the interests of the narrowing of the issues in dispute and the efficient use of court time.**

[102] SCCR Report, Recommendations, paragraph 121.

Expert evidence

The reports of expert witnesses and skilled persons

6.5 The SCCR recommended that:

> "The provisions of RCS 47.11, whereby the commercial judge may order the reports of skilled persons or witness statements to be lodged in process, and at the procedural hearing may determine in light of these that proof is unnecessary on any issue, should apply generally to all types of action that are subject to active judicial case management."[103]

6.6 The SCCR considered that the advance intimation and lodging of witness statements was particularly helpful in the case of expert evidence as this gives the court proper time to prepare and shortens any proof diet. The SCCR commended the enabling power within the commercial court and recommended that it should apply generally to all types of action subject to active judicial case management[104].

6.7 The SCJC agrees with this view and considers that this power would be important in allowing the ambition of the statement of principle to be met.

6.8 The SCCR recommended that:

> "A rule should be adopted to introduce a presumption that an expert's report would be treated as evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence.[105]"

6.9 The SCJC has noted the approach of the family courts, reflected in the Court of Session's voluntary protocol in family actions:

> "5.3 Where affidavits or reports have been lodged they may be treated as all or part of the evidence in chief of the deponent or author.
>
> 5.4 It is recognised that the use of affidavits limits the length of proofs."

> **The SCJC considers that the court should be able to order that the reports of skilled persons or expert witness be lodged in process, and may determine in light of these that proof is unnecessary on any issue. The default position should be that the report of an expert stands as that expert's evidence-in-chief.**

[103] SCCR Report, Recommendations, paragraph 115.

[104] SCCR Report, Chapter 9, paragraph 47.

[105] SCCR Report, Chapter 9, paragraph 91.

The form of expert evidence

6.10 At present questions of whether expert evidence is needed, what type, and the number of experts required, are left to the parties. The general response to the SCCR's consultation indicated there was little support for radical reform in this area[106]. However, some respondents suggested that the court's general case management powers could be developed to give the court the discretion to decide what expert evidence was necessary. Flaws were identified in the control of expert evidence in family law cases, and concerns expressed about the resultant costs to parties and the public purse.

6.11 The SCCR noted the approach in other jurisdictions, particularly that in England and Wales where expert evidence is governed by Part 35 of the Civil Procedure Rules 1998. The general principle adopted in England and Wales is that the court should have control over the giving of expert evidence and that this should be restricted to what is reasonably required to resolve the dispute[107]. Part 35 also contains a rule setting out the court's power to restrict expert evidence, that rule is as follows:

> "35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.
>
> (2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –
>
> (a) the field in which expert evidence is required and the issues which the expert evidence will address; and
>
> (b) where practicable, the name of the proposed expert.
>
> (3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address."

6.12 The SCCR recommended that:

> "We are not persuaded that it is necessary to introduce a general permission rule in Scotland or to introduce express case management powers that would enable the court to regulate the type of expert evidence to be adduced or the number of experts that parties may lead. With the exception of proceedings relating to children, respondents did not identify any problems relating to inappropriate use of experts and if witnesses are called unnecessarily this can be addressed by the court's powers in relation to certification of witnesses.

[106] SCCR Report, Chapter 9, paragraph 62.

[107] Civil Procedure Rules 1998, rule 35.1.

> However, given the concerns that have been expressed in relation to cases involving children we recommend that the provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals."[108]

6.13 The SCJC agrees that there should be no general requirement to seek the court's permission to instruct an expert witness. The SCJC has noted the experience in courts, such as the commercial courts, where there is already a culture of judicial involvement in decisions concerning expert evidence.

6.14 The SCCR did not endorse a presumption in favour of the instruction of single joint experts. It did, however, recommend that the court should have the power, in actively case managed cases, to order the instruction of such witnesses.

> **The SCJC considers that parties should not require to seek the court's permission before instructing an expert witness, but that the rules should provide for a strong power for the judge, where appropriate, to make orders about the identity and scope of expert witnesses and their evidence.**

Evidence management powers

Commercial court practice

6.15 In the commercial courts, the judge is given strong evidence-management powers to shape and control the matters which require proof and the ways in which the court can be satisfied on a fact having been proved. Rule 47.12 of the Rules of the Court of Session 1994 allows the judge to order proof by "oral evidence, the production of documents or affidavits on any issue", that "witness statements shall stand as evidence in chief", and that "proof is unnecessary on any issue"

6.16 The Court of Session's new, strengthened power to regulate civil procedure by act of sederunt extends to making provision "for or about … witness and evidence, including modifying the rules of evidence as they apply to proceedings"[109].

6.17 In fast-track cases and judicial reviews, the SCJC has decided that the default position should be that proof is not required on any issue, except as ordered by the judge and in the manner ordered by the judge. In any case subject to active case management, however, the converse position should apply: the normal rules of evidence will apply, except where the judge has made an order concerning the mode of proof, along the same lines as the powers which the commercial judge has in commercial procedure.

> **The SCJC considers that the new civil procedure rules should contain provision for both a set of strong case management powers for the judge concerning the scope of evidence as well as default provision on the**

[108] SCCR Report, Chapter 9, paragraphs 77 and 78.

[109] Courts Reform (Scotland) Act 2014, sections 103(2)(o) and 104(2)(o).

> **agreement of evidence and particular methods for experts to give their evidence.**

Draft provision

6.18 Draft provision might therefore be along the following lines:

Evidence

Evidence management powers

x.1.—(1) The judge may give orders about evidence, such as an order—

(a) restricting evidence to particular issues;

(b) determining the manner in which evidence on any particular issue is to be given, whether by video recording, oral evidence, the lodging of written statements, by production of documents, or otherwise;

(c) requiring a party to provide written notice of the topics for examination during oral evidence;

(d) granting warrant to officers of the law to take possession of anything which the judge considers necessary to produce and to hold any such thing in safe custody, subject to inspection by parties;

(e) allowing the inspection of any land, premises, article or other thing, which the judge considers relevant, either by the judge or by another person;

(f) that a copy of any document is to be treated as an original

Witness Statements

x.2.—(1) Parties must lodge a witness statement for each expert witness by a date ordered by the judge, unless the judge orders otherwise.

(2) A "witness statement" is a written statement—

(a) containing evidence which a person could give orally; and

(b) signed by that person.

(3) The content of the witness statement is the evidence in chief of the person who signed it.

(4) With the permission of the judge, the party relying on the witness statement may, at the inquiry—

(a) ask questions of the witness which introduce, clarify or supplement the terms of the witness statement;

(b) ask questions of the witness which relate to new matters which have arisen since the witness statement was lodged.

Instructing expert witnesses

x.3—(1) The duty of an expert witness—

(a) is to the court;

(b) is to assist the court in providing parties with a just resolution of their dispute.

(2) This duty overrides any obligation to the person who instructed or paid the expert witness.

(3) An expert witness may only give evidence on matters which are reasonably required to provide parties with a just resolution of their dispute.

(4) A party who is considering instructing an expert witness must, as early as possible, lodge a note setting out—

(a) the identity of the witness to be instructed, if known;

(b) why that witness's evidence is reasonably required to provide parties with a just resolution of their dispute; and

(c) the expected completion date for any reports.

Witness statements by expert witnesses

x.4.—(1) The written statement of an expert witness must state that the expert witness understands the nature of their duty under rule x.3(1) and (2).

(2) Other parties may lodge a minute of questions to be put to another party's expert witness.

(3) Except where the judge orders otherwise—

(a) each party may only lodge one minute of questions;

(b) the minute of questions must be lodged within 14 days of the witness statement being lodged;

(c) the minute of questions must be limited to clarification of the contents of the witness statement.

(4) The party who instructed the expert witness must lodge the expert witness's answers to the minute of questions in the form of an annex to the written statement, by the date ordered by the judge.

(5) The judge may make an order about the expenses of any procedure under this rule.

Concurrent presentation of expert evidence

x.5.—(1) The judge may order expert evidence on a particular matter to be given by the concurrent presentation of expert evidence.

(2) Where the judge orders that expert evidence must be given by concurrent presentation—

(a) the parties must prepare a note for the judge, setting out the areas of agreement and disagreement between the expert witnesses;

(b) that note must be lodged at least 7 days before the hearing.

(3) At the hearing at which expert evidence is being given by concurrent presentation—

(a) all expert witnesses will give oral evidence at the same time;

(b) the judge may direct how evidence is to be given by the expert witnesses, including by the judge questioning the witnesses directly, inviting the witnesses to discuss a particular matter between them or, exceptionally, allowing cross-examination by parties.

Evidence in fast-track procedure

x.6-(1) Any rule of law or enactment that prevents evidence being led on grounds of inadmissibility does not apply in proceedings allocated to fast-track procedure.

(2) Any rule of law that restricts the manner in which evidence must be presented does not apply in proceedings allocated to fast-track procedure.

(3) Subject to any orders made by the judge—

(a) information may be presented to the court in any manner; and

(b) the judge consider a matter proved based on that information.

Chapter 7. The form, style and language of court rules

The form of rules

Acts of sederunt

7.1 The relevant powers allow the Court of Session to make rules for civil procedure in the form of acts of sederunt. An act of sederunt is a formally minuted act of the Court of Session in its legislative capacity, with the Court's power to govern by acts of sederunt pre-dating their statutory regulation.

7.2 The 2014 Act provides separate powers for making rules for the Court of Session[110] and for the sheriff and Sheriff Appeal courts[111]. Powers to prescribe the fees of solicitors and others within these courts are similarly in separate sections[112]. There is, however, no difficulty in combining these powers and producing, in a single instrument, provision which covers multiple courts. The best examples of this in an act of sederunt are the rules on contempt of court[113], or the rules of representation for non-natural persons[114], both of which apply across courts.

7.3 Acts of sederunt are Scottish Statutory Instruments and those which contain only civil procedural rules are subject to the default laying requirement in the Scottish Parliament.[115] This means that the Scottish Parliament does not get a vote to annul, nor has to vote to approve, them. Their status as Scottish Statutory Instruments affects some formal elements. The body of the instrument has to be divided in certain recognised ways (for example into rules or paragraphs) and certain presentational elements – the tabulation, the typeface, the font size – cannot be altered in the official print of the instrument. Certain types of visual presentation are possible in the body of the instrument. The format can handle tables and certain sorts of lists, for example. If necessary, more innovative ways of displaying information could be incorporated into instruments by converting them into images and inserting them as such, however this can cause difficulty with presentation online and future amendment. For examples of this, see the forms prescribed for use with simple procedure[116], or the first use in court rules of a flow-chart, also in the Simple Procedure Rules 2016:

[110] Courts Reform (Scotland) Act 2014, section 103.

[111] Courts Reform (Scotland) Act 2014, section 104.

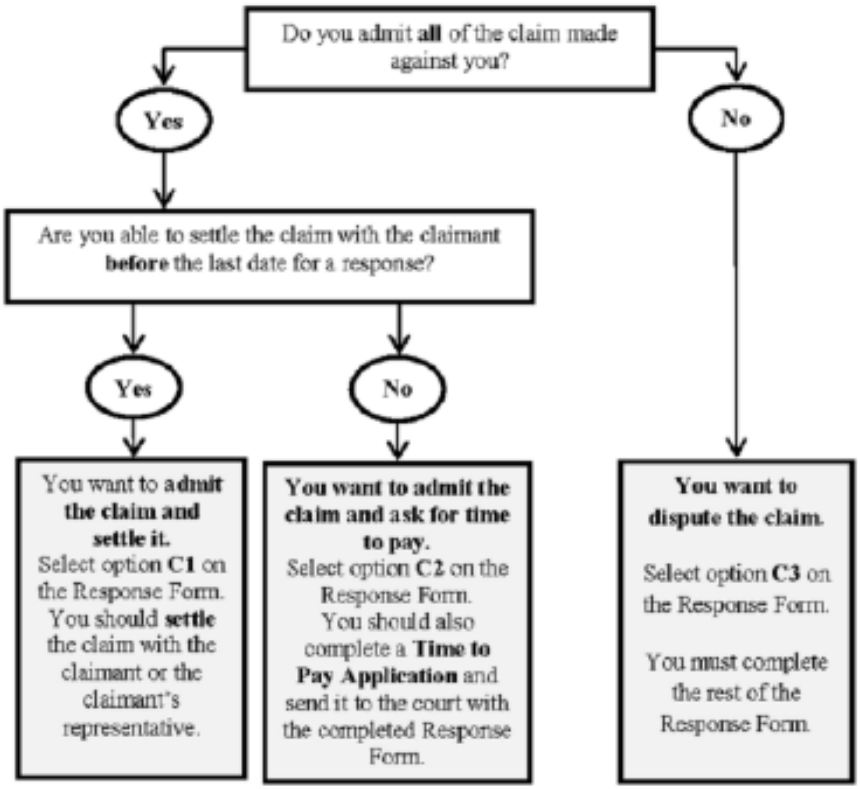
[112] Courts Reform (Scotland) Act 2014, section 105 and 106.

[113] Act of Sederunt (Contempt of Court in Civil Proceedings) 2011.

[114] Act of Sederunt (Lay Representation for Non-Natural Persons) 2016.

[115] The default laying requirement is in the Interpretation and Legislative Reform (Scotland) Act 2010, section 30.

[116] The forms for use in simple procedure are in the Act of Sederunt (Simple Procedure) 2016, schedule 2.



7.4 The SCJC has also noted the increasing use in recent years of technically inert, organisational material in primary legislation and in court rules, for example the overview provisions in section 1 of the Investigatory Powers Act 2016 or the legislative sign-posting in rule 6.1 of the Sheriff Appeal Court Rules 2015. This sort of material might be thought to be particularly appropriate and useful in a large instrument with many independent parts, like a set of court rules.

> **The SCJC considers that the new civil procedure rules should be ambitious and innovative in matters of structure, layout and presentation. Considering that these rules are in daily use by the legal profession, the focus of the drafting approach should be usability and readability.**

The number and size of instruments

7.5 The Rules of the Court of Session 1994 alone has over one hundred chapters, with at least three of those chapters – chapter 49 (family actions), chapter 41 (applications under statute), and chapter 74 (companies) – being the size of many separate codes of rules themselves. The Court of Session rules are contained in a single code, whereas the equivalent rules for the sheriff courts are spread across at least a dozen[117].

7.6 Having multiple sets of rules for a single sheriff court has its challenges, from a drafting perspective as well as a usability perspective. On a practical level, large instruments are difficult to deal with. A visit to a law library which keeps each year's

[117] For more on this, see paragraph 1.14.

copies of the reprints of the Court of Session rules will demonstrate that annually the volume becomes larger, the spine less secure and the paper thinner. Increasingly lawyers and the public access litigation online, where perhaps the difficulties caused by an over-large instrument are less pronounced. However, a significant number of litigators prefer bound reprints of the rules. This will likely continue for some time.

7.7 The difficulties caused by particularly long instruments are obvious. They are difficult to navigate. They are difficult to amend, from a drafting perspective, particularly if you are concerned about a provision, phrase or word being interpreted consistently within a single set of rules. They require users to carry around vast amounts of irrelevant information in order to have access to the information they need. The question has been raised why, if a single procedural code was produced, a Court of Session practitioner should have to carry around the rules which only applied in the sheriff court. This point can be taken further. Does a personal injury practitioner, need to carry around the hundreds and hundreds of pages of rules which apply only to family law or to companies? Legal practice is significantly more specialised that it was even in 1993 when the two main civil codes were last rewritten. It is therefore acknowledged that there is at least as strong an argument for the deconsolidation of civil procedural rules as there is for the consolidation of them.

The challenge of consistency

7.8 Having multiple sets of rules covering the same court can create problems when attempting to regulate the general parts of that court's procedure. For example, each significant set of sheriff court rules has to replicate the rules on lay support, service, extracts, motion procedure, live links, vulnerable witnesses and interventions. Chapter 2 of the Summary Application Rules 1999 is a good example of this. A consequence of this approach is that whenever an adjustment needs to be made to a general provision (for example, because primary legislation has reformed the law on vulnerable witnesses), that adjustment needs to be reflected in multiple places, across multiple sets of rules. The length of the amending instrument is increased. Inevitably, provisions which ought logically to be consistent across codes drift apart or develop idiosyncratic quirks, running the risk that the differences are interpreted as significant, when no significance was intended.

7.9 A different approach is sometimes taken. The Fatal Accident Inquiry Rules 1977[118], though not technically civil procedural rules, applied only in the sheriff court. Where specific provision about procedure is not made in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, or in the rules made under that act, then the rules which would apply in an ordinary cause were to be followed[119]. In this way, amendments made to the Ordinary Cause Rules 1993 automatically flowed through, if not otherwise dealt with, to the Fatal Accident Inquiry Rules. This approach is followed, to an extent, in other codes, like the Child Care and Maintenance Rules.

[118] Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977. These Rules are due to be replaced by new rules set out in the Act of Sederunt (Fatal Accident Inquiry Rules 2017.

[119] Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, section 4(7).

7.10 This approach is not, however, a particularly transparent way of regulating court procedure. The reader has to have a fairly complete understanding of the subject-matter scope of, for example, the fatal accident inquiries in order to look to the Ordinary Cause Rules 1993 and work out which ones apply. The Ordinary Cause Rules 1993 are obviously designed principally for dealing with disputes between parties and may not be particularly apt to be directly applied to a completely different type of process, such as an inquisitorial fatal accident inquiry or a sensitive childcare dispute. Frankly, when the Ordinary Cause Rules 1993 are amended, the knock-on effect on other codes of rules parasitic on them is rarely considered by the drafter. This means that the possibility of producing unintended effects is increased.

Approaches to the number of instruments

7.11 The difficulties involved in omnibus rules have been discussed, as have the difficulties involved in the preparation and management of multiple codes.

7.12 There are some principles which the SCJC has identified to govern the approach to be taken to any decision relating to the length and number of instruments:

- While the length of instruments alone should not be determinative, in practice longer instruments create difficulties which shorter instruments do not have.
- There are certain cross-cutting aspects of general court procedure which should be consistent across subject matters (for example, provision relating to vulnerable witnesses or intimation).
- There are certain aspects of civil procedure where it is desirable for substantive procedure to be identical across courts (for example, family actions or personal injury actions), and splitting these rules across codes can create difficulties achieving this.
- It is generally unhelpful for codes to contain provision which a practitioner is unlikely to have to refer to (for example, rules relating to a different court, or to an uncommonly-encountered type of procedure).
- Users should be able to confidently identify the procedural provision which relates to the court or type of action they are interested in, without having to deduce it from elsewhere.

> **The SCJC will consider all options for the arrangement of the instruments containing rules of court, based on the considerations set out in paragraph 7.12.**

The style of rules

The particular challenges of drafting court rules

7.13 For much of the SCJC's work it will continue to be appropriate for the drafters to seek guidance from the standard sources on legislative drafting, both internal and public. There is no reason for our approach to be different when it comes to, for example,

gender neutrality, syntax, sentence structure, or the expression of dates and numbers. Nevertheless, it may be the case that there are some features of the SCJC's drafting work which would make a rules-specific approach appropriate.

7.14 The drafting work of parliamentary counsel or a government department can involve almost any sort of drafting task: changing the common law, setting up a body, conferring powers on an office, prescribing detailed matters about a particular agricultural or scientific practice. The drafting of court rules can involve a surprising variety of subject matter, but is largely concerned with the same business: drafting rules about civil or criminal procedure. These rules have a number of challenges which commonly feature, because of the nature of the task. If the product of the comprehensive rules rewrite is to be a coherent, consistent set of court rules then it is worth considering some of these challenges and whether the SCJC is able to take a consistent drafting approach to these matters.

A particular challenge: amendment

7.15 One of the principal causes of complex drafting is frequent amendment[120]. LPPO's instruments are overwhelmingly amending instruments. To illustrate this point, in 2014, the office produced 12 acts of sederunt. Of these instruments, 7 amended the Rules of the Court of Session. The Ordinary Cause Rules were amended 5 times, the Summary Cause Rules were amended 3 times, the rules on solicitors' fees were amended twice, and the Small Claims Rules, Sheriff Court Bankruptcy Rules, Sheriff Court Company Insolvency Rules, Childcare and Maintenance Rules, Messenger-at-arms and Sheriff Officers Rules, Commissary Business Rules and Sheriff Court Adoption Rules were each amended once. Only one standalone instrument was produced: the Fitness for Judicial Office Tribunal Rules[121].

7.16 We estimate that, since September 1994 when they came into force, the Rules of the Court of Session have now been amended at least 140 times. As a result, they enjoy rules with such perplexing numbering as rule 14A.4(1A)(a) (to do with recall of arrestment). The Delegated Powers and Law Reform Committee of the Scottish Parliament typically recommends to the Scottish Government that it should consider the consolidation of an instrument after it has been substantially amended 5 times. Luckily for those who draft Court of Session instruments, this policy is not applied to rules of court. Rules amended this often become difficult to navigate and difficult to read. They can appear ornate, fragmented, unbalanced and off-putting.

7.17 Rules are amended for three principal reasons: to provide rules required for the complete implementation of another institution's policy (normally the UK or Scottish Government's, as expressed in primary or secondary legislation), as a result of a policy independently decided on by the relevant rules council (now usually the Scottish Civil Justice Council), or as part of a regular programme of work (the best example being the annual uprating of certain fees provision). To look again at 2014's

[120] Office of the Parliamentary Counsel, "*When Laws Become Too Complex*", March 2013, page 1.

[121] These Rules were set out in the Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014. They were revoked within a year and replaced by a separate standalone instrument in 2015.

acts of sederunt, of the 12, 6 were a direct response to government policy, 3 implemented a policy initiated by a rules council, 2 were annual fees uprating instruments, and 1 contained a mixture of provision.

7.18 There is probably little that can be done about the need for sets of rules to be amended regularly. Increasingly, governments' legislation requires to be reflected in rules and the Scottish Civil Justice Council can be properly expected to have a programme of reform in mind that will itself require substantial amendment to court rules. The question therefore becomes what approaches can be adopted to the drafting of new sets of rules which might mean that future amendments produce less complexity, and consequently less difficulty navigating or reading them.

7.19 For example, often rules of court are amended simply to provide for a form of statutory application and some incidental rules relating to a statutory application, as is thought to be required by government legislation. Consideration might be given to whether a suitably flexible form of default, generic statutory application might be prescribed. With imagination, something could be developed which was both future-proofed and which allowed for all of the most common forms of statutory application to be made in this way, without the need to prescribe a bespoke form for each, each time. If this development was accompanied by the explicit setting out of a policy that a particularised form would only ever be prescribed when it was considered absolutely necessary, this might cut down considerably on the number of amendments made to the principal codes. When the sheriff court's summary application rules were first in force in 1999, an approach similar to this was attempted and, for a number of years, was largely successful. A combination of factors has meant that, over time, the practice of prescribing more individual and particular forms of statutory application became more common.[122]

> **The SCJC considers that for as much of civil procedure as is appropriate, the prescription of default, generic provisions should be preferred to individualised forms of procedure.**

A particular challenge: setting out time limits and periods

7.20 More so than perhaps any other task which the drafter is presented with, court rules often have to address the question of describing times or dates by which a certain action must be performed, or periods within which something must be done, or actions which begin such a time period. This can often be a genuinely challenging task and it is one which is not made easier by the fact that acts of sederunt have not adopted a consistent approach to describing dates, times or periods.

7.21 There are substantive policy consideration which underlie the drafting difficulty. For example, a procedure will often provide for one party to an action to have a period of time within which they can respond to something done by another party. Imagine a rule where a party is to be given 7 days to consent or object to a motion, with the court having the option to decide the motion either when such consent or objection is received, or at the end of the 7 days.

[122] Chapter 3 of the Summary Application Rules 1999 contains 47 Parts with rules for certain applications.

7.22 From when should the 7 day period run? From when the motion was sent or when it was received by the other party? Either event will have happened part way through a day. Presumably the responder should be given 7 full days to respond. If the rules provided for the 7 whole days, does this mean that a response lodged during the first, partial day would not be competently made? Surely the position must be that it is 7 full days and any unexpired part of the day on which the thing is lodged? Is that what the rules say, unambiguously? All of these concerns have answers, and sensible ones, and the official practice of the courts is generally consistent when it comes to what the answer is. The problem is that if we express things differently in different rules, and inconsistently, we create the impression that something different is meant, and the reader is led on a fruitless search for what that difference might be.

7.23 Even if we were to agree on the terms that should be used, we would have to be particularly careful to ensure that they produced, in law, the effect was desired. Does the phrase "14 days from [the event]" include or exclude the day of the event? If we say "within 7 days of [the event]" does this mean 7 days either side or only following? Does a phrase like "before the end of 4 weeks after [the event]" inadvertently mean that the thing can be done *before* the event (since that too is before 4 weeks after it)? When we are dealing with substantive rights there can be no room for ambiguity or imprecision. Being late for a deadline in court procedure can mean losing a right to appeal or, at the very least, a substantial penalty in expenses.

7.24 Two things are clear: that this is a task which court rules, in particular, will have to address regularly, and that this is an area where the case for a consistent approach is especially strongly made.

> **The SCJC considers that a standard approach to the drafting of elements such as these should be adopted, and set out in a style guide for court rules.**

A particular challenge: timetables and processes

7.25 Rules currently (and can likely expect to increasingly) prescribe complex timetables and processes. See, for example, rule and form 7.2 of the Sheriff Appeal Court Rules 2015, the standard orders issued when permission is given in a judicial review, or the personal injury timetable[123]. The timetabling of cases, whether explicitly in the rules (by case-flow management) or in orders of the court (by active case management) is a necessary consequence of the court taking more control over the progress of cases. The introduction of a statutory pre-action protocol in certain personal injury cases also requires the prescription of a complex timetable. The use of statutory pre-action protocols in categories of cases is likely to increase. If either of these types of timetable is to be a feature of the new civil procedure rules, it is worth considering what it will mean for the drafting and presentation of court rules.

7.26 The worst way of setting out a timetable of any complexity is by a series of declarative sentences. The need to refer backwards and forwards to dates to link the sentences together ("7 days after that period …", "within 14 days beginning from the

[123] For example, the personal injury timetable in an action in the Court of Session is in Form 43.6 contained in Appendix 1 of the Rules of the Court of Session 1994. A similar timetable is prescribed for an ordinary cause.

date on which …" etc) produces complex sentences and obscures the important points in a timetable: the sequence of events and the relevant dates or periods. It is thought that it would be particularly appropriate for rules to take an innovative approach to setting out timetables, perhaps through the use of tables with a column for the event and a column for the time period.

> **The SCJC considers that a standard approach to the drafting of timetables should be adopted, which is considered sufficiently unambiguous and clear to meet the standard of legal certainty.**

A particular challenge: forms

7.27 The instruments produced by the Court of Session prescribe more forms than other, equivalent offices in Scotland. Nearly every instrument produced contains a new form, an amendment to a form or a reference to an existing form. Many forms simply prescribe a form of words, such as the forms of extract decrees, the forms of oaths, or the form of words that must be used to mark an appeal. The function of many forms is to require parties to provide certain information to the court, and to prescribe the order and detail of the information which must be provided. For example, a form of writ or application often requires a party to set out certain aspects of the background to the application and information about other parties to the case which the court and its administration requires to know. Some forms, though not many, have communicative functions as well. In small claims and summary cause for example, the initiating forms and the forms concerned with time to pay applications all contain substantial guidance to those completing them about how they should be completed. Only very few forms, at present, contain graphical or layout elements.

7.28 The forms used for the simple procedure rules take a different approach. They are much closer in style and function to the sort of forms that consumers commonly encounter when dealing with public bodies, such as HMRC or the DVLA. The layout is as important as the content. Devices such as check-boxes and highlighted guidance are used. The expectation is that parties will use the forms as laid-out and printed, not simply the form of words prescribed. Part of the impetus for a different approach to laying out the forms was the fact that they were to be used with a new integrated case management system and online claims portal.

> **The SCJC considers that a diversity of approaches will be required to the prescription of forms including, where appropriate, laying out forms to include guidance and graphical elements.**

The language of court rules

Background

7.29 Rules concerning the sheriff courts' new jurisdictions in actions of reduction and actions of proving the tenor[124] were made in April 2015. During that consideration, the SCJC considered the intelligibility of terms like 'reduction' and 'proving the tenor' and

[124] Act of Sederunt (Ordinary Cause Rules Amendment) (Proving the Tenor and Reduction) 2015.

whether retaining these terms was consistent with the commitment to clear and accessible rules-drafting. The SCJC agreed to remit the matter to the Rules Rewrite Committee[125] who decided to consider the question as part of the rules rewrite.

7.30 This part will set out the SCJC's consideration of the substantive updating of terminology and also the broader, connected question of how the rules should approach difficult, ambiguous or commonly-used terminology more generally.

The problem of consistency

7.31 A provision of legislation, including a rule of court, should be read and interpreted in context. Among the most important aspects of that context is the language of the rest of the legislation, or the rest of the rules of court[126]. Unless there is a powerful reason for thinking otherwise, a term can be assumed to have been intended to have the same meaning in all places where it appears in a piece of legislation[127]. From a drafting perspective, it is incredibly useful to be able to say with confidence that a word is being used consistently across a set of rules since that ought to lessen the possibility of a court being satisfied that a difference in meaning was intended. This gives the drafter and the SCJC more control over future interpretation of rules.

7.32 The Rules of the Court of Session 1994 may be one of the most-amended statutory instruments currently used in regular practice. If the singularity of vision necessary to produce an internally consistent set of rules ever did exist in them, it does not now. There are any number of examples in the present rules of drafting where one word is obviously intended to have more than one meaning, or many different terms are used with an apparently identical meaning being intended. A good example is discussed in the Court of Session Practice entry on decrees and interlocutors[128]. The author, Lord Carloway, identifies that:

> " … the words 'decree', 'judgment' and 'interlocutor' are often used interchangeably. Originally, in accordance with the ordinary meaning of the word, an interlocutor was an order of the court pronounced during the dependence of an action. It was an order incidental to, but not determinative of, the merits, or part of the merits, of the case. A decree was that final determination. In both cases the words came to refer to the written expression of the court's order. A judgment of the court tended to be a reference to a written or oral opinion stating the reasons for an interlocutor or decree.
>
> Although there is a tendency to use the words in their original sense, the distinctions have become blurred. The Rules of [the Court of Session] 1994 refer to final pronouncements on the merits as interlocutors. The Court of Session Act 1988 itself sometimes refers

[125] SCJC, Minutes of the Scottish Civil Justice Council, 11 May 2015, paragraph 5.

[126] Daniel Greenberg, Craies on Legislation (9th Edition), Sweet & Maxwell, 2008, paragraph 20.1.36.

[127] *London Borough of Hounslow v Thames Water Utilities Limited* [2003] 3 W.L.R. 1243 QBD.

[128] Lord Carloway, Decrees and Interlocutors in Court of Session Practice, Tottel, 2015.

> to judgments and interlocutory judgments as distinct from decrees and interlocutors. It sometimes refers to interlocutors when these may be final and sometimes to decrees when these are granted during the dependence of a cause. It is best to read each use of the words in the context in which it appears and against any historical background before deciding whether a particular word is intended to have the original restrictive meaning or the wider one now in general use."

7.33 That sort of historical analysis sounds like a lot of work, particularly considering that as long ago as 1861 Bell complained that "the term [interlocutor], in Scotch practice, is applied indiscriminately to the judgment or order of the Court, or of the Lords Ordinary, whether they exhaust the question at issue or not."[129].

7.34 There is plainly a need in rules to make provision relating to these three ideas: orders given during the dependence of an action, orders finally determining an action or part of it, and the reasons (written or otherwise) given by the judge for making such an order. Indeed, these three ideas are perfect examples of the sort of core concepts which we can reasonably expect rules to have to regulate and regularly refer to, apply or modify. There is no reason for the rewrite to continue the sort of ambiguity identified in the passage above.

7.35 The process of drafting the rules, and in particular the special and specific parts of the rules, will necessarily involve regular reference to these sorts of core ideas. In practice the rules are likely to be drafted over a period time by many people, and the policy behind the drafting is likely to be developed by many Committees of the SCJC and the SCJC, depending on the subject matter. Nevertheless, there is likely to be a group of core concepts, each with a connected suite of terminology, which arise across subject matters: what parties should be called, how documents are referred to, the structure of motions, how judgments are named, what orders of the court are called. The approach to these, if the comprehensive rewrite is to effectively reform the general part of civil procedure, will have to be utterly consistent.

> **The SCJC considers that the drafting of new civil procedure rules presents an opportunity to introduce greater consistency to the terminology used in court practice.**

Arguments for and against an updating of substantive terminology

7.36 Responsibility for the consistent use of terminology lies principally with the SCJC's officials in the Rules Rewrite Drafting Team. However the decision whether to update the substantive terminology of civil procedure (and, if so, how much and in what way) is a principled policy decision for the SCJC to take. In this context, what is meant by 'substantive terminology' is probably easier to explain by examples than by description. The main labels given by the rules to parties, steps in litigation and documents are the best examples of substantive terminology. The names of any remedies would be substantive terminology. For example, it would be perfectly competent for the civil procedure rules to rename the term 'proving the tenor' and

[129] Bell, Dictionary of the Law of Scotland, 1861.

give it a name thought to be more understandable. The names of the principal steps in procedure would also be substantive terminology. If the SCJC wished to, the word 'reclaiming' could be entirely replaced with the word 'appeal'. The labels given to litigants is substantive terminology – whether someone is designed as a 'pursuer', an 'applicant' or an 'appellant' is a question for civil procedure rules. The name for a writ – 'summons', 'petition' or 'application' – is determined by the civil procedure rules. The 2014 Act specifically endorses the use of the Court of Session's regulatory powers to produce such a simplification and modernisation: section 103(2)(d) provides for rules to be made about "simplifying the language used in connection with […] proceedings or matters incidental or ancillary to them".

7.37 The Simple Procedure Rules 2016 have updated some substantive terminology. The explicit purpose of those rules was an attempt to produce something intelligible by and aimed at the lay reader. As such, it was decided at the outset that where terminology was confusing, obscure or off-putting, the Access to Justice Committee should consider whether it should be updated. So, for example, the rules no longer talk of 'sisting' a case, but instead of 'pausing' one. The terms 'Claimant' and 'Claim', and 'Respondent' and 'Response' have been used for the principal actors in a simple procedure case.

7.38 There are arguments against such an updating of substantive terminology. There is romance to and history behind many of the terms used in Scottish civil procedure. Taking a case to the Inner House isn't called 'reclaiming' for no reason: the name reflects the background to and substance of the step being taken. An apparently neutral, descriptive phrase like 'the orders sought in the application' seems bloodless and leaden in comparison with 'the prayer of the petition'. There are also practical arguments. Someone seeking to understand the law that governs, for example, the prayer of a petition would look it up under that name and be exposed to all the sources that use that term, whether online or in a library. That background and those sources would not be immediately available to someone searching for the same concept under its new name.

7.39 It is, however, probably inevitable that the preparation of the new civil procedure rules will involve some (and probably a significant amount of) updating of terminology and labels. It is unlikely that all new steps in procedure will have direct equivalents in existing procedure. New steps will be invented and old steps merged, abandoned or reframed. New labels will have to be invented for some of these. One good example is the name for the initiating document in a civil action. Since the two types of action are to be combined, there will have to be a name for the new document by which these actions are commenced. The SCCR suggested the term 'writ'[130]. The SCJC has not yet decided on these questions of terminology.

> **The SCJC considers that it should take an ad-hoc, flexible approach to decisions whether to update substantive terminology. In each case, the strengths of the arguments against and in favour are likely to fall slightly differently. In some situations, the case will be obviously made. In other**

[130] SCCR Report, Chapter 5, paragraph 69.

> **cases an alternative approach (perhaps the use of more explanatory material) might address concerns about intelligibility of terminology. Undoubtedly in some cases, for proper reasons, traditional labels may be retained even where they are perceived to be not quite as modern as they might be.**

Chapter 8. Information and communications technology

Background

The Scottish Civil Courts Review

8.1 The SCCR considered how the use of technology in the courts could improve efficiency and access to justice, stating that:

> "The Scottish civil courts lag behind many jurisdictions in their use of IT. IT can provide obvious advantages in facilitating communications in a country with extensive rural areas. Failure to keep up with developments will create an ever increasing gap between the citizen's experience of work and society and his experience of the justice system. This is a matter not just of hardware, but of procedure, rules and attitudes."[131]

8.2 The Lord President stated in a recent address to the Law Society Council that:

> "Over the next 5 years plans will be developed which will see the court room, and its ancillary offices, redesigned in light of modern ideas and technology."[132]

8.3 The Courts Reform (Scotland) Act 2014 Act provides the Court of Session with the power to regulate procedure and practice in the Court of Session, the Sheriff Appeal Court ("SAC") and the sheriff court, including the power to make provision about the conduct and management of proceedings, "including the use of technology"[133].

8.4 The SCCR made a number of recommendations regarding the use of ICT in Scotland's civil courts, taking account of the 72 responses to its consultation paper. Those recommendations were as follows:

- "The SCS should develop an up to date strategy for enhanced provision of ICT based on research commissioned to identify the needs of all court users;
- The SCS website should be covered by a source of guidance and support particularly for parties in cases covered by the proposed simplified procedure falling within the jurisdiction of the district judge. It should include information on:
    - Other sources of advice and assistance;
    - Providers of mediation and other forms of ADR including links as appropriate; and
    - Self-help materials;

[131] SCCR Report, Chapter 6, paragraph 77.

[132] Lord Carloway, Redesigning The Court Room, Law Society Council, 29 January 2016.

[133] Courts Reform (Scotland) Act 2014, sections 103(2)(c) and 104(2)(c).

- The use of email as a means of communicating with the courts and the judiciary should be actively pursued as soon as is practicable and consideration should be given to extending the system to other undefended actions;
- Video and telephone conferencing should be encouraged;
- Consideration should be given to means of encouraging court users to communicate electronically. This may involve entering into some sort of agreement with a provider to allow access to systems locally; managing the provision of such access directly, for example with local authorities; or by lower court fees;
- All evidence in civil cases, apart from those under the simplified procedure, should be recorded digitally[134]."

Scottish Courts Service and Scottish Government policies

8.5 The Scottish Courts Service, predecessor to the Scottish Courts and Tribunals Service ("SCTS"), published its ICT Strategy in April 2011. A key aim of the strategy was to "move away from paper based processes"[135]. The SCTS website was redesigned and relaunched in November 2012, targeted at lay and professional court users. More recently, the website has been amended to include guidance on simple procedure and links to available "advice and assistance" providers. Digital recording equipment has been installed in all courtrooms in the Court of Session, and all sheriff court criminal court rooms. The introduction of digital recording equipment continues to be rolled out into dedicated civil sheriff court rooms. All digital recordings are stored centrally and are readily accessible by authorised users.

8.6 The Programme for Government[136] set out the Scottish Ministers' commitment to create a modern, user-focused justice system through the greater use of digital technology to deliver simple, fast and effective justice. This supports the Digital Strategy for Justice in Scotland published in August 2014 (which covers administrative, civil and criminal justice) and sets out three key objectives:

- allowing people and businesses to access the right information at the right time;
- fully digitised justice systems; and
- making data work for us[137].

8.7 Objective one is delivered through the web pages of mygov.scot, the national gateway for citizens and businesses to access public services in Scotland.

8.8 The second objective is of particular relevance for the purposes of this paper. The strategy lists various user benefits which would accompany a fully digitised justice

[134] SCCR Report, Chapter 6, paragraph 84

[135] Scottish Courts Service, ICT Strategy (2011-2014), April 2011, paragraph 3.11.

[136] Scottish Government, A Plan for Scotland (2016-2017), September 2016, page 69.

[137] Digital Scotland, Digital Strategy for Justice in Scotland, August 2014.

system. For example, digital interlocutors, opinions and decisions can be served more securely and quickly than using paper methods; the digital storage of evidence should shorten court process and save time, leading to knock-on savings for agents and SCTS; and electronic creation of documents would save on paper and postage.

8.9 The next ambition for civil justice within the Digital Strategy programme is the creation of an online dispute resolution system that introduces interactive content and gives access to transactional "do-it-yourself" tools, accessible through mygov.scot. One aim is to help achieve integration between alternative dispute resolution methods and formal adjudication routes. Early next year, the Scottish Government's Digital Strategy implementation team will work with SCTS and justice organisations to investigate where digital technology can further support simple procedure and deliver on a recommendation of the Civil Justice Advisory Group (CJAG), that:

> "Court rules should be introduced which would encourage, but not compel, parties to seek to resolve their dispute by mediation or another form of alternative dispute resolution, prior to raising a court action"[138]

8.10 In criminal justice, work is underway to develop a "Digital Evidence Information Sharing" capability. In the first instance, the focus is on how CCTV evidence is captured, stored and shared. Work has started to inform how CCTV evidence can be captured by police, transitioned into a standard format and shared with officials working in the Crown Office and Procurator Fiscal Service ("COPFS") for case marking. The alpha project started in October and is due to finish before the end of December. After this, subject to funding, the Scottish Government plans to initiate further projects to learn how COPFS could disclose CCTV evidence to defence agents and the courts.

Existing use of ICT in the courts

The Court of Session

8.11 The Rules of the Court of Session 1994 already make specific, albeit limited, provision for the use of ICT. Chapter 23 (motions) enables the electronic lodging of motions where a party is represented by an agent. An agent must provide an email address to the Deputy Principal Clerk for the purpose of transacting motion business[139], or the agent does not have suitable facilities, they must make a declaration in writing and intimate it to other parties in the case. Party litigants are not compelled to make motions by email.

8.12 The Rules of the Court of Session 1994 also provide specific exceptions to the general rule that motions are to be made electronically. Chapter 35 (recovery of evidence) provides that where confidentiality is claimed for any evidence sought to be recovered under certain rules, such evidence is to be enclosed in a sealed packet.

[138] Civil Justice Advisory Group, Final Report of the Civil Justice and Advisory Group, January 2011, page 50.

[139] The Deputy Principal Clerk is responsible for maintaining a list of the email addresses for the purposes of transacting motion business. The list must be kept up to date on the SCTS website.

Where a motion to open the packet is lodged, the party enrolling the motion must intimate the terms of the motion to the person claiming confidentiality by post[140]. The SCJC will have to consider, when preparing the new civil procedure rules, whether there are any particular circumstances in which it is appropriate or necessary to maintain a requirement (as opposed to an option) for paper intimation or lodging.

8.13 Chapter 74 (companies) makes some limited provision regarding use of email allowing petitions to be sent electronically as soon as practicable, in addition to by post or sheriff officer. This system therefore provides both a requirement for traditional service, and also a requirement for electronic service.

8.14 Chapter 93 (live links) makes provision for a party to apply for the whole or part of evidence given or submission to be made through a live link to allow a person to participate in proceedings whilst at a place outside of the court room[141]. Chapter 99 (Energy Act 2008 interdicts) provides that steps taken to make the respondent aware of the application may include publication using electronic means.

8.15 In addition to these rules of court, certain Court of Session practice notes address the use of ICT in the Court. For instance, Court of Session Practice Note No.3 of 2015 applies to actions on the summar roll where the Court has appointed parties to lodge electronic documents[142]. All electronic documents must be prepared in accordance with its provisions. Documents should be contained in a single pdf and numbered in ascending order throughout, and comply with requirements as to the default display size and resolution. The index page must be hyperlinked to the pages or documents to which it refers. Electronic documents must be submitted on a memory stick, clearly marked or labelled with the title of the case and identity of the party.

The Sheriff Appeal Court

8.16 The Sheriff Appeal Court Rules 2015 also make provision in relation to use of live links and e-motions . They go one step further than in the Court of Session by allowing electronic intimation and lodging of documents other than motions.

8.17 Where the receiving party is represented by a solicitor, an intimating party may give intimation in different ways, including by fax or electronic means. Where intimation is given by those means, different timescales apply. Where the receiving party is a party litigant, intimation must be by recorded post or sheriff officer.

8.18 Documents can be lodged electronically, whether the party is represented by a solicitor or not.

[140] Rules of the Court of Session 1994, rule 35.8(3).

[141] This provision was introduced following the work of the IT Committees of the Court of Session Rules Council and the Sheriff Court Rules Council, under chairmanship of Lord Macphail and Sheriff Ian Peebles QC as he was then. For more information on this, see SCCR Report, Chapter 6, paragraph 49.

[142] Court of Session Practice Note No. 3 of 2015 (format of electronic documents for summar roll hearings).

The sheriff court

8.19 Sheriff court rules make similar provision to the Rules of the Court of Session 1994 in relation to use of technology. Chapter 15 of the Ordinary Cause Rules 1993 largely mirrors its equivalent Chapter 23 in the Court of Session in respect of e-motions. The Ordinary Cause Rules 1993 also provide exceptions to the general rule that motions are to be made electronically and make provision for the use of live links.

8.20 The Summary Application Rules 1999 also make limited provision for the use of electronic notification, providing that the method of intimation of certain orders (for example, medical examination orders or quarantine orders) may be made by telephone, email or facsimile transmission[143]. Similarly, the Child Care and Maintenance Rules 1997 provide that service may be made by facsimile or other electronic transmission, where the recipient has access to that facility[144].

Recent developments

8.21 This historically limited ICT use is likely to be transformed by the creation of an Integrated Case Management System ("ICMS") and the Civil Online portal. Both of these developments represent a major innovation for the Scottish civil courts.

8.22 ICMS was introduced internally for the Sheriff Appeal Court and sheriff courts on 31 October 2016. It is expected to be introduced in the Court of Session in 2017-2018, which until then continues to use the electronic Case Management System ("CMS") to manage cases and schedule hearings.

8.23 The Simple Procedure Rules 2016 are the first stand-alone set of court rules drafted with the use of technology firmly in mind. The Rules expressly refer to the Civil Online portal[145] as a way for litigants to progress their claims. Developed in response to the SCCR's call for a pilot of an online small claim and summary cause system, SCTS has described the Rules as "the start of a journey to online processing in civil courts".

8.24 Separately, since 28 November 2016, it has been possible to serve claims by advertisement on online walls of court for simple procedure actions[146].

8.25 The Civil online portal will go online after further user testing and development. This which will enable parties to commence and progress actions with a value of £5,000 or less online.

8.26 Since ICMS was introduced internally for the sheriff courts and the Sheriff Appeal Court on 31 October 2016, it has been possible for court staff and the judiciary to:

- register actions and applications,

[143] Summary Application Rules 1999, rules 3.39.3-3.39.9.

[144] Child Care and Maintenance Rules 1997, rule 3.15(f).

[145] The Civil Online portal is described as "the portal on the Scottish Courts and Tribunals Service website".

[146] Simple Procedure Rules 2016, rule 6.12(4) allows the sheriff to order the details of the claim to be publicised by advertisement on the SCTS website.

- produce court generated documents and update ICMS with documents in a case (up to 5 megabytes in size),
- electronically authenticate and seal court generated documents (judiciary and clerks only),
- email court generated documents once sealed,
- register, process and renew caveats,
- search, view and schedule cases and hearings,
- dispose of cases and record outcomes of hearings,
- update status of cases – for example, recall of sists,
- register and monitor appeals.

8.27 When the Civil Online portal goes live for simple procedure, parties will be able to, for example:

- submit cases online,
- lodge applications (and oppose applications),
- track cases online,
- update ICMS with documents in a case (up to 5 megabytes in size).

A vision for ICT

Electronic and paper-based processes

8.28 The SCJC considers that the new civil procedure rules should introduce a system-wide shift, from a default of paper-based processes with occasional options for electronic processing bolted on, to a presumption that every procedural step in litigation should be conducted electronically. This would include lodging documents, making applications or motions, and communication with court officials. There are clear benefits to parties and the court in opting for electronic rather than traditional communication by post or hand delivery, for example, reduced postage costs, speed of delivery and the creation of an instant electronic record of lodging or intimation.

8.29 It will continue to be necessary, for reasons of access to justice and particularly for unrepresented litigants, for the rules to maintain the ability to conduct this business using paper-based processes. A significant, though presumably decreasing part of society will not have the resources or the technological skills which would enable them to use online court processes unassisted. This is likely to be the case for the near future. The new civil procedure rules should therefore provide for the rules on electronic litigation may be disapplied to any action where appropriate.

> **The SCJC considers that electronic interaction with the courts should be the default in the new civil procedure rules, except where the court orders otherwise.**

Adjustment of pleadings

8.30 A specific example of an innovative feature which the new civil procedure rules may facilitate is the online adjustment of pleadings in the form of a shared, editable document on which parties can 'track changes' during the period of time allowed for adjustment, or any permitted amendment.

> **The SCJC will consider the introduction of online, shared, editable pleadings in the new civil procedure rules.**

Parallel online blind bidding

8.31 Ultimately, most civil cases settle. Sometimes both parties are willing to settle at a similar level, but neither party is willing to let the other party know that, for fear of losing bargaining ground; and neither party wants to make the first offer, with the result that the case fails to settle, or only settles very late in the day, resulting in wasted legal expense and court time.

8.32 It is also true to say that the later settlement is attempted, the more difficult it is, because the accumulated legal expense on both sides can prove to be a block on sensible negotiation, sometimes becoming the single largest issue to resolve.

8.33 The current system of tenders is an open system (between the parties if not the court) and is often used tactically. It differs from ordinary negotiation in that there are potential financial consequences attached to a failure to agree.

8.34 Double blind bidding, on the other hand, is a system whereby both parties submit 'blind' (sealed) bids to a third party, with the proviso that if the bids come within an agreed percentage of each other, a settlement is deemed to have been agreed.

8.35 In this way, neither party knows what the other is bidding, and so there is no perception of weakness attached to putting in a genuine offer intended to reflect the level at which settlement would be acceptable. There is no consequence for failing to agree (or failing to participate) other than that the case proceeds.

8.36 It is possible to do this online, and online blind bidding as a method of settlement has been around for some time, with examples in the US. One such online platform, Cybersettle, has been widely used in reparation claims, and has been incorporated into some companies' standard terms (such as the supplier contracts for GE Oil and Gas).

8.37 That procedure works by having three successive bidding rounds. The parties contract that if their bids come within a certain percentage of each other an enforceable bargain is struck and the case is settled.

8.38 If they do not come close enough, then there is no deal, and neither party has compromised their position by giving away the level at which they are willing to settle.

8.39 The issue is that, in the absence of a contractual provision, were one party to suggest using an online settlement procedure to the other side, this may in itself be perceived as a sign of weakness. In any event, these systems are not well known or understood.

8.40 It would be fruitful to explore whether, if a system like this were integrated into the court rules as an option for parties, it would have the potential to achieve early settlement and reduce the costs associated with late settlement.

8.41 A bidding scheme might work as follows:

- When an action is raised, parties are registered on the system and they are given the details of a secure site where they can submit bids.
- A number of bidding rounds would be specified to be available at one or a number of the usual 'pinch points' in proceedings as follows:
    - On raising the action. This gives parties the opportunity to try to settle as soon as it is clear that the dispute has been formalised.
    - At the close of adjustment. This gives parties the opportunity to settle when they have seen the other side's case fully set out.
    - In advance of any debate. This gives parties the opportunity to settle having given detailed consideration to the legal arguments.
    - In advance of the proof. This gives parties the opportunity to settle in advance of the proof when the full extent of the evidence has been analysed and matters are about to be removed from the control of the parties as they head into court.
- If one of the bidding rounds is successful, and parties come within the agreed fixed percentage of each other, the case is held to have been settled by operation of the rules. If none of the rounds are successful parties proceed to proof in the normal way.

> **The SCJC will consider the incorporation into the new civil procedure rules of a system of parallel online blind bidding.**

Evidence and information

8.42 In relation to the criminal courts, the Evidence and Procedure Review called on Scotland to harness the opportunities that new technologies bring to improve the quality and accessibility of justice[147]. It advocated the view that substantial improvements can be made to the administration of justice with the widespread use of pre-recorded statements in place of testimony in court and a more imaginative use

[147] Scottish Courts Service, Evidence and Procedure Review Report, March 2015, paragraphs 1.12-1.14

of live-link technology. The Evidence and Procedure Review published a Next Steps paper a year later, which concluded that work should be undertaken to develop requirements for a Digital Evidence Vault for storage of evidence, and that there should be further development of proposals to reform criminal procedures to allow for a more streamlined, digitally enabled justice process[148]. The Digital Strategy for Justice in Scotland referred to the Scottish Government's aim to create a digital evidence vault to securely store all documents, audio, pictures and video content, preserving citizens' privacy.

8.43 The Next Steps Review emphasised that digital reproduction is increasingly a feature of everyday business and should be acceptable as best evidence provided there is a robust means of certification and authentication.

8.44 To align with the developments being progressed in the criminal courts, the more modern approach in the civil courts could be to move away from written material and the use of "live" links, in favour of video recorded statements by witnesses, including experts. These could be lodged in the process over time and be available for inspection by participants. The use of this type of material ought to cut down the time needed for court hearings themselves and should reduce the number of witnesses requiring to attend.

8.45 If digital presentation of evidence is pursued in civil courts, then courts and the ICT systems which support them, require to be fully equipped to facilitate this. The SCJC agrees that the use of digitally recorded, preserved and displayed evidence, including testimony, should be possible under the new civil procedure rules

> **The SCJC considers that the new civil procedure rules should facilitate the digital recording and presentation of evidence.**

[148] Scottish Courts and Tribunals Service, Evidence and Procedure Review: Next Steps, February 2016, paragraph 36.

Chapter 9. Transition, implementation and tidying the statute book

Otiose or redundant rules

9.1 The SCJC has performed a survey of existing rules, looking for any provision which is considered otiose through legislative developments, or redundant through under-use.

9.2 It has not identified any significant chapters of rules which could be considered either otiose or redundant, but is committed to a substantial reduction in the number of specialist chapters devoted to a single form of action or an application under statute.

The problem of transition

Making new rules and revoking old rules

9.3 The SCJC is committed to a comprehensive rewrite of Scotland's civil court rules. An inevitable part of the making of new rules is the disposal, by revocation, of old rules.

9.4 The problem which is raised by the revocation of any existing instruments or rules, and their replacement by successor instruments or rules, is the status and treatment of causes which were raised or decisions taken, and which might still be ongoing, under the now-revoked instrument or rules.

9.5 There are a variety of approaches which have been adopted, from continuing in effect revoked rules for existing causes, to applying new rules to all causes, no matter when they were originally raised.

Past transitions to new civil procedure rules

9.6 On 05 September 1994, when the Rules of the Court of Session 1994 came into force, the Act of Sederunt containing the Rules of the Court of Session 1965 ("the 1965 Rules") was revoked in its entirety[149]. Every Act of Sederunt relating to civil procedure which pre-dated the 1965 Rules was revoked, as was every Act of Sederunt which had amended or supplemented those Rules. The only rules whose effect was saved were those which related to fees, outlays and interest on decrees. Those rules were only saved for the purposes of fees already incurred or decrees already pronounced. There was no specific transitional or savings provision relating to the procedural parts of the 1965 Rules or what should happen to cases that were proceeding in the Court of Session according to those rules in September 1994.

9.7 Rule 1.2 of the Rules of the Court of Session 1994 applied those Rules to "any cause whether initiated before or after the coming into force of these Rules".

9.8 There were a number of reasons for this approach. Firstly, there were only a limited number of significant structural changes being made to the nature of Court of Session litigation. The Rules of the Court of Session 1994 were a consolidation, refinement and improvement of the 1965 Rules, making a number of discrete reforms, but leaving the process and language of civil litigation in Scotland intact.

[149] Act of Sederunt (Rules of the Court of Session 1994) 1994, paragraph 3(2) and schedule 4.

Indeed, the Parliament House print of the Rules of the Court of Session 1994 has always contained a table of derivations, setting out which of the 1965 Rules was the predecessor provision to each rule. This approach meant that, in practice, there would be little difficulty for the experienced litigator in identifying the applicable rules when an active case was transferred from the 1965 Rules to the new set of rules.

9.9 The Rules of the Court of Session 1994 have been amended dozens of times. In many cases, this amendment has involved the substitution of entire chapters relating to a particular aspect of procedure. Some chapters are effectively mini-codes governing the conduct of a class of litigation; for example, chapter 43 on personal injury actions, chapter 47 on commercial actions, or chapter 49 on family actions. When chapter 58, on judicial reviews, was recently replaced in its entirety on 22 September 2015, the decision was taken to save the effect of the existing rules for cases which had already begun on the date on which the amendment took effect[150]. The reasons for this were both principled and practical. Substantial changes to the nature and availability of judicial review were being implemented and a much wider set of case management powers being given to the judge. In some cases, it was considered, it would be improper for parties who had expected their petition to be handled in a particular fashion to be exposed to the possibility of their petition being dealt with in a different and possibly more stringent way. Separately, the changes to procedure were sufficiently fundamental, including new types and names of hearing, that it would be difficult for judges, courts officials and administrators to work out the proper way in which to treat an existing case as proceeding under the new rules.

9.10 The saving of the old rules for existing cases therefore meant that, after 22 September 2015, there was a gradual build-up of cases under the new rules and a gradual diminishing of cases under the old rules until, at an unknowable (but, it must be hoped, not too distant) date, the last case under the old rules is concluded and the saving provision ceases to have any effect.

9.11 This approach has been, broadly, the typical one in recent years. The saving provision applied to small claims is a good example. When the Act of Sederunt (Small Claim Rules) 1988 ("the 1988 Rules") were made, they were applied only to small claims made after 30 November 1988. The older law of summary causes being saved for any existing claims. When these rules were replaced, on 20 June 2002, by the Small Claims Rules 2002, the transitional provision in the Act of Sederunt provided that any claims raised before 20 June 2002 "shall proceed according to the law and practice in force immediately before that date"[151], saving both the 1988 Rules and the law which preceded them. When the time came, as part of the commencement of the simple procedure, to revoke the Small Claim Rules 2002, the question was raised about how much of the effect of previous rules should be saved. It became clear after investigation that, since the indefinite sist was such a routine feature of small claims litigation, on commencement of simple procedure, there were

[150] Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 3) (Courts Reform (Scotland) Act 2014) 2015, paragraph 4.

[151] Act of Sederunt (Small Claim Rules) 2002, paragraph 3.

existing cases still technically proceeding under the Small Claims Rules 2002, the 1988 Rules and potentially from the law of summary cause applying before them.

9.12 In order to preserve the effect of the procedure applying to all of these cases, the saving provision had to be drafted as follows:

> **Revocation and saving of the Small Claim Rules 2002**
>
> **3.**—(1) The Act of Sederunt (Small Claim Rules) 2002 is revoked.
>
> (2) Despite that revocation, the Small Claim Rules 2002 continue to apply to a small claim commenced before 28th November 2016.
>
> (3) Despite the revocation of paragraph 3 of the Act of Sederunt (Small Claim Rules) 2002 (transitional provision), the law and practice in force immediately before 10th June 2002 continues to apply to a small claim commenced before that date.

Options for transferring old cases

Comprehensive savings

9.13 The SCJC could adopt as its policy the comprehensive saving of the Rules of the Court of Session 1994 as they apply to existing causes on the date of revocation.

9.14 One benefit to this approach would be certainty. There would be no doubt as to which set of rules applied to which cause. Each cause would follow the set of rules in force at the point at which the cause was raised. It would also avoid any question of unfairness involved in transferring a cause from one procedural regime to another. No party would have their procedural options or rights limited, altered or expanded in an unanticipated manner by their cause being transferred to the new rules. It would also mean that causes under the new rules would build up gradually, perhaps allowing judges, litigators and courts officials more time and room to become familiar with new procedures, develop efficient practices and adjust to a new way of working.

9.15 It would, however, mean that for an unpredictably long period (and a potentially extremely long period) everyone involved in civil litigation would have to simultaneously operate two sets of rules: the old rules for existing cases and the new rules for new cases. This would be an administrative burden, requiring the parallel operation of two sets of systems – IT systems, personnel, filing, court programming – for as long as it takes to conclude all legacy cases. It might also prove confusing for litigants and litigators, who would be expected to retain knowledge about twice the amount of procedural material as they normally do. It would also delay the impact of any benefits in efficiency which the new rules were expected to bring about.

9.16 While the comprehensive saving of a code is the most practical choice in many scenarios (see, for example, the discussion of the new judicial review rules at paragraphs 9.8 and 9.9), this has often only been possible because of the limited, encompassable class of causes affected. Courts officials were able to describe and assess the numbers of existing judicial reviews and estimate the burden involved in

disposing of them under the old rules. For the new civil procedure rules, the weight of any additional administrative burden, as well as the effort involved in concluding any legacy cases, would be enormously amplified by the fact that what was being saved was the entirety of the Court of Session Rules and all sets of sheriff court rules and for every single cause presently before the courts.

Comprehensive transfer

9.17 The SCJC could adopt as its policy the comprehensive transfer of all existing causes from the Rules of the Court of Session 1994 to the new rules, as was done in 1994.

9.18 This approach would, itself, produce a sort of certainty. Again, it would be clear which set of rules applied, as a single set of rules would apply to every cause before the court, whenever commenced. It would also mean that any benefits that the SCJC considers the new rules have would be felt sooner and more comprehensively. If, for example, the new rules gave judges a new set of potent case management powers, these could be applied effectively to existing actions as well as new ones. This approach would certainly be simpler. Judges, litigators and courts officials would only ever have to apply a single set of rules, and would have the opportunity to become familiar with the new rules more quickly.

9.19 However, doing this in a fair, practical and transparent way may be difficult or impossible if the SCJC is going to propose any radical or structural changes to way in which civil litigation operates in Scotland. This approach was possible in 1994 because few reforms of this type were proposed but the current exercise is likely to involve more significant and more fundamental reforms. For example, the suggestion that the procedural distinctions between causes brought as summons and those brought as petitions should be ended would involve a fundamental restructuring of the court and its administration. The suggestion that there should be much wider use of case management, and in particular active case management, would necessarily involve causes being treated very differently than they were before. It might not prove quite so easy to draw a direct table of destinations between the existing rules and the new rules, as was possible between the 1965 Rules and their successor.

9.20 If the approach is very different, there may even be questions of fairness or oppression raised by forcing litigants' cases (and, therefore, the adjudication of their substantive rights and liabilities) to be transferred into a new procedure. Steps and strategic decisions which a litigant, following professional advice, takes in respect of their case might be perfectly properly taken in the expectation of one form of procedure but might prove less advantageous or sound when that procedure is changed without their consent.

Discussion

9.21 The SCJC considers that the transfer of existing cases to the new civil procedure rules would create great benefits for the courts administration, for professional users of the rules and for litigants. For those benefits to be most keenly felt, that transfer should take place in as comprehensive and as swift a manner as possible.

9.22 However, the SCJC recognises the potential for individual unfairness in a scheme of comprehensive transfer. It considers that the rules should make bespoke provision, allowing that unfairness to be mitigated or avoided in individual cases when presented, with the ambition that all cases before the court should be transferred to the new rules by a fixed point, not too long after the coming into force date of the new civil procedure rules.

9.23 This bespoke provision would have to address the difficulties which a comprehensive transfer of cases might present. These difficulties could be summarised as:

- the difficulty of identifying in advance how a case proceeding under the old rules might continue under the new rules,
- the long and uncertain period for which the old rules would continue to apply,
- the confusion involved in running two parallel sets of rules, and
- the inefficiency caused by not being able to apply the improved processes of the new rules to existing cases.

9.24 The SCJC considers that these problems could be addressed by rules which provided for a scheme along the following lines:

- The new civil procedure rules will apply to causes commenced on or after the date on which they come into force.
- For the first 6 months, judges will have the power to transfer existing cases from the old rules to the new rules either on the application of a party or otherwise, and will appoint a specific procedural step to be carried out by the parties under the new rules when they make such an order.
- For the following 6 months, judges will be obliged to make an order transferring cases to the new rules unless, on special cause shown, parties can argue otherwise.
- At the end of that 6 month period, all existing cases proceeding under the old rules will be automatically transferred to the new rules.

9.25 The effect of such a scheme would be to put the transfer from the old rules to the new in the hands of the court, creating a managed build-up of cases under the new rules alongside certainty about the point at which the old rules will cease to apply.

9.26 The concern that the it would be practically difficult for the rules to properly provide a mechanism for transferring cases between the old and new rules would be addressed because each transfer would take place at a time, and in a way, ordered by a judge. It is imagined that a standard approach to ordering such transfers would quite swiftly be developed. Since these orders would be made gradually, over a year, the court would not become overloaded with procedural decisions to make.

9.27 Such a scheme would mean that the rules identify a point in time, in advance, by which every cause would be transferred to the new rules. The unfairness of such an

enforced transfer would, however, be mitigated by the fact that for the first 6 months it could only happen when parties applied for it to happen. After that, a transfer to the new rules would become the default position and would be addressed, on a case by case basis, as each un-transferred case came before a judge during the natural progress of the litigation. Any unfairness to parties in such a default position would be addressed by the fact that they had had warning of the position and by the ability of judges to, on cause shown, retain the effect of the old rules by order.

9.28 Finally, there would only be one situation where the transitional provision would provide for the transfer of causes to the new rules by automatically by operation of law. This would be where no order had been made within a year. In these cases, which it must be imagined would be rare, parties may be assumed by their inaction to have consented to, or be indifferent to the effects of, the transfer to the new rules.

> **The SCJC considers that the rules should provide for the comprehensive transfer of all cases to the new civil procedure rules, according to a managed timetable set out in rules and under the supervision and control of the court.**

Implementation of the new civil procedure rules

9.29 The new civil procedure rules could either be drafted in full and brought into force on a single day, or drafted and brought into force as part of a phased programme of implementation, with different parts of civil procedure becoming subject to new rules on different days. For example, with the new civil procedure rules applying first to commercial actions, then family actions some time later, and judicial reviews some date after that.

9.30 A ‘big bang’ approach, with a single day for implementation of all of the new rules, is by far the simplest and most straightforward, especially if the transitional regime applied to the old rules is to be complex. There is only one important date that litigators need to bear in mind: the date the new rules come into force in their entirety. Any benefits of the new rules can be immediately applied to all new cases.

9.31 The SCJC considers that there is limited scope for an ability to sensibly phase in new rules. Obviously, all typical general provision would have to be prepared in advance of the first implementation date: without rules for the initiation, adjudication and disposal of a cause there is no civil procedure. Equally, even less-common general matters would have to be prepared: while they may not be relevant in every single cause that comes before the court, rules for the determination of expenses, for motions and minutes, for counterclaims or for the withdrawal of agents, are potentially necessary in every single cause. Similarly, there is a range of very special provision that, while it should be necessary only rarely, it is all needed for the proper functioning of the system and is in many cases required by primary legislation or international obligation: for example, provision on devolution issues, references to the Court of Justice of the European Union, or vulnerable witnesses.

> **The SCJC considers that the new civil procedure rules should be introduced and come into force for all new actions on a single day.**

Practice Notes

9.32 The preparation of the new civil procedure rules should also present the opportunity to think more clearly about the balance between those matters best dealt with by a rule of court and those matters more appropriately handled in a practice note, issued directly by the judges of the Court of Session or the sheriff principal. Some matters covered by rules might be thought to be more appropriately dealt with by practice note: for example, some of the provision in chapter 4 of the Rules of the Court of Session 1994 about administrative matters such as the form of process, size and shape of the paper used in court documents, etc . Some matters dealt with by Practice Note might be considered to be so well-established and important that they could best be incorporated into the rules themselves.

9.33 Practice Notes can be issued very quickly and amended very easily. There is no formal procedure which applies to them. The language can be looser and less prescriptive than a rule has to be. They can be a very useful way to set out expected practice in typical situations, to address developing inefficiencies, to provide guidance where doubt about interpretation exists or to respond quickly to controversies. At the moment there are some practice notes which cover, in a reasonably comprehensive fashion, the practice which judges expect to be adopted in certain categories of procedure: for example, Practice Note No 5 of 2015 which supplemented the rewritten chapter of the Court of Session Rules on judicial review. Others cover much more minor, discrete matters: for example, Practice Note No 1 of 2005 which provides for an address to which certain immigration and asylum petitions must be lodged. Some are very detailed and procedural: for example, Practice Note No 1 of 2010, which provides a detailed commentary on the rules relating to causes in the Inner House. Some are more in the nature of an informal note to practitioners: for example, Practice Note No 4 of 1991 which upbraids counsel for reported breaches of confidentiality relating to advance copies of opinions being issued. Others can be regarded as curios: for example, Practice Note No 3 of 1992, issued in anticipation of “a woman for the first time sitting as a temporary judge in the Court of Session”.

9.34 When the Rules Court of Session Rules 1994 came into force, Practice Note No 3 of 1994 performed a mass revocation of existing practice notes which no longer applied or which had been superseded. However, since then the number of practice notes has multiplied. Some amend existing practice notes and some supplement others. Some clearly supplant existing practice notes without explicitly withdrawing them. Others are probably otiose because the underlying procedure or practice no longer occurs, but nobody has thought to withdraw the practice note. Some were clearly intended to have a temporary effect but have never been formally withdrawn.

9.35 The SCJC is of the view that, in order for a consistent approach to be taken to the substantive question of the matters best dealt with by practice note and to the formal question of being sure which practice notes apply and to what, that the following proposals might be followed:

- A single practice note should be prepared for the Court of Session and for each sheriffdom, consolidating all existing practice notes whose effect the judges wish to retain; and all other existing practice notes should be withdrawn.
- Each practice note would follow the order, structure and numbering of the civil rules to which it related, so that Part 1 of the comprehensive practice note would contain guidance from the judges about the practice to be applied to the matters contained in Part 1 of the new civil procedure rules, and so on.
- All new and additional matters to be covered by practice note should, from then on, be incorporated into the comprehensive practice note by amendment, ensuring certainty about the procedural guidance in effect.

9.36 It should be noted that the issuing of, and content of, practice notes for the Court of Session is the exclusive responsibility of the Lord President and the sheriffs principal, typically following consultation with judges. The SCJC, however has a view on the appropriate balance of regulation between formal rules and informal practice notes.

> **The SCJC recommends the introduction of single, consolidated practice notes for each court or sheriffdom.**

Chapter 10. Summary of decisions

10.1 The SCJC considers that the rewrite should encompass the Rules of the Court of Session, the Ordinary Cause Rules, the Summary Application Rules, the Child Care and Maintenance Rules and the Adoption Rules, and every other set of civil procedural rules relating to the sheriff court with a direct equivalent in the rules of the Court of Session. **(paragraph 1.17)**

10.2 The SCJC has decided that, where appropriate, sheriff court rules should be contained in a single instrument. **(paragraph 1.17)**

10.3 The SCJC has decided that the Fatal Accident Inquiry Rules and the Simple Procedure Rules are out with the scope of the rules rewrite. **(paragraph 1.25)**

10.4 The SCJC considers that the new civil procedure rules should set out, at the beginning of the rules, a statement of principle. Judges should be obliged to take account of this statement of principle when interpreting the rules and when making any case management order under the rules. Parties, and their representatives, should be obliged to assist judges in respecting the statement of principle. **(paragraph 2.9)**

10.5 The SCJC considers that the statement of principle should have as its core consideration the doing of substantive justice between the parties. It should also set out that doing substantive justice means taking account, in a proportionate way, of the cost of doing justice, and that efficiency is an important aspect of doing substantive justice. **(paragraph 2.14)**

10.6 The SCJC considers that the new civil procedure rules should not continue the historic distinction between petition and summons procedures. (**paragraph 3.10)**

10.7 The SCJC also considers that ordinary actions and summary applications in the sheriff court should be commenced in the same manner. **(paragraph 3.10)**

10.8 The SCJC considers that the new civil procedure rules should provide for certain actions to be allocated to a fast-track procedure, and that the judge should be able to transfer cases between fast-track procedure and active case management. **(paragraph 3.15)**

10.9 The SCJC considers that the new civil procedure rules should provide that all remedies are available under both the fast-track and case-managed procedures. **(paragraph 3.17)**

10.10 The SCJC considers that the new civil procedure rules should provide for proof in fast-track procedure to be limited to matters ordered by the judge. **(paragraph 3.20)**

10.11 The SCJC considers that the rules should encourage concise and focused pleading, with a power for the judge to order adjustment, narrowing, clarification and expansion of pleadings. **(paragraph 3.23)**

10.12 The SCJC considers that parties should be able to set out their views on the form and location of any case management hearings. Taking these into account, the judge should have the power to make any order about the form, location and conduct of a case management hearing, including the power to hold them by conference call, by email exchange or in a courtroom. **(paragraph 4.8)**

10.13 The SCJC considers that, in all cases not allocated by the rules to a case-flow management model, parties should have the ability to set out, at the same time as they give the court their views on the form of any case management hearing, their views on the appropriate form of case management for their cause. **(paragraph 4.10)**

10.14 The judge will then make a decision, after taking account of parties' views, about the appropriate form of case management. **(paragraph 4.10)**

10.15 The SCJC considers that the new civil procedure rules should contain case-flow management provisions for all suitable categories of case, including personal injury cases. The rules should provide for cases to be able to be ordered out of any case-flow management procedure. **(paragraph 4.17)**

10.16 The SCJC considers that the new civil procedure rules should contain powers allowing the judge to order the urgent disposal of any dispute, as well as the fast-track procedure. **(paragraph 4.19)**

10.17 The SCJC considers that the new civil procedure rules should contain a suite of standard orders, providing default case management orders for (i) categories of case which typically arise, and (ii) specialised types of action. **(paragraph 4.24)**

10.18 Parties should have the ability to set out, at the same time as they give the court their views on the form and type of any case management, their views on (i) whether any standard order should be issued, and (ii) whether that standard order needs to be supplemented or adjusted in any particular way. **(paragraph 4.24)**

10.19 The judge should have the power to issue one of these standard orders, supplement or adjust the terms of a standard order, or issue an entirely bespoke order using the judge's case management powers. **(paragraph 4.24)**

10.20 The SCJC considers that parties should be required to lodge a case management questionnaire with their originating writ and defences. **(paragraph 4.26)**

10.21 The SCJC considers that pre-action protocols should be provided for all classes of case where the court has a reasonable expectation of certain steps and disclosure being made by the parties in advance of litigation, in the interests of narrowing the issues in dispute in a cause. **(paragraph 5.8)**

10.22 The SCJC considers that the court should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover specific documents. **(paragraph 5.11)**

10.23 The court should be able to order the lodging of documents constituting, evidencing or relating to the subject matter of the action, or any invoices, correspondence or similar documents relating to it within a specified period. **(paragraph 5.11)**

10.24 The normal procedures for recovery of evidence should also be available to parties. **(paragraph 5.11)**

10.25 The recovery of documents should be competent at any stage in the proceedings. Any documents founded on in the pleadings should be lodged in advance of the first case management hearing. **(paragraph 5.11)**

10.26 The SCJC considers that parties should, on appropriate notice, be able to seek summary disposal of any action. The test for summary disposal should be the opposing party having no real prospect of success and there being no other compelling reason why the case should proceed. The court should, on giving appropriate notice, be able to summarily dispose of an action, or part of an action. **(paragraph 5.14)**

10.27 The SCJC considers that judges should have the power to impose a time limit on any hearing or any part of any hearing, impose a time limit on any step to be taken by a party, vary any deadline or time limit set out in these rules, require a party to provide a written estimate of the length of time it will take to complete a step or take any action, and require a party to submit a written note of argument in advance of any hearing or step with permission having to be sought by motion to raise any other matters. **(paragraph 5.18)**

10.28 The SCJC considers that the new civil procedure rules should provide judges with a broad and general power to relieve parties from non-compliance with rules and orders and to sanction parties for such non-compliance. This power should be wide enough to include all of the possible sanctions identified by the SCCR. **(paragraph 5.21)**

10.29 The SCJC considers that the duties of expert witnesses should be set out in the new civil procedure rules. But the SCJC is not satisfied that experts should be required to disclose the terms of their instruction. **(paragraph 6.2)**

10.30 The SCJC considers that judges should be given the power to make orders about expert witnesses, including a power to require them to confer in advance of proof, in the interests of the narrowing of the issues in dispute and the efficient use of court time. **(paragraph 6.4)**

10.31 The SCJC considers that the court should be able to order that the reports of skilled persons or expert witness be lodged in process, and may determine in light of these that proof is unnecessary on any issue. The default position should be that the report of an expert stands as that expert's evidence-in-chief. **(paragraph 6.9)**

10.32 The SCJC considers that parties should not require to seek the court's permission before instructing an expert witness, but that the rules should provide for a strong power for the judge, where appropriate, to make orders about the identity and scope of expert witnesses and their evidence. **(paragraph 6.14)**

10.33 The SCJC considers that the new civil procedure rules should contain provision for both a set of strong case management powers for the judge concerning the scope of evidence as well as default provision on the agreement of evidence and particular methods for experts to give their evidence. **(paragraph 6.17)**

10.34 The SCJC considers that the new civil procedure rules should be ambitious and innovative in matters of structure, layout and presentation. Considering that these rules are in daily use by the legal profession, the focus of the drafting approach should be usability and readability. **(paragraph 7.4)**

10.35 The SCJC will consider all options for the arrangement of the instruments containing rules of court, based on the considerations set out in paragraph 7.12. **(paragraph 7.12)**

10.36 The SCJC considers that for as much of civil procedure as is appropriate, the prescription of default, generic provisions should be preferred to individualised forms of procedure. **(paragraph 7.19)**

10.37 The SCJC considers that a standard approach to the drafting of elements such as time limits should be adopted, and set out in a style guide for court rules. **(paragraph 7.24)**

10.38 The SCJC considers that a standard approach to the drafting of timetables should be adopted, which is considered sufficiently unambiguous and clear to meet the standard of legal certainty. **(paragraph 7.26)**

10.39 The SCJC considers that a diversity of approaches will be required to the prescription of forms including, where appropriate, laying out forms to include guidance and graphical elements. **(paragraph 7.28)**

10.40 The SCJC considers that the drafting of new civil procedure rules presents an opportunity to introduce greater consistency to the terminology used in court practice. **(paragraph 7.35)**

10.41 The SCJC considers that it should take an ad-hoc, flexible approach to decisions whether to update substantive terminology. In each case, the strengths of the arguments against and in favour are likely to fall slightly differently. In some situations, the case will be obviously made. In other cases an alternative approach (perhaps the use of more explanatory material) might address concerns about intelligibility of terminology. Undoubtedly in some cases, for proper reasons, traditional labels may be retained even where they are perceived to be not quite as modern as they might be. **(paragraph 7.39)**

10.42 The SCJC considers that electronic interaction with the courts should be the default in the new civil procedure rules, except where the court orders otherwise. **(paragraph 8.29)**

10.43 The SCJC will consider the introduction of online, shared, editable pleadings in the new civil procedure rules. **(paragraph 8.30)**

10.44 The SCJC will consider the incorporation into the new civil procedure rules of a system of parallel online blind bidding. **(paragraph 8.41)**

10.45 The SCJC considers that the new civil procedure rules should facilitate the digital recording and presentation of evidence. **(paragraph 8.45)**

10.46 The SCJC considers that the rules should provide for the comprehensive transfer of all cases to the new civil procedure rules, according to a managed timetable set out in rules and under the supervision and control of the court. **(paragraph 9.28)**

10.47 The SCJC considers that the new civil procedure rules should be introduced and come into force for all new actions on a single day. **(paragraph 9.31)**

10.48 The SCJC recommends the introduction of single, consolidated practice notes for each court or sheriffdom. **(paragraph 9.36)**

Chapter 11. Next Steps

Upcoming work

Ordinary procedure in the Court of Session and sheriff court

11.1 The SCJC has decided to focus, over the next year, on the development of a detailed model for ordinary procedure, defended and undefended, in the Court of Session and sheriff court.

11.2 This will involve fleshing out the model set out in chapter 4, and preparing draft rules which cover all of the typical steps that an ordinary action might go through in either court. This will start with the initiation of the action, and work through the court authorising the involvement of other parties, the bringing in of other parties and the defending of the action (or its disposal as undefended), initial case management and allocation, hearings and the decision.

11.3 Rules will not be prepared at this point on fast-track procedure or any other specialist type of litigation, such as family actions, personal injury or any statutory application. While rules will be prepared on incidental matters which commonly arise in a typical action, such as motions procedure and expenses, rules will not be prepared at this point on less typical incidental procedure, such as devolution issues or interventions.

Work-streams

11.4 The SCJC has therefore divided its upcoming work into six work-streams. The work of each will be superintended by the SCJC and the Rules Rewrite Committee. The business of three work-streams will be done by a small reference group, consisting of Committee members and others with specialist expertise which can assist the group.

11.5 The first work-stream will be considered by the Rules Rewrite Committee and will cover **commencement and initial case management**. It will develop recommendations on the form of commencing writ and the form of defences, the case management questionnaire, pleadings, service of the commencing writ, administrative consideration of the writ by the clerk, caveats, vexatious litigants, preliminary pleas, adjustment, the form of process, counterclaims, summary decree and initial case management decisions.

11.6 The second work-stream will be considered by a reference group and will cover **applications and motions**. It will develop recommendations on motions and minutes, interlocutors, transfer and remit of actions, and the involvement of third parties (including sist and transference, party minuters, third party procedure, etc).

11.7 The third work-stream will be considered by a reference group and will cover **decrees, extracts and enforcement**. It will develop recommendations on interim diligence, procedure in undefended cases, decrees and extracts, reponing and reclaiming, decisions and reasons and diligence.

11.8 The fourth work-stream will be considered by a reference group and will cover **evidence, proof and hearings**. It will develop recommendations on the mode of

proof, the rules of evidence, the judge's evidence and information management powers, hearings and the judge's hearing management powers, expert witnesses, documents, vulnerable witnesses, notices to admit and non-admission, and the recovery of evidence.

11.9 The fifth work-stream will be considered by the Access to Justice Committee and will cover **access to justice**. It will develop recommendations on representation and lay representation, lay support, the withdrawal of agents, time to pay and alternative dispute resolution.

11.10 The sixth work-stream will be considered by the Costs and Funding Committee and will cover **expenses and taxation**. It will develop recommendations on expenses, the power of auditors, offers (by pursuers and by tender), settlement and abandonment.

Consultation

Engagement with the public and the professions

11.11 The SCJC believes that these reforms will only be successful if the public and the professions are informed of, and involved in, their development.

11.12 The SCJC has set out in detail the matters which it will be considering over the next year so that the public and professions are best able to be involved in that consideration. If you have any information about these subjects you would like to be taken into account, suggestions for reform connected to these matters or would like to offer to be involved in the work of any of the reference groups, please contact the SCJC's Secretariat on **scjc@scotcourts.gov.uk**.

11.13 The SCJC has also decided to publish regular papers for each work-stream to keep everyone updated about the matters being considered and the decisions being taken.

11.14 The SCJC and its Secretariat will continue to be open and receptive to ideas for reform or improvement submitted by the public and the professions.

Summer tours

11.15 As part of its engagement with the public and the professions, the SCJC will be running a tour in Summer 2017, visiting each sheriffdom, to give presentations about, lead a discussion of, and hear local bars' views concerning the development of new civil procedure rules.

11.16 Information about dates, venues and speakers will be published soon.

Second report

11.17 All of this work will culminate in the publication of the 'New Civil Procedure Rules: Second Report' on ordinary procedure in the Court of Session and sheriff court. This report will contain the details of the SCJC's new model for civil procedure with a set of draft provisions, published for consultation.