

**REQUEST FOR AMENDMENT TO COURT OF SESSION RULES****Purpose**

1. To ask the Scottish Civil Justice Council to amend Rule 37.2.-(1) and (2) of the Rules of the Court of Session to require pursuers to request the issue of a jury precept further in advance of the diet for jury trial than is currently required.

**Timing**

2. Routine. An administrative work-around is currently in place. Staff in the Offices of Court aim to telephone pursuers 70 days in advance of diets for jury trial to request submission of the jury precept. However, pursuers cannot be compelled to submit the precept any sooner than 28 days in advance of the diet. Given the relatively small number of civil cases set down for jury trial this administrative work-around is sustainable at the present time. Amendment of the Rule in due course will reduce the administrative burden on staff and cost to SCTS in chasing-up pursuers for precepts.

**Background**

3. In 2015, with the agreement of the then Lord President and following a successful pilot SCTS changed the system for citing jurors from a two-stage citation process using 'revisal' notices and citations, to a single-stage process using only citations. The 'revisal' notices issued under the two-stage citation process were intended to establish whether potential jurors were contactable, ensure they were eligible and available and prompt any requests for excusal at an early stage. However, the two-stage process was expensive and unreliable and SCTS moved to a more streamlined and cost-effective method of summoning jurors. This produced financial savings and other benefits for SCTS by making use of new technology and providing more choice to potential jurors in how they contact the court.

4. In order to accommodate the removal of the 'revisal' stage in the jury citation process, it has become clear that courts require to issue a greater number of citations to potential jurors, to ensure that there is a sufficient number of eligible jurors to form a selection pool for each jury trial, taking account of parties' rights of challenge. While this can be accommodated within the legislation governing criminal procedure, there exists an upper limit on the number of jurors that can be summoned for cases in the Court of Session.

5. The Court of Session has found that the upper limit of 50 jurors who can be cited for any specified trial is barely sufficient due to the number of people who do not respond to their citation and the number of requests for excusal as of right. Since the move to single-stage citation there has been one instance in which a civil jury trial was not able to proceed due to an insufficient number of jurors attending on the day. There has also been one instance in which a civil jury trial was able to proceed only because the parties to the action waived their statutory right to each challenge the selection of up to four jurors. These incidents have led to reputational damage to SCTS and undermine confidence in the civil justice system.

6. SCTS has submitted a request to Scottish Government to amend primary legislation to remove the upper limit on the number of jurors that can be cited in civil cases and to remove the right of each party to challenge, without reason, the selection of up to four jurors. It is recognised, however, that any such legislative change will take several years to achieve. In the meantime, SCTS is seeking to implement administrative changes intended to minimise the risk of civil jury trials not being able to proceed due to insufficient numbers of jurors being available. One of these administrative changes is to cite jurors for civil cases further in advance of the date of trial in order to:

- a) give those cited more notice of the requirement to serve; and,
- b) allow an opportunity for SCTS to take remedial action where it becomes apparent that a large proportion of those cited for a particular case are entitled to excusal as of right or have strong grounds for discretionary excusal.

#### **Current Rules**

7. Rule 37.2-(1) of the Rules of the Court of Session states:

“Not less than 28 days before the diet for jury trial, the pursuer shall attend at the General Department and request the issue of a jury precept.”

8. Although the rule does not in any way prohibit the making of a request for the issue of a jury precept at any point before 28 days in advance of the diet for jury trial, the reality is that requests are made no sooner than 28 days in advance. Once a request is made and a jury precept is issued, that precept is forwarded, in accordance with Rule 37.2-(4) of the Rules of the Court of Session, to the sheriff principal of the Sheriffdom of Lothian and Borders who causes a list of jurors to be prepared. Citations are produced and are sent to the Offices of the Court of Session for issue. The citations are sent out by first class mail, with the effect that, in general, they are delivered to the recipient’s address around 25 days in advance of the date of trial.

9. Rule 37.2-(2) of the Rules of the Court of Session states:

“Where the pursuer has failed to request the issue of a jury precept under paragraph (1), any other party may request a jury precept not less than 21 days before the diet for jury trial.”

10. This rule provides a safeguard to enable civil jury trial diets to be preserved in the event that the pursuer does not submit a request for a jury precept. However, jury citations generated in response to a request made under this rule will not reach the recipients until approximately 18 days in advance of the date of trial, giving people less time to notify their availability and make any arrangements required to facilitate attendance.

11. Rule 37.2-(1) was previously amended by Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 1999 when the obligation on the pursuer to request the issue of a jury precept was amended from not less than 14 days to not less than

28 days before the diet for jury trial. Rule 37.2-(2) was amended in the same Statutory Instrument to read from not less than 10 days to not less than 21 days.

### **Proposed Amendments**

12. It is proposed that Rule 37.2-(1) should be amended to require pursuers to request the issue of a jury precept not less than **70 days** before the diet for jury trial. This will enable citations to be delivered to potential jurors approximately nine weeks in advance of the diet for jury trial – the same time period as is applied in criminal cases.

13. It is proposed that Rule 37.2-(2) should be amended to enable any other party to request the issue of a jury precept not less than **63 days** before the diet for jury trial. This amendment will maintain the existing safeguard that enables jury trial diets to be maintained in the event that pursuers do not submit a request for a precept.<sup>1</sup>

### **Anticipated Impact**

14. Amendment of Rule 37.2-(1) to require pursuers to request the issue of a jury precept 70 days in advance of the diet for jury trial will enable citations to be delivered to recipients approximately 66 days in advance of the trial diet. This will give potential jurors longer notice of the requirement to serve, affording them more time in which to make alternative arrangements for issues such as childcare and work commitments. This should reduce the need for requests for discretionary excusal.

15. The amendment will not impact on the number of excusals as of right. However, earlier citation will result in Court of Session staff receiving earlier notification of the number of those cited who are ineligible to serve on the jury. Where the numbers of these are high it will be possible, in the time remaining before the trial diet, to issue additional citations to make up the number of competent jurors, up to a maximum of 50.

16. Amending Rule 37.2-(1) in the way requested will result in pursuers incurring a fee for requesting the issue of a jury precept (currently £298) 10 weeks in advance of the diet for jury trial. The majority of cases set down for jury trial settle before the date of trial. It might be argued, therefore, that requiring the jury precept to be requested as far as 10 weeks in advance of the trial diet will result in pursuers unnecessarily incurring costs. Under the current administrative work-around it is not uncommon for the pursuer's agents to decline to request the issue of a jury precept when asked because they anticipate that the case will settle. However, it is currently common for jury precepts to be requested (and paid for) 28 days before the diet for trial and for the case to settle shortly after. In most instances,

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<sup>1</sup> In addition to amendment of primary legislation and amendment of court rules, steps will be taken to add civil juries to SCTS' Jury Portal. This will require people cited as jurors in civil cases to register receipt of their citation via the Jury Portal. Failure to register receipt within two weeks of the date of issue will result in a reminder letter being issued with advice on the potential penalties for failure to attend. It will also provide Offices of Court staff with an indication of how many citations have been undelivered, enabling consideration to be given to whether additional citations should be issued.

therefore, pursuers are already incurring costs which could be said eventually to be unnecessary.

17. In 2016 a total of 65 civil jury trials were fixed in the Court of Session. Three jury trials proceeded. Between 1<sup>st</sup> January and 30<sup>th</sup> September 2017, a total of 18 civil jury trials were fixed. One jury trial proceeded and a second one called but was unable to proceed due to insufficient jurors.

#### **Vires**

18. Rules 37.2-(1) and (2) were originally made in Statutory Instrument 1994 No. 1443 - Act of Sederunt (Rules of the Court of Session 1994) 1994. They were amended by Statutory Instrument 1999 No. 1386 – Act of Sederunt (Rules of the Court of Session Amendment No 5) (Miscellaneous) 1999. Vires to make amendments to the rules relating to matters incidental or ancillary to proceedings in the Court is vested in the Court of Session by Section 103 (1) (b) of the Courts Reform (Scotland) Act 2014.

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