ANNEX B CONSULTATION QUESTIONNAIRE

Consultation question 1

Do you have any comments on the approach taken to splitting the Simple Procedure Rules into two sets of rules?

Comments No comments

Consultation question 2

Are you content with the use of the following terms in the rules?

- ***Claim** – for a standard simple procedure case*

Content Not content ☐ No Preference X

- ***Claimant** – for pursuer*

Content Not content ☐ No Preference X

- ***Responding party** – for defender*

Content ☐ Not content X No Preference ☐

- ***Freeze – for sist***

Content X Not content ☐ No Preference ☐

Consultation question 3

Do you have any comments on the approach taken to updating hard to understand terminology in the simple procedure rules?

Comments
I think that replacing terms that have meaning only in a legal context is a good idea, such as "freeze" for "sist," as "sist" is a word that few lay people have ever heard. I'm less sure that replacing some of the other terminology is necessary, particularly for terms that are already in plain English. For example, I think that laypeople will usually understand that "pursuer" means the person raising and pursuing the claim, as this term already has meaning in plain English. Laypeople also may be more likely to readily recognise that "defender" means the person that the claim has been made against rather than "responding party"—this term in particular may be confusing for laypeople.

Consultation question 4

Is there any terminology remaining in the draft simple procedure rules which you think is unfriendly or difficult for the lay user to understand and, if so, what alternatives would you suggest?

Yes ☐ No ☐

Comments

Although this is a very small point, I wonder why the term "lay support" has been used in Part 2. Previously this has been referred to as "lay assistance" in rules of court. I can see why "support" might have been considered a better term, but it may be confusing to have the same function referred to as "lay support" in the simple procedure while it is still "lay assistance" in the Ordinary Cause Rules and other procedures. In my view, "assistant" has a more clear meaning in plain English than "supporter." "Lay supporter" may also suggest that the primary role is the "moral support" aspect referred to in Rule 8.2, rather than the more important functions such as taking notes and providing quiet advice.

I would also suggest reconsidering describing the simple procedure as "speedy" in the rules and on the forms. My concern is that this is a relative term and it is important to manage the expectations of party litigants, who may have a different idea of what is "speedy." There may be many cases that are not resolved quickly, through no fault of the court. I think that "as quickly as possible," which is used elsewhere, is a better term.

Part 5 of the rules makes a useful distinction between "service" and "sending," of court documents, but the sound and the meaning of these terms is perhaps similar enough to cause confuse. It is difficult to think of a plain English term for "service," but perhaps even referring to it as "formal service" makes the difference more readily understandable?

Consultation question 5

Do you have any comments about the approach taken to the numbering and layout of the rules?

Comments No comments.

Consultation question 6

Do you have any comments about how, and where, the rules should be presented on the internet?

Comments Putting a link to the rules on the front page of the SCTS website might be a good idea (rather than having to go through the "drop down" menu) as it could make them easier for parties to find and for court staff to give parties the web address. As with the rules currently, each heading could be clickable and have a "jump to" for the individual rules within the section. It might be a good idea to make them available as a PDF as well, but in the first instance it is most convenient to open as a webpage. In some portions of the rules currently on the website, each chapter has to be downloaded individually and then opened. This makes it difficult to browse the rules and check things quickly, so I think that this should be avoided if possible.

Consultation question 7
Do you have any comments on the approach to headings in the Rules?

Comments No comments.

Consultation question 8
Do you have any comments on the approach taken to minimising the number of hearings?

Comments

The approach taken seems contrary to the SCCR's recommendation that the first hearing should be "in effect a case management hearing"—the consultation paper states that the presumption is that the case will be determined at the first hearing and case management hearings should only be held when necessary. In my view, where party litigants are involved, the presumption should be that a case management hearing would be held in the first instance. There is value in the opportunity for the sheriff and litigants to communicate face-to-face and clarify the issues of the case and the possibility of settlement at this stage. Going straight to an evidential hearing places a requirement on party litigants to have their cases, including productions and witnesses, fully prepared at the very beginning of the process. Parties who are represented by solicitors (who are far more aware of the process and how to draft a relevant case in fact and law) would be placed at an even greater advantage than they already under the current rules. Some party litigants may lack the literacy skills necessary to set their case out properly in writing, and a hearing gives the sheriff a chance to address this and ascertain any other accommodations parties may need.

Another difficulty is that party litigants will not always know what is relevant to their case in fact and law. I appreciate that the sheriff will have a relatively free hand in dealing with cases, but allowing the full hearing to be too much "at large" creates the risk of a lack of fair notice and unfairness to the opposing party. At the same time, limiting parties too closely to their initial pleadings may be unfair to party litigants. A case management conference provides the sheriff with an opportunity to discuss and clarify the legal and factual issues to be dealt with at the evidential hearing.

While there are cases where dispensing with a case management conference is likely to be appropriate (such as very simple payment disputes and cases where both parties are represented) I think that this should be the exception rather than the rule.

Consultation question 9

Do you have any comments on the approach taken to alternative dispute resolution in the rules?

Comments No comments.

Consultation question 10

Do you have any comments on the proposed principles of simple procedure as set out in Part 1 Rules 2.1 – 2.5?

Comments No comments

Consultation question 11

Do you have any comments on the proposed duties on sheriffs, parties and representatives?

Comments
To manage party litigants' expectations, it may be worthwhile to expand what the rules say about the remit of the sheriff clerk and court staff. Party litigants often do not understand the role of court staff and that court staff may advise them only on procedural matters, and not give them legal advice. As court staff are the first point of contact party litigants have with the court, better setting out their remit would avoid wasted time and frustration.

Consultation question 12

Do you have any other comments on the approach taken in Part 1: The simple procedure?

Comments
No comments.

Consultation question 13

Do you have any comments on the approach taken in Part 2: Representation and support?

Comments
The rules set out for lay representation seem to be those that apply to individuals — will there be a separate section dealing with lay representation for non-natural persons in the simple procedure, as provided for in section 96 of the Courts Reform (Scotland) Act 2014? It seems to me that the criteria are slightly different (particularly with reference to remuneration and the requirements set out in s96(2)(a-b)) and that a separate section of rules within this part and a separate form will be needed for lay representatives of non-natural persons. It appears from the rules that the lay representative is entitled to appear for the litigant when the litigant is not present himself (particularly in terms of Rule 5.1), but this could perhaps be clarified? If this is the case, as the lay representation form may be presented for the first time at a hearing (rather than with the claim form itself) I'd suggest that it should include a section on the form for the party litigant to sign as well to confirm the representative is authorised to act for him.

Consultation question 14

Do you have any comments on the proposed timetable for raising a simple procedure claim?

Comments

I found the timetable confusing at first glance. As I read it, the minimum period of notice for the claim is still the usual 21 days, but as far as I can tell that is not stated outright in the rules. What occurs if the attempts to serve the claim form by recorded delivery are returned or the claimant is otherwise unable to serve the claim form in time to allow for the period of notice to elapse before the response date? Under the current small clamims and summary cause (abbreviated as "SC" here) rules the pursuer has to lodge a minute for re-service—does the claimant under the simple rules have to seek a set of fresh dates, and if so how do they go about this?

In respect of the timetable overall, it seems to me that much of the increased efficiency in the new procedure is at the expense of the responding party. As I understand it, if the claim form is served on the last date for service, the date for first consideration is fixed at 35 days later. Thus if the form is served on the last date for service and this is day 1, the response form must be with the court by day 21. (I appreciate that the claim form might be served some time in advance as well, which would allow for more time.) Where the form is served by recorded delivery, the responding party might not receive the form for several days. Even if it is received promptly, this leaves the responding party only three weeks to determine whether to defend the claim, draft his response form, ingather and list his supporting documents and list his witnesses. Party litigant responding parties are likely to need at least some time to research their position or seek advice. It would be difficult for many to get an appointment with advice agencies such as CAB within this timescale. Parties who wish to be represented would also need time to find a solicitor, and the solicitor would have to act very quickly to take instructions, gather all of the required information, and draft and return the forms in time.

Under the current small claims and summary cause procedures, the defender has at least 21 days just to decide if he will defend the claim, and does not have to lodge defences in writing (if at all) until after the first hearing. In the ordinary cause procedure when the initial writ is served on day 1, the defender has until day 21 to decide whether to defend the claim and return the notice of intention to defend, and until day 35 just to lodge defences alone. I think that the proposed timescale for the simple procedure puts too much pressure on the responding party and places him at a great disadvantage as compared to the claimant, who can prepare the entirety of his case in his own time before lodging the claim form. In my view, particularly in light of the fact that the responding party must prepare his entire case at this stage, additional time should be allowed. (Although I appreciate that this creates the difficulty that, in cases that are not defended, the claimant will have to wait longer to seek decree—as far as I can tell, the only real options are to tolerate this to allow for a longer timescale, keep the timescale shorter, or adopt additional procedure similar to that in the ordinary cause that allows the responding party to either fail to respond or note his intention to defend the case and then gives him further time to lodge his defence.)

Consultation question 15

Do you have any other comments on approach taken in Part 3: Making a claim?

Comments
The addition of examples is helpful—perhaps additional examples for each type of claim (for example, actions for delivery) available under the simple procedure could also be included? I appreciate that this would make the rules longer, but it could save parties and court staff considerable time.

Consultation question 16

Do you have any comments on the flowchart (at Part 4 Rule 2.4) setting out the options available to the responding party when responding to a claim?

Comments I think that this is helpful—my only suggestion is that, as the rules have to cater for many different people who may process information differently, the procedure could perhaps be set out in a narrative form as well.

Consultation question 17

Do you have any other comments on the approach taken in Part 4: Responding to a claim?

Comments
As noted above, I think that the amount of detail required in the response form (as set out in Rules 3.1-3.6) is too much to ask for in a relatively short timescale, both for party litigants and those who choose to engage solicitors.

Consultation question 18
Do you have any comments on the approach taken in Part 5: Sending and service?

Comments

I think that Rule 6.1 (relating to service on a party when their address is not known) in this section needs to be expanded somewhat. It is also not clear how the claimant goes about seeking an order for the claim to be served by advertisement. I'd suggest that some guidance as to when it is appropriate to serve an action by advertisement has to be built into the rules, as it is in the current SC rules and the current OCR rules stating that is to be granted when the address "is not known and cannot reasonably be ascertained." It may be that the intention in the simple procedure is to give the sheriff a wider discretion in granting service by advertisement, but my concern is that laypeople will not understand what is required. Party litigants often do not fully understand the importance of providing fair notice of their claim to the defender and are unlikely to be aware of the extent of the information the sheriff will require to decide whether service by advertisement is reasonable. They may then just lodge claim forms with "unknown" in the address field, providing no information as to why service by advertisement should be granted. (There is also no place on the claim form to provide this information.) Forms without at least some information will inevitably have to returned, leading to delay and unnecessary work for court staff.

My suggestion would be to clarify the rule to say something like "If you do not know and are not able to find out the responding party's address, you may apply to have the claim served by advertisement." Additional information (such as why the party's address is unknown and what efforts the claimant has made to find the address) could then be sought in either an additional box on the claim form or perhaps an additional application to be included with the claim form. In my view, the value of having a separate application outweighs the inconvenience of having to direct parties to an additional form. The form could provide information specific to cases where the address is not known (such as suggesting steps that the claimant may have taken to find the address) without cluttering up the principal claim form. Perhaps more importantly, it is not uncommon for an order for service by advertisement to be sought at a later stage, after service by recorded delivery and/or sheriff officer has failed. I think that an additional form is thus needed anyway for these cases, to allow litigants to request service by advertisement at this point.

Consultation question 19

Do you have any comments on the proposed procedures for settlement and for undefended actions?

Comments

It is clear how the procedure for settlement it will work when the sums are paid and the claim is dismissed within the 21 days provided, but less so if the application for decision is not sent within this time period. What sort of order will the sheriff usually issue under these circumstances? As the claim has been admitted and there is no defence lodged, it seems that neither a case management conference nor a full hearing is appropriate. There is also the possibility that claimants who have been paid will simply forget to lodge an application to have their claim dismissed (much as they often simply fail to attend hearings in the small claims courts now after they have been paid) and first orders may be issued unnecessarily. Additional guidance for parties and sheriffs may be useful here.

I note that the rules and Application for a Decision do not appear to make provisions for parties to seek an order for "expenses only" when the principal sum only has been paid. These orders seem to be sought fairly regularly under the small claims and summary cause procedure—is the intention for the simple procedure to eliminate this practice?

Consultation question 20

Do you have any comments on the proposed model for case management conferences?

Comments
It may be worthwhile to insert a provision into Rule 6.3 similar to that in the existing SC rules that the sheriff should (or, perhaps more appropriately here, may) make a note of the issues to be dealt with at the full hearing, and add that this should also be communicated to parties. This is covered somewhat already under rule 6.3 (a), but I think that there is value in ensuring that parties know the relevant issues for the full hearing, and that the court can confirm that this was communicated to them. I suspect that this will be particularly true in cases require a case management conference.

Consultation question 21

Do you have any other comments on the approach taken in Part 6: The first consideration of a case?

Comments

I note that Part 1, Rule 7.7 and the Standard Orders in Part 16 provide for the ability of the sheriff (with the parties' consent) to decide the case on the papers, but I do not see this mentioned as a possibility in Part 6 or a full draft order. I think that, if this is to be done, the procedure needs to be fleshed out in the Rules to a greater extent. My concern is that the court must ensure that party litigants in particular are providing informed consent for their cases to be dealt with in this manner, as they are essentially giving up their right to a hearing. They may also not fully understand the distinction between decisions in fact and in law and what information or argument to provide in their forms. They may feel like they have not been properly "heard" if there is an adverse decision, which in turn may lead to unnecessary appeals. Part 6 would be a logical place in include a provision setting out that the sheriff may ask to consider the case on the papers as a first order. There should also be a standard order for the sheriff to request consent for this type of consideration, to ensure that all parties are given the same information and are able to make an informed decision.

Consultation question 22

Do you have any comments on the approach taken in Part 7: Orders of the sheriff?

Comments No comments

Consultation question 23

Do you have any comments on the proposed model for freezing and unfreezing cases?

Comments No comments

Consultation question 24

Do you have any other comments on the approach taken in Part 8: Applications by the parties?

Comments

I note that Part 8 provides for an "application to become an additional party", but that the rules do not provide for a form of third party procedure. The latter, along with provision for commission and diligence, is currently allowed under the summary cause rules. (I assume that the Simple Procedure (Special Claims) Rules include these procedures, particularly as these rules will include the personal injury procedure?) Will these orders be competent in the simple procedure? How can parties seek any other order not provided for in Part 8 or in the forms? There do not appear to be forms for an application to amend or for abandonment as well—will these be in the final draft of the rules, or will there be a standard "blank" form? My concern is that, if the ability of parties to request orders in writing (as is currently done using the incidental application in the SC procedures) is limited and there are no hearings prior to the full hearing where the parties can make verbal motions, the procedure will be too inflexible. While I appreciate that the procedure is intended to be simple, in my view it should also be robust enough to handle reasonably complicated claims.

I note that applications are "sent" rather than "served" on the responding parties. As most applications will be considered out of court, this raises the concern that there will not be proof that the responding party has received or even been sent the application and that they have had an opportunity to note any objection before an order is made. However, I appreciate that requiring parties to serve these applications by recorded delivery or sheriff officer is disproportionate. The rules also indicate that the responding party must return any objection to an application within "7 days," but how is the 7 days determined? When does the 7 days begin? I may have missed this provision, but as far as I can tell there is no place on the application to freeze or unfreeze to indicate the date that it has been sent. Most party litigants will interpret this to mean 7 days from their receipt of the application, but this date will be different depending on how it is sent (e.g. by email or post). It may need to be clarified somewhat. Perhaps the application forms could include a section to be completed by the applicant indicating the date and method that the application has been sent to the responding party.

Consultation question 25

Do you have any comments on the approach taken in Part 9: Documents and other evidence?

Comments
One practical matter that could perhaps be considered at this stage is how copies of documents and productions are to be provided to party litigants who are unable to borrow them. The table of court fees provides for a copy fee that can become considerable if there are many pages to copy, and making these copies can take up a lot of time for court staff. Perhaps a decision should be taken on whether party litigants should be uniformly required to pay copy fees for productions (or if they should be waived) and make this clear in the rules so litigants and the court know what to expect?

Consultation question 26

Do you have any comments on the approach taken in Part 10: Witnesses?

Comments
The period of notice for citing a witness should perhaps be longer than 7 days. As witnesses are to be cited only when the litigant has not been able to arrange for them to appear (possibly because they do not wish to) I think that it would be better if they are not notified at the last minute.

Consultation question 27

Do you have any comments on whether the detailed provisions on documents, evidence and witnesses are necessary in the Simple Procedure Rules?

Comments
I think that provisions are appropriate and necessary. It keeps the simple procedure as informal as possible, while still providing for the requirements of fair notice.

Consultation question 28
If you think that any of this provision could be dispensed with (or any additional provision is necessary), please identify that provision.

Comments
No comments.

Consultation question 29

Do you have any comments on the approach taken in Part 11: The hearing?

Comments No comments

Consultation question 30
Do you have any comments on the approach taken in Part 12: The decision?

Comments

It may be worthwhile, either in this section or in the duties of parties, to make it clear that it is the responsibility of the "winning" party to enforce the decree once they have the decree form. I think that this is a common misconception amongst party litigants, who often believe that the court enforces payment or performance of a decree, and again it is worthwhile (and time-saving) to manage their expectations.

I note that the simple procedure rules differ from the SC rules on recall of decree in that there is no longer a requirement to lodge an application within one year (SC Rule 22.1(8)) or 14 days of service of a charge for payment (rule 22.1(7)) and that the sheriff is no longer required to recall the decree (rule 22.1(13)). This brings the simple procedure more in line with the reponing procedure in the ordinary cause, but I wonder if perhaps some form of time limit should be included. Under these rules, any decision (apart from dismissal) made in absence remains "live" and subject to revocation indefinitely. This could prove more problematic in the simple procedure than in the ordinary cause, as there will be a higher volume of cases. I think that inclusion of a one-year deadline from the date of the decision, and perhaps a longer additional deadline of 28 days from service of a charge for payment, is reasonable. It should be within the sheriff's powers to grant revocation if it is shown that service was invalid or ineffective and that party truly didn't have notice of the decision, but otherwise an indefinite period for revocation for debts of this size seems disproportionate.

This is a minor point, but I think that for the sake of being clear to party litigants, the difference between decree of dismissal and decree of absolvitor should be set out either at Rule 4.1 here or in the interpretation section. It may not be possible to substitute a term in plain English, but even just adding something like "This means that the same claim cannot be raised in court again" at the end of Rule 4.1(e) would explain the distinction.

Consultation question 31
Do you have any comments on the approach taken in Part 13: Other matters?

Comments
No comments

Consultation question 32
Do you have any comments on the approach taken in Part 14: Appeals?

Comments No comments

Consultation question 33
Do you have any comments on the approach taken in Part 15: Forms?

Comments

Consultation question 34
Do you have any comments on any individual forms?

Comments

On the Claim form, I think that there will need to be more than "Where did this take place?" to establish jurisdiction, particularly for party litigants. Neither the form nor the rules tell party litigant how to determine where to lodge their claim, and I suspect that many will be inclined to automatically send the forms to their own nearest sheriff court. This may be incorrect and cause delay and unnecessary work for court staff. I appreciate that advising on jurisdiction can border on providing legal advice, but it might simplify matters to include examples or the most basic methods of establishing jurisdiction (eg, the address of the responding party) and include a box asking the claimant to explain why he has raised the case in this court.

I think that the parts of the section that asks for the crave of the case may be worded too broadly as well, particularly "I want the responding party to be ordered to do something for me". I understand that this is included to allow for orders *ad factum praestandum,* but I'm concerned that, particularly in the absence of further guidance, this suggests to party litigants that the remit of the court is far wider than it truly is—it invites the party to write in virtually anything. Parties may even interpret this is allowing them to seek orders amounting to something like interdict, for example "I want the court to make an order for Mr Jones to stay off of my property."

I think that there is also a good possibility that party litigants will not know how to properly frame orders, apart from orders for payment, in a manner that is sufficiently specific and that gives the responding party fair notice of the claim, and that (if the case is undefended) will allow the court to issue an order in the proper terms. Again further examples would help, particularly for actions such as delivery. I appreciate this is not an easy problem to address, but I'd suggest that there should at least be some sort of note either in the rules or on the form indicating that it is the responsibility of the litigant to ensure that the order sought is appropriate given the facts and circumstances of the claim, and that they may wish to seek advice if they are unsure.

Consultation question 35

Do you have any comments on the proposal to include standard orders in the rules?

Comment
No comments.

Consultation question 36

Do you have any comments on the terms of the standard orders included in the draft rules?

Comments No comments

Consultation question 37
Do you have any comments on the approach taken in Part 18?

Comments

Consultation question 38
Do you have any other comments on the draft Simple Procedure Rules?

If there will be no additional guidance to the rules, it may be a good idea to include an appendix providing separate "idiot's guides" to the procedure for claimants and responding parties, perhaps in the form of a flow chart with reference to the section of the rules for each step? This would be useful for quick reference. Unfortunately I suspect that most party litigants will not read the rules through in their entirety and will be looking only for the steps that they need to take. I worry that many will just pick up the phone and call the court if there is no additional guidance, which will take up court staff's time when they could be dealing with other matters.

I have noted a few concerns about the procedure overall above, although I appreciate that it is no easy task to devise a procedure that it both efficient and user friendly. I do, however, think that the some aspects of the process may be overly complicated. In my view, if the fixing of a hearing in the first instance as in the current SC procedures is to be eliminated, further consideration should perhaps be given to following a model closer to that used in the ordinary cause. I consider that fixing the date of first consideration creates an unnecessary time pressure, particularly as service of the claim form is often the most variable and unpredictable aspect of the process in terms of the amount of time it takes. The need for (often repeated) orders for re-service is one of the biggest disadvantages to the SC procedure, but was balanced by the value of having an automatic hearing in the first instance. As this is not needed in the simple procedure, it seems more sensible to me to not to have a fixed date, but to require the response form by the last date for the period of notice (although, as I have noted, I think that more time should be allowed if a full defence must be lodged) and then sent to the sheriff at that time to make first written orders, with the procedure to continue as set out thereafter.

As far as I can tell, this method modelled on the ordinary cause creates two main difficulties: first, the claimant must then calculate the period of notice himself in order to know whether a response has been lodged in time. However, as the form will be served by the court (or a solicitor or sheriff officer) this can easily be provided by the court. Secondly, this means that the amount of time before the case is before the court is undefined, as the claimant may take some time to serve the form, and the claim form remains outstanding or "active" indefinitely if he does not serve it or fails to lodge an application for decision. However, I think that it is reasonable to place the onus on the claimant to ensure that the form is served promptly and that the action thereafter progresses, and he has the incentive to do so if he wishes to have his claim resolved. As in the ordinary cause, provision could be made for the instance to fall on the form if it is not served within a set period of time, or if an application for a decision is not lodged. In the ordinary cause this is a year and a day from the date of service or the expiry of the period of notice, but something like six months would probably be more appropriate here.