

## 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
Adopting two sets of rules is a sensible approach. Complications can be caused at present with the use of summary cause procedure for personal injury actions. In this respect, having two separate sets of rules is preferable.

### 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

- Claimant – for pursuer

Content  Not content  No Preference

- Responding party – for defender

Content  Not content  No Preference

- Freeze – for sist

Content  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?*

<p>Comments</p> <p>It is necessary for some terminology to remain in the rules as coming to court is a legal process and there are certain matters which require the use of slightly more technical language (as mentioned at paragraph 24 of the Consultation Paper). We would support the idea (mentioned at paragraph 39 of the Consultation Paper) of having links to definitions of terms used within the rules available on the internet to assist individuals when they are reading the rules.</p>
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**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

Views were mixed in relation to some of the terms used. Some felt that the use of the term "freeze" rather than the term "sist" was not particularly helpful. Confusion may be caused by the fact that the term "freeze" has a different meaning in relation to court proceedings in England and Wales. It may also not be clear to party litigants what "freeze" means, particularly where the proposed rules define it as meaning "to sist the case". It may be preferable to have a very basic list of defined terms with "sist" being defined as "to put the action on hold".

Under the current Small Claims and Summary Cause rules it is possible for an action to be raised against a defender using their trading name (and a decree granted in the terms of a trading name is also enforceable). Clarification as to whether it is still possible to define a responding party using only their trading name would be helpful. The removal of the ability to litigate using a trading name would be detrimental to claimants who were looking to raise an action against a responding party which was known to them only on the basis of a trading name.

**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

Having a link to the rules available from the Scottish Courts and Tribunals website would be helpful. As mentioned in the response to question 3, having links to definitions set up within the rules could also be helpful for parties unfamiliar with the rules.

It could also be helpful if the rules could be accessible on alternative devices (such as a tablet or mobile phone) as individuals who are looking to access a copy of the rules may be doing so via these methods.

**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

In general it was felt that limiting the number of hearings and the use of written orders could be beneficial. It would be useful to ensure that written orders could be clear as to any decisions regarding what was to be discussed at future hearings or any information to be provided where future hearings might be dealt with by different sheriffs. However, it would be necessary to wait to see how these methods operate in practice to determine the extent of any benefit which would be achieved from this.

**Consultation question 9**

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

Comments

It was generally felt that it should be remembered that, whilst it may be helpful to consider alternative dispute resolution in some cases, it would not be suitable for all cases and this should be borne in mind to avoid the referring of cases to alternative dispute resolution if there was likely to be little practical benefit from this. In this regard there were concerns as to what was intended by parties being "encouraged to settle disputes by negotiation" in part 1 rule 2.4.

When considering whether alternative dispute resolution would be helpful, parties opinions and indeed those of the sheriffs may depend on the facilities which were available for parties who wished to utilise alternative dispute resolution. The mediation service available in Edinburgh Sheriff Court is an example of a particularly useful option as it will be relatively easy (and cost effective) for parties to arrange for a mediation using this service. However, in other courts where no such services are as readily available, alternative dispute resolution may be much less attractive and parties may consider that the costs of engaging with alternative dispute resolution in these circumstances would be uneconomic where the sums sued for are not high value.

There was also some concern as to what would happen if a case were to be transferred to alternative dispute resolution at the first hearing but this was not successful.

**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

Views were mixed in relation to the inclusion of principles within the rules. Some felt that the inclusion of principles may make little practical difference other than setting out the mission statement of the court in applying the rules.

There was also some concern that what was intended by some of the principles was not entirely clear. One example of this is mentioned in the response to question 10 above. Another example is in part 1 rule 2.5 where it is provided that "Parties should normally only have to come to court when it is necessary to do so to resolve their dispute". This could be indicative of an intention to avoid cases calling in court unless it were necessary or, instead, indicate parties should seek to resolve disputes prior to raising claims or using other methods such as alternative dispute resolution.

**Consultation question 11**

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

Comments

Following on from the comments in question 10 above, some concerns were raised in relation to requirements for parties and representatives "to respect the principles of simple procedure" and for the sheriff to manage cases in a way which was compatible with the principles. This may be difficult where it was not immediately clear what the principles required.

There was also concern that the reference to the sheriff's powers in part 1, rule 7.2 which allowed for the sheriff to "do anything or order parties to do anything" was lacking in clarity and a clearer definition of the sheriff's powers would be beneficial. More importantly, it is simply wrong as a matter of promoting legal certainty in the judicial system to endow the judiciary with such a broad discretionary power.

**Consultation question 12**

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

Comments

It was felt that the approach of setting out what parties ought to do in the rules could be helpful in providing assistance to party litigants with no previous experience of the rules.

**Consultation question 13**



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

<p>Comments</p> <p>It may be useful for a party who wishes to have representation by a lay representative at a hearing in terms of part 2 rule 4.4 to provide a copy of the Lay Representation Form to the other party to the dispute in advance of the hearing so that they are aware of who will be appearing at the hearing.</p>
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**Consultation question 14**

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

<p>Comments</p> <p>No comments</p>
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**Consultation question 15**

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

Comments

Questions were raised as to what would happen if a party sought to refer to additional documents or have evidence from different witnesses who were not mentioned in their claim form or response form.

**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

No comments

**Consultation question 17**

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

Comments
No comments

**Consultation question 18**

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

Comments
Allowing for service by advertisement on the Scottish Courts and Tribunals Service website in terms of part 5, rule 6.2 is beneficial.

**Consultation question 19**

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

Comments
No comments

**Consultation question 20**

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

Comments
Concerns were raised about the potential lack of teeth for non compliance with the written orders in part 6, for example, as there was not provision for decree by default to be granted for a failure to comply.
Under rule part six, rule 6.4 it is stated that the sheriff can make a decision at a case management conference only with the consent at the parties. It would be helpful if there were provision to allow the sheriff greater powers so that, if it was clear to the sheriff following a case management discussion that there was not proper basis either to the claim or the response, the sheriff could either dismiss the claim or grant decree, either on the request of one party or exercising his own discretion. This would avoid the situation where it was necessary for the sheriff to fix a further hearing, in circumstances where there was no merit in doing so, which would result in further delay and cost before the matter could be brought to an end.

**Consultation question 21**

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

Comments
No comments

**Consultation question 22**

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

Comments
It was generally felt that it would be helpful for orders of the sheriff to be issued in writing. It would be useful if it was clear what sanction there would be for a failure by one party to comply for the sheriff's orders in terms of part 7, for example, could a claim be dismissed if there was a serious failure by the claimant to comply with the orders?
Setting out a clear consequence for failure by parties to comply with the rules would fit in with the principle for parties to follow the orders of the sheriff in part 1, rule 5.7.

**Consultation question 23**

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

Comments

As noted in the response to question 4 above, some felt that the use of the terms freezing and unfreezing was not particularly helpful as these terms were unlikely to provide greater clarity than the term sist.

However, the procedure does seem in some respects similar to what is allowed for under the current rules. The ability of a sheriff to deal with these requests on the basis of papers will be helpful. Having the option to freeze the case at an early stage may be helpful for a respondent who has not had much notice of the claim and requires to carry out some investigations into the claim in order to allow them to properly respond to it.

**Consultation question 24**

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

Comments

The possibility of applications being be dealt with on the basis of the papers is useful.

As noted in the response to question 15 above, some clarity as to the procedure for parties to make amendments to the lists included in their claim or response forms of either documents to be relied on or witnesses from whom evidence would be led would be useful.

**Consultation question 25**

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

Comments
No comments

**Consultation question 26**

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

Comments
No comments

**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  No further comments
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**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  It might be helpful for parties to also provide the court and their opposing party with an estimate of how long they think will be required to lead evidence on their cases. This could assist the court with allocation of hearing. It may even allow the court to give parties more specific times as to when their case would be dealt with by a sheriff (in a manner more akin to the English system) and avoid the time spent by parties waiting for their case to call.
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**Consultation question 29**

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



Comments

It might be helpful for the rules to provide some further guidance as to how hearing would normally proceed, for example, that it would be normal for the party who has raised the action to set out their case first. In addition, some guidance on how to deal with taking evidence from witnesses, could also be useful for party litigants who are not familiar with this.

**Consultation question 30**

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

Comments

No comments

**Consultation question 31**

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

Comments

As regards the transfer of a case out of simple procedure, it might be of assistance to mention that this would be done in accordance with the procedure set out in the Courts Reform (Scotland) Act 2014, ie, following an application by a party, as party litigants may not be familiar with this provision.

**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
No comments

**Consultation question 34**

*Do you have any comments on any individual forms?*

Comments
No particular comments other than the wording used on the forms is quite clear.

**Consultation question 35**

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

Comments
No comments

**Consultation question 36**

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

Comments
In relation to the first standard order in part 16 (Response Form received: ordering a hearing), is it noted that this includes a requirement which provides "both parties are ordered to bring the original documents to the hearing". This may cause difficulty when the original documents are not immediately available and it could be useful to allow parties to bring copies of documents instead in cases where the terms of the original documents are not in dispute.

**Consultation question 37**

*Do you have any comments on the approach taken in Part 18?*

Comments

Reference is made to the response to questions 4 and 23 above regarding the use of the terms "Freeze the progress of a case". No further comments.

**Consultation question 38**

*Do you have any other comments on the draft Simple Procedure Rules?*

Comments

It is appreciated that there is a requirement for a review of the procedures to allow a "speedy, inexpensive and informal procedure" for helping people sort out disagreements about matters of a lower monetary value.

A considerable number of actions currently raised within the Small Claims/Summary Cause court unfortunately relate to non payment of debt where claimants are left with no alternative other than to pursue this non payment via the court system. These actions are not necessarily in dispute. The jurisdiction limit of £5,000.00 is also not that inconsiderable an amount and non or delayed payment of debts up to this limit can be the difference of survival, whether the claimant be incorporated or unincorporated. Also, as a firm heavily involved in assisting claimants trying to recover money that is due to them one of the most common complaints heard is about the length of time it takes to move from the issue of the action to decree.

The proposed new rules do not take the aforementioned into account. In reviewing the current procedure perhaps consideration should be made as to whether or not "commercial" and "consumer" actions could have separate simple procedures. The "commercial" procedure being more akin to the Ordinary Cause rules - if no response is made by the responding party within a period of service Decree can be moved for by the claimant. This would allow non disputed "commercial" actions to progress to decree quicker. It would also allow the court more time to assist those "people" that are actually in dispute.