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
We consider this to be a sensible approach. We are disappointed to note that there is no intention to consult further prior to drafting a further set of Simple Procedure Rules to cover personal injury claims. We consider that these raise a number of issues which require particular attention and we would suggest that further consultation is appropriate.

Consultation question 2

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

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

Content x Not content ☐ No Preference ☐

- ***Claimant** – for pursuer*

Content x Not content ☐ No Preference ☐

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

Content ☐ Not content x No Preference ☐

- ***Freeze – for sist***

Content ☐ Not content x 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
We consider that if the party bringing the claim is to be known as the "claimant" the corresponding term for the party against whom the claim is directed, should be "defendant" or the current term, "defender." We are not aware of any evidence that this term is not currently generally understood by members of the public and we consider the suggested term "responding party" to be unnecessarily cumbersome, especially so if there is to be more than one such party in an action. We would prefer the term "pause" to the suggested "freeze" as we consider it more accurately describes the effect of a sist.

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 x

Comments No comments

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
They should be easily identifiable and be given a separate section on the Scottish courts website.

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 principle we agree that this is desirable. However we consider that the draft Rules do not fully reflect that aim since they provide in a number of instances, for hearings to be fixed to consider matters which could in many cases be dealt with by the sheriff of consent, without the need for a hearing. The Rules do not appear to provide a mechanism for this to happen.

Consultation question 9

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

Comments
The cost of alternative dispute resolution may in some cases exceed the value of the claim and there is no provision for parties to recover the costs of this. These considerations should be taken into account by the Sheriff when discussing this with the parties.

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
We agree with these principles though are concerned that the principle of rule 2.4 may not be followed through in practice, if there is a continuation of current practice whereby a Defender who states a Defence in good faith and then settles the claim (for whatever reason) can then be penalised by having Summary Cause expenses awarded against them. This serves as a disincentive to settlement and we would be concerned if this principle were carried though into the proposed Rules. We consider that ideally the proposed expenses regime applicable to the Simple Procedure should have been made available in order that it could be considered in conjunction with the draft Rules.

Consultation question 11

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

Comments No comments

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 No comments

Consultation question 14
Do you have any comments on the proposed timetable for raising a simple procedure claim?

Comments It is unclear how much time the Sheriff Clerk will allow for service of the claim form to be completed.

Consultation question 15
Do you have any other comments on approach taken in Part 3: Making a claim?

Comments

We consider that the table of actions / dates shown in Part 3 is not particularly easy to follow and might be better presented in a flow chart.

We consider that it is of crucial importance that any supporting documents being relied upon by the claimant are not only listed in the claim form, but are also lodged in court, or, at the very least, copies are intimated to the defender along with the claim form at the time of service. This is a matter of basic fair notice. The Sheriff Clerk should be required to check the claim form for information on such documents, and that any documents listed are attached. If they are not, and no reason is given in the claim form as to why the documents listed are not available, the Sheriff clerk should have a duty to refuse to warrant the claim form for service. Only in cases where limitation is imminent should an exception be made for this.

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

It should be made clearer in the response form that the responding party is not obliged to complete and return the form themselves, but that they can opt to have this done on their behalf by their appointed representative. The current wording of the form might give the impression that they must reply and give details of their representative in the form. This could lead to parties who have representation available to them not receiving the benefit of advice from their representative before returning the form.

We consider that it may in some cases be unrealistic to expect a responding party to be in a position to list their witnesses and documents at the time of lodging the response form. They may have had no prior notice of the claim. Where this information can be given in the response form, we take the view that it should be given. However where it cannot be given there should be space on the form for the reason for that to be explained.

Although personal injury claims are not covered by this consultation, we understand that no further consultation may take place prior to rules being drafted for personal injury claims. In such cases, we consider that the claimant must be required to provide, in the claim form, full details of the injury sustained, identify all medical practitioners and institutions from whom treatment was sought, and where available, lodge and intimate to the responding party a copy of any expert medical report being relied upon. If no expert report is lodged along with the claim form, the claimant must be required to state whether it is their intention to obtain one.

There is no option in the response form to state that liability for the claim is admitted but that the amount claimed is in dispute. This option should be provided.

We also consider that there should be an option in the response form to seek to introduce a Third Party into the action. There does not appear to be any provision in the Rules for Third Party procedure.

Consultation question 17

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

Comments
There does not appear to be any guidance in the Rules for what a responding party should do if they miss the deadline for returning the response form. Legally qualified representatives will be aware of the court's inherent discretionary dispensing power, but party litigants are unlikely to know about this and it would be desirable for the Rules to make specific provision for late response forms. There should also be provision for the claimant to be able to consent to a late response form being received, thus allowing the application to be dealt with by the Sheriff without the need for an unnecessary hearing on the matter.

Consultation question 18

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

Comments There should be provision for lodging forms with the court by email.

Consultation question 19
Do you have any comments on the proposed procedures for settlement and for undefended actions?

The claim form and response form should include clear notices that parties will not receive any reminders from the court in respect of the deadlines given. This is appropriate given that it is expected that many parties will be representing themselves.

Consultation question 20

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

Comments

We consider that these might be useful in some cases but would be concerned that the operation of this provision, in practice, may vary dramatically from court to court. There should be some attempt on the part of Sheriffs Principal to achieve consistency on the question of when case management conferences will be called and what will happen at them.

We do not agree with a provision to the effect that the Sheriff can only determine the case at a case management conference with the consent of the parties. There will be cases where is it clear, on the documents submitted, that the whole claim (or defence) or part of it, is hopelessly incompetent or irrelevant. For example a claim may be time barred or may be directed against the wrong defender, or the response form might not disclose any relevant defence. In such circumstances, after appropriate enquiry of the parties, the Sheriff ought to be able to dispose of all or part of the claim regardless of whether the parties consent.

Finally we consider that provision ought to be made for case management conferences to be held by telephone at the request of one or other of the parties or at the Sheriff's discretion. This would be in keeping with the aim of minimising unnecessary inconvenience and costs. Telephone case management conferences worked very well, in our experience, when they featured in the pilot scheme at Glasgow Sheriff Court in connection with personal injuries actions.

Although not part of this consultation, we would suggest that in personal injury claims, case management conferences should be mandatory or at least the expected norm. The Sheriff should have the ability to continue a case management conference as many times as required in order to ensure that parties are unable to settle the claim and are ready for an evidential hearing, before one is fixed.

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
The proposed provision is that order may be given in writing or in person at a hearing or case management conference. We consider that any orders given in person at a hearing or case management conference should be required to be confirmed in writing by the Sheriff Clerk to each party as soon as reasonably practicable after they are given. We have experienced difficulties arising out of a failure of sheriff courts to issue interlocutors timeously. Adequate resources should be allocated to ensure this does not happen in the new procedure.

Consultation question 23

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

Comments
We have concerns in relation to Rules 5.1, 5.2, and 5.3. Firstly, there is a possibility that they will be interpreted and applied differently in different courts. As with the issue of case management conference, is would be desirable to have some guidance issued as to when this will happen. Secondly, we do not consider that it ought always to be necessary for parties to appear in person at a hearing in terms of Rule 5.2. This runs contrary to the aim of avoiding unnecessary hearings. We would submit that it would be more appropriate to require parties to lodge a letter or form explaining why there has been no move to recall the "freeze" and what they would like to happen. If satisfied with their explanation, the sheriff could make a decision on whether to recall or continue the freeze. If not, he or she could then fix a hearing at which parties would have to appear. This would at least allow for the possibility of the issue being sorted out without an unnecessary hearing.

Consultation question 24
Do you have any other comments on the approach taken in Part 8: Applications by the parties?

Comments

There should be a mechanism for a party to consent to any application made by the other party, thus allowing the Sheriff to make an immediate decision rather than wait the period of seven days allowed in the Rules for an objection to be lodged.

There does not appear to be any provision in the Rules for applications for commission and diligence for the recovery of evidence. This should be included along with style forms.

The provisions on abandonment should include allowance for abandonment of consent, on the basis that there are to be no expenses due to or by either party or on the basis that expenses have already been paid. This would avoid the need for the Sheriff Clerk to fix a hearing on expenses in such cases.

There does not appear to be any provision for the defender (responding party) introducing a further responding party (or third party) whom they consider to be liable to the claimant or from whom they claim a right of relief. This should be provided for along with an automatic period being allowed for all parties to adjust the claim form and response form following the lodging of a response form by the additional responding party.

There should be the ability for the Sheriff to allow the introduction of the further responding party, if it is not opposed by the claimant, without the need for a hearing to be fixed on the application.

Similarly, we consider that where an application is made by someone who is not a party to the action to be allowed to enter the action as an additional responding party, (Rule 8.1) and this is not opposed by any other party, the application should be considered by the sheriff without the need for a hearing and only if the sheriff requires to be addressed on the application should a hearing be fixed. Finally we consider that the terminology used in the Sheriff Court ordinary cause and Court of Session, of "Party Minuter" should still be used in order to differentiate that additional party from existing "responding parties."

Consultation question 25

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

Comments

As already stated we consider that both parties should be required to intimate to the other, copies of any documents upon which they rely, at the time of serving the claim form or response form. If such documents are not available at that time, the reason for this should be explained.

The requirement that these documents are only lodged in court and can be borrowed or inspected by the other party is not conducive to the efficient progress of litigation and adds to the inconvenience to parties and the court. There is no obvious reason why parties could not be required to provide copies of their documents to each other as well as lodge the principals at court. In practice this often happens anyway but it should in our view be a requirement in the Rules.

We consider that a requirement to lodge documents only 14 days before an evidential hearing is not appropriate given that parties need time to consider these and possibly discuss them with witnesses, whether expert or lay. To some extent this will be addressed by requiring parties to intimate copies of their documents along with the claim form and response form, but there will undoubtedly be cases where that is not possible and parties will require to lodge documents later. We would suggest a deadline of 28 days before the hearing would be more appropriate. This is more likely to give parties time to consider their positions and discuss possible settlement. There is a risk that if parties simply don't have enough time to do this before a hearing date, hearings will proceed when the claims might be capable of settlement. This will be particularly pertinent to personal injury claims.

Consultation question 26

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

Comments

We do not consider that citing witnesses on a seven day period of notice is generally not appropriate, and would be concerned at the risk of hearings having to be discharged because witnesses have been cited at such short notice and have been found to be unavailable. Seven days barely allows sufficient time for a postal citation to be returned to the sender and personal service attempted. It would also mean the other party being given very little notice of an application to discharge a hearing, leaving them little time to advise their witnesses of the position.

One of the difficulties we have with the current draft Rules is that they give no indication of how far in advance evidential hearings will be fixed. Ideally we consider that a period of not less than four to six weeks would be appropriate, to give parties a reasonable period in which to cite witnesses and also to give the witnesses themselves reasonable notice of their required attendance at court. While there will always be cases where late citation of witnesses is required, parties should be encouraged to issue citations at the earliest opportunity and to advise the opposing party and the court at the earliest opportunity if it appears that any of their witnesses are available and that the evidential hearing may not be able to proceed on the appointed date.

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
As outlined in other answers we feel that several key issues are not covered in sufficient detail. The issues we have raised will also be of particular relevance in personal injury claims.

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
This is covered in previous answers.

Consultation question 29
Do you have any comments on the approach taken in Part 11: The hearing?

Comments
We consider that the terminology used could be made clearer. The generic term "hearing" is confusing as it is used elsewhere in the rules and is not in our view necessarily indicative of its importance. We consider that it would be better termed "full hearing", "evidential hearing", or "final hearing" or some other similar term that denotes its significance and differentiates it from other hearings that may take place during the progress of the claim.

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

Comments
There should be provision for an application to revoke a decision to be made of consent, thus allowing the sheriff to make a decision on it based on the application and avoid the need for a hearing under Rule 6.1.

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

Comments
There should be provision in the Rules for a party to ask the Sheriff to transfer the case out of the Simple procedure. The draft Rules appear to envisage that only the Sheriff should instigate this. We consider that if a sheriff clerk considers that there may be a fundamental lack of competency in relation to a claim form, or that is had no clear basis in law, they should be have a duty to put the claim form before a sheriff for consideration before it is warranted for service.

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
We have already stated that the Response form should make it clear that it can be completed by the party's representative. We consider that the Response Form could be better worded to state explicitly that if it is not returned to court by the responding party or their representative by the date given, the court may award decree against them. As previously stated there should be options available for admitting liability but disputing the value of the claim, and for introducing a Third Party.

Consultation question 35

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

Comments
We have no particularly strong views on this but consider that as long as they will be used consistently by all courts unless there is good reason to depart from them in any particular case, there may be no need for them to be incorporated into the Rules.

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 We have not seen any part 18 so cannot comment on this. If the question is intended to relate to part 17, we consider that it requires revision. Many of the "special meanings" are specific legal terms which, without further explanation, may be meaningless or confusing to party litigants and lay representatives.

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

Comments

As stated previously we are concerned at the indication that no further consultation will take place before any further simple procedure (special claims) rules are drafted, in particular those for personal injury claims. In our view these are likely to merit further consultation. In particular we have concerns regarding appropriate provisions for the recovery of evidence, exchange of documents and evidence by parties, the timescale over which a claim will be expected to be progressed, and the ability to introduce third parties. These are all relevant to all types of Simple Procedure claims but even more so to personal injury claims.