

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 It is unduly complicated to have two sets of Rules. There should be one set with (if necessary) certain sections or chapters only applicable to certain types of action. Two sets could lead to mistakes being made.
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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>In principle it is to be recommended unless the replacement terminology is confusing or too informal. Freeze/Unfreeze is too informal/conversational and does not fit well with formal court procedures. Alternative language should be considered. It is noted that the interpretation section already seeks to clarify legal terms. This could be extended so that current legal terms are still used but explained in the Rules. Furthermore, having completely different language in the simple procedure from all other civil court actions could cause confusion and error.</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

Absolve/absolving/absolvitor – this is available as an outcome but not defined. It has serious implications for parties and should be explained.

Alternative Dispute Resolution – this is not defined. Terms such as mediation are commonly used and understood but ADR as a concept is not readily understood

First consideration- this concept generally will be difficult for an unrepresented party to grasp

Additional Responding Party Application-this term is not user friendly."Third Party" or "Party Minuter" is easier for users to understand. The rule is confusing at 8.1 indicating that an Additional Responding Party is also called an Applicant.

Frozen/Unfrozen/Application for a case to be unfrozen/ Application for a case to be frozen-such use of language has no place in Rules of court. The term "sist" and "recall of sist" has an established meaning and is readily understood. Alternatives such as "put on hold" or perhaps suspend/re-activate would be more readily understood as an alternative to "sist" as a second option.

Revocation-this term is misleading as it implies a finality which is not the case."Recall of decree" has a recognised and pertinent meaning.

Consultation question 5

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

Comments

The proposed format and layout of the “Rules” is misconceived. The style used is confounding Rules with examples, questions and charts. The headings are in the format of questions. There are illogical insertions and the document does not flow in a logical, user friendly fashion. A number of items such as examples, questions and flowcharts have no place in the Rules. Instead they should form a separate Guidance Note for Users. The recognised format of the Small Claims and Summary Cause Rules with logically flowing Chapters is to be commended in comparison with this document. The causal effect being that it is not user friendly is unduly complicated and lengthy, confusing and contradictory.

Consultation question 6

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

Comments Scottish Courts Website

Consultation question 7

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

Comments The headings as questions suggests FAQs rather than Rules of procedure – ordinary Chapters and headings would be better.
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Consultation question 8

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

Comments

This could mean cases being resolved more quickly and reduce costs but this outcome is more likely in cases involving solicitors. Documents prepared for court by Party litigants often fail to accurately state the claim or defence. It is only when parties attend court and are questioned about the matter that the true nature of the dispute is established. To have matters possibly disposed of without any hearing could lead to a perception that justice has not been done – the aggrieved party has not had their day in court. It could also lead to error – they may have had claim or valid defence, they just haven't explained it properly. Equally, matter may be progressed to a full hearing when they have no merit again because their claim or defence has been badly worded.

In addition, party litigants often don't read the relevant court Rules. They wait to be directed by the Court as to what should happen next. A first hearing when the case is discussed, a hearing appointed and information given about witnesses and documents is often relied on by party litigants to keep them on track.

The new procedure could be counterproductive leading to an increase in decrees being recalled.

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

Comments

Too much emphasis on something people don't necessarily know about or understand. Also, by the time party litigants have taken court action the relationship between them and their opponent may have reached a stage where negotiation/mediation is no longer a viable option and the emphasis on same may result in people feeling reluctant to seek legal redress.

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

It is not clear why a declaration of principles is needed in this document when there are already tried, tested and recognised principles of law to be applied in a court of law.

Rules are there to regulate procedure.

Consultation question 11

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

Comments

The concept of inserting this into the document is confusing Rules with information that more properly would be found in separate Guidance intended for the assistance of parties.

The proposed duties are cumbersome and in some elements fundamentally flawed in law, such as the requirement for previous convictions to be declared in the case of representatives.

Consultation question 12

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

Comments

Much of what is contained within Part 1 seems unnecessary. Rules should be simple, straightforward and succinct. That has not been achieved in this section.

Consultation question 13

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

Comments

This section is difficult to follow. It seems unnecessary and confusing to say “A lay representative is a person entitled to act as a lay representative”. It’s not clear whether a person can ask anyone they want to be their lay representative

The section on lay supporter seems completely unnecessary. Court hearings are not in private and party litigants often bring a family member or friend as moral support. That does not need to be regulated by the Rules. The only restriction on bringing a friend/relative should be if there isn’t room in the court or the person is disruptive. Instead of saying what a companion can or cannot do – it would be enough to say that if a person is accompanied by a person who is not their representative then they are not allowed to participate directly in the process.

4.2 – it should be possible for a party to cover their representative’s or supporter’s expenses

4.6 – this seems oppressive and raises Data Protection and Human Rights issues

Consultation question 14

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

Comments

It is not readily apparent why the current timetable in small claims and summary cause actions is to be departed from. It is not apparent that there will be any benefit to the users, nor whether it would make the process speedier. In fact it seems likely that it will take longer for an action to reach a hearing or other conclusion.

The content and format proposed is unduly complicated and lengthy.

Consultation question 15

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

Comments

Casual examples should not form part of court Rules and should more properly be found in Guidance.

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

The Flowchart should not be in the Rules but instead could be found in Guidance.

The language and format of the section is confusing, combining Claimants information with steps that the Clerk of Court is to carry out.

Consultation question 17

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

Comments

The language and format of the section is confusing, combining the Responding Parties information with steps that the court/Clerk of Court is to carry out.

Consultation question 18

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

Comments

As currently drafted it is not competent to go for Sheriff Officer Service until Recorded Delivery post has failed. Recorded delivery post service is extremely unreliable and it should not be compulsory to attempt it first. It could lead to delay and possible injustice.

Recorded Delivery service in any event is no longer a postal option. Instead, "signed for" and "registered" post are the options.

The language and format of the section is confusing. Party litigants will find it difficult to understand when something should be sent and when something should be served.

Consultation question 19

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

Comments

Party litigants are rarely proactive when dealing with court actions. The requirement to lodge an application for a decision could mean that actions are dismissed for want of insistence simply because the Rules have not been read. A section headed “Undefended actions” would be helpful to direct the Claimant. The section on “first consideration” deals with too many things under one heading. However, there should also be a process for contacting a Claimant who hasn’t put in an application for a decision to ensure it is not as a result of ignorance or oversight.

The language and format is confusing.

Consultation question 20

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

Comments

By contrast with the other sections the part relating to case management is very short. With party litigants it is likely that case management will often be required but the format of these hearings is not made clear. It is stated that parties are required to attend but the consequences of failing to do so are not articulated. A final decision can only be made at a case management hearing with the consent of both so failing to appear will not adversely affect the outcome – and indeed might be to advantage of a party who is trying to delay matters. This section requires more detailed information

Consultation question 21

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

Comments

The language and format of this Part is confusing and not user friendly. There is too much contained in this Part – it would be better divided into shorter sections or Chapters.

Consultation question 22

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

Comments

Very little information is contained within this Part. No information is given about failure to comply with orders and the consequences of same. The language and format of this Part is confusing, for example 2.5 - “give parties an entirely different order.”

Consultation question 23

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

Comments

The language and format of this Part is confusing and not user friendly. It is unlikely that this will be understood or used by party litigants, unless they have taken advice. Party litigants are not proactive and rely on the Court/Sheriff to tell them what the procedure will be. The Rules are lengthy and this section is found late on in the document. The Rules surrounding the process are also quite detailed and unduly complicated. It would be better to have a basic list of applications that can be made together with stated reasons for the applications. Thereafter, a section on how to go about it.

Consultation question 24

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

Comments

Sections 7, 8 and 9 do not sit well in this Part.

Consultation question 25

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

Comments

The Part on documents is hard to follow. This is a key section. In actions involving party litigants it is often one person's word against the other. Documents can be vital to getting to the truth of the dispute. This section should be signposted earlier on and should be easier to understand. The references to "bringing" and "lodging" are confusing. A simple statement that the documents which are to be used must be sent to the court and the other party 14 days in advance of the hearing; and that the sender should keep a copy for their own use which they should bring to the court for the hearing, would be helpful. When parties are notified about the Hearing this requirement as to use of documents should be included in the letter. Generally, the language and format of this Part is confusing.

Consultation question 26

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

Comments

The language and format of this Part is confusing. The section is in the format of Frequently Asked Questions and should be more direct, basic and to the point as regards the procedure to be followed. Additional information should be contained in Guidance.

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

Fairly detailed information about documents and evidence is needed. Much of the information about witnesses could be taken out.

The language and format used is confusing.

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

The language and format used generally is confusing.

Consultation question 29

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

Comments

The Rules on the hearing don't really explain what will take place at the hearing. The focus appears to be ADR and negotiation and does not adequately explain that evidence may be taken from witnesses.

The current Rules of court for a hearing in a Small Claim/Summary Cause are commended as being succinct and to the point.

Consultation question 30

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

Comments

The language and format of the section is confusing.

The use of the word "revoked" is misconceived as it implies a finality which is not the case.

Consultation question 31

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

Comments

The language and format of this Part is confusing and should be more clearly set out under separate and distinct headings such as-Transfer of the cause to another role, Appeals etc

Consultation question 32

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

Comments

The language and format of this Part is confusing to users. A simple set of procedural steps would be more user friendly as in the current Small Claims/Summary Cause Rules.

“Appeal Report” could instead remain as, “Stated Case”.

“Take time to consider the application” could remain as, “Avizandum”.

Consultation question 33

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

Comments

A List of Forms and the Rule to which they apply is a useful Appendix.

Consultation question 34

Do you have any comments on any individual forms?

Comments

They are numerous, lengthy and the language and format are confusing and not user friendly.

Consultation question 35

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

Comments A basic list of Standard Orders would be used by court staff and Sheriffs but not necessarily understood by party litigants.
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Consultation question 36

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

Comments No

Consultation question 37

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

Comments

The interpretation section should be changed to “legal terms” and definition/explanation. The term “special meaning” is not helpful. Everyone using the Rules is aware that they relate to a legal process. A section which defines legal terminology is therefore helpful if it is described as such.

Consultation question 38

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

Comments

In conclusion, it is not considered that they are fit for purpose in their current format and language nor would they be an improvement compared with the current Rules.