Consultation; Ordinary Procedure Rules Response by the Society of Solicitor Advocates

1) **Question 1. Will the “look and feel” of these consolidated rules provide court users with the simplified, harmonized and user friendly procedure sought?**

Compared to the plethora of rules applicable to Ordinary Court of Session Actions, Petitions, Sheriff Court Ordinary Actions and Summary Applications the rules are certainly simplified. In respect that they cover all types of action in both the Court of Session and the Sheriff Court they are harmonized. They are in user friendly language. That does not mean, however that they necessarily create “user friendly” procedure.

A lot of the procedure is relatively easy to follow.

We agree with the proposal that a summons must be raised within four months rather than within a year and a day.

We agree with the proposal that and that summonses and defences should not ordinarily exceed 5000 words.

We agree with the proposal that the same judge or sheriff should, if possible, hear the case from start to finish.

We do not believe that the rules make for predictable procedure. To that extent they are not “user friendly”. The rules are clearly intended to introduce case flow management across the board. However, some types of actions lend themselves to this more than others. Personal injury cases pioneered this kind of judicial management 20 years ago. However, such actions are quite formulaic, and most of them settle, as was recognized by the Coulsfield Report. The course of a personal injury case was always predictable, even before they were subject to case flow management. Many other types of action seen in the courts follow their own unique course. Whilst agents and counsel are able to present a case as they wish the litigants whom they represent have some degree of control. If case flow management is applied to these cases there will be a lack of predictability as to how they will proceed. It will be hard to advise clients about what will be required of them by the courts, and the costs and timescales of this.

These rules would make going to court riskier than it is at present. This is not friendly to court users. Their advisors would have to warn them that although they bear the expense, control of the presentation of pleadings and the evidence rests with the court and not with them. “Orders about presenting information” let the court direct the evidence which is led.

2) **Question 2. Are there any individual rules you think users might find difficult to implement and comply with, and if so what would you do differently?**

There are no specific rules that ought to be difficult to implement.

However, some of the terminology creates confusion, needlessly;

We do not see what purpose is achieved by the draft rules avoiding the term “evidence” and favouring “information” instead.

The current system is clear. Written pleadings convey information which may or may not be correct. The parties lead evidence to prove that their pleadings are correct. Evidence is not the same as information. The draft rules are likely to confuse party litigants. There is the risk that they will think that their written pleadings are enough when, plainly, they are not.

We do not see what purpose is achieved by the draft rules using the term "substantive hearing" instead of proof, debate or proof before answer. These specific terms have well established meanings. Anyone who goes into court should be able, without too much difficulty, to learn their distinctions and how they should be conducted.

3) **Question 3. Can you suggest any additional rules, or changes in layout, that would improve these consolidated rules?**

The layout is good. The issues lie not in the lack of rules as in the effect of the draft rules as they stand and, in particular, the confusing terminology used (see above) and the inquisitorial nature of the court's management of litigation.

The harmonizing of procedure by the application of the same draft rules in both the sheriff court and the Court of Session is a good idea but raises the question of why we need both the sheriff court and the Outer House of the Court of Session.