Response by the Senators of the College of Justice

to

Targeted Consultation: Ordinary Procedure Rules.

30 November 2023

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to

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Question 1 – "Will the "look and feel" of these consolidated rules provide court users with the simplified, harmonised and user friendly procedure sought?

- We are supportive of the aims and general approach of The Procedural Narrative. The approach is pragmatic and, subject to points made below, the "look and feel" of the Rules will assist the court users. We understand that the Rules are a draft and it is intended that they will be developed. We consider that, while the draft Rules provide a useful starting point, there are a number of respects in which further consideration is required.
- We are concerned that in certain respects the "look and feel" of the Rules is not appropriate for the full range of cases to which they will apply. The more extreme approach to informality is appropriate where the issues are simple, the sums involved small, and the users may well be party litigants. That is not the position in relation to most cases in the Court of Session. Litigation is a formal process and a degree of formality in the rules that govern it is appropriate. This is developed further below.
- We recognise also that a balance must be struck between providing sufficient detail and brevity. While in some respects the Rules provide a lot of detail, in other key areas too little is said and this could lead to uncertainty and a lack of uniformity.
- By way of example of the lack of appropriate formality, we consider that it would be an error to replace the terms "evidence" or "facts" on the one hand, with the term "information". The words are not synonymous or interchangeable. Properly construed the term "evidence" encapsulates those matters which are relevant to a decision on the merits of issues raised in court proceedings, whereas "information" is a descriptor of all other matters put before the court. Matters are made more difficult by the use of "information" in a different sense

in Rule 33. Where it is used as a substitute for "evidence", it is referring to material on which a decision might be based. In Rule 33, it appears to refer to conclusions of fact that might be reached on the basis of such material. It would be beneficial to maintain the distinctions between these various matters. The change runs the risk of misleading users and/or resulting in a lack of focus with consequent delay and expense.

- Another illustration of the issue is that "judge" and "court" appear to be used, on occasion, without clarity as to what is meant. For example, in Rule 9, the decision as to whether a case is arguable is made by the "court".
- While we understand there is a desire not to be too prescriptive, we consider that there is too little detail given in relation to pleading.
    - There is inadequate detail of what is required of a summons. Saying only that it must set out the "factual and legal basis" and setting a maximum length is likely to result in a lack of focus in which the key points cannot readily be identified. This will make it more difficult for sheriffs and judges and for the litigants and their advisers.
    - While we accept that the particular terms may be outdated, it should nonetheless be necessary to have a case that is relevant – in the sense that if the facts are proved the remedy claimed may be granted – and sufficiently specific – in the sense that fair notice is given to the other party or parties of the case they face. This should be stated in the Rules.
    - We also consider it appropriate that, in the context of precise and focussed pleading, against the background of the need for adequate relevancy and specification, the requirement for pleas-in law should be maintained.
- In other respects, the draft Rules lack flexibility. By way of example:
    - Rule 12 does not permit a shorter period of notice.
    - The expedited procedure can be ordered only at the stage of the Case Management Order. The Court should be able to order it on an application made at the commencement stage.

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?"

- While we welcome the Rules as a step towards having a single civil procedure, it is apparent that considerable refinement is required. The following points are illustrative only and are not intended to be exhaustive.
- Rules such as 3, 4 and 5 impose requirements with no sanction for non-compliance.
- Rule 7 requires action on the part of a person who is not yet a party to the case. How can this be enforced on them?
- In Rule 15 – undefended cases – an application for a decree in absence must specify among other things "the basis on which decree is sought" What does this mean? Is it intended to broaden the circumstances in which a court (presumably, the judge) may refuse to grant decree?
- For summary decrees, whereas the current rule sets out clearly the manner in which summary decree may be applied for (with an intimation period of 14 days, which is reasonable in the context), in outline the proposed new rule simply states that the court may grant summary decree "on the application of a party". No guidance whatsoever is given as to time limits.
- Rule 34 provides inadequate safeguard for havers and is likely to lead to difficulty and expense. The haver has no notice of the application and can have no input prior to the order being granted. There is no provision for review of an order once granted. It has become the practice for orders for recovery of documents to be framed in very wide terms. Compliance can be difficult, time consuming and very expensive. No provision is made as to payment to meet costs reasonably incurred by the haver. No provision is made to consider the interests of the haver. In addition, the change to recovery of "information" will pose particular difficulties in this Rule. For example, what is the position in relation to "information" a doctor has that is not in the medical records.
- Rule 35 only applies, "where the court orders that the presentation of specific information is necessary for the purpose of the hearing". The expression "specific information" is not defined. Sub-paragraphs (2) to (4) do not appear to

'fit' with a situation in which the Court has decided that some particular information – or evidence – is required.

- Chapter 4 of Part 3 – dealing with witnesses - is not clear. Rule 57 appears to proceed upon a misunderstanding of how witness statements are used and would require them to include cross-examination. This will not be practicable.
- In a number of places, the Rules require that decisions are taken to promote "the just resolution" of the case. This expression is defined in Rule 2(2). While that is entirely understandable in the context of stating the purpose of the Rules, we are concerned that where it is used later (Rules 19, 22, 31 and 62) it may conflate the issues of procedure and substantive outcome. It could be misleading.

Question 3 – "Can you suggest any additional rules, or changes in layout, that would improve these consolidated rules?

- Additional rules may be required to address issues noted above.
- Then rules should contain a fast-track procedure. This would be suitable for urgent applications which are not opposed. This is particularly important standing the abolition of petition procedure. It would be of use for matters currently dealt with by way of petition, such as company petitions - reductions of capital, schemes of arrangement, restoration to the register - and the like.
- Case management is important, but for an effective and efficient procedure it is also necessary for the parties to assist the court as much as reasonably possible. Examples could include agreeing a joint statement of the issues in the case and, if there are expert witnesses, having the experts meet to identify what points they agree and disagree. It may be worth making such points explicit in the Rules.

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