Law Society of Scotland

Consultation Response

Scottish Civil Justice Council (SCJC) Targeted Consultation: Ordinary Procedure Rules

October 2023

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Civil Justice Committee (the Committee) and our Mental Health and Disability Committee (MHDC) welcome the opportunity to consider and respond to the Scottish Civil Justice Council (SCJC) Targeted consultation: Ordinary Procedure Rules. We have the following comments to put forward for consideration.

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

The rules contain some very welcomed changes including the introduction of a docket system with a single judge however, it is recognised that this will place a significant burden on both Sheriffs and judges and will only be achieved with the injection of additional resources. The Committee have noted a number of rules which envisage greater intervention on the party of a judge than exists under the current rules. This includes the ability for the court to require a party to present information from a specific witness. The Committee would be keen to explore whether this highlights a move from the current adversarial system towards an inquisitorial system.

In relation to Rule 1; “purposes and overarching duties”

The Gill Review said this;

“The Review’s primary purpose is to improve access to justice for the people of Scotland. An effective and efficient civil justice system is a vital component of a civilised and prosperous society. A good civil justice system must provide citizens with high quality advice, information, and assistance, at a price they can afford, to help them avoid civil legal problems arising, to provide means to help to resolve problems satisfactorily when they do arise, and to ensure that citizens’ civil rights and responsibilities are protected and enforced when necessary. The system will be failing if the civil courts are seen as remote and inaccessible, if people are inhibited from pursuing or defending valid claims because they cannot afford the assistance they need to enable them to do so, or if the procedures and language the courts use create confusion in the minds of the general public. These are all issues which the Review will address.”

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The closest attempt at any articulation of these principles is ss.103 and 104 of the Courts Reform (Scotland) Act 2014 see e.g.103(2)(b). There is nothing there about either "economy" or "proportionality."

Nor was there anything in the Taylor Review.

The Committee supports the "purposes and overarching duties" however, it has expressed concern, that the absence of a specific statutory re-statement of either economy or proportionality could be interpreted as a lack of *vires*. A previous example of a *vires* challenge was seen following the introduction of pursuer's offers. [1]

The Committee is aware that the rules propose extensive case management which, if implemented effectively, may negate the need to refer to the overarching principles in practice. It is however appropriate that the *vires* point be raised as a concern.

The MHDC has noted that at para 1.4, "the procedural narrative only concerns ordinary actions in the Court of Session and sheriff court. Specialised actions, such as personal injury, judicial review, commercial and family actions will be considered at a later stage of the Rules Rewrite Project." There is no specific mention of the adults with incapacity (AWI) jurisdiction. Following separate correspondence, MHDC understands that the ultimate intention is to remove the distinction between ordinary cause and summary applications in the sheriff courts, including in the context of the AWI jurisdiction, but that this is likely to be subject to further specific work following on from the current consultation. MHDC is strongly of the view that further, specific, consideration of the AWI jurisdiction is required. MHDC suggest deferring substantive changes until such time as the implementation of the recommendations of the Scottish Mental Health Law Review is more advanced.

The Committee also recognise that, as solicitors, they are accustomed to dealing with very detailed provisions. As drafted, there is a huge amount which is not covered in these rules; the assumption being that a lot of detail will be put into a different act, regulations, or practice notes. Separate rules will also be required for specialised cases. The Committee would be happy to provide further comments once sight of the overall project is available.

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?

The Committee would like to highlight a number of individual rules.

[1] *Taylor v Marshall's Food Group Limited* 1998 S.C.841

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- ADR – Rule 3

This is couched in terms which are mandatory not permissive.

The experience of Committee members with similar requirements in the Commercial court is largely positive however, the Committee would welcome some reassurance that cost sanctions will not be used to oblige the use of ADR.

- Commencing a case – Rule 8

8(2) says a “case commences on registration.” Service is proposed to take place within four months of registration, or longer if the pursuer applies for an extension.

At the moment defenders know that service has to take place within the triennium or quinquennium. If that has not occurred, the practice is to proceed on the basis that no action is going to be forthcoming. The proposed change means that it could be four months or even longer, after registration, before it is known if an action is going to be raised.

There is no obvious reason to change the current position that provides for service as being when the action commences. The current position is reflected in all existing court rules. The current arrangement means that both sides are fully aware of what is happening. A change to registration signalling the commencement date would add a layer of unwanted uncertainty.

- Registration of summons - Rule 9

The rule provides that parties must have an arguable case failing which they will not be permitted to proceed. It is not appealable. There is no equivalent in relation to defences.

- Service of a summons – Rule 11

Electronic service should be an option but will require the introduction of appropriate practice notes.

- Case management hearings – Rule 24

The terms of rule 24(3) makes the default position on witnesses that they are to attend electronically. This does seem to set up a tension between the recently enacted Ordinary Cause Rules e.g. 4A which makes attendance the default position, with the opportunity for a hybrid.

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

Cases below £5,000 appear to have been overlooked.

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