Response by the Sheriffs Principal

To

Targeted Consultation: Ordinary Procedure Rules

October 2023

1. Executive Summary

1.1 The Sheriffs Principal welcome the opportunity to comment at an early stage on the draft Act of Sederunt (Ordinary Procedure Rules) 2023 ("the proposed rules") as part of a targeted consultation exercise.

1.2 We respond both in our capacity as Sheriffs Principal with statutory responsibility for the efficient administration of court business, and in our capacity as members of the Sheriff Appeal Court.

1.3 Our comments are restricted to the effect of the proposed rules on the sheriff courts only. We note the draft rules are not intended to cover specialised actions.

1.4 We agree with the policy objective, namely (i) to simplify, harmonise and consolidate the rules for progressing straightforward civil actions so that they are easy to use and understand, and (ii) to promote consistency between courts in the way straightforward civil actions are progressed.

1.5 We agree that there is no intrinsic reason for there to be both Ordinary Procedure and Summary Application rules in the sheriff courts.

1.6 Many of the proposed rules are to be welcomed, such as: (a) Rule 6(1) requiring parties to engage in pre-action correspondence; (b) the word limits for Summons and Defences contained in Rules 8(4) and 12(4); (c) the requirement to serve a summons within four months (Rule 10(2)); and (d) the ability to serve and lodge initiating documents digitally.

1.7 However, we regret that we cannot agree with the general approach of the proposed rules.

1.8 The proposed rules:

(i) do not differentiate between "active case management" and "case-flow management";

(ii) will impose unworkable burdens upon the judiciary with little discernible advantage to litigants in many cases;

(iii) will impose unworkable burdens on sheriff court administration which are likely to lead to delays and frustrations on the part of litigants;

(iv) will create significant resourcing and court programming challenges;

(v) will promote unchallengeable discretion and create uncertainty in decision making;

(vi) are likely to lead to complex litigation and appeals on procedural or case management decisions made by sheriffs, in turn adversely affecting the efficient disposal of business in the Sheriff Appeal Court and

(vii) will lead to uncertainty for parties and/or their representatives who will require to react to the orders made by a sheriff rather than adhere to a well understood case flow management timetable.

1.9 We do not regard it as fruitful to comment on each specific rule standing our considerable reservations concerning the general approach of the proposed rules. Instead, we set out in further detail the nature of our concerns below. We note that at this stage, the Scottish Civil Justice Council has sought initial feedback on the general approach and views on the general direction of travel.

2. Differences between the Court of Session and the sheriff courts

2.1 At the heart of any new model of court rules is a desire to create a system in which the courts operate smoothly, predictably, inclusively and efficiently for the benefit of all court users. The proposed rules do not appear to recognise the core importance of practical court administration in achieving this.

2.2 Much of what is proposed may work perfectly well in the Court of Session. The large majority of litigation in Scotland, however, does not take place in the Court of Session. The critical difference is one of scale, and corresponding demand on resources. What follows is an attempt to illustrate a series of practical difficulties which will arise in the sheriff courts, and of a scale likely to cause a high degree of inefficiency and confusion.

3. High numbers of cases

3.1 The sheriff courts are projected to see approximately 80,000 actions registered during the year 2023/2024. Of those, approximately 14,000 are projected to be raised by unrepresented litigants. The number of proofs and debates fixed during that period are

estimated to be approximately 7,000. These figures are not intended to be any more than an illustration. We refer to them only to illustrate general principles.

3.2 Three initial points emerge:-

- the number of cases raised in the sheriff court is very large. It follows that if the new rules require every case to receive bespoke judicial and administrative consideration, the burden on the courts will be very great;

- the number of party litigants in the sheriff court is also very large. We suggest that the types of action raised by party litigants are disproportionately more likely to appear in the sheriff courts than the Court of Session. It follows that the requirement for simple and certain rules is particularly stark and

- the proportion of cases which result in proof or debate being fixed is a very small percentage of the cases raised (projected to be around 8.75% in 2023/2024) and even fewer will in fact proceed to a debate or proof. While some judicial case management may have resulted in early resolution, a significant percentage of cases settle without any judicial involvement at all.

4. The need for a more discerning approach to case management

4.1 In the New Civil Procedure Rules First Report dated May 2017 ("the First Report"), the question of active case management was addressed in Chapter 4:

> *"4.5 The SCJC agrees with the SCCR that, in appropriate cases, the active management of cases and their progress by judges is strongly in the interests of the court, in managing its time efficiently. This is also in the interests of the parties, in achieving a speedy determination of their disputes. However, there are significant resource implications involved in active judicial case management. Not only does this model involve the front-loading by parties and their representatives of much of the effort involved in the procedural management of cases, but it*

requires judges to become familiar with a case and its issues earlier, and very often to do much of this familiarisation in advance of hearings, on the papers.

4.6 The SCJC is therefore of the view that the active case management model will have to be implemented in a way that protects the court's resources and judicial time, so that the effort involved in active judicial case management can be directed to the cases which need it the most. There are two principal methods of achieving this: making available appropriate, less resource-intensive alternative procedures in suitable categories of case, and allowing active judicial case management to take place in a form that is as flexible and efficient as possible."

4.2 The First Report differentiated "active" case management from "case-flow" management; however, chapter 5 of the proposed rules appears to place all defended ordinary cases under "active" case management.

4.3 We understand from paragraph 1.4 of *The New Civil Procedure Rules – Second Report: The Procedural Narrative July 2022*, that the proposed rules are designed to replace the rules governing **all** ordinary actions and summary applications in the sheriff court (except family, commercial and personal injury actions). That, in our view, would be contrary to Rule 1(2)(c) of the proposed rules.

4.4 Many straightforward actions, such as debt recovery actions are initially defended but resolve during the current adjustment period of 8 weeks under the Ordinary Cause Rules without any judicial input. Simple actions for payment of debt do not merit active case management. Similarly, actions for the recovery of heritable property raised under the current Summary Application Rules do not require active case management.

4.5 The benefits of case management are recognised and form an established part of existing sheriff court procedure. All sheriff courts have adapted considerably in the last two decades to adopt a discerning and nuanced approach to case management. Most, if not all, sheriffs are skilled at actively shaping the course of cases to arrive at an early, just and efficient resolution. It is at the core of what the sheriff court does.

4.6 However, case management is presently only exercised in those cases where it is appropriate to become involved. It is discerningly and intelligently exercised. The court keeps

in mind at all times the efficient use of resources, whether of the parties or of the court. It is not imposed for every case. The proposed rules represent a change of principle. They compel end-to-end case management in every case, and in so doing dilute and waste judicial resources, and reduce structure.

4.7 The new draft rules place relatively few obligations on the court user. They require the court to take the lead in a resource-demanding way. It is not clear that this has been recognised – for example, the consultation questions focus only on the court users, not the court.

4.8 Case management is much more resource-intensive than a fixed schedule-based approach. It tends to be appropriate for high-value, complex or anxious cases. Such cases are likely to form the bulk of business in the Court of Session, but less so in the sheriff courts. Imposing universal end-to-end case management makes inherently more sense in the former forum, but not in the latter.

4.9 In the sheriff courts, there are far more cases, covering an extremely wide jurisdiction. If end-to-end, active case management is to be required for every case in the sheriff courts, it is likely to pose a much bigger logistical challenge.

4.10 Specialisms create resource implications with regards to court programming. Shrieval rotas are required to manage judicial docketing of such cases. The wider the range of cases in which a docketing system is utilised, the more complex the court programming challenges, particularly in larger courts. Ensuring sheriffs are available to preside over their cases on a regular basis necessarily takes them away from other areas of work, both civil and criminal. This is a particular challenge when sheriffs also have other duties (such as those who are appointed as Appeal Sheriffs or Temporary Judges or who serve on various councils and boards) which can often take up a large proportion of their time. Inevitably, judicial docketing will lead to delays for litigants in the larger courts caused by the need to secure judicial continuity over all cases under the proposed rules. In geographically diverse sheriffdoms, there is a dependency upon floating sheriffs to deliver court programmes. The introduction of a system of docketing for all actions under the proposed rules will present a serious challenge; in order to secure the expeditious progress of litigation and avoid delays, judicial

continuity will be the exception rather than the norm. This will undermine the application of the proposed rules and lead to disappointed litigants who will expect continuity.

4.11 A more discerning approach to the desire to secure judicial continuity and case management is required if the policy objectives of the proposed rules are to be achieved. That might involve a longer period between the lodging of defences and a hearing (to provide parties with the space to, for example, adjust their respective pleadings, secure legal aid, negotiate settlement, instruct solicitors or refine the issues in dispute) together with a mechanism to 'opt-in' to an active case management procedure.

5. Obligations on litigants

5.1 The proposed rules represent a change of emphasis. Broadly speaking, the existing rules place obligations on the parties to progress their case. They know, for example, when they will require to appear at an Options Hearing, and what they must have achieved by then.

5.2 The proposed rules place obligations on the court. The court must provide, in each case, a bespoke procedure. The ability of the parties to shape their action is subsidiary to the court's own view of what is required.

5.3 As a result:-

- the rules do not provide any useful guidance to inexperienced parties. They have no means of knowing in advance what they must do. This is likely to lead to a heavy burden on the clerks, who are already under considerable pressure, to provide advice;

- the rules give considerable and unregulated powers to sheriffs. Different sheriffs may require different approaches. Not only does this promote inconsistency and uncertainty, but the rights of the parties to challenge shrieval decisions is unclear, and challenge is not generally supported by the proposed rules;

- the court inherits a heavy burden of administration. A stark example of this is contained in Rule 17 in terms of which a sheriff, on his own initiative, may assign a hearing on the question of summary decree (which appears to contradict Rule 9(2) in terms of which a sheriff would require to have already determined that a summons contains an arguable case, if the action is raised by a party litigant). This approach involves the judiciary considering each set of pleadings after defences are lodged in all cases falling under the proposed rules. There is no scope within the confines of current court programming and judicial resources for such an undertaking. This approach absolves the parties of responsibility. Moreover, litigants are likely to regard a decision by a sheriff to assign a hearing as a pre-determination of the outcome. Another example of this approach is found in Rule 8 which is silent on the issue of jurisdiction, leaving it to the clerk (or the sheriff) to consider whether the pleadings disclose any basis upon which it might be concluded that the court has jurisdiction. The result is the creation of a very large workload for staff and for sheriffs. That is particularly so when it is recognised that a large percentage of cases resolve without any judicial input at all;

- the effect of non-compliance with the rules is in some cases uncertain (see for example Rule 3(b) which does not appear to fall within the definition of "default" in Rule 4; it is unclear whether a failure to comply with Rule 6 will amount to a "default");

- the court is charged with duties which do not presently exist. If a duty is created, this suggests that parties will enjoy a remedy where this is not complied with. The possibility of litigation is created, without any clear limits;

- the court is charged with duties of uncertain scope, effectiveness or result. For example, we suggest that if there is no sanction, and no remedy, for failure to "encourage", then creating an obligation has no purpose. We suggest that it is

not appropriate, or coherent, to create rules which place such duties on a court. This is amplified where the action required to comply is subjective and vague. The intended result could be achieved by recognising that extra-judicial resolution forms a part of a "just resolution" under rule 1, or is an overarching principle to the rules. The rationale for placing any duties on the court is unclear, and unnecessary duties create unnecessary burdens: and

- the court is tasked with actively assisting party litigants, which has the potential to cause unfairness (contrary to the recent judicial statements regarding the limited role of the court in this regard: see the opinion of the Inner House in *Aslam v Royal Bank of Scotland* [2018] CSIH 47 and the opinion of the Supreme Court in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119).

5.4 The proposed rules are not easily described as user-friendly. The simplification of language does not reflect a closer understanding of what the court will do, and when. We would suggest an inexperienced litigant would not be given certainty, or assisted practically, by these provisions.

6. Burden on the court – enquiries by litigants

6.1 At the centre of our response is a plea to recognise the very real logistical challenges which the courts administration faces.

6.2 There are significant pressures on staff, both clerks and administrative officers. They have a considerable workload at present, which is made very challenging when they require to interrupt their duties to deal with queries from members of the public. There are many litigants who are demanding, and a small percentage who are extremely challenging. The rise of email communication has meant a huge rise in queries and requests for help, and it is difficult in some cases to restrict the assistance given to vulnerable litigants. Accordingly, the system is already under pressure.

6.3 The proposed rules are likely to make matters much worse. A number of factors lead to this conclusion:-

- First, an active case management rather than a case flow management approach creates less certainty in the initial progress of a case, not more, particularly where a sheriff may make a wide range of orders on a wide range of issues. Where parties and solicitors, are uncertain about the next step in a case, their first and extremely easy resort is to make a specific enquiry of a clerk. The clerk must cease what they are doing and attend to the enquiry. Many enquiries are anxious, complex and require considerable skill and time to deal with;

- Second, such enquiries will be frequent, owing to the large numbers of party litigants. This will be, proportionately, a much larger problem in the sheriff courts than in the Court of Session, owing to the nature of the sheriff court jurisdiction;

- Third, a single case may require multiple queries, as inexperienced parties will seek information about what has happened at each stage and what is likely to happen.

6.4 Without a significant increase in resources, we are very concerned that these additional pressures upon court staff will have a significant adverse effect upon our ability to discharge our statutory responsibility for the efficient administration of court business.

7. Burden on the court – clerking confusion

7.1 Separately, the rules will be equally confusing for the clerks. For example, there is insufficient, or no, information to inform a clerk:-

- what a summons needs to contain before it can be warranted;
- what type of action is being raised, so it can be classified;
- whether there is jurisdiction and
- who is responsible for a written statement on why there is no arguable case.

7.2 While we accept that over time, clerks will become familiar with the proposed rules, it remains the case that the answer to some of the issues highlighted at paragraph 6.1 above would be to require the clerk, on every registration, to read up to five thousand words, whereas the necessary information can be presently found at a glance. A clerk who is confused will wish to consult a sheriff who will again, be required to find time to deal with all such queries.

7.3 Presently, when a NID is lodged a timetable is generated immediately with the requisite dates. The proposed rules require defences to be lodged along with a questionnaire. The pursuer then has one week after the 28 day expiry of period of notice to lodge their questionnaire before the case is then passed to a sheriff to consider making a case management order. If the defences come in after, say, two weeks the pursuer still has a further 3 weeks to lodge their questionnaire and the case effectively sits in limbo. There may only be one week for the sheriff to consider all the information and issue a case management order to meet the 14 day deadline. Overall, with digital processes this would involve complex diary management that the system would need to fully support. The sheriff clerks are likely to be required to spend significant time checking for items that have expired, or need action. This would start at the initial stages of the case and remain through all of the case management orders and their various requirements.

8. Burden on the court – burden on sheriffs

8.1 This is a wholly unwelcome development from the point of view of a sheriff. The rules create new and onerous burdens, which in a high percentage of cases, as we have already identified, will lead to wasted effort.

8.2 Such challenges include:-

- Giving advice to clerks, inevitably requiring a forensic examination of up to five thousand word submission, in every case;
- Duplicating the work of the clerk in cases where an arguable case is not readily apparent, before preparing a written statement;

- Re-reading the summons and the defences when lodged, to consider whether to fix a hearing on the question of summary decree;
- Case management and the time involved in considering every defended case and deciding bespoke orders. This will add considerably to workload, as well as being wasted effort in the large number of cases where cases resolve without ever calling in court;
- Lack of shrieval resources to deal with every case. There are currently not enough resources for every civil action in the sheriff court to be individually case managed.

8.3 The additional burden on the sheriffs can only be managed by increased time for preparation and chambers duties. The sheriff courts and the demands of the court programmes cannot facilitate that. Even assuming additional judicial resources were to be made available, we would continue to have significant reservations regarding whether they are put to best use case managing every action which falls into the proposed rules.

8.4 The proposed rules bear a strong resemblance to the Simple Procedure Rules. Sheriffs already require considerable chambers time to deal with this procedure, where the content of the claims is less complex and the cases shorter in duration. Simple Procedure introduces only simplified procedure, but not simple litigation or simple adjudication. It is highly demanding for sheriffs. It should not be regarded as a model for a global litigation procedure which is prosecuted by solicitors and counsel who understand, and take responsibility for, the progression of claims.

8.5 We require to be mindful of the welfare and morale of sheriffs and court staff. These proposals are likely to be met with dismay.

9. Worked example – procedure in Glasgow Sheriff Court

9.1 During the pandemic, enhanced case management of ordinary actions was introduced in Glasgow Sheriff Court in July 2020. The scheme operated in a very similar way to the proposed rules. Upon the lodging of defences, a sheriff was allocated to each ordinary action

to undertake active case management. Hearings were assigned to take place by telephone conference before the same sheriff.

9.2 The objective of the scheme was laudable: to support the expeditious resolution of proceedings. It has not had the desired effect.

9.3 The following issues arose:

- to accommodate the need for specific sheriffs to deal with specific cases, an 'ordinary court' required to be convened four days a week. Previously, only one ordinary court was convened in Glasgow each week. This had the effect of diverting judicial resources;

- the sheriffs could not be allocated preparation time for case management hearings without compromising the court programme and accordingly, no 'reading-in' time was afforded. Without 'reading-in' time, the ability of a sheriff to case manage is restricted;

- moving from one court to four (to accommodate case management hearings before specific sheriffs) gave rise to significant challenges for court staff. Clerks could not be made available to clerk three additional courts per week. Hearings proceeded in the absence of a clerk of court. Sheriffs were required to obtain contact details for parties, call them directly, note the outcome of the hearing and provide notes for the preparation of court interlocutors – all of which is, we would suggest, a poor use of judicial resources and

- allocating specific sheriffs to deal with case management hearings, proofs and debates caused delays attributable to the other duties allocated to that sheriff.

9.4 The scheme implemented in Glasgow Sheriff Court lead to inefficiencies, a poor use of limited judicial resources (both in terms of, in effect, clerking hearings and managing cases which did not require active case management), delays in assigning hearings and had an adverse impact upon morale for the judiciary and staff.

9.5 Significantly, the available data indicates that the scheme had a nominal effect on the number of proofs and debates that proceeded and on the journey time between case registration and disposal.

9.6 Put shortly, the scheme did not produce the desired outcome. The enhanced case management of ordinary actions introduced in July 2020 will come to an end in November 2023 to alleviate the largely unsuccessful and unnecessary challenges it placed upon staff and the judiciary.

10. Conclusion

10.1 We are supportive of any initiative which renders litigation simpler, cheaper, and easier to understand. It is with great regret, therefore, that we must present this unsupportive position on the proposed rules. We hope that our comments can be a basis for inclusive development of any rules which are to come. As Sheriffs Principal, we have both a statutory responsibility for the efficient administration of sheriff court business and we will also have responsibility for the interpretation and application of these rules in the exercise of our appellate functions. We are keen to ensure that the correct balance is struck between simplicity, consistency and efficiency.

10.2 There are features of the proposed rules which are to be welcomed, such as removal of required peremptory diets, the power to dismiss cases for lack of insistence, practical provisions such as word count, and the pre-action protocol.

10.3 Overall, however, these rules place a heavy burden on the court, without obvious benefit to either litigants or the administration of justice. The exercise of simplifying rules or procedure has spilled over into affecting the whole approach of the court. We see these rules as presently drafted, unworkable.

10.4 We would point to the current, successful, working of the sheriff courts. Many of the aims of the revised rules are already organically included in existing practices. Case management is exercised widely and with discretion. Appropriate cases get appropriate case management, particularly in family, personal injury and commercial cases. The culture

whereby the court would allow parties to dictate the pace of ordinary actions has all but ended.

10.5 We would accordingly suggest that a codification of the existing rules, with improvements such as case flow management with an option to move to active case management in ordinary actions, would be a more fruitful direction of travel. Language could be simplified, gaps in procedure plugged, and the necessary adjustments for digital litigation made. We would be happy to assist in such a process.

11. The consultation questions

11.1 For completeness, our responses to the consultation questions are:-

Question 1: we agree that the look and feel of these proposed rules is appropriate to providing a simplified, harmonised and user-friendly procedure. The rules do not actually achieve that, and our reservations are set out above.

Question 2: we have not considered the practical working of each of the rules. As a generality, we consider that the rules provide less structure, and less guidance, than at present. The price of flexibility is uncertainty. An inexperienced court user would struggle to know what to do, and would find the procedure difficult to predict.

Question 3: We have no additional rules to suggest, noting that further specialised rules are to come and a further consultation exercise will take place.

The Sheriffs Principal

19 October 2023