

PAPER APART

TARGETED CONSULTATION on the Ordinary Procedure Rules

Written Response

1. The consultation papers suggest that the new Ordinary Procedure Rules (“the Rules”) represent a consolidation of the existing rules for “ordinary” actions in the Court of Session and Sheriff Court. However, as currently drafted, at parts, the new Rules appear to instead reframe and innovate on those existing rules.
2. The existing court rules enable parties to elect a case management model if appropriate eg. by way of the commercial action procedure. Parties have the ability to choose an alternative process to the case management model if that is better suited to the just resolution of their dispute. However, the Rules propose an active judicial case management model for all “ordinary” actions. There are actions which are not suitable for such a model. By adopting a one size fits all approach, some of those actions which currently benefit from the existing procedures may be prejudiced.
3. Some of the Rules introduce an entirely new model and/or step of process:
 - 3.1. A pre action protocol with parties required to provide intimation of their intention to raise a case, with a response to be provided within a prescribed period.
 - 3.2. Cases will commence when a summons is lodged for registration, rather than on service. This may raise questions regarding the prescription and limitation of actions and the application of the substantive law in that regard.
 - 3.3. A summons is to be served within 4 months of registration. How will this proposed new rule impact service of a summons abroad where substantially longer may be needed to do so eg. where the relevant country has derogated from the Hague Convention?
 - 3.4. The completion of prescribed case management questionnaires, documents not currently familiar to court users.
 - 3.5. Evidence (or “information”) taking the form of a witness recording. Other parties may lodge a note of questions or lines of inquiry to be put to the witness, which may be modified by the court. Questions arise regarding the proper testing of such evidence. More widely, the "information" proposals may require the law of evidence to be considered as these may have a wider impact than simply updating the procedural rules.
 - 3.6. Parties must apply to the court for permission to raise a counterclaim although no detail is provided as to what is required in such an application.
4. It is unclear how other specialist procedures will operate alongside the Rules, and the impact these changes may have more widely. For example, will these be the overarching starting rules, with the specialist rules deriving from those?

5. Given the proposed changes, and the serious consequences in the form of sanctions for a party in default, it is respectfully suggested that a new practice note should be issued to accompany the rules, and that note might be reviewed by interested parties before issue.

6. The details of this consultation have been published on the Council's website. It is respectfully suggested that consultations with such far reaching consequences might be published more widely to ensure it is brought to the attention of all those impacted. Our dispute resolution team were largely unaware of the proposed changes until recently, and have not had a proper opportunity to consider the proposed changes in any detail.