



**Scottish
Civil Justice
Council**

The New Civil Procedure Rules

First Report

May 2017

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Foreword

by

Colin Sutherland, Lord Carloway

Lord President of the Court of Session

An advocate from the 19th century would find the Edinburgh of 2017 a bewildering place: the way people dress; the way they communicate with each other and socialise; the way they travel around the city and further afield; and, maybe more than anything else, the way in which they work. If they tried to take a bus, or visit a café or book a theatre ticket, they would be lost. If they were to make their way to Parliament House, however, they would, once recovered from the shock of seeing women at the bar and on the bench, find our courts to be comfortingly familiar. They might even feel up to the task of taking some instructions.



Can this be right? Have we fallen into the trap of thinking that, because the present court system is fair, it is the only way to achieve fairness? At the heart of the ambitious project, which this report introduces, is this question: what will fairness mean in our courts in the year 2020 and beyond? Court rules seem to last for 25 or 30 years (a generation) before they are replaced, albeit largely repeated from what has gone before. If the new civil procedure rules are introduced in 2 or 3 years' time, we can expect them to last until nearly the middle of the 21st Century.

The courts must provide a system of justice to the public. The public's changed expectations of what services should look like, and how they should work, are therefore key to understanding what fairness will mean in 2020. The public has become used to services which are increasingly swift and responsive, automated, available anywhere and accessible in a variety of different ways. Platitudes about justice being seen to be done are not a complete response to a generation that sees no unfairness in transacting some of its most important business entirely online.

This first report of the project to prepare new civil procedure rules sets out the initial thinking of the Scottish Civil Justice Council on a number of important and over-arching matters. The form and structure of the rules is addressed. A bold vision for active judicial case management of defended actions is set out. A set of principles for civil procedure is recommended.

Some of the changes that must be made challenge existing ways of working, business structures and habits. I am, nevertheless, confident that Scottish lawyers will respond to these challenges with the same vigour and creativity that they have to every other reform in the last 200 years: by treating them as opportunities. The concrete improvements to the experiences of all those that want to, or have to, use the courts should be the guide to the success of these changes. But that success will depend also on the profession: their flexibility, their imagination and their active participation in contributing to the debate, and making their voices heard. This is an opportunity to reshape civil justice and the Scottish

Civil Justice Council needs to know what you think about those topics identified, in Chapter 11, as forming the focus of our next year of work.

The task is an ambitious but a necessary one: to build a civil justice system which makes more sense to someone born at the turn of the millennium than to someone born in the previous two centuries.

May 2017

Chapter 1. Introduction

Background to the rules rewrite project

- 1.1 The report of the Scottish Civil Courts Review (“the SCCR”) recommended a comprehensive review and rewrite of Scotland’s civil procedure rules¹. It also made a number of recommendations relating to the purpose, structure and content of the new civil procedure rules. For example, it recommended the abolition of the distinction between summons and petition procedure in the Court of Session², the incorporation into the rules of a guiding principle³, the adoption of a general approach to case management⁴, sanction for non-compliance⁵, and the harmonisation, where possible, of the rules in different courts⁶.
- 1.2 The report also recommended the establishment of a single Rules Council for both courts, with the resources and professional support required to undertake this task⁷.

The Acts

- 1.3 The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (“the 2013 Act”) established the Scottish Civil Justice Council (“the SCJC”). The SCJC’s functions include keeping the civil justice system under review⁸ and preparing draft civil procedure rules for submission to the Court of Session⁹.
- 1.4 The SCJC is required to have regard to certain principles when exercising these functions¹⁰. These are that:
- the civil justice system should be fair, accessible and efficient,
 - the rules relating to practice and procedure should be as clear and easy to understand as possible,
 - practice and procedure should, where appropriate, be similar in all civil courts, and
 - methods of resolving disputes which do not involve the courts should, where appropriate, be promoted¹¹.

¹ [The Report of the Scottish Civil Courts Review](#) (“SCCR Report”), September 2009, Chapter 15.

² [SCCR Report](#), Chapter 5, paragraph 69.

³ [SCCR Report](#), Chapter 9, paragraphs 11 – 13.

⁴ [SCCR Report](#), Chapter 5, paragraph 48.

⁵ [SCCR Report](#), Chapter 9, paragraphs 146 - 148.

⁶ [SCCR Report](#), Chapter 15, paragraphs 27 – 37.

⁷ [SCCR Report](#), Chapter 15, paragraphs 51 – 56.

⁸ Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(1)(a).

⁹ Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(1)(c).

¹⁰ Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(2).

¹¹ Scottish Civil Justice and Criminal Legal Assistance Act 2013, section 2(3).

- 1.5 The Courts Reform (Scotland) Act 2014 (“the 2014 Act”) made significant changes to the structure and powers of Scotland’s civil courts, including a comprehensive replacement, restatement and expansion of the Court of Session’s powers to make civil procedure rules by Act of Sederunt¹².
- 1.6 The new powers allow rules to be made “for or about (a) the procedure and practice to be followed in proceedings in the court”, and “(b) any matter incidental and ancillary to such proceedings”. The 2014 Act contains illustrative lists of ways in which these powers may be used¹³, including by making provision for or about:
- avoiding the need for, or mitigating the length and complexity of, proceedings,
 - other aspects of the conduct and management of proceedings, including the use of technology,
 - simplifying the language used in connection with proceedings or matters incidental or ancillary to them,
 - the form of any document to be used in connection with proceedings, or matters incidental or ancillary to them,
 - the steps that a court may take where there has been an abuse of process by a party to proceedings.

The Rules Rewrite Working Group

- 1.7 The Rules Rewrite Working Group (“RRWG”) was established in order to develop and submit to the SCJC a rules rewrite methodology. This project was carried out as part of the Making Justice Work programme. Its remit included considering the vision and objective of the new rules, reviewing the approach taken by other jurisdictions to similar projects, creating a style guide for rules, and agreeing the format for drafting instructions¹⁴.
- 1.8 In March 2014, the RRWG published its Interim Report. It analysed the approach taken to rules rewrite projects in other jurisdictions, including the decision to produce one or more civil codes, and whether they included in their rules an overriding objective. Its recommendations included that:
- separate rules for the sheriff court and the Court of Session should be retained, with harmonisation of procedures where appropriate,
 - ambiguous language in rules should be clarified,

¹² The power relating to the Court of Session is in section 103 of the Courts Reform (Scotland) Act 2014 and the power relating to the sheriff courts and Sheriff Appeal Court is in section 104.

¹³ Courts Reform (Scotland) Act 2014, sections 103(2) and 104(2).

¹⁴ Rules Rewrite Working Group, [Interim Report on the ‘Making Justice Work 1’ Rules Rewrite Project](#) (“Interim Report on the Rules Rewrite Project”), March 2014, paragraphs 1 – 3.

- the rules should contain a statement of principle, in preference to an overriding objective,
- consultation on draft rules should not be the norm, but should be considered on a case-by-case basis.

1.9 In April 2015, the RRWG published its Final Report. It endorsed the recommendations in the Interim Report¹⁵, established a style guide for new rules¹⁶ and a model for instructing new rules¹⁷. Following the publication of the Final Report, the RRWG was re-established as the Rules Rewrite Committee of the SCJC with a remit that included the comprehensive review of civil procedure rules.

The Rules Rewrite Drafting Team and implementation of the 2014 Act

1.10 In Summer 2014, the Lord President's Private Office established a dedicated rules-drafting team to support the Court of Session and the SCJC in their rule-making functions. The team comprises lawyers on secondment from the Government Legal Service for Scotland with experience in the development and drafting of secondary legislation.

1.11 The early focus of the Rules Rewrite Drafting Team has been the rules required to implement the principal structural reforms in the 2014 Act. Instruments have, so far, been made which:

- provide a sheriff court procedure for actions of reduction and proving the tenor,
- support the national personal injury jurisdiction of Edinburgh Sheriff Court, including jury trials in that court,
- support the increase in the exclusive competence of the sheriff court to £100,000,
- replace entirely the chapter of the Rules of the Court of Session 1994 concerning judicial review procedure,
- establish the Sheriff Appeal Court in its criminal and civil jurisdictions,
- provide for statutory pre-action protocols in some personal injury cases,
- supporting changes to the law on vexatious litigants,
- allow lay representation of non-natural persons, and
- provide rules for the new simple procedure.

¹⁵ Rules Rewrite Working Group, [Final Report on the 'Making Justice Work 1' Rules Rewrite Project](#) ("Final Report on the Rules Rewrite Project"), April 2015, paragraphs 8–10.

¹⁶ Rules Rewrite Working Group, [Final Report on the Rules Rewrite Project](#), paragraphs 14–16.

¹⁷ Rules Rewrite Working Group, [Final Report on the Rules Rewrite Project](#), paragraphs 23–32.

The Rules Rewrite Project

The scope of the project

- 1.12 The proposal is that there should be a comprehensive rewrite of Scotland's civil procedural rules. The suggestion of a single, procedural code covering both of Scotland's principal civil courts – the Court of Session and the sheriff court – was rejected by the RRWG, in favour of separate but harmonious codes covering each court¹⁸. The approach to the number of instruments is discussed more fully in chapter 7 (form, style and language of court rules). The SCJC will consider all options for the arrangement of the instruments containing court rules.
- 1.13 At present, the Rules of the Court of Session 1994¹⁹ are a self-contained procedural code. Indeed, they strictly go further than regulating the procedure only of the Court of Session: part 6 of chapter 41 concerns the Registration Appeal Court and chapter 69 concerns the election court²⁰. They also contain, in chapter 42, provision regulating the fees of solicitors. There is very little procedural provision relating to the Court of Session out with the Rules of the Court Session 1994²¹.
- 1.14 The civil procedure rules relating to the sheriff court are more dispersed. They include:
- The Company Director Disqualification Rules 1986²²
 - The Company Insolvency Rules 1986²³,
 - The Debtors (Scotland) Act Rules 1988²⁴,
 - The Ordinary Cause Rules 1993²⁵,
 - The Summary Suspension Rules 1993²⁶,
 - The Child Care and Maintenance Rules 1997²⁷,
 - The Summary Applications Rules 1999²⁸,

¹⁸ Rules Rewrite Working Group, [Final Report on the Rules Rewrite Project](#), paragraphs 8-10.

¹⁹ Act of Sederunt (Rules of the Court of Session 1994) 1994, schedule 2.

²⁰ Lands Valuation Appeal Court cases are also within the scope of the Rules of the Court of Session 1994 (see rule 3.2(3)(d)) but the rules contain little provision relating to that Court.

²¹ Examples of which include the Act of Sederunt (Contempt of Court in Civil Proceedings) 2011 and the Act of Sederunt (Expenses of Party Litigants) 1976.

²² Act of Sederunt (Company Director Disqualification) 1986.

²³ Act of Sederunt (Sheriff Court Company Insolvency Rules) 1986.

²⁴ Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988.

²⁵ Sheriff Courts (Scotland) Act 1907, schedule 1.

²⁶ Act of Sederunt (Summary Suspension) 1993.

²⁷ Act of Sederunt (Child Care and Maintenance Rules) 1997.

- The Devolution Issues Rules 1999²⁹,
- The Summary Cause Rules 2002³⁰,
- The Small Claim Rules 2002³¹,
- The Debt Arrangement and Attachment Rules 2002³²,
- The Caveat Rules 2006³³,
- The Chancery Procedure Rules 2006³⁴,
- The Adoption Rules 2009³⁵,
- The Money Attachment Rules 2009³⁶,
- The Commissary Business Rules 2013³⁷,
- The Simple Procedure Rules 2016³⁸,
- The Sheriff Court Bankruptcy Rules 2016³⁹.

1.15 There is a separate fees instrument for the sheriff court⁴⁰. The rules of the Sheriff Appeal Court are also contained in a separate stand-alone instrument⁴¹.

1.16 Both the Summary Cause Rules and the Small Claim Rules are being replaced by the Simple Procedure Rules⁴². The unitary Rules of the Court of Session 1994 cover matters which are dealt with in separate sets of rules in the sheriff courts: statutory applications, for example, are dealt with either under chapter 41 or by bespoke provision, the rules relating to adoption are in chapter 67 and the equivalent of the

²⁸ Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999.

²⁹ Act of Sederunt (Proceedings for Determination of Devolution Issues Rules) 1999.

³⁰ Act of Sederunt (Summary Cause Rules) 2002, schedule 1.

³¹ Act of Sederunt (Small Claim Rules) 2002, schedule 1.

³² Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002.

³³ Act of Sederunt (Sheriff Court Caveat Rules) 2006.

³⁴ Act of Sederunt (Chancery Procedure Rules) 2006.

³⁵ Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009.

³⁶ Act of Sederunt (Money Attachment Rules) 2009.

³⁷ Act of Sederunt (Commissary Business) 2013.

³⁸ Act of Sederunt (Simple Procedure) 2016, schedule 1.

³⁹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.

⁴⁰ Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993

⁴¹ The Act of Sederunt (Sheriff Appeal Court Rules) 2015.

⁴² The Small Claim Rules were revoked by the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 4) (Simple Procedure) 2016, paragraph 3(1).

bankruptcy rules is found in chapter 72. Each of these types of procedure has its own instrument and set of rules in the sheriff court.

- 1.17 If the SCJC's guiding principle that procedure and practice should, where appropriate, be similar across Scotland's civil courts is to be respected, there is no reason why two different approaches to the arrangement of court rules should be maintained simply because of the way acts of sederunt have historically been organised. If the Rules of the Court of Session 1994 are to be considered and rewritten in their entirety, then all of the equivalent rules in the sheriff court will also be addressed.

The SCJC considers that the rewrite should encompass the Rules of the Court of Session, the Ordinary Cause Rules, the Summary Application Rules, the Child Care and Maintenance Rules and the Adoption Rules, and every other set of civil procedural rules relating to the sheriff court with a direct equivalent in the rules of the Court of Session.

The SCJC has decided that, where appropriate, sheriff court rules should be contained in a single instrument.

- 1.18 Similarly, the Sheriff Appeal Court Rules 2015, though newly made, are logically within the scope of the rewrite. The rules are broadly modelled on chapter 40 of the Rules of the Court of Session 1994, so in order for appeals provision to be harmonised in both courts they will have to be considered.
- 1.19 The SCJC has recently begun, as part of its programme of evaluating all newly-produced sets of rules, a review of the Sheriff Appeal Court Rules 2015⁴³.

Matters out with the scope of the project

- 1.20 The Simple Procedure Rules 2016 are out with the scope of the rewrite. They have only recently come into effect and the intention is for simple procedure to operate separately from ordinary civil business. The RRWG explicitly recognised the separate status of simple procedure⁴⁴. The Access to Justice Committee of the SCJC has recently begun a review of the effectiveness of the Simple Procedure Rules 2016.
- 1.21 There are some matters regulated by act of sederunt, and even some matters presently contained within the sets of rules relating to the Court of Session and the sheriff court, which it has been decided properly lie out with the scope of rewrite.
- 1.22 The SCJC's remit presently only extends to three courts: the Court of Session, the Sheriff Appeal Court and the sheriff court⁴⁵. Properly understood, some of the matters in the Rules of the Court of Session 1994 relate to courts other than the Court of

⁴³ SCJC, [Minutes of the Scottish Civil Justice Council](#), 21 November 2016, paragraph 15.

⁴⁴ Rules Rewrite Working Group, [Interim Report on Rules Rewrite Project](#), paragraph 53.

⁴⁵ Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, section 2(6).

Session; for example, the Registration Appeal Court⁴⁶ or the election court⁴⁷. The civil procedure relating to these courts is therefore outside the scope of the rewrite, though will necessarily need to be addressed by the Court of Session and the officials who advise it on its legislative functions as a result of the project.

- 1.23 The SCJC has assumed responsibility for the preparation of procedural rules for Fatal Accident Inquiries⁴⁸. These rules will be outside the scope of the rewrite project.
- 1.24 An amendment made by the 2014 Act to the 2013 Act clarified that the preparation of rules regulating the recoverable expenses of solicitors was one of the functions of the SCJC⁴⁹. Preparing these instruments falls within the remit of the Costs and Funding Committee, as successor to the Lord President's Advisory Committee on solicitors' fees. The Costs and Funding Committee is presently deciding on which of the recommendations in the Report on the Cost and Funding of Litigation⁵⁰ should be taken forward.
- 1.25 It will be necessary to coordinate changes to the regime for solicitors' (and others) fees with the new processes, systems and feeing points introduced in the new civil procedure rules.

The SCJC has decided that Fatal Accident Inquiry Rules and the Simple Procedure Rules are out with the scope of the rules rewrite.

Purpose of this report

Discussion papers

- 1.26 At its meeting in January 2016, the Rules Rewrite Committee agreed on a plan for how to approach the rewrite project⁵¹. This plan was approved by the SCJC at its meeting in March 2016⁵².
- 1.27 The first phase of the plan involved the Rules Rewrite Committee and, where appropriate, other Committees of the SCJC considering and agreeing discussion papers on over-arching matters of significance or principle. These discussion papers involved practical, historical and comparative research into matters identified by the Rules Rewrite Committee as requiring to be explored before the more detailed, practical business of instructing and drafting new codes of rules began.

⁴⁶ For more on the Registration Appeal Court, see the Representation of the People Act 1983, section 57.

⁴⁷ For more on the election court, see the Representation of the People Act 1983, section 123.

⁴⁸ The functions of the Scottish Civil Justice Council set out in section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 were amended to include the preparation of draft inquiry procedure rules.

⁴⁹ Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, section 2(1) and (6A).

⁵⁰ [Report of the Review of Expenses and Funding of Civil Litigation in Scotland](#), September 2013.

⁵¹ SCJC, [Minutes of the Rules Rewrite Committee](#), 19 January 2016, paragraphs 8 – 9.

⁵² SCJC, [Minutes of the Scottish Civil Justice Council](#), 14 March 2016, paragraph 30.

- 1.28 Beginning at its meeting in May 2016⁵³, the Rules Rewrite Committee considered these discussion papers and came to conclusions on the recommendations and questions contained in them. This report records these conclusions.

Engagement with the public and the professions

- 1.29 The Rules Rewrite Committee and the SCJC agreed that open and constructive engagement with the public and the professions throughout the development of the new civil procedure rules would be an important way of improving the quality of the SCJC's decisions and ensuring the success of the project.
- 1.30 The publication of this report, which distils and records the SCJC's consideration of the discussion papers, begins that engagement with the public and the professions. Chapter 11 contains more detailed proposals about public engagement.

⁵³ SCJC, [Minutes of the Rules Rewrite Committee](#), 31 May 2016, paragraphs 9-20.

Chapter 2. A statement of principle

Background

The Scottish Civil Courts Review

2.1 The SCCR Consultation Paper, issued in November 2007, considered that the adoption of a guiding principle for civil procedure would “bring Scotland into line with countries with similar legal systems which have recently carried out major reviews and reforms of their civil justice system.”⁵⁴ It posed this question to consultees:

“Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?”⁵⁵

2.2 Nearly three-quarters of respondents were in favour of including a statement of principle⁵⁶. The SCCR recommended that:

“A preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court.”⁵⁷

The Rules Rewrite Working Group

2.3 The RRWG considered this recommendation and concluded that:

“there should be a statement of principle and purpose in both the sheriff court and Court of Session rules, to which the court should have due regard, but that it should not override the other rules of court. The statement should be founded on recommendation 112 of the Scottish Civil Courts Review, and should indicate that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, within a reasonable time, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court, and that parties are expected to comply with the rules.”⁵⁸

2.4 The SCJC agrees that the rules should set out principles for civil procedure. The reasons for including such a statement are:

⁵⁴ [Scottish Civil Courts Review: A Consultation Paper](#) (“SCCR Consultation Paper”), paragraph 5.3.

⁵⁵ [SCCR Consultation Paper](#), paragraph 5.50.

⁵⁶ [SCCR Report](#), Chapter 9, paragraph 4.

⁵⁷ [SCCR Report](#), Recommendations, paragraph 112.

⁵⁸ Rules Rewrite Working Group, [Interim Report on the Rules Rewrite Project](#), paragraph 71.

- assisting the court and litigation in interpreting and understanding the rules,
- improving case management,
- increasing access to justice by incorporating ideas of proportionality and costs into the courts' understanding of fairness, and
- bringing Scotland into line with comparable legal systems.

2.5 The SCJC has considered two aspects of the proposed inclusion of a statement of principle:

- how such a principle should be expressed in any rules of court, including its effect on the interpretation of the rules, and
- the content of a statement of principle, and which matters it should cover.

Discussion

The effect of a statement of principle

2.6 Both the SCCR and the RRWG concluded that a statement of principle should not have an overriding or binding effect over other provisions of the rules of court. The RRWG considered that “placing an objective within the rules would be essential to ensuring effective case management but that were it to have an overriding and binding effect that that might cast doubt on the applicability of individual rules and lead to satellite litigation.”⁵⁹

2.7 The SCJC agrees with this view, and has considered the experience of the courts in England and Wales following the adoption of an “overriding objective” in the Civil Procedure Rules 1998. It has noted the litigation that followed the adoption of the overriding objective and, in particular, the cases of *Mitchell v News Group Newspapers Ltd*⁶⁰ and *Denton v TH White Ltd*⁶¹. It has also considered the comments in the Final Report of the Chief Justice’s Working Party established to consider civil procedure in Hong Kong, which suggested that the introduction of an overriding objective was likely to give rise to unnecessary and misguided subsidiary argument. In any event, following the decision in *Denton*, the SCJC has noted that one commentator, Deirdre Dwyer, has suggested that the term “overriding” does not mean “all-defeating”. She suggests that “the concerns of the Hong Kong reformers were misplaced, since the overriding objective, correctly construed, is not intended to be used to override existing provisions. Rather, it is a device to interpret the Rules, and to resolve inevitable conflicts in interpretation.”⁶²

2.8 The SCJC considers that, rather than focusing on the overriding (or otherwise) character of the statement, what will ensure the success of such a statement is the

⁵⁹ Rules Rewrite Working Group, [Interim Report on the Rules Rewrite Project](#), paragraph 70.

⁶⁰ [2013] EWCA Civ 1537.

⁶¹ [2014] EWCA Civ 906.

⁶² Deirdre Dwyer, *The Civil Procedure Rules Ten Years On*, Oxford University Press, 2009, page 73.

way in which it interacts with other key provisions of the new civil procedure rules. For example, in the Civil Procedure Rules in England and Wales, rule 1.2 requires the court to “seek to give effect to the overriding objective” when exercising its powers or interpreting the rules. Rule 1.3 places a duty on parties to assist the court in this. Similar provision can be found in the Simple Procedure Rules⁶³, which sets out the five principles of simple procedure. Sheriffs to take these principles into account “when managing cases and interpreting these rules”⁶⁴. Similarly, parties and representatives are required to “respect the principles of simple procedure”⁶⁵.

- 2.9 A statement of principle will only be an effective influence on the civil justice system if it is given strong effect in the rules, applied appropriately by the judiciary and respected by litigants. All of these aspects should feature in the new civil procedures.

The SCJC considers that the new civil procedure rules should set out, at the beginning of the rules, a statement of principle. Judges should be obliged to take account of this statement of principle when interpreting the rules and when making any case management order under the rules. Parties, and their representatives, should be obliged to assist judges in respecting the statement of principle.

The content of a statement of principle

- 2.10 The statement of principle should set how the Court of Session intends that civil litigation in Scotland should be conducted and should set out the values that the Court considers should guide everyone involved in civil justice, from judges to the legal professions and those litigating.
- 2.11 The introduction of a statement of principle should signal a change in approach. One commentator said this, of the introduction in England and Wales of an overriding objective:

“Under the CPR the aim of the civil process remains, of course, to decide disputes on their merits, i.e. to determine the litigants’ rights and enforce them. As before, the court must strive to establish the true facts and correctly apply the law to them, thereby giving effect to substantive rights. This objective is sometimes referred to as doing substantive justice, or justice on the merits. But, unlike the preceding rules, the CPR recognise that substantive justice is not the sole aim of the civil process. Or, put differently, that substantial justice is more than just the correct application of the law to the true facts. The overriding objective recognises that justice is not done unless it is obtained at proportionate cost and within reasonable time.[This] calls for a complex balance to be struck in practice because it is subject to internal tensions. The more accuracy of fact finding we

⁶³ Simple Procedure Rules 2016, rule 1.2.

⁶⁴ Simple Procedure Rules 2016, rule 1.4.

⁶⁵ Simple Procedure Rules 2016, rules 1.5 and 1.6.

desire, the more resources would need to be invested in the investigation of the issues and in the decision making process, which may well lead to higher costs. Higher costs may be avoided only by a sacrifice in accuracy or by accepting longer duration of the proceedings. Clearly, the imperatives of truth finding, of economy of resources, and of delivering expeditious judgment pull in different directions. The resolution of this tension is at the heart of case management since it is only through active case management that the court can achieve an optimal balance between the three imperatives and deliver a satisfactory adjudicative service.”⁶⁶

- 2.12 The SCJC agrees with this perspective. Whatever other values are set out in a statement, the core job of the courts is adjudication according to the law. Properly understood, any other values included in a statement of principle are aspects of this. A proportionate approach to costs, for example, is a legitimate aim because it is *part* of good adjudication: it promotes access to justice. A demand for greater efficiency is a legitimate aim because delays are themselves a threat to the adjudicative process. The incorporation of a statement of principle requires these values because they are essential to justice, not because they conflict with it. The Court of Appeal in *Mitchell* endorsed the approach to compliance with the rules set out by the Master of the Rolls in the 18th implementation lecture of the Jackson Reforms, where he said that:

“The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so”⁶⁷.

- 2.13 The SCJC considers that the content and structure of the statement of principle should reflect this, and should make explicit that any concepts of proportionality that are incorporated into the statement of principle are, properly understood, important aspects of the courts’ responsibility to do substantive justice between the parties.
- 2.14 The RRWG endorsed a statement of principle which contained the considerations set out in SCCR Report⁶⁸. The SCJC has considered this, as well as recent relevant examples of similar provision. These include the five principles of simple procedure, which are tailored to a procedure designed with informal resolution and lay

⁶⁶ Adrian Zuckerman, A Tribute to Lord Dyson’s Conception of a Just Process, *Civil Justice Quarterly*, 2015, 34(3), page 231.

⁶⁷ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at paragraphs 38 and 39.

⁶⁸ [SCCR Report](#), Recommendations, paragraph 112.

representation in mind. It has also considered rule 2(2) of the Supreme Court Rules 2009, which provides that “the overriding objective of these Rules is to secure that the Court is accessible, fair and efficient.” The rules for the Mental Health Tribunal for Scotland provide that “the overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible.”⁶⁹ The rules for the Immigration and Asylum Chamber of the First-Tier Tribunal contain an instructive definition of dealing with a case fairly and justly. They set out that:

“Dealing with a case fairly and justly includes—

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.”⁷⁰

The SCJC considers that the statement of principle should have as its core consideration the doing of substantive justice between the parties. It should also set out that doing substantive justice means taking account, in a proportionate way, of the cost of doing justice, and that efficiency is an important aspect of doing substantive justice.

Draft provision

2.15 The SCJC therefore considers that the new civil procedure rules should open with a chapter containing a statement of principle, along the following lines:

Chapter 1

The principles of civil procedure

The purpose of these rules

1.1—(1) The purpose of these rules is to provide parties with a just resolution of their cause.

(2) A just resolution of a cause is one that is—

⁶⁹ Mental Health Tribunal for Scotland (Practice and Procedure)(No.2) Rules 2005, rule 4.

⁷⁰ Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 2(2).

- (a) in accordance with the substantive rights of the parties,
- (b) arrived at within a reasonable time, and
- (c) conducted in a fair manner, taking account of—
 - (i) economy,
 - (ii) proportionality, and
 - (iii) the efficient use of the resources of the parties and of the court.

The duty of the judge

1.2 The judge must take into account the purpose of these rules when—

- (a) interpreting these rules, and
- (b) making case management orders.

The duty of parties and representatives

1.3 Parties and representatives must respect the purpose of these rules by—

- (a) taking into account the purpose of these rules when seeking a case management order, and
- (b) assisting the judge with performing the duty in rule 1.2.

Chapter 3. Initiating an action

Background

The Scottish Civil Courts Review

- 3.1 The SCCR recommended that the historic distinction in Court of Session procedure between actions commenced by summons and those commenced by petition should be ended, with the new civil procedure rules providing a single form of initiating document for all civil actions. The SCCR concluded that:

“[T]he distinction between ordinary actions and petitions could be done away with, since the essential procedural elements of the two types of action are the same: there is a writ containing an application to the Court to make an order; the writ must set out the names of other parties who have an interest in the application, the facts on which the application is based and the legal justification for the order desired; the Court gives its authority for the writ to be served on the other parties; the other parties have a specified time in which to respond to the writ; and in the absence of any response it is open to the originating party to ask the Court to make the order requested.⁷¹”

- 3.2 The distinction between petition and summons procedure is explained in the Report of the Royal Commission on the Court of Session:

“The object of the summons is to enforce a pursuer's legal right against a defender who resists it, or to protect the legal right which the defender is infringing; the object of a petition, on the other hand, is to obtain from the administrative jurisdiction of the court power to do something or to require something to be done, which it is just and proper should be done, but which the petitioner has no legal right to do or require, apart from judicial authority.⁷²”

- 3.3 The distinction also expresses itself in procedural rules of court. For example, chapters 13 and 14 of the Rules of the Court of Session 1994 contain codes for the commencement of causes by summons and by petition respectively. Different forms of initiating writ are prescribed for each. Chapters 19 (decrees in absence) and 21 (summary decrees) only apply to actions raised by summons.
- 3.4 Some rules have been made which directly address or resolve difficulties caused by the distinction. The limited scope of remedies available in a petition has been addressed for judicial reviews by rule 58.13 of the Rules of the Court of Session 1994. The problem identified by the cases of *Ruddy*⁷³ and *Docherty*⁷⁴ has also been addressed by rules 58.15 and 58.16 of the Rules of the Court of Session 1994.

⁷¹ [SCCR Report](#), Chapter 5 paragraph 69.

⁷² Report of the Royal Commission on the Court of Session, 1927 CMND 2801, pages 49-50.

⁷³ *Ruddy v Chief Constable of Strathclyde* [2011] S.C. 527.

Petition and summons procedure

Research

- 3.5 To assist the SCJC with its consideration of the SCCR's recommendation to abolish the distinction between petition and summons procedure, Dr Stephen Thomson was commissioned to prepare a discussion paper on the subject. The purpose of this paper was to consider the history of the distinction between petition and summons procedure as well as the legal and principled basis for that distinction. The research was to consider any difficulties likely to be presented by the proposal to remove the distinction as well as the difficulties caused by the distinction in present practice. The research was also to take in a comparative analysis of the approach taken to such matters in similar jurisdictions.
- 3.6 Dr Thomson's paper can be found at **Annex A** to this Report.

The abolition of the distinction

- 3.7 The SCJC considers that the policy reasons for allocating some causes to petition procedure and some causes to summons procedure no longer justify the division of actions between the two procedures, as that division currently operates. Petition procedure is intended to be a more flexible, summary jurisdiction, particularly suited to actions which seek the discretionary application of one of the court's powers, and which might commonly not have a contradictor. This is reflected in the greater discretion given to the court to order procedure in petition cases and in the less strict approach to the mode of proof.
- 3.8 Two developments have eroded the coherence of this distinction and, therefore, the basis for its justification. Judicial reviews comprise a significant proportion of petition business in the Court of Session, yet in practice exhibit few of the characteristics which would justify their treatment as such. They are almost always disputed and proceed according to established bodies of law, and the procedure in a judicial review is detailed and prescribed by both primary legislation and rules of court. Similarly, in a commercial action, though raised by summons, the rules have very successfully provided for a process which exhibits two of the most significant characteristics of the petition: considerable procedural discretion for the court and a relaxation of the rules regarding the mode of proof.
- 3.9 Particularly given the decision to introduce a case management model in all defended actions, the SCJC is of the view that retaining the distinction between the petition and summons, and the division of actions between them, would not support the principles of the new civil procedure rules.
- 3.10 This decision applies equally to the distinction in sheriff court procedure between actions commenced (by initial writ) as an ordinary cause and those commenced (by initial writ) as a summary application.

⁷⁴ *Docherty v Scottish Ministers* [2012] S.C. 150.

The SCJC considers that the new civil procedure rules should not continue the historic distinction between petition and summons procedures.

The SCJC also considers that ordinary actions and summary applications in the sheriff court should be commenced in the same manner.

A fast-track procedure

- 3.11 There will continue to be actions which require to be disposed of swiftly, flexibly and simply. While it would be possible for a judge, using case management powers, to identify these cases and make an appropriately urgent order for the cause to be disposed of summarily, the SCJC does not consider that this would be an efficient use of judicial time. The categories of case which need to be disposed of in a summary manner can and should be identified in the rules and automatically allocated by the rules to a more flexible and speedy procedure.
- 3.12 The following descriptions of action have been identified by the SCJC as those that should be allocated by the rules to the ‘fast-track procedure’:
- actions which are typically *ex parte*;
 - actions which only seek the exercise of a statutory or discretionary power;
 - actions which commonly require speedy or urgent disposal;
 - actions which are unlikely to require formal proof.
- 3.13 The SCJC also considers that judges should have the power to allocate any other action to the fast track at the initial case management stage, after considering any views expressed by the parties⁷⁵.
- 3.14 Since a case might develop in unexpected ways, or be incorrectly categorised initially, it will be important for the judge to have the power, either on the application of a party or otherwise, to transfer actions between the fast-track and case-managed procedures.
- 3.15 The fast-track procedure would have allocated to it by the new civil procedure rules any actions in the sheriff court considered appropriate, most likely those currently proceeding as a summary application and any others which meet the tests set out in paragraph 3.12.

The SCJC considers that the new civil procedure rules should provide for certain actions to be allocated to a fast-track procedure, and that the judge should be able to transfer cases between fast-track procedure and active case management.

⁷⁵ For more information on this, see chapter 4 (initial case management).

Remedies

- 3.16 A significant aspect of the historical distinction between petitions and summons procedure is the different remedies available, or considered most properly sought, under each. This is another feature of judicial review procedure which has been elided by rules: rule 58.13 of the Rules of the Court of Session 1994 and its predecessors provide that in a petition for judicial review all remedies, including those traditionally most associated with the summons, are available to the court.
- 3.17 The SCJC does not consider that there is a principled reason why every lawful remedy should not be competent in every action, where the substantive law provides that a party is entitled to it. This could be achieved without affecting the basis on which a remedy may be granted, the order in which remedies can competently be sought, or the court's power exceptionally to refuse to provide a remedy.

The SCJC considers that the new civil procedure rules should provide that all remedies are available under both the fast-track and case-managed procedures.

The mode of proof

- 3.18 The flexibility afforded to the court in petition procedure has its most significant expression in the ability of the court to consider matters 'proved' in the absence of their having been demonstrated in court by the traditional means: oral testimony, with the possibility of cross examination and the application by the court of the rules of evidence to exclude otherwise reliable information (for example, the best evidence rule). The SCJC has noted that in some of the most serious cases which come before the court – for example, a judicial review of the legislative competence of an Act of the Scottish Parliament or a challenge to an immigration decision by the Secretary of State – the court typically proceeds on entirely 'unproved' material. Indeed, in many public law judicial reviews, the unproved material lodged by parties can be voluminous and decisive.
- 3.19 The SCJC considers that the flexible approach to the mode of proof in petition cases should be adopted for those cases allocated to the fast track. The default position should be that no formal proof is required, except on specific matters as ordered by the judge.
- 3.20 Chapter 6 contains further conclusions about evidence and the mode of proof.

The SCJC considers that the new civil procedure rules should provide for proof in fast-track procedure to be limited to matters ordered by the judge.

Pleadings

- 3.21 The SCCR recommended the widespread introduction of abbreviated pleadings:

“For all actions in the Court of Session and sheriff court, with the exception of those subject to Chapter 43 procedure, pleadings should be in an abbreviated form. A docketed judge or sheriff should

determine whether adjustment of the pleadings is necessary to focus the issues in dispute and should have the power to determine what further specification is required and how that should be provided.”⁷⁶

- 3.22 The SCJC has considered this recommendation and agrees that, in general, shorter, more focused and more concise pleadings are highly desirable.
- 3.23 If parties are to be encouraged by the rules to commence proceedings with more focused pleadings, it will also be necessary for the rules to provide for appropriate focusing of the points in dispute by adjustment and for the judge to have the power to require adjustment or clarification on particular issues. This would be consistent the ambition of the statement of principle set out in chapter 2.

The SCJC considers that the rules should encourage concise and focused pleading, with a power for the judge to order adjustment, narrowing, clarification and expansion of pleadings.

⁷⁶ [SCCR Report](#), Recommendations, paragraph 116.

Chapter 4. Initial case management

Background

The Scottish Civil Courts Review

- 4.1 The SCCR identified that some degree of management by the court of all types and value of case is an essential feature of an effective civil justice system but that the present system was piecemeal and lacked judicial control throughout the procedure⁷⁷.
- 4.2 On the assumption that all cases should be case managed, the SCCR went on to suggest a model for case management⁷⁸. The model would apply generally to all defended civil cases in the Court of Session and the sheriff court.
- 4.3 That model, with 3 stages, promotes early and active consideration by the court of the appropriate procedure. It is as follows:
- On the lodging of defences, a case would be allocated to a particular judge or sheriff, creating judicial continuity.
 - A case management hearing would then be fixed at an early stage. It would not require formal attendance at court and would usually take place by telephone conference. The factual and legal issues are identified at this stage and the court decides what form of case management is appropriate.
 - In complex cases the court may use active judicial case management (similar to commercial actions) tailoring what should happen next whereas, in more straightforward cases a timetable with procedural steps, might be issued (similar to personal injury actions). In some cases, a mixture of the two might be adopted.
- 4.4 The Review made recommendations and observations about some specific aspects of Scottish civil procedure. It considered that the approach in the commercial court worked well⁷⁹, and recommended that active case management should be included as an option in personal injury procedure⁸⁰. This recommendation has now been implemented in both the Court of Session and sheriff court.

Active judicial case management

- 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

⁷⁷ [SCCR Report](#), Chapter 5, paragraph 1.

⁷⁸ [SCCR Report](#), Chapter 5, paragraphs 48 and 49.

⁷⁹ [SCCR Report](#), Chapter 5, paragraph 12.

⁸⁰ [SCCR Report](#), Chapter 4, paragraph 80.

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.
- 4.7 The SCCR specifically suggested that the initial case management conference would "normally take place by means of a telephone conference call"⁸¹. The SCJC has noted and approves of recent moves towards flexibility. The Simple Procedure Rules 2016, for example, allow an early 'case management discussion' to "take place in a courtroom, by videoconference, conference call, or in any other form or location ordered by the sheriff"⁸². The experience of the commercial court in Glasgow has also been that, in suitable cases, case management by conference call is effective and efficient. It is considered that the judge will normally be in the best place to decide how case management should take place and, after seeking the views of the parties, should be able to make any order about the form and location of a case management hearing. This power will be important in ensuring that the effort involved in active judicial case management is proportionate, efficient and effective.
- 4.8 The SCJC has noted the increasing tendency towards the specialisation of the judiciary and considers that this may assist in ensuring an effective and consistent approach to case management in certain areas of practice. It may even be possible to introduce a system of docketing of cases in specialist areas, ensuring judicial continuity⁸³. The SCJC will explore options for specialisation and judicial continuity with the judiciary and officials within the Scottish Courts and Tribunals Service.

The SCJC considers that parties should be able to set out their views on the form and location of any case management hearings. Taking these into account, the judge should have the power to make any order about the form, location and conduct of a case management hearing, including the power to hold them by conference call, by email exchange or in a courtroom.

⁸¹ [SCCR Report](#), Chapter 5, paragraph 48.

⁸² Simple Procedure Rules 2016, rule 7.7(1).

⁸³ For an example of judicial docketing in court rules, see the Fatal Accident Inquiry Rules 2017, rule 2.5.

Forms of case management

Alternatives to active judicial case management

- 4.9 As noted above, the SCJC considers that active judicial case management should be reserved for those cases where it is most necessary, in order that the resources involved in actively managing cases are deployed most proportionately. The new civil procedure rules will therefore have to provide the judge with a range of alternative approaches, with each involving less use of judicial and court time than active judicial case management.
- 4.10 In some cases, for example in any category of case which is case-flow managed, there will be very little judicial resource involved in managing the litigation: the case management model will be written into the rules, and will apply automatically. In other cases, there may be some judicial involvement in allocating the case to a timetable or procedure other than active judicial case management. A number of approaches are set out below. In each defended case, it will be necessary to have the initial views of the parties about which form of case management they think is most appropriate for their dispute. This is so that the judge is best able to make a decision about the form of case management, and best able to make a decision about the form of a case management hearing

The SCJC considers that, in all cases not allocated by the rules to a case-flow management model, parties should have the ability to set out, at the same time as they give the court their views on the form of any case management hearing, their views on the appropriate form of case management for their cause.

The judge will then make a decision, after taking account of parties' views, about the appropriate form of case management.

Case-flow management

- 4.11 In a case-flow management model, defended cases of a particular description are automatically assigned by the rules to a timetable which parties are obliged to follow. Judicial intervention, especially early in the process, is limited. Judges typically become actively involved only late in the process, when determination of the issues in dispute becomes necessary. The rules are able to provide for highly particularised steps, tailored to the nature of the dispute. For example, in case-flow managed personal injury procedure, a statement of claim tailored to personal injury claims replaces the condensation. Case-flow management is therefore particularly suitable for categories of cases which:
- are reasonably routine and predictable, such that the rules are able, with confidence, to set out a series of steps or requirements which are likely to be useful in most cases,
 - are commonly encountered, such that the effort involved in developing a set of case-flow management rules is justified, and

- do not require much active judicial case management.
- 4.12 It will be noted that these are very similar to the considerations which would make the use of a pre-action protocol most effective, and it is suggested that it will be in these most predictable, and most specialist, forms of procedure that a pre-action protocol will most likely be provided.
- 4.13 The personal injury “case-flow” procedure within the Court of Session and the sheriff courts followed recommendations of a Working Party under the chairmanship of Lord Coulsfield, and was introduced into the Court of Session on 01 April 2003. Case-flow management of personal injury cases is now the norm in the Court of Session and sheriff court. Nonetheless, the Lord Ordinary may instead, taking into account the likely complexity of the action and whether efficient determination of the action is served by doing so, apply Chapter 42A of the Rules of the Court of Session 1994.
- 4.14 The purpose behind Chapter 42A is to:
- “..allow the court, at a procedural stage, to identify and resolve issues that are known reasons for seeking variation of the timetable or the discharge of the proof diet at a later date. This “frontloading” of the action will allow the court to make more informed case management decisions when it comes to fixing further procedure at the hearing on the By-Order (Adjustment) Roll.”⁸⁴
- 4.15 Chapter 42A is therefore intended to allow the court to become involved in judicial case management with the aim of identifying and seeking to resolve issues which arise at a procedural stage. This option was extended recently from Court of Session procedure to apply in the sheriff courts.⁸⁵
- 4.16 Case-flow management, set out in rules of court, involves parties taking steps largely without the active involvement of the court or a judge. It therefore represents the most efficient way of ensuring that the courts’ resources and judicial time is most proportionately deployed to those cases which would benefit most from active judicial case management.
- 4.17 Where a case is allocated by the rules to case-flow management, however, it may become clear to parties or, exceptionally, to the courts, that the efficient determination of the case requires active case management. A power to order cases out of a case-flow will therefore be an important aspect of ensuring justice is done, and that the ambition of the statement of principle is met, in each case.

The SCJC considers that the new civil procedure rules should contain case-flow management provisions for all suitable categories of case, including personal injury cases. The rules should provide for cases to be able to be ordered out of any case-flow management procedure.

⁸⁴ [Court of Session Practice Note No 2 of 2014](#) (Personal Injury Actions), paragraph 7.

⁸⁵ Chapter 36A was added to the Ordinary Cause Rules 1993 by the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 2) (Personal Injury and Remits) 2015.

Fast-track procedure

- 4.18 In some cases, active judicial case management would be an inappropriate and inefficient use of judicial resource, because parties do not want it and it is unnecessary given the characteristics of the dispute. Where the issue in contention is straightforward and there are no or few preliminary matters requiring resolution, parties may simply be interested in being allocated a hearing at which their dispute will be decided and the court's role is properly limited to making the orders necessary in order to allow the dispute to be determined at that hearing.
- 4.19 The SCJC has decided that a fast-track procedure should be created, replacing much of existing petition procedure and summary application procedure, as well as any other categories of actions considered by the SCJC appropriate for summary disposal. In addition, it will be necessary for the new civil procedure rules to contain some provision allowing the judge, in appropriate cases, to make a case management order which allows even a complex dispute to be disposed of urgently, where the circumstances require it or where parties ask for it.

The SCJC considers that the new civil procedure rules should contain powers allowing the judge to order the urgent disposal of any dispute, as well as the fast-track procedure.

Standard orders

- 4.20 The court's authorial role in active judicial case management is time consuming: considering the procedural requirements of each case, creating and setting out a realistic timetable, providing parties with the procedural options they require and the court with the information it needs. For some cases, which raise highly particular issues or which are complex, the case management orders required will be necessarily bespoke and the court will have to fully apprise itself of the issues in the case at an early stage in order to make the appropriate procedural orders. For many categories of case however, similar issues are raised regularly. While the argument may not be made for providing full case-flow management in the rules for these cases, the SCJC considers that it should be possible for the rules to assist the judge and provide some guidance and certainty to parties about the case management orders which they might expect to be made in certain categories of case.
- 4.21 The SCJC has noted the approach of the Simple Procedure Rules 2016 to 'standard orders'. These are examples, provided for in the rules, of orders which the sheriff might make in typical situations. For example, a standard order is provided for cases which require a case management discussion, or for cases which the sheriff considers can be resolved without a hearing. Rule 8.3 of the Simple Procedure Rules 2016 provides that the sheriff may, in a typical situation, give parties a standard order, customise a standard order, or give parties an entirely bespoke order⁸⁶.
- 4.22 A standard orders model is a refinement of, or supplement to, full active judicial case management, rather than a complete alternative. The judge retains the power to

⁸⁶ The standard orders of the sheriff are in the Act of Sederunt (Simple Procedure) 2016, schedule 3.

exercise complete authorial control over the procedure in the case. All of the case management powers remain available. The benefits of the model include an increased level of predictability. In a description of case where a standard order is provided, parties will be aware going on of the sort of orders which a judge may make. The judge will also not have to invest as much resource in crafting the individual terms of a case management order: a standard approach, including a standard timetable, will have been identified, which can be adjusted or supplemented as required, if any individual features of the particular dispute demand it.

- 4.23 A standard orders model might also assist the SCJC in meeting the ambition of the SCCR to reduce the number of specialised procedures in the various rules of court⁸⁷. Much of the Rules of the Court of Session 1994, for example, is devoted to particular rules designed to implement a specialised form of action. Chapters 62 to 106 are largely devoted to specialised rules designed to implement and support the requirements of various statutes. It is hoped that the adoption of a general case management model would reduce the necessity of resorting this regularly to specially drafted provision. This would, however, reduce the predictability of litigation, and deny judges the benefit of being able to rely on the guidance of rules in order to be satisfied that an approach compatible with the demands of a particular statute or application was being adopted. If standard orders were instead prescribed for many typical situations and for many of these specialised forms of procedure, then parties and judges would be able to take advantage of both the benefits of considered, specialised provision as well as the potential of active judicial case management.
- 4.24 In order for a standard orders model to be effective, and for the ambition of the statement of principle to be met in full, the judge would need to know the views of parties as to whether there was a standard order prescribed in the rules which was suitable for their cause, and whether parties considered that the standard order needed to be adjusted or supplemented. If parties were required to express views at the same early stage as they as express views on the form of any case management hearing and the appropriate case management approach, judges could take these into account when making any initial case management, or allocation, order. If, for example, no views were expressed on the need for bespoke provision, judges and parties would be able to take confidence that the terms of an existing standard order were considered by everyone to be appropriate.

The SCJC considers that the new civil procedure rules should contain a suite of standard orders, providing default case management orders for (i) categories of case which typically arise, and (ii) specialised types of action.

Parties should have the ability to set out, at the same time as they give the court their views on the form and type of any case management, their views on (i) whether any standard order should be issued, and (ii) whether that standard order needs to be supplemented or adjusted in any particular way.

⁸⁷ [SCCR Report](#), Chapter 5, paragraph 70.

The judge should have the power to issue one of these standard orders, supplement or adjust the terms of a standard order, or issue an entirely bespoke order using the judge’s case management powers.

A case management questionnaire

- 4.25 At a number of points, the SCJC’s suggested model for initial case management requires parties to inform the court of their preferences or suggestions for the form of case management that should be adopted: whether an action should be allocated to the fast-track, whether an action is appropriate for a particular standard order (and whether that standard order should be varied), whether a case management hearing is required and, if so, what form it should take.
- 4.26 The SCJC considers that parties should be expected to apply their minds to all of these questions in a considered way in advance of litigating. The best way for the court to be apprised of parties’ views would be for both principal writs – the originating document and any form of defence or answers – to be required by the rules to be accompanied by a case management questionnaire, taking parties through their case management options and seeking their explanation of their preferred case management approach. This questionnaire would ask:
- whether any required pre-action protocols have been followed and, if not, why not,
 - whether the type of action is allocated by the rules to either fast-track procedure or a case-flow procedure,
 - whether the party considered that, although it is not allocated to it by the rules, fast-track procedure was appropriate for the action,
 - whether there needs to be an initial case management hearing and, if so, what form it should take (court hearing, videoconference, exchange of emails),
 - whether any of the standard orders set out in the rules are appropriate for the action and, if so, whether the timetables in the standard order need to be adjusted or not.

The SCJC considers that parties should be required to lodge a case management questionnaire with their originating writ and defences.

A model for initial case management

- 4.27 The SCJC has concluded that the rules should provide for a suite of case management options, all designed to ensure:
- that judicial and court time is protected, so that the resources involved in active case management are reserved for the cases which require it the most,
 - that judges have the ability to hold case management hearings in a form which is effective and proportionate, and

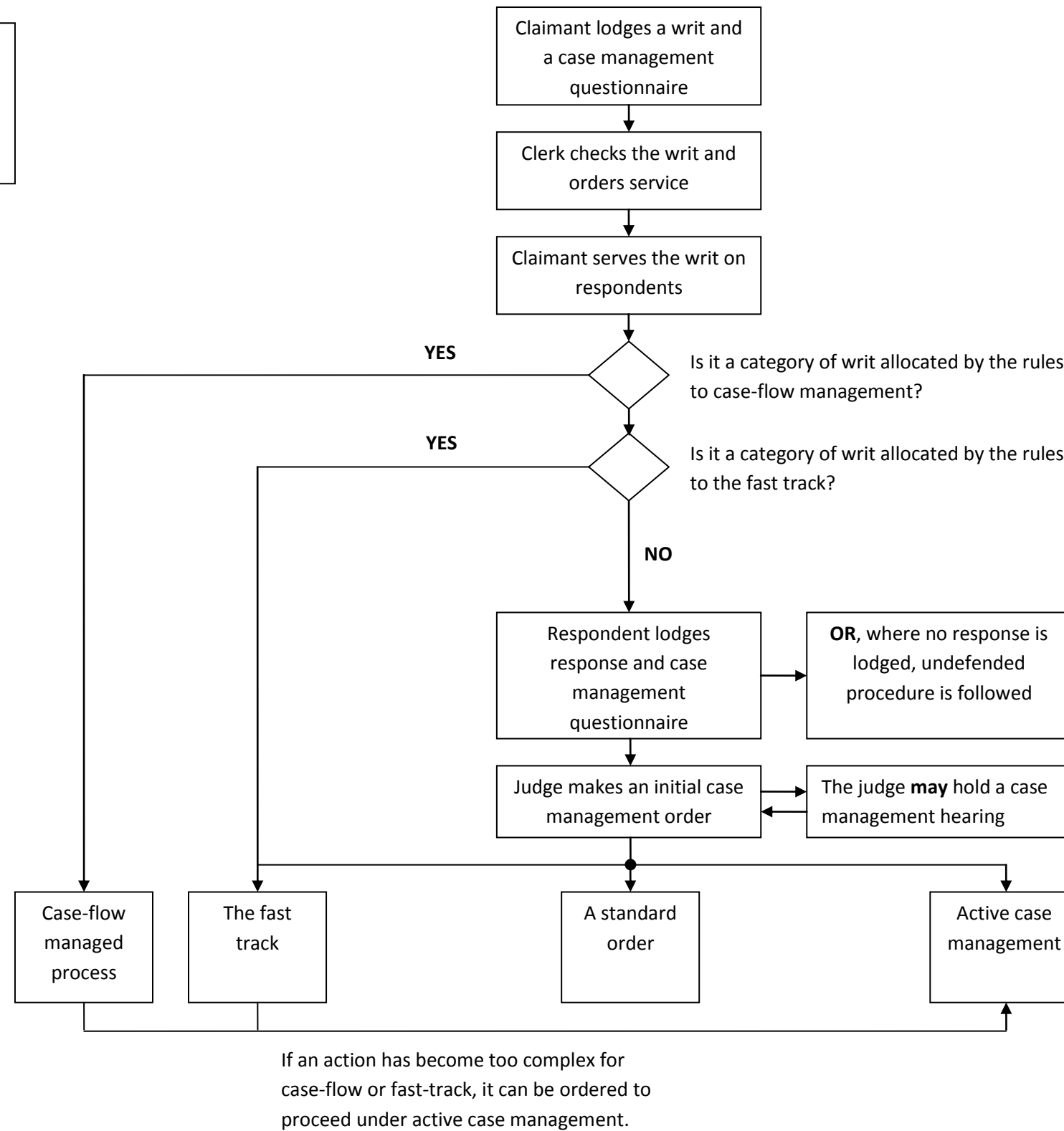
- that parties are able to express views about the form and type of case management which is applied to their case.

4.28 The SCJC considers that an initial case management model for disputed or defended cases along the following lines should feature in the new civil procedure rules:

THE NEW CIVIL PROCEDURE RULES

A CASE MANAGEMENT MODEL FOR ORDINARY PROCEDURE IN THE COURT OF SESSION AND SHERIFF COURT

Note: no decisions have been taken about terminology. This table uses 'claimant' for the party bringing the action, 'respondent' for all other parties, and 'judge' for the Lord Ordinary or sheriff.



Chapter 5. Case management powers

Background

The Scottish Civil Courts Review

- 5.1 The SCCR considered that the courts should have enhanced case management powers and discussed these under the headings of:
- identifying the issues in dispute,
 - managing time efficiently, and
 - having effective sanctions for non-compliance.
- 5.2 The SCJC agrees that a strong, flexible and creative set of case management powers will be essential if the implementation of the statement of principle is to be effective. Judges will be expected to take account of the statement of principle when exercising their case management powers and the suite of powers should be sufficient to empower judges to manage cases in a way which lives up to the ambition of the statement.

Identifying the issues in dispute

Background

- 5.3 The identification and narrowing of the issues genuinely in dispute was identified by the SCCR as essential if the aims of minimising costs, prompt resolution, and making the best use of the courts' finite resources were to be achieved⁸⁸.
- 5.4 The principal method by which the issues genuinely in dispute will be identified and narrowed will continue to be by the preparation and adjustment of pleadings by the parties. However, in order that the ambition of the statement of principle is met the court must be empowered both to encourage and to require parties to take steps to narrow their cases and to perform actions which encourage or support such narrowing.
- 5.5 The SCJC considers that, in the interests of both the efficient use of court time by the identification and narrowing of the issues in dispute, the judge should have considerable powers to demand, shape and limit the information presented to the court and the evidence which requires formal proof. The SCJC's initial conclusions on this matter are set out in chapter 6 (evidence).

Pre-action protocols

- 5.6 The use of pre-action protocols has been identified as a way of ensuring parties focus on identifying issues in dispute before an action is even raised in court. A voluntary protocol in personal injury cases has operated for a number of years, and

⁸⁸ [SCCR Report](#), Chapter 9, paragraph 16.

an adaptation of this was recently incorporated into court rules⁸⁹. The SCJC is currently considering whether other such protocols should be provided for in rules.

- 5.7 There is a pre-action protocol in asylum and immigration cases imposed by practice note⁹⁰, and the commercial court expects a level of pre-action communication between parties before a commercial action is commenced⁹¹.
- 5.8 The 2014 Act for the first time allows the Court of Session to make provision about steps to be taken by parties in advance of litigating. This includes the promulgation of statutory pre-action protocols and the ability to provide, in rules, for their application and enforcement, by sanctions if necessary, by the courts⁹².

The SCJC considers that pre-action protocols should be provided for all classes of case where the court has a reasonable expectation of certain steps and disclosure being made by the parties in advance of litigation, in the interests of narrowing the issues in dispute in a cause.

The disclosure of evidence

- 5.9 The SCCR noted an appetite for earlier and wider disclosure of evidence and the recovery of documents. The SCCR recommended that there should not be radical reform of the Scottish system but that that the process of disclosure should be exercised proportionately and subject to judicial controls. It also identified that this might be done as an aspect of initial case management, where the court could establish what additional information might be necessary, and how long the parties would require to obtain it.
- 5.10 The SCCR recommended that:
- “the court should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover documents either generally or specifically;
 - the court should be entitled to order the lodging of documents constituting, evidencing or relating to the subject matter of the action, or any invoices, correspondence or similar documents relating to it within a specified period;
 - the normal procedures for recovery of evidence should also be available to parties;

⁸⁹ The Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016; also see, Stephen Feltham, [Courts Reform: A Call to Pre-Action](#), Journal of the Law Society of Scotland, September 2015.

⁹⁰ [Court of Session Practice Note No. 5 of 2015](#) (judicial review), paragraphs 14-20.

⁹¹ [Court of Session Practice Note No. 6 of 2004](#) (commercial actions), paragraph 11.

⁹² The power of the Court of Session to make provision about action to be taken before proceedings in court are commenced is contained in the Courts Reform (Scotland) Act 2014, sections 103(2)(b) and 104(2)(b).

- recovery of documents should be competent at any stage in the proceedings;
- any documents founded on in the pleadings should be lodged in advance of the first case management hearing.⁹³

5.11 The recommendations are very similar to the powers currently afforded to the Court in commercial actions. The party raising the action is required to prepare a schedule listing the documents founded on, which is to be appended to the summons and lodged as an inventory of productions.⁹⁴ In commercial actions the court may order:

“disclosure of the identity of witnesses and the existence and nature of documents relating to the action or authority to recover documents either generally or specifically;

documents constituting, evidencing or relating to the subject-matter of the action or any invoices, correspondence or similar documents relating to it to be lodged in process within a specified period;”⁹⁵

The SCJC considers that the court should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover specific documents.

The court should be able to order the lodging of documents constituting, evidencing or relating to the subject matter of the action, or any invoices, correspondence or similar documents relating to it within a specified period.

The normal procedures for recovery of evidence should also be available to parties.

The recovery of documents should be competent at any stage in the proceedings. Any documents founded on in the pleadings should be lodged in advance of the first case management hearing.

Summary disposal

5.12 The SCCR recommended that:

“At any stage in proceedings either party should be able to seek summary disposal. The test should be whether the pursuer or the defender has no real prospect of success and where there is no other compelling reason why the case should proceed. The court should have the power *ex proprio motu*, and as part of its active case

⁹³ [SCCR Report](#), Chapter 9, paragraph 38.

⁹⁴ Rules of the Court of Session 1994, rule 47.3(1).

⁹⁵ Rules of the Court of Session 1994, rule 47.11(1).

management function, summarily to dispose of an action or defence by applying the same test.⁹⁶

- 5.13 The current position is that the court, on the application of the pursuer, may grant summary decree where it is satisfied that there is no defence to the action, or to any part of it to which the motion relates. Generally, the summary decree procedure applies only to the pursuer and a defender who wishes to argue that the summons or writ discloses no cause of action must take the case to debate once the time for adjusting has expired.
- 5.14 The SCCR recognised that in most other jurisdictions, there is power for allegations to be struck out or for a decision to be made, where the court is satisfied that the pleaded claim does not disclose a cause of action or where a defence does not disclose an answer⁹⁷. The SCCR recommended that the court should also have the power, of its own initiative, and as part of its active case management function, summarily to dispose of an action or defence by applying the same test. In that circumstance the court should fix a hearing to hear parties.

The SCJC considers that parties should, on appropriate notice, be able to seek summary disposal of any action. The test for summary disposal should be the opposing party having no real prospect of success and there being no other compelling reason why the case should proceed. The court should, on giving appropriate notice, be able to summarily dispose of an action, or part of an action.

Managing time efficiently

Background

- 5.15 Most respondents to the SCCR's consultation considered that the court should have greater control in the allocation of hearing time⁹⁸. The SCCR recommended that:

“The court should expect parties to agree on a timetable for presentation of the evidence or submissions so that the most effective use is made of court time. A judge or sheriff should, as part of his case management functions, have the power to time limit hearings in particular types of case where he considers it appropriate.⁹⁹”

- 5.16 The SCCR also focused on the use of outline, or skeleton, arguments as a tool to ensure that the court's time is used efficiently. It was considered that they give the judge appropriate notice of matters, allowing a focused and informed use of case management powers. It was also noted that they assist parties in their duty to narrow the scope of submissions to points genuinely in contention. For example, if properly

⁹⁶ [SCCR Report](#), Recommendations, paragraph 123.

⁹⁷ [SCCR Report](#), Chapter 9, paragraph 98.

⁹⁸ [SCCR Report](#), Chapter 9, paragraph 112.

⁹⁹ [SCCR Report](#), Chapter 9, paragraph 117.

prepared, a skeleton argument might expose parties' agreement on all relevant statutory provisions in advance of a hearing, limiting the necessary submissions.

Discussion

- 5.17 The SCJC considers that judges should have the strongest possible powers to control the scope and pace of litigation in the courts, in the interests of the efficient administration of justice. In particular, judges should be able to require parties to prepare and lodge timetables and should have powers allowing the court to keep parties to these timetables. Judges should have effective control over the conduct of a hearing and should have a strong power to control the pace of litigation by the use of deadlines and time limits.
- 5.18 All of these powers, of course, would only be capable of being exercised compatibly with the statement of principle. Any use of these powers which conflicted with the statement, and in particular with the pre-eminence given to doing substantive justice between parties, would not be proper. However, in order that the court is able to ensure that justice is done within a reasonable time, and that the interests of economy, efficiency and proportionality are properly respected, the judge must be given a set of powers that put that ambition within judicial control.

The SCJC considers that judges should have the power to impose a time limit on any hearing or any part of any hearing, impose a time limit on any step to be taken by a party, vary any deadline or time limit set out in these rules, require a party to provide a written estimate of the length of time it will take to complete a step or take any action, and require a party to submit a written note of argument in advance of any hearing or step with permission having to be sought by motion to raise any other matters.

Effective sanctions for non-compliance

Background

- 5.19 The SCCR recommended that:

“Where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the court to impose such sanctions as it considers appropriate.

The rules of court should entitle the court to:

- a) dismiss the action or counterclaim, in whole or in part;
- b) grant decree in respect of all or any of the conclusions of the summons, or of the craves of the initial writ, or counterclaim;
- c) refuse to extend any period for compliance with a provision in the rules of an order of the court;
- d) make an award of expenses;

- e) disallow a party from amending or updating part of its claim;
- f) disallow a party from calling one or more witnesses, including expert witnesses;
- g) deprive a claimant who is in default of all or some of the interest that would otherwise have been awarded;
- h) order caution for expenses; and
- i) order immediate payment of expenses incurred in procedural matters and assess them summarily. Payment of the sum would be a condition precedent of further procedure.

We do not propose this as an exhaustive list.”¹⁰⁰

- 5.20 The SCCR noted, however, that the primary object of a sanctions regime is not punishment but the prevention of non-compliance and encouraging efficiency¹⁰¹.

Discussion

- 5.21 The SCJC agrees with the analysis of the SCCR. In order to give effect to the statement of principle and to any improvements to civil procedure made by the rules, the enforcement of any orders and of the rules must have real teeth. The SCJC agrees that it is the judges who are best placed to assess the gravity of any non-compliance, weigh up whether it is non-compliance that could be or ought to be excused, and decide whether to provide relief, impose a sanction, or both.

The SCJC considers that the new civil procedure rules should provide judges with a broad and general power to relieve parties from non-compliance with rules and orders and to sanction parties for such non-compliance. This power should be wide enough to include all of the possible sanctions identified by the SCCR.

Draft provision

- 5.22 The SCJC considers that the general case management powers of the judge should be set out at the beginning of the rules, directly after the statement of principle.
- 5.23 The way in which the powers are organised within the rules should guide the reader as to the ways in which the powers might be exercised and the purposes for which the powers might be applied. The general power of the judge to do anything necessary will be broken down into illustrative examples of its possible application.
- 5.24 Draft provision might therefore be along the following lines:

Chapter 2

¹⁰⁰ [SCCR Report](#), Recommendations, paragraphs 127 and 128.

¹⁰¹ [SCCR Report](#), Chapter 9, paragraph 143.

*Case management***Case management powers**

2.1—(1) The judge may make any order necessary to provide a just resolution of a cause, including—

(a) an order made to assist the court in identifying the issues, such as an order—

(i) requiring a party to disclose the existence and nature of documents related to the cause,

(ii) granting authority to recover documents related to the cause,

(iii) requiring the lodging of any document related to the cause,

(iv) fixing a hearing and specifying a purpose for that hearing,

(v) requiring a party to address the court for any purpose,

(vi) requiring parties to agree certain matters in advance of a step or hearing (such as the relevant statutory provisions) or formally notify the court of their disagreement,

(b) an order made to allow to manage time efficiently, such as an order—

(i) imposing a time limit on any hearing or any part of any hearing,

(ii) imposing a time limit on any step to be taken by a party,

(iii) varying a deadline or time limit set out in these rules,

(iv) requiring a party to provide a written estimate of the length of time it will take to complete a step or take any action,

(v) requiring a party to submit a written note of argument in advance of any hearing or step and limiting matters which may be raised to those contained in the note of argument,

(c) an order dealing with a party's non-compliance with a rule or order, such as an order—

(i) dismissing the cause in whole or in part,

(ii) granting decree in whole or in part,

- (iii) disallowing a party from leading a witness or leading particular evidence,
 - (iv) relieving the party from the consequence of not complying with an order,
 - (v) imposing conditions on that relief from non-compliance,
 - (vi) requiring caution for expenses,
 - (vii) awarding expenses.
- (2) The judge may make orders—
- (a) of the judge's own accord, or
 - (b) on the application of a party.

Chapter 6. Evidence

Expert witnesses

The duties of expert witnesses

- 6.1 The SCCR, noting Part 35 of the English and Welsh Civil Procedure Rules, recommended that a rule be introduced clarifying that the overriding duty of an expert witness was to the court. The Review also supported the disclosure, on request, of all written and oral instructions to the expert and the basis upon which the expert is remunerated, including whether the expert is retained on a contingency basis, has agreed to defer his fees, or has a continuing financial relationship with the agent of the party instructing him.
- 6.2 The SCJC has considered the recommendations of the SCCR and supports the introduction of statutory duties for expert witnesses. It will consider the introduction of a code of practice for expert witnesses, and guidance as to the form of experts' reports. The SCJC does not consider, however, that the case has been made for requiring experts to disclose their otherwise private arrangements with the party that instructed them.

The SCJC considers that the duties of expert witnesses should be set out in the new civil procedure rules. But the SCJC is not satisfied that experts should be required to disclose the terms of their instruction.

Case management powers

- 6.3 The SCCR noted the terms of rule 47.12(2)(h) of the Rules of the Court of Session 1994 which provides there should be consultation between skilled persons with a view to agreeing about any points held in common. The commercial judge:

“..may direct that skilled persons should meet with a view to reaching agreement and identifying areas of disagreement, and may order them thereafter to produce a joint note, to be lodged in process by one of the parties, identifying areas of agreement and disagreement, and the basis of any disagreement.”

- 6.4 The SCCR recommended that:

“In all cases to which the active case management model applies, the court should have power to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements.¹⁰²”

The SCJC considers that judges should be given the power to make orders about expert witnesses, including a power to require them to confer in advance of proof, in the interests of the narrowing of the issues in dispute and the efficient use of court time.

¹⁰² [SCCR Report](#), Recommendations, paragraph 121.

Expert evidence

The reports of expert witnesses and skilled persons

6.5 The SCCR recommended that:

“The provisions of RCS 47.11, whereby the commercial judge may order the reports of skilled persons or witness statements to be lodged in process, and at the procedural hearing may determine in light of these that proof is unnecessary on any issue, should apply generally to all types of action that are subject to active judicial case management.”¹⁰³

6.6 The SCCR considered that the advance intimation and lodging of witness statements was particularly helpful in the case of expert evidence as this gives the court proper time to prepare and shortens any proof diet. The SCCR commended the enabling power within the commercial court and recommended that it should apply generally to all types of action subject to active judicial case management¹⁰⁴.

6.7 The SCJC agrees with this view and considers that this power would be important in allowing the ambition of the statement of principle to be met.

6.8 The SCCR recommended that:

“A rule should be adopted to introduce a presumption that an expert’s report would be treated as evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence.”¹⁰⁵

6.9 The SCJC has noted the approach of the family courts, reflected in the Court of Session’s voluntary protocol in family actions:

“5.3 Where affidavits or reports have been lodged they may be treated as all or part of the evidence in chief of the deponent or author.

5.4 It is recognised that the use of affidavits limits the length of proofs.”

The SCJC considers that the court should be able to order that the reports of skilled persons or expert witness be lodged in process, and may determine in light of these that proof is unnecessary on any issue. The default position should be that the report of an expert stands as that expert’s evidence-in-chief.

¹⁰³ [SCCR Report](#), Recommendations, paragraph 115.

¹⁰⁴ [SCCR Report](#), Chapter 9, paragraph 47.

¹⁰⁵ [SCCR Report](#), Chapter 9, paragraph 91.

The form of expert evidence

6.10 At present questions of whether expert evidence is needed, what type, and the number of experts required, are left to the parties. The general response to the SCCR's consultation indicated there was little support for radical reform in this area¹⁰⁶. However, some respondents suggested that the court's general case management powers could be developed to give the court the discretion to decide what expert evidence was necessary. Flaws were identified in the control of expert evidence in family law cases, and concerns expressed about the resultant costs to parties and the public purse.

6.11 The SCCR noted the approach in other jurisdictions, particularly that in England and Wales where expert evidence is governed by Part 35 of the Civil Procedure Rules 1998. The general principle adopted in England and Wales is that the court should have control over the giving of expert evidence and that this should be restricted to what is reasonably required to resolve the dispute¹⁰⁷. Part 35 also contains a rule setting out the court's power to restrict expert evidence, that rule is as follows:

“35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –

(a) the field in which expert evidence is required and the issues which the expert evidence will address; and

(b) where practicable, the name of the proposed expert.

(3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address.”

6.12 The SCCR recommended that:

“We are not persuaded that it is necessary to introduce a general permission rule in Scotland or to introduce express case management powers that would enable the court to regulate the type of expert evidence to be adduced or the number of experts that parties may lead. With the exception of proceedings relating to children, respondents did not identify any problems relating to inappropriate use of experts and if witnesses are called unnecessarily this can be addressed by the court's powers in relation to certification of witnesses.

¹⁰⁶ [SCCR Report](#), Chapter 9, paragraph 62.

¹⁰⁷ Civil Procedure Rules 1998, rule 35.1.

However, given the concerns that have been expressed in relation to cases involving children we recommend that the provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals."¹⁰⁸

- 6.13 The SCJC agrees that there should be no general requirement to seek the court's permission to instruct an expert witness. The SCJC has noted the experience in courts, such as the commercial courts, where there is already a culture of judicial involvement in decisions concerning expert evidence.
- 6.14 The SCCR did not endorse a presumption in favour of the instruction of single joint experts. It did, however, recommend that the court should have the power, in actively case managed cases, to order the instruction of such witnesses.

The SCJC considers that parties should not require to seek the court's permission before instructing an expert witness, but that the rules should provide for a strong power for the judge, where appropriate, to make orders about the identity and scope of expert witnesses and their evidence.

Evidence management powers

Commercial court practice

- 6.15 In the commercial courts, the judge is given strong evidence-management powers to shape and control the matters which require proof and the ways in which the court can be satisfied on a fact having been proved. Rule 47.12 of the Rules of the Court of Session 1994 allows the judge to order proof by "oral evidence, the production of documents or affidavits on any issue", that "witness statements shall stand as evidence in chief", and that "proof is unnecessary on any issue"
- 6.16 The Court of Session's new, strengthened power to regulate civil procedure by act of sederunt extends to making provision "for or about ... witness and evidence, including modifying the rules of evidence as they apply to proceedings"¹⁰⁹.
- 6.17 In fast-track cases and judicial reviews, the SCJC has decided that the default position should be that proof is not required on any issue, except as ordered by the judge and in the manner ordered by the judge. In any case subject to active case management, however, the converse position should apply: the normal rules of evidence will apply, except where the judge has made an order concerning the mode of proof, along the same lines as the powers which the commercial judge has in commercial procedure.

The SCJC considers that the new civil procedure rules should contain provision for both a set of strong case management powers for the judge concerning the scope of evidence as well as default provision on the

¹⁰⁸ [SCCR Report](#), Chapter 9, paragraphs 77 and 78.

¹⁰⁹ Courts Reform (Scotland) Act 2014, sections 103(2)(o) and 104(2)(o).

agreement of evidence and particular methods for experts to give their evidence.**Draft provision**

6.18 Draft provision might therefore be along the following lines:

Evidence**Evidence management powers**

x.1.—(1) The judge may give orders about evidence, such as an order—

- (a) restricting evidence to particular issues;
- (b) determining the manner in which evidence on any particular issue is to be given, whether by video recording, oral evidence, the lodging of written statements, by production of documents, or otherwise;
- (c) requiring a party to provide written notice of the topics for examination during oral evidence;
- (d) granting warrant to officers of the law to take possession of anything which the judge considers necessary to produce and to hold any such thing in safe custody, subject to inspection by parties;
- (e) allowing the inspection of any land, premises, article or other thing, which the judge considers relevant, either by the judge or by another person;
- (f) that a copy of any document is to be treated as an original

Witness Statements

x.2.—(1) Parties must lodge a witness statement for each expert witness by a date ordered by the judge, unless the judge orders otherwise.

(2) A “witness statement” is a written statement—

- (a) containing evidence which a person could give orally; and
- (b) signed by that person.

(3) The content of the witness statement is the evidence in chief of the person who signed it.

(4) With the permission of the judge, the party relying on the witness statement may, at the inquiry—

- (a) ask questions of the witness which introduce, clarify or supplement the terms of the witness statement;

- (b) ask questions of the witness which relate to new matters which have arisen since the witness statement was lodged.

Instructing expert witnesses

x.3—(1) The duty of an expert witness—

- (a) is to the court;
 - (b) is to assist the court in providing parties with a just resolution of their dispute.
- (2) This duty overrides any obligation to the person who instructed or paid the expert witness.
- (3) An expert witness may only give evidence on matters which are reasonably required to provide parties with a just resolution of their dispute.
- (4) A party who is considering instructing an expert witness must, as early as possible, lodge a note setting out—
- (a) the identity of the witness to be instructed, if known;
 - (b) why that witness's evidence is reasonably required to provide parties with a just resolution of their dispute; and
 - (c) the expected completion date for any reports.

Witness statements by expert witnesses

x.4.—(1) The written statement of an expert witness must state that the expert witness understands the nature of their duty under rule x.3(1) and (2).

- (2) Other parties may lodge a minute of questions to be put to another party's expert witness.
- (3) Except where the judge orders otherwise—
- (a) each party may only lodge one minute of questions;
 - (b) the minute of questions must be lodged within 14 days of the witness statement being lodged;
 - (c) the minute of questions must be limited to clarification of the contents of the witness statement.
- (4) The party who instructed the expert witness must lodge the expert witness's answers to the minute of questions in the form of an annex to the written statement, by the date ordered by the judge.
- (5) The judge may make an order about the expenses of any procedure under this rule.

Concurrent presentation of expert evidence

x.5.—(1) The judge may order expert evidence on a particular matter to be given by the concurrent presentation of expert evidence.

(2) Where the judge orders that expert evidence must be given by concurrent presentation—

- (a) the parties must prepare a note for the judge, setting out the areas of agreement and disagreement between the expert witnesses;
- (b) that note must be lodged at least 7 days before the hearing.

(3) At the hearing at which expert evidence is being given by concurrent presentation—

- (a) all expert witnesses will give oral evidence at the same time;
- (b) the judge may direct how evidence is to be given by the expert witnesses, including by the judge questioning the witnesses directly, inviting the witnesses to discuss a particular matter between them or, exceptionally, allowing cross-examination by parties.

Evidence in fast-track procedure

x.6.(1) Any rule of law or enactment that prevents evidence being led on grounds of inadmissibility does not apply in proceedings allocated to fast-track procedure.

(2) Any rule of law that restricts the manner in which evidence must be presented does not apply in proceedings allocated to fast-track procedure.

(3) Subject to any orders made by the judge—

- (a) information may be presented to the court in any manner; and
- (b) the judge consider a matter proved based on that information.

Chapter 7. The form, style and language of court rules

The form of rules

Acts of sederunt

- 7.1 The relevant powers allow the Court of Session to make rules for civil procedure in the form of acts of sederunt. An act of sederunt is a formally minuted act of the Court of Session in its legislative capacity, with the Court's power to govern by acts of sederunt pre-dating their statutory regulation.
- 7.2 The 2014 Act provides separate powers for making rules for the Court of Session¹¹⁰ and for the sheriff and Sheriff Appeal courts¹¹¹. Powers to prescribe the fees of solicitors and others within these courts are similarly in separate sections¹¹². There is, however, no difficulty in combining these powers and producing, in a single instrument, provision which covers multiple courts. The best examples of this in an act of sederunt are the rules on contempt of court¹¹³, or the rules of representation for non-natural persons¹¹⁴, both of which apply across courts.
- 7.3 Acts of sederunt are Scottish Statutory Instruments and those which contain only civil procedural rules are subject to the default laying requirement in the Scottish Parliament.¹¹⁵ This means that the Scottish Parliament does not get a vote to annul, nor has to vote to approve, them. Their status as Scottish Statutory Instruments affects some formal elements. The body of the instrument has to be divided in certain recognised ways (for example into rules or paragraphs) and certain presentational elements – the tabulation, the typeface, the font size – cannot be altered in the official print of the instrument. Certain types of visual presentation are possible in the body of the instrument. The format can handle tables and certain sorts of lists, for example. If necessary, more innovative ways of displaying information could be incorporated into instruments by converting them into images and inserting them as such, however this can cause difficulty with presentation online and future amendment. For examples of this, see the forms prescribed for use with simple procedure¹¹⁶, or the first use in court rules of a flow-chart, also in the Simple Procedure Rules 2016:

¹¹⁰ Courts Reform (Scotland) Act 2014, section 103.

¹¹¹ Courts Reform (Scotland) Act 2014, section 104.

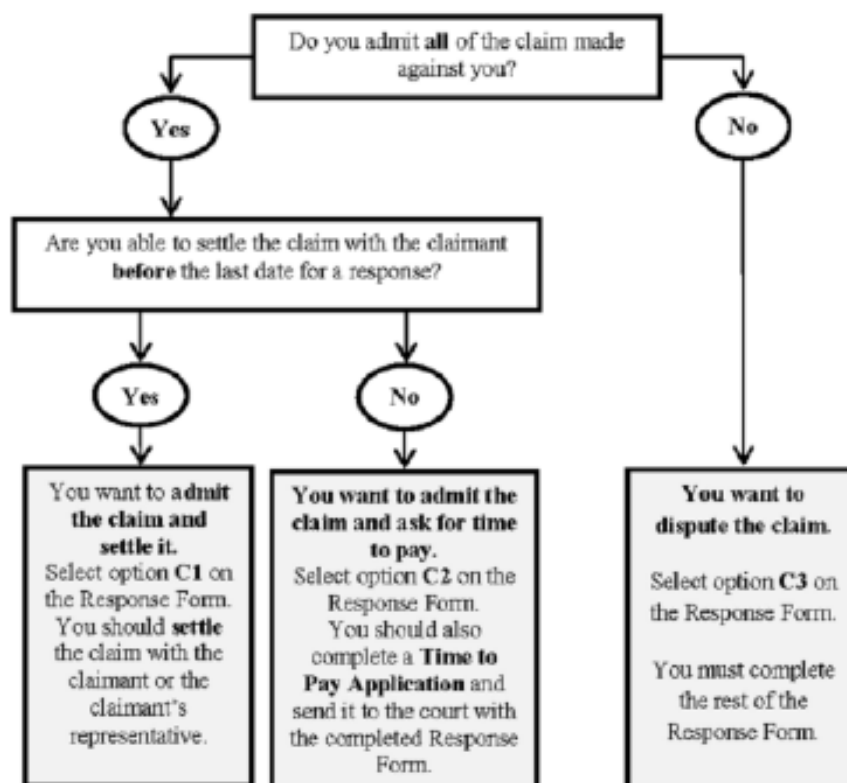
¹¹² Courts Reform (Scotland) Act 2014, section 105 and 106.

¹¹³ Act of Sederunt (Contempt of Court in Civil Proceedings) 2011.

¹¹⁴ Act of Sederunt (Lay Representation for Non-Natural Persons) 2016.

¹¹⁵ The default laying requirement is in the Interpretation and Legislative Reform (Scotland) Act 2010, section 30.

¹¹⁶ The forms for use in simple procedure are in the Act of Sederunt (Simple Procedure) 2016, schedule 2.



- 7.4 The SCJC has also noted the increasing use in recent years of technically inert, organisational material in primary legislation and in court rules, for example the overview provisions in section 1 of the Investigatory Powers Act 2016 or the legislative sign-posting in rule 6.1 of the Sheriff Appeal Court Rules 2015. This sort of material might be thought to be particularly appropriate and useful in a large instrument with many independent parts, like a set of court rules.

The SCJC considers that the new civil procedure rules should be ambitious and innovative in matters of structure, layout and presentation. Considering that these rules are in daily use by the legal profession, the focus of the drafting approach should be usability and readability.

The number and size of instruments

- 7.5 The Rules of the Court of Session 1994 alone has over one hundred chapters, with at least three of those chapters – chapter 49 (family actions), chapter 41 (applications under statute), and chapter 74 (companies) – being the size of many separate codes of rules themselves. The Court of Session rules are contained in a single code, whereas the equivalent rules for the sheriff courts are spread across at least a dozen¹¹⁷.
- 7.6 Having multiple sets of rules for a single sheriff court has its challenges, from a drafting perspective as well as a usability perspective. On a practical level, large instruments are difficult to deal with. A visit to a law library which keeps each year's

¹¹⁷ For more on this, see paragraph 1.14.

copies of the reprints of the Court of Session rules will demonstrate that annually the volume becomes larger, the spine less secure and the paper thinner. Increasingly lawyers and the public access litigation online, where perhaps the difficulties caused by an over-large instrument are less pronounced. However, a significant number of litigators prefer bound reprints of the rules. This will likely continue for some time.

- 7.7 The difficulties caused by particularly long instruments are obvious. They are difficult to navigate. They are difficult to amend, from a drafting perspective, particularly if you are concerned about a provision, phrase or word being interpreted consistently within a single set of rules. They require users to carry around vast amounts of irrelevant information in order to have access to the information they need. The question has been raised why, if a single procedural code was produced, a Court of Session practitioner should have to carry around the rules which only applied in the sheriff court. This point can be taken further. Does a personal injury practitioner, need to carry around the hundreds and hundreds of pages of rules which apply only to family law or to companies? Legal practice is significantly more specialised than it was even in 1993 when the two main civil codes were last rewritten. It is therefore acknowledged that there is at least as strong an argument for the deconsolidation of civil procedural rules as there is for the consolidation of them.

The challenge of consistency

- 7.8 Having multiple sets of rules covering the same court can create problems when attempting to regulate the general parts of that court's procedure. For example, each significant set of sheriff court rules has to replicate the rules on lay support, service, extracts, motion procedure, live links, vulnerable witnesses and interventions. Chapter 2 of the Summary Application Rules 1999 is a good example of this. A consequence of this approach is that whenever an adjustment needs to be made to a general provision (for example, because primary legislation has reformed the law on vulnerable witnesses), that adjustment needs to be reflected in multiple places, across multiple sets of rules. The length of the amending instrument is increased. Inevitably, provisions which ought logically to be consistent across codes drift apart or develop idiosyncratic quirks, running the risk that the differences are interpreted as significant, when no significance was intended.
- 7.9 A different approach is sometimes taken. The Fatal Accident Inquiry Rules 1977¹¹⁸, though not technically civil procedural rules, applied only in the sheriff court. Where specific provision about procedure is not made in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, or in the rules made under that act, then the rules which would apply in an ordinary cause were to be followed¹¹⁹. In this way, amendments made to the Ordinary Cause Rules 1993 automatically flowed through, if not otherwise dealt with, to the Fatal Accident Inquiry Rules. This approach is followed, to an extent, in other codes, like the Child Care and Maintenance Rules.

¹¹⁸ Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977. These Rules are due to be replaced by new rules set out in the Act of Sederunt (Fatal Accident Inquiry Rules 2017).

¹¹⁹ Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, section 4(7).

- 7.10 This approach is not, however, a particularly transparent way of regulating court procedure. The reader has to have a fairly complete understanding of the subject-matter scope of, for example, the fatal accident inquiries in order to look to the Ordinary Cause Rules 1993 and work out which ones apply. The Ordinary Cause Rules 1993 are obviously designed principally for dealing with disputes between parties and may not be particularly apt to be directly applied to a completely different type of process, such as an inquisitorial fatal accident inquiry or a sensitive childcare dispute. Frankly, when the Ordinary Cause Rules 1993 are amended, the knock-on effect on other codes of rules parasitic on them is rarely considered by the drafter. This means that the possibility of producing unintended effects is increased.

Approaches to the number of instruments

- 7.11 The difficulties involved in omnibus rules have been discussed, as have the difficulties involved in the preparation and management of multiple codes.
- 7.12 There are some principles which the SCJC has identified to govern the approach to be taken to any decision relating to the length and number of instruments:
- While the length of instruments alone should not be determinative, in practice longer instruments create difficulties which shorter instruments do not have.
 - There are certain cross-cutting aspects of general court procedure which should be consistent across subject matters (for example, provision relating to vulnerable witnesses or intimation).
 - There are certain aspects of civil procedure where it is desirable for substantive procedure to be identical across courts (for example, family actions or personal injury actions), and splitting these rules across codes can create difficulties achieving this.
 - It is generally unhelpful for codes to contain provision which a practitioner is unlikely to have to refer to (for example, rules relating to a different court, or to an uncommonly-encountered type of procedure).
 - Users should be able to confidently identify the procedural provision which relates to the court or type of action they are interested in, without having to deduce it from elsewhere.

The SCJC will consider all options for the arrangement of the instruments containing rules of court, based on the considerations set out in paragraph 7.12.

The style of rules

The particular challenges of drafting court rules

- 7.13 For much of the SCJC's work it will continue to be appropriate for the drafters to seek guidance from the standard sources on legislative drafting, both internal and public. There is no reason for our approach to be different when it comes to, for example,

gender neutrality, syntax, sentence structure, or the expression of dates and numbers. Nevertheless, it may be the case that there are some features of the SCJC's drafting work which would make a rules-specific approach appropriate.

- 7.14 The drafting work of parliamentary counsel or a government department can involve almost any sort of drafting task: changing the common law, setting up a body, conferring powers on an office, prescribing detailed matters about a particular agricultural or scientific practice. The drafting of court rules can involve a surprising variety of subject matter, but is largely concerned with the same business: drafting rules about civil or criminal procedure. These rules have a number of challenges which commonly feature, because of the nature of the task. If the product of the comprehensive rules rewrite is to be a coherent, consistent set of court rules then it is worth considering some of these challenges and whether the SCJC is able to take a consistent drafting approach to these matters.

A particular challenge: amendment

- 7.15 One of the principal causes of complex drafting is frequent amendment¹²⁰. LPPO's instruments are overwhelmingly amending instruments. To illustrate this point, in 2014, the office produced 12 acts of sederunt. Of these instruments, 7 amended the Rules of the Court of Session. The Ordinary Cause Rules were amended 5 times, the Summary Cause Rules were amended 3 times, the rules on solicitors' fees were amended twice, and the Small Claims Rules, Sheriff Court Bankruptcy Rules, Sheriff Court Company Insolvency Rules, Childcare and Maintenance Rules, Messenger-at-arms and Sheriff Officers Rules, Commissary Business Rules and Sheriff Court Adoption Rules were each amended once. Only one standalone instrument was produced: the Fitness for Judicial Office Tribunal Rules¹²¹.
- 7.16 We estimate that, since September 1994 when they came into force, the Rules of the Court of Session have now been amended at least 140 times. As a result, they enjoy rules with such perplexing numbering as rule 14A.4(1A)(a) (to do with recall of arrestment). The Delegated Powers and Law Reform Committee of the Scottish Parliament typically recommends to the Scottish Government that it should consider the consolidation of an instrument after it has been substantially amended 5 times. Luckily for those who draft Court of Session instruments, this policy is not applied to rules of court. Rules amended this often become difficult to navigate and difficult to read. They can appear ornate, fragmented, unbalanced and off-putting.
- 7.17 Rules are amended for three principal reasons: to provide rules required for the complete implementation of another institution's policy (normally the UK or Scottish Government's, as expressed in primary or secondary legislation), as a result of a policy independently decided on by the relevant rules council (now usually the Scottish Civil Justice Council), or as part of a regular programme of work (the best example being the annual uprating of certain fees provision). To look again at 2014's

¹²⁰ Office of the Parliamentary Counsel, "[When Laws Become Too Complex](#)", March 2013, page 1.

¹²¹ These Rules were set out in the Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014. They were revoked within a year and replaced by a separate standalone instrument in 2015.

acts of sederunt, of the 12, 6 were a direct response to government policy, 3 implemented a policy initiated by a rules council, 2 were annual fees uprating instruments, and 1 contained a mixture of provision.

- 7.18 There is probably little that can be done about the need for sets of rules to be amended regularly. Increasingly, governments' legislation requires to be reflected in rules and the Scottish Civil Justice Council can be properly expected to have a programme of reform in mind that will itself require substantial amendment to court rules. The question therefore becomes what approaches can be adopted to the drafting of new sets of rules which might mean that future amendments produce less complexity, and consequently less difficulty navigating or reading them.
- 7.19 For example, often rules of court are amended simply to provide for a form of statutory application and some incidental rules relating to a statutory application, as is thought to be required by government legislation. Consideration might be given to whether a suitably flexible form of default, generic statutory application might be prescribed. With imagination, something could be developed which was both future-proofed and which allowed for all of the most common forms of statutory application to be made in this way, without the need to prescribe a bespoke form for each, each time. If this development was accompanied by the explicit setting out of a policy that a particularised form would only ever be prescribed when it was considered absolutely necessary, this might cut down considerably on the number of amendments made to the principal codes. When the sheriff court's summary application rules were first in force in 1999, an approach similar to this was attempted and, for a number of years, was largely successful. A combination of factors has meant that, over time, the practice of prescribing more individual and particular forms of statutory application became more common.¹²²

The SCJC considers that for as much of civil procedure as is appropriate, the prescription of default, generic provisions should be preferred to individualised forms of procedure.

A particular challenge: setting out time limits and periods

- 7.20 More so than perhaps any other task which the drafter is presented with, court rules often have to address the question of describing times or dates by which a certain action must be performed, or periods within which something must be done, or actions which begin such a time period. This can often be a genuinely challenging task and it is one which is not made easier by the fact that acts of sederunt have not adopted a consistent approach to describing dates, times or periods.
- 7.21 There are substantive policy considerations which underlie the drafting difficulty. For example, a procedure will often provide for one party to an action to have a period of time within which they can respond to something done by another party. Imagine a rule where a party is to be given 7 days to consent or object to a motion, with the court having the option to decide the motion either when such consent or objection is received, or at the end of the 7 days.

¹²² Chapter 3 of the Summary Application Rules 1999 contains 47 Parts with rules for certain applications.

- 7.22 From when should the 7 day period run? From when the motion was sent or when it was received by the other party? Either event will have happened part way through a day. Presumably the responder should be given 7 full days to respond. If the rules provided for the 7 whole days, does this mean that a response lodged during the first, partial day would not be competently made? Surely the position must be that it is 7 full days and any unexpired part of the day on which the thing is lodged? Is that what the rules say, unambiguously? All of these concerns have answers, and sensible ones, and the official practice of the courts is generally consistent when it comes to what the answer is. The problem is that if we express things differently in different rules, and inconsistently, we create the impression that something different is meant, and the reader is led on a fruitless search for what that difference might be.
- 7.23 Even if we were to agree on the terms that should be used, we would have to be particularly careful to ensure that they produced, in law, the effect was desired. Does the phrase “14 days from [the event]” include or exclude the day of the event? If we say “within 7 days of [the event]” does this mean 7 days either side or only following? Does a phrase like “before the end of 4 weeks after [the event]” inadvertently mean that the thing can be done *before* the event (since that too is before 4 weeks after it)? When we are dealing with substantive rights there can be no room for ambiguity or imprecision. Being late for a deadline in court procedure can mean losing a right to appeal or, at the very least, a substantial penalty in expenses.
- 7.24 Two things are clear: that this is a task which court rules, in particular, will have to address regularly, and that this is an area where the case for a consistent approach is especially strongly made.

The SCJC considers that a standard approach to the drafting of elements such as these should be adopted, and set out in a style guide for court rules.

A particular challenge: timetables and processes

- 7.25 Rules currently (and can likely expect to increasingly) prescribe complex timetables and processes. See, for example, rule and form 7.2 of the Sheriff Appeal Court Rules 2015, the standard orders issued when permission is given in a judicial review, or the personal injury timetable¹²³. The timetabling of cases, whether explicitly in the rules (by case-flow management) or in orders of the court (by active case management) is a necessary consequence of the court taking more control over the progress of cases. The introduction of a statutory pre-action protocol in certain personal injury cases also requires the prescription of a complex timetable. The use of statutory pre-action protocols in categories of cases is likely to increase. If either of these types of timetable is to be a feature of the new civil procedure rules, it is worth considering what it will mean for the drafting and presentation of court rules.
- 7.26 The worst way of setting out a timetable of any complexity is by a series of declarative sentences. The need to refer backwards and forwards to dates to link the sentences together (“7 days after that period ...”, “within 14 days beginning from the

¹²³ For example, the personal injury timetable in an action in the Court of Session is in Form 43.6 contained in Appendix 1 of the Rules of the Court of Session 1994. A similar timetable is prescribed for an ordinary cause.

date on which ...” etc) produces complex sentences and obscures the important points in a timetable: the sequence of events and the relevant dates or periods. It is thought that it would be particularly appropriate for rules to take an innovative approach to setting out timetables, perhaps through the use of tables with a column for the event and a column for the time period.

The SCJC considers that a standard approach to the drafting of timetables should be adopted, which is considered sufficiently unambiguous and clear to meet the standard of legal certainty.

A particular challenge: forms

7.27 The instruments produced by the Court of Session prescribe more forms than other, equivalent offices in Scotland. Nearly every instrument produced contains a new form, an amendment to a form or a reference to an existing form. Many forms simply prescribe a form of words, such as the forms of extract decrees, the forms of oaths, or the form of words that must be used to mark an appeal. The function of many forms is to require parties to provide certain information to the court, and to prescribe the order and detail of the information which must be provided. For example, a form of writ or application often requires a party to set out certain aspects of the background to the application and information about other parties to the case which the court and its administration requires to know. Some forms, though not many, have communicative functions as well. In small claims and summary cause for example, the initiating forms and the forms concerned with time to pay applications all contain substantial guidance to those completing them about how they should be completed. Only very few forms, at present, contain graphical or layout elements.

7.28 The forms used for the simple procedure rules take a different approach. They are much closer in style and function to the sort of forms that consumers commonly encounter when dealing with public bodies, such as HMRC or the DVLA. The layout is as important as the content. Devices such as check-boxes and highlighted guidance are used. The expectation is that parties will use the forms as laid-out and printed, not simply the form of words prescribed. Part of the impetus for a different approach to laying out the forms was the fact that they were to be used with a new integrated case management system and online claims portal.

The SCJC considers that a diversity of approaches will be required to the prescription of forms including, where appropriate, laying out forms to include guidance and graphical elements.

The language of court rules

Background

7.29 Rules concerning the sheriff courts’ new jurisdictions in actions of reduction and actions of proving the tenor¹²⁴ were made in April 2015. During that consideration, the SCJC considered the intelligibility of terms like ‘reduction’ and ‘proving the tenor’ and

¹²⁴ Act of Sederunt (Ordinary Cause Rules Amendment) (Proving the Tenor and Reduction) 2015.

whether retaining these terms was consistent with the commitment to clear and accessible rules-drafting. The SCJC agreed to remit the matter to the Rules Rewrite Committee¹²⁵ who decided to consider the question as part of the rules rewrite.

- 7.30 This part will set out the SCJC's consideration of the substantive updating of terminology and also the broader, connected question of how the rules should approach difficult, ambiguous or commonly-used terminology more generally.

The problem of consistency

- 7.31 A provision of legislation, including a rule of court, should be read and interpreted in context. Among the most important aspects of that context is the language of the rest of the legislation, or the rest of the rules of court¹²⁶. Unless there is a powerful reason for thinking otherwise, a term can be assumed to have been intended to have the same meaning in all places where it appears in a piece of legislation¹²⁷. From a drafting perspective, it is incredibly useful to be able to say with confidence that a word is being used consistently across a set of rules since that ought to lessen the possibility of a court being satisfied that a difference in meaning was intended. This gives the drafter and the SCJC more control over future interpretation of rules.
- 7.32 The Rules of the Court of Session 1994 may be one of the most-amended statutory instruments currently used in regular practice. If the singularity of vision necessary to produce an internally consistent set of rules ever did exist in them, it does not now. There are any number of examples in the present rules of drafting where one word is obviously intended to have more than one meaning, or many different terms are used with an apparently identical meaning being intended. A good example is discussed in the Court of Session Practice entry on decrees and interlocutors¹²⁸. The author, Lord Carloway, identifies that:

“ ... the words ‘decree’, ‘judgment’ and ‘interlocutor’ are often used interchangeably. Originally, in accordance with the ordinary meaning of the word, an interlocutor was an order of the court pronounced during the dependence of an action. It was an order incidental to, but not determinative of, the merits, or part of the merits, of the case. A decree was that final determination. In both cases the words came to refer to the written expression of the court's order. A judgment of the court tended to be a reference to a written or oral opinion stating the reasons for an interlocutor or decree.

Although there is a tendency to use the words in their original sense, the distinctions have become blurred. The Rules of [the Court of Session] 1994 refer to final pronouncements on the merits as interlocutors. The Court of Session Act 1988 itself sometimes refers

¹²⁵ SCJC, [Minutes of the Scottish Civil Justice Council](#), 11 May 2015, paragraph 5.

¹²⁶ Daniel Greenberg, *Craies on Legislation* (9th Edition), Sweet & Maxwell, 2008, paragraph 20.1.36.

¹²⁷ *London Borough of Hounslow v Thames Water Utilities Limited* [2003] 3 W.L.R. 1243 QBD.

¹²⁸ Lord Carloway, *Decrees and Interlocutors in Court of Session Practice*, Tottel, 2015.

to judgments and interlocutory judgments as distinct from decrees and interlocutors. It sometimes refers to interlocutors when these may be final and sometimes to decrees when these are granted during the dependence of a cause. It is best to read each use of the words in the context in which it appears and against any historical background before deciding whether a particular word is intended to have the original restrictive meaning or the wider one now in general use.”

- 7.33 That sort of historical analysis sounds like a lot of work, particularly considering that as long ago as 1861 Bell complained that “the term [interlocutor], in Scotch practice, is applied indiscriminately to the judgment or order of the Court, or of the Lords Ordinary, whether they exhaust the question at issue or not.”¹²⁹.
- 7.34 There is plainly a need in rules to make provision relating to these three ideas: orders given during the dependence of an action, orders finally determining an action or part of it, and the reasons (written or otherwise) given by the judge for making such an order. Indeed, these three ideas are perfect examples of the sort of core concepts which we can reasonably expect rules to have to regulate and regularly refer to, apply or modify. There is no reason for the rewrite to continue the sort of ambiguity identified in the passage above.
- 7.35 The process of drafting the rules, and in particular the special and specific parts of the rules, will necessarily involve regular reference to these sorts of core ideas. In practice the rules are likely to be drafted over a period time by many people, and the policy behind the drafting is likely to be developed by many Committees of the SCJC and the SCJC, depending on the subject matter. Nevertheless, there is likely to be a group of core concepts, each with a connected suite of terminology, which arise across subject matters: what parties should be called, how documents are referred to, the structure of motions, how judgments are named, what orders of the court are called. The approach to these, if the comprehensive rewrite is to effectively reform the general part of civil procedure, will have to be utterly consistent.

The SCJC considers that the drafting of new civil procedure rules presents an opportunity to introduce greater consistency to the terminology used in court practice.

Arguments for and against an updating of substantive terminology

- 7.36 Responsibility for the consistent use of terminology lies principally with the SCJC’s officials in the Rules Rewrite Drafting Team. However the decision whether to update the substantive terminology of civil procedure (and, if so, how much and in what way) is a principled policy decision for the SCJC to take. In this context, what is meant by ‘substantive terminology’ is probably easier to explain by examples than by description. The main labels given by the rules to parties, steps in litigation and documents are the best examples of substantive terminology. The names of any remedies would be substantive terminology. For example, it would be perfectly competent for the civil procedure rules to rename the term ‘proving the tenor’ and

¹²⁹ Bell, Dictionary of the Law of Scotland, 1861.

give it a name thought to be more understandable. The names of the principal steps in procedure would also be substantive terminology. If the SCJC wished to, the word 'reclaiming' could be entirely replaced with the word 'appeal'. The labels given to litigants is substantive terminology – whether someone is designed as a 'pursuer', an 'applicant' or an 'appellant' is a question for civil procedure rules. The name for a writ – 'summons', 'petition' or 'application' – is determined by the civil procedure rules. The 2014 Act specifically endorses the use of the Court of Session's regulatory powers to produce such a simplification and modernisation: section 103(2)(d) provides for rules to be made about "simplifying the language used in connection with [...] proceedings or matters incidental or ancillary to them".

- 7.37 The Simple Procedure Rules 2016 have updated some substantive terminology. The explicit purpose of those rules was an attempt to produce something intelligible by and aimed at the lay reader. As such, it was decided at the outset that where terminology was confusing, obscure or off-putting, the Access to Justice Committee should consider whether it should be updated. So, for example, the rules no longer talk of 'sisting' a case, but instead of 'pausing' one. The terms 'Claimant' and 'Claim', and 'Respondent' and 'Response' have been used for the principal actors in a simple procedure case.
- 7.38 There are arguments against such an updating of substantive terminology. There is romance to and history behind many of the terms used in Scottish civil procedure. Taking a case to the Inner House isn't called 'reclaiming' for no reason: the name reflects the background to and substance of the step being taken. An apparently neutral, descriptive phrase like 'the orders sought in the application' seems bloodless and leaden in comparison with 'the prayer of the petition'. There are also practical arguments. Someone seeking to understand the law that governs, for example, the prayer of a petition would look it up under that name and be exposed to all the sources that use that term, whether online or in a library. That background and those sources would not be immediately available to someone searching for the same concept under its new name.
- 7.39 It is, however, probably inevitable that the preparation of the new civil procedure rules will involve some (and probably a significant amount of) updating of terminology and labels. It is unlikely that all new steps in procedure will have direct equivalents in existing procedure. New steps will be invented and old steps merged, abandoned or reframed. New labels will have to be invented for some of these. One good example is the name for the initiating document in a civil action. Since the two types of action are to be combined, there will have to be a name for the new document by which these actions are commenced. The SCCR suggested the term 'writ'¹³⁰. The SCJC has not yet decided on these questions of terminology.

The SCJC considers that it should take an ad-hoc, flexible approach to decisions whether to update substantive terminology. In each case, the strengths of the arguments against and in favour are likely to fall slightly differently. In some situations, the case will be obviously made. In other

¹³⁰ [SCCR Report](#), Chapter 5, paragraph 69.

cases an alternative approach (perhaps the use of more explanatory material) might address concerns about intelligibility of terminology. Undoubtedly in some cases, for proper reasons, traditional labels may be retained even where they are perceived to be not quite as modern as they might be.

Chapter 8. Information and communications technology

Background

The Scottish Civil Courts Review

8.1 The SCCR considered how the use of technology in the courts could improve efficiency and access to justice, stating that:

“The Scottish civil courts lag behind many jurisdictions in their use of IT. IT can provide obvious advantages in facilitating communications in a country with extensive rural areas. Failure to keep up with developments will create an ever increasing gap between the citizen’s experience of work and society and his experience of the justice system. This is a matter not just of hardware, but of procedure, rules and attitudes.”¹³¹

8.2 The Lord President stated in a recent address to the Law Society Council that:

“Over the next 5 years plans will be developed which will see the court room, and its ancillary offices, redesigned in light of modern ideas and technology.”¹³²

8.3 The Courts Reform (Scotland) Act 2014 Act provides the Court of Session with the power to regulate procedure and practice in the Court of Session, the Sheriff Appeal Court (“SAC”) and the sheriff court, including the power to make provision about the conduct and management of proceedings, “including the use of technology”¹³³.

8.4 The SCCR made a number of recommendations regarding the use of ICT in Scotland’s civil courts, taking account of the 72 responses to its consultation paper. Those recommendations were as follows:

- “The SCS should develop an up to date strategy for enhanced provision of ICT based on research commissioned to identify the needs of all court users;
- The SCS website should be covered by a source of guidance and support particularly for parties in cases covered by the proposed simplified procedure falling within the jurisdiction of the district judge. It should include information on:
 - Other sources of advice and assistance;
 - Providers of mediation and other forms of ADR including links as appropriate; and
 - Self-help materials;

¹³¹ [SCCR Report](#), Chapter 6, paragraph 77.

¹³² Lord Carloway, [Redesigning The Court Room](#), Law Society Council, 29 January 2016.

¹³³ Courts Reform (Scotland) Act 2014, sections 103(2)(c) and 104(2)(c).

- The use of email as a means of communicating with the courts and the judiciary should be actively pursued as soon as is practicable and consideration should be given to extending the system to other undefended actions;
- Video and telephone conferencing should be encouraged;
- Consideration should be given to means of encouraging court users to communicate electronically. This may involve entering into some sort of agreement with a provider to allow access to systems locally; managing the provision of such access directly, for example with local authorities; or by lower court fees;
- All evidence in civil cases, apart from those under the simplified procedure, should be recorded digitally¹³⁴.

Scottish Courts Service and Scottish Government policies

8.5 The Scottish Courts Service, predecessor to the Scottish Courts and Tribunals Service (“SCTS”), published its ICT Strategy in April 2011. A key aim of the strategy was to “move away from paper based processes”¹³⁵. The SCTS website was redesigned and relaunched in November 2012, targeted at lay and professional court users. More recently, the website has been amended to include guidance on simple procedure and links to available “advice and assistance” providers. Digital recording equipment has been installed in all courtrooms in the Court of Session, and all sheriff court criminal court rooms. The introduction of digital recording equipment continues to be rolled out into dedicated civil sheriff court rooms. All digital recordings are stored centrally and are readily accessible by authorised users.

8.6 The Programme for Government¹³⁶ set out the Scottish Ministers’ commitment to create a modern, user-focused justice system through the greater use of digital technology to deliver simple, fast and effective justice. This supports the Digital Strategy for Justice in Scotland published in August 2014 (which covers administrative, civil and criminal justice) and sets out three key objectives:

- allowing people and businesses to access the right information at the right time;
- fully digitised justice systems; and
- making data work for us¹³⁷.

8.7 Objective one is delivered through the web pages of mygov.scot, the national gateway for citizens and businesses to access public services in Scotland.

8.8 The second objective is of particular relevance for the purposes of this paper. The strategy lists various user benefits which would accompany a fully digitised justice

¹³⁴ [SCCR Report](#), Chapter 6, paragraph 84

¹³⁵ Scottish Courts Service, [ICT Strategy \(2011-2014\)](#), April 2011, paragraph 3.11.

¹³⁶ Scottish Government, [A Plan for Scotland \(2016-2017\)](#), September 2016, page 69.

¹³⁷ Digital Scotland, [Digital Strategy for Justice in Scotland](#), August 2014.

system. For example, digital interlocutors, opinions and decisions can be served more securely and quickly than using paper methods; the digital storage of evidence should shorten court process and save time, leading to knock-on savings for agents and SCTS; and electronic creation of documents would save on paper and postage.

- 8.9 The next ambition for civil justice within the Digital Strategy programme is the creation of an online dispute resolution system that introduces interactive content and gives access to transactional “do-it-yourself” tools, accessible through mygov.scot. One aim is to help achieve integration between alternative dispute resolution methods and formal adjudication routes. Early next year, the Scottish Government’s Digital Strategy implementation team will work with SCTS and justice organisations to investigate where digital technology can further support simple procedure and deliver on a recommendation of the Civil Justice Advisory Group (CJAG), that:

“Court rules should be introduced which would encourage, but not compel, parties to seek to resolve their dispute by mediation or another form of alternative dispute resolution, prior to raising a court action”¹³⁸

- 8.10 In criminal justice, work is underway to develop a “Digital Evidence Information Sharing” capability. In the first instance, the focus is on how CCTV evidence is captured, stored and shared. Work has started to inform how CCTV evidence can be captured by police, transitioned into a standard format and shared with officials working in the Crown Office and Procurator Fiscal Service (“COPFS”) for case marking. The alpha project started in October and is due to finish before the end of December. After this, subject to funding, the Scottish Government plans to initiate further projects to learn how COPFS could disclose CCTV evidence to defence agents and the courts.

Existing use of ICT in the courts

The Court of Session

- 8.11 The Rules of the Court of Session 1994 already make specific, albeit limited, provision for the use of ICT. Chapter 23 (motions) enables the electronic lodging of motions where a party is represented by an agent. An agent must provide an email address to the Deputy Principal Clerk for the purpose of transacting motion business¹³⁹, or the agent does not have suitable facilities, they must make a declaration in writing and intimate it to other parties in the case. Party litigants are not compelled to make motions by email.
- 8.12 The Rules of the Court of Session 1994 also provide specific exceptions to the general rule that motions are to be made electronically. Chapter 35 (recovery of evidence) provides that where confidentiality is claimed for any evidence sought to be recovered under certain rules, such evidence is to be enclosed in a sealed packet.

¹³⁸ Civil Justice Advisory Group, [Final Report of the Civil Justice and Advisory Group](#), January 2011, page 50.

¹³⁹ The Deputy Principal Clerk is responsible for maintaining a list of the email addresses for the purposes of transacting motion business. The list must be kept up to date on the SCTS website.

Where a motion to open the packet is lodged, the party enrolling the motion must intimate the terms of the motion to the person claiming confidentiality by post¹⁴⁰. The SCJC will have to consider, when preparing the new civil procedure rules, whether there are any particular circumstances in which it is appropriate or necessary to maintain a requirement (as opposed to an option) for paper intimation or lodging.

- 8.13 Chapter 74 (companies) makes some limited provision regarding use of email allowing petitions to be sent electronically as soon as practicable, in addition to by post or sheriff officer. This system therefore provides both a requirement for traditional service, and also a requirement for electronic service.
- 8.14 Chapter 93 (live links) makes provision for a party to apply for the whole or part of evidence given or submission to be made through a live link to allow a person to participate in proceedings whilst at a place outside of the court room¹⁴¹. Chapter 99 (Energy Act 2008 interdicts) provides that steps taken to make the respondent aware of the application may include publication using electronic means.
- 8.15 In addition to these rules of court, certain Court of Session practice notes address the use of ICT in the Court. For instance, Court of Session Practice Note No.3 of 2015 applies to actions on the summar roll where the Court has appointed parties to lodge electronic documents¹⁴². All electronic documents must be prepared in accordance with its provisions. Documents should be contained in a single pdf and numbered in ascending order throughout, and comply with requirements as to the default display size and resolution. The index page must be hyperlinked to the pages or documents to which it refers. Electronic documents must be submitted on a memory stick, clearly marked or labelled with the title of the case and identity of the party.

The Sheriff Appeal Court

- 8.16 The Sheriff Appeal Court Rules 2015 also make provision in relation to use of live links and e-motions . They go one step further than in the Court of Session by allowing electronic intimation and lodging of documents other than motions.
- 8.17 Where the receiving party is represented by a solicitor, an intimating party may give intimation in different ways, including by fax or electronic means. Where intimation is given by those means, different timescales apply. Where the receiving party is a party litigant, intimation must be by recorded post or sheriff officer.
- 8.18 Documents can be lodged electronically, whether the party is represented by a solicitor or not.

¹⁴⁰ Rules of the Court of Session 1994, rule 35.8(3).

¹⁴¹ This provision was introduced following the work of the IT Committees of the Court of Session Rules Council and the Sheriff Court Rules Council, under chairmanship of Lord Macphail and Sheriff Ian Peebles QC as he was then. For more information on this, see [SCCR Report](#), Chapter 6, paragraph 49.

¹⁴² [Court of Session Practice Note No. 3 of 2015](#) (format of electronic documents for summar roll hearings).

The sheriff court

- 8.19 Sheriff court rules make similar provision to the Rules of the Court of Session 1994 in relation to use of technology. Chapter 15 of the Ordinary Cause Rules 1993 largely mirrors its equivalent Chapter 23 in the Court of Session in respect of e-motions. The Ordinary Cause Rules 1993 also provide exceptions to the general rule that motions are to be made electronically and make provision for the use of live links.
- 8.20 The Summary Application Rules 1999 also make limited provision for the use of electronic notification, providing that the method of intimation of certain orders (for example, medical examination orders or quarantine orders) may be made by telephone, email or facsimile transmission¹⁴³. Similarly, the Child Care and Maintenance Rules 1997 provide that service may be made by facsimile or other electronic transmission, where the recipient has access to that facility¹⁴⁴.

Recent developments

- 8.21 This historically limited ICT use is likely to be transformed by the creation of an Integrated Case Management System (“ICMS”) and the Civil Online portal. Both of these developments represent a major innovation for the Scottish civil courts.
- 8.22 ICMS was introduced internally for the Sheriff Appeal Court and sheriff courts on 31 October 2016. It is expected to be introduced in the Court of Session in 2017-2018, which until then continues to use the electronic Case Management System (“CMS”) to manage cases and schedule hearings.
- 8.23 The Simple Procedure Rules 2016 are the first stand-alone set of court rules drafted with the use of technology firmly in mind. The Rules expressly refer to the Civil Online portal¹⁴⁵ as a way for litigants to progress their claims. Developed in response to the SCCR’s call for a pilot of an online small claim and summary cause system, SCTS has described the Rules as “the start of a journey to online processing in civil courts”.
- 8.24 Separately, since 28 November 2016, it has been possible to serve claims by advertisement on online walls of court for simple procedure actions¹⁴⁶.
- 8.25 The Civil online portal will go online after further user testing and development. This which will enable parties to commence and progress actions with a value of £5,000 or less online.
- 8.26 Since ICMS was introduced internally for the sheriff courts and the Sheriff Appeal Court on 31 October 2016, it has been possible for court staff and the judiciary to:
- register actions and applications,

¹⁴³ Summary Application Rules 1999, rules 3.39.3-3.39.9.

¹⁴⁴ Child Care and Maintenance Rules 1997, rule 3.15(f).

¹⁴⁵ The Civil Online portal is described as “the portal on the Scottish Courts and Tribunals Service website”.

¹⁴⁶ Simple Procedure Rules 2016, rule 6.12(4) allows the sheriff to order the details of the claim to be publicised by advertisement on the SCTS website.

- produce court generated documents and update ICMS with documents in a case (up to 5 megabytes in size),
- electronically authenticate and seal court generated documents (judiciary and clerks only),
- email court generated documents once sealed,
- register, process and renew caveats,
- search, view and schedule cases and hearings,
- dispose of cases and record outcomes of hearings,
- update status of cases – for example, recall of sists,
- register and monitor appeals.

8.27 When the Civil Online portal goes live for simple procedure, parties will be able to, for example:

- submit cases online,
- lodge applications (and oppose applications),
- track cases online,
- update ICMS with documents in a case (up to 5 megabytes in size).

A vision for ICT

Electronic and paper-based processes

8.28 The SCJC considers that the new civil procedure rules should introduce a system-wide shift, from a default of paper-based processes with occasional options for electronic processing bolted on, to a presumption that every procedural step in litigation should be conducted electronically. This would include lodging documents, making applications or motions, and communication with court officials. There are clear benefits to parties and the court in opting for electronic rather than traditional communication by post or hand delivery, for example, reduced postage costs, speed of delivery and the creation of an instant electronic record of lodging or intimation.

8.29 It will continue to be necessary, for reasons of access to justice and particularly for unrepresented litigants, for the rules to maintain the ability to conduct this business using paper-based processes. A significant, though presumably decreasing part of society will not have the resources or the technological skills which would enable them to use online court processes unassisted. This is likely to be the case for the near future. The new civil procedure rules should therefore provide for the rules on electronic litigation may be disapplied to any action where appropriate.

The SCJC considers that electronic interaction with the courts should be the default in the new civil procedure rules, except where the court orders otherwise.

Adjustment of pleadings

- 8.30 A specific example of an innovative feature which the new civil procedure rules may facilitate is the online adjustment of pleadings in the form of a shared, editable document on which parties can ‘track changes’ during the period of time allowed for adjustment, or any permitted amendment.

The SCJC will consider the introduction of online, shared, editable pleadings in the new civil procedure rules.

Parallel online blind bidding

- 8.31 Ultimately, most civil cases settle. Sometimes both parties are willing to settle at a similar level, but neither party is willing to let the other party know that, for fear of losing bargaining ground; and neither party wants to make the first offer, with the result that the case fails to settle, or only settles very late in the day, resulting in wasted legal expense and court time.
- 8.32 It is also true to say that the later settlement is attempted, the more difficult it is, because the accumulated legal expense on both sides can prove to be a block on sensible negotiation, sometimes becoming the single largest issue to resolve.
- 8.33 The current system of tenders is an open system (between the parties if not the court) and is often used tactically. It differs from ordinary negotiation in that there are potential financial consequences attached to a failure to agree.
- 8.34 Double blind bidding, on the other hand, is a system whereby both parties submit ‘blind’ (sealed) bids to a third party, with the proviso that if the bids come within an agreed percentage of each other, a settlement is deemed to have been agreed.
- 8.35 In this way, neither party knows what the other is bidding, and so there is no perception of weakness attached to putting in a genuine offer intended to reflect the level at which settlement would be acceptable. There is no consequence for failing to agree (or failing to participate) other than that the case proceeds.
- 8.36 It is possible to do this online, and online blind bidding as a method of settlement has been around for some time, with examples in the US. One such online platform, Cybersettle, has been widely used in reparation claims, and has been incorporated into some companies’ standard terms (such as the supplier contracts for GE Oil and Gas).
- 8.37 That procedure works by having three successive bidding rounds. The parties contract that if their bids come within a certain percentage of each other an enforceable bargain is struck and the case is settled.

- 8.38 If they do not come close enough, then there is no deal, and neither party has compromised their position by giving away the level at which they are willing to settle.
- 8.39 The issue is that, in the absence of a contractual provision, were one party to suggest using an online settlement procedure to the other side, this may in itself be perceived as a sign of weakness. In any event, these systems are not well known or understood.
- 8.40 It would be fruitful to explore whether, if a system like this were integrated into the court rules as an option for parties, it would have the potential to achieve early settlement and reduce the costs associated with late settlement.
- 8.41 A bidding scheme might work as follows:
- When an action is raised, parties are registered on the system and they are given the details of a secure site where they can submit bids.
 - A number of bidding rounds would be specified to be available at one or a number of the usual 'pinch points' in proceedings as follows:
 - On raising the action. This gives parties the opportunity to try to settle as soon as it is clear that the dispute has been formalised.
 - At the close of adjustment. This gives parties the opportunity to settle when they have seen the other side's case fully set out.
 - In advance of any debate. This gives parties the opportunity to settle having given detailed consideration to the legal arguments.
 - In advance of the proof. This gives parties the opportunity to settle in advance of the proof when the full extent of the evidence has been analysed and matters are about to be removed from the control of the parties as they head into court.
 - If one of the bidding rounds is successful, and parties come within the agreed fixed percentage of each other, the case is held to have been settled by operation of the rules. If none of the rounds are successful parties proceed to proof in the normal way.

The SCJC will consider the incorporation into the new civil procedure rules of a system of parallel online blind bidding.

Evidence and information

- 8.42 In relation to the criminal courts, the Evidence and Procedure Review called on Scotland to harness the opportunities that new technologies bring to improve the quality and accessibility of justice¹⁴⁷. It advocated the view that substantial improvements can be made to the administration of justice with the widespread use of pre-recorded statements in place of testimony in court and a more imaginative use

¹⁴⁷ Scottish Courts Service, [Evidence and Procedure Review Report](#), March 2015, paragraphs 1.12-1.14

of live-link technology. The Evidence and Procedure Review published a Next Steps paper a year later, which concluded that work should be undertaken to develop requirements for a Digital Evidence Vault for storage of evidence, and that there should be further development of proposals to reform criminal procedures to allow for a more streamlined, digitally enabled justice process¹⁴⁸. The Digital Strategy for Justice in Scotland referred to the Scottish Government's aim to create a digital evidence vault to securely store all documents, audio, pictures and video content, preserving citizens' privacy.

8.43 The Next Steps Review emphasised that digital reproduction is increasingly a feature of everyday business and should be acceptable as best evidence provided there is a robust means of certification and authentication.

8.44 To align with the developments being progressed in the criminal courts, the more modern approach in the civil courts could be to move away from written material and the use of "live" links, in favour of video recorded statements by witnesses, including experts. These could be lodged in the process over time and be available for inspection by participants. The use of this type of material ought to cut down the time needed for court hearings themselves and should reduce the number of witnesses requiring to attend.

8.45 If digital presentation of evidence is pursued in civil courts, then courts and the ICT systems which support them, require to be fully equipped to facilitate this. The SCJC agrees that the use of digitally recorded, preserved and displayed evidence, including testimony, should be possible under the new civil procedure rules

The SCJC considers that the new civil procedure rules should facilitate the digital recording and presentation of evidence.

¹⁴⁸ Scottish Courts and Tribunals Service, [Evidence and Procedure Review: Next Steps](#), February 2016, paragraph 36.

Chapter 9. Transition, implementation and tidying the statute book

Otiose or redundant rules

- 9.1 The SCJC has performed a survey of existing rules, looking for any provision which is considered otiose through legislative developments, or redundant through under-use.
- 9.2 It has not identified any significant chapters of rules which could be considered either otiose or redundant, but is committed to a substantial reduction in the number of specialist chapters devoted to a single form of action or an application under statute.

The problem of transition

Making new rules and revoking old rules

- 9.3 The SCJC is committed to a comprehensive rewrite of Scotland's civil court rules. An inevitable part of the making of new rules is the disposal, by revocation, of old rules.
- 9.4 The problem which is raised by the revocation of any existing instruments or rules, and their replacement by successor instruments or rules, is the status and treatment of causes which were raised or decisions taken, and which might still be ongoing, under the now-revoked instrument or rules.
- 9.5 There are a variety of approaches which have been adopted, from continuing in effect revoked rules for existing causes, to applying new rules to all causes, no matter when they were originally raised.

Past transitions to new civil procedure rules

- 9.6 On 05 September 1994, when the Rules of the Court of Session 1994 came into force, the Act of Sederunt containing the Rules of the Court of Session 1965 (“the 1965 Rules”) was revoked in its entirety¹⁴⁹. Every Act of Sederunt relating to civil procedure which pre-dated the 1965 Rules was revoked, as was every Act of Sederunt which had amended or supplemented those Rules. The only rules whose effect was saved were those which related to fees, outlays and interest on decrees. Those rules were only saved for the purposes of fees already incurred or decrees already pronounced. There was no specific transitional or savings provision relating to the procedural parts of the 1965 Rules or what should happen to cases that were proceeding in the Court of Session according to those rules in September 1994.
- 9.7 Rule 1.2 of the Rules of the Court of Session 1994 applied those Rules to “any cause whether initiated before or after the coming into force of these Rules”.
- 9.8 There were a number of reasons for this approach. Firstly, there were only a limited number of significant structural changes being made to the nature of Court of Session litigation. The Rules of the Court of Session 1994 were a consolidation, refinement and improvement of the 1965 Rules, making a number of discrete reforms, but leaving the process and language of civil litigation in Scotland intact.

¹⁴⁹ Act of Sederunt (Rules of the Court of Session 1994) 1994, paragraph 3(2) and schedule 4.

Indeed, the Parliament House print of the Rules of the Court of Session 1994 has always contained a table of derivations, setting out which of the 1965 Rules was the predecessor provision to each rule. This approach meant that, in practice, there would be little difficulty for the experienced litigator in identifying the applicable rules when an active case was transferred from the 1965 Rules to the new set of rules.

- 9.9 The Rules of the Court of Session 1994 have been amended dozens of times. In many cases, this amendment has involved the substitution of entire chapters relating to a particular aspect of procedure. Some chapters are effectively mini-codes governing the conduct of a class of litigation; for example, chapter 43 on personal injury actions, chapter 47 on commercial actions, or chapter 49 on family actions. When chapter 58, on judicial reviews, was recently replaced in its entirety on 22 September 2015, the decision was taken to save the effect of the existing rules for cases which had already begun on the date on which the amendment took effect¹⁵⁰. The reasons for this were both principled and practical. Substantial changes to the nature and availability of judicial review were being implemented and a much wider set of case management powers being given to the judge. In some cases, it was considered, it would be improper for parties who had expected their petition to be handled in a particular fashion to be exposed to the possibility of their petition being dealt with in a different and possibly more stringent way. Separately, the changes to procedure were sufficiently fundamental, including new types and names of hearing, that it would be difficult for judges, courts officials and administrators to work out the proper way in which to treat an existing case as proceeding under the new rules.
- 9.10 The saving of the old rules for existing cases therefore meant that, after 22 September 2015, there was a gradual build-up of cases under the new rules and a gradual diminishing of cases under the old rules until, at an unknowable (but, it must be hoped, not too distant) date, the last case under the old rules is concluded and the saving provision ceases to have any effect.
- 9.11 This approach has been, broadly, the typical one in recent years. The saving provision applied to small claims is a good example. When the Act of Sederunt (Small Claim Rules) 1988 (“the 1988 Rules”) were made, they were applied only to small claims made after 30 November 1988. The older law of summary causes being saved for any existing claims. When these rules were replaced, on 20 June 2002, by the Small Claims Rules 2002, the transitional provision in the Act of Sederunt provided that any claims raised before 20 June 2002 “shall proceed according to the law and practice in force immediately before that date”¹⁵¹, saving both the 1988 Rules and the law which preceded them. When the time came, as part of the commencement of the simple procedure, to revoke the Small Claim Rules 2002, the question was raised about how much of the effect of previous rules should be saved. It became clear after investigation that, since the indefinite sist was such a routine feature of small claims litigation, on commencement of simple procedure, there were

¹⁵⁰ Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 3) (Courts Reform (Scotland) Act 2014) 2015, paragraph 4.

¹⁵¹ Act of Sederunt (Small Claim Rules) 2002, paragraph 3.

existing cases still technically proceeding under the Small Claims Rules 2002, the 1988 Rules and potentially from the law of summary cause applying before them.

- 9.12 In order to preserve the effect of the procedure applying to all of these cases, the saving provision had to be drafted as follows:

Revocation and saving of the Small Claim Rules 2002

3.—(1) The Act of Sederunt (Small Claim Rules) 2002 is revoked.

(2) Despite that revocation, the Small Claim Rules 2002 continue to apply to a small claim commenced before 28th November 2016.

(3) Despite the revocation of paragraph 3 of the Act of Sederunt (Small Claim Rules) 2002 (transitional provision), the law and practice in force immediately before 10th June 2002 continues to apply to a small claim commenced before that date.

Options for transferring old cases

Comprehensive savings

- 9.13 The SCJC could adopt as its policy the comprehensive saving of the Rules of the Court of Session 1994 as they apply to existing causes on the date of revocation.
- 9.14 One benefit to this approach would be certainty. There would be no doubt as to which set of rules applied to which cause. Each cause would follow the set of rules in force at the point at which the cause was raised. It would also avoid any question of unfairness involved in transferring a cause from one procedural regime to another. No party would have their procedural options or rights limited, altered or expanded in an unanticipated manner by their cause being transferred to the new rules. It would also mean that causes under the new rules would build up gradually, perhaps allowing judges, litigators and courts officials more time and room to become familiar with new procedures, develop efficient practices and adjust to a new way of working.
- 9.15 It would, however, mean that for an unpredictably long period (and a potentially extremely long period) everyone involved in civil litigation would have to simultaneously operate two sets of rules: the old rules for existing cases and the new rules for new cases. This would be an administrative burden, requiring the parallel operation of two sets of systems – IT systems, personnel, filing, court programming – for as long as it takes to conclude all legacy cases. It might also prove confusing for litigants and litigators, who would be expected to retain knowledge about twice the amount of procedural material as they normally do. It would also delay the impact of any benefits in efficiency which the new rules were expected to bring about.
- 9.16 While the comprehensive saving of a code is the most practical choice in many scenarios (see, for example, the discussion of the new judicial review rules at paragraphs 9.8 and 9.9), this has often only been possible because of the limited, encompassable class of causes affected. Courts officials were able to describe and assess the numbers of existing judicial reviews and estimate the burden involved in

disposing of them under the old rules. For the new civil procedure rules, the weight of any additional administrative burden, as well as the effort involved in concluding any legacy cases, would be enormously amplified by the fact that what was being saved was the entirety of the Court of Session Rules and all sets of sheriff court rules and for every single cause presently before the courts.

Comprehensive transfer

- 9.17 The SCJC could adopt as its policy the comprehensive transfer of all existing causes from the Rules of the Court of Session 1994 to the new rules, as was done in 1994.
- 9.18 This approach would, itself, produce a sort of certainty. Again, it would be clear which set of rules applied, as a single set of rules would apply to every cause before the court, whenever commenced. It would also mean that any benefits that the SCJC considers the new rules have would be felt sooner and more comprehensively. If, for example, the new rules gave judges a new set of potent case management powers, these could be applied effectively to existing actions as well as new ones. This approach would certainly be simpler. Judges, litigators and courts officials would only ever have to apply a single set of rules, and would have the opportunity to become familiar with the new rules more quickly.
- 9.19 However, doing this in a fair, practical and transparent way may be difficult or impossible if the SCJC is going to propose any radical or structural changes to way in which civil litigation operates in Scotland. This approach was possible in 1994 because few reforms of this type were proposed but the current exercise is likely to involve more significant and more fundamental reforms. For example, the suggestion that the procedural distinctions between causes brought as summons and those brought as petitions should be ended would involve a fundamental restructuring of the court and its administration. The suggestion that there should be much wider use of case management, and in particular active case management, would necessarily involve causes being treated very differently than they were before. It might not prove quite so easy to draw a direct table of destinations between the existing rules and the new rules, as was possible between the 1965 Rules and their successor.
- 9.20 If the approach is very different, there may even be questions of fairness or oppression raised by forcing litigants' cases (and, therefore, the adjudication of their substantive rights and liabilities) to be transferred into a new procedure. Steps and strategic decisions which a litigant, following professional advice, takes in respect of their case might be perfectly properly taken in the expectation of one form of procedure but might prove less advantageous or sound when that procedure is changed without their consent.

Discussion

- 9.21 The SCJC considers that the transfer of existing cases to the new civil procedure rules would create great benefits for the courts administration, for professional users of the rules and for litigants. For those benefits to be most keenly felt, that transfer should take place in as comprehensive and as swift a manner as possible.

- 9.22 However, the SCJC recognises the potential for individual unfairness in a scheme of comprehensive transfer. It considers that the rules should make bespoke provision, allowing that unfairness to be mitigated or avoided in individual cases when presented, with the ambition that all cases before the court should be transferred to the new rules by a fixed point, not too long after the coming into force date of the new civil procedure rules.
- 9.23 This bespoke provision would have to address the difficulties which a comprehensive transfer of cases might present. These difficulties could be summarised as:
- the difficulty of identifying in advance how a case proceeding under the old rules might continue under the new rules,
 - the long and uncertain period for which the old rules would continue to apply,
 - the confusion involved in running two parallel sets of rules, and
 - the inefficiency caused by not being able to apply the improved processes of the new rules to existing cases.
- 9.24 The SCJC considers that these problems could be addressed by rules which provided for a scheme along the following lines:
- The new civil procedure rules will apply to causes commenced on or after the date on which they come into force.
 - For the first 6 months, judges will have the power to transfer existing cases from the old rules to the new rules either on the application of a party or otherwise, and will appoint a specific procedural step to be carried out by the parties under the new rules when they make such an order.
 - For the following 6 months, judges will be obliged to make an order transferring cases to the new rules unless, on special cause shown, parties can argue otherwise.
 - At the end of that 6 month period, all existing cases proceeding under the old rules will be automatically transferred to the new rules.
- 9.25 The effect of such a scheme would be to put the transfer from the old rules to the new in the hands of the court, creating a managed build-up of cases under the new rules alongside certainty about the point at which the old rules will cease to apply.
- 9.26 The concern that it would be practically difficult for the rules to properly provide a mechanism for transferring cases between the old and new rules would be addressed because each transfer would take place at a time, and in a way, ordered by a judge. It is imagined that a standard approach to ordering such transfers would quite swiftly be developed. Since these orders would be made gradually, over a year, the court would not become overloaded with procedural decisions to make.
- 9.27 Such a scheme would mean that the rules identify a point in time, in advance, by which every cause would be transferred to the new rules. The unfairness of such an

enforced transfer would, however, be mitigated by the fact that for the first 6 months it could only happen when parties applied for it to happen. After that, a transfer to the new rules would become the default position and would be addressed, on a case by case basis, as each un-transferred case came before a judge during the natural progress of the litigation. Any unfairness to parties in such a default position would be addressed by the fact that they had had warning of the position and by the ability of judges to, on cause shown, retain the effect of the old rules by order.

- 9.28 Finally, there would only be one situation where the transitional provision would provide for the transfer of causes to the new rules by automatically by operation of law. This would be where no order had been made within a year. In these cases, which it must be imagined would be rare, parties may be assumed by their inaction to have consented to, or be indifferent to the effects of, the transfer to the new rules.

The SCJC considers that the rules should provide for the comprehensive transfer of all cases to the new civil procedure rules, according to a managed timetable set out in rules and under the supervision and control of the court.

Implementation of the new civil procedure rules

- 9.29 The new civil procedure rules could either be drafted in full and brought into force on a single day, or drafted and brought into force as part of a phased programme of implementation, with different parts of civil procedure becoming subject to new rules on different days. For example, with the new civil procedure rules applying first to commercial actions, then family actions some time later, and judicial reviews some date after that.
- 9.30 A 'big bang' approach, with a single day for implementation of all of the new rules, is by far the simplest and most straightforward, especially if the transitional regime applied to the old rules is to be complex. There is only one important date that litigators need to bear in mind: the date the new rules come into force in their entirety. Any benefits of the new rules can be immediately applied to all new cases.
- 9.31 The SCJC considers that there is limited scope for an ability to sensibly phase in new rules. Obviously, all typical general provision would have to be prepared in advance of the first implementation date: without rules for the initiation, adjudication and disposal of a cause there is no civil procedure. Equally, even less-common general matters would have to be prepared: while they may not be relevant in every single cause that comes before the court, rules for the determination of expenses, for motions and minutes, for counterclaims or for the withdrawal of agents, are potentially necessary in every single cause. Similarly, there is a range of very special provision that, while it should be necessary only rarely, it is all needed for the proper functioning of the system and is in many cases required by primary legislation or international obligation: for example, provision on devolution issues, references to the Court of Justice of the European Union, or vulnerable witnesses.

The SCJC considers that the new civil procedure rules should be introduced and come into force for all new actions on a single day.

Practice Notes

- 9.32 The preparation of the new civil procedure rules should also present the opportunity to think more clearly about the balance between those matters best dealt with by a rule of court and those matters more appropriately handled in a practice note, issued directly by the judges of the Court of Session or the sheriff principal. Some matters covered by rules might be thought to be more appropriately dealt with by practice note: for example, some of the provision in chapter 4 of the Rules of the Court of Session 1994 about administrative matters such as the form of process, size and shape of the paper used in court documents, etc . Some matters dealt with by Practice Note might be considered to be so well-established and important that they could best be incorporated into the rules themselves.
- 9.33 Practice Notes can be issued very quickly and amended very easily. There is no formal procedure which applies to them. The language can be looser and less prescriptive than a rule has to be. They can be a very useful way to set out expected practice in typical situations, to address developing inefficiencies, to provide guidance where doubt about interpretation exists or to respond quickly to controversies. At the moment there are some practice notes which cover, in a reasonably comprehensive fashion, the practice which judges expect to be adopted in certain categories of procedure: for example, Practice Note No 5 of 2015 which supplemented the rewritten chapter of the Court of Session Rules on judicial review. Others cover much more minor, discrete matters: for example, Practice Note No 1 of 2005 which provides for an address to which certain immigration and asylum petitions must be lodged. Some are very detailed and procedural: for example, Practice Note No 1 of 2010, which provides a detailed commentary on the rules relating to causes in the Inner House. Some are more in the nature of an informal note to practitioners: for example, Practice Note No 4 of 1991 which upbraids counsel for reported breaches of confidentiality relating to advance copies of opinions being issued. Others can be regarded as curios: for example, Practice Note No 3 of 1992, issued in anticipation of “a woman for the first time sitting as a temporary judge in the Court of Session”.
- 9.34 When the Rules Court of Session Rules 1994 came into force, Practice Note No 3 of 1994 performed a mass revocation of existing practice notes which no longer applied or which had been superseded. However, since then the number of practice notes has multiplied. Some amend existing practice notes and some supplement others. Some clearly supplant existing practice notes without explicitly withdrawing them. Others are probably otiose because the underlying procedure or practice no longer occurs, but nobody has thought to withdraw the practice note. Some were clearly intended to have a temporary effect but have never been formally withdrawn.
- 9.35 The SCJC is of the view that, in order for a consistent approach to be taken to the substantive question of the matters best dealt with by practice note and to the formal question of being sure which practice notes apply and to what, that the following proposals might be followed:

- A single practice note should be prepared for the Court of Session and for each sheriffdom, consolidating all existing practice notes whose effect the judges wish to retain; and all other existing practice notes should be withdrawn.
- Each practice note would follow the order, structure and numbering of the civil rules to which it related, so that Part 1 of the comprehensive practice note would contain guidance from the judges about the practice to be applied to the matters contained in Part 1 of the new civil procedure rules, and so on.
- All new and additional matters to be covered by practice note should, from then on, be incorporated into the comprehensive practice note by amendment, ensuring certainty about the procedural guidance in effect.

9.36 It should be noted that the issuing of, and content of, practice notes for the Court of Session is the exclusive responsibility of the Lord President and the sheriffs principal, typically following consultation with judges. The SCJC, however has a view on the appropriate balance of regulation between formal rules and informal practice notes.

The SCJC recommends the introduction of single, consolidated practice notes for each court or sheriffdom.

Chapter 10. Summary of decisions

- 10.1 The SCJC considers that the rewrite should encompass the Rules of the Court of Session, the Ordinary Cause Rules, the Summary Application Rules, the Child Care and Maintenance Rules and the Adoption Rules, and every other set of civil procedural rules relating to the sheriff court with a direct equivalent in the rules of the Court of Session. **(paragraph 1.17)**
- 10.2 The SCJC has decided that, where appropriate, sheriff court rules should be contained in a single instrument. **(paragraph 1.17)**
- 10.3 The SCJC has decided that the Fatal Accident Inquiry Rules and the Simple Procedure Rules are out with the scope of the rules rewrite. **(paragraph 1.25)**
- 10.4 The SCJC considers that the new civil procedure rules should set out, at the beginning of the rules, a statement of principle. Judges should be obliged to take account of this statement of principle when interpreting the rules and when making any case management order under the rules. Parties, and their representatives, should be obliged to assist judges in respecting the statement of principle. **(paragraph 2.9)**
- 10.5 The SCJC considers that the statement of principle should have as its core consideration the doing of substantive justice between the parties. It should also set out that doing substantive justice means taking account, in a proportionate way, of the cost of doing justice, and that efficiency is an important aspect of doing substantive justice. **(paragraph 2.14)**
- 10.6 The SCJC considers that the new civil procedure rules should not continue the historic distinction between petition and summons procedures. **(paragraph 3.10)**
- 10.7 The SCJC also considers that ordinary actions and summary applications in the sheriff court should be commenced in the same manner. **(paragraph 3.10)**
- 10.8 The SCJC considers that the new civil procedure rules should provide for certain actions to be allocated to a fast-track procedure, and that the judge should be able to transfer cases between fast-track procedure and active case management. **(paragraph 3.15)**
- 10.9 The SCJC considers that the new civil procedure rules should provide that all remedies are available under both the fast-track and case-managed procedures. **(paragraph 3.17)**
- 10.10 The SCJC considers that the new civil procedure rules should provide for proof in fast-track procedure to be limited to matters ordered by the judge. **(paragraph 3.20)**
- 10.11 The SCJC considers that the rules should encourage concise and focused pleading, with a power for the judge to order adjustment, narrowing, clarification and expansion of pleadings. **(paragraph 3.23)**

- 10.12 The SCJC considers that parties should be able to set out their views on the form and location of any case management hearings. Taking these into account, the judge should have the power to make any order about the form, location and conduct of a case management hearing, including the power to hold them by conference call, by email exchange or in a courtroom. **(paragraph 4.8)**
- 10.13 The SCJC considers that, in all cases not allocated by the rules to a case-flow management model, parties should have the ability to set out, at the same time as they give the court their views on the form of any case management hearing, their views on the appropriate form of case management for their cause. **(paragraph 4.10)**
- 10.14 The judge will then make a decision, after taking account of parties' views, about the appropriate form of case management. **(paragraph 4.10)**
- 10.15 The SCJC considers that the new civil procedure rules should contain case-flow management provisions for all suitable categories of case, including personal injury cases. The rules should provide for cases to be able to be ordered out of any case-flow management procedure. **(paragraph 4.17)**
- 10.16 The SCJC considers that the new civil procedure rules should contain powers allowing the judge to order the urgent disposal of any dispute, as well as the fast-track procedure. **(paragraph 4.19)**
- 10.17 The SCJC considers that the new civil procedure rules should contain a suite of standard orders, providing default case management orders for (i) categories of case which typically arise, and (ii) specialised types of action. **(paragraph 4.24)**
- 10.18 Parties should have the ability to set out, at the same time as they give the court their views on the form and type of any case management, their views on (i) whether any standard order should be issued, and (ii) whether that standard order needs to be supplemented or adjusted in any particular way. **(paragraph 4.24)**
- 10.19 The judge should have the power to issue one of these standard orders, supplement or adjust the terms of a standard order, or issue an entirely bespoke order using the judge's case management powers. **(paragraph 4.24)**
- 10.20 The SCJC considers that parties should be required to lodge a case management questionnaire with their originating writ and defences. **(paragraph 4.26)**
- 10.21 The SCJC considers that pre-action protocols should be provided for all classes of case where the court has a reasonable expectation of certain steps and disclosure being made by the parties in advance of litigation, in the interests of narrowing the issues in dispute in a cause. **(paragraph 5.8)**
- 10.22 The SCJC considers that the court should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover specific documents. **(paragraph 5.11)**

- 10.23 The court should be able to order the lodging of documents constituting, evidencing or relating to the subject matter of the action, or any invoices, correspondence or similar documents relating to it within a specified period. **(paragraph 5.11)**
- 10.24 The normal procedures for recovery of evidence should also be available to parties. **(paragraph 5.11)**
- 10.25 The recovery of documents should be competent at any stage in the proceedings. Any documents founded on in the pleadings should be lodged in advance of the first case management hearing. **(paragraph 5.11)**
- 10.26 The SCJC considers that parties should, on appropriate notice, be able to seek summary disposal of any action. The test for summary disposal should be the opposing party having no real prospect of success and there being no other compelling reason why the case should proceed. The court should, on giving appropriate notice, be able to summarily dispose of an action, or part of an action. **(paragraph 5.14)**
- 10.27 The SCJC considers that judges should have the power to impose a time limit on any hearing or any part of any hearing, impose a time limit on any step to be taken by a party, vary any deadline or time limit set out in these rules, require a party to provide a written estimate of the length of time it will take to complete a step or take any action, and require a party to submit a written note of argument in advance of any hearing or step with permission having to be sought by motion to raise any other matters. **(paragraph 5.18)**
- 10.28 The SCJC considers that the new civil procedure rules should provide judges with a broad and general power to relieve parties from non-compliance with rules and orders and to sanction parties for such non-compliance. This power should be wide enough to include all of the possible sanctions identified by the SCCR. **(paragraph 5.21)**
- 10.29 The SCJC considers that the duties of expert witnesses should be set out in the new civil procedure rules. But the SCJC is not satisfied that experts should be required to disclose the terms of their instruction. **(paragraph 6.2)**
- 10.30 The SCJC considers that judges should be given the power to make orders about expert witnesses, including a power to require them to confer in advance of proof, in the interests of the narrowing of the issues in dispute and the efficient use of court time. **(paragraph 6.4)**
- 10.31 The SCJC considers that the court should be able to order that the reports of skilled persons or expert witness be lodged in process, and may determine in light of these that proof is unnecessary on any issue. The default position should be that the report of an expert stands as that expert's evidence-in-chief. **(paragraph 6.9)**
- 10.32 The SCJC considers that parties should not require to seek the court's permission before instructing an expert witness, but that the rules should provide for a strong power for the judge, where appropriate, to make orders about the identity and scope of expert witnesses and their evidence. **(paragraph 6.14)**

- 10.33 The SCJC considers that the new civil procedure rules should contain provision for both a set of strong case management powers for the judge concerning the scope of evidence as well as default provision on the agreement of evidence and particular methods for experts to give their evidence. **(paragraph 6.17)**
- 10.34 The SCJC considers that the new civil procedure rules should be ambitious and innovative in matters of structure, layout and presentation. Considering that these rules are in daily use by the legal profession, the focus of the drafting approach should be usability and readability. **(paragraph 7.4)**
- 10.35 The SCJC will consider all options for the arrangement of the instruments containing rules of court, based on the considerations set out in paragraph 7.12. **(paragraph 7.12)**
- 10.36 The SCJC considers that for as much of civil procedure as is appropriate, the prescription of default, generic provisions should be preferred to individualised forms of procedure. **(paragraph 7.19)**
- 10.37 The SCJC considers that a standard approach to the drafting of elements such as time limits should be adopted, and set out in a style guide for court rules. **(paragraph 7.24)**
- 10.38 The SCJC considers that a standard approach to the drafting of timetables should be adopted, which is considered sufficiently unambiguous and clear to meet the standard of legal certainty. **(paragraph 7.26)**
- 10.39 The SCJC considers that a diversity of approaches will be required to the prescription of forms including, where appropriate, laying out forms to include guidance and graphical elements. **(paragraph 7.28)**
- 10.40 The SCJC considers that the drafting of new civil procedure rules presents an opportunity to introduce greater consistency to the terminology used in court practice. **(paragraph 7.35)**
- 10.41 The SCJC considers that it should take an ad-hoc, flexible approach to decisions whether to update substantive terminology. In each case, the strengths of the arguments against and in favour are likely to fall slightly differently. In some situations, the case will be obviously made. In other cases an alternative approach (perhaps the use of more explanatory material) might address concerns about intelligibility of terminology. Undoubtedly in some cases, for proper reasons, traditional labels may be retained even where they are perceived to be not quite as modern as they might be. **(paragraph 7.39)**
- 10.42 The SCJC considers that electronic interaction with the courts should be the default in the new civil procedure rules, except where the court orders otherwise. **(paragraph 8.29)**
- 10.43 The SCJC will consider the introduction of online, shared, editable pleadings in the new civil procedure rules. **(paragraph 8.30)**

- 10.44 The SCJC will consider the incorporation into the new civil procedure rules of a system of parallel online blind bidding. **(paragraph 8.41)**
- 10.45 The SCJC considers that the new civil procedure rules should facilitate the digital recording and presentation of evidence. **(paragraph 8.45)**
- 10.46 The SCJC considers that the rules should provide for the comprehensive transfer of all cases to the new civil procedure rules, according to a managed timetable set out in rules and under the supervision and control of the court. **(paragraph 9.28)**
- 10.47 The SCJC considers that the new civil procedure rules should be introduced and come into force for all new actions on a single day. **(paragraph 9.31)**
- 10.48 The SCJC recommends the introduction of single, consolidated practice notes for each court or sheriffdom. **(paragraph 9.36)**

Chapter 11. Next Steps

Upcoming work

Ordinary procedure in the Court of Session and sheriff court

- 11.1 The SCJC has decided to focus, over the next year, on the development of a detailed model for ordinary procedure, defended and undefended, in the Court of Session and sheriff court.
- 11.2 This will involve fleshing out the model set out in chapter 4, and preparing draft rules which cover all of the typical steps that an ordinary action might go through in either court. This will start with the initiation of the action, and work through the court authorising the involvement of other parties, the bringing in of other parties and the defending of the action (or its disposal as undefended), initial case management and allocation, hearings and the decision.
- 11.3 Rules will not be prepared at this point on fast-track procedure or any other specialist type of litigation, such as family actions, personal injury or any statutory application. While rules will be prepared on incidental matters which commonly arise in a typical action, such as motions procedure and expenses, rules will not be prepared at this point on less typical incidental procedure, such as devolution issues or interventions.

Work-streams

- 11.4 The SCJC has therefore divided its upcoming work into six work-streams. The work of each will be superintended by the SCJC and the Rules Rewrite Committee. The business of three work-streams will be done by a small reference group, consisting of Committee members and others with specialist expertise which can assist the group.
- 11.5 The first work-stream will be considered by the Rules Rewrite Committee and will cover **commencement and initial case management**. It will develop recommendations on the form of commencing writ and the form of defences, the case management questionnaire, pleadings, service of the commencing writ, administrative consideration of the writ by the clerk, caveats, vexatious litigants, preliminary pleas, adjustment, the form of process, counterclaims, summary decree and initial case management decisions.
- 11.6 The second work-stream will be considered by a reference group and will cover **applications and motions**. It will develop recommendations on motions and minutes, interlocutors, transfer and remit of actions, and the involvement of third parties (including sist and transference, party minutes, third party procedure, etc).
- 11.7 The third work-stream will be considered by a reference group and will cover **decrees, extracts and enforcement**. It will develop recommendations on interim diligence, procedure in undefended cases, decrees and extracts, reponing and reclaiming, decisions and reasons and diligence.
- 11.8 The fourth work-stream will be considered by a reference group and will cover **evidence, proof and hearings**. It will develop recommendations on the mode of

proof, the rules of evidence, the judge's evidence and information management powers, hearings and the judge's hearing management powers, expert witnesses, documents, vulnerable witnesses, notices to admit and non-admission, and the recovery of evidence.

- 11.9 The fifth work-stream will be considered by the Access to Justice Committee and will cover **access to justice**. It will develop recommendations on representation and lay representation, lay support, the withdrawal of agents, time to pay and alternative dispute resolution.
- 11.10 The sixth work-stream will be considered by the Costs and Funding Committee and will cover **expenses and taxation**. It will develop recommendations on expenses, the power of auditors, offers (by pursuers and by tender), settlement and abandonment.

Consultation

Engagement with the public and the professions

- 11.11 The SCJC believes that these reforms will only be successful if the public and the professions are informed of, and involved in, their development.
- 11.12 The SCJC has set out in detail the matters which it will be considering over the next year so that the public and professions are best able to be involved in that consideration. If you have any information about these subjects you would like to be taken into account, suggestions for reform connected to these matters or would like to offer to be involved in the work of any of the reference groups, please contact the SCJC's Secretariat on scjc@scotcourts.gov.uk.
- 11.13 The SCJC has also decided to publish regular papers for each work-stream to keep everyone updated about the matters being considered and the decisions being taken.
- 11.14 The SCJC and its Secretariat will continue to be open and receptive to ideas for reform or improvement submitted by the public and the professions.

Summer tours

- 11.15 As part of its engagement with the public and the professions, the SCJC will be running a tour in Summer 2017, visiting each sheriffdom, to give presentations about, lead a discussion of, and hear local bars' views concerning the development of new civil procedure rules.
- 11.16 Information about dates, venues and speakers will be published soon.

Second report

- 11.17 All of this work will culminate in the publication of the 'New Civil Procedure Rules: Second Report' on ordinary procedure in the Court of Session and sheriff court. This report will contain the details of the SCJC's new model for civil procedure with a set of draft provisions, published for consultation.

Petition and Summons Procedure

Discussion paper for the Rules Rewrite Committee of the Scottish Civil Justice Council

Dr. Stephen Thomson

14th December 2016

Discussion Paper on Petition and Summons ProcedureStructure of Paper

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1. Research Specification

I have been asked by the Rules Rewrite Committee (the “Committee”) of the Scottish Civil Justice Council (the “SCJC”), to provide historical and principled academic analysis in relation to questions arising from the proposal to merge petition and summons procedure.

The Committee has advised that the purpose of the research is:

- to assist the Committee with its consideration of whether to merge petitions and summons procedure;
- to assist the Committee with its understanding of the issues that would be raised should it decide to merge petition and summons procedure.

It was added by the Committee that it is not the purpose of the research to make substantive suggestions or recommendations to the Committee about whether petition and summons procedure should be merged or how that might be achieved in practice.

The Committee has advised that the objectives of the research are to provide it with:

- an understanding of the history of the distinction between petition and summons procedure;
- an understanding of the legal and principled basis for that distinction;
- an analysis of any difficulties caused by that distinction in present practice;
- an analysis of any difficulties likely to be presented by the proposal to remove that distinction;
- a comparative analysis, as appropriate, of the approach taken to any similar matters in England and Wales, Commonwealth jurisdictions such as Canada and Australia, and other comparable places.

It was added by the Committee that the focus of the research is expected to be the law and history of the Court of Session, as that is the forum where the procedural differences between the procedures are most marked. It was also added that, to the extent that it is necessary, appropriate or interesting, the focus of the research may also extend to the law and history of the sheriff courts, to investigate

whether a consistent approach between the courts can be achieved.

2. Historical, legal and principled basis for the distinction

2.1 Overview

The petition¹ and the summons² are the two principal forms of originating process in the Court of Session. The distinction between them is found, with variations in terminology, over a relatively long period in Scots civil procedure. It is useful to introduce the discussion with an overview of some of the orthodox positions taken in the literature on the basic distinction. Beginning with the institutional writers, Stair described the distinction as follows:

A solemn action is that which proceeds expressly in the King's name, and hath no execution till parties be heard, or be contumacious. And so a summary action is that which wants these solemnities.³

Bankton stated that:

A general division of actions, most frequent with us, is, that they are either Ordinary or Extraordinary. The first are these which proceed in the common course, by citation of the parties, whether on a privileged or other summons. Extraordinary, are such as are brought into court in a different manner, and not in the ordinary course of proceeding, viz. by way of Complaint or Suspension.⁴

Erskine wrote that “[s]undry actions proceed upon a warrant of the Court of Session, without any summons issuing from the signet, and therefore denominated *summary actions*”. Examples were given of bills of complaint exhibited against members of the College of Justice or court practitioners, factors on sequestrated estates, inferior judges in contempt of authority, officers of the law for oppression, and litigants in any action brought before the court who were guilty of a wrong pending suit.⁵

1 Petition procedure is sometimes called “summary procedure”. The petition should not be confused with a petitory action – see the *Laws of Scotland: Stair Memorial Encyclopaedia* (Civil Procedure Reissue), paras. 36 and 38.

2 Summons procedure is sometimes called an “action”, “ordinary action” or “solemn procedure”.

3 Viscount Stair, *The Institutions of the Law of Scotland* (5th edn, 1832, John Shank More (ed)), IV.3.24.

4 Andrew McDouall (Lord Bankton), *An Institute of the Law of Scotland* (1752, rep 1994, Stair Society), IV.24.19.

5 John Erskine, *An Institute of the Law of Scotland* (5th edn, 1824), IV.1.9.

Among the classic statements in the broader literature and case law, the Clyde Report of 1927 made the following distinction between the petition and the summons:

The object of the summons is to enforce a pursuer's legal right against a defender who resists it, or to protect a legal right which the defender is infringing; the object of a petition, on the other hand, is to obtain from the administrative jurisdiction of the court power to do something or to require something to be done, which it is just and proper should be done, but which the petitioner has no legal right to do or to require apart from judicial authority. The contentious character of the proceedings which follow a summons necessitates a higher degree of formality than is appropriate to an *ex parte* application such as a petition, even though opposed; hence the distinction between the “solemn” procedure in an action and the “summary” procedure in a petition.⁶

It was suggested in the *Stair Memorial Encyclopaedia* that this gave an unduly narrow description of the object of petitions, and that Lord Keith and the *Dunedin Encyclopaedia* were nearer the mark.⁷ Lord Keith made the following distinction:

The summons and the petition have different historical origins and the purpose of the summons is different from the purpose of the petition. A summons was a writ issued in the King's name, directed to messengers-at-arms, charging a defender to appear within a certain period, if he wished to resist decree passing against him, and the procedure in the event of his non-appearance was settled by a very long course of practice and regulation. A petition is an *ex parte* application addressed to the Lords of Council and Session and seeks their aid for some purpose or other, *e.g.*, by supplying some deficiency of power in the petitioner, in protecting pupils and minors, by exercising some statutory jurisdiction, or the *nobile officium*, in a variety of matters. We are entirely masters of the procedure in a petition, subject to any regulations thereanent made by Act of Sederunt.⁸

The *Dunedin Encyclopaedia* stated that:

Historically the petition, or, as it was sometimes called supplication, was regarded in early times as purely an equitable proceeding, suitable whenever the ordinary forms of action were inapplicable or circumstances required a simple and summary form of procedure... Some traces of its origin survive

⁶ *Report of the Royal Commission on the Court of Session* (Cmd 2801) (1927) (“Clyde Report”), pp.50-51.

⁷ *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 26. See also para. 31.

⁸ *Tomkins v Cohen*, 1951 SC 22 at 23, per Lord Keith. The procedure initiated by petition was described in the same case as “entirely different” to the procedure initiated by summons – *ibid.*, per Lord President Cooper.

in the rule that procedure by petition is incompetent whenever any other form of action can be used. The purely equitable jurisdiction of the Court known as the *Nobile Officium* has always been, and still is, invoked by petition.⁹

The difference between the petition and the summons (or “action”) was set out as follows in *Balfour's Handbook of Court of Session Practice*:

Procedure by petition differs from procedure by action in respect that –

1. It is in general *ex parte* or non-contentious;
2. The initial writ is not a summons in name of the Sovereign, but a petition addressed to the Court;
3. An order of the Court must be asked and obtained before it can be served;
4. While the action generally asks the Court to vindicate and enforce some right already existing in the pursuer, the petition, as a rule, asks the Court to confer some privilege or authority on the petitioner; and
5. The procedure is summary.¹⁰

Likewise, it was described in Maclaren's *Court of Session Practice* as follows:

While procedure by summons is based on the idea that there is some person, whether an individual, body corporate or unincorporate, or the lieges, against whom the pursuer desires to establish a right or seek a remedy, a petition is an *ex parte* application craving the authority of the Court for the petitioner, or seeking the Court to ordain another person, to do an act or acts which otherwise the petitioner would be unable to do, or cause to be done.

A petition does not run in name of the Sovereign; it is simply addressed to the Court.

While a summons usually passes the Signet and may thereupon be served upon the defender, a petition cannot be served until the authority of the Court has been obtained.

A summons may be signed by a law agent, whereas a petition must be signed by counsel.

In a summons the procedure is solemn, while the procedure in a petition is summary.¹¹

9 Viscount Dunedin et al (eds), *Encyclopaedia of the Laws of Scotland* (W. Green, Edinburgh, 1926-1935) (“*Dunedin Encyclopaedia*”), Vol. XI, at 308.

10 Robert Berry (ed), *Balfour's Handbook of Court of Session Practice* (5th edn) (W. Green, Edinburgh, 1922), p.200.

These statements generally highlight a number of common distinctions made between the petition and the summons. Among the more common features attributed to the petition is that it is usually made *ex parte*, and typically initiates non-contentious or non-adversarial proceedings. It is addressed to the court, rather than to a contradictor,¹² and the commencement of process arises at the point of lodging the petition in court. The comparatively greater flexibility available under the petition is often emphasised.¹³ In addition, the petition is often regarded as invoking a comparatively greater sense of discretionary or equitable jurisdiction, particularly as the petitioner approaches the court not on the basis of right, but to seek a remedy to which he has no right, and which he instead seeks from the court on a discretionary or equitable basis.

By contrast, the summons is typically said to have a contradictor, initiating contentious or adversarial proceedings. The summons is addressed to the defender, rather than to the court,¹⁴ and the commencement of process arises by service of the summons on the defender. The court is regarded as commanding comparatively less flexibility under the summons than under the petition. This may imply a relatively lesser sense of the invocation of discretionary or equitable jurisdiction, particularly as the pursuer typically approaches the court to enforce or vindicate a legal right. The tone of proceedings initiated by summons is a more ordinary and regularised one.

These and other characteristics which are often attributed to the petition and the summons may be contrasted as follows:

<u>Summons</u>	<u>Petition</u>
Usually with contradictor	Usually <i>ex parte</i>
Usually contentious or adversarial	Usually non-contentious or non-adversarial
Signeted in the name of the Sovereign	Addressed to the court (neither Signeted nor made out in the name of the Sovereign) ¹⁵
Warrant for service on the respondent must be obtained from the Signet office	Warrant for service on the respondent (if any) must be obtained from the court ¹⁶

11 James A. Maclaren, *Court of Session Practice* (W. Green, Edinburgh, 1916), p.825.

12 Form 14.4 (form of petition).

13 Contrast, for example, the Rules of the Court of Session (Act of Sederunt (Rules of the Court of Session 1994) 1994 (Scottish SI 1994/1443) (“RCS”), Sch. 2), Chs. 13 (Summonses, Notice, Warrants and Calling) and 14 (Petitions).

14 Form 13.2-A (form of summons).

15 This difference is not applicable in the sheriff court, where both an ordinary cause action and a summary application are commenced by way of initial writ – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 25.

16 *Ibid.*, which describes this as now a technical distinction.

Commenced by service of the summons (or, in the sheriff court, the initial writ) on the defender	Commenced by lodging of the petition (or, in the sheriff court, the initial writ ¹⁷) in court
Procedure relating to decrees in absence is applicable	Procedure relating to decrees in absence is not applicable
Procedure involves the application of rules of law as distinct from the discretionary exercise of statutory or common law powers	Procedure involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law
Procedure is in the relevant sense ordinary	Procedure is in the relevant sense extraordinary
Court has comparatively less discretion over procedure	Court has comparatively greater discretion over procedure
Pleas-in-law must be inserted	Pleas-in-law are generally not required to be inserted (other than in petitions for judicial review)
Always originates in the Outer House, never in the Inner House (when originating in the Court of Session)	Some petitions must originate in the Outer House and others must originate in the Inner House (when originating in the Court of Session) ¹⁸
Procedure is solemn	Procedure is summary
Process initiated to enforce or vindicate a legal right	Process initiated to seek a remedy to which the petitioner has no legal right
Comparatively lesser appeal to the court's equitable discretion	Comparatively greater appeal to the court's equitable discretion

This is not an exhaustive characterisation of the two forms of originating process, but juxtaposes their arguably more salient or distinctive features. To some extent, this may appear to be a principled basis on which to make the distinction between the two contrasting forms of proceeding. The summons initiates the ordinary form of action whereby a pursuer seeks to enforce or vindicate a legal right, whereas the petition initiates a more abbreviated and flexible form of proceeding whereby a more extraordinary, discretionary or equitable process or remedy may be used or delivered by the court not of right, but of privilege.

The situations in which the petition may or must be used are numerous and varied, and provision as to the appropriate form of originating process is found in a variety of sources, both statutory and non-statutory.¹⁹ The *Stair Memorial Encyclopaedia* sets out a number of situations in which the petition is regarded as the appropriate form by which process should be initiated.²⁰ Whilst these

¹⁷ In relation to summary applications.

¹⁸ See pp. 11-12 below.

¹⁹ See pp. 10-14 below.

²⁰ *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 28.

will not be restated in full, they can be summarised as follows:

- Procedure involves the discretionary grant of authority or permission (supplying some deficiency of power in the petitioner)
- Procedure involves the discretionary appointment of a person to an office
- Procedure involves the discretionary grant of a remedy which only the court can grant and to which the pursuer is not entitled as of right
- Claim involves exercise of the Court of Session's *parens patriae* jurisdiction²¹
- Claim involves exercise of the Court of Session's *nobile officium*²²
- Claim by its nature is set apart for the Inner House
- Procedure involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law

Classic examples of the petition being the appropriate form of originating process include an application for the appointment of a judicial factor, a trustee applying for authority for an act relating to the management of trust funds or for directions, an application to the *parens patriae* jurisdiction, an application to the *nobile officium*, an application for suspension, suspension and interdict or suspension and liberation, or for certain applications for the inspection, photographing, preservation, custody and detention of documents and property.²³

It has been suggested that there is not just a single policy reason for distinguishing the petition from the summons, but rather policy reasons which “var[y] with each different class of petition”.²⁴ This may at least partly explain the several and varied classes of petition, and the piecemeal provision for petitions in the legislation and Rules of Court.²⁵ However, it also raises another important feature of the petition which is that it is not a uniform category of originating process, singularly and

21 The *parens patriae* jurisdiction is the protective jurisdiction of the Court of Session over vulnerable persons or those unable to act for themselves, such as children and the terminally ill. It is related to, but apparently distinguishable from, the *nobile officium* – see Stephen Thomson, *The Nobile Officium: The Extraordinary Equitable Jurisdiction of the Supreme Courts of Scotland* (Avizandum, Edinburgh, 2015), pp.118-120.

22 The *nobile officium* is the Court of Session's extraordinary equitable jurisdiction to award a remedy where a legal norm is deficient, unavailable or absent, or to alleviate the rigour of the strict law where its application would be unduly excessive, oppressive or burdensome. Whereas the Court of Session's *nobile officium* extends to matters of civil jurisdiction, the High Court of Justiciary has a *nobile officium* over matters of criminal jurisdiction. See generally Thomson, *The Nobile Officium*.

23 Administration of Justice (Scotland) Act 1972, s. 1(1); RCS, Ch. 64.

24 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 24.

25 The current Rules of Court, with their separate chapters for different categories of petition, seem to reflect a “codification” of former practices specific to those categories, which were nevertheless transacted under general rules – see *ibid.*, para. 228.

categorically distinct from the summons. Rather, there are a number of different categories of petition, and their features display a degree of diversity. In this regard, “[d]ifferent types of petitions have different purposes”, and these “seem to have resisted compendious, affirmative definition”.²⁶ For example, as described below,²⁷ the petition for judicial review is in several respects quite different from other types of petition.

Furthermore, in terms of policy justifications for the petition, speed and cheapness are cited.²⁸ This *prima facie* appears to be a sensible approach to civil procedure: if an intending petitioner requires a remedy with a greater sense of urgency or supplication of the court's privilege than is usual, why subject him to the same length and expense of proceedings as a pursuer in an ordinary action? If there is typically no contradictor, why not abbreviate proceedings in the interests of expediency and efficiency? If the outcome of the process depends essentially on the court's discretion (as the remedy is not demanded of right), why not allow the court to abbreviate and modify procedure as it sees fit to effect and transact the process? These considerations seem to enhance the accessibility of judicial proceedings and, broadly speaking, “access to justice”. However, speed and cheapness are by no means the only policy justification for the petition, and some urgent applications can even be made by way of summons.²⁹

2.2 Determination of whether to commence process by petition or summons

A number of statutes make direct provision on the form of originating process to be used. For example, it is provided that petition is to be used for an application by trustees or beneficiaries for the variation of trust purposes,³⁰ by a company member for an order against the conduct of company affairs which are unfairly prejudicial to company members,³¹ by a solicitor whose name has been struck off the roll in pursuance of an order of the court to have the court order his name to be restored to the roll,³² and by the Lord Advocate for a scheme to be made for the future government and management of an endowment.³³

²⁶ *Ibid.*, para. 26.

²⁷ See pp. 15-16, 27-29 and 35, and fn. 79 below.

²⁸ *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30.

²⁹ See p.38 below.

³⁰ Trusts (Scotland) Act 1961, s. 1.

³¹ Companies Act 2006, s. 994(1).

³² Solicitors (Scotland) Act 1980, ss. 55(3) and (4).

³³ Education (Scotland) Act 1980, s108A.

The Rules of Court often specify whether process in a given case must be initiated by petition or summons. It is provided, for example, that an application for revocation of a patent,³⁴ appointment of a judicial factor,³⁵ discharge of a judicial factor,³⁶ and certain applications under the Financial Services Act 1986,³⁷ Uncertificated Securities Regulations 1995,³⁸ Gender Recognition Act 2004,³⁹ and in relation to qualified conveyancers and executry practitioners,⁴⁰ shall each be made by petition. Meanwhile, it is provided that certain applications for financial provision after overseas divorce or annulment, and overseas dissolution or annulment of civil partnership, shall be made by summons.⁴¹ An application under section 7(2) of the Family Law (Scotland) Act 1985 (variation or termination of agreement on aliment) “shall be made by summons or in defences in a family action, as the case may be”.⁴²

Chapter 14 of the Rules of Court makes provision for the distribution of petition business between the Inner and Outer Houses of the court. The current distribution of business is as follows:

Outer House⁴³

- Application for the appointment of a judicial factor, a factor *loco absentis*, a factor pending litigation or a curator *bonis*
- Application for the appointment of a judicial factor on the estate of a partnership or joint adventure
- Application to the *nobile officium* of the court which relates to the administration of a trust, the office of trustee or a public trust
- Petition and complaint for breach of interdict
- Application to the supervisory jurisdiction of the court
- Application for suspension, suspension and interdict, and suspension and liberation
- Application to recall an arrestment or inhibition other than in a cause depending before the court

34 RCS, r. 55.6(1).

35 *Ibid.*, r. 61.2(1). This appointment, when achieved on a non-statutory basis, may be sought in exercise of the *nobile officium* – see Thomson, *The Nobile Officium*, pp.70-74.

36 RCS, r. 61.33(1). This does not apply to situations in which application for discharge is to be made to the Accountant of Court – *ibid.*, rr. 61.31 and 61.33(1).

37 *Ibid.*, r. 75.2.

38 *Ibid.*, r. 75.6.

39 *Ibid.*, rr. 91.2(1) and 91.3(1).

40 *Ibid.*, r. 80.2(1).

41 *Ibid.*, rr. 49.53(1) and 49.53B(1).

42 *Ibid.*, r. 49.57.

43 *Ibid.*, rr. 14.2(a)-(i).

- Petition or other application under the Rules of the Court of Session or any other enactment or rule of law
- Application to the court in exercise of its *parens patriae* jurisdiction

*Inner House*⁴⁴

- Petition and complaint other than for breach of interdict
- Application under any enactment relating to solicitors or notaries public
- Application which is, by virtue of the Rules of the Court of Session or any other enactment, to be by petition and is incidental to a cause depending before the Inner House
- Application to the *nobile officium* of the court other than an application mentioned in RCS, Rule 14.2(c) (applications relating to the administration of a trust, the office of trustee or a public trust)
- Petition by trustees for directions under Part II of Chapter 63
- Application under section 1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (assistance in obtaining evidence for civil proceedings in another jurisdiction)
- Application under section 1 of the Trusts (Scotland) Act 1961 (variation or revocation of trusts)
- Application under section 17(6), 18(7), 20(7), 20(11)(b), 21(5), 21(7) or 21(10) of, or under paragraph 20 of Schedule 1 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (orders in relation to conveyancing or executry practitioners)
- Application required to be made to the Inner House under any enactment

Where a provision does not specify whether a petition must be made to the Inner or Outer House, effectively the default position is now that the petition should be presented to the Outer House.⁴⁵

In some circumstances, the form of originating process to be used is determined by whether a cause is already depending before the court. For example, certain applications under the Copyright Act 1988, Trade Marks Act 1994 or Olympics Association Right (Infringement Proceedings) Regulations 1995 shall be made:

- (a) in a cause depending before the court, by motion; or

⁴⁴ *Ibid.*, rr. 14.3(a)-(i).

⁴⁵ See *ibid.*, Ch. 14 in general, and rr. 14.2(h) and 14.3(i) in particular.

- (b) where there is no depending cause, by petition...⁴⁶

In another example, applications to set aside transactions under section 3 of the Age of Legal Capacity (Scotland) Act 1991 may be made:

- (a) by an action in the Court of Session or the sheriff court, or
(b) by an incidental application in other proceedings in such court...⁴⁷

It has been suggested that it is unclear whether in some circumstances the petition must be used.⁴⁸ Whilst in some cases the choice of procedure may have a bearing on the substantive law to be applied, in other cases it might have no material effect on the substantive law.⁴⁹ In the former case, selection of the wrong procedure should in principle increase the risk of the court finding the selected procedure to be incompetent.

It has been stated that in “most” cases, the intending litigant has no choice as to whether to initiate process by way of petition or summons, as statute or the Rules of Court “usually” specify which form of process must be used.⁵⁰ However, in some cases the choice is apparently for the litigant to make. For example, Rule of Court 73.2 provides the following in relation to applications for rectification of defectively expressed documents under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985:

- (1) Subject to paragraph (2), an application to which this Chapter applies shall be made by petition.
- (2) An application to which this Chapter applies may be made-
- (a) in an action to which Chapter 47 (commercial actions) applies, by summons or by a conclusion ancillary to other conclusions in the summons or in a counterclaim; or

⁴⁶ *Ibid.*, r. 55.17.

⁴⁷ Age of Legal Capacity (Scotland) Act 1991, s. 3(5).

⁴⁸ See *Parliament House Book*, Rules of Court annotations, para. 14.2.10.

⁴⁹ See *Paterson, Petitioner (No 2)*, 2002 SC 160 at para. 53, per Lord Carloway.

⁵⁰ Robert Howie QC and Bryan Heaney, '*Petitions in the Outer House*' in *Court of Session Practice* (Bloomsbury Professional, accessed via Practical Law, 20th November 2016), para. 2.

- (b) in any other action, by a conclusion in a summons or in a counterclaim.⁵¹

There also appears to be a choice under Rule of Court 53.1 on whether to include in a summons conclusions for suspension, interdict and liberation in qualifying circumstances.⁵² To the extent that the initiator of the process has a choice in whether to use the petition or the summons, this may suggest a category of cases in which the distinction between the two forms of process is based not necessarily on legal doctrine or policy as such, but on the option of the initiator. Perhaps, if cases exist where either process can be used, there is less distance between the forms of process in terms of principle – or at least not as much conceptual distance between them in all cases.

Nevertheless, where proceedings are initiated by petition – even where the court is not persuaded that this was the proper form of process, but where no objection has been taken and the court is not prepared to deem them incompetent – the effect of this is not to “transform a case involving an ordinary remedy based upon legal right into a purely discretionary one”.⁵³ That in itself is potentially significant, and again suggests the possibility of less conceptual distance between the two forms of process – at least in some cases – than the orthodox coverage might have recognised.

2.3 Testing the distinction between the petition and summons

The preceding sections set out the generally accepted features of, and distinctions between, the petition and the summons as forms of originating process. The existing literature has tended not to test those putative features and distinctions, however. Rather than merely serve to repeat or reiterate the orthodox view of the forms of process, the opportunity is taken in this paper to ask to what extent these features and distinctions are comprehensively applicable. Indeed, the general lack of commentary on the forms of process – and in particular scholarly analysis – might lead statements to import the logic and premises of historically expressed views without subjecting them to a sufficient level of scrutiny.

The doctrinal, policy and practical justifications for the petition depend on the alleged distinctions between the petition and the summons being accurate. A comprehensive, empirical study of

⁵¹ RCS, r. 73.2. See further pp. 25-26 below.

⁵² RCS, r. 53.1.

⁵³ *Paterson, Petitioner (No 2)*, 2002 SC 160 at para. 53, per Lord Carloway. Consider also, though of a different nature, *Wilson v Inverness Retail and Business Park Ltd*, 2003 SLT 301, in which it was doubted whether the court could dismiss an otherwise competent and relevant action on the view that it was “inappropriate” in light of some alternative means of proceeding – at para. 27, per Lord Eassie.

processes initiated by petition and summons is beyond the scope of this paper, but it is instructive to ask to what extent these distinctions hold true in practice, and to subject them to tests for analytical rigour. Are, for example, petitions typically *ex parte*, without a contradictor? Are they generally non-contentious or non-adversarial in nature? Do they indeed invoke a comparatively greater sense of the extraordinary, the discretionary or the equitable? This section will raise questions of this nature under two headings: (a) that the petition is usually an *ex parte* form of originating non-contentious or non-adversarial process, and (b) that the petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law.

The purpose of this section is not to “disprove” or completely reject the existing accounts of the distinction between the petition and the summons. Its purpose is more nuanced – to the extent that the features and distinctions do not hold comprehensively true, the two forms of process might not be so categorically divided as a matter of principle as the views traditionally expressed would have it – in which case, there may be space created for the recommendation for the distinction's abolition. In this way, the current section looks to introduce balance to the analysis of the distinction.

a. *Petition is usually an ex parte form of originating non-contentious or non-adversarial process*

The petition is typically described as a form of originating process initiated *ex parte*. By contrast, the summons is regarded as typically having a contradictor – in other words, a party cited as a respondent who resists or objects to the action. In many cases this may be correct, and it has been said that, with the notable exceptions of petitions for the custody of children, judicial review, and suspension and interdict, it is apparently not common for a petition to be opposed.⁵⁴ In fact, there have even been cases in which a petition has been refused as incompetent on the basis that it involved a question of disputed right.⁵⁵ There have also been cases in which a petition was sisted to allow disputed matters to be settled by way of an action.⁵⁶

However, a significant number of petitions do not proceed as *ex parte* applications, but as

54 William W. McBryde and Norman J. Dowie, *Petition Procedure in the Court of Session* (2nd edn) (W. Green, Edinburgh, 1988), p.3.

55 *Mackenzie v Macfarlane*, 1934 SN 16; *Simeone, Petitioners*, 1950 SLT 399; *Heggie v Davidson*, 1973 SLT (Notes) 47.

56 *Davidson's Trustees v Arnott*, 1951 SC 42; *Church of Scotland Trust v O'Donoghue*, 1951 SC 85.

contentious or adversarial proceedings. The salient example is the petition for judicial review,⁵⁷ which in the majority of cases will have a party cited as respondent who seeks to resist or object to the petition. Indeed, the very essence of judicial review is to confine a body to its jurisdiction,⁵⁸ and this can take many forms such as seeking reduction of an *ultra vires* decision, an order of specific implement to compel a body to decide or to give reasons for its decision, or an order of interdict to restrain a body from acting *ultra vires*. It is commonplace in such petitions for the body whose decision, act or omission is challenged to be cited as contradictor, and they will typically resist or object to the petition. The most recently available statistics published by the Scottish Government (covering the year 2014-2015) disclose that 399 petitions for judicial review were initiated, and 287 disposed, in the Court of Session.⁵⁹ 1,213 cases were initiated, and 1,062 disposed, through the Petitions Department.⁶⁰ Proceeding on the assumption that all or almost all petitions for judicial review are contested,⁶¹ this means that – on the basis of petitions for judicial review alone, and not taking into account other types of petition – approximately 27-33% of petitions did not proceed on an *ex parte* basis, but instead had a contradictor and proceeded on a contested basis. These are very rough figures, but they already suggest that a significant volume of petitions are not made *ex parte*, and are used to transact contentious or adversarial proceedings.

Petitions other than those for judicial review do sometimes proceed contentiously or adversarially. For example, though most petitions to the *nobile officium* are *ex parte* and neither demand nor require a contradictor, some petitions are met with resistance in the form of a party who lodges objections. Even the *nobile officium*, therefore – despite putatively being the greatest appeal to the court's “equitable” jurisdiction – can be, and has been, invoked through contentious or adversarial proceedings initiated by petition.

A further example is found in relation to the enforcement of foreign judgments under section 9 of the Administration of Justice Act 1920 or section 2 of the Foreign Judgments (Reciprocal

57 Changes to the Rules of Court, particularly those relating to petitions for judicial review, have “tended to blur the distinction [between the petition and the summons] over recent years” – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 87.

58 See Stephen Thomson, *The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session* [2016] Public Law 670.

59 *Civil Justice Statistics in Scotland 2014-2015* (Published by the Scottish Government, 18th March 2016), p.76 (Table 23). This is the highest number of petitions for judicial review initiated over the period of coverage in the report, namely from 2008-2009 to 2014-2015. It represents approximately a 30% increase on the immediately preceding year.

60 *Ibid.*, p.55 (Table 2). The table also shows that 139 cases were initiated, and 138 disposed, in the Inner House. This is described as first instance business only, excluding appeals and reclaiming motions, but it is unclear whether it includes any petition business.

61 Figures do not appear to be available for this.

Enforcement) Act 1933. The application for registration of such a judgment shall be made by petition,⁶² presumably *ex parte*. However, on registration of the judgment, the petitioner must serve notice on the judgment debtor in the prescribed form,⁶³ and the judgment debtor may then apply by note to set aside the registration.⁶⁴ These proceedings can conceivably be regarded as contentious following the judgment debtor's application by note, and it can be seen that the judgment debtor's prescribed mechanism for objecting to the registration is by note (presumably within the existing petition procedure) – with no requirement to initiate process by summons. Related to this, a decree for payment made by a court in another part of the United Kingdom may be challenged by applying either to sist proceedings for enforcement,⁶⁵ or to reduce the registration of the judgment.⁶⁶ This must be done by petition.⁶⁷

A solicitor whose name has been struck off the roll in pursuance of an order made by the court may apply to the court for an order directing his name to be restored to the roll,⁶⁸ and a solicitor whose rights of audience have been revoked in pursuance of an order made by the court may apply to the court for an order restoring those rights.⁶⁹ These applications shall be made by petition, and intimation of the petition shall be made to the Scottish Solicitors' Discipline Tribunal, which shall be entitled to appear and be heard in respect of the application.⁷⁰ These can potentially be contentious proceedings.

Separately, a petition made “in a summary way” for determining whether rolling stock and plant is liable to be attached by diligence can presumably be opposed,⁷¹ and though generally a quite distinct class of petition, the election petition will typically have at least one respondent.⁷²

The availability of interim interdict and other interim orders demonstrates that contentious proceedings can arise in procedure initiated by petition, and that non-contentious proceedings can arise in procedure initiated by summons. This further tests the putative correlation between the petition and the summons, and their respective characteristics of being non-contentious and

62 RCS, r. 62.5(1).

63 *Ibid.*, r. 62.9.

64 *Ibid.*, r. 62.10(1).

65 Civil Jurisdiction and Judgments Act 1982, Sch. 6, para. 9.

66 *Ibid.*, para. 10.

67 RCS, r. 62.37(3).

68 Solicitors (Scotland) Act 1980, s. 55(3).

69 *Ibid.*, s. 55(3A).

70 *Ibid.*, s. 55(4).

71 Railway Companies (Scotland) Act 1867, s. 5.

72 See *Laws of Scotland: Stair Memorial Encyclopaedia* (Elections and Referendums Reissue), para. 354.

contentious. Section 47(1) of the Court of Session Act 1988 provides for interim interdict to be sought in any cause containing a conclusion or crave for interdict or liberation, with additional provision for orders for interim possession of any property to which a cause relates,⁷³ including in relation to orders (and interim orders) *ad factum praestandum*.⁷⁴ These interim orders are made by motion, though the defender may lodge a caveat in which case the issue is contentious, even though the motion may have been made in the context of a petition.⁷⁵ This would therefore be a contentious proceeding arising within the context of a petition. Conversely, if the process was initiated by summons and the defender had not lodged a caveat (or the motion had not been intimated to the party affected⁷⁶), the motion would be made (and order granted) *ex parte*. This would therefore be a non-contentious proceeding arising within an otherwise “contentious” cause initiated by summons.

Finally, though perhaps unusual (or even exceptional) due to the pressing nature of the case, the summons has successfully been used to obtain declarator even where the issue to be decided was uncontentious – in the sense that the parties to the case were not in dispute about the legal consequences of a particular action. The Inner House (in a court of five judges) considered that such a course would be inappropriate in future cases, however, in which the court's *parens patriae* jurisdiction fell to be exercised.⁷⁷

The conclusion which may be drawn from this discussion is that, whilst it might generally be true that the petition is an *ex parte* form of originating non-contentious or non-adversarial process, it is not universally true. Just how many petitions do and do not fall into this category cannot be ascertained without large-scale empirical research. However, the fact that several classes of petition can initiate contentious or adversarial proceedings – including the major category of petitions for judicial review, in which the contentious or adversarial nature of proceedings is the norm – raises questions about just how extensively the claimed attributes of petitions can be and ought to be asserted. In addition, as procedure initiated by summons can, albeit infrequently or even rarely, be non-contentious or non-adversarial, there is further uncertainty in the accuracy and extent of the putative correlation between the forms of originating process and the *ex parte*, contentious,

73 Court of Session Act 1988, s. 47(2).

74 *Ibid.*, s. 47(2A).

75 Including (but not limited to) a petition for judicial review – RCS, r. 58.13(2)(b).

76 See the *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 117.

77 *Law Hospital NHS Trust v Lord Advocate*, 1996 SC 301. Application to the *parens patriae* jurisdiction is now made by petition to the Outer House – RCS, r. 14.2(i).

adversarial or otherwise character commonly attributed to them.

b. Petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law

It has been claimed that petition procedure involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law, the converse applying for summons procedure. This is closely associated with the idea that whilst in a summons the pursuer seeks to enforce or vindicate a legal right, the petitioner supplicates the court to exercise its privilege to grant a remedy to which he has no legal right. The court's discretion is, the principle goes, key to the success of a petition.⁷⁸

The respective forms and terminology reflect this distinction. Form 13.2-A is provided for use in procedure initiated by summons. This is addressed from the pursuer to the defender, in which “the pursuer craves the Lords of our Council and Session to pronounce a decree against you [the defender] in terms of the conclusions appended to this summons”. Meanwhile, Form 14.4 is provided for use in procedure initiated by petition. It is instead addressed from the petitioner “unto the Right Honourable the Lords of Council and Session” – to the court itself. Likewise, whereas the summons contains the pursuer's “crave”, the petition contains the petitioner's “prayer”.⁷⁹ The idea of the latter is that it comprises a more elevated expression of humility on the part of the petitioner, who seeks from the court a remedy to which he has no right. The petition even introduces the substance of the application with the words “humbly sheweth”, and in former times – around the 18th century in particular – there were cases in which the petitioner was designed as the “supplicant”.

The traditional characterisation of each form of originating process under the present heading might again hold true in many cases. As for the previous section, the precise accuracy or extent of this characterisation cannot be measured without a large-scale empirical study. However, the distinction is again one which can be tested, both on the more general level of principle, and in relation to remedies. The paper will challenge this distinction in the interests of testing the veracity of the orthodox view, and ensuring balance in the analysis and range of perspectives available to the

⁷⁸ Consider *Bank of Scotland v Brunswick Developments (1987) Ltd (No 2)*, 1997 SC 226 at 231, per Lord President Rodger.

⁷⁹ However, petitions for judicial review have no prayer.

Committee.

Beginning with the more general point of principle, Lord Macfadyen and Sean Smith stated with reference to the Clyde Report's distinction between the purpose of the petition and the summons that:

While this remains a useful distinction, it should not be thought that it is always necessarily inappropriate to proceed by way of petition where it is sought to enforce or protect a party's rights. For example, it has been held competent to proceed by way of petition in order to recover possession of heritable property, though the orders sought might in substance have the same effect as an action of removing.⁸⁰

The authors cite, in this regard, a case in which “petition procedure had been chosen in order to avoid perceived objections to the competency of raising a simple action of removing in the Court of Session”.⁸¹ Other categories of petition in which the object of the petition is to “protect a legal right which the defender is infringing” (putatively the object of the summons) are the petition for suspension, petition for interdict, and petition for suspension and interdict.⁸² The general principle that the petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law can therefore already be seen as not one of universal application.

Likewise, the general principle that the summons involves the application of rules of law as distinct from the discretionary exercise of statutory or common law powers is also not one of universal application. In particular, the summons can be used to obtain so-called “equitable remedies”⁸³ which are allegedly awarded on a more or less discretionary basis. This also extends to the award of interim remedies, such as interim interdict. The basis for the court's decision on whether to grant an interim order is the balance of convenience test,⁸⁴ which is a matter for the discretion of the

80 Lord Macfadyen and Sean Smith, *'Procedure in an Ordinary Action'* in *Court of Session Practice* (Bloomsbury Professional, accessed via Practical Law, 20th November 2016), para. 2.

81 *Oliver & Son Ltd, Petitioners*, 1999 SC 656.

82 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 26.

83 See pp. 22-25 below.

84 Indeed, this test applies not only to an order for interim interdict, but also, for example, interim suspension – see *Muqit v General Medical Council*, 2000 SLT 943.

court.⁸⁵

Sometimes the court has discretion under summons procedure which seems more redolent of that under petition procedure, such as the provision that, in an application to set aside a transaction under the Age of Legal Capacity (Scotland) Act 1991, the court “may make... such further order, if any, as seems appropriate to the court in order to give effect to the rights of the parties”.⁸⁶ Conversely, even when exercising the *nobile officium* – putatively the court’s “purely equitable” jurisdiction⁸⁷ – the award of remedies is not entirely discretionary (or perhaps better put, not arbitrary), with precedent continuing to play a perhaps surprising role.⁸⁸

In relation to remedies, it can also be seen that there are questions about the extent to which it is accurate or appropriate to regard the petition as a form of process categorically concerned with the discretionary exercise of statutory or common law powers.⁸⁹ Though there is potentially scope for argument that discretion can take on more or less equitable forms, the petition has often been taken to invoke a greater sense of acting according to equitable considerations than as a matter of strict legal right.

The equitable nature of jurisdiction, judicial power and remedies is complex and under-explored in both the law and literature. The “equitable” descriptor has also been used with great elasticity and lack of precision in many different scenarios over a prolonged period of time, such that it is not always clear that the term is being used with consistency or to convey the same meaning, categorisation or conceptual analysis. It is also important to note that there is no exact correlation between the “equitable” remedy and the process or jurisdiction by which it is accessed – for example, an “equitable” remedy (such as interdict⁹⁰) can be accessed through a non-equitable form of process (in principle, the summons⁹¹); whilst a non-equitable remedy (such as damages⁹²) can be

85 *Toynar Ltd v Whitbread & Co plc*, 1988 SLT 433, p.435. See also *Scottish Power Generation Ltd v British Energy Generation (UK) Ltd*, 2002 SC 517.

86 Age of Legal Capacity (Scotland) Act 1991, s. 3(5). It is provided in s. 3(5) that the application may be made by action in the Court of Session or the sheriff court, or by incidental application in other proceedings in such court. The “action” referred to is presumably one initiated by summons; though the application could also be made incidentally under petition procedure.

87 *Dunedin Encyclopaedia*, Vol. XI, para. 697.

88 See Thomson, *The Nobile Officium*, pp.241-252.

89 It is perhaps also worth noting that the *nobile officium* has sometimes been regarded as an exercise of, but at other times distinguished from, common law powers – see *ibid.*, pp.26-28.

90 See pp. 22-23 below.

91 For a recent example of interdict obtained by summons, see *Van Lynden v Gilchrist* [2016] CSIH 72.

accessed through a supposedly “equitable” form of process (such as the petition for judicial review⁹³). It can also be observed that the court (and in some circumstances the sheriff court) retains much in the way of discretion in the many and varied applications of tests of fairness, reasonableness, justice, equitableness and so on. These may bear a wide range of applications of, or relationships to, the “equitable” or discretionary forms of process, jurisdiction, judicial power, legal doctrine and remedies. The tests are too numerous and varied to enumerate, but include statutory and non-statutory tests such as:

- Where a party has suffered damage including personal injury or death in circumstances where that is the result partly of his own fault and partly the fault of another (contributory negligence), the court's power to reduce damages recoverable by an injured party to such extent as the court thinks just and equitable having regard to his share in the responsibility for the damage;⁹⁴
- The requirement in seeking the remedy of recompense that it be equitable for the pursuer to be reimbursed by the defender on the basis of *quantum lucratus* in respect of the loss incurred by the pursuer;⁹⁵
- An order of the court winding up a building society if the court is of the opinion that it is just and equitable that the building society should be wound up;⁹⁶
- The application of *Wednesbury* unreasonableness as a ground of judicial review;⁹⁷ and
- The sheriff's power to postpone the granting of authority to a trustee to sell the family home for such period (not exceeding three years) as the sheriff considers reasonable in the circumstances, or to grant the application for authority to sell subject to such conditions as the sheriff may prescribe.⁹⁸

The imprecise use of the term “equitable” may be responsible for what is potentially an over-extension of its application. This is particularly discernible in relation to remedies, where many of the common law remedies have been, at one time or another, described as “equitable”. Repetition,⁹⁹

92 Though rules of law may provide for the award or calculation of damages on an equitable basis.

93 RCS, r. 58.13(g).

94 Law Reform (Contributory Negligence) Act 1945, s. 1.

95 See *Varney (Scotland) Ltd v Lanark Town Council*, 1974 SC 245, p.260.

96 Building Societies Act 1986, s. 89(1)(h).

97 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, accepted as a ground of review in Scots law.

98 Bankruptcy (Scotland) Act 2016, s. 113(2).

99 *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd*, 2001 SC 653; and see *Courtney's Executors v Campbell* [2016] CSOH 136, paras. 52-53.

restitution¹⁰⁰ and recompense¹⁰¹ have each been described as equitable remedies, as have rescission¹⁰² and retention.¹⁰³

Sometimes the supposedly equitable nature of a remedy depends on the context in which it is used: reduction, for example, appears to have been regarded as “equitable” in nature when used as a mode of review, but perhaps not, or not to the same extent, when used as a rescissory action.¹⁰⁴ It has nevertheless been described as an “equitable remedy” in recent case law.¹⁰⁵

Interdict has been subject to varying views on the extent to which it is an equitable remedy. It has been described as “well known” that interdict is an “equitable remedy”,¹⁰⁶ and that:

It is essential to keep in view the very peculiar nature of a process of interdict, which differs materially from every other civil suit... An interdict is thus of the nature of an extraordinary remedy, not to be given except for urgent reasons, and even then not as a matter of right, but only in the exercise of a sound judicial discretion.¹⁰⁷

However, a more restrained view has also been taken of the equitable nature of interdict:

Discretion does not normally come into the question when the Court comes to adjudicate as to the final rights of the parties upon an ascertained state of facts. Apart from some understandable exceptions... the general rule is that when operations have been found to be illegal by a final judgment of the Court, the petitioner has a definite right to interdict, unaffected by questions such as balance of convenience or loss...¹⁰⁸

Perhaps lying between these two positions is the following view:

100 *McGraddie v McGraddie* [2012] CSIH 23, para. 55.

101 *Varney (Scotland) Ltd v Lanark Town Council*, 1974 SC 245; *McGraddie v McGraddie* [2012] CSIH 23, para. 55; and see *Courtney's Executors v Campbell* [2016] CSOH 136.

102 *AW Gamage Ltd v Charlesworth's Trustee*, 1910 SC 257.

103 *Stobbs & Sons v Hislop*, 1948 SC 216, p.223; *McNeill v Aberdeen City Council (No 2)* [2013] CSIH 102, para. 30; *Laws of Scotland: Stair Memorial Encyclopaedia* (Remedies Reissue), para. 96. See also *Inveresk plc v Tullis Russell Papermakers Limited* [2010] UKSC 19 at paras. 81-84, per Lord Rodger of Earlsferry.

104 *Spence v Davie*, 1993 SLT 217; *Stair Memorial Encyclopaedia* (Remedies Reissue), para. 25. See also, however, the *ibid.*, para. 62.

105 *Cooney v Dumfries and Galloway Council* (unreported, 29th March 2011) at para. 4, per Lord Prosser (cited in *Watt v Lothian Health Board* [2015] CSOH 117 at para. 33); *McLeod v Prestige Credit Ltd* [2016] CSOH 69 at para. 17, per Lord Tyre.

106 *Murdoch v Murdoch*, 1973 SLT (Notes) 13 at 13, per Lord President Emslie.

107 *School Board of the Parish of Kelso v Hunter* (1874) 2 R 228 at 231-232, per Lord Deas.

108 *Ferguson v Tennant*, 1978 SC (HL) 19 at 47, per Lord Justice-Clerk Wheatley.

It is true... that interdict is an equitable remedy but the court's discretion to refuse interdict on that score is strictly limited...¹⁰⁹

Equitable discretion has also been cited with reference to specific implement, where it was said that the court:

possesses an overall equitable jurisdiction which enables it in certain circumstances to refuse to grant the remedy (although normally available) in exceptional circumstances, where there exist compelling reasons rendering it inconvenient or unjust to do so.¹¹⁰

This has also been judicially established,¹¹¹ and though specific implement has perhaps not ordinarily been considered a discretionary remedy, it has been said that, in certain contractual and perhaps other situations (which would usually involve issues of right transacted by summons procedure), the court retains discretion to withhold the remedy in exceptional circumstances such as impossibility or impracticability.¹¹²

Though this already accounts for a number of common law remedies, exceptionally, it has even been stated that the court has an underlying discretion to withhold a remedy even where it is strictly due as a matter of legal right:

It appears to me that a superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights. There are, so far as I know, only three decided cases, in which the Court of Session, there being no facts sufficient to raise a plea in bar of the action, have nevertheless denied to the pursuer the remedy to which, in strict law, he was entitled. These authorities seem to establish, if that were necessary, the proposition that the Court has the power of

109 *Webster v Lord Advocate*, 1985 SC 173 at 180, per Lord Stott, citing Hector Burn-Murdoch, *Interdict in the Law of Scotland* (William Hodge, Edinburgh and Glasgow, 1933), pp.102-103. The view expressed in the *Stair Memorial Encyclopaedia* is that “[w]hile interdict has been described as an equitable remedy, this does not mean that it is not, at the stage of final judgment, granted as of right” – *Stair Memorial Encyclopaedia* (Remedies Reissue), para. 17.

110 *Ibid.*, para. 9.

111 *Beardmore & Co v Barry*, 1928 SC 101.

112 *Paterson, Petitioner (No 2)*, 2002 SC 160 at para. 56, per Lord Carloway. See also *Stair Memorial Encyclopaedia* (Remedies Reissue), para. 9.

declining, upon equitable grounds, to enforce an admittedly legal right; but they also shew that the power has been very rarely exercised.¹¹³

This, even if it accounts only for exceptional circumstances, puts significant strain on the idea of “legal rights”, as a right is presumably inviolable and something which is indeed enforced or vindicated as a matter of strict legal entitlement. However, a number of the common law remedies are not universally for the enforcement of “legal rights”, and the suggestion is that the court retains an underlying discretion to withhold remedies (including those due in enforcement or vindication of legal rights) as a matter of equitable jurisdiction. This introduces a somewhat restrictive interpretation of the idea of a “right to a remedy” or the “enforcement or vindication of legal rights”, and it suggests that the remedies cannot be categorically forced into the classification “equitable” or “non-equitable”.

Nevertheless, the classification of remedies as “equitable” or otherwise is relevant for the perceived competency of remedies which can be sought in a given case. This is seen, for example, in *Varney (Scotland) Ltd v Lanark Town Council*. Lord Justice-Clerk Wheatley stated that:

Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can be had only when no other legal remedy is or has been available. If a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense.¹¹⁴

Similarly, Lord Kissen stated that “in principle, [he] cannot see how an equitable remedy can be invoked when another remedy given by statute or, indeed, by common law was available and was not used”.¹¹⁵ Lord Fraser added that in the same case “the common law did afford relief, but the pursuers did not avail themselves of it, and in the circumstances of this case that is, in my opinion, enough to prevent their relying on the equitable remedy”.¹¹⁶

Furthermore, if equitable discretion features (according to the various instances of case law and the broader literature) in relation to so many common law remedies, obtainable by way of petition or

113 *Grahame v Magistrates of Kirkcaldy* (1882) 9 R (HL) 91 at 91-92, per Lord Watson. See also Thomson, *The Nobile Officium*, pp.170-171.

114 *Varney (Scotland) Ltd v Lanark Town Council*, 1974 SC 245 at 252-253, per Lord Justice-Clerk Wheatley.

115 *Ibid.* at 257, per Lord Kissen.

116 *Ibid.* at 260, per Lord Fraser.

summons, uncertainty is raised on what it means for the petition to be said to involve the discretionary exercise of statutory or common law powers as distinct from the application of rules of law – and the converse for the summons.

Another casting of this distinction is that whereas the summons is used for the enforcement or vindication of legal rights, the petition is used to seek a remedy to which the petitioner has no legal right. It is for this reason that it has generally been thought incompetent to seek declarator by way of petition, for declarator implies (or even requires) the existence of some legal right in order to be granted. An action of declarator has been said to be:

one by which a right which has been questioned, or a fact or facts on which such right depends are declared... Unless, however, there is an actual or threatened violation of a right, the Court will not pronounce judgment on declaratory conclusions... Even where there is a right, the Court will not declare it if it is not disputed... But where a right future and even contingent is disputed, and there is a proper contradictor, a declarator will be sustained... [I]t may now almost be said that any question of law which a suitor has an interest to obtain an answer to, and as to which he can get a proper contradictor, may be made the subject of a declarator.¹¹⁷

The case of *Renyana-Stahl Anstalt v MacGregor* has been cited as authority for this proposition,¹¹⁸ however there are two important qualifications to be made in relation to this case. First, the court's reasoning turns primarily upon a construction of Rule of Court 73.2 (and the Rules of Court are always subject to change¹¹⁹).¹²⁰ Second, whilst the court's discussion spills out into a more general consideration of the distinction between the petition and the summons,¹²¹ the case proceeds on a reading of Rule 73.2 which is open to challenge. The court (correctly) reasons on the basis that Rule 73.2(1) provides that an application for rectification “shall” be made by petition. However, it then goes on to reason that, despite noting that Rule 73.2(2) “permits” such applications to be brought by way of summons or counterclaim in certain circumstances, the procedural avenues specified in Rule 73.2(2) “should” be used in those circumstances.¹²² In fact, Rule 73.2(2) specifies that the application “may” (not “must” or “shall”) be brought by way of summons or counterclaim

117 *Æ.J.G. Mackay, Manual of Practice in the Court of Session* (W. Green, Edinburgh, 1893), pp.374-375.

118 Howie and Heaney, *Petitions in the Outer House*, para. 5.

119 As the court acknowledged in relation to suspension of diligence, which formerly required a separate application by petition, but can now be sought by conclusion for suspension in a summons of reduction (per r. 53.1) – *Renyana-Stahl Anstalt v MacGregor*, 2001 SLT 1247, para. 52.

120 *Ibid.*, para. 51.

121 *Ibid.*, para. 52.

122 *Ibid.*, 2001 SLT 1247, para. 51.

in those circumstances. This stands in contrast with Rule 73.2(1) which specifies that (subject to Rule 73.2(2)) the application “shall” be made by petition. The provision in Rule 73.2(1) is therefore mandatory, whilst that in Rule 73.2(2) is permissive. The court in *Renyana-Stahl* has, however, interpreted Rule 73.2(2) to be mandatory rather than permissive. That interpretation is open to challenge,¹²³ though it is possible that “may” in Rule 73.2(2) refers to the “choice” between Rules 73.2(2)(a) and (b), rather than being permissive (as opposed to mandatory).¹²⁴

Nevertheless, Lord Tyre held in two more recent cases that it was incompetent to seek the remedy of declarator by way of petition.¹²⁵ This was grounded in the fact that whereas petition procedure was not about the enforcement of rights as such, declarator was precisely an endeavour to have an existing right declared or enforced.¹²⁶ Lord Tyre stated that the appropriate mechanism for changing such a long-established practice as that reflected in the petition/summons distinction would be the work of the Committee “rather than judicial innovation”.¹²⁷

It is the case, however, that declarator can be competently sought in certain classes of petition. The Rules of Court specifically provide for the court's power to award declarator in a petition for judicial review.¹²⁸ Declarator can be used in this context for a number of purposes, such as declarator that a decision-maker has acted *ultra vires* of its statutory powers, declarator that a purported act or decision has no legal effect, or declarator on the status of a person, object or instrument in clarification of the applicability or non-applicability of statutory provisions.

It is, on this note, questionable whether a major class of petition – those to the supervisory jurisdiction for judicial review – should properly be considered “equitable” in nature. Whilst it is true that remedies can be withheld even if other relevant legal tests for awarding them have been satisfied – and that the remedies are in that sense awarded equitably¹²⁹ – many, presumably most, petitions for judicial review are concluded on the application of rules of law, as opposed to the discretionary exercise of statutory or common law powers. Where a body acts in excess of

123 Though it is also the interpretation of the *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 31.

124 This Rule of Court could perhaps be better drafted to remove the ambiguity, such as by substituting “must” for “may” if this is intended to refer to the “choice” between Rules 73.2(2)(a) and (b), and therefore to be mandatory only where either Rules 73.2(2)(a) or (b) apply.

125 *Chaudhry v Advocate General for Scotland* [2013] CSOH 36; *Hooley Ltd v Ganges Jute Pte Ltd* [2016] CSOH 141. Though it is competent to seek declarator in a petition for judicial review – RCS, r. 58.13(3)(b).

126 See *Hooley Ltd v Ganges Jute Pte Ltd* [2016] CSOH 141 at paras. 9-10, per Lord Tyre.

127 *Ibid.* at para. 11, per Lord Tyre.

128 RCS, r. 58.13(3)(b).

129 See Thomson, *The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session*, pp.674-676, and the authorities cited therein at fn. 56-58.

jurisdiction, there must be few cases in which the court would not proceed on the basis that legal rules have been violated or are likely to be violated, and award whatever remedy is needed to cure the unlawful decision, act or omission. In such cases it is questionable whether the court acts on the basis of, or is principally motivated by, considerations of equitable discretion. That is the case even though the supervisory jurisdiction is invoked by petition, against the backdrop of equitable conceptions of judicial review.¹³⁰

All of this serves to question to what extent the distinction between the petition and the summons, as forms of process involving the discretionary exercise of statutory or common law powers versus the application of rules of law, is accurate both as a matter of principle and practice. It may be true in some, perhaps many, cases – again, the exact extent would require empirical research. However, there are questions to be asked, and doubts to be expressed, about some of the fundamental assumptions and forms of analysis used to express these distinctions, and concerns about concepts and descriptors used with insufficient precision or consistency. This creates room for doubts and uncertainty about the alleged gulf of principle between the petition and the summons. It is difficult to pinpoint exactly to what extent each form of process aligns with the respective ideas of jurisdiction being exercised on a discretionary basis, and jurisdiction being exercised in the strict application of legal rules (and whether these are always standalone categories). If, however, this distance of principle is not as great as initially anticipated, the principled justification for dividing the two forms of process is susceptible to erosion. It is important to note that the analysis presented in this section of the paper is not to diminish, nor to argue for the diminishment or collapsing of, principled distinctions between the petition and the summons. Rather, it seeks to serve as a counterweight to the prevailing narrative in the law and literature that the two forms of process are separated by fundamental issues of principle, and to ask questions of the accuracy and universal applicability of that narrative. The conclusion of this section is that questions and doubts may be legitimately expressed, but that it is difficult to assess just to what extent the principled basis of the distinction is eroded.

3. Difficulties caused by the distinction in present practice

One of the general difficulties caused by the distinction in practice is that an applicant can choose a particular form of originating process only to find that it is incompetent. This outcome can be

130 See *ibid.*, pp.674-676.

encountered for a number of reasons, such as the remedy or remedies sought, the contentious or non-contentious nature of the application, inadvertent non-compliance with a Rule of Court, statutory provision or common law rule, or the attempted order of utilising remedies or avenues of redress.

First, some remedies have historically been said to be available under just one of the forms of process. For example, suspension has been thought to be the exclusive preserve of the petition, though it was not completely unheard of for it to have been granted by way of summons.¹³¹ There was once a view that an action for interdict (with no other remedy sought) by summons was incompetent, though Lord Cameron corrected this view on consideration of the authorities and literature to say that, though rare, it was competent.¹³² It has nevertheless been noted that the preferable process for obtaining interdict is by petition due to its “summary nature”.¹³³ It has also been stated that, with the exception of petitions for judicial review and two other exceptions:

the main traditional judicial remedies for the affirmation, protection or enforcement of rights – declarator; reduction; payment; decree *ad factum praestandum* (specific implement); and removing or ejection – can in principle only be competently granted if concluded for in an action commenced by summons.¹³⁴

In addition, the Rules of Court provide that applications for suspension, suspension and interdict, and suspension and liberation “shall be made by petition”.¹³⁵ The view has also been expressed that it is in principle incompetent to seek damages for reparation or breach of contract in a petition, or the enforcement of a contract by specific implement.¹³⁶

Second, the contentious or non-contentious nature of the application can lead to its being held competent or incompetent. As noted above,¹³⁷ there have been cases in which a petition has been refused as incompetent on the basis that it involved a question of disputed right.¹³⁸ There have also

131 See *Gilmont Transport Services Ltd v Renfrew District Council*, 1982 SLT 290.

132 *Exchange Telegraph Co Ltd v White*, 1961 SLT 104. A conclusion for interdict may be included in a summons where real or personal diligence is sought – RCS, r. 53.1.

133 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 237.

134 *Ibid.*, para. 31.

135 RCS, r. 60.2(1). An exception is where a pursuer may include a conclusion for suspension in a summons where it is sought to suspend diligence – *ibid.*, r. 53.1.

136 Howie and Heaney, *Petitions in the Outer House*, para. 5.

137 See p. 15 above.

138 *Mackenzie v Macfarlane*, 1934 SN 16; *Simeone, Petitioners*, 1950 SLT 399; *Heggie v Davidson*, 1973 SLT (Notes) 47.

been cases in which a petition was sisted to allow disputed matters to be settled by way of an action.¹³⁹ The contested nature of a petition can therefore lead to its being held incompetent.

Third, it was noted earlier that the provisions on the form of originating process to be used are found in a number of different sources. Sometimes provision is made in the Rules of Court, other times in an array of statutory provisions, and sometimes it is unclear which form of process should be used.¹⁴⁰ It can also be seen that there are a number of common law rules on the forms of originating process and the circumstances in which one or the other is appropriate for use. As a result, there is a wide range of sources to be consulted by intending applicants in order to ensure that all statutory and non-statutory rules are complied with.

Finally, there are, as noted, rules on the order in which attempt should be made to utilise remedies or avenues of redress. The putatively greater appeal to the court's discretion under petition procedure could also support the principle that the petition should not be utilised when other statutory rights of appeal or other common law remedies are available and have not been attempted.¹⁴¹ A further difficulty is that it has sometimes appeared necessary on a strict reading of the rules to raise two causes instead of one due to the petition/summons distinction and its attendant rules. This can give rise to expense and duplication, though for those reasons the court has exercised discretion to allow the relevant remedies to be pursued in a single form of process.¹⁴² Though abolition of the distinction between the petition and the summons would address that issue, so might express provision for the court's discretion to permit the remedies to be sought in a single form of process as it thinks fit, or a relaxation of the confinement of particular remedies to one or other form of process.

Though there are rules and principles applicable to the circumstances in which particular remedies or processes should be attempted, the relevant issues of principle and practice are not always clear, nor consistently applied and articulated by the court. In addition, complications are encountered when multiple remedies are sought, such as a combination of “equitable” and non-equitable remedies. The ways in which multiple remedies or avenues of redress combine or do not combine are potentially a source of needless additional work for intending litigants and counsel. There are uncertainties about when the summons should be used to initiate contentious proceedings, or when

139 *Davidson's Trustees v Arnott*, 1951 SC 42; *Church of Scotland Trust v O'Donoghue*, 1951 SC 85.

140 See fn. 48 above.

141 Consider also pp. 24-25 above.

142 *Gilmont Transport Services Ltd v Renfrew District Council*, 1982 SLT 290.

these can be dealt with by way of a petition which is resisted or to which objections are lodged. There is underlying judicial discretion in relation to many of these issues, and whilst the existence of that discretion can act as an important safety valve to ensure the rationality of procedure and the ability to deal with unusual or exceptional circumstances, it gives rise to further uncertainties about the appropriate form of process in a given case and the relevant expectations of the court. Indeed, even where the “wrong” form of process is selected, there may be the opportunity to convert proceedings from one form of process to another,¹⁴³ but this opportunity will not always be available and, to the extent that the court has discretion on whether to permit the form of process to be converted, there arises the concomitant scope for uncertainty. The court also appears to have discretion to allow the “wrong” form of process to be used where no objection has been taken.¹⁴⁴

These issues give rise to significant concerns about whether procedure is sufficiently accessible, navigable and understandable to the extent possible for ordinary litigants, and consequential concerns about access to justice. There can be little justification for any more procedural complexity than is necessary, and in the interests of the accessibility and transparency of judicial procedure, where steps can be taken to simplify and make more accessible – without sacrificing any of the utility, operability or rationality of procedure – they should be taken.

There are two ways in which the problems set out in this section can be approached and considered. One view is that the distinction between the petition and the summons is an additional procedural complexity which must be navigated, and which presents ample opportunity for getting it wrong. Not only can getting it wrong frustrate the achievement of justice, be costly for litigants and needlessly consume court resources, the additional necessary endeavours by intending litigants to avoid getting it wrong potentially increase the time and cost of legal advice and litigation. Abolition of the distinction could therefore potentially simplify this aspect of the court's procedure and improve the prospects of utilising process in a correct and timely manner, furthering the possibility of achieving justice, and saving time and resources for both litigants and the court.

However, there is another view. Even if the issues raised in this section are regarded as problematic, abolition of the distinction between the petition and the summons will not necessarily solve those problems. Difficulties may persist about when one remedy or another is regarded as

143 See, for example, RCS, r. 60.5.

144 See *Paterson, Petitioner (No 2)*, 2002 SC 160, para. 53.

appropriate – for example, whether declarator is an appropriate remedy where the applicant seeks an order to which he has no right; or whether non-equitable or “contentious” remedies or those which presuppose the existence of legal rights can be appropriately used in *ex parte* applications; or whether an “equitable” remedy can be pursued when other statutory or common law remedies have not been utilised or attempted. It may still be necessary to sist non-contentious proceedings to allow disputed matters to be settled. There would likely be, unless broader reforms were enacted, significant remaining complexities about the availability and appropriateness of various remedies or avenues of redress, with provisions continuing to be scattered throughout an array of statutory and non-statutory sources. Even with the abolition of the distinction between the petition and the summons, there might remain differences in the availability of remedies depending on which branch of procedure is accessed by way of the generic writ.¹⁴⁵ The order in which remedies or avenues of redress should be attempted will likely persist as a difficulty to be encountered in relevant cases.

Abolition of the distinction between the petition and the summons could therefore be a partial solution to some of these complexities, but it seems unlikely that, without the enactment of broader reforms, many of these difficulties would disappear or be fully alleviated. The extent of the perceived advantages of abolishing the distinction would have to be determined, and weighed against potential challenges and drawbacks encountered by its abolition.¹⁴⁶ It would also have to be determined whether abolition of the distinction goes far enough to alleviate some of these issues encountered in civil procedure, and if not, whether abolition of the distinction is an appropriate or sufficient response to those issues. For example, there might be alternative options to be explored such as allowing more or all of the common law remedies to be competently sought under either form of originating process, whilst retaining the distinction between the petition and the summons and the procedural differences they putatively embody. There might need to be serious consideration given to what it means to describe some remedies as “equitable”, and others as non-equitable; to consolidate provisions on the availability and applicability of remedies or forms of process in the Rules of Court (rather than requiring intending litigants to trawl through the Rules of Court, statutes and case law just to attempt to ascertain how to competently initiate process). There may well be advantages to be gained from abolishing the distinction between the petition and the summons, but this must be weighed against alternatives and potential costs.

4. Difficulties likely to be presented by the removal of the distinction

145 See pp. 22-27 above.

146 See pp. 32-39 below.

4.1 Risk of replacing one two-tier process with another

The view was expressed by the Gill Report that the essential procedural elements of summons and petition procedure are the same:

there is a writ containing an application to the Court to make an order; the writ must set out the names of other parties who have an interest in the application, the facts on which the application is based and the legal justification for the order desired; the Court gives its authority for the writ to be served on the other parties; the other parties have a specified time in which to respond to the writ; and in the absence of any response it is open to the originating party to ask the Court to make the order requested. This should be the standard initial procedure for all actions.¹⁴⁷

Even if this is true, it should not conceal the fact that the newly introduced writ would be used to access more than one alternative form of procedure. The extent to which there would be procedural uniformity, or consolidation of process, would appear to be limited.

This can be seen in relation to the sheriff court, where ordinary cause actions and summary applications are each commenced by initial writ (though note some special forms of statutory application¹⁴⁸).¹⁴⁹ This was not always the case – in the late 19th century, process could be initiated in the sheriff court by either summons or summary application. In 1876, these forms of process were unified in a single writ called a petition,¹⁵⁰ thereafter replaced by the initial writ.¹⁵¹

There is potentially an argument for proposing that, if these different categories of application can be commenced by a single type of initial writ in the sheriff court, the same can be achieved in the Court of Session. In other words, the petition and the summons can be replaced by a single type of writ which can be used to access different branches of procedure. Furthermore, some have expressed a desire for procedural uniformity between the Court of Session and the sheriff court, and the replacement of the petition/summons distinction in the Court of Session with a single type of

147 *Report of the Scottish Civil Courts Review* (“Gill Report”) (September 2009), Ch. 5, para. 69.

148 See *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 772, fn. 1.

149 Ordinary Cause Rules (Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (Scottish SI 1993/1956) (“OCR”), Sch. 1), r. 3.1; Summary Application Rules (Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999) (Scottish SI 1999/929) (“SAR”), r. 2.4.

150 Sheriff Courts (Scotland) Act 1876, s. 6 (repealed).

151 Sheriff Courts (Scotland) Act 1907, Sch. 1, r. 1 (as originally enacted), and r. 2 (as originally enacted and subsequently amended by the Sheriff Courts (Scotland) Act 1913, Sch. 2).

initial writ could achieve a degree of uniformity between the courts.

However, there are some important qualifications to make on the apparently more unified nature of sheriff court procedure. First, the recently introduced Simple Procedure Rules¹⁵² appear to be initiated by filing a “claim form” rather than an initial writ.¹⁵³ If this interpretation is correct, the initial writ cannot be regarded as the single form of originating process in the sheriff court. It remains to be seen what provision is made in the forthcoming Simple Procedure (Special Claims) Rules.

Second, even the initial writ presents what is potentially a veneer of uniformity, as it is used to access different underlying branches of procedure.¹⁵⁴ It has been said that, though there is a single type of initial writ for ordinary cause actions¹⁵⁵ and summary applications, the “procedures themselves are quite distinct”.¹⁵⁶ This raises the question of why it is important to proceed by way of a single form of originating process when more than one branch of procedure is capable of being accessed. It might legitimately be asked what purpose a unified form of writ serves if it can alternatively access distinct procedures; and separately, whether the challenges which must be faced, and adaptations which must be made, under such a new procedure are justified by the perceived benefits such a change would bring.

The risk in the Court of Session is that the status quo of two main forms of originating process (petition and summons) is replaced by a single form of generic writ which is nevertheless capable of being used to access different avenues of procedure. In particular, the single form of writ may be used to access – whether on the application of a party or on the court's own motion – a full (akin to a solemn) or abbreviated (akin to a summary) process. Whilst there might be good reason for this, it continues a distinction between a more solemn and more summary process. The sheriff court itself retains a distinction between a full (ordinary cause action) and abbreviated (summary application) process. Even with the introduction of a single, generic form of writ in the Court of

152 Act of Sederunt (Simple Procedure) (Scottish SI 2016/200), effective 28th November 2016.

153 Simple Procedure Rules (“SPR”), rr. 3.2 and 3.3.

154 Though, it should be noted that the Gill Report's recommendation was for a “standard *initial* procedure” to be used for all causes – *Gill Report*, Ch. 5, para. 69 (emphasis added).

155 In addition, two forms of procedure exist within the ordinary cause action, namely standard procedure (OCR Ch. 9) and additional procedure (OCR Ch. 10). The sheriff is empowered under OCR r. 9.12(4) to, at the options hearing, and having heard the parties, of his own motion or on the motion of any party, and on being satisfied that the difficulty or complexity of the cause makes it unsuitable for transaction under Chapter 9 procedure, order that the cause proceed under Chapter 10 procedure. This is essentially a matter for the sheriff's discretion – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 426.

156 *Ibid.*, para. 26.

Session, there would seem to be, at a minimum, the replacement of one two-tier process with another. A concern of this nature was expressed elsewhere, where it was said that the:

range of reasons given in the sources for using the flexible procedure of petition or summary application in lieu of the relative rigidity of ordinary action procedure rather suggests that if the distinction did not exist, it would have to be invented.¹⁵⁷

However, the counter-argument can also be presented: if the litigant can access alternative branches of procedure in the sheriff court by way of a single form of initial writ, why should he be required to choose (and correctly choose) one of two forms of originating process in the Court of Session? If it is possible in the sheriff court, why is it not also possible in the Court of Session? In addition, even if a single form of process can be used to access different branches of procedure, is it not nevertheless a simplification of procedure to remove the requirement to choose between different forms of process?

It should be considered whether abolition of the distinction will necessarily result in the replacement of one two-tier process with another, or if this can be avoided. Alternatively, if a new two-tier process is introduced, perhaps along the lines found in the sheriff court,¹⁵⁸ then it will have to be considered how to reduce or minimise the disadvantages of the current process. If the distinction between the petition and the summons is replaced by a single form of writ which can be used to access a more solemn or more summary procedure, and some of the existing difficulties can be removed or alleviated, then it may be a reform worth pursuing.

There are, alternatively or in addition, other potential reforms which could achieve increased uniformity within the Rules of the Court of Session, and between the Court of Session and the sheriff court. For example, an area in which sheriff court procedure is more uniform than Court of Session procedure is in relation to pleas-in-law. In the Court of Session, a summons is required to

¹⁵⁷ *Ibid.* Lord Cullen, in his *Review of the Business of the Outer House of the Court of Session* (“Cullen Report”) (1995), para. 9.9, considered the argument that “petitions as a separate type of proceeding should be abolished and... one document should replace both the summons and the petition”. He rejected this proposal including on the basis that the distinction between the petition and the summons was “sensible and well founded”. Niall Whitty, author of the relevant section of the *Stair Memorial Encyclopaedia*, “support[ed] Lord Cullen’s conclusion unreservedly” – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 26.

¹⁵⁸ Which is technically “multi-tier” as several branches of procedure can be initiated by way of initial writ.

include pleas-in-law.¹⁵⁹ There is no requirement to include pleas-in-law in a petition,¹⁶⁰ though they must be included in a petition for judicial review,¹⁶¹ and in practice are included where it is expected that answers will be lodged by a respondent.¹⁶² Where answers are lodged to a petition, these must (contrary to former practice¹⁶³) include pleas-in-law.¹⁶⁴ By contrast, in the sheriff court, initial writs in both ordinary cause actions and summary applications are required to contain pleas-in-law¹⁶⁵ – though there is an exception to this in relation to personal injury actions.¹⁶⁶ A possible reform could be to require pleas-in-law to be included in all (or no) forms of originating process initiated in the Court of Session, to introduce uniformity.

Finally, it should be remembered that abolition of the distinction between the petition and the summons would not eradicate the divide between forms of originating process in the Court of Session, for there is also the special case, which is neither a petition nor a summons.¹⁶⁷ This could either remain as an alternative form of process, or itself be abolished. If retained, the special case procedure could potentially also be initiated by way of the newly introduced generic writ.

4.2 Ensuring the continued possibility of *ex parte* applications

It must be ensured that applications can still be made *ex parte* under the new unified form of process, for example in applications to the *nobile officium*, by trustees for directions,¹⁶⁸ for the inspection, photographing, preservation, custody and detention of documents and property (on an *ex parte* basis),¹⁶⁹ for the disclosure of information as to the identity of persons (on an *ex parte* basis),¹⁷⁰ and other proceedings in which an *ex parte* application is appropriate.

4.3 Retaining flexibility/brevity in appropriate cases

159 RCS, r. 13.2(3)(b) and Form 13.2A.

160 See *ibid.*, rr. 14.4(1) and (2).

161 *Ibid.*, r. 58.3(3) and Form 58.3.

162 *Green's Annotated Rules of the Court of Session*, note 14.4.7.

163 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 227.

164 RCS, r. 18.3(2)(b).

165 OCR, r. 3.1 and Forms G1 and G1A.

166 OCR, r. 3.1(1)(c) (inserted by Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009/285 (Scottish SI), r. 2(2)); and Form P11, which contains a statement of claim rather than pleas-in-law.

167 Court of Session Act 1988, s. 27; and see RCS, Ch. 78. This is different from the summary trial, which is initiated by petition – Court of Session Act 1988, s. 26(1); RCS, Ch. 77.

168 On the applicability and application of the *nobile officium* in relation to trusts, see Thomson, *The Nobile Officium*, pp.31-67.

169 Administration of Justice (Scotland) Act 1972, s. 1(1); RCS, Ch. 64.

170 Administration of Justice (Scotland) Act 1972, s. 1(1A); RCS, Ch. 64.

One of the issues likely to be presented by the abolition of the distinction is how to effect and craft in the Rules of Court (or, where appropriate, statute) the retainment of putatively greater levels of discretion by the court in cases which would currently be transacted by way of petition. For example, in petitions to the *nobile officium* there seems to be an inherent need for maximum procedural flexibility. It must be considered how this is to be retained – whether in the Rules of Court or otherwise – when the distinction is abolished. Possibilities include enacting a Rule of Court which states that an application to the *nobile officium* permits the court to, for example, “dispense with such procedural requirements [in the Rules of Court] as it thinks fit”, or empowering the court to “do all things which the Court could have done by exercise of the *nobile officium* prior to the enactment of [the new Rules of Court]”.¹⁷¹

However, it may not be difficult to retain flexibility and/or brevity in relation to particular categories of application under the new procedure. For example, there might continue to be provision for the specific procedure relating to mutual recognition of protection measures in civil matters, which are at present made by petition.¹⁷² Indeed, the relative flexibility pertaining to petition procedure does not necessarily require that there must be a distinction between petition and summons procedure. Nor, using the previous example, does an application to the *nobile officium* necessarily require as a matter of principle to be made by petition for the jurisdiction to be capable of being used in its current form. Whilst it may be true that there is doctrinal and symbolic significance in the fact that the *nobile officium* is accessed by way of petition,¹⁷³ it is not the petition – which is merely a form of originating process – which confers the jurisdiction and powers of the *nobile officium* upon the court.¹⁷⁴ Moreover, it has already been demonstrated that a number of petitions do not initiate *ex parte*, non-contentious or non-adversarial process, nor do they always

171 The intending litigant would likely still have to consult the case law, however, for guidance on the scope, extent and applicability of the various branches of procedure accessed by a generic form of writ.

172 RCS, r. 106.9(1). The application may be made by note where a process exists in relation to an incoming protection measure – *ibid.*, r. 106.9(2).

173 The author of this paper wrote elsewhere that “[i]t is doctrinally significant that the *nobile officium* is accessed by way of petition... The heightened equitable nature of the *nobile officium* is... captured in its invocation by petition rather than by way of summons. Although the *nobile officium* is not the only object at which a petition may be presented, it clearly involves addressing the court for assistance rather than initiating an action against a contradictor, with the court adjudicating over an adversarial dispute of right” – Thomson, *The Nobile Officium*, pp.24-25.

174 It can also be considered what role the Rules of Court play in distributing *nobile officium* business between the Inner and Outer Houses. It is arguable that in this regard the Rules of Court merely distribute that business between the Inner and Outer Houses, and reflect a statutory restriction on the competency of raising this particular form of proceeding in the wrong forum. This does not mean that the Rules of Court are the source of the *nobile officium* and the powers that the court thereby enjoys – if statute provides a legal basis for the exercise of the *nobile officium*, it perhaps does so only indirectly.

involve the discretionary exercise of statutory or common law powers as distinct from the application of rules of law.

As has been pointed out, sheriff court procedure retains the option of raising an ordinary cause action or a summary application, even though each is commenced by initial writ. In addition, a claim form is used to commence an application under simple procedure. Not only are these procedures governed by their own banks of rules,¹⁷⁵ there can also be more than one form of procedure within a single category of process. This applies to the distinction between standard procedure¹⁷⁶ and additional procedure¹⁷⁷ in the Ordinary Cause Rules, with the sheriff having discretion to order that the cause proceed under additional instead of standard procedure.¹⁷⁸ There are clearly options available in terms of reforming the Rules of the Court of Session to build sufficient capacity for flexibility and brevity in appropriate cases into the rules. This could be achieved by replacing the petition and the summons with a single form of generic writ, though another possibility is investing the court with greater capacity to ensure flexibility and brevity, where appropriate, under summons procedure.

4.4. Retaining the relative speed and cheapness of abbreviated/expedited process

The speed and cheapness of petition procedure, relative to summons procedure, has been cited as a policy reason justifying the existence of the petition.¹⁷⁹ However, some urgent applications may¹⁸⁰ or must¹⁸¹ be initiated by summons, meaning that relative speed, cheapness or urgency cannot be the sole criterion on which, as a matter of principle, petitions and summonses are cleaved. Moreover, whilst the *Stair Memorial Encyclopaedia* cites relative speed and cheapness as a policy

175 OCR, SAR and SPR, respectively.

176 OCR, Ch. 9.

177 *Ibid.*, Ch. 10. This is “more flexible” than Chapter 9 procedure – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 423; see also paras. 426-429.

178 See [fn. X] above.

179 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30. See also, for example, *Peel's Trustees v Drummond*, 1936 SC 786; and *Gordon's Trustees, Petitioners*, 1990 SC 194.

180 See the Court of Session Act 1988, s. 47.

181 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30; James J. Darling, *The Practice of the Court of Session* (Vol. 2) (William Wait, Edinburgh, 1833), p.596.

justification for the introduction in 1985, on the recommendation of the Dunpark Working Party report, of the rule that applications for judicial review should be made by petition,¹⁸² the use of petition to access the supervisory jurisdiction of the court is also at least partly explained by a longstanding and lingering association between judicial review and broader notions of equitable jurisdiction.¹⁸³

Nevertheless, the flexibility afforded by the Rules of Court to petition procedure facilitates its being a potentially speedier and cheaper procedure than that pursued by way of summons. It is provided that, where answers are lodged to a petition, the petitioner shall “apply by motion for such further procedure as he seeks, and the court shall make such order for further procedure as it thinks fit”.¹⁸⁴ Where the petition is unopposed, “the court shall, on the motion of the petitioner, after such further procedure and inquiry into the grounds of the petition, if any, as it thinks fit, dispose of the petition”.¹⁸⁵ In that regard, the court “may make such order to dispose of a petition as it thinks fit, whether or not such order was sought in the petition”.¹⁸⁶ The flexibility of this procedure allows the court to dispense with procedural formalities,¹⁸⁷ and the position is encapsulated in Lord Keith's statement that the judges are “entirely masters of the procedure in a petition, subject to any regulations thereanent made by Act of Sederunt”.¹⁸⁸ There are also other examples of relative speed and cheapness being made possible by virtue of flexibility of procedure, such as when proceedings are to an extent “administrative”, the court is “not bound to adhere to strict rules of evidence”.¹⁸⁹

It would be desirable to retain, under the new procedure, the possibility of relative speed and cheapness in applications where appropriate.¹⁹⁰ These might include, for example, applications for judicial review, trustees' applications for directions, or applications to the *nobile officium*. It has elsewhere been stated that judicial remit is more commonly used in petition procedure, and is intended to save time and expense compared with a contested proof on the factual issue.¹⁹¹ Sufficient provision may therefore be made under the new procedure to ensure that time and

182 See *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30.

183 See Thomson, *The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session*, pp.674-676.

184 RCS, r. 14.8.

185 *Ibid.*, r. 14.9(1).

186 *Ibid.*, r. 14.10(1).

187 As, for example, in *Low, Petitioner*, 1920 SC 351; and *Watson, Petitioners*, 1920 1 SLT 243.

188 *Tomkins v Cohen*, 1951 SC 22 at 23, per Lord Keith.

189 *Colville, Petitioner*, 1962 SC 185 at 192. See also *Gordon's Trustees, Petitioners*, 1990 SC 194.

190 It is worth noting the current provision that the court has the power to sanction relief from compliance with the Rules of Court in individual cases (RCS, r. 2.1), and that the Lord President has flexibility over the applicability of procedure (RCS, r. 2.2). However, these are probably not envisaged as being used with frequency.

191 Lord Macfadyen and Smith, *'Procedure in an Ordinary Action'*, para. 10.

expense can continue to be saved in appropriate situations, such as by judicial remit. The opportunity to make balanced time and cost savings can greatly enhance the accessibility of judicial procedure, and access to justice more broadly. This manifests both in time and cost savings for intending litigants, but also in a potential reduction in the consumption of court resources. It is worth adding that, if the possibility exists for urgent applications to be made by summons in limited circumstances, it might be asked why that cannot be achieved by way of summons or any other form of writ where speed and/or cheapness is desirable, including the newly introduced form of generic writ. This could potentially be achieved by allowing the generic writ to be capable of accessing a more summary procedure in appropriate cases.

5. Other jurisdictions

A brief overview will be given of comparative forms of originating process in other Common law jurisdictions, namely England and Wales; the Australian states of New South Wales and Victoria; New Zealand; and the Canadian provinces of Ontario, British Columbia and Alberta.

5.1 England and Wales

Civil procedure in England and Wales is primarily regulated by the Civil Procedure Rules 1998.¹⁹² There are two principal methods of commencing proceedings under the CPR: (i) by issuing a claim form under Part 7 of the CPR, or (ii) by issuing a claim form under the alternative procedure provided for in Part 8 of the CPR.

Part 7 is the standard method for commencing proceedings.¹⁹³ Part 8 is used where a claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact,¹⁹⁴ such as trustees seeking directions on the management of trust property, or where a declaration is sought on the interpretation of a trust deed. Part 8 is also used where a CPR rule or Practice Direction permits or requires the use of that procedure in specified proceedings.¹⁹⁵

192 SI 1998/3132 (as amended) (“CPR”). These were made following an inquiry led by Lord Woolf – see *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) – and the enactment of the Civil Procedure Act 1997. The CPR ultimately replaced the Rules of the Supreme Court 1965 (SI 1965/1776) and the County Court Rules 1981 (SI 1981/1687).

193 *Halsbury's Laws of England* (Civil Procedure, Vol. 11, 2015), para. 138.

194 CPR, r. 8.1(2)(a).

195 *Ibid.*, rr. 8.1(2)(b) and 8.6.

For example, Part 8 procedure may be used in a claim by or against a child or protected party as defined in Rule 21.1(2) which has been settled before the commencement of proceedings and the sole purpose of the claim is to obtain the approval of the court to the settlement, or a claim for provisional damages which has been settled before the commencement of proceedings and the sole purpose of the claim is to obtain a consent judgment.¹⁹⁶ Part 8 procedure *must* be used in, for example, a claim under section 1 of the Inheritance (Provision for Family and Dependents) Act 1975,¹⁹⁷ certain claims against a solicitor (unless made in existing proceedings¹⁹⁸),¹⁹⁹ or an application for a writ of habeas corpus.²⁰⁰

There are various procedural differences for proceedings commenced under Part 8. Provision is made in Part 8 for the matters which must be stated in the claim form. The defendant is not required to file a defence, and therefore Part 16 on statements of case, Part 15 on defence and reply, any time limit in the CPR which prevents the parties from taking a step before a defence is filed, and the requirement under Rule 7.8 to serve on the defendant a form for defending the claim, do not apply.²⁰¹ In addition, the claimant may not obtain judgment by request on an admission and therefore Rules 14.4-14.7 on admissions, and the requirement under Rule 7.8 to serve on the defendant a form for admitting the claim, do not apply.²⁰² A claim under Part 8 is also treated as allocated to the multi-track and therefore Part 26 on case management (preliminary stage) does not apply.²⁰³ Where the claimant uses Part 8 procedure he may not obtain default judgment under Part 12,²⁰⁴ and the court's permission is required for a party to make a Part 20 claim (counterclaims and certain additional claims).²⁰⁵ A modified procedure applies to appeals from Part 8 procedure.²⁰⁶

Some of the procedural rules under Part 7 also apply to proceedings commenced under Part 8.²⁰⁷ The court may at any stage order the claim to continue as if the claimant had not used Part 8 procedure and, if it does so, the court may give any directions it considers appropriate.²⁰⁸

196 Practice Direction 8A (Alternative Procedure for Claims), para. 3.1.

197 CPR, r. 57.16(1).

198 *Ibid.*, r. 67.2(2)(b). In which case an application notice is made in accordance with CPR Part 23.

199 CPR, r. 67.2(2)(a).

200 *Ibid.*, r. 87.2(1)(a).

201 *Ibid.*, r. 8.9(a).

202 *Ibid.*, r. 8.9(b).

203 *Ibid.*, r. 8.9(c).

204 *Ibid.*, r. 8.1(5).

205 *Ibid.*, r. 8.7.

206 *Halsbury's Laws of England* (Civil Procedure, Vol. 11, 2015), para. 151.

207 Practice Direction 8A (Alternative Procedure for Claims), para. 4.1(1).

208 CPR, r. 8.1(3).

The same form of originating process – the claim form – is used to commence proceedings under each of Parts 7 and 8. However, the CPR generally do not apply to specific categories of proceedings where particular statutory forms of application are provided. These include insolvency proceedings, non-contentious or common form probate proceedings, proceedings in the High Court when acting as a Prize Court, proceedings before the Court of Protection, family proceedings, adoption proceedings and election petitions in the High Court.²⁰⁹ Particular statutory forms of application, or separate provision for application, are specified for these types of proceeding.²¹⁰ Whilst it is therefore the case that there is a single form of originating process under the CPR (the claim form), this does not account for other forms in proceedings initiated under provisions other than the CPR.

5.2 Australia

a. New South Wales

In New South Wales, there are two main forms of originating process, namely the statement of claim and the summons.²¹¹ The statement of claim must be used in proceedings, *inter alia*, for relief in relation to a debt, tort or trust, or for damages for breach of duty including for the death of any person, personal injury to any person, and damage to property.²¹² The summons must be used in certain specified proceedings, including where there is no defendant, on an appeal or application for leave to appeal (other than proceedings assigned to the Court of Appeal), on a stated case, and on any application (other than one for damages) made under any Act (other than the Civil Procedure Act 2005).²¹³ The summons *may* be used (except where the application is made in proceedings that have been commenced in the court²¹⁴) to initiate the following kinds of proceeding:

- (a) proceedings on an application for a writ of habeas corpus ad subjiciendum,
- (b) proceedings on an application for an order for the custody of a minor,

209 *Ibid.*, 2.1(2).

210 See, for example, the Insolvency Rules 1986 (SI 1986/1925); Non-Contentious Probate Rules 1987 (SI 1987/2024); Prize Court Rules 1939 (SR & O 1939/1466); Court of Protection Rules (SI 2007/1744); Family Procedure Rules 2010 (SI 2010/2955); and Election Petition Rules 1960 (SI 1960/543). See also *Halsbury's Laws of England* (Civil Procedure, Vol. 11, 2015), para. 160.

211 Uniform Civil Procedure Rules 2005 (New South Wales) (“UCPR”), r. 6.2.

212 *Ibid.*, r. 6.3.

213 *Ibid.*, rr. 6.4(1) and 6.4(3).

214 In which case the application should be made by motion – *ibid.*, r. 18.1.

- (c) proceedings on an application for an order for the appointment of a tutor of a person under legal incapacity,
- (d) proceedings on an application for a declaration of right,
- (e) proceedings in an application for an injunction,
- (f) proceedings on an application for the appointment of a receiver,
- (g) proceedings on an application for an order for the detention, custody or preservation of property,
- (h) proceedings on a claim for relief for trespass to land.²¹⁵

In addition, it is provided that:

Proceedings:

- (a) in which the sole or principal question at issue is, or is likely to be, one of:
 - (i) the construction of an Act or a Commonwealth Act, or
 - (ii) the construction of an instrument made under an Act or a Commonwealth Act, or
 - (iii) the construction of a deed, will, contract or other document, or
 - (iv) some other question of law, or
- (b) in which there is unlikely to be a substantial dispute of fact,

are amongst those which are appropriate to be commenced by summons unless the plaintiff considers the proceedings more appropriate to be commenced by statement of claim.²¹⁶

Whereas the statement of claim is mostly used in proceedings involving a dispute of fact, the

215 *Ibid.*, r. 6.4(2).

216 *Ibid.*, r. 6.4(4).

summons is mostly used where a question of law is at issue. As the summons is not designed to transact proceedings involving a dispute of fact, it takes a more summary form. It has been said that proceedings commenced by summons usually proceed on affidavit evidence, but that the evidentiary rules are the same whether one proceeds by summons (using affidavits) or statement of claim (using oral evidence).²¹⁷ There does, however, seem to be changing practice with regard to proceedings initiated by summons. Previously, for example, specific performance was not generally awarded other than under a statement of claim, but it is now commonly sought in summonses.²¹⁸

There is some flexibility if the wrong form of process is used.²¹⁹ The UCPR also provide for the court to make summary judgment,²²⁰ and though this is potentially available under either form of originating process, in practice it is limited to process initiated by statement of claim.²²¹

b. Victoria

In Victoria, proceedings are mainly commenced by writ or originating motion.²²² There is a general requirement to initiate proceedings by writ,²²³ but originating motion must be used where there is no defendant in the proceedings, where by or under any Act an application is authorised to be made to the court, or where required by the Supreme Court (General Civil Procedure) Rules.²²⁴ For example, originating motion shall be used to commence proceedings for judicial review,²²⁵ and applications under the Evidence (Miscellaneous Provisions) Act 1958 for the examination of a witness in Victoria in relation to a matter pending before a court or tribunal in a place out of Victoria shall be made by originating motion not joining any person as a defendant.²²⁶ Applications

217 The Hon. Mr Justice P.W. Young, *'Equity'* (2007) (Bar Practice Course materials, The New South Wales Bar Association, accessed on 10th December 2016 at http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Young%20J.pdf), pp.13-14.

218 *Ibid.*, p.31.

219 Uniform Civil Procedure Rules 2005 (New South Wales), rr. 6.5 and 6.6.

220 *Ibid.*, r. 13.1.

221 The Hon. Mr Justice P.W. Young, *'Equity'* (2007) (Bar Practice Course materials, The New South Wales Bar Association, Accessed on 10th December 2016 at http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Young%20J.pdf), p.23.

222 Supreme Court (General Civil Procedure) Rules 2015 (SR No 103/2015) (Victoria), r. 4.01. Interlocutory applications are made by summons – *ibid.*, r. 4.02.

223 *Ibid.*, r. 4.04(1).

224 *Ibid.*, r. 4.05(1).

225 *Ibid.*, r. 56.01(2).

226 *Ibid.*, r. 81.01(2)(a).

for punishment for contempt of court shall be made by summons or originating motion.²²⁷

In addition, proceedings *may* be initiated by originating motion where it is unlikely that there will be any substantial dispute of fact and, for that reason, it is appropriate that there be no pleadings or discovery.²²⁸ There is also provision for a special procedure to apply in proceedings initiated by originating motion, including for an order to be made in an urgent case, to save time and expense for the parties, or where the defendant consents.²²⁹ Generally, whereas evidence is to be given orally in proceedings commenced by writ, in proceedings initiated by originating motion, evidence is to be given by affidavit, though it can be given orally by agreement of the parties and unless the court otherwise orders.²³⁰ There is some flexibility offered where the wrong form of process is used.²³¹

5.3 New Zealand

The principal form of originating process in the High Court of New Zealand is the statement of claim,²³² but this does not apply in relation to a number of specified proceedings.²³³ These are:

- An unopposed application relating to estate administration (including probate),²³⁴ in which case other forms of application are specified;²³⁵
- Certain statutory appeals,²³⁶ in which case a notice of appeal is filed;²³⁷
- Certain proceedings commenced by originating application;²³⁸
- An application to the High Court to put a company into liquidation,²³⁹ where separate

227 *Ibid.*, r. 75.06(1).

228 *Ibid.*, r. 4.06.

229 *Ibid.*, r. 45.05(3).

230 *Ibid.*, rr. 40.02 and 45.02. Evidence is generally to be given by affidavit in any interlocutory or other application in any proceeding – *ibid.*, r. 40.02(a). Provision is nevertheless made for the court to order that evidence be given orally on the hearing of an interlocutory or other application in any proceeding or at the trial of a proceeding commenced by originating motion, or by affidavit at the trial of a proceeding commenced by writ – *ibid.*, r. 40.03.

231 *Ibid.*, rr. 2.02 and 4.07.

232 High Court Rules 2016 (LI 2016/225) (New Zealand) (“HCR”), r. 5.25(1).

233 *Ibid.*, r. 5.25(2).

234 *Ibid.*, r. 5.25(2)(a).

235 *Ibid.*, Part 27.

236 *Ibid.*, r. 5.25(2)(b).

237 *Ibid.*, Part 20.

238 *Ibid.*, r. 5.25(2)(c); and Parts 18, 19 and 26.

239 *Ibid.*, r. 5.25(2)(d).

- provision is made for filing a statement of claim;²⁴⁰ or
- A proceeding, commenced in accordance with the Trans-Tasman Proceedings Regulations and Rules 2013, to register under subpart 5 of Part 2 of the Trans-Tasman Proceedings Act 2010 a registrable Australian judgment,²⁴¹ where certain forms and provisions on interlocutory applications are provided.²⁴²

Of most relevance to this paper is the third itemised point, where proceedings are commenced by originating application. Certain statutory applications “must” be made by originating application.²⁴³ In addition, liquidators, receivers and certain types of judicial manager and statutory manager “may” seek the directions of the court by originating application.²⁴⁴ Further, the court “may, in the interests of justice, permit any proceeding not mentioned in rules 19.2 to 19.4 to be commenced by originating application”,²⁴⁵ and that permission may be sought without notice.²⁴⁶ This includes the possibility of applying for permission to raise certain applications that are otherwise to be commenced by statement of claim, to instead be commenced by originating application.²⁴⁷ Notable in this category of applications are “proceedings in which the relief claimed is wholly within the equitable jurisdiction of the court”, such as:

- (i) the determination of a claim of an entitlement as beneficiary under a will or trust or on the intestacy of a deceased person, or as a creditor of a deceased person, whether the claim is made by the person claiming to be entitled or by that person's assignee or successor:
- (ii) the ascertainment of a class of creditors, beneficiaries under a will, or persons entitled on the intestacy of a deceased person, or of beneficiaries under a trust:
- (iii) the giving of particular accounts by executors, administrators, or trustees:
- (iv) the payment into court of money held by executors, administrators, or trustees:
- (v) the giving of directions to persons in their capacity as executors, administrators, trustees, or

240 *Ibid.*, Part 31.

241 *Ibid.*, r. 5.25(2)(e).

242 Trans-Tasman Proceedings Regulations and Rules 2013.

243 HCR, r. 19.2.

244 *Ibid.*, r. 19.4.

245 *Ibid.*, r. 19.5(1).

246 *Ibid.*, r. 19.5(2).

247 *Ibid.*, r. 18.4.

beneficiaries to do or abstain from doing a particular act:

- (vi) the approval of a sale, purchase, compromise, or other transaction by executors, administrators, or trustees:
- (vii) the carrying-on of a business authorised to be carried on by any deed or instrument creating a trust or by the court:
- (viii) the interpretation of a deed or instrument creating a trust:
- (ix) the determination of a question that arises in the administration of an estate or trust or whose determination is necessary or desirable to protect the executors, administrators, or trustees.²⁴⁸

This category also includes certain statutory applications (notably (but not limited to) company, family and trusts legislation),²⁴⁹ certain issues relating to contracts for the sale of land,²⁵⁰ certain issues relating to mortgages and charges over land,²⁵¹ and “any other proceeding to which the court directs that this Part is to apply”.²⁵²

A proceeding is commenced by originating application when the application is filed in the proper registry of the court,²⁵³ or when the court gives permission for the above applications to be made by originating application.²⁵⁴ Proceedings commenced by originating application can be *ex parte*,²⁵⁵ and may have evidence taken orally on oath if the court, on application before or at the hearing, so directs.²⁵⁶ The scope of process initiated by originating application has been amply set out in the case law:

[T]he type of proceeding suited to the originating application procedure is a straightforward application, not requiring detailed pleadings or interlocutory orders for its fair resolution. Such a type of proceeding tends to be an application under a specific statutory provision, where the issue that arises can be clearly defined, and the issues confined. The procedure is not well suited to the

248 *Ibid.*, r. 18.1(a).

249 *Ibid.*, r. 18.1(b).

250 *Ibid.*, r. 18.1(c).

251 *Ibid.*, r. 18.1(d).

252 *Ibid.*, r. 18.1(e).

253 *Ibid.*, r. 19.7(1).

254 *Ibid.*, rr. 19.5(1) and 19.7(1).

255 *Ibid.*, r. 19.9(2).

256 *Ibid.*, r. 19.13.

determination of substantive rights involving the application of common law doctrines as distinct from statutory tests. It is not well suited to cases involving multiple parties, and cases where there is the possibility of crossclaims or counterclaims...

It is no longer right to say that [originating application procedure] cannot be utilised where there is an opposing party. Nevertheless, while the procedure is not limited to applications where there is no opposing party, it is nevertheless, in relation to contested proceedings not listed in r 19.2, an exceptional procedure. It is limited to cases where it is not necessary in the interests of justice for there to be the usual particularised pleadings, or interlocutory steps such as discovery, for the proper determination of the issues. While the types of proceedings where the originating application procedure can be used as of right under r 19.2 have been expanded, and can include the determination of substantive personal and property rights, this expansion does not create a *carte blanche* to commence any urgent matter by way of originating application. If a party wishes to obtain an urgent hearing and a truncated procedure in such a circumstance, it should file a standard proceeding in the usual way and seek priority, or allocation to the Fast Track, or some other step within the ambit of the standard procedure that will reduce time limits. A party should not treat the originating application procedure as a short cut for urgent cases.²⁵⁷

In another case, when deciding whether to grant leave to proceed by originating application under Rule 19.5, the High Court of New Zealand stated that the party opposing the application “played up the need for full pleadings, full discovery, and the opportunity to cross-examine witnesses” and that they “had in mind a procedure which would not ensure a hearing for at least another six months, long after [a particular] tribunal hearing will have been completed”. The court was of the view, however, that “[t]hose general submissions did not impress”.²⁵⁸

5.4 Canada

a. Ontario

The Rules of Civil Procedure in Ontario provide for a statement of claim, notice of action, notice of application, application for a certificate of appointment of an estate trustee, counterclaim against a person who is not already a party to the main action, and third or subsequent party claim.²⁵⁹ The general position is that proceedings shall be commenced by action,²⁶⁰ the originating process for

257 *Hong Kong and Shanghai Banking Corporation Ltd v Erceg* (2010) 20 PRNZ 652 at paras. 25-26, per Asher J.

258 *Wellington City Council v Registrar of Companies* [2015] NZHC 572 at para. 27, per Associate Judge Bell.

259 Rules of Civil Procedure (RRO 1990, Reg 194, as amended to O Reg 281/16) (Ontario) (“RCP”), r. 1.03(1).

260 *Ibid.*, r. 14.02.

which is a statement of claim.²⁶¹ Where there is insufficient time to prepare a statement of claim, an action may be commenced by issuing a notice of action,²⁶² with a statement of claim filed within thirty days after the notice of action is issued.²⁶³ It should be noted that there is a separate procedure called “simplified procedure” for which the originating process is a statement of claim or notice of action.²⁶⁴

An application is commenced by issuing a notice of application or, where appropriate, an application for a certificate of appointment of an estate trustee.²⁶⁵ This may be made under an authorising statute²⁶⁶ or under the RCP.²⁶⁷ The RCP provide for the commencement of process by application in the following scenarios:

- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
- (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
- (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
- (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
- (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
- (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;
- (g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

261 *Ibid.*, r. 14.03(1).

262 *Ibid.*, r. 14.03(2).

263 *Ibid.*, r. 14.03(3).

264 *Ibid.*, r. 76.4 – see generally r. 76.

265 *Ibid.*, r. 14.05(1).

266 *Ibid.*, r. 14.05(2).

267 *Ibid.*, r. 14.05(3).

- (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.²⁶⁸

The situations in which the RCP provide for commencement of process by notice of application bear some similarity to scenarios in which it might be appropriate to initiate process in the Court of Session by petition.²⁶⁹ Nevertheless, for each type of originating process, the process is “issued by the registrar's act of dating, signing and sealing it with the seal of the court and assigning to it a court file number”.²⁷⁰

b. British Columbia

In another Canadian province, British Columbia, the general form of originating process is a notice of civil claim.²⁷¹ However, certain processes must be initiated by filing a petition or requisition, as appropriate:

- (a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;
- (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;
- (c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document;
- (d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;
- (e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;
- (f) the relief sought is for payment of funds into or out of court;
- (g) the relief sought relates to land and is for
 - (i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,
 - (ii) a declaration that settles the priority between interests or charges,

268 *Ibid.*

269 Potentially also including item (g.1), which could be analogous to a petition for judicial review on the basis of violation of the Human Rights Act 1998.

270 RCP, r. 14.07(1).

271 Supreme Court Civil Rules (BC Reg 168/2009, as amended to BC Reg 3/2016) (British Columbia), r. 2-1(1).

- (iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or
- (iv) an order of partition or sale;
- (h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.²⁷²

Some of these situations, in which the originating process must be by petition or requisition, again bear similarity to situations in which it might be appropriate or necessary to initiate process in the Court of Session by petition.

c. Alberta

In the Canadian province of Alberta, a court action is generally required to be initiated by statement of claim. However, there are certain situations in which the action may be initiated by originating application:²⁷³

- (a) there is no substantial factual dispute,
- (b) there is no person to serve as defendant,
- (c) a decision, act or omission of a person or body is to be the subject of judicial review,
- (d) an enactment authorizes or requires an application, an originating application, an originating notice, a notice of motion or a petition to be used,
- (e) an enactment provides for a remedy, certificate, direction, opinion or order to be obtained from the Court without providing the procedure to obtain it, or
- (f) an enactment provides for an appeal to the Court, or authorizes or permits a reference to the Court, or provides for a matter to be put before the Court, without providing the procedure to be used.²⁷⁴

Once again there is some similarity with circumstances in which it might be appropriate or necessary to initiate process in the Court of Session by petition. Process initiated by originating application is not generally subject to the rules on the management of litigation or disclosure of information unless the parties otherwise agree or the court otherwise orders.²⁷⁵ The court also has

272 *Ibid.*, r. 2-1(2).

273 The originating application was previously known in Alberta as an “originating notice”.

274 Alberta Rules of Court (AR 124/2010, as amended to AR 85/2016), r. 3.2(2). See also *ibid.*, rr. 3.15 and 3.16, on originating applications for judicial review.

275 *Ibid.*, r. 3.10(1).

the power to relax certain other rules where process is by originating application.²⁷⁶ It is explained that:

Typically, an action started by originating application will not require the same kind of management, either by the parties or the Court, nor require the same kind of disclosure of records or questioning, as actions started by statement of claim. However, if management, document disclosure and questioning are required, the parties may agree or the Court may order them.²⁷⁷

6. Conclusion

This paper has sought to promote the purpose and objectives of the Committee's research brief. It has also sought to challenge some of the orthodox conceptions about the distinction between the petition and the summons. This has been done both to test the veracity of that distinction and, noting that the existing literature has tended to affirm rather than challenge the distinction, improve the analysis and range of perspectives available to the Committee. The position of this paper is not that the distinction is disproved or rejected, but that a critical analysis shows that there are significant questions to be asked of the distinction and the differences in policy and doctrine that each form of originating process is alleged to represent. These do not automatically lead to either conclusion – that the distinction between the petition and the summons should be retained or abolished. It is hoped that the paper offers an additional, original perspective which can improve the clarity and critical nature of the analysis available to the Committee in deciding whether and how to proceed with the proposed reform.

This includes challenges to the generally held belief that the petition is usually an *ex parte* form of originating non-contentious or non-adversarial process, and that the petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law. It also includes the signalling of caution in regarding sheriff court procedure as more unified than Court of Session procedure, referring in particular to the variety of distinct procedures which can be accessed by way of initial writ, and cognisant of the new Simple Procedure Rules. On the other hand, it has been suggested that the existence of the petition and the summons might represent a needless complication of Court of Session procedure. The distinction between the petition and the summons does raise doctrinal and practical difficulties, including difficulties of

276 *Ibid.*, r. 3.10(2).

277 *Ibid.*, r. 3.10 (information note).

consistency, accessibility and comprehensibility.

With the abolition of the distinction would come both opportunities and risks. The replacement of the petition and the summons with a single, generic form of originating process would remove a potentially unnecessary procedural complication. That would present opportunities for time and cost savings in judicial proceedings, and therefore for the improvement of access to justice. However, the abolition of the distinction risks the replacement one two-tier process with another. It should also be ensured that the new procedure offers the continued possibility of initiating *ex parte* applications, that it retains flexibility and brevity in appropriate cases, and that it retains the relative speed and cheapness of abbreviated or expedited process.

It would appear that abolition of the distinction between the petition and the summons would offer, at best, a partial solution to the complexities of the procedural issues discussed in this paper. Abolition would not necessarily eradicate difficulties about the competency of individual remedies in given circumstances, the equitable or non-equitable nature of remedies, the ability or otherwise to transact contentious proceedings by way of an *ex parte* application, and the order in which remedies or avenues of redress should be attempted. A significant outstanding difficulty, which is potentially a great impediment to access to justice, is that the legal rules and principles on these issues are scattered throughout a wide array of statutory and non-statutory sources. Even when located, those rules and principles are not always articulated with clarity, certainty or consistency.

Finally, the opportunity was taken in the paper to consider comparative forms of originating process in other jurisdictions. It is notable that, in each of the seven jurisdictions under review, there is not a single form of generic writ which applies comprehensively to all civil proceedings. The most unified in terms of generic originating process appears to be England and Wales, where the claim form is used to initiate proceedings under the CPR, regardless of whether Part 7 or Part 8 procedure is used. However, as noted, the CPR do not apply to a number of specific categories of proceedings where particular forms of application are provided.

In the other jurisdictions under review, there appear to be two or more forms of originating process. There also appears to be a regular form of process and a form of process which initiates a typically more abbreviated or flexible type of proceeding. Each jurisdiction would require further research to

explore in depth the context, background and reasons for those distinctions, but it is certainly interesting that none of those jurisdictions have proceeded down the route of a single form of generic writ in civil procedure. That does not necessarily lead to the conclusion that Scotland should not pursue that objective, but it does raise the question of why the other jurisdictions under review have not done so. The reason could be as banal as conservatism or a lack of imagination on the part of those with responsibility for regulating civil procedure, or it is thought too technically difficult to achieve in practice. However, the reason could alternatively be that a single form of originating process is thought not to serve the needs of litigants or the utility of civil procedure.