

PROJECT INITIATION DOCUMENT (v 1.2)

Project name **Rules Rewrite Project (MJW 1.8)**
- a sub project within MJW Project 1 (Delivering efficient and effective court structures)

Release Date: **21st May 2012**

Document History

Revision History

Revision date	Previous revision date	Summary of Changes	Changes marked
10.02.2012	n/a	Initial Project Brief	V 1.0
22.03.2012	10.02.2012	Project Brief / Mandate to support consideration by the Project Board	V 1.1
21.05.2013	22.03.2012	Document updated to a full PID to support moving to the next stage (Design & Development)	V 1.2

Distribution This document has been distributed to:

Name	Title	Date of Issue	Version
	MJW 1 Project Board	21.05.2013	V1.2

Purpose

To define the project for achieving a 'rules rewrite', to form the basis for its management and the assessment of overall success.

Background

Civil courts review

The potential need for a comprehensive rewrite of the civil court rules, along with adoption of a case management approach and a myriad of changes to procedural rules to support civil courts reform, was identified as part of the Scottish Civil Courts Review (Sep 2009). That review did make it clear that they were promoting a wide ranging but integrated set of reforms to the civil courts and there was a clear message not to "cherry pick" from those initiatives but to pursue an integrated approach.

The Scottish Government Response (Nov 2010) accepted the need for reform, and the associated need to rewrite all the supporting rules of court. Since 2010 the relevant policy development work has been progressed as follows:

- The Scottish Civil Justice Council now has its supporting legislation in place, is finalising recruitment of members and will start sitting with effect from June 2013
- The Courts Reform (Scotland) Bill has been prepared as the enabling bill to progress the main structural elements of the reforms and that bill is currently out for public consultation
 - The recommendations made relative to "enhanced rule making powers" are covered in chapter 6 of the public consultation document (*refer appendix 2 of this paper*)
 - The consultation closes 24th May 2013 and the Scottish Governments response to that consultation exercise is expected to be published by August
 - The final bill is due to be tabled in Parliament in January 2014, with a view to receiving Royal Assent by December 2014.

In developing the Bill the Scottish Government's preferred approach is to leave much of the detail to be developed by the Scottish Civil Justice Council through court rules. Their rationale behind that approach is that "the Court of Session will be able to go into greater detail and provide more flexibility for the judiciary in court rules than would be possible for Parliament through primary legislation".

This project

This project has been established to progress the reform of the relevant rules of court, in support of the wider implementation of the civil courts reform agenda.

Rules Rewrite A number of other civil jurisdictions have been through a comprehensive rewrite of their civil court procedure, and whilst it is a sizeable piece of work it is seen as being a key enabler for Scotland's courts to deliver a modern civil justice system that is fit for the 21st century.

Such a rewrite is a significant investment – it is likely to involve up to 5 legal draftsmen each year during the first few years just to establish the philosophy and the core rules, and up to a decade to then progressively work through the rules that are used less frequently (the more esoteric rules would remain in force until replaced).

Reform Agenda The need to reform the civil justice system at the same time as all civil rules are being rewritten will raise a number of dilemmas during this process e.g. :

- For a specific improvement do you wait for the core rules approach, or amend the current outdated rules?
- How best to coordinate with available and/or proposed ICT systems to be able to deliver functionality in time for new rules.

Current Rules of Court The current rules of court, and the associated downloadable forms, are an extensive body of work and are all made publicly available on the SCS website:

Court of Session Rules:

<http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules>

<http://www.scotcourts.gov.uk/rules-and-practice/forms/court-of-session-forms>

Sheriff Court Rules:

<http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules>

<http://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms>

The sheer volume and complexity of that information conveys the scale of challenge for this project.

Project Definition

Project objectives

The objective is:

- To deliver a fully integrated body of rules that can support a court system that is fit for the 21st century.

That objective is underpinned by the SCJC guiding principles:

- Rules should support a civil justice system that is “fair, accessible and efficient”.
- Rules should be as clear and as easy to understand as possible.
- Where appropriate, rules should be similar in all civil courts.
- Where appropriate, ADR should be promoted.

(Note – It is expected that the SCJC will review and confirm the objectives for this project at one of its earliest meetings in 2013)

CCR Objectives

The project also needs to support the following objectives relevant to delivering the Civil Courts Reform programme:

- To ensure the court has sufficient powers to control the conduct and pace of all cases before it.
- To support cases being progressed with due regard to economy, proportionality and the efficient use of the resources of the parties and the court.

Defined method of approach

- Develop the methodology for approaching the rules rewrite.
- Segment, rank & prioritise the rules of court and set an annual “rules rewrite programme” for:
 - existing court rules that may need to be updated in parallel with the reforms *(to support business as usual)*
 - new rules to support implementation of the civil courts reform programme, and case management in particular.
- Arrange the progressive drafting of each of the new rules in line with the agreed programme, consideration by the Scottish Civil Justice Council, approval by the Court of Session and the subsequent passing and publication of the Acts of Sederunt

**Project scope
– part a)**
Rules rewrite

(Recommendation 206 of the Civil Courts Review)

- Evaluate the merits of the recommendation as it relates to consolidating onto unified rules, review the core rules/fast-track/multi-track approach used in E&W and approaches taken in other jurisdictions, evaluate the requirements for the new judicial tier, consult with interested parties, evaluate responses, contribute to policy recommendations and instructions to the bill team, comment on draft bill, develop a flexible implementation plan, update for final decisions of the Scottish parliament and manage the transitional arrangements to deliver the new regime.

The 'implementation plan' will need to: confirm the aims objectives and guiding principles for the civil rules in Scotland, set an appropriate timetable for the rewrite (up to 10 years), build the capability and capacity to draft the rules, link the rollout of new rules to required IT changes, monitor implementation and ensure workability of new procedures including:

- Case Management
- Other Procedural Updates
- All other rules

**Project scope
– part b)**
Case
Management

(Recommendations 48 to 73 of the Civil Courts Review)

To put in place a framework of policy and practice which can support case management based on:

- Allocating cases to a docket system for judicial case management.
 - Use of an appointment based approach for procedural business.
 - Case management hearings by telephone or videoconference, rather than court hearing.
 - Abolishing the distinction between:
 - ordinary procedure and petition procedure
 - ordinary cause and summary application
 - Modernising the terminology used in court rules
 - Transferring cases to designated specialist.
 - Confirming jurisdiction of each tier of the judiciary
 - Updating the approach to Court Programming
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Project scope – part c) Enhanced case management	<p><i>(Recommendations 112 to 126 of the Civil Courts Review)</i></p> <p>To put in place the appropriate underlying procedures to support <u>enhanced case management</u> including:</p> <ul style="list-style-type: none">○ Ordering the disclosure of documents○ Lodgement of witness statements○ Abbreviated pleadings○ Instructing experts / joint reports○ Restricting medical evidence○ Overriding duty on expert to assist the court○ Duty on experts to confer○ Restricting oral evidence of experts○ Ability to seek summary disposal○ Ability to time limit hearings○ Ability to order written arguments
Project scope – part d) Other procedural updates	<p>Review the recommendations made and create the rules of court to support wider reform of the civil courts. This includes drafting the new procedures, consulting as appropriate, achieving Scottish Government policy support, arranging formal signoff, and arranging the rollout and implementation of those new procedures.</p> <p>Procedures will need to be either created or amended across the following substantive areas identified in SCCR</p> <ul style="list-style-type: none">○ Sift Mechanism for Appeals (<i>Rec. 19</i>)○ Raising the privative jurisdiction (<i>Rec. 20 to 25</i>)○ Clarifying powers of remit (<i>Rec. 26 to 27</i>)○ Jurisdiction (<i>Rec. 28 to 31</i>)○ Organisation of the Sheriff Court (<i>Rec. 36</i>)○ Curators, reporters <i>etc</i> (<i>Rec. 74 to 77</i>)○ Low Value Cases (<i>Rec. 79 to 93</i>)○ Mediation and ADR (<i>Rec. 96 to 100</i>)○ Pre Action Protocols (<i>Rec. 102 to 106</i>)○ Offers in Settlement (<i>Rec. 107 to 111</i>)○ Effective Sanctions (<i>Rec. 127 to 130</i>)○ Party Litigants (<i>Rec. 131 to 132</i>)○ Vexatious Litigants (<i>Rec. 133</i>)○ Rule Making Powers (<i>Rec. 134</i>)○ Judgements (<i>Rec. 135 to 141</i>)○ McKenzie Friends (<i>Rec. 149</i>)○ Judicial Review (<i>Rec. 150 to 156</i>)○ Multiparty Actions (<i>Rec. 157 to 182</i>)○ Judicial Expenses (<i>Rec. 183 to 190</i>) <p>In addition to the SCCR changes there will be any other procedural updates identified as a change priority from the ‘business as usual’ activities of the courts</p>

Project deliverables

- 1) Prepare and refine the **policy instructions** that are necessary to clarify the powers supporting the drafting of new rules.
 - 2) Promulgate **draft rules** that will facilitate discussion, dialogue and refinement of the civil court rules (through the Scottish Civil Justice Council).
 - 3) Coordinate appropriate **Acts of Sederunt** being passed by the Court of Session in support of the rewrite of all civil court rules.
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Exclusions

Criminal Rules – This project excludes the direct responsibility for updating the criminal court rules, but there will be overlaps in the adoption of the general guiding principles being developed and any specific changes to criminal procedure that may be needed to support the introduction of summary sheriffs.

Tribunal Rules – As indicated in the Tribunals (Scotland) Bill the SCJC is expected to take on the rule making function for Tribunals at some future point in time. Each tribunal operates under existing rules and there is no immediate imperative to undertake this workload ahead of the civil court rules rewrite. On that basis SCS are excluding tribunal rules from the scope of this project at this point in time (*this exclusion should be reviewed on an annual basis, or earlier if required*).

Constraints

Capability & Capacity – Availability of sufficient:

- Legal staff with the requisite skills for drafting of legislation
- Judicial training expertise to support the desired change in culture and behaviors
- Training resources for court based staff

Concurrent Jurisdictions – For some particular streams of business (e.g. family law) there may be a need to support concurrent jurisdictions across multiple tiers of the judiciary. In those instances the need for complete harmonisation of the rules will be even greater.

Judicial Continuity - There is a need to find a practical way to balance calls for judicial continuity in the handling of cases, with competing operational demands which may support the bulk processing of cases.

Taylor Review – In effect some specific recommendations made in the SCCR report are being deferred pending publication of the Taylor Review on “The Costs and Funding of Litigation”. The issuing of that report and the timing of any follow-up work generated (e.g. solicitors fee setting) will constrain the projects ability to progress some rules until much later in the project. That constraint will need to be recognised in setting the annual work programmes.

Interfaces
Operational

Scottish Civil Justice Council (SCJC) – Timely consideration and passage of any new rules will require tight coordination of effort with the SCJC to ensure a) alignment of priorities in the annual work programme b) timely feedback on the draft rules proposed and c) timely approvals of the final versions of new rules.

Lord Presidents Private Office (LPPO) – Good working relationships will be required with the LPPO to ensure a) continuous improvement in the quality of the drafting instructions produced and b) to progress formal approval of the rules by the Court of Session.

Interfaces
- Project
Management

ICT – The ability to specify likely user requirements well in advance will be key to securing timely updates to the civil courts database (CMS or its replacement) prior to implementation of rule changes. Similarly, the ways that the rules may need to be written will be informed to some extent by the ICT technologies that are available or foreseen at the time of drafting rules.

Making Justice Work Programme (MJW) – There will be a need for effective coordination with other sub projects within MJW Project 1, as well as coordination with other initiatives within the wider MJW programme. Key project linkages within MJW 1 will include:

- *MJW 1.4 Judicial Structures* – There will be a critical need to ensure that the new rules as created do support the effective operation of the new judicial tier once introduced, and keep in step with the other planned adjustments to judicial structures.
- *MJW 1.6 Personal Injury Court* – The development of the enabling rules under this project will be a prerequisite for establishment of that new court by mid-2015.
- *MJW 1.9 Sheriff Appeal Court* – The development of the enabling rules under this project will be a prerequisite for establishment of that new court by mid-2015.

Project Organisation Structure

Senior Responsible Owner: **Steve Humphreys**

Project Sponsor: **Kathryn MacGregor**

Project Manager: **Kathryn MacGregor**
(Until Sep 2013 when legal staff are seconded to stage 1)

General oversight of this sub-project and escalation of any major issues will be via the MJW Project 1 Project Board.

At this point in time this 'Rules Rewrite Project' is not complex enough to warrant a project board in its own right. That position will be kept under review by the project manager as the rules rewrite methodology emerges.

User Perspective

The user perspective will come through detailed engagement with the Scottish Civil Justice Council and its various working groups

Communication Plan

Project controls

PID
Business Case
Highlight Reports
Post Implementation Review
Project Closure Report

Other

Business Case

Refer to the separate outline business case (21st May 2013) issued in parallel with this PID.

The rules rewrite is a key enabler for the civil court reforms and the expected benefits for the business are:

- B1: Reduced system costs (*through court rules that can help support a new duty to give due regard to the proportionality of costs to the parties*).
- B2: Reduced system time/delays (*through new case management procedures that can support the judiciary in actively managing the pace and conduct of cases*).
- B4: Improved User Experience (*by delivering court procedures that are as easy as possible to understand and access*).

Project Resources:

The estimate of the FTE requirement to cover the tasks envisaged in this document is a peak of up to 6.1 FTE per year during the first two years of stage 2 (Drafting the Rules):

PROJECT FTE REQUIRED											Project Life Total
Grade	yr 1	yr 2	yr 3	yr 4	yr 5	yr 6	yr 7	yr 8	yr 9	yr 10	
G6	0.1	1.1	1.1	0.6	0.6	0.6	0.6	0.3	0.3	0.3	5.6
G7	0.58	4	4	2	2	2	2	1	1	1	19.6
SEO											0
HCO		1	1	0.5	0.5	0.5	0.5	0.25	0.25	0.25	4.75
	0.68	6.1	6.1	3.1	3.1	3.1	3.1	1.55	1.55	1.55	29.9

The skill sets required within the project team will be:

- Project management skills (*desirable*)
- Legally qualified staff with policy development skills (*essential*)
- Legally qualified staff with sound drafting skills (*essential*)
- Good knowledge of civil business (*essential*)

Option 1 – Do Nothing

The do nothing option would see the comprehensive rules rewrite put on hold, and the rules to support specific elements of civil courts reform would then revert to being progressed by the LPPO/SCJC over a much longer time frame.

Option 2 – Rules Rewrite

This option would see a dedicated team of legal draftsmen deployed on the comprehensive rewrite of all court rules and require a potential investment of circa £1.8M to achieve that objective.

Project Plan

Given the experience in England and Wales and other jurisdictions, then a full comprehensive rules rewrite is expected to take up to ten years to complete. The aim would be to have most of the core rules in place within 2 years from commencement of drafting, but all the other more esoteric rules could take up to a further 8 years to complete.

The project is being broken into two stages:

Stage 1: Methodology (Sep 2013 to Mar 2014)

Stage 2: Drafting (Apr 2014 onwards)

The indicative tasks within each of those stages are as outlined in Appendix 1

Risk Log

Legislative Priorities – If the government pursues a heavy legislative agenda then there is a risk that critical drafting resources may need to be diverted onto other higher priority legislation in the parliamentary programme. This risk would be mitigated by either increasing or decreasing the pace of change on the court rules project.

Issues Log

Civil Database – The potential replacement of the CMS database in parallel with the reform of the civil system will add a layer of complexity to the management of change.

Legal Challenge – Prior to the Bill receiving royal assent there will be a need to avoid anticipating the wishes of Parliament regarding rule making powers. In the context of a straightforward rewrite of existing rules under existing powers this will not be an issue, but for any rules that do require the council to have the ‘enhanced powers’ envisaged in the Bill then any external consultation should be scheduled during 2015 so that it occurs after the bill has received royal assent. The rewrite timetable will have to be constructed with this issue in mind if it is to avoid any potential legal challenges for having created rules that are “ultra vires”.

Frequency of Meetings – Achieving reasonable progress on the rules rewrite may mean that external participants on various bodies may be required to meet far more frequently. If this increased call on their time becomes onerous it may become disconnected from a policy approach that relies on their voluntary/unpaid contributions.

Legal Resource – In the current environment there is a limited pool of legal resource available within the Scottish Government, with multiple calls on that resource from competing change programmes. The pace of change in this project will in part be dictated by its ability to secure suitable resource from that limited pool of lawyers.

APPENDIX 1 - Indicative Project Task Listing

PROJECT MANAGEMENT

Develop the Outline Business Case and PID **(complete)**
Appointment of project manager
Provide Highlight Reports
Develop the Full Business Case

STAGE 1 – METHODOLOGY (*Sep 2013 to Mar 2014*)

Confirm the vision and objectives for new rules

- Discussion and approval via SCJC

Review the approach in other jurisdictions

- E&W, Australia, etc.

Develop and distribute a draft “rules rewrite methodology”
Confirm and issue the final “rules rewrite methodology”
Agree the format and guidance for “drafting instructions”
Confirm the “style guide” to underpin new rules
Review the work programme agreed by the SCJC
Segment and prioritise the specific rules to be rewritten
Develop and issue the 1st annual “rules rewrite programme

STAGE 2 – DRAFTING (*Apr 2014 Onwards*)

Establish the drafting team
Progress the annual “rules rewrite programme”

- Consider the annual programme agreed by the SCJC
- Receive and review “drafting instructions” from LPPO
- Develop and circulate ‘draft rules’ for comment
- Refine rules based on feedback received
- Progress final approval of new rules (by SCJC)
- Monitor approval of new rules (by Court of Session)
- Monitor subsequent publication of approved rules & forms
 - on SCS website
 - on “legislation.gov.uk”

APPENDIX 2 – EXTRACT FROM PUBLIC CONSULTATION

CHAPTER 6: Facilitating the modernisation of procedures in the Court of Session and sheriff courts

Introduction

136. This chapter sets out the Scottish Government's proposals to facilitate the improvement of procedures in the Court of Session and the sheriff courts. It discusses five proposals:

- A) The improvement of civil procedure generally in the Court of Session and sheriff courts.
- B) The creation of new powers in the Inner House of the Court of Session to sift and dispose of appeals with no reasonable prospects of success.
- C) The abolition of the distinction between ordinary and petition procedure in the Court of Session.
- D) New procedures for dealing with vexatious litigants.
- E) Scotland-wide enforcement of interdict and interim orders

137. The Scottish Government's preferred approach is to leave much of the detail in these areas to be developed by the Scottish Civil Justice Council through court rules. The Court of Session will be able to go into greater detail and provide more flexibility for the judiciary in court rules than would be possible for Parliament through primary legislation.

A) The improvement of civil procedure generally in the Court of Session and sheriff courts

Background

138. The SCCR makes a number of important recommendations to improve civil procedure in the Scottish courts. These include:

- creating compulsory pre-action protocols for personal injury cases³⁶
- enhancing the judge's powers of case management³⁷
- encouraging briefer pleadings, and giving the judge power to determine what
- further specification is needed³⁸
- creating new rules for treating expert evidence³⁹

The Scottish Government response – options considered

139. The Scottish Government discounted simply providing for these matters in full in primary legislation: it would be far too rigid, and too inflexible. It therefore favours leaving the development of the detail to court rules, to be developed – and adjusted over time as needs be – by the Court of Session with the assistance of the Scottish Civil Justice Council.

140. The Court of Session currently has fairly extensive powers already to make provision for the treatment and handling of civil cases in both the Court of Session and sheriff courts as set out in sections 5 and 5A of the Court of Session Act 1988 and section 32 of the Sheriff Courts (Scotland) Act 1971. These powers, particularly those in section 32 of the Sheriff Courts (Scotland) Act 1971, go into a lot of detail about the specific type of matters and proceedings which can be covered by the general rule making power.

APPENDIX 2 – EXTRACT FROM PUBLIC CONSULTATION (continued)

141. While simply reviewing and augmenting the existing powers, as needs be, would of course be possible, there are a number of disadvantages to it. In particular, it is a fairly rigid model, relying on a high degree of particularisation about the areas of practice and procedure which it purports to cover, and increases the likelihood of amendment by future legislation to add further particular examples, for the avoidance of doubt.

The Scottish Government's proposals

Replace the existing rule making powers with more general and generic powers.

142. Section 85 of the draft Bill set out the provisions as regards the Court of Session, and section 86 as regards the sheriff courts and the new Sheriff Appeal Court.

143. The intention is to put beyond doubt the legal basis to provide for the matters which may be prescribed in rules of court, but avoiding setting out all the detailed, particular cases mentioned in the existing powers (especially in section 32 of the 1971 Act). This approach means that the current references to specific pieces of legislation will be removed.

Issues to consider

144. Sections 85 and 86 of the draft Bill reflect the following intentions:

- The rule making powers, for both the Court of Session and sheriff court, need to be sufficiently wide to ensure they can sufficiently regulate court processes and procedures.
- The rule making powers also need to enable the delivery of the SCCR recommendations on case management.
- The rule making powers need to be expressed clearly to avoid any successful challenges to the underlying powers of the rules made in exercise of them.
- The powers must ensure the judiciary are empowered and enabled to deliver the reforms; without, however, interfering with judicial discretion.
- The rule making powers need to be “future proofed” as far as possible: to allow sufficient scope for court procedures to evolve and adapt; and, to avoid the need for new legislation to have to cater for particular types of procedure.

Questions (civil procedure in the Court of Session and sheriff courts)

Q23. Do you agree that the new rule making provisions in sections 85 and 86 of the draft Bill will help improve the civil procedure in the Court of Session and sheriff courts?

Q24. Are there any deficiencies in the rule making provisions that would restrict the ability of the Court of Session to improve civil procedure in the court of Session and sheriff courts?

Q25. What impact do you think these proposals will have on you or your organisation?

APPENDIX 2 – EXTRACT FROM PUBLIC CONSULTATION (continued)

B) The creation of new powers in the Inner House of the Court of Session to sift and dispose of appeals with no reasonable prospects of success.

Background

145. The SCCR recommended that Scottish Ministers should consider introducing legislation that would “make for a sift mechanism for reclaiming motions and statutory appeals” to the Inner House of the Court of Session⁴¹. The recommendation was based on a recommendation of Lord Penrose who, essentially, recommended:

- A single judge of the Inner House should be able to consider the grounds of appeal/motion. And, if he or she thought appropriate, the single judge would be able to put the case out for submissions on whether the appeal/reclaiming motion should be refused on the grounds that it was not arguable.
- If the single judge concluded the appeal/motion should be refused on the basis it was unarguable, that decision was to be final and not open to review.
- But, the Inner House would have power to reopen the single judge's final determination, if the Inner House thought that: (a) it was necessary to do so to avoid real injustice; (b) the circumstances were exceptional; and (c) there was no effective, alternative remedy.

The Scottish Government response – options considered

146. The Scottish Government agrees with the SCCR's recommendations that there should be a sift mechanism for appeals and reclaiming motions to the Inner House: it is essential to the administration of justice in Scotland that the most senior court in Scotland is not tied up considering unarguable cases or cases with no reasonable prospect of success.

147. To meet concerns expressed by the Scottish Parliament during the passage of the Judiciary and Courts (Scotland) Act 2008, the SCCR proposed that the Inner House would have power to reopen the single judge's final determination, if the Inner House thought that: (a) it was necessary to do so to avoid real injustice; (b) the circumstances were exceptional; and (c) there was no effective, alternative remedy.

The Scottish Government's proposals

Introduce a sift mechanism for reclaiming motions and statutory appeals.

148. We have not offered draft provisions at this stage, as we are interested to hear views on the proposals.

Questions (sift and disposal of appeals in the Inner House of the Court of Session)

Q26. Do you agree that a single judge of the Inner House should be able to consider the grounds of an appeal or motion?

Q27. What impact do you think these proposals will have on you or your organisation?

41 SCCR recommendation 19. And see the discussion in the SCCR in Chapter 4, paragraphs 97 to 99.

42 Review of Inner House Business by the Rt Hon Lord Penrose 2009. www.scotcourts.gov.uk

APPENDIX 2 – EXTRACT FROM PUBLIC CONSULTATION (continued)

C) The abolition of the distinction between ordinary and petition procedure in the Court of Session.

149. The SCCR recommended that the distinction between Ordinary and Petition procedure in the Court of Session should be abolished, and that all actions in the Court of Session should be replaced by a standard initial procedure⁴³.

The Scottish Government response – options considered

150. The Scottish Government agrees with the general thrust of the SCCR's recommendation, that procedure in the Court of Session should be streamlined. It also agrees with the principle of abolishing the distinction between ordinary and petition procedure.

The Scottish Government's proposals

Abolish the distinction between ordinary and petition procedure.

151. The Scottish Government believes that this should be done by rules of the Court of Session to be developed by the Scottish Civil Justice Council. As such, we have not offered draft provisions. However we are interested in views as to the practical considerations arising as a result of abolishing the distinction, particularly with a view to avoiding any unintended consequences.

Questions (reforms in the Court of Session):

Q28. Do you agree that the distinction between ordinary and petition procedure should be abolished?

Q29. Do you foresee any unintended consequences for this change?

Q30. What impact do you think these proposals will have on you or your organisation?

⁴³ SCCR recommendation 56 and see further SCCR Chapter 5, paragraphs 69 and 70.

APPENDIX 2 – EXTRACT FROM PUBLIC CONSULTATION (continued)

D) New procedures for dealing with vexatious litigants.

Background

152. The SCCR makes a number of recommendations to improve procedures relating to vexatious litigants⁴⁴. The SCCR noted that "litigants who conduct their cases in an unreasonable manner present a growing problem for the administration of justice." Therefore, the SCCR recommended that:

"...the civil courts should have powers similar to those in England and Wales in relation to civil restraint orders which would provide for a graduated system of orders regulating the behaviour of parties who persist in conduct which amounts to an abuse of process."⁴⁵

The Scottish Government's proposals

Introduce a new procedure to replace the Vexatious Litigants Act 1898.

153. The new procedure will give the Court of Session and sheriff courts power to grant a civil order regulating the behaviour of parties (whether individuals or bodies) who persist in conduct which the relevant Court thinks amounts to an abuse of process.

154. In detail, this means that:

- Both the sheriff court and Court of Session should have power, on their own motion, barring the litigant from making any further applications in relation to particular live proceedings (a "limited civil restraint order").
- The Court of Session should have power, on its own motion, to restrain a party from issuing particular claims or applications in specified courts where these involve, relate to, touch upon or led to the proceedings in which the order is made (an "extended civil restraint order").
- The Court of Session should also have power to make an order that no civil legal proceedings may be begun by a party in a Scottish court unless the party obtains the leave of a judge sitting in the Outer House (a "general civil restraint order").

155. In granting any order under the new provisions the court should be entitled to take into account proceedings, either active or historic, in other jurisdictions. Where the conduct occurs in the sheriff court and the sheriff thinks it may be appropriate for an extended or general restraint order to be granted, he may refer the matter to the Court of Session.

156. The Scottish Government also proposes that the Lord Advocate should have express power to apply to the court for a civil restraint order (of whichever degree).

Issues for consideration

157. We have not offered draft provisions at this stage, as we are interested to hear views on the proposals.

Questions (procedures for dealing with vexatious litigants)

Q31. Do you agree that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants?

Q32. What impact do you think these proposals will have on you or your organisation?

⁴⁴ See paragraphs 170 to 190 of chapter 9 SCCR.

⁴⁵ SCCR, Chapter 9, paragraph 190, page 243

APPENDIX 2 – EXTRACT FROM PUBLIC CONSULTATION (continued)

E) Scotland-wide enforcement of interdict and interim orders

Background

158. The SCCR stated that respondents that the current system, where sheriff court orders (particularly those granting interim interdict) are enforceable only in the sheriffdom in which they are granted, caused difficulties in cases involving domestic abuse and in regulatory and enforcement proceedings at the instance of local authorities or public bodies.

159. The SCCR recommended that:

“The sheriff court legislation should be amended to provide that an interdict or other interim order granted in one sheriff court shall be enforceable throughout Scotland.”⁴⁶

The Scottish Government response – options considered

160. We wish to remove any doubt about whether the effect of interdict is Scotland wide and make it clear that a sheriff or summary sheriff may grant an interdict which prohibits the carrying out of specified actions in any part of Scotland. We think that the person/body to whom the interdict is addressed should be served with a notice making it clear that they are prohibited from carrying out a certain action or actions anywhere in Scotland. Of course the object of the interdict may be situated within the sheriffdom where the interdict is granted, but we are looking at circumstances where this is not the case.

161. Changing the law to give interdict all-Scotland effect seems straightforward enough, but there may be difficulties in relation to enforcement. The question arises as to whether an action for enforcement should be raised in the sheriffdom in which the interdict was granted or whether it should be capable of enforcement in any sheriffdom in Scotland, based on the Scotland-wide effect of the original order. The Scottish Government would welcome views on this.

162. As regards interim orders and warrants, it would be desirable to achieve the same Scotland-wide result as with interdict, but the Government would welcome views on how this may be achieved.

The Scottish Government’s proposals

163. We have not offered draft provisions at this stage as we are interested to hear views on this.

Questions (Scotland-wide enforcement of interdict and interim orders):

Q33. Do you think that an order for interdict should be capable of being enforced at any sheriff court in Scotland?

Q34. Should interim orders and warrants have similar all-Scotland effect and be capable of enforcement at any sheriff court?

Q35. What impact do you think these proposals will have on you or your organisation?

46 SCCR Chapter 4, page 86, paragraph 172.