Faculty response
to SCJC Targeted Consultation: on the Ordinary Procedure Rules

1. Following its two previous Reports, published in May 2017 and July 2022, the SCJC's Rules Rewrite Project has published a worked example in the form of draft rules intended to "promote discussion and feedback". The purpose of the draft is to illustrate what a single set of rules, designed to consolidate multiple procedures into one document, might "start to look like". The rules would cover the majority of ordinary actions initiated for cases over £5,000 in the Sheriff courts, and over £100,000 in the Court of Session.

2. The stated policy objectives are –
   a. To simplify, harmonise and consolidate the rules for progressing straightforward civil actions so that they are easy to use and understand; and
   b. To promote consistency between courts in the way straightforward civil actions are progressed.

3. The consultation seeks inter alia views on the merits of having such a consolidated set of rules. In addition, the consultation questions posed "are being used to (a) test how well the narrative within each rule could meet user expectations for a simplified and user- friendly procedure, and (b) identify suggestions for improvement." The draft rules are to be read in conjunction with the Procedural Narrative.

4. It would appear from the supporting materials that the draft is not intended to approximate to a final version of the new rules but is to be illustrative only of the general approach or direction of travel. In drafting our response, we have sought to bear in mind this limited purpose of the draft. However, we have found it difficult to form useful conclusions on the merits of the proposed rules – and how the component parts fit together – in circumstances where they are plainly incomplete and provisional. Beyond a few general comments in response to the specific questions posed, we have therefore concentrated on the details and language of the draft.

Question 1: the look and feel of the rules

5. In principle, we see no reason why procedural rules should not be the same or similar in both courts; indeed such consolidation seems to us to be a rational step, and one likely to produce efficiencies in the overall management of civil justice in Scotland. However, consolidation does not necessarily entail simplification; still less oversimplification. Modernisation of language, while no doubt desirable, should not in our view be an end in itself, at least where it runs the risk of obscuring long-established and well-understood rules of procedure. Moreover, the draft is currently somewhat inconsistent in the way it uses language – for example, although evidence is referred to (unhelpfully, in our view) as "information" and motions become "applications", the draft still uses some technical legal terms, such as "lodge" in relation to documents.

6. To an extent, we can see parallels to the present draft rules in the current Simple Procedure rules which apply to actions up to £5,000. That is a process which is simplified, automated (when the system works; we say more about this below) and which involves an element of case management. We suggest, however, that different considerations may apply to claims which are more complex or valuable than those initiated under Simple Procedure. Pursuers and defenders are much more likely to be represented, and the need radically to simplify procedures in such cases does not seem to us to be as pressing as in those cases where party litigants are more common.

7. We would add that if the aim is for online processing, that does not (and should not, we think) necessarily entail a fully automated "form-filling" process. There would in our view be no downside to rules which adopt a presumption of simplicity in the pleadings, but which allow for sufficient flexibility to require more detailed pleadings in appropriate cases. Such flexibility is in our view essential to the proper administration of justice.

8. We assume that the intention is to have a single integrated IT management system which could be rolled out to all ordinary actions – that certainly seems to be the ambition of the SCJC's First Report. If so, that can no doubt be best achieved with a common or standard set of rules. That said, we have reservations about the exclusive use of an IT portal in this way – it may be vulnerable to crashes and hacks, and particularly in cases running close to time limits, this could produce unfortunate results and unfairness. Some provision about such eventualities would be necessary. Moreover, IT literacy is by no means universal, particularly among the older population. If the intention of the rules is to make it easier for party litigants to engage with the court system, then this may be a significant barrier [see e.g. Rule 8(1)].

9. Returning to the particulars of the question, we agree that the working draft has the 'look and feel' of court rules. However, we fear that the language employed in the working draft is less clear and less precise than that which currently appears in the Ordinary procedure rules. In seeking to modernise the language of the rules there may be a danger of "throwing the baby out with the bathwater", and we do not think that that will improve the usability or accessibility of the rules. We question whether the proposed change is truly necessary in the absence of evidence that the current rules are defective, or productive of injustice. Ordinary procedure rules in the Sheriff Court or Court of Session could fairly easily be made standard across the court system – an alternative that would produce less disruption and difficulty than wholesale change.

10. The order of the rules in the working draft is logical so far as it goes. However, detailed comment on the draft rules is difficult without sight of the forms which may be used – and are likely to be necessary – to underpin the rules. Moreover, as we indicate in our comments on Rules 19-30, below, there are omissions, and we are not convinced that the current draft sets out a clear and predictable "pathway" for litigants to follow. It is not clear in some instances whether particular steps laid out in the draft Rules will necessarily be followed, or in what circumstances.

11. The principles of judicial case management and continuity of oversight are sound in theory, and to be welcomed. However, we anticipate that they may be difficult to implement consistently either in large sheriff courts or in the Court of Session without the deployment of appropriate – that is to say greater – resourcing and judicial time management and allocation.

Question 2: comment on individual rules

12. See Appendix 1 – this contains the collated comments of the Committee on the draft Rules.

Question 3: additional rules/layout

13. The layout is acceptable so far as it goes and we have no comment on that.

14. However, there are severable notable absences, including:
    - Multi-party procedure (including group actions);
    - An appeal process;
    - Amendment of pleadings, and the circumstances in which that will be considered and allowed by the court;
    - Devolution issues;
    - Judicial review;
    - Interdict;
    - Citation of witnesses.

15. Is it the intention to make separate rules about some or all of these issues? If so then this might, we fear, make matters more rather than less complicated. It is also unclear how petition procedure would fit in to (or be replaced by) the rules. Consideration should be given to a simplified 'fast-track' procedure within the working draft to accommodate cases which currently proceed by way of unopposed petition/summary application.

16. If a simplified system of pleading is to be adopted then, as already noted, there should be flexibility to require more detailed pleadings if appropriate, or indeed an option to transfer novel or complex cases to a more traditional or managed form of process and pleading, as is currently possible in some types of action.

17. Finally, and perhaps most importantly, we consider that the ability to hold a debate on the relevancy and specification of the pleadings is a valuable aspect of Scottish court procedure, one which is apt to save judicial time by winnowing out dubious cases. While we recognise that there is provision in the draft rules (Rule 87, on interpretation) to order a debate, we consider that if there is to be a concerted move away from detailed pleadings, there is a danger that debates will fall into desuetude. What would be the subject of any debate under the present draft rules and how would the legal points before the court be focussed? Careful consideration should be given to this consequence and whether it is desirable or justified by concerns about the accessibility of the court rules.

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Appendix 1: comments on particular provisions

Rule	Comment
1	This rule suggests that the Ordinary Procedure Rules will apply to all civil proceedings in the Court of Session and sheriff courts. However, it is understood that the intention remains to have specialist rules for particular types of civil proceedings. There should be clarity as to which proceedings the Ordinary Procedure Rules will apply to, and which of the existing Rules will be repealed by the new Act of Sederunt.
3	This resembles the existing commercial rules
4 and 5	No further comment – these rules resemble existing provisions
6	We are unsure why this is required in the rules, which reflect what is reasonably commonly done in practice. Moreover, the interaction between rules 6 and 8 lacks clarity. Rule 6 states that a person intending to commence a case "must" undertake certain actions before lodging a summons. Rule 8 then contemplates a circumstance in which those actions are *not* undertaken, in which case a party must explain why.

	It is not clear whether a summons can be rejected for a failure to comply with Rule 6 and, if so, who determines whether it ought to be rejected. Rule 9 details that a court "may" register a summons, suggesting an element of discretion. The matter is of critical importance for the purposes of prescription.
7	This requires a potential defender to engage in pre-litigation correspondence. It is not clear why a defender, who has not yet had proceedings raised against them, should be bound by the Ordinary Procedure Rules to do anything. It is not clear if there are any consequences for failure. In the commercial court of the Court of Session, there is a Practice Note which details that the defender is "expected" to respond to pre-litigation communications. The draft Ordinary Procedure Rules go further than this and would appear to have a different status.
8	See notes re rule 6 above. 8(4) details that a reason must be given for exceeding 5,000 words. It is not clear where that reason must be given. In the summons itself? A covering email? If a reason is given, does this mean the length of the Summons is permitted, or is a decision then taken whether to allow a Summons exceeding 5,000 words? If so, who takes this decision? How quickly will such a decision be taken, bearing in mind potential prescription issues?
	A summons *must* be lodged by online application – the question is – what happens if the online system is not working – this is especially important if dealing with an issue of prescription. Are there access to justice issues?

	A substantive law change to the Prescription and Limitation (Scotland) Act 1973 may be required to provide for an extension to the prescriptive period if the Scotcourts website portal is down or does not allow a summons to be lodged.
	Rule 8 - unless a reason is given? Should the rule be qualified to as to specify “sufficient reason” or “except on cause shown”? Cf rule 36
8 and 12	Rules 8 and 12 - are we, in effect, doing away with competency and relevancy in ordinary rules cases? What about a provision requiring e.g. concise numbered paragraphs? Need to answer all issues of relevance? Will there be forms? Will there be provision for transfer of the cause to “old-fashioned” ordinary procedure with pleas-in-law etc. Is the purpose of this to make the procedure more accessible to party litigants? Is that desirable?
9	Rule 9(1) uses the word “may”. If Rule 9(2) does not apply, that is the Summons is lodged by a solicitor, what is the basis for refusing to register the summons if Rule 8 has been complied with?
	Rule 9 – permission to proceed. Why only party litigants? Procedure appears very summary. There is apparently no opportunity to make representations. Are there article 6 issues?
9(3)	This suggests that a party litigant receives a lesser right of appeal than a represented party. A party litigant who lodges a case held to be unarguable, without a hearing and without knowing what is said in response, receives no right of appeal. In contrast, a represented party who has an unarguable case is entitled to have their summons registered and an opportunity to make submissions, or adjust their case, before any summary decree could pass against them. They would then have a right of appeal, at which point they could seek to amend their case.

	It is not clear what happens if a party is represented at the point of registering a summons but thereafter appears as a party litigant.
11	Rule 11 details that service by electronic transmission is permitted. However, the rules don't clarify what is meant by electronic transmission until Rule 40. There is a tension, because rule 11 suggests that there is a right to serve electronically, but rule 40 suggests that can only be done by consent.
12	Rule 12(3) requires a defender to admit any facts which are not disputed. 12(5) details that a failure to deny a matter does not amount to an admission. This leaves the potential for uncertainty regarding the extent of factual dispute. In our view a rule requiring a party to make clear which matters are and are not in dispute would be preferable. In our experience, a notice to admit procedure (as envisaged in Rule 33) is not a good substitute for clarity in the pleadings. Rule 12(4) – as with 8(4), there is a lack of clarity.
	Rule 12(5) appears to represent a fundamental change to our current system of pleading. We question whether, if that is the intention, this is desirable.
13	Rule 13 – inconsistency of provision with Rule 8. Why the apparently greater requirement for specificity in relation to counterclaims?
13(5)	As above re 8(4) and 12(4).
16	This is the old provision re reponing. The rule does not set out the basis upon which a decree can be recalled. It does not seem to be automatic but what is the test? The rule is silent.
17	17(1) envisages that *either* of the grounds under (a) or (b) would permit summary decree. It is noted that this is an innovation upon the current Sheriff Court summary decree rule:

	(2) An application may only be made on the grounds that— (a) an opposing party's case (or any part of it) has no real prospect of success; **and** (b) there exists no other compelling reason why summary decree should not be granted at that stage.
18	This mirrors the commercial rules. The commercial provisions work reasonably well as cases so assigned are allocated to commercial sheriffs/judges. In a busy court, it is difficult to see how this will operate in practice, if the expectation is that all or most cases will be subject to case management. While we note the use of the words "practicable and appropriate" we are apprehensive that the application of this rule may lead to scheduling issues and delays.
19-21 generally	When read together, these rules require a lot to happen within 14 days of the defences being lodged. They assume judicial availability to: - Consider any case management questionnaire lodged by the defender, - Decide whether the pursuer should be ordered to produce a case management questionnaire within 7 days - Consider the pursuer's case management questionnaire - Analyse the dispute between the parties - Determine whether a case management order is necessary and the content of that.
19-30 generally	The Committee was of the view that these draft rules, which appear to be a blend of changes to the OCR 1993 including changes to appeal provisions, *do not* provide a clear pathway for litigants. At present one can say with certainty what the steps in a litigation are and what the timescales are for key steps. Under

	the present draft it is not even certain that there will be a case management hearing. This is similar to the practice in Employment Tribunals. There you have the electronic submission; the questionnaire process and then case management hearings which can either be case management or substantive. We are not wholly convinced that a case management hearing, if one is held at all, will happen sooner than the present Options Hearing. In Employment Tribunal proceedings there has never been the same focus on written pleadings although the essential facts have to be pled and the remedies sought detailed. There is no mention of a Record or of the closing of the Record which up to now has been a significant step in the conduct of an action, and generally triggers further procedural steps, including debate, if appropriate. We note the reference to standard case management order in Rule 19(3) but we are unable to comment further without seeing the form that details what that is. Standard orders are a feature of the current sheriff court PI rules, chapter 36 and rules re appeal, Act of Sederunt (Sheriff Appeal Court Rules) 2015
20	Rule 20 requires the defender to lodge a case management questionnaire. In contrast, the pursuer only requires to lodge such a questionnaire if ordered by the court. The reason for this imbalance is not apparent.
	Rule 20 - what is the purpose of this? And when might an order under 20(1) be made, standing the terms of 20(3)(b)? We are uneasy about replacing the term “evidence” with “information”. Information is not (necessarily) evidence. Surely the focus should be on presenting the evidence needed to establish

	(or negate) the pleaded case. Is revision of the law of evidence anticipated? Rule 20 is akin to what is done in the procedure before the Employment Appeal Tribunal (EAT), but often ignored as it is not part of the pleadings.
21(2)	This refers to "the expedited procedure". The current draft of the rules does not define what this means.
25	Rule 25 requires that a note must be lodged 7 days before a case management hearing. It is not clear to what extent this will overlap with information already provided in a case management questionnaire. There may be a risk of duplication of effort and cost.
26(a)	Rule 26(a) - clarification and fair notice of what? It may be that this is shorthand for clarification of the details of the relevant party's case, but the drafting is not very clear, at least to potential party litigants (if that's part of the aim, see above). 26(b) - can that be an order for production of documents? How does this fit with Rule 34?
28	The test set out in Rule 28 is quite vague. There is developed caselaw regarding open justice, which (put short) requires the court to take the least restrictive step necessary to ensure the administration of justice. The court has an inherent jurisdiction to determine what the constitutional principle of open justice requires. The matter was discussed by the Supreme Court in *Dring v Cape Intermediate Holdings Ltd* [2019] 3 WLR 429 and *A. Secretary of State for the Home Department* 2014 SC UKSC 151; *A v PF, Dundee* 2017 HCJAC 91; *MH v The Mental Health Tribunal For Scotland* 2019 SC 432. It is not clear that the principles that arise from these cases are compatible with the wording of Rule 28(1).

33	How is Rule 33(1) to be satisfied in practice? Is there a need for an express provision requiring discussions (oral and/or in writing) between parties? In the present procedure the principal manner of agreeing uncontroversial matters is through the refinement of written pleadings. Is the expectation under the new rules to be that notices to admit will ordinarily be lodged? If so, there are cost implications, which may be inconsistent with Rule 2(2).
34	This rule does not: - provide for lodging of documents in a confidential envelope, which is often an essential procedure. - detail the procedure to be followed and rights of the parties when documents are provided voluntarily - detail the procedure to be followed in a commission for the recovery of information, including the appointment of a commissioner - detail the procedure for commission for examination of witnesses. Is the intention to rely on existing jurisprudence?
35	Rule 35 - compare rule 26. What are the limits (if any) of the court's powers regarding the presentation of information?
37	The title of Chapter 1 of Part 3 is currently "Intimation and lodging of things". Perhaps "intimation and lodging" is all that is required?
38	We have some reservations about the desirability of allowing intimation of documents by unrecorded first-class post.
40	Due to the importance that can often attach to the lodging or intimation of information and the timing of that exchange, the inferential acceptance of a willingness to communicate in a particular way may pose difficulties. It is not clear that Rule 40(2)(c) is necessary or desirable. 40(2) – We are doubtful as to the use of the word "may". Should it be "will" or "must"?

43-48 general comment	Motions are now to be known as Applications. Is this to include Minutes of Amendment? The position is unclear. We note that amendment is referred to in Rule 66(4) in relation to service of third-party notices.
48	It is not entirely clear what circumstances this rule is intended to cover and whether any time limit should apply to the right to recall.
57	This rule introduces a new procedure regarding witness statements. It is not clear what difficulty with the current rules it seeks to address. The Rule does not make clear in what circumstances the procedure should be adopted. What status would a note lodged under 57(3) enjoy, if any? We presume that the process envisaged at 57(3) – (6) is to be optional. The right to cross-examine a witness on any relevant topic should be maintained, and if that is accepted, then what purpose do these provisions serve? The pleadings normally provide notice of the lines of inquiry to be taken.
62	Rule 62 – expert "information", and which must be "accurate". What about opinion evidence, which is the point of most expert reports? What is wrong with the form of declaration which most expert reports currently carry about duties to the court and so on? Are we saying that the expert cannot be subject to cross examination, at least in some circumstances?
71	It is not clear whether this intends to restrict the ability of an applicant to become involved in an action as a defender, rather than a third party. 71(1)(a) mentions only an application to become a third party.
72-79 general comment	These rules look similar to the provisions of the Court Reform (Scotland) Act 2014
76	76(4) envisages no right of appeal. It is not clear how this interacts with the current entitlement to seek permission to appeal to the UKSC under s.40 of the Court of Session Act 1988.

	If a matter is sufficiently important to be referred to the Inner House for determination, it is not clear why removing the usual right to seek permission to appeal is desirable.
Part 5	This Part is currently titled "Things to do with enforcing a case". Why not just "enforcement"?
	There is passing reference to rights of appeal but there is no specific provision about appeals in this draft. If the same rules are to apply to the sheriff court and Court of Session, new appeal rules will be required.
87	Rule 87 – "information" – includes "items". What about documents? Perhaps "real, documentary and oral evidence". But in any event, if "information" is defined using the word "evidence" why not simply use the word "evidence" throughout – see above re rule 20. Generally, the draft seems inconsistent in the way it uses language. As already noted, it attempts to redefine evidence as "information" and makes other attempts to use non-technical language, but then uses a word such as "lodge" in relation to documents. A very well understood word in legal terms, but not easily comprehensible to the non-lawyer if that is the aim.