

## Revamping Scotland's Civil Court Procedures The Initial Recommendations



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The Scottish Civil Justice Council (SCJC) is undertaking a comprehensive rewrite of Scotland's existing civil procedure rules. In May 2017 *The New Civil Procedure Rules First Report* (the Report) was published setting out the SCJC's recommendations.

### Summary

Recognising the fact that some of Scotland's rules are somewhat antiquated, Lord Carloway notes in his foreword that the task of rewriting Scotland's civil procedure rules is ambitious but necessary in order to create a system of civil justice that "makes more sense to someone born at the turn of the millennium than to someone born in the previous two centuries." On the other hand, the Report captures the real attachment of many in the profession to Scotland's unique terminology and procedure, which the SCJC notes will not be done away with wholesale, instead they will adopt an ad hoc approach, changing only what needs to be modernised.

We summarise below some of the key recommendations and will produce updates as and when there are developments.

### Statement of Principle

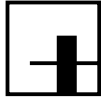
The SCJC propose the introduction of a statement of principle which would operate as a guiding principle as to the purpose of the rules – to provide parties with a just resolution of their disputes in accordance with their substantive rights, within a reasonable time, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court.

The statement of principle is intended to assist the courts in interpreting the rules, improve case management and bring Scotland in line with comparable systems. However, although it may be similar to the 'overriding objective' that applies in England and Wales (E&W), it would not have an overriding or binding effect over other rules. This is due to concern that doing so could generate satellite litigation, as has been seen in E&W. Instead Scottish judges would be obliged to take the statement of principle into account when interpreting the rules and making case management orders.

### Case Management

The introduction of case management rules is recommended by the SCJC to allow judges the strongest possible powers to control the scope and pace of litigation. However, active judicial case management is recommended only for the cases where it is most necessary, due to the significant resource implications created by the need for parties to 'front load' work and for judges to become involved in proceedings at a much earlier stage. It is recommended that certain defended cases should be automatically assigned to timetables, such as those already used in personal injury cases.

It is also proposed that a fast-track procedure be created for cases where the issues are straightforward and where there are few preliminary matters to be resolved.



The SCJC noted that matters currently dealt with by Petition and Summary Application procedure would fall to be dealt with under the new fast-track, along with any other suitable matters.

A key feature of the proposed case management model is that parties have the opportunity to inform the court of their preference for the type of case management, by way of completion of a case management questionnaire, which would be lodged with the court along with the principal writs, the originating writ and the defences. This is again similar to what already happens in E&W.

The SCJC also recommend that pre-action protocols should be introduced for all cases where there is a reasonable expectation that specific steps and disclosures will be made by the parties prior to litigation. They are already in place through Practice Notes for Commercial Actions and asylum and immigration cases, and a voluntary Pre-Action Protocol exists for personal injury actions.

The introduction of a suite of standard orders is also recommended, which would provide default case management orders for categories of cases and specialised types of action, and could be adjusted where necessary.

A flowchart of the case management model for ordinary procedure in the Sheriff Court and Court of Session has been **drawn up**, where the terminology used is also that currently used in E&W, 'claimant' for the party bringing the action, 'respondent' for all other parties, and 'judge' for the Lord Ordinary or sheriff, although it is noted that no decisions have yet been taken about terminology.

### Evidence

The SCJC makes a number of recommendations which would bring Scottish procedure in relation to expert evidence much more into line with that in E&W. The SCJC recommends or will consider:

- setting out the duties of expert witnesses within the new civil procedure rules, including an overriding duty to the court;
- introducing a code of practice for expert witnesses to include guidance on the form of expert reports;
- greater evidence management powers for judges, including the ability to order that expert reports be obtained and lodged in process; and
- that expert reports be taken as the expert's evidence in chief, whereas at the moment an expert report only gives advance notice of the evidence the expert will give when called in court.

### Form, Style and Language

The SCJC state that the structure, layout and presentation of the new CPR's should be ambitious and innovative and that the drafting should be focused to allow for usability and readability by those who will be using the rules regularly.

Scotland currently has separate sets of rules for each court with similar but distinct procedures, depending on where a case is being heard, and the Report comments on the challenge of having multiple sets of rules for different courts and different types of procedure and puts forward arguments in favour of consolidation and separation. It appears that the SCJC have not decided on how the instruments should be arranged, as the Report concludes that "all options" will be considered.

The practical difficulty of interpreting time periods is discussed in the Report, with the SCJC concluding that they are strongly in favour of a consistent approach to these types of rules and that a style guide should be included. It is also proposed that there should be a standard approach to timetable drafting that is clear enough to meet the standard of legal certainty.

Consideration of the language of court rules is discussed at length. The SCJC promote introducing greater consistency and give specific examples of where terminology could be updated. For example they suggest that 'reclaiming' could be replaced with 'appeal'.

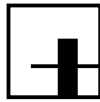
There seems to be debate within the SCJC as to what extent the language should be updated. The 'romance and history' behind legal terms is used as an argument against modernisation, while the Report notes that replacing 'the prayer of petition' with 'the orders sought in the application' seems 'bloodless and leaden'.

The Report states that the SCJC will take an 'ad-hoc, flexible' approach in considering modernisation of the terminology and they say that traditional labels may be retained even where "they are perceived to be not quite as modern as they might be".

### Technology

The Report proposes that the new rules should provide for a shift from our current default paper-based system to one where there is a presumption that every step in procedure can be taken electronically. They identify the benefits of speed and the instant creation of an electronic record of what has been lodged with the court. The SCJC is also considering electronic adjustment of pleadings and the use of digitally recorded, preserved and displayed evidence. This would be a radical shift in practice.

The SCJC is to consider the introduction of online blind bidding, where either party could lodge a blind bid online,



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which would only be seen by the other side if it came within a set percentage of the amount bid by the other side. The current procedure of lodging a tender which is intimated to the other side is seen as having the disadvantage of one party having to reveal their hand or lose face, whereas the proposed blind bidding system would encourage parties to make realistic bids and thereby promote settlement.

### Timeline

There is no official timetable in place for the introduction of the new Civil Procedure Rules. However, we have created the timeline below from the facts available at the moment. As the review progresses and more information is released we will publish regular updates.

September 2009	The Scottish Civil Courts Review was published. In Chapter 15 a comprehensive review and rewrite of Scotland's civil procedure rules was recommended.
May 2017	<i>The New Civil Procedure Rules: First Report</i> was published setting out the SCJC's proposals
Summer 2017	A tour of the six court areas will be launched. At each location there will be presentations and discussions as part of the engagement programme.
Over the next 12 months	The SCJC will encourage open and constructive engagement with lay people and legal professionals throughout the development of the new civil procedure rules.
May 2018 onwards	Within 12 months or so we should expect publication of the New Civil Procedure Rules: Second Report following completion of the work streams, consultation and summer tours. The Second Report will contain details of the SCJC's new model for civil procedure together with draft provisions for consultation.
Following publication of the New Civil Procedure Rules: Second Report	There will be a consultation period on the draft provisions set out in the Second Report.
2019-2020	The new Civil Procedure Rules likely to be introduced.

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