

SCOTTISH CIVIL JUSTICE COUNCIL REVIEW OF SHERIFF APPEAL COURT RULES

OUTLINE OF KEY POLICY PROPOSALS

Introduction

1. This paper accompanies the draft rules.
2. The draft rules are not finalised and are only intended to illustrate the proposed changes to the existing rules. Should the policy proposals be accepted, the drafting may be further adjusted. Further changes may also be made before the draft rules are presented to the Scottish Civil Justice Council's Rules Rewrite Committee, to take account of comments received from consultees, and any additional comments received from the sheriffs principal and Sheriff Appeal Court staff.
3. This paper sets out a brief explanation of the policy rationale behind the main proposals.

Terminology

4. One issue that has been identified relates to the terminology which describes each procedure – “standard appeal procedure” and “accelerated appeal procedure”.
5. The issue is that these terms do not adequately capture the character of each procedure, leading to confusion amongst the profession. The ordinary meaning of the word “standard” implies that standard appeal procedure is the default procedure. However, this is not necessarily the case in practice; rather, the decision on procedure should be made only on application of the test contained in rule 6.6.
6. It is therefore proposed that the terminology should be replaced with “procedure before one appeal sheriff” and “procedure before three appeal sheriffs”.
7. Consultees are invited to note that, whilst the proposed new terminology would accurately describe most appeals, it would not be a factually accurate description of every appeal. Whilst in practice most appeals under procedure before three appeal sheriffs would be heard by a bench of three, it would remain possible for a larger bench to be convened. Similarly, whilst in practice most appeals under procedure before one appeal sheriff would be heard by one appeal sheriff, it would remain possible for more than one appeal sheriff to hear such an appeal (although it is anticipated that this would rarely, if ever, happen in practice).
8. It is considered that the proposed new terminology would overall be clearer and easier to understand than the existing terminology.

Provisional Procedural Orders and requirement for respondent's view

9. Currently, on receipt of the note of appeal, the procedural Appeal Sheriff makes a provisional procedural order under rule 6.6. That order provisionally appoints the appeal to the procedure that the procedural Appeal Sheriff considers appropriate, on the application of the rule 6.6 test. At that point, the procedural Appeal Sheriff has only the appellant's view of what the appropriate procedure should be, and has not yet received answers.
10. It is proposed that the decision on procedure should be made following receipt of the note of appeal, answers, and any grounds of cross-appeal. The concept of a provisional procedural order should be abolished and the procedural Appeal Sheriff would make an order appointing the appeal to the appropriate procedure.
11. It is also proposed that the respondent should be required to state in the answers his or her view of which procedure is suitable. The procedural Appeal Sheriff will be required to have regard to the views of all parties when making his or her decision on procedure.
12. This is intended to improve efficiency and ensure that the procedural Appeal Sheriff has sufficient information on which to make the decision under rule 6.6.

Clerk to issue initial order in majority of appeals

13. Currently, the procedural Appeal Sheriff makes an order for intimation and answers at the same time as making a provisional procedural order (i.e. on receipt of the note of appeal). It is proposed that the Clerk should, in general, make the initial order for intimation and answers on receipt of the note of appeal.
14. It is proposed that the note of appeal will only be brought before the procedural Appeal Sheriff for an order in certain circumstances. The Clerk would be compelled to bring a note of appeal in front of the procedural Appeal Sheriff for an order:
 - Where the appellant applies for urgent disposal;
 - Where the appellant requests variation of timescales.
15. In the absence of an application by the appellant, the Clerk would be able to bring a note of appeal in front of the procedural Appeal Sheriff where the Clerk considers that an appeal may require urgent disposal.
16. The Clerk would also be able to refer a question about the competency of an appeal or cross-appeal to the procedural Appeal Sheriff at any time until the procedural Appeal Sheriff makes an order under rule 6.6. See paragraphs 27 - 29 below.
17. This is intended to improve efficiency.

Grounds of cross-appeal and answers to grounds of cross-appeal

18. Currently, rule 7.3 makes provision in relation to cross-appeals. It is contained in the chapter on standard appeals and therefore only applies after an appeal has been allocated to standard procedure.
19. A respondent may lodge grounds of cross-appeal within 28 days after the timetable is issued under rule 7.2(1). A further 28 day period¹ then follows within which the appellant may lodge answers to the grounds of cross-appeal.
20. It is proposed that these timescales should be shortened, to improve efficiency and allow appeals to be dealt with more quickly. It is also thought to be more logical for any grounds of cross-appeal to be lodged earlier in the procedure. It is therefore proposed that provision on cross-appeals should be moved to Chapter 6.
21. It is proposed that any grounds of cross-appeal should be lodged at the same time as answers (i.e. within 14 days of intimation of the appeal to the respondent, or such other period as the procedural Appeal Sheriff may order).
22. Answers to any grounds of cross-appeal would require to be lodged within 14 days after intimation of the grounds of cross-appeal to the appellant.

Urgent disposal of appeal

23. Currently, rules 7.4 and 7.5 provide for the urgent disposal of appeals. They are contained in the chapter on standard appeals and therefore only apply after an appeal has been allocated to standard procedure. An urgent appeal can only be heard by three appeal sheriffs.
24. It is proposed that provision on urgent appeals is moved to Chapter 6, along with the provisions on initiation of an appeal. This would make it clear that urgent disposal can be ordered at the very outset of an appeal, on receipt of the note of appeal.
25. It is proposed that where the procedural Appeal Sheriff makes an order for urgent disposal, he or she must specify the procedure to be followed, the periods for complying with each procedural step, and the number of appeal sheriffs that will hear the appeal. It is proposed that an urgent appeal should be capable of being heard by one appeal sheriff, where appropriate. This is intended to provide maximum flexibility in urgent appeals.
26. Currently, rule 7.4(4) provides that where the decision appealed against concerns an order made by the sheriff under section 11(1) of the Children (Scotland) Act 1995 (court

¹ From the date of intimation of the grounds of cross-appeal.

orders relating to parental responsibilities etc), the appellant must seek urgent disposal. It is suggested that there may be other categories of appeal for which the appellant should be compelled to seek urgent disposal, such as those involving orders in relation to adoption or permanence. This will be considered further before finalised proposals are put to the Rules Rewrite Committee.

Competency question

27. Currently, rules 7.7 and 7.8 provide that a question about the competency of an appeal may be referred to the procedural Appeal Sheriff by any respondent.
28. It is proposed that provision on competency should be removed from Chapter 7 and placed in Chapter 6, along with the other provisions on initiation of an appeal. The intention is to clarify that a competency question can be raised at the very outset of an appeal, after a note of appeal has been lodged or intimated.
29. It is also proposed that the rules should state that the Clerk to the Sheriff Appeal Court can refer a competency question to the procedural Appeal Sheriff. This would provide a mechanism similar to rule 40.10(2) of the Rules of the Court of Session. That rule provides that where the Deputy Principal Clerk of Session considers that an appeal may be incompetent, he or she may refer the question of competency to a procedural judge.

Determination of procedure (rule 6.6)

30. With the exception of the types of appeal set out in rule 6.1 (e.g. simple procedure appeals under proposed new Chapter 29A, stated case appeals under Chapter 30, etc.), all appeals must be allocated to either procedure before Appeal Sheriff or procedure before three Appeal Sheriffs under rule 6.6.²
31. It is proposed that improvements should be made to the rule 6.6 test, as follows:
 - Revised rule 6.6(1): This provides that the rule does not apply to appeals ordered for urgent disposal (for which bespoke procedure will be ordered).
 - Revised rule 6.6(3): This revised paragraph (3) amends the existing test, including the addition of a proportionality element to the test. The procedural Appeal Sheriff is required to take into account the representations of parties as to the appropriate procedure; the value and importance of the claim; the complexity of the issues of fact and law; and the presumption in paragraph (4).

² It is intended that under the new policy proposals, rule 6.6 will also not apply to appeals which have been ordered for urgent disposal. In those appeals, the procedural Appeal Sheriff will order bespoke procedure suited to the needs of the appeal.

- Revised rule 6.6(4): This revised paragraph (4) states that several types of appeals against procedural decisions will be presumed suitable for procedure before one Appeal Sheriff, in the absence of special circumstances. It also adds two other categories of appeal to the existing categories presumed suitable for procedure before one Appeal Sheriff: appeals against decisions granting interim or summary decree, and appeals against a decision sisting an action.

Representations (rule 6.7)

32. Currently, rule 6.7 provides that any person to whom an order under rule 6.6 has been made may make representations, in objection to the procedure provisionally appointed, within 14 days of intimation.
33. It is proposed that this rule should be deleted and there should no longer be a period set aside for the lodging of objections. This is no longer considered necessary, in light of the proposal that the decision on procedure will be made taking account of all parties' views. The removal of the objections period is intended to improve efficiency.
34. In an urgent appeal, it should remain open to either party to object to the decision to appoint an appeal to urgent disposal; and where a party does object, there should be a hearing.

Proposed Chapter 6A

35. Currently, provision for accelerated appeals is contained in Chapter 27. As mentioned above, it is proposed that the accelerated procedure should be renamed "procedure before one Appeal Sheriff". It is proposed that this chapter should be moved to proposed new Chapter 6A. This is intended to improve the structure of the rules. Currently, Chapter 27 prescribes that the Clerk must fix a hearing and intimate the date and time of that hearing to parties. No further procedure is prescribed.
36. It is proposed that new Chapter 6A should also require parties to provide notes of argument and authorities, where ordered to do so by the procedural Appeal Sheriff. It is also proposed that any party may apply to sist an appeal under Chapter 6A.

Timescale for lodging appendix (rule 7.10)

37. Currently, rule 7.10 provides that the appellant must lodge an appendix no later than 7 days before the procedural hearing.
38. The short 7 day period between lodging of authorities and the procedural hearing has, in practice, caused operational difficulties. It is therefore proposed that the deadline should be changed to 14 days before the procedural hearing.

Timescale for giving notice that appendix not required (rule 7.11)

39. Currently, rule 7.11 provides that where the appellant considers that it is not necessary to lodge an appendix he or she must give written notice of that fact no later than 7 days before the procedural hearing.
40. The short 7 day period between giving notice and the procedural hearing has caused operational difficulties in practice. It is therefore proposed that the deadline should be changed to 14 days prior to the procedural hearing.

Timescale for lodging notes of argument (rule 7.12)

41. Currently, rule 7.12 provides for the content of notes of argument and related procedure. It provides that the parties must lodge notes of argument no later than 7 days before the procedural hearing.
42. The short 7 day period between lodging of notes of argument and the procedural hearing has, in practice, caused operational difficulties. It is therefore proposed that the deadline should be changed to “the date specified in the timetable”. This is to provide the procedural Appeal Sheriff with the ability to assess the timescales for notes of argument on a case by case basis, providing maximum flexibility as far as notes of argument are concerned.

Timescale for lodging estimates of duration of appeal hearing (rule 7.13)

43. Similarly, current rule 7.13 provides that parties must lodge estimates of the duration of any appeal hearing not later than 7 days before the procedural hearing.
44. The short 7 day period between lodging of estimates and the procedural hearing has, in practice, caused operational difficulties. It is therefore proposed that the deadline should be changed to 14 days prior to the procedural hearing.

Authorities (proposed rule 7.14A)

45. Currently, provision on authorities is contained in Practice Note No.1 of 2016, rather than the rules themselves. It is proposed that provision on authorities would be better contained in the rules.

Transfer to other procedure (proposed rule 7.18)

46. Proposed new rule 7.18 would allow the procedural Appeal Sheriff, of his or her own accord, or on the application of a party, to order that an appeal appointed to procedure before three appeal sheriffs, should instead proceed under procedure before one appeal sheriff.

47. This is intended to provide flexibility, but it is anticipated that this power would rarely be used in practice.

Abandonment of appeal (rule 9)

48. Currently, rule 9.1 provides that an appellant may apply to the Court to abandon an appeal by lodging a minute of abandonment. There is no requirement to lodge a motion.

49. The lack of a requirement to lodge a motion has, in practice, caused operational difficulties. It is therefore proposed that the appellant must, at the same time as lodging a minute of abandonment, apply by motion to abandon in terms of the minute of amendment.

50. It is not anticipated that this proposal would entail any additional cost implication for parties. Under the current SAC Fees Order,³ there is no fee for lodging a relevant written motion where it accompanies a minute.

51. It is also proposed that rule 15.1 should be amended to make clear that the procedure in Chapter 15 will not apply to a minute of abandonment.

Amendment of sheriff court pleadings (rule 16)

52. Current rule 16.1 provides that any party to an appeal may apply by motion to amend the pleadings in the sheriff court process.

53. The sheriffs principal and the clerks have identified an issue with the requirement for a motion only to be lodged, with no minute of amendment.

54. It is therefore proposed that rule 16 should be amended to include a requirement for a minute to be lodged along with the motion to amend the pleadings.

55. It is not anticipated that this proposal would entail any additional cost implication for parties. Under the current SAC Fees Order, there is no fee for lodging a relevant written motion where it accompanies a minute.⁴

56. It is also proposed that rule 15.1 should be amended to make clear that the procedure in Chapter 15 will not apply to a minute of amendment.

Appeals from summary causes – timing of decision (rule 29.5)

³ The Sheriff Appeal Court Fees Order 2018 (2018/82), Schedule 1.

⁴ *Ibid.*

57. Chapter 29 prescribes the procedure in summary cause and small claim appeals. Rule 29.5 currently provides that, where the Court reserves judgment, it must give its decision in writing within 28 days.
58. The sheriffs principal have advised that it would be helpful for rule 29 to include a power (vested in the President of the SAC, whom failing the Vice-President) to grant an extension to the 28 day period.

Appeals by stated case under Part 15 of the Children’s Hearings (Scotland) Act 2011 – timing of decision (rule 30.4)

59. Chapter 30 prescribes the procedure in appeals by stated case under Part 15 of the Children’s Hearings (Scotland) Act 2011. Rule 30.4 provides that where the Court reserves judgment, it must give its decision in writing within 28 days.
60. The sheriffs principal have advised that it would be helpful for rule 30 to include a power (vested in the President, whom failing the Vice-President) to grant an extension to the 28 day period.

Simple Procedure appeals (proposed Chapter 29A)

61. The existing rules are silent on the procedure to be followed in simple procedure appeals. The procedure is governed by rule 16.4 of the Simple Procedure Rules.
62. It is proposed that it would be helpful for prospective litigants if the rules include a signpost to rule 16.4 of the Simple Procedure Rules.

Schedule 1

63. Paragraph 1(1) of Schedule 1 provides that the quorum of the Court for the types of business specified in subparagraph (3) is one Appeal Sheriff. Paragraph 1(2) of Schedule 1 provides that the quorum of the Court for any other business is three Appeal Sheriffs.
64. It is proposed that the list of types of business in paragraph (3) should be expanded. By virtue of inclusion in the list, it will be possible for the additional types of business to be heard by one (or more than one) appeal sheriff.