

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL**

**RULES REWRITE COMMITTEE**

**MONDAY, 19 JUNE 2023**

**Judges Dining Room, Level +1, Parliament House**

**MINUTES**

**Present:** Lord President (Chair)  
Mark Boni  
Sheriff Kenneth Campbell KC  
Joel Conn  
Ian Dickson  
Summary Sheriff Roddy Flynn  
Jaqueline Harris  
Lord Richardson

**Apologies:** Walter Drummond-Murray

**Unable to Connect:** Duncan Hamilton KC and Lord Colbeck

**In Attendance:** Jonathan Brown (Parliamentary Counsel Office)  
Chris Fyfe (Deputy Principal Clerk of Session)

**Support:** Jessica Flynn (SCJC)  
Craig McCorkindale (SCJC)  
Graeme Welsh (SCJC)

**Item 1 - Welcome, apologies and agreement of private papers**

1. The Chair welcomed the Committee members present, and noted the one apology received.
2. The Committee agreed not to publish papers 3.1, 3.1A, 3.2, 3.2A and 3.2B.

**Item 2 - Updates since the last meeting**

*Item 2.1 - Items by Correspondence (Paper 2.1):*

3. The Committee noted the one item considered by correspondence:

**Paper 2023/14** – approved the minutes of the previous meeting on 27 March 2023. Those minutes are available online.

**Item 3 - Work Programme:**

*Item 3.1 – Discontinuing use of the signet (Papers 3.1 & 3.1A):*

4. **The Committee noted the drafting instructions agreed by the Council for the Electronic Transmission of Document Rules, which will introduce a court interlocutor (the Order for Service) to provide a warrant for service. This would replace the historic requirement for a summons to pass the signet.**
5. The risk of references to passing the signet (within historic Acts) proving a barrier to its withdrawal was discussed along with the mitigations addressing that risk. Whilst the risk of future legal challenge could be mitigated further if that change was made by primary legislation, identifying an appropriate legislative vehicle would add unnecessary delay. It was concluded that the Council's existing powers to change procedure via secondary legislation are sufficient. To provide a reasonable time for objections, the proposed letters to the King, Keeper of the Signet and the Writers of the Signet will need to go in advance of the secondary legislation being implemented.
6. **The Committee agreed to the issue of letters to the Sovereign, the Lord Clerk Register, the Keeper of the Signet, and Writers of the Signet to provide awareness that (on the introduction of the new rules) civil actions in the court of Session will no longer be initiated in the Kings name.**
7. The introduction of an Order for Service will provide comparability with the process for a warrant for service within the sheriff courts. Given the importance that practitioners place on evidencing service, a small risk of legal challenge will remain.

*Item 3.2 – Consulting on the Ordinary Procedure Rules (Papers 3.2, 3.2A & 3.2B):*

8. The Committee considered version 3 of the proposed new rules.

*Rule 8 (JB49) Intimation of a potential case; and  
Rule 9 (JB50) Response to intimation of a potential case*

9. With pre-action protocols the intention is to encourage reasonable communication in advance of proceedings. Rules 8 and 9 could be pitched too high if a party could just issue a letter and proceed to serve a summons. Whilst that may be sufficient for undefended simple debt cases the Committees expectation is higher with cases which are likely to be defended. England and Wales uses sanctions, but policing non-compliance would be time consuming and may not provide sufficient added value. The original policy intent was to seek the parties' views in order to help support the subsequent case management discussions, rather than set too high a bar.

### Rule 13 (JB55) Service of a Summons

10. Some wording may have been omitted from rule 13 (2), which is too limiting.

### Rule 16 (JB 59) Counterclaims – permission:

11. Paragraph 2.29 of the Procedural Narrative requires permission when lodging a counterclaim. The Committee discussed the further background provided on the working groups thinking and the similarities with “passing the signet” which reflects the granting of permission to serve a summons. Having a requirement for leave does support the expectations for case management. If leave is refused, the party can raise a separate action. The underlying concern is about the workload generated when requiring permission: is it mandatory or a matter of discretion; is it meant to be a swift process with oral reasons or require detailed written submissions; could the rules just signpost specialised guidance to draw out the distinctions needed between ordinary and commercial actions etc.

**12. The Committee agreed to revisit the requirement for permission, once consultation feedback from the profession is available.**

### Thresholds based on word counts:

13. The inclusion of word count thresholds sends the right message about maintaining the brevity of pleadings, providing the appropriate safety valves are in place. However, excessive wording is more of a problem at the ‘adjustments’ stage, compared to the content of the summons, defences or counterclaim. The extent of a potential for tables and schedules to circumvent the word count was discussed. The conclusion was that the way forward was to introduce initial thresholds to test how well they work, and to change then if necessary.

**14. The Committee agreed to test initial thresholds of 5,000 words for the summons, defences and counterclaims.**

15. England and Wales opted to use page numbers rather than word counts. Their judiciary are strict in the application of those numbers.

### When to start consulting users?

16. Whilst a lot of things remain to be clarified within individual rules, the conclusion is that they are now at a critical mass whereby it is sufficient to expose them to wider scrutiny. Gaining that feedback from the profession at this stage will support continuous adjustment of the way in which the Committee approaches this comprehensive rules rewrite over the coming years.

**17. The Committee agreed that:**

- **The draft rules are now sufficiently well developed to start seeking wider external views via a three month Targeted Consultation; and**

- **The consultees and the supporting consultation papers should be approved by correspondence.**

18. For implementation a big bang approach remains the most probable, but that will need to be revisited in due course. Piloting in the one court (or Sherifffdom) would provide learning opportunities but equally the complexity of the changes to IT systems may be simpler if applied to all courts at once.

#### **Item 4 - Any other business**

19. There was no other business raised.

#### **Item 5 – Dates of future meetings**

20. The revised date of the next scheduled meeting is 5 September 2023.