

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL  
RULES REWRITE COMMITTEE**

**TUESDAY, 31 MAY 2022**

**Judicial Institute, Level -2 Parliament House**

**MINUTES**

- Present:** Lord President (Chair)  
Joel Conn  
Ian Dickson  
Walter Drummond-Murray  
Summary Sheriff Roddy Flinn  
Duncan Hamilton QC  
Jaqueline Harris  
Lord Richardson
- In attendance:** Craig Anderson (Offices of the Court of Session)  
Johnathon Brown (Parliamentary Counsel Office)  
Ysabeau Middleton
- Support:** Craig McCorkindale (Scottish Civil Justice Council)  
Graeme Welsh (Scottish Civil Justice Council)  
Jessica Flynn (Scottish Civil Justice Council)
- Apologies:** Nicola Anderson (Legislation Implementation Team, SCTS)  
Mark Boni  
Sheriff Principal Turnbull  
Sheriff Kenneth Campbell QC

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

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

**Item 2 - Update since last meeting**

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

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

**Paper 2022/11** – approved the minutes of the previous meeting on 26 April 2022 (which can be viewed online).

*Item 2.2 – Publishing the Procedural Narrative (oral Update)*

4. Paragraph 2.28 has been amended and the remaining items in square brackets are being finalised. A draft media release has been prepared.

**Item 3 - Work programme**

*Item 3.1 – Ordinary Civil Procedure (Papers 3.1 and 3.1A):*

5. The Committee considered a number of the policy questions posed within the paper that accompanied the draft rules:

Rule 2 (JB70) – Overview

6. The way the rules had been organised into parts and chapters was seen to deliver on the goal of improved readability. Some longer headings would benefit from being more concise. Rule 7 is a placeholder for chapter overviews, which will be considered at a future meeting.
7. The draft rules follow the numbering system which is used for primary legislation. Reverting to the classic numbering system for rules may help minimise renumbering when making future amendments.
- 8. The secretariat is to review and update the relevant section of the Style Guide; on the numbering system for rules.**

Rule 3 (JB31) – Purpose:

9. The draft rule suggests the words “and expeditious” are inserted at 3(1) and 3(2) to provide consistency with the phrase “...*just and expeditious resolution of disputes*” which is repeated elsewhere within the draft rules, and Procedural Narrative. The Committee concluded that the need to keep pressure on the timing is captured sufficiently in 3 (2) (b) of the purpose statement. Consistency would be better achieved by removing the use of the phrase “just and expeditious” where it appears elsewhere within these rules.
- 10. The Committee agreed that the words “and expeditious” should not be inserted into rule 3, and was otherwise content with the revised wording.**

Rule 10 (JB51) - Commencing a case:

11. The Committee considered a proposed amendment to the Style Guide:  
*To avoid duplication, a rule should not repeat the information which a user would readily find within an accompanying form / online application.*
12. That proposition reflects the natural tension that arises when deciding on the level of detail set out within a rule when compared to that in a Form that accompanies that rule, particularly where the required content needs to be rendered within an online App. The need to avoid repetition and to simplify the rules is accepted but there was a sense that this proposed change could be a step too far. In practice a judge expects to find the substantive requirements within the rule.
13. The draft content of a detailed Form can be a better place to start in terms of paring down the substantive elements that do need to be stated within a rule.
- 14. The Committee will revisit the policy question on the balance to be struck between rules and forms, once forms start to become available.**
15. It is implicit within these draft rules that the signetting of documents would become a thing of the past. A nervousness remains that some old legislation may represent a barrier.
- 16. The Secretariat is to review the policy position on signetting, and update the committee in due course.**

Rule 12 (JB54) – Order for service of a summons &  
Rule 13 (JB 55) – Service of a summons:

17. The Committee discussed whether there was a need for any further alignment in the methods of intimation and service. The draft rules provide seven ways to intimate something and four ways to serve something. In practice the terms are used interchangeably, and over time the distinction will become increasingly blurred given the move to electronic transmission.
- 18. The Committee agreed that, in due course, it should revisit the policy question on aligning the methods of intimation and service.**

Rule 14 (JB57) – Defences:

19. This draft rule implies that the 28 day limit for the lodging of defences runs from the day on which the summons was [served]. The query is whether that 28 days should run from the day on which notification was given, rather than the day on which it was received.

**20. The Committee agreed that the 28 days for lodging defences is to run from the date on which notification was given.**

Rule 16 (JB59) – Counterclaim:

21. The Committee considered two options for handling counterclaims:

- All counterclaims must be made using the application form irrespective of the time when they are being lodged in process; or
- Counterclaims should be made using the application form, except where the counterclaim is made within the defences lodged.

22. There is a lot of variation in practice. For practitioners the danger is putting in all the detail to get the counterclaim accepted at any permission stage, and then having to repeat it all again for case management purposes.

23. The Committee discussed the way in which permission works. The court currently lacks control over how potential counterclaims are being brought in prior to the record stage. Such control could be illusory given that a party can simply elect to make a standalone claim, rather than a counterclaim. That does beg the question of what the court gains by insisting on permission.

**24. The Secretariat is to review the thinking behind paragraph 2.29 of the Procedural Narrative, and retable this policy question in due course.**

The policy questions remaining from paper 3.1

25. There was insufficient time to consider the remaining policy questions posed within Paper 3.1. Those questions will be carried forward to the next meeting.

Other queries arising:

26. During discussions members flagged the following as matters for consideration:

- Rule 8 (JB49) – Intimation of potential case:
  - *This rule is currently silent on what happens if the pursuer claims to have complied with the pre-action steps but did not?*
- Rule 9 (JB50) – Response to intimation of intended action:
  - *This rule awaits amendment for the changes made to paragraph 2.28 of the Procedural Narrative.*
- Rule 11 (JB53) – Registration of summons:

- *The reference to legally represented may require a tighter definition than currently provided for (within the interpretation rule).*
- Rule 15 (JB58) – Content and Form of Defences:
  - *Some nervousness remains given the comparison to OCR where if a party does not deny something which is within their own knowledge then they are deemed to have accepted it.*
- The level of assumed knowledge:
  - *The draft rules do require a degree of knowledge which can be found elsewhere. That tension is best addressed by the principle of “less rather than more”.*

***Action Point>> ALL – members are to email the secretariat with their feedback on any other draft rules that warrant attention.***

#### **Item 4 - A.O.B.**

27. No other business was raised.

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

28. The next meeting has been scheduled for:

- Tuesday, 28 June 2022.