



The Clerk

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Glynis McKeand
Secretary to the Sheriff Court Rules Council
Scottish Executive Justice Department
St Andrew's House
Regent Road
Edinburgh
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Dear Glynis

WS Response

The WS Society is an organisation whose membership extends to just over one thousand solicitors across the whole of Scotland. As an organisation of solicitors, many of whom are specialist litigators, the Society is grateful for the opportunity to submit this response to the Sheriff Court Rules Council Consultation Paper. The proposals contained within this paper are seen as a positive step for the improvement of services by the courts administration through the use of information technology. The law is a knowledge business and increased use of information technology is essential in delivering legal advice to clients. In addition these proposals are welcomed as increasing public access to justice

The response has been prepared by Laurel Wheatley WS and by the Clerk.

RECOMMENDATIONS FOR ORDINARY CAUSE AND SUMMARY APPLICATIONS

1. Electronic transmission, lodging and storage of the following documents should be competent:

- (a) Initial Writs/Petitions/Applications
- (b) NID
- (c) Defences/Answers
- (d) Closed Record
- (e) Motions
- (f) Minutes

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Note: For the avoidance of doubt it is not anticipated that productions for proof will be electronically stored at this stage. This issue will be looked at separately.

1.1 Do you consider this proposal to be a step in the right direction?

The opportunity to transmit the above types of documents is a welcome step in the right direction. The electronic transmission, lodging and storage of documents already occurs sporadically within the Scottish Courts. The current practice within the Commercial Cause in Glasgow Sheriff Court is that pleadings and motions can be emailed directly to the Sheriff. This has proved convenient and efficient to solicitors using the system.

The filing of steps in process is becoming mainstream practice within the English Courts and other courts worldwide. Some courts in England and Wales are accepting documents electronically. It is possible to initiate Small Claims Actions on line using the Moneyclaim website. In America, courts across the country are adopting an e-filing system with companies such as E-filing.com and LexisNexis developing court-sanctioned e-filing systems into widespread use.

This proposal would align the Scottish Courts Administration with now widespread practice of doing business on-line.

1.2 What would the advantages be?

Transmission and Lodging

This proposal would offer greater flexibility to the court practitioner.

It would mean that solicitors could transmit and lodge documents at any time, rather than doing so within court opening hours. Electronic transmission is nearly immediate and so a solicitor would be able to work on a document right up to the deadline for lodging it. Using a system of hardcopies, a solicitor is constrained by the times of postal or DX delivery and has to have a hard copy ready by 4:45 the day before in order to meet the post.

It has the potential to reduce the amount of support staff within a firm, as it could reduce the amount of photocopying and other time spent preparing hard copies. It could reduce the need for court runners and couriers.

Storage

Once documents are transmitted and lodged, responsibility lies with the Court

Administration to store the documents in process. From a court solicitor's perspective, the advantages to electronic storage might be that there would be more immediate access to documents which are stored. If a website system is developed, parties solicitors may not need to visit the Sheriff Clerk's office in person in order to view and borrow parts of process. This would reduce the need for out of town solicitors to instruct local agents to borrow

process. It would also reduce demands on the 'counter-staff' within the Sheriff Clerk's office.

Another potential benefit which might arise out of electronic storage is that it can be easily searched. It could prove to be a valuable tool for archival research (government research, academia, historians etc). The information contained within the court documents may be of interest to a wide range of researchers. If this information is more readily accessible in electronic form, it may facilitate research. Actions raised within the courts might offer a reflection of broader issues of Scottish society. A system which facilitates study could be an important tool in legal and educational research, and ultimately an important public benefit.

Electronic storage of court process might facilitate use of Alternative Dispute Resolution forums, such as mediation. A mediation service is presently offered in Edinburgh Sheriff Court and it is hoped to extend such services across other courts in Scotland. It might assist Mediation services within each court if there was easier access to the documents lodged in process.

1.3 What would the disadvantages be?

It could potentially restrict access to the courts if a litigant (either a party litigant or a firm of solicitors) did not have access to the internet or use of email. The proposal will require court users to make some investment in computer technology. If this sort of investment is necessary to access the courts, it may act as a barrier to those who cannot afford it, or those who are unable or prevented from using it. The gains made in efficiency and cost savings may be at the expense of access to justice.

The consultation paper makes no mention of an accompanying electronic method of payment of administration fees. Some form of electronic payment method may need to be developed to be used in conjunction with electronic lodging, otherwise there would be duplication of paper work. For example, a NID might be lodged electronically, but a cheque (or a Form E200, credit charging arrangement) would have to be sent later with a covering letter and perhaps a hard copy of the NID which was first lodged.

1.4 What impact do you think this proposal would have on the litigant?

There are still firms in Scotland who do not use the internet or email extensively. For these firms, an investment in the appropriate technology will be necessary to carry out litigation in the future. The financial investment will have to be accompanied by an investment in time for training both solicitors and support staff in how to use a new system.

It may also have an impact on a party litigant who may not have access to the internet.

The public accessibility of any website based system may need to take into account provisions for those with disabilities, such as the visually impaired.

1.5 Do you have any general comments to make?

These proposals do not include all documents which need to be lodged. For example, certificates of intimation of motions are not mentioned. If certificates of intimations are not

accepted electronically, then they would need to be sent in as a hard copy, and there would be no reduction in paperwork with respect to motions. The motions lodged electronically would be followed by hard copy correspondence with certificates of intimations, likely enclosing a hard copy of the motion.

The transmission and lodging of documents would rely on a server which functioned properly. There may need to be consideration for the possibility that the court administration server 'went down' at some time. If that were to happen, documents might have been submitted on time, but were ultimately received late. Consideration must be given to back up systems in the event of server problems.

1. All interlocutors pronounced by the court (including warrants granted by sheriffs and clerks) should be transmitted electronically to agents (party litigants too where they wish to avail themselves of this service).

1.1. Do you consider this proposal to be a step in the right direction?

Emphatically yes. This is already being done in the Commercial Roll in the Court of Session.

Warrants and certified copies of interlocutors might require a higher degree of sophistication in respect of a digital signature. Please see below in respect of signatures. It would lead to the correction of errors in interlocutors promptly while memories are fresh.

1.2. What would the advantages be?

It would be convenient to solicitors and it would provide consistency across courts, as not all send copies of interlocutors as a matter of course.

1.3. What would the disadvantages be?

The Courts Administration should consider a means for keeping an up to date email address for every agent in an action. The email contact address should be noted at the outset of each action and the courts should be encouraged to use the litigants own reference numbers. Hard copies of interlocutors are presently posted to a firm's postal address, without the firm's internal reference. In larger firms, a considerable number of interlocutors arrive in the post everyday with no internal reference number and staff must do a search within the firm to find the solicitor responsible for the case. This problem may transfer to the emailing of interlocutors if they are posted to a generic email address rather than to a specific individual within the firm. Problems could arise if the courts were simply to email interlocutors to 'mail@firmname.co.uk' addresses. Firms would need to allocate staff to check a specified email address for all incoming interlocutors. While it would be of great convenience to have interlocutors sent to solicitors, a risk management issue arises. Historically, partners supervised incoming post. This helpful practice has been significantly disrupted by the increased use of email. It would be helpful if the courts administration could work with firms to accommodate the useful facility of emailing interlocutors. The

emails need a reference to the solicitor acting yet must also be available to the management of that solicitor's firm.

1.4. What impact do you think this proposal would have on the litigant?

See Answer 1.4 above

1.5. Do you have any general comments to make?

See above

2. The system should be operated by use of a website that provides positive confirmation of receipt.

2.1. Do you agree with the option of using a website?

The use of a website, rather than being email based, will provide structure and consistency to the courts administration. It will ensure that information is sent into the court in a consistent format.

2.2. Do you have any comments on any advantages?

It will offer consistency to the courts administration.

2.3. Do you have any comments on any disadvantages?

It will force users to adhere to the particular format chosen by the courts administration. The forms of the documents proposed in recommendation 1 are often detailed and lengthy written pleadings, for example, an initial writ. Any forms based on a website should have no restrictions on length or number of words/characters inputted into any field.

If it is to be a website based system, it would be desirable to be able to save a document in draft form before it is submitted because a user may not be able to complete the entire form in one sitting. Accordingly, there should be a means to save drafts for editing purposes before they are submitted.

If such a 'drafts system' was included, then consideration would need to be given to how those drafts are accessed and by whom. A recent working example of this arose with the Stamp Duty website. The forms are very detailed and cannot always be finished in one sitting. Provision was made to save drafts. However the drafts were saved by firms. On returning to the firm's "draft section", a user was often faced with numerous other drafts, being worked on by other solicitors in the firm.

If a website is to be used, it would be desirable to be provided with a copy of what is submitted. Ideally, this would accompany the confirmation of receipt. Alternatively, there should be a function which permits the user to print what is submitted. It would be desirable for the solicitor to be able to save a copy of the submitted document in electronic form also.

2.4. Do you have any general comments to make?

4. After a short pilot scheme the system should be introduced in all the courts in Scotland.

2.5. Do you agree that the system should be introduced across the whole of Scotland?

Pilot schemes are essential in introducing any new technology, and will assist in working out any 'snagging' issues within the system before it is introduced to the rest of the courts in Scotland.

2.6. Do you have any comments on any advantages?

See 4.1 above

2.7. Do you have any comments on any disadvantages?

A pilot scheme would mean that only certain courts would be using the system. It would involve different procedures across courts. The onus would fall on the court users to remember which scheme is in use in each court.

2.8. Do you have any general comments to make?

There is no mention of any review procedure for the pilot scheme. A comprehensive review system would need to be established before any system was implemented throughout the whole of the courts across Scotland.

The recommendation refers to the cost implications for solicitors in relation to the purchase of the necessary software to access the system. There could be public policy implications with respect to the type of software used. There could be copyright issues - and subsequent licence fees - in using a particular type of software.

There could be political and competition issues attached to the use a type of software. For example, a common format for sending documents is by PDF. The copyright for that is owned by Adobe. This software is presently provided without charge, but this situation could change in the future, and users may be faced with licence costs to use it. The courts administration might consider open source software for the sake of flexibility.

5. The electronic system should be operated by the Scottish Court Service in parallel with a paper system for a period of 2 years after its introduction. Thereafter it is proposed that only in limited or exceptional circumstances or on cause shown should the paper system be used by solicitors.

5.1 Do you agree with using parallel systems initially?

Yes. A parallel system would enable the court service to monitor the effectiveness of the system.

- 5.1 Do you have any comments on any advantages?
- 5.2 Do you have any comments on any disadvantages?
- 5.3 What period of time would you suggest?

In our view paper filing should always remain competent. Computing is not yet reliable or secure enough to make a ban on paper filing desirable.

- 5.4 What should the exceptional circumstances be?
- 5.6 Do you have any general comments to make?

We refer to answer 5.3 above. It is recommended that there should be no requirement on solicitors to use the system after any period. The success of the system will be reflected in the number of solicitors who begin to use it voluntarily. If the system which is introduced is not efficient, court solicitors should not be forced to continue to use it. It may be that the new system results in more work and more administration cost for the users. If the new system is unpopular and inefficient, then that will likely be reflected in the uptake and use of it. If there is no requirement on party litigants to use it, then there should be no requirements on solicitors.

- 6. There should be a statutory provision that removes the need for a manual signature.
- 6.1 Do you agree with this proposal?
- 6.2 What do you see as advantages?
- 6.3 What do you see as disadvantages?
- 6.4 Do you have any general comments to make?

The Electronics Communications Act 2000 (section 7) and the rules of court allow the use of electronic signatures, so there may be no need for a specific statutory provision that removes the need for a manual signature.

There are a number of functions of a traditional ink signature. One is to identify the person signing the document. Digital signatures accomplish this function in that they are unique. Encryption technology is sophisticated enough to ensure that digital signatures can be used safely.

Another function of ink signatures is that they provide evidence of that person's intention to be bound by the document. It identifies the document that contains the agreement of the parties (or perhaps distinguishes one document from many preceding versions or revisions of that document). During the course of a court action, records can be adjusted and amended, and there will be a number of versions of it before and after the closing of the record. A common concern about Word documents is that they can be easily altered. However, there is software available to detect if any changes have been made to a document after a digital signature has been applied to it.

Digital or electronic signatures can fulfil these traditional functions of an ink signature. Digital signatures can be verified. Software is available to detect if any changes have been made to a document after a signature has been applied to it.

password is. If a solicitor were to withdraw from acting, or if a party were to dismiss his or her solicitor, a new password could be issued to that party.

8. There should be a centralised virtual court. In the first place all such actions would go electronically to this single site and unless defended or otherwise required a hearing would be dealt with entirely electronically at this site.

8.1 Do you consider this proposal to be a step in the right direction?

This proposal would follow the system used by the Employment Tribunals and could prove to be much more efficient.

8.2 What would any advantages be?

The advantages would be a specialised centralised practice with specialised support staff to deal with all actions at the initial stage. It would be convenient and more efficient to solicitors who deal in high volume debt recovery work.

8.3 What would any disadvantages be?

The disadvantages might be that it restricts access to justice for the party litigant. As the system stands, party litigants can be given a great deal of assistance from the Sheriff Clerk in lodging the correct forms and following procedure. There is a personal element for the party litigant who can go along to his or her local court and obtain assistance from the Sheriff Clerk's office. If the system were to be centralised in a virtual court, this local and personal resource might disappear.

8.4 What impact do you think this proposal would have on the litigant?

See 8.3 above

8.5 Do you have any general comments to make?

9. The Sheriff Clerk should serve all summary cause and small claims actions.

No.

9.1 Do you consider this proposal to be a step in the right direction?

No

9.2 What would any advantages be?

See 9.4 below

9.3 What would any disadvantages be?

See 9.4 below.

9.4 What impact do you think this proposal would have on the litigant?

The litigant would be in the hands of the Sheriff Clerk to effect service. Some sort of protection in respect of time bar will be required, particularly where the pursuer is a party litigant. This proposal would transfer responsibility for ensuring service from the litigant to the Sheriff Clerk. The proposal will result in more work for the Sheriff Clerk in cases where postal service is not effective. The change may disrupt competition between sheriff's officers.

9.5 Do you have any general comments to make?

See 9.4 above.

10. The Secretariat should search the primary and secondary legislation to identify where changes will be required.

10.1 Do you have any suggestions on where changes should be made?

The Rules of the Court, Acts of Sederunt, controls on Sheriffs Officers and Practice Notes will all have to be considered.

The Society would be happy to comment on any detailed proposals to come out of the process and to contribute to any working group formed. Let us know if we can help in any way.

Yours sincerely

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Clerk