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30 November 2004

Ms. Glynis McKeand,
Secretary to the Sheriff Court Rules Council,
Scottish Executive Justice Department,
St Andrew's House,
Regent Road, Edinburgh, EH1 3DG

Dear Ms McKeand,

**DISCUSSION PAPER ON INFORMATION TECHNOLOGY IN CIVIL
CASES IN THE SHERIFF COURT**

Please find enclosed the Faculty's approved response.

Yours sincerely,

 Andrew F. Stewart

Encl.

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FACULTY OF ADVOCATES

Response

by

Faculty of Advocates

on

Sheriff Court Rules Council

Consultation Paper

**Proposals for Further Extension of the use of
Information Technology in Civil Cases in the Sheriff Court**

Introduction:

The Faculty believes that the use of information technology in the Court system has a great capacity to increase the efficiency of the conduct of business, bringing with it welcome savings in the cost of litigation. It has long been recognised by the profession and the public that some aspects of the present civil litigation procedures tend to be inefficient and productive of delays. Pressures on court resources contribute to such delays, and anything which can be done to relieve these pressures is to be welcomed.

The Faculty is also aware of the substantial increase in efficiency that has been experienced in Singapore as a result of the enthusiastic adoption in that jurisdiction of electronic filing of court documents and of "virtual" procedures. This has evoked a positive response amongst those litigants who are in a position to "forum shop" in that the greater efficiency has attracted an increase in such litigation in Singapore, to the detriment of neighbouring jurisdictions.

The Faculty believes that a similar approach in Scotland is capable of delivering a system which will be perceived by commercial litigants as giving this jurisdiction a competitive edge, as well as bringing real benefits to the wider public.

However, the Faculty is also aware that for the full benefits of such a change in the system to be felt, as bold and committed an approach as was taken in Singapore is necessary. The Faculty is encouraged by the radical nature of the present proposals so far as they go, but believes that if the full benefits of such a change of culture are to be obtained these proposals should be seen as the first step, rather than the end of the process.

Although the Faculty appreciates that this is an initiative of the Sheriff Court Rules Council, and is therefore restricted in its scope to the Sheriff Court, the Faculty would express its hope that similar proposals would be brought forward for the conduct of business in the Court of Session.

Against that background, the following responses are made.

Responses:

- 1.1 As noted above, the Faculty welcomes the present proposals as very much a first step in a process which it hopes will be ongoing.
- 1.2 A major advantage would be to increase the speed and efficiency of court actions. This would in turn help to secure a competitive advantage for the Scottish Sheriff Court system in the eyes of litigants in the commercial world.
- 1.3 The principal potential risks come in relation to security and the reliable archiving of data. These are by no means contraindications to proceeding with an entirely desirable reform, but it is worth highlighting these issues as matters which will require detailed attention at the implementation stage.
- 1.4 There ought to be increased efficiency and speed of delivery resulting in cost savings once the system is established. Commercial litigants may view a more efficient system as giving Scotland a competitive edge in litigation.
- 1.5 Generally, the considered expansion of IT within the court service is thought to be a positive step. There are some important administrative and practical issues that require to be considered at an early stage:

 - 1 If electronic transmission, lodging and storage of documents is permitted, what is to be the form of the original Initial Writ, that is to say, what will be used for service? It is assumed that service will normally be by means of a paper document but provision should be made for electronic service in appropriate cases. It may be that the question of how to achieve (and prove) effective electronic service as well as the question of just what are the "appropriate cases" lies beyond the scope of the present rule changes and should be made the subject of fuller consultation at a later stage of the reform process; but the Faculty can see no impediment at the present stage to permitting electronic service in cases where a defender has indicated that he is prepared to accept service electronically.
 - 2 Following on from this, it may be that the provisions for proof of execution of service will have to be considered.
 - 3 It is to be envisaged that the Sheriff Court Rules will permit and in due course require electronic adjustment to the Initial Writ and Defences. The system presently followed in most Sheriff Courts of requiring Notes of Adjustment is unduly cumbersome when compared with a system which permits the marking up of changes on a running basis (for example, the Open Record system used in the Court of Session). With the Initial Writ and Defences, in digital form there would be great efficiency gains to be obtained by allowing adjustments also to be marked up digitally. It is suggested that serious consideration should be given to amending the Rules to require the use of an electronic Open Record, or at least versions of the Initial Writ and Defences which "track changes".

- 4 Any system introduced should be flexible enough to allow, at the next stage of reform, the integration of electronically stored productions. This is considered vital to the development of IT use within Sheriff Courts.
- 5 The presentation of electronic documents during Court hearings is an issue that requires consideration at this stage, as there may be resource implications. For example, is the intention to have all documents available in electronic format for viewing on monitors or laptops by all parties?

2.1 This, again, is a step in the right direction. It is noted that the proposal is to allow transmission of such interlocutors, but there remains the question of the form of the principal interlocutor and the authenticity of copy interlocutors. As to the principal interlocutor, is this to continue to be on paper, with an ink signature thereon? Given that the principal documents are to be in electronic form, there seems to be no good reason for principal interlocutors not to be in the same form, provided that appropriate technical measures are adopted to ensure authenticity. So far as certified copy interlocutors (CCIs) are concerned, logic suggests that similar provision should be made, but it is appreciated that, for example, the present procedures for diligence are predicated on a requirement for paper. The Faculty believes that consideration of this question underlines the need for a wider review of procedures in which such questions may properly be addressed. Any such review will require to extend beyond the Rules Council and involve other agencies such as the Registers of Scotland, and those with responsibility for addressing questions of substantive law, whether the Scottish Law Commission or the Scottish Ministers. Pending such a wider review, the Rules will require to make provision for the continued availability of paper CCIs.

2.2 There will be a clear advantage of increased efficiency for both users and for court administration.

2.3 As discussed above, it is envisaged that there will still be a need for CCIs in paper form. For the reforms to be taken on, there will require to be a more comprehensive review so as to minimise the potential risks inherent in different agencies developing IT models in isolation. Consideration should be given to the inter-agency integration of electronic documents. It seems to the Faculty that even at this stage, there could be discussions with the Registers of Scotland concerning the feasibility of registering electronic CCIs as an aspect of the Registers Direct reforms.

- 2.4 See above (2.1 – 2.3).
- 2.5 See response 2.3 above.
- 3.1 Yes.
- 3.2 The website would appear to be the more robust and reliable option. It is also likely to be the more secure option.
- 3.3 The transfer of data from existing systems currently employed by users may have negative cost implications in the short term.
- 3.4 Security and stability of the website are perhaps two of the most important issues for this option. Clearly there will have to be technical input on these issues.
- 4.1 The Faculty would favour as full and as rapid an implementation as possible. To this end, it is agreed that the system should be introduced across the whole of Scotland. It is suggested that it may be beneficial to introduce the system without the need for a pilot if sufficient and adequate testing had been carried out prior to going online.
- 4.2 Having a unified website based system would be likely to deliver clear advantages of uniformity, ease of use and efficiency.
- 4.3 The system will require to be rigorously tested prior to going online (see point 4.1). There may be benefit in co-ordinating with other agencies who are developing, or are likely to develop, website based systems.
- 4.4 Two general comments are made:
- 1 A transition period of about 6 months is considered adequate before the system introduced becomes mandatory.
 - 2 The possibility of "virtual" attendance in Court should be provided for. A clear candidate for such a reform would be Options Hearings, but it may be that the court should have the flexibility to allow "virtual" hearings at other stages of procedure. It may be that this would be by means of relatively old technology, such as telephone conference calls (as currently sometimes happens in the commercial procedure in Glasgow Sheriff Court), but the rules should also make provision to permit such attendance by means of an interactive session through the medium of the web.
- 5.1 It is accepted that there may be a need to have a short transitional period where both systems are permitted, but, provided there has been adequate notice to

allow practitioners to obtain and become familiar with the relevant software, there is no good reason why such a transitional period should be any more than about 6 months, all as discussed above.

5.2 A shorter transition period ought to focus minds on the move to the electronic system. It ought not to create any prejudice given the current climate of IT development in the legal world generally.

5.3 Provided that the transitional period is kept short, the Faculty sees no particular disadvantages.

5.4 Six months should be adequate.

5.5 Three are suggested:

1. Breakdown/failure of Court IT system
2. Breakdown/failure of user IT system
3. At the Sheriff's discretion upon good cause being shown. It is not possible to foresee every situation in which there might be good cause, but the rules should make it clear that the paper system should be limited to very rare occasions.

5.6 Consideration will require to be given to what is to happen to cases initiated under the old procedures. It might be that all such cases should be switched to the new procedure at a particular date or it might be that all such cases should be allowed to run their course under the old system. Though the Faculty has no strong preference, on balance it might be that the latter option is preferable.

6.1 There should, indeed be a statutory provision removing the need for manual signatures. Without such a provision, it will not be possible for meaningful progress to be made in completing the reform process. By way of example, reference is made to the discussion above regarding the form of Initial Writs, execution of service and CCIs.

6.2 This would allow progression to a truly complete electronic system which would serve to unlock the full benefits by way of increased efficiency and cost savings.

- 6.3 There would need to be appropriate authentication for both the signatories and the date. Depending on how far the fuller reform discussed in paragraph 2.1 above has progressed, it is likely that it will still require to remain competent to have a manual signature as an alternative to electronic authentication.
- 6.4 Consideration would have to be given to the application of the best evidence rule in relation to any particular document format and between formats.
- 6.5 The Requirements of Writing (Scotland) Act 1995 would require to be considered. How much further it would be necessary to consider other legislative provisions would depend upon the progress of the discussions desiderated in paragraph 2.1 above.
- 7.1 The whole of the process should be available for viewing online. There should be online 'access' equivalent to what is available at present in the administration department of each Sheriff Court. It is appreciated that for this to be fully implemented the Sheriff Court Rules Council will require to complete its review relating to digitisation of productions.
- 7.2 A password linked to the case reference number might be the simplest and most robust solution, though, if greater security were required, consideration might be given to requiring the use of digital signatures.
- 7.3 It is difficult to know why, in a climate of freedom of information, any documents that are currently available should not be available when the system goes online. The system should protect by appropriate measures access only to those documents and steps of process which currently enjoy protection. Public access should be maintained to documents (such as judgements) to which public access is currently available, whether or not such judgements are published on the Scottish Courts website.
- 8.1 The Faculty wholeheartedly welcomes this proposal, and sees it as giving valuable practical experience which might be built upon in advancing "virtual" access to the Court in all Sheriff Court cases.
- 8.2 It would improve the delivery of justice.
- 8.3 It would require (as is proposed the Ordinary Cause procedure) to make special provision for parties litigant for whom, it may be, the system would

require to be voluntary (bearing in mind the varying levels of access to technology and competence in its use on the part of such parties).

- 8.4 It ought to improve efficiency and be more cost effective for the litigant.
- 8.5 Reference is made to paragraph 8.3 above.

- 9.1 The Faculty agrees.
- 9.2 It would be more efficient and cheaper.
- 9.3 Consideration will require to be given to whether to insist upon paper service in all cases, or whether, in appropriate cases, to permit electronic service.
- 9.4 The extension of the service to parties litigant in summary cause actions as well as small claims is likely to be perceived as making access to the courts easier and is to be welcomed.
- 9.5 In all cases (not just summary cause and small claims actions) if the route of permitting electronic service is to be followed, there are obvious issues of how to serve and how to authenticate service. One possible model which might address those issues would be service by the Sheriff Clerk, though this would have implications both as regards Court resources and its possible impact on the role of Sheriff Officers. Accordingly, any such extension would require further consultation.

- 10 Apart from consideration of the Sheriff Court Rules themselves, if there is to be progress on a wider reform to facilitate an electronic procedure, areas requiring further consideration will include: the authentication of documents; the best evidence rule; diligence, and requirements for registration of documents.