



The Scottish Civil Justice Councils response to the consultation on COVID RECOVERY

On 17 August 2021, the Scottish Government opened a consultation exercise on:
[Covid Recovery: A consultation on public services, justice system and other reforms](#)

Four of the questions asked within that consultation do touch on matters that fall within the remit of the Scottish Civil Justice Council for keeping the civil justice system under review. The written responses the Council submitted to those four questions were:

Question 12: Courts: intimation, etc. of documents

The Council supports permanent legislative provisions.

The Scottish Civil Justice Council is supportive of this pragmatic change as it supports the modernisation of the civil justice system, and we believe virtual walls of court are better able to support the courts need for a mechanism of last resort when serving documents, particularly once all other options for effecting service are exhausted.

We suggest that the permanent legislation reflects that only abbreviated descriptions of each document appear on the virtual walls of court, rather than the document itself. To minimise the need to redact documents, access to individual documents should only occur in response to a legitimate enquiry.

Question 23: Courts and tribunals: conduct of business by electronic means

The Council supports permanent legislative provisions.

The Scottish Civil Justice Council is supportive of the modernisation of the civil justice system. The electronic signing of documents, and the electronic transmission of documents, has now become a matter of routine. That has provided significant benefits to the civil justice system and it is essential to retain those benefits.

Drafting permanent legislation should be straightforward if the policy intention is to cover service of documents within Scotland only. We would add a note of caution if the intention is to cover service of documents outwith Scotland as there may be a range of unintended consequences under international law e.g. the Hague Service Convention.

Question 24: Courts and tribunals: virtual attendance

The Council supports permanent legislative provisions.

The Scottish Civil Justice Council is supportive of the modernisation of the civil justice system. Gaining the very practical technology option to hold a virtual hearing, in lieu of an in-person hearing, has been very beneficial in terms of expanding the choices available to the court when issuing directions fixing diets for civil court hearings. That said, on a case-by-case basis the court will always balance any proposed mode of attendance with the wider interests of justice.

The emergency legislation took an umbrella approach to drafting by disapplying the need for all physical attendances at court, and requiring the court to direct otherwise where it thought physical attendance was appropriate. That directive approach in legislation was appropriate for an urgent Covid response but we believe permanent legislation needs to be enabling rather than directive, and it should reflect the actual choices available to the court.

In that regard, the Council's own public consultation on the Mode of Attendance at Court Hearings closes on 15 November 2021, and our analysis of consultation responses will be published as soon as practicable. We would recommend that the Scottish Government consider that analysis to help inform its own view on the level of choice enabled through legislation.

Question 34: Covid Recovery (proposals for legislation beyond the consultation proposals)

The Council suggests the Digitisation of Wills as one policy area for further legislative change.

The pandemic has led to a spike in the annual death rate across Scotland and in turn, that brings the way in which civil society deals with the beneficiaries of estates into sharp perspective. The Scottish Civil Justice Council would suggest that some initial legislative changes could be progressed relatively quickly to enable the modernisation of commissary business, and longer term the introduction of legislation to support digital wills and their storage and retention might reduce the number of citizens who die intestate.

Within the current commissary business process, the application for Confirmation and the accompanying Inventory of Estate are suitable candidates for automation. However, an original copy of a will still needs to accompany any application for Confirmation due to the Requirements of Writing (Scotland) Act 1995. The Council believes that the benefits arising from the electronic signing and transmission of documents are capable of being extended to wills, providing sufficient safeguards can be built in to provide assurance on which copy of a Digital Will can be treated by the courts as determinative.

One longer-term option that could help address that last point would be to legislate for a publicly funded technology solution (a National Repository) where the public and/or profession can lodge a Digital Will in advance. That could enable all dealings within the subsequent estate to rely on ready online access to a legally valid Digital Will held in a fully secure and traceable manner, accessible only by those with a direct interest in the estate and any professionals who may act on their behalf. As the handling of wills is a significant element within the legal services market, an early Public Consultation on Digital Wills would assist with the formulation of policy in this area.

*Scottish Civil Justice Council
9 November 2021*