



RESPONSE

by

THE FACULTY OF ADVOCATES

to

Coronavirus Recovery and Reform (Scotland) Act 2022 - criminal justice measures:
consultation

The Faculty of Advocates is the independent referral Bar in Scotland. Faculty is pleased to have the opportunity to respond to this consultation, although should make it clear at the outset that Faculty does not seek to comment upon issues of policy.

We would comment on the topics listed in the Consultation Paper as follows:

Question 1

It is proposed that the provisions for Chapter 1 (Conduct of business by electronic means in criminal cases: documents) will be made permanent. Which of the following best describes your view?

We think the provisions for Chapter 1 should be made permanent.

If you have any comments on the proposal for permanency of these provisions, please provide them below.

Electronic signing is entirely reasonable and practicable. Our experience is that it works very well.

Question 2

It is proposed that the provisions in Chapter 2 (Virtual attendance – criminal courts) will be made permanent. Which of the following best describes your view?

We think the provisions for Chapter 2 should be made permanent.

If you have any comments on the proposal for permanency of this provision, please provide them below.

We wish to highlight two aspects.

First, the continued use of Webex to conduct preliminary hearings in High Court cases. We are in favour of this continuing, not because it is necessarily ideal but because there are now too few Advocates to allow the previous 'in person' system to operate as it should. Put shortly, most Advocates are engaged most days in conducting trials. Few Advocates are spare, such that 'in person' hearings held in Glasgow would be very difficult to accommodate. The Webex based system is flexible and should continue. If it expired, a substantial number of preliminary hearings would be negatively affected either by having someone covering the case who knows less about it than the principal Advocate, or no one being available to cover it at all.

Second, the use of remote links for police and professional witnesses. Remote links remove the need for police and professional witnesses to travel to court and free up the witness to conduct other work while waiting to give their evidence. These undoubted and important benefits come at a cost. Valuable court time is regularly lost due to delays in establishing remote links and re-establishing failed remote links. For example, when a number of police officers give remote evidence from the same police station, the link requires to be broken and re-established for each officer. This is not a seamless process. Valuable court time is lost. Video and audio quality can vary significantly. This can impact on the quality of the evidence which the jury sees on court room monitors and hears on courtroom speakers. Saving the time of police and professional witnesses is important. Making sure that court time is not lost and that the quality of evidence is not diminished are equally important.

Question 3

If you have any views on whether there are any specific factors the court should have to take into account when deciding whether it's appropriate for people to participate in proceedings by electronic means, please provide them below.

We do not have any particular views. It is important that appropriate arrangements are in place to make sure that virtual hearings are accessible to the members of the public who wish to view them.

Question 4

It is proposed that the provisions for Chapter 3 (National Jurisdiction for Callings from Custody etc.) will be made permanent. Which of the following best describes your view?

We have no view.

If you have any comments on the proposal for permanency of this provision, please provide below.

N/A

Question 5

It is proposed that the provisions for Chapter 4 (Fiscal fines) will be made permanent. Which of the following best describes your view?

We have no view.

If you have any comments on the proposal for permanency of this provision, please provide them below.

N/A

Question 6

Do you agree or disagree with the proposal that digital evidence should be used to produce evidence in courts in criminal cases rather than having to produce the original item in court?

We agree.

Please elaborate on your answer, setting out any advantages or disadvantages of the proposal as you see them.

In principle, this is a valuable provision. There are important practical issues that must be considered in striking the balance between (a) avoiding the unnecessary seizure and storage of items and (b) ensuring that the original items are available for defence inspection and as possible defence productions. The evidential significance of original items may not be apparent to the prosecution and/or defence at an early stage of proceedings e.g. before there has been full disclosure of the prosecution case or where additional evidence emerges later on.

Question 7

Do you agree or disagree with the proposal that where an image is produced that it can be treated as if it was the item itself that was being produced?

Unsure.

Please elaborate on your answer, setting out any advantages or disadvantages of the proposal as you see them.

We have reservations about an image being treated as the best evidence in all cases. In most cases, an image would fulfil the same function as the physical production. The item may be certain distinctive physical characteristics which are less obvious in an image. This may be of particular importance in determining whether the item can be seen in CCTV footage. There may be limited occasions when this is the case. However, on such occasions the items themselves may provide decisive evidence to incriminate or exculpate an accused.

Question 8

Do you agree or disagree that the current procedural framework as outlined in chapter 5 would allow the defence to seek for the physical production to be brought to court if its absence would prejudice a fair trial??

Unsure.

Please elaborate on your answer, setting out any advantages or disadvantages of the proposal as you see them.

Much will depend on the actual wording of the test and how it is applied by the court. We would suggest that unless a defence request is unjustified then it should be allowed.

Existing summary and solemn criminal procedure rules under the Criminal Procedure (Scotland) Act 1995 provide the prosecution with an opportunity to identify at an early stage whether or not an original item is required at trial. Using existing rules, it would be open to the prosecution to serve a Statement Of Uncontroversial Evidence (SOUE) on the accused stating that the digital image should be treated as if the item was produced. Importantly, the

existing SOUE procedures allow the defence to challenge the SOUE and allow the prosecution to request the court to direct that the defence challenge be disregarded if it is unjustified.

Question 9

It is proposed that the transfer of digital files to any reliable digital evidence system such as DESC (which has a robust audit system) should remove the requirement of certification as outlined in the scheme under the 1995 Act. Which of the following best describes your view on this proposal?

Unsure.

If you have any comments on this proposal, please write them below.

Very often the main concern is whether evidence has been changed in some way before it has come into the possession of the police and prosecution. It is extremely rare for there to be any concern that an item has been deliberately altered by the police or by the prosecution. The main concern is often about what may have happened to an item before it has been seized as a production by the police. If the original data is not available, then it might be that the metadata cannot be checked to ascertain information as to whether the information has been altered. The potential use of Artificial Intelligence to manipulate data may be a concern.

Question 10

Whilst the examples given have related to files from mobile devices, there are other types of documents which could be transmitted into DESC, especially as the term document is given a wide definition in schedule 8. This could include items such as photographs of evidence or paper copies of a traditional document which are scanned and uploaded to DESC.

It is proposed that any type of document uploaded to DESC should be accepted as a true copy without the need for separate certification. Which of the following best describes your view on this proposal?

Unsure.

If you have any comments on this proposal, please write them below.

See Q9

Difficulty arises where there has been any manipulation of that item before it has come into the possession of investigators. Experts in digital imaging and cybercrime may be able to make a valuable contribution to this consultation exercise.

Question 11

If there were to be a challenge to the admissibility of the evidence held within DESC on the basis that the image is not a true copy, we do not consider that any new procedure need be introduced to allow this challenge. We consider that there are sufficient procedures currently in place to allow a challenge to the admissibility of such evidence through procedural pre-trial hearings in all courts.

It is proposed that any issue in relation to the admissibility of the copy held in DESC could be raised through the pre-trial hearing system already in place.

Which of the following best describes your view on this proposal?

Unsure.

If you have any comments on this proposal, please write them below.

Under existing rules, documents already held by the police and/or COPFS are routinely certified as true copies. It is rare for the this to be challenged. Any concern is likely to relate to the provenance of the original document. As noted above, the issue of provenance and reliability will generally become an issue at the initial point of its existence, before being passed to investigators. The challenge is more likely to relate what may have happened to the item before it was seized by the police.

Question 12

Certification under schedule 8 will still be needed for copies of documents which are not uploaded to DESC. There are occasions where the certification of the document is incorrect or missing an essential piece of information. Where there is no valid certificate the copy document cannot generally be accepted into evidence in place of the original.

Whilst we do not consider that there should be any separate procedure to challenge the admissibility of copy documents certified under schedule 8 due to defect in certification, as the issue should be raised at a procedural hearing, an issue may arise if such a defect is not detected until after a procedural hearing in the case, particularly if it is only discovered shortly before or at the trial.

If this happened at the trial, it could potentiality result in a trial being halted for the matter to be resolved or a decision taken that the copy document could not be put in

evidence. This could not just cause inconvenience to victims and witnesses but could also result in the failure of a case.

At present the ways to remedy the defect would include having the document re-certified, or to try and obtain the original document to put in evidence. This second course may not be possible as the original may no longer exist. Both of these routes to correct a defect would be time consuming.

We do not consider that this should be necessary. There may be sufficient information before the court to allow it to accept that the copy document is a true copy. We therefore consider that the law should be more flexible. The court could be given a discretion to allow the copy document to be admitted if satisfied it is a copy despite any defect in certification.

It is proposed that the court therefore be given a discretion to allow a document to be led in evidence if satisfied it is a copy document despite any defect in certification. Which of the following best describes your view on this proposal?

We agree.

If you have any comments on this proposal, please write them below.

Currently if there is a deficiency in the schedule 8 certificate then a witness from the organisation may give oral evidence that the document is a business document. A certificate is simply one way in which a document can be certified as a business document under the existing rules of criminal procedure. Oral evidence is another way under the existing rules.

Question 13

One of the ways a court may be satisfied that a document is a copy document is to simply hear oral evidence of that fact. It is therefore also proposed that the court should be able to hear evidence from witnesses, to allow it to be satisfied that the document can be deemed a true copy and treated for evidential purposes as if it were the document or material part of the document.

Which of the following describes your view on this proposal?

We agree.

If you have any comments on this proposal, please write them below.

Existing legislation allows a witness who is already listed on an indictment to be called. New provision could be made to allow a witness who is not listed to be called to speak to the document being a true copy subject to this being in the interests of justice.

Question 14s

Out with the proposals outlined in chapters 1 -6, do you think any further legislative changes are needed to support the modernisation of criminal justice procedures through greater use of digital processes in order to achieve our ambitions of an efficient and resilient criminal justice system?

No.

If you answered yes, please provide details of what those legislative changes might be.

The criminal justice system has achieved a significant amount in a short time frame and whilst facing extreme and unprecedented pressures. The courts, prosecution, defence, police and justice partner agencies have done a formidable job.

In your answer, please make reference to the particular procedure, how any additional legislation would support modernisation and what these legislative changes would achieve.

Question 15:

Do you have any views on potential impacts of the proposals in the chapters of this consultation on human rights?

No

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Question 16:

Do you have any views on potential impacts of the proposals in the chapters of this consultation on equalities and the protected characteristics set out above?

No

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Question 17:

Do you have any views on potential impacts of the proposals in the chapters of this consultation on children and young people as set out in the UN Convention on the Rights of the Child (UNCRC)?

No

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Question 18: _____

Do you have any views on potential impacts of the proposals in the chapters of this consultation on socio-economic equality?

Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

There may be an issue with access to justice in terms of socio-economic equality regarding access to IT equipment.

Question 19: _____

Do you have any views on potential impacts of the proposals in the chapters of this consultation on communities on the Scottish islands?

No

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Question 20: _____

Do you have any views on potential impacts of the proposals in the chapters of this consultation on privacy and data protection?

No

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Question 21: _____

Do you have any views on potential impacts of the proposals in the chapters of this consultation on businesses and the third sector?

No

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Question 22: _____

Do you have any views on potential impacts of the proposals in the chapters of this consultation on the environment?

No

Please provide details, making reference to the specific proposal or proposals to which your comments relate.