



Law Society
of Scotland

Consultation Response

Rules Covering the Mode of Attendance at Court Hearings

15 November 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Civil Justice committee welcomes the opportunity to consider and respond to the Scottish Civil Justice Council consultation: Rules covering the mode of attendance at Court hearings. The committee has the following comments to put forward for consideration.

Preamble

Our desire is to work constructively with SCJC and SCTS on the proposals for mode of attendance at court hearings. The following observations however will hopefully set out clearly why we consider this consultation to be premature and suggest an alternative approach.

This consultation comes at a time when Scotland is emerging from what is perceived to be the worst effects of the Covid crisis. SCTS current policy is to keep court buildings closed for most civil business for safety reasons notwithstanding most shops and businesses are open to the public. Large scale events such as world conferences on climate change, concerts and sporting events, attracting thousands of delegates and spectators, are being held around Scotland due to relaxation in Government guidelines.

Scotland is, by and large, trying to return to a degree of normality. It would appear however that assumptions are being made by SCTS and / or SCJC that it is not possible to safely manage the re-opening, or at least partial re-opening, of the courts on safety grounds.

We acknowledge and accept that one of the reasons for continuing civil restrictions is the prioritisation of criminal business and the need to reduce the criminal backlog. However, one of the main reasons cited for conducting civil business virtually, at least in relation to the Court of Session, is that having 12 court rooms in use at any one time, with the inevitable footfall, creates an unacceptable level of risk. Even accepting that is the case at this moment in time (though we would not expect there would be a need to occupy 12 court rooms in Parliament House on any given day if procedural business is conducted online) it fails to

take account of how that risk will develop over the coming months. The rules are intended to be a permanent feature of the Scottish Civil Court system. They need to be fit for purpose in the medium to long term, not simply based on a perceived level of risk today.

The changes which the legal profession have faced since March 2020 have been borne out of necessity. There was a need to adapt on an emergency basis to ensure the courts continued to function as best they could. The efforts made by all court stakeholders to make those adaptations is highly commendable but that does not mean that the changes which have been forced upon court users should all remain.

The Law Society of Scotland, at its August working group meeting with SCTS, called for a pilot scheme to be introduced in courts across Scotland, including the Court of Session, so that a limited number of live proofs, evidential hearings and appeals could be held in the court buildings. This would be regardless of case type or duration, the aim being to analyse how live proofs could be safely accommodated and assess whether there were any practical or safety issues which required attention. The outcome of the pilot would inform SCJC in the current consultation exercise and avoid a set of rules being introduced with no evidence base to justify the proposals. Our suggestion to run a pilot scheme has not been implemented. If the suggestion is to now be accepted, we recommend that the pilot operates for a 12 month period. Analysis of the experiences of all participants in cases which proceeded in person and those which did not should be undertaken, followed by a further period of consultation.

The Law Society is of the opinion that there is no empirical data currently available to form a basis for the proposed rules in their current form. We accept that the way the courts operated pre-Covid should not form the basis of how the courts operate going forward. But the rules have been drafted when the courts have largely been closed for civil business. In our view it is necessary to consider the proper structure of the rules following a period of holding live hearings.

Further, the rules do not reflect the overwhelming opinions expressed in responses to the surveys undertaken by the Law Society (and the Faculty of Advocates) which formed the basis of submissions in briefing papers submitted to the conference held on 10th May 2021 on “Civil Business Post-Covid”. We are particularly concerned that the starting point for the draft rules is to seek to exclude proofs, evidential hearings, debates and appeals from live hearings in the court building when over 90% of Law Society member responses expressed the desire, on behalf of solicitors and the clients they represent, to return to live hearings when it is safe to do so. The reasons are numerous and varied but none of them seem to be reflected in the terms of the draft rules. The perception is that the rules have been drafted hastily with no evidence base to justify those relating to in person hearings.

Neither the Society nor its members are arguing that the view of “It’s Aye been” must prevail. This is a question of weighing up the pros and cons of live hearings and virtual hearings, listening to the profession and those whom they serve and taking cognisance of the reasons, for and against, a return to live proofs, evidential hearings, debates and appeals. A concluded view, in our submission, can only be reached after the courts have re-opened to run a number of proofs etc as part of the aforementioned pilot. By the same token, it is fully recognised that virtual hearings have worked well for procedural business and should remain the default position moving forward.

Further, we note that the Scottish Government consultation on Covid Recovery contemplates an extension to emergency legislation, not permanent changes, thus recognising that it is too early to make permanent change.

During this consultation exercise, SCTS guidance has changed. The fixing of in-person hearings until November 2021 was only allowed in “exceptional circumstances” but from 15th November 2021 the guidance is changing to allow in-person hearings “on cause shown”. This is welcomed but is simply indicative of the fluid nature of the current position and is all the more reason not to prematurely introduce the new rules.

In short, we are of the opinion that this consultation should be held in abeyance pending the operation of a pilot scheme as outlined above. Studies of the “workability” of live hearings and virtual hearings should be undertaken in order that a knowledge-base can be established to inform the most appropriate wording of the new rules. Without that, we fear that that SCJC and SCTS will not “take the vast majority of members of the profession with them” and more importantly the cornerstone principles of Access to Justice, Fairness and Transparency will not be met. In this regard, we note the importance of facilitating public access to court hearings. While virtual procedures have the potential to widen public access, there are a number of barriers to participation by virtual means which require careful consideration. We consider that public access is of particular importance in relation to environmental matters given the role of public participation in environmental decision-making in terms of compliance with the Aarhus Convention¹.

¹ The United Nations Economic Commission for Europe (UNECE) [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#), adopted at Aarhus on 25 June 1998

Question 1 –

For the categories of case listed as suitable for an in-person hearing:

o Do you think the general presumption given is appropriate?

Partly.

1. We agree that those actions listed in 35B.2.(2)(a) and (b) (family, adoption, children etc) should be in person.
2. We agree that Civil Jury trials should be held in person. That said, we question why it is recognised that this is appropriate, but the proposal is not to have in-person civil proofs as the default position. A proof and a civil jury trial are both obviously evidential hearings with the purpose of determining the substantive issues in dispute. There seems to be no logical reason for permitting a civil jury trial in person where 12 jurors require to be present in the court building but not to permit proofs where there are no jurors. Even if the jurors were to be located in a cinema complex, the distinction of having the default position for civil jury trials proceeding as a live hearing and most proofs to be held virtually is illogical.
3. Our position on proofs, debates and appeals is set out below.

and

o Would you make any additions or deletions and if so why?

1. For the reasons mentioned in the preamble we consider it to be premature to introduce restrictions to the types of legal debate and reclaiming motions/appeals (35.B.2.(2)(c) and (f) respectively) to those which raise a point of law of general public importance/ particular difficulty or importance.
2. Given the privative jurisdiction of the Court of Session where any case with a monetary value must be over £100,000, we find it difficult to accept that any case would not be deemed to be important.
3. Further, the rules do not make it clear who decides that a case has a point of law of general public importance/particular difficulty or importance. We assume this would be a judge but for reasons mentioned below we consider that on Access to Justice, Fairness and Transparency grounds it should be open to the parties to agree that debates and appeals should be in-person and only if there is disagreement on the mode of attendance should a judge be required to rule.
4. Similarly, we consider it premature to include in the draft rules that only proofs where there is a significant issue of credibility of a party or witness which is dependent upon an analysis of the party's or witness's demeanour or character should proceed in-person.

5. We consider that parties should have the right to have their evidential hearing conducted in-person, regardless of the type of case (including commercial causes). That should be the starting point in the interests of Access to Justice. The corollary is that if parties agree to hold the hearing virtually and, subject to approval of the court, the hearing should be held virtually. This puts the litigant front and centre on the issue of mode of attendance.
6. The “credibility of witness” requirement which the draft rules require to exist before a live proof will be allowed is an artificial qualification to a fundamental right. Arguably, the credibility and reliability of all witnesses who give evidence in the Scottish courts is subject to analysis and comment by the judge and those presenting the case for the parties. Often, credibility and reliability issues of witnesses do not manifest themselves until the witnesses are in the witness box and subjected to the rigours of examination and cross-examination. Effective advocacy may be lost if the witness is sitting in the comfort of their living room and can somehow lose a connection if a difficult question is posed.
7. Commercial litigators are firmly of the view that credibility issues are prevalent in the majority of commercial proofs. They express concern that if all commercial proofs have to be held virtually their clients will simply take their business south of the border and litigate in the English courts. Commercial litigants often have a choice where to litigate. They would have no compunction to litigate south of the border if they felt the Scottish system was inferior to the English courts and the inability to have an in-person proof may well cause them to form that view.
8. The English position going forward has been confirmed in a joint statement by the Lord Chief Justice, Lord Burnett of Maldon and Senior President of Tribunals, Sir Keith Lindblom, on 1st October 2021:

“Although everything has not returned fully to normal, most cases in all jurisdictions are now being conducted with the judges or magistrates present in their courts. That is equally so where participants are attending remotely, when it is in the interests of justice to do so.

It is important that judicial powers are exercised from courts and tribunal buildings. While it was necessary to make exceptions at earlier stages of the pandemic, that must now once more be the default position. No judge or magistrate should conduct hearings from home (or premises other than courts and tribunal buildings) save in exceptional and unavoidable circumstances.”

Whilst the fact that the English judiciary is reverting to being present in court buildings is not of itself a reason for Scotland to follow suit, it is a relevant factor where Commercial court business could very well be lost to the English courts if Scotland adopts the rules as currently drafted. Whilst it may be argued that current infection rates in England are a good reason not to adopt the English position, we again emphasise that these rules are for the medium to long term and should not be unduly influenced by the prevalence of Covid in the latter part of 2021.

9. Reasons cited by Law Society of Scotland members for returning to in-person hearings in the survey commissioned in March 2021 include:

- a. The perception that a judicial office holder will make a better assessment of credibility and reliability of a party or witness if the party or witness appears in person. Whilst we recognise there are differing opinions on whether that is true, the perception is overwhelming. We would argue that it matters not whether there is clear data on the accuracy of that perception, The overriding factor is that Justice needs to be seen to be done and, to do that, litigants and their agents/counsel have to have confidence in the judicial office holder's ability to perform the fundamental function of assessing credibility and reliability. Absent such confidence, the losing party in particular will feel aggrieved that the process has not been fair and transparent.
- b. Digital Poverty Issues – a significant number of the population either cannot access the necessary hardware or software to participate effectively in a virtual hearing, or they do not have reliable broadband due to an inability to afford it or do not have the technical know-how to engage with IT. Whilst it is recognised that efforts are being made to address the issue by Government and various users of the court system this problem will persist in the medium term.
- c. Poor internet connection even with the appropriate hardware and software – there remains a significant variation in the quality of broadband strength across Scotland with some agents working in areas where they cannot connect to Fibre.
- d. Advocacy is much more difficult in a virtual setting and leads to “virtual fatigue” – effective examination and cross examination of a witness is diminished in a virtual setting, coupled with the fact that it is extremely tiring to conduct lengthy hearings on a virtual platform.
- e. Communication difficulties – it is much harder and sometimes impossible to relay confidential messages / take instructions between agents, counsel and clients whilst using a virtual platform.
- f. Loss of Advocacy skills – an inability to appear in-person in a court room will inevitably lead to a loss of or inability to acquire advocacy skills.
- g. Gravitas of the proceedings is lost in a virtual setting
- h. The ability to achieve late resolution of the case is diminished – meeting face to face in the court building on the day of a proof often led to discussions which resulted in settlement being achieved even in those cases where settlement discussions had previously been exhausted.
- i. Social interaction with other court users and lawyers is a positive experience which many young lawyers have had no opportunity to participate in.

10. We understand that the issue of expense is virtually neutral in terms of SCTS running evidential hearings on a virtual platform compared to in-person. There can therefore be no justification for not holding in-person hearings on cost grounds. Indeed, agents consider it to be more

expensive to conduct business virtually due to the need for additional 1) IT investment and 2) personnel required to deal with various aspects of a virtual evidential hearing.

11. We do recognise that there will be occasions where it is appropriate to hold a “hybrid proof” where some witnesses attend in-person and some give their evidence virtually. Again, our position is that this is a matter which should be left to the parties to agree and only in the event of disagreement should the judge be asked to rule on the matter. The interlocutor assigning proof dates should clearly state which witnesses are allowed to give their evidence virtually.
12. The foregoing comments are made in the context that the in-person pilot should proceed and the position should be reviewed following the ingathering of the appropriate data.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

o Do you think the general presumption given is appropriate? Partly

We agree that those hearings listed in 35B.3.(2)

- (a) family case management hearings,
- (b) pre-proof hearings
- (d) procedural hearings
- (h) those where an application for a virtual hearing is granted should proceed virtually.

Our position on all other forms of hearing listed under 35B.3(2) is set out in the answer to Question 1 and the second part to question 2.

and

o Would you make any additions or deletions and if so why?

We consider that the following types of hearing should, as a default position, proceed in person:

1. Hearings where a judicial review petition can be determined
2. All debates
3. All proofs including those in commercial actions
4. All reclaiming motions and appeals

5. Hearings fixed under Rule 41B.4(2)(d) of the Rules of the Court of Session (Hearing to determine application for loss of protection from Qualified One Way Cost Shifting) – such an application has potentially serious consequences for a Pursuer. The jurisprudence in this area has not yet developed. The importance of such a hearing and the precedent-setting nature of any court decisions render it appropriate for such hearings to be held in-person.

The reasons for 2, 3 and 4 are set out in Answer 1.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- o Do you think lodging a motion is the right way to do that? Please explain your answer.

We agree that motion procedure is the appropriate way to seek an order for departure from the default position.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- o Do you agree that the court should have the final say? Please explain your answer

No. Our position is that parties should have the final say in the mode of attendance. The most important stakeholders in the court system are the litigants. Their views should be the top priority in determining the mode of attendance. Only where there is disagreement between the parties on the mode of attendance for a particular hearing where the default position is “in-person” should the court decide.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

No

Ordinary Cause Rules: OCR

Question 6 – For the categories of case listed as suitable for an in-person hearing:

- o Do you think the general presumption given is appropriate?

No, in so far as the terms of the proposed rule 28ZA.2 are inconsistent with the position advanced above.

And

o Would you make any additions or deletions and if so why?

Reference is made to Answer 1 above.

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

o Do you think the general presumption given is appropriate?

We agree that all hearings listed under 28ZA.3(2) are appropriate to be conducted virtually except:
28ZA.3(2)(g) – debates and
28ZA.3(2)(q) – hearings fixed under OCR 31A.4(2)(d) in relation to loss of QOCS protection.
The reasons are outlined above.

and

o Would you make any additions or deletions and if so why?

As above.

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

o Do you think lodging a motion is the right way to do that?

Yes

o Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

Whilst we have no strong view on whether an application form to alter the mode of attendance should accompany the motion, we are in favour of consistency in approach between the courts and would therefore support the use of the application form in the Sheriff Court. Whatever method is utilised, the primary objective is to ensure that the reasons for any application to depart from the default position are set out clearly for the benefit of the court and to give fair notice to the opponent.

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

o Do you agree that the court should have the final say? Please explain your answer

No – for the reasons mentioned above, the parties should be able to agree the mode of attendance.



Question 10 – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?

No





For further information, please contact:

Lucy Stewart

Professional Practice team

Law Society of Scotland

DD: 0131 476 8348

lucystewart@lawscot.org.uk