Scottish Civil Justice Council Consultation
on Mode of Attendance at Court
Response by the Scottish Law Agents' Society
6th November 2021

Answers to the 10 Questions in the Response Form

RCS

Answer 1

We agree that all of the categories listed are suitable for an in-person hearing.

As regards proofs, where there is an issue of credibility it is essential that the judge has the best possible opportunity to make an accurate assessment, and this requires that he or she is in the physical presence of the witness.

Debates and appeals where there is a point of general public importance should be heard in public to facilitate public access. Where it is felt that the physical presence of advocates will assist in achieving settlement, that should happen.

Family hearings concern uniquely personal matters and the parties need to be able to participate as closely as possible. Their physical presence is by far the best way of achieving this.

We would recommend that the following types of hearing be added to the list;

1) All other proofs, including those in commercial actions. It is often impossible to predict when an issue of credibility or reliability will arise. In addition, hearing a proof in open means that it is treated by the participants with the full importance that it deserves.
2) All other debates, including in commercial actions. Debates deal with legal issues which will almost always arise again in future cases.
3) All other appeals, including those in commercial actions, for the reason immediately above.
4) All motions and hearings where there is the citation of legal authorities other than the court rules themselves. So, for example, a motion for interim interdict, a reponing note but probably not a motion to allow amendment of the pleadings. There could be a more restricted category in commercial actions, although such actions are often of importance to the business or mercantile community, and any restriction should be slight.

Answer 2

We do not think that the presumption is appropriate, because we think that the categories are far too wide.

We agree that for reasons of convenience and cost, "procedural business" could appropriately be conducted by remote means. The Consultation Paper refers to "reduced travel time" and "reduced inconvenience" as benefits of remote hearings, and we agree. So, to take the example given above,

there is little point in counsel and solicitors spending a morning (including travelling and waiting time) in court to deal with a contentious motion to amend written pleadings, unless it involves consideration of points of law. In our experience many such motions arise because of a change in factual circumstances, late arrival of information or other case specific factors which are of little or no relevance outwith the cause itself. These motions can properly be conducted remotely, saving time and money.

The problem is that the Consultation Paper does not define "procedural business". This could be done by a Lord President's Practice Note, but until we see such a draft note it is difficult to comment further.

The Paper refers to concerns over how to maintain the gravitas of the court and how to facilitate effective participation. We share these concerns, which is a reason why we make the recommendation at Answer 1.
Another reason is to allow effective not just theoretical public access. The paper has a section on "Open Justice". This makes the point that registered journalists can apply for the means to deal in to hear and to get joining instructions to see electronic proceedings.

The public can apply to dial in to hear proceedings, but not to see them. This restriction is said to be temporary, until safeguards can be put in place to deal with "potential contempt of court issues" which we assume means taking recordings. The nature of these safeguards is not explained. Until they are, we think that there is no justification for making permanent any proposals concerning remote hearings.

In preparing for this Response we wrote to the SCJC to ask for statistics of how many members of the public have actually accessed remote hearings in each of the last 5 years. To explain, pre-Covid, the public could in theory access remote forms of procedure such as commercial hearings in Glasgow Sheriff Court. The response was that we should contact SCTS, which we did. The SCTS response, dated 28th October 2021 states that this information is not held.

In light of this, and having regard to the experiences of our members, it cannot be disputed that the public rarely or never accesses remote hearings. So, we can assume that it will never or rarely happen in the future. In other words, in practice, remote hearings means that litigation will take place in private. We think that this is a bad idea. We already have a form of private litigation in Scotland. It is called arbitration. By contrast, the courts should be public, in practice as well as in theory, unless there are very good reasons to exclude particular cases from the public eye.

Answer 3

We think that lodging a motion should be the right way to change the mode of attendance. This is the normal method of making an application to the court.

Answer 4

We agree that the court should have the final say, because it is in ultimate control of the proceedings.

Answer 5

The language of the paper is interesting, referring to "attendance by electronic means" and tending to avoid "remote" and "virtual". Our view is that it is inappropriate to try to equate actual and remote

participation under the banner of "attendance". Webex is an alternative to attendance; the witness who is sitting in his living room is not "attending" court. Witnesses were always able to give evidence by video link, even before Covid. This was instead of their having to attend court.

The court can change the mode of attendance *ex proprio motu* and parties can move this and the court may grant the motion if it will not prejudice the fairness of proceedings and is not contrary to the interests of justice,

To our mind these are odd tests. When would it ever prejudice fairness to call a case in open court and how could doing so ever be contrary to the interests of justice? This is not explained in the Paper. If, on the other hand, the Paper proposed tests such as cost or convenience we could appreciate why the court might wish to have regard to, for example, the wish to avoiding witnesses having to go to unreasonable time and trouble in attending court for a proof. Equally, if a witness or party were elderly and not comfortable with technology, an in person appearance could be appropriate.

OCR

Answer 6

Our Answer 1 applies *mutatis mutandis*. In our experience, conducting child welfare hearings remotely is far inferior to doing so in person.

Answer 7

Our Answer 2 applies *mutatis mutandis.* We would add that if "procedural business" were defined by Sheriff Principal Practice Notes there could be well be a divergence across the six sheriffdoms, creating needless complexity and scope for error. Uniformity should be a goal.

Answer 8

Our Answer 3 applies *mutatis mutandis*. There is no need for an application form in similar terms to the RCS.

Answer 9

Our Answer 4 applies *mutatis mutandis.*

Answer 10

Our Answer 5 applies *mutatis mutandis.* We would add that to minimize inconvenience to parties and witnesses there is scope to transfer a cause between sheriff courts. Obviously, this facility is not open to the Court of Session.

The Scottish Law Agents' Society
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