

## **Response of the Senators of the College of Justice to Scottish Civil Justice Council Consultation on Rules covering the Mode of Attendance at Court Hearings**

1. The Senators of the College of Justice welcome the opportunity to respond to the consultation on rules covering the mode of attendance at court hearings. Our response focusses on the Court of Session.
2. Our experience during the pandemic has shown that digital and video technology has much to offer a modern court system such as ours. The lodging and use of documents in electronic form are prime examples of innovations that have worked well and represent substantial progress in the conduct of court hearings. So is the disposal of many procedural matters by email correspondence without the need for a hearing at all. Many procedural hearings have also been successfully conducted by video conferences. These are some of the improvements which should be retained.
3. When it comes to substantive hearings different issues arise. Having now had substantial experience of conducting such hearings by video, we are satisfied that they should not become the norm in the Court of Session.
4. There are two problems about conducting substantive hearings by video conference.
5. The first difficulty is that a video conference simply cannot match the many advantages of a hearing that takes place with the main participants present together in a court room. A hearing based in a physical court room is, in our view, the best way of presenting complex legal arguments and contested evidence to a court. A court room hearing allows for witnesses to be effectively (and where appropriate vigorously) challenged and for the truth and reliability of their evidence to be tested to the limit. This is as it should be. Moreover, legal arguments can be thoroughly examined and explored in the course of constructive debate. None of this can be done as well over a video hearing. The technology amounts to a barrier against effective court room communication. It is much more difficult for the judges to intervene and to engage with the participants constructively and openly. Exchanges are stilted and

awkward. We understand that most of the lawyers do not like these hearings. They have found that they do not allow them to put forward their clients' cases as they would wish. The latencies inherent in internet-based data transmission impair free-flowing dialogue, which should be at the heart of a court hearing conducted under our adversarial system. Technical problems interrupting the hearing are common. At the end of the day the reality is that video hearings are sub-optimal for most substantive business.

6. Secondly, the dignity and solemnity of the court room are missing in a video conference. There is an absence of the formality that should characterise a court hearing. The court as a physical place supports the public's acceptance of the legitimacy and authority of the court, and the law itself. In a video conference these essential features are lost.
  
7. The point was well put by Kafker J. of the Supreme Judicial Court of Massachusetts in his concurring judgment in the case of *Diaz v Commonwealth of Massachusetts* 487 Mass. 336 (2021):

“When a person physically comes to court, he or she is immediately aware of the gravity of the proceedings felt in an actual court room. The transition to a virtual court room is different. There, the participants experience court in the same way in which they experience much of their everyday life, usually from the same location in which they live, work, or socialize ... Seeing other participants on screen in similar environments both deemphasizes the formal nature of the court and diminishes the sense that they are engaging in a unified proceeding. While this has often been necessary during the Covid-19 pandemic, judges must be conscious that when so many communications take place through video conferencing, court proceedings risk becoming just another video call, rather than an occasion the solemnity of which is reinforced by the environment in which it takes place.”

8. We note that in England and Wales the Lord Chief Justice and the Senior President of tribunals have recently directed that all judges must no longer conduct hearings from home or from premises other than courts or tribunal buildings. They have emphasised

that it is important for judicial powers to be exercised from courts and tribunal buildings and that this must be the default position. We strongly agree. We note also that the Supreme Court of the United Kingdom has announced that it intends to resume in-person hearings. We consider that the Court of Session should do the same, at least for substantive hearings.

9. As to the rules of court, we favour a much less complex scheme than envisaged in the draft rules. The system we propose distinguishes between substantive and procedural hearings. In the case of the former the default position should be that they will be conducted in-person in the court room. But the judge could depart from that rule (altogether or to a more limited extent) where he or she is satisfied that to do so would be in the interests of justice. For procedural hearings the default should be the other way round; these would where necessary be conducted by video conference unless the court considered that the interests of justice required a court room hearing to take place. Many procedural hearings would continue to be disposed of 'on the papers' as has happened successfully during the pandemic. We believe that a straightforward set of rules reflecting these principles would avoid many of the difficulties that would be bound to arise under the draft rules, such as questions as to which cases raise sufficiently important issues to qualify for an in-person hearing. Or whether a proof would turn on the credibility of particular witnesses. Our approach would allow the judge managing the case flexibility to fix the type of hearing best suited to the particular facts and circumstances of the case, taking full account of the issues which arise and the views of the parties. Hybrid hearings involving a mixture of evidence given in the court room and evidence given by video link would be entirely possible; evidence given by video has, of course, been used successfully in civil and criminal cases for some time. Judicial discretion would be paramount, as we believe it must be. In that regard, there are occasions when consideration of the effective use of time, convenience for court users, travel and environmental impact will make virtual hearings desirable.
10. Our answers to the questions in the consultation paper reflect the views set out above.