

Scottish Civil Justice Council

Consultation: Rules Covering the Mode of Attendance at Court Hearings

Annex A Response Form

Response by Solicitors of Midlothian Council's Litigation Team

This response is provided by the individual solicitors of Midlothian Council's litigation team ("MLC litigation team"). Whilst the response is provided as a group response by those solicitors, this represents the views of those solicitors as individuals, and is not a formal response on behalf of Midlothian Council.

MLC's litigation team are principally involved in appearances within the Sheriff Court in three main areas:

1. Applications for welfare and financial powers under the Adults with Incapacity (Scotland) Act 2000 ("AWI Cases")
2. Applications for permanence for children under the Adoption and Children (Scotland) Act 2007 ("Children's Cases")
3. Applicants in summary cause proceedings seeking payment or eviction from heritable property in terms of the Housing (Scotland) Act 2001 ("Heritable Cases")

Accordingly, we have limited our responses to those specific areas.

MLC's litigation team have had the benefit prior to submitting this response of reviewing the response on behalf of the Faculty of Advocates. MLC's litigation team share the concerns of the Faculty in relation to the inefficiencies and inequalities that arise out of the use of virtual hearings, and specifically agree with the Faculty in their position that "Faculty considers that the proposals, if implemented, would create problems with access to justice, the quality of justice and inequality" (paragraph 2(iv)).

MLC's litigation team notes the benefits outlined within the Consultation Paper of remote hearings, and also considers that there are benefits to the public purse in hearings being virtual. This ensures that solicitors are not requiring to travel to court, in addition to potential savings in relation to whose expenses the Council are obliged to pay, including safeguarders and curators ad litem. However, MLC's litigation team respectfully submits that more often than not litigants in the cases in which they are principally in court, (including those adults who lack capacity, parents of children for whom the Council are seeking permanence and tenants for whom the Council seek to evict) can be particularly vulnerable members of society, for whom access to justice is of particular importance and for whom technology inequality can be pronounced. Whilst there are clear benefits in remote hearings, it is our respectful position that those benefits must always be weighed against the fundamental importance of ensuring access to justice.

It is the view of MLC's litigation team that virtual hearings should be the default position for procedural matters, with the hearing being in-person if appropriate in the interests of justice. However it is our view that the default for contentious hearings, hearings where an order under the Adoption and Children (Scotland) Act 2007 could be made and the parent/family member is not represented, and proofs should be that the hearing will be in- person.

Question 1 – For the categories of case listed as suitable for an in-person hearing:

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

NA

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

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

NA

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

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

NA

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

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

NA

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

NA

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

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

We note that the draft Rules for the Court of Session propose that applications under the Adoption and Children (Scotland) Act 2007 should be in-person. We consider that, where a parent or family member is not represented, Children's cases should be in-person in the Sheriff Court.

We agree with the rest of the cases included in the in-person list, and in particular agree that peremptory diets ought to be in-person or hybrid.

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

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

For AWI and Heritable cases, we agree the general presumption of virtual hearings is appropriate. However, where an adult or family member wishes to oppose the granting of an application under the Adults with Incapacity (Scotland) Act 2000, we consider that the hearing should be in-person or hybrid.

MLC's litigation team have appeared using both video and telephone attendance. The preferred option for appearance is for virtual hearings to be by video conference. There is a clear benefit in being able to see the Sheriff via video whilst addressing them, and in being able to see other parties in the call. Difficulties have arisen in telephone appearances in not being able to see the Sheriff, not being clear who is addressing the court on the call, and not being clear/being able to see who is all on the call. We appreciate however that some parties will not have access to technology for video conferencing, and in those situations do not suggest that those parties should be prevented from appearing via telephone.

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

- Do you think lodging a motion is the right way to do that?
- Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

We consider that the method to request a change to an in-person hearing or hybrid hearing should be as simple as possible. We consider that the requirement to enrol a motion places an additional burden on unrepresented parties and places an additional barrier in access to justice. A person who

does not have ready access to a computer, printer or WiFi/data may struggle to enrol a motion. That person is also likely to struggle to attend a virtual hearing.

We would suggest that if parties are unrepresented, they should be able to contact the sheriff clerk's office by telephone or email to request that the hearing is in-person. We would suggest that information in relation to this could be included in papers when served.

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

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

MLC's litigation team consider that where parties in an AWI or Heritable action (or indeed a Children's case if for any reason that should be virtual) request an in-person or hybrid hearing, this should be automatically granted.

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

We consider that it may be preferable in certain circumstances for hearings to be hybrid. Provided that the court technology can satisfactorily allow a mix of in-person and virtual appearance, there may be situations where some parties could appear virtually, whilst others were within the court room. For example, in a hearing under the Adults with Incapacity (Scotland) Act 2000, if an adult or family member wishes to be present in court it may not be necessary for the safeguarder to appear in court, particularly if their report is straightforward. In that case, provided that technology allows, a hybrid hearing may be preferable in order to minimise costs to the public purse.