Response by The Sheriffs' Association and The Summary Sheriffs' Association
to
Scottish Civil Justice Council Consultation

Rules Covering the Mode of Attendance at Court Hearings

The Sheriffs' Association and The Summary Sheriffs' Association welcome the opportunity to respond to this consultation. This document constitutes our joint response to the proforma questionnaire, and we also take the opportunity to add a number of observations at a less granular level and offer suggested amendments to the draft rules.

As the Council observes in the consultation document:

> "There is an ongoing public debate about the merits of remote hearings. For some court users the attendance at hearings by electronic means has been perceived as delivering significant benefits in terms of reduced travel time and inconvenience, as well as more efficient hearings. For other court users it has raised concerns over how best to facilitate effective participation, maintain the gravitas of the court and respond to the availability of technology." (paragraph 4)

We anticipate that debate is likely to continue into the medium term, and it is important to acknowledge that. Different court users will have different views, and there is no single answer to the question of the most appropriate form of hearing. We would also observe that there are likely to be consequences for the resources required, which cannot be fully quantified at this stage. However it is important that sufficient resources are provided, whatever form a hearing takes, if the quality of access to justice is to be maintained. It may be, for example, that experience will show that a significant number of proofs are hybrid in form, at least for a period of time. Our experience already is that such proofs require additional time and effort from court staff as well as sheriffs and practitioners. While we appreciate these matters are not directly within the view of the SCJC, they do bear on the practical operation of the rules. But the point is that the rules will require to be sufficiently flexible, or rather allow judicial office holders sufficient flexibility, to deal with the position that there may be times when the necessary resources for hybrid proofs are not available and an in-person proof is required.

As we note below, we consider that it is important that the decision about the form of hearing should be in the hands of a judge at the level where the hearing will take place, whether the decision is that of the actual judge who will take the hearing or not.

An issue mentioned in the Equality Impact Assessment of which sheriffs have become acutely aware in the past 18 months is the intersection of access to justice and digital poverty. On the whole, we consider the draft rules contain sufficient powers for the court to try to steer a course which takes account of that in individual cases, if the issue is raised in a timely manner. However, we anticipate this is something which the SCJC may wish to keep in view.

We have confined our response to those questions relating to procedure in the sheriff court.

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

We are broadly content with the categories of case listed in rule 28ZA.2 as suitable for in-person hearing. As we read the draft rules, many hearings in family actions will be by electronic means, but child welfare hearings will require to be in-person hearings. We consider that this strikes the correct balance. Child welfare hearings often involve applications for delivery of a child, or for residence / contact orders. These are anxious issues for the parents. Experience suggests that the court achieves a better outcome for the child where these are in-person.

We strongly support the inclusion of rule 28ZA.2(3). Our experience already is that in some cases, it is difficult to assess critical issues of credibility in hearings conducted by electronic means, and there can be a real risk in such hearings of a miscarriage of justice.

We suggest adding an express reference to hearings of any kind in which one or more of the parties requires an interpreter, since that is much more efficiently managed at an in-person hearing. The position is the same where there are multiple parties, represented by multiple agents; in such cases the proper and efficient management of the court can quickly become impossible. So too, with a hearing of any length, proof or otherwise, in which parties are self-represented; such parties are more likely to have inadequate broadband. The risks in each case are the same; an important point or piece of evidence may be missed by the court, leading to a miscarriage of justice, and/or litigants will feel that they have had a perfunctory, ill-managed or inadequate hearing. The shift to hearings by electronic means is such a fundamental change that maintaining confidence in our system of civil justice is critical.

While on one view, these are the kind of cases that might come within the scope of rule 28ZA.5, and be dealt with by means of an application under rule 28ZA.4, we think it would be of very considerable benefit to litigants and judicial office holders for there to be an explicit provision, similar to that in rule 28ZA.2(3), for cases in which the efficient management of the court hearing required the hearing to be in in-person hearing. That would encourage litigants and agents to give proper consideration to such issues.

We therefore suggest the following amendments:-

Rule 28ZA.2(f) should read: "*(f) where paragraph (3) applies, proofs and other hearings*"

Rule 28.ZA(3) should read:

> *"(3) This paragraph applies to proofs and other hearings–*
>
> *(a) where there is a significant issue of credibility of a party or witness which is dependent upon a party's or witness's demeanour or character, or*
>
> *(b) where it is necessary for the efficient management of the proof or hearing for parties or witnesses to attend the proof or hearing physically."*

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

We are broadly content with the list in rule 28ZA.3. We note however that absent from the list is a reference to a 'procedural hearing', perhaps because the Ordinary Cause Rules make no express mention of such a hearing.

It is in practice a common form of hearing in the sheriff court. A case which is being continued for negotiations, for the lodging of a joint minute; for the lodging of a technical report etc. will often be continued to a 'procedural hearing'. There is a provision in the proposed amendments to the Court of Sessions, in rule 35B.3(2)(d), for "*[hearings] in relation to procedure*" which we suggest could usefully be replicated in the list in rule 28ZA.3(2). We should add that without such a reference, a 'procedural hearing' in a family action would fall within the scope of the definition in rule 28ZA.2(2)(b), such that attendance at a procedural hearing would require to be by physical means.

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

We agree that a motion is the appropriate way for a party to ask the court to depart from the general presumption, whichever it is.

We would support a requirement for a party to lodge a form similar to the proposed Form 35B.4-A or B. We consider the forms contain a number of helpful prompts for parties, requiring them to address the sorts of issues which are likely to be of concern to the court in dealing with such an application. We do not consider the requirement for such a form in addition to a motion to be unduly burdensome, since the information is necessary, and in our experience, additional information is already frequently provided as a paper apart in support of written motions. That is a trend which has accelerated as a consequence of other procedural changes in response to the current pandemic.

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.

We consider that it is important that the decision about the form of hearing should be in the hands of a judge at the level where the hearing will take place, whether the decision is that of the actual judge who will take the hearing or not. That is because a judge will be best placed to assess the available information about the issues, and also to gauge conditions in a particular forum, and here we have in mind that the conditions in a given sheriff court may vary from another court, and flexibility is essential if justice is to be done.

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

We would wish to make some further points.

Firstly, these changes are perhaps the most significant changes to the Ordinary Cause Rules since their first iteration in 1907. While the 1993 Rules were a substantial re-iteration, and the creation of Simple Procedure, the Sheriff Appeal Court and the All-Scotland Personal Injury Court were all milestones, what is proposed here will have a greater practical effect on more litigants, and their agents, more frequently, than any of these.

Secondly, it would be fair to say that the circumstances around this consultation exercise are unusual, if not unique. The sheriff courts have of course been allocating work between physical courts, and remote access courts, from the early days of the pandemic, out of necessity. It is right that this is now done on a consistent basis across the sheriff courts of Scotland. But because of our recent experience we can offer views as to what will work well, and what is sub-optimal, with much more confidence than would otherwise be the case for new rules. We can therefore say with some confidence that the division of court hearings on the basis proposed in these draft rules bears to be workable, provided the suggestions we offer, above, are taken into account.

Thirdly, some of what we say may have read-across to the proposed amendments to the Court of Session Rules, but these fall outwith the scope of this response and our own experience, and we refrain from further comment.

We would be very willing to attend at a meeting of the the SCJC or a committee dealing with this consultation and speak to any aspect of this submission, or the draft rules generally. The contacts, for that purpose would be:

- Sheriffs' Association – Sheriff Kenneth Campbell QC

- Summary Sheriffs' Association – Summary Sheriff Roddy Flinn