

RESPONSE BY SCOTTISH YOUNG LAWYERS' ASSOCIATION

To

SCOTTISH CIVIL JUSTICE COUNCIL CONSULTATION: RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS ("the Consultation")

This response is submitted on behalf of the Scottish Young Lawyers' Association ("**SYLA**"). The SYLA is a non-profit organisation, which educates, entertains and represents young lawyers in Scotland. The SYLA is run for and on behalf of young lawyers by a committee of volunteers and has over 3,100 members across the country. Our members include students, solicitors up to 10 years PQE and Devils or Advocates of up to 10 years standing. Many of our members have had experience of and have been affected by the adoption of telephone and video technology for court hearings. This response is therefore representative of the junior members of the legal profession and the next generation of Scottish lawyers.

The SYLA opened up a survey to its members in order to representatively respond to the Consultation.

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1. In response to the first question 67% of respondents felt the general presumptions were not appropriate.

The general consensus was that all evidential hearings, proofs and debates should be heard in person as the default. Some went as far as to say that opposed motions should also be heard in person.

Actions posing questions of legal importance such as Judicial Reviews, appeals and reclaiming motions were considered to merit in person hearings by default. One respondent highlighted that matters where there is a party litigant should also have a presumption of in-person hearings, unless the party litigant requests otherwise, as at a physical hearing the party litigant is more easily assisted by clerks, judges, solicitors and counsel.

2. 67% of respondents felt that the items listed here were not appropriate.

All those who voted in this manner felt that substantive business such as debates and proofs were better to be heard in person.

3. All but one of the respondents agreed that motion would be the suitable method for departing from the proposed rules. This would minimise cost to parties and work for the court. One individual considered an even simpler form should be used where there is consensus.

4. All respondents agreed that it should be a matter of discretion for the decision maker, some with the caveat that the presumptions should be altered to reduce the need for such motions and use of court time and others suggesting this must be an appealable decision.
5. Respondents who had commented in previous questions re-iterated their views about substantive business being conducted in person. Their reasons were varied.

One respondent felt that the proposed rules presented a “fundamentally diminished form of justice.”

Another pointed out that “The proposals are not in line with process and procedure in other jurisdictions and represents a significant move from person centred dispute resolution.”

Multiple respondents reflected on their own instruction of counsel as solicitors in virtual hearings commenting that it was difficult to properly correspond with Counsel when each person was appearing from a different location, when no-one was present in the same location as a witness or the solicitor and client were in different locations.

The organisation is very concerned about the impact that virtual hearings is having on the development of junior lawyers. In particular, trainees are not being provided with opportunities to properly observe Counsel in person, communicate with them and understand the court process. Intrants to the faculty of advocates are unable to observe hearings in the same manner. Both of these, SYLA are concerned, may dilute the standard of advocacy in future generations of lawyers. It may also dissuade able lawyers from considering a career in litigation as the learning opportunities are far removed from what they had been pre-pandemic.

6. 58% of respondents felt the general presumptions were not appropriate.

The general consensus from those recommending a change to the draft is for proofs and debates to default to in person hearings. It was also felt that substantive opposed motions in the national or regional hub courts could be heard in person if appropriate. IT was also suggested that the default for Child Welfare Hearings should be changed as these have been difficult to manage virtually.

7. The majority of respondents felt that substantive business such as proofs, debates and extensive opposed motions should be heard in person.
8. All but one of the respondents agreed the appropriate mode would be a motion. The dissenting individual considered an even simpler form should be used where there is consensus.

9. The vast majority of respondents felt that a separate form would over-complicate things, increase cost and serve no substantial purpose.

10. The following comments were made by SYLA members:

- This could be used as an opportunity to use e-motions as default in all cases.
- 'Virtual hearings' should only proceed by way of webex. Some courts have been conducting opposed motions by telephone conference as this is not felt to be appropriate.
- If virtual hearings are to be kept for procedural business then steps must be taken to ensure they are conducted appropriately by all involved and that they maintain the important gravitas.
- Some SYLA members have been subject to or have witnessed behaviours by in particular, party litigants which would not have been tolerated in in-person courts such as swearing, accusatory remarks and degrading comments towards solicitors appearing. Something will require to be done about this.
- Virtual hearings may seem all well and good to those with the ability to effectively participate but it should be borne in mind that many people do not have a stable internet connection, may have caring responsibilities, may flat or house share and as a result, for them, virtual hearings are much more difficult.
- Even for solicitors, many have experienced unexpected internet drop-out, technical hardware issues and the varying quality of microphones / cameras which impact on the ability to smoothly conduct court business.
- What will happen if part way through questioning of a witness the internet of the solicitor, advocate or judge goes down?
- In particular in evidential hearings many members have reported frustration that raising an objection to a line of questioning has been impeded by internet connection.
- The All Scotland Personal Injury Court sheriffs have made their position clear, in contradiction to the draft rules, that they can determine the reliability and credibility of a witness or party without difficulty on Webex. Motions where in person proofs have been sought by both parties have been rejected on this ground.
- Members are concerned about their professional development. Many trainees who would ordinarily have appeared on a firm rota are not being given that experience when individuals solicitors are logging on to webex for their hearings.
- Solicitors are not meeting in person in court, meaning many are struggling with isolation and lack of a professional network.
- Virtual courts reduce the opportunities for parties and agents to meet in person and discuss cases, potentially resolving matters without wasting court time.
- Clients are expressing a concern that the most important decisions in their life are being reached over a screen – they can't look a decision maker in the eye and don't feel they are receiving real justice.

- The evidential hearings are not as efficient as in person hearings due to delay in co-ordinating witnesses, delay in internet and the needs for screen breaks for all participants.

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The Scottish Young Lawyers' Association