RESPONSE OF THE ADVOCATES' FAMILY LAW ASSOCIATION

TO

THE SCJC CONSULTATION ON RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS

[1] The Advocates' Family Law Association welcomes the opportunity to respond to the SCJC consultation on rules covering the mode of attendance at court hearings.

[2] We make the following preliminary points which inform our response to the questions:

[3] We note that the consultation paper recognises that most family law hearings ought to be in person. We agree. However, we also consider that a number of the factors which form the basis of this approach to family hearings will be shared with other areas of civil litigation. We therefore agree with and support the response submitted by the Faculty of Advocates.

[4] It is self-evident that effective participation and representation of the litigant is essential. In a WebEx hearing it is difficult to ensure meaningful engagement with the litigant – they are largely invisible. Taking instructions on points as they arise during a hearing is particularly problematic. Our members have had to put virtual means in place to try to imitate the interaction with the litigant and instructing solicitor which takes place in an in person hearing. Alternatively, they have conducted the hearing whilst physically present with the litigant and instructing solicitor. However, these workarounds simply underline the superior nature of an in person hearing.

[5] We would also note that digital exclusion is an issue which arises in the context of family actions. Our members have experience of litigants and witnesses having difficulties in participating in a hearing conducted by electronic means as a result of lack of an appropriate device, software, wifi or broadband. We would also note that there is a difference between what suffices for an every day mobile or internet connection with what

is required for a court hearing. As the consultation paper notes, the issue of digital exclusion is a wider one requiring, amongst other things, Government support.

[6] Our members are also aware of the very significant infrastructure which requires to be in place for a substantive hearing conducted by electronic means to take place, particularly where evidence is led. We are concerned that the cost of providing such infrastructure, personnel and support may be prohibitive, particularly for cases conducted with legal aid funding, but also for a privately paying party.

[7] The changes proposed in the draft rules are a very significant departure from the position which pertained prior to the pandemic. Whilst it is important to ensure that what is good is not lost including the use of electronic documents and greater ease of taking evidence from a witness who lives abroad or is unable to attend in person, there appears to be little support for such a radical change at present. We note that the consultation acknowledges the significant public debate on the merits of conducting hearings by electronic means continuing within Scotland and internationally. We are not aware of research within Scotland in relation to the experience of litigants and other participants in virtual court hearings. For example, in a rapid consultation undertaken by the Nuffield Family Justice Observatory and instituted by the President of the Family Division in England and Wales in June 2021[1], professionals and parents, lay parties and relatives were asked to share their experience of family court hearings during the pandemic. The purpose of this was to inform the post-pandemic recovery plans of the Family Court and the Court of Protection. At this stage, we consider that the principle of most family hearings being in person is the only one which is appropriate.

[8] Whilst Webex hearings have allowed litigation to continue during the pandemic, we question whether Webex is yet a system which absent any public health issues is fit for purpose. In particular, we note that it does not yet appear to facilitate open justice. Parties interested in a litigation or who have completed their evidence and wish to follow

[1] https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/07/remote-hearings-in-the-family-court-post-pandemic-report-0721.pdf

the remainder of proceedings are required to link via audio only. It is not immediately obvious how such a link might be obtained or accessed. An audio only link does not allow the virtual observer to know whether the hearing is delayed or has been adjourned. It is charged at national rate. The cost can be prohibitive. Such issues ought to be resolved before Webex should be used for post-pandemic virtual hearings.

[9] Telephone hearings should not be an option for any type of hearing. It is the experience of AFLA members that telephone hearings have been particularly unsatisfactory:

- It is understood that many courts utilise the Cisco system which restricts the number of persons who can join the call. As a result, members have experienced the exclusion of parties from family law hearings. Where the court is making significant decisions about the family life of litigants, they ought to be able to attend if they wish to do so in order to hear the proceedings first hand. Their presence allows the court to engage with them directly – this is of general importance, but is a particular feature of child welfare hearings in the Sheriff Court which in our view can only be conducted effectively in person.
- For telephone hearings which require parties to dial in, the cost of doing so represents a further barrier to access to justice.
- Even in circumstances in which it would be possible to join the call - perhaps because of the administrative burden of facilitating remote hearings - AFLA members have experienced being excluded from calls despite having been instructed for the hearing or have been advised that attendance is only possible if they attend at a location with agents in order that only one number need be dialled by the court. Litigants should not be precluded from utilising their choice of representative at a hearing.
- Telephone hearings are difficult to manage – it is not always clear who is speaking, who is on the call and whether any person has lost connection to the call. Self-evidently screen sharing of documents is not available.

In summary, telephone hearings are a barrier to access to justice. They do not promote or facilitate open justice. They should form no part of post-pandemic court business and their use should be discontinued as soon as possible.

RCS

Question 1 – 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 agree that the default for the listed family law hearings should be in person. However, we do not agree that it is necessary to specify a list of hearings suitable for an in person hearing. The rules could be simplified as suggested in the response from the Faculty of Advocates by providing a list of hearings for which the default is remote attendance with all other hearings remaining in person.

Question 2 – 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?

As explained above, we do not consider that any category of case ought to be suitable for attendance by telephone. We agree that case management hearings and pre-proof hearings in family actions should be listed as suitable for attendance by video attendance. However, practical consequences have not been considered. WebEx hearings cannot be conducted from courts within Parliament House. There may be delays to in-person hearing where participants have been involved in WebEx hearings before 10am.

Question 3 – 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? Please explain your answer.

We agree that a motion is the right way for parties to apply to change the mode of attendance. We agree with the applicable test. We do not agree that such a motion ought to be determined without an oral hearing. The motion should be dealt with in the normal manner with oral submissions in the event of opposition or the court requiring to be addressed thereon. We would suggest that consideration be given to amending the case management rules in respect of family actions in order to allow such motions to be dealt with in that context.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:
o Do you agree that the court should have the final say? Please explain your answer

We do not consider that the court should have the ability to change the mode of attendance *ex proprio motu* and without hearing parties' submissions. This could undermine the rules if the defaults set out were capable of being so readily set aside without parties addressing the court in advance. The defaults ought to apply unless one of the parties makes a motion to change the mode of attendance.

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

No.

OCR

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 agree that the default for the listed family law hearings should be in person. However, consistent with our response to Question 1 above, we do not agree that it is necessary to specify a list of hearings suitable for an in person hearing.

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?

As explained above, we do not consider that any category of case ought to be suitable for attendance by telephone. We agree that the listed hearings in relation to family proceedings would be suitable for video attendance. We observe that OCR 33.36 requires personal attendance of parties at Options Hearings which may, depending on the rules implemented, require consequent amendment.

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 right way for parties to apply to change the mode of attendance and setting out the reasons for that either in the motion or an accompanying

application form would be helpful. We agree with the applicable test. We do not agree that such a motion ought to be determined without an oral hearing. The motion should be dealt with in the normal manner with oral submissions in the event of opposition or the court requiring to be addressed thereon. We would suggest that consideration be given to amending the case management rules in respect of family actions in order to allow such motions to be dealt with in that context.

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:
o Do you agree that the court should have the final say? Please explain your answer

We do not consider that the court should have the ability to change the mode of attendance *ex proprio motu* and without hearing parties' submissions. This could undermine the rules if the defaults set out were capable of being so readily set aside without parties addressing the court in advance. The defaults ought to apply unless one of the parties makes a motion to change the mode of attendance.

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

No.