

Scottish Civil Justice Council consultation: Rules covering the Mode of Attendance at Court Hearings



Established in 1902

Submission by Medical and Dental Defence Union of Scotland (MDDUS)

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Dear Sir/Madam,

I write on behalf of MDDUS to highlight the key points that we wish to bring to the attention of the consultation team.

We welcome the opportunity to submit to the Council's consultation on Rules covering the Mode of Attendance at Court Hearings. This covering letter should be read in conjunction with the specific responses to the consultation, as follows below.

The Medical and Dental Defence Union of Scotland (MDDUS) is a medical defence organisation that represents the professional interests of more than 53,000 doctors and dentists across the UK, offering access to indemnity, legal advice, and support. MDDUS represents doctors and dentists as Defenders in the Sheriff Court (predominately ASPIC) and the Court of Session.

During the Covid-19 pandemic, we have regularly attended online hearings including Proofs and an Appeal, in both the Sheriff Court and the Court of Session. Our experience in relation to procedural matters has been generally good and we agree that there has been an opportunity to save time travelling to and from the Courts which has had favourable costs and time implications. However, our experience of evidential hearings has not been as positive, and we strongly oppose the proposed move to this becoming the norm, not only because of the impact this would have on our members, but also due to wider considerations which impact the profession as a whole. In addition, we are concerned about the impact of this on teaching and developing students, trainees and more junior members of the profession and the Bar.

The Scottish Government's digital strategy supports a preference for an ongoing shift to digital public services where that can improve the overall experience. We would submit that in the circumstances we refer to in our response, the experience has not been improved. There are documented concerns identified by SCTS about the misuse of recordings of evidence, and we also have concerns about how witnesses perceive the judicial system from the comfort of their living rooms. There are issues relating to the proper assessment of credibility and reliability, and concerns about maintaining the confidentiality of that evidence when witnesses are giving evidence from their home, where other witnesses to a case may also reside.

Rather than improving the experience, we believe that remote evidential hearings are far inferior to in person ones. We have found there to be issues with access to documentation and reception issues often interfere with the smooth running of proceedings, as well as presenting challenges to communication between Counsel and witnesses.

In cases where we represent doctors, they have an additional burden in that if they are criticised by a court or tribunal, they require to self-refer to the GMC. A finding of negligence is therefore of particular concern to a medical professional given the regulatory consequences, and this amplifies the need in such cases for there to be a fair and just approach to the treatment of the oral evidence. Issues of credibility and reliability of witnesses are in our opinion always significant and of importance in such cases and in this regard, we believe clinical negligence Proofs should always proceed in person.

Whilst we accept that there is a case in some circumstances for a hybrid format for formal evidence, so that some experts may not require to travel from across the United Kingdom, in general we believe witnesses to fact should give evidence in person. We have also noted that there appears to be little cost benefit to the STCS in proceeding with remote hearings and given that there is certainly considerable evidence that efficiency, quality of justice and access to justice is not improved, there seems little reason to proceed down the intended route.

Our responses to the full list of questions contained within the consultation follows below.

Yours sincerely,

Lindsey McGregor

Deputy Head of Legal (Scotland)

Medical and Dental Defence Union of Scotland

Rules Covering the Mode of Attendance at Court Hearings

Responses by MDDUS – please see also covering letter attached.

ANNEX A – CONSULTATION RESPONSE FORM

RCS

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?

MDDUS Solicitors are only involved in legal debates, proofs, civil jury trials, and reclaiming motions and therefore this response is restricted to our experience of those categories rather than the wider list set out in the rules.

We are not in agreement with the general presumption that attendance in person is only required where there is a point of law of general public importance/particular difficulty or importance (in respect of legal debates etc) nor do we agree that a proof should only proceed in person where there is a significant issue of credibility of the party or witness which is dependent upon an analysis of the party's or witness's demeanour or character. (Rules 35B.2.C)23)

The reasons we submit for proceeding with in person hearings are varied and are a mix of issues of policy and concerns specifically affecting our members.

Remote hearings were introduced as a necessity to cope with the first lockdown in March 2020. There has been no assessment of the benefits or disadvantages in a formal sense, yet this experience is being used as the bedrock for these new rules. We believe there should have been a proper analysis before steps were taken to proceed with this consultation and implementation.

What is clear is that the collective experience of the legal profession has led to their overwhelmingly rejection of the proposed concept of a default of virtual hearings in all but restricted circumstances. The outcome of the Law Society of Scotland's survey illustrates this.

In England, Wales and Ireland, the courts are moving back to the pre pandemic status quo, and the Medical Practitioners Tribunal Service has proceeded with in person hearings over the last year. This is unsurprising given the issues with virtual hearings. From our experiences, virtual hearings can cause a significant number of inefficiencies and indeed inequalities. Our experience of some virtual hearings has been that they can be inefficient, particularly when there are issues with devices and Wi-Fi. This can waste time, cause delays and be very stressful for those involved. The mechanics of running a proof remotely are a major reason against the proposed presumption. For the advocate the presentation of documentation and engagement with the witnesses is severely hampered. This can impact on the effectiveness of cross examination, and is an inferior experience to in person hearings.

From the perspective of our members who are defending actions based on their alleged negligence, there are significant concerns about judging the credibility and reliability of the factual evidence against them when witnesses are giving evidence in the comfort of their own home. This does not maintain the gravitas that is required when judging a professional person's conduct and practice particularly when the outcome could have implications on their registration with their professional regulator.

In addition, from a public policy perspective, remote hearings give rise to inequality. Participants have a variety of digital devices which range in quality and cost meaning there is not a level playing field when it comes to participating in these hearings. Further, they are not accessible for members of the public or indeed for members of the profession. Trainee solicitors, law students and others interested in the court process cannot easily or readily view proceedings and learn. This is a significant loss to the profession and to the public. It is easy to enter a court room and watch justice in action however, it is not the same viewing it online often because it is impossible to obtain access to the virtual hearing.

There are also significant issues from a health and welfare perspective. Many users undertaking a long proof would be faced with using up to three screens in order to represent their clients effectively over the course of a period of time, which causes eye strain and headaches. Although there has been a suggestion that additional breaks would be provided, this would only serve to elongate the proceedings and would disturb the flow.

The proposed rules provide for in person hearings only where an issue of credibility of a party is significant. We are of the view in cases involving our members that such issues would arise and do arise in almost every proof. This distinction we believe is unworkable as there is bound to be numerous disputes about interpreting and applying whether an issue was "significant" or not. This will simply lead to an increase in costly hearings and delays.

Virtual hearings provide the protentional for dishonesty. Witnesses cannot be monitored to the same degree when giving evidence at home. Other factual witnesses who are yet to give evidence could be listening in, other individuals might be providing input or assistance to the witness during their evidence, or the witness could be accessing documentation or material that is not before the court, all without the court being aware. We have had experience of the latter already in a hearing before a regulator. There are no safeguards present for the protection of that evidence which is extremely concerning for those being judged.

The proposed rules if passed will institute a form of procedure which is second-best and does not even have the benefit of cost saving to the SCTS. Lord Carloway has already advised that WebEx has few if any cost saving benefits.

There should be a presumption of a requirement to attend a hearing physically for all proofs, legal debates, reclaiming motions and appeals although we accept there may be scope in some cases for hybrid hearings with some evidence being led in person and virtually. Parties can then opt out of that to have all or part of the hearing heard remotely if the specific circumstances of that case justify it.

Finally, we would submit that for the legal profession, the move away from in person hearings has been detrimental, not only to the mental health of some members of the profession but has also led to diminishing opportunities for meeting colleagues and for learning and teaching. We would also highlight the Law Society survey which indicated that only 5% of those surveyed thought that proofs worked well online and only 3% thought that tribunals worked well. These statistics should be borne in mind when considering the appropriateness of general presumption for virtual hearings.

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?

MDDUS only represent their medical and dental members in limited types of litigation and these comments are therefore limited to the types of actions our members would be involved in. We would refer you to our answer to question 1.

Our experience in relation to attending Procedural Hearings in the Court of Session by both telephone conference and WebEx has been on the whole positive. There has been a saving in time in respect of less travel and we are of the view that proceeding in this manner is efficient and in the interests of justice. As an aside, we do view the absence of opportunity to discuss cases with other parties either in parliament hall or outside the court to be a negative development, but it is appreciated that there are many benefits to all parties in proceeding electronically in relation to procedural matters (Rule 35B)3(2)(d).

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.

We disagree that lodging a Motion is the correct way to proceed to warrant a departure from the general presumption. If the rules proceed as currently drafted, then we are of the view that the issue of attending in person at a Hearing should be dealt with as part of the rules of court particular to the lodging of a Written Statement of Proposals (Rule 42A.6 of the Court of Session Rules). This already deals with the management of the Proof and the exchange of witness statements of those to give evidence at the Proof. The discussion could thereafter take place at the Case Management Hearing in terms of Rule 42A.7. It is submitted that this would be a more appropriate forum for decision making in relation to the suitability for the Hearing to proceed in person and that the additional steps of dealing with this matter by Motion is an additional, unnecessary expense.

Where the application involves Hearings other than Proofs such as a legal debate, we are of the view that this could be done by way of Motion. We formed the view that the form 35B.4-A was unnecessary, and the terms could be incorporated into a motion if required. We do not of course accept that the use of the motion or form is the correct way to proceed in any event.

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

Rule 35B.4 (4) confirms that the Motion is to be placed before a Lord Ordinary for determination without an oral Hearing. We believe that this matter should be dealt with orally at the Case Management Hearing or at an opposed motion hearing if related to a type of case not involving an evidential hearing, and not by the Lord Ordinary on the papers. It is not appropriate for this power to be delegated to the Court without a proper examination of all the issues and the opportunity for oral arguments. Altering the mode of the hearing without such examination would be likely to lead to further litigation and appeal by parties who had been unsuccessful.

If parties are agreed in their position for example to proceed in person, it appears to be perverse that the court could then alter that without the opportunity for oral submissions in the normal way.

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

There seems little necessity in using the Form 35B-A to be attached to the Motion. It is simply an additional administrative burden that could be incorporated into a Motion.

OCR

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 would refer to the answers provided above. We would again submit the importance of all Proofs being heard in person and not just where there is a significant issue of credibility of a party or witness. In relation to clinical negligence cases where a defender doctor or dentist's registration is at risk, it is particularly important for the reliability and credibility of those making allegations of breach of duty against them to be tested in person given what is at stake for the defender.

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?

We would again refer to our answer to Question 2. In summary, there are benefits in Procedural Hearings proceeding by electronic means.

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

Again, with reference to Answer 3, if this legislation proceeds as planned, and Proofs are required to only proceed in person if there are significant issues of credibility of a party or witness and we seek to challenge this, we do not agree that this should proceed by way of Motion and should be dealt with by parties in their Written Statements of Procedure and the Sheriff addressed upon this at the Procedural Hearing. We do not believe there is any need for the Application Form attached to the Court of Session Rules. The information contained within that could be dealt with in the Motion Form.

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

Please see answer 4.

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

Please see answer 5