RESPONSE

OF THE JUNIOR END OF THE JUNIOR BAR

to the Consultation Paper on Rules covering the Mode of Attendance at Court Hearings

issued by the Scottish Civil Justice Council

Introduction

1. The aim of this document is to set out the response of the junior end of the junior bar (the "junior juniors"[1]) to the consultation paper issued by the Scottish Civil Justice Council entitled *Rules Covering the Mode of Attendance at Court Hearings* (the "consultation paper").

Prefatory points

2. Attention is drawn to four prefatory points.

3. First, a response to the consultation paper has been prepared by the Faculty of Advocates (the "FOA response"). The FOA response includes a revised version of the proposed new rules (the "revised rules").

4. Second, the FOA response reflects the views of the junior juniors in relation to the proposal that virtual hearings become the default position in civil cases. To the FOA response, the junior juniors add a single observation. The Lord President made it clear in his remarks of 27 September 2021 that virtual hearings have "few, if any, cost saving benefits to the [Scottish Court and Tribunal Service]"[2]. That being the case, assessment of the consultation paper neccessarily hinges on this question: *will virtual hearings*

[1] For present purposes, the "junior juniors" are members of the Faculty of Advocates not more than 5 years called.

[2] https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/speeches/opening-of-the-legal-year270921.pdf?sfvrsn=2def7832_2

improve the quality of justice in Scotland? It seems patently obvious that they will not. The changes proposed (the "proposals") by the consultation paper are, therefore, irrational. Reference is made to paragraphs 4 - 48 of the FOA response, the terms of which apply *mutatis mutandis*.

5. Third, the revised rules are (for the avoidance of any doubt) expressly endorsed by the junior juniors.

6. Fourth, the focus of this document will hereinafter be restricted to the anticipated effect of the proposals on (i) professional development, (ii) collegiality, and (iii) wellbeing.

Professional development

7. Our concerns in respect of professional development are twofold.

The first concern: the junior is marginalised

8. Virtual hearings hinder the extent to which junior advocates are visible to the court. That is deeply problematic. In this connection, reference is made to six points.

9. First, the career of an advocate depends as much on reputation as on anything else. That is because the persuasiveness of an argument is assisted by the reputation of the advocate making it.

10. Second, where senior and junior counsel are instructed together in a virtual hearing, the practice is that only the senior will appear on screen. All too often, the judge seems to be unaware of the junior's involvement. Indeed, it is becoming depressingly common for the junior's name not to appear on written decisions.

11. Third, the junior thus becomes marginalised.

12. Fourth, a restriction is thereby imposed on the ability of the junior to develop a reputation with the bench.

13. Fifth, that restriction affects the junior juniors to a disproportionate extent. Against more experienced individuals with reputations already established, the junior junior is at a competitive disadvantage. To curtail the ability of the junior juniors to develop reputations of their own is to cement that disadvantage.

14. Sixth, professional development is thus hamstrung. The junior junior is less effective as an advocate. The administration of justice suffers as a direct consequence thereof.

The second concern: interaction with senior counsel is restricted

15. Virtual hearings hinder the extent to which junior advocates are able to interact with senior counsel.

16. Discussions between opposing seniors before and after court would once have included the juniors. As a matter of necessity, those discussions now take place by telephone between the seniors only. The juniors are suddenly seldom involved.

17. No longer is there a chance, for example, to observe as those more experienced conduct critical negotiations.

18. The same issue applies in court. Rather than engage substantively and/or study the advocacy style of senior members, the role of the junior is now to receive (and relay) instructions sent via Whatsapp chat groups.

19. Opportunities to learn by watching others (the very essence of an advocate's training) are significantly reduced. Practical education - for which there is no substitute - is compromised. On any view, that is a lamentable state of affairs. And, as before, it is one which affects the junior juniors (whose training is necessarily less developed than that of more senior colleagues) to a disproportionate extent.

20. Professional development is thereby hindered. The junior junior is less effective as an advocate. The administration of justice suffers as a direct consequence thereof.

Conclusions

21. To reduce the junior to an invisible presence is something which should be regarded as deeply undesirable. At the very least, it is surely beyond dispute that the quality of justice is not improved by this new dynamic.

22. For the reasons sets out above, the professional development of the junior juniors is adversely affected in circumstances where there are limited opportunities to (a) develop a reputation with the court, and (b) engage with senior (or more experienced juniors) in a manner which facilitates practical learning.

23. The net result is a less effective junior bar. That will hamper the administration of justice and prejudice the conduct of litigation.

24. The junior juniors whose wings are today being clipped will at some point in the future form the pool of talent from which judicial appointments and/or appointments as senior counsel are filled. The interests of justice demand that efforts be made to protect and promote the strength of that pool. The consultation paper runs contrary to that objective.

Collegiality

25. An advocate's job is often lonely and always stressful. The antidote is the sense of collegiality – the coffee in the reading room; the walk in Parliament Hall; the chat over lunch – which has long existed between members. It is that collegiality which sustains the advocate during periods of pressure and through which friendships and/or professional relationships are formed. Perhaps more importantly, collegiality engenders trust. It is trite – but worth emphasising nonetheless – that trust is an essential ingredient in any extra-judicial discussions. Without it, the ability to resolve disputes is constrained. Where the ability to resolve disputes is constrained, more time in court is required.

26. The proposals advanced in the consultation paper will reduce the Faculty to a disparate collection of individuals. The inevitable consequence of that Kafka-esque metamorphosis is loss of the collegiality hereinbefore described. Once more, the junior juniors will be disproportionately affected. By virtue of their comparatively limited experience, members of that constituency have had less time to form the relationships which are so important personally and professionally. The remote world will deprive them of the chance to earn the trust of their more experienced colleagues. It will prevent them from establishing trust in one another. As before, the junior junior thus becomes less effective as an advocate. Professional development is further constrained. There is no improvement in the quality of justice.

Wellbeing

27. If the proposals in the consultation paper take effect, the defining characteristic of a career at the bar will be solitude. For some people, that will perhaps be of little concern. For many others, this brave new virtual world will be a highly unappealing (and de-motivating) prospect. It will be lonely. Long periods of isolation will be punctuated only by hearings which involve no human interaction. Few at the bar today will have anticipated quite so secluded an existence. Most will not have banked on being required to turn their homes into makeshift offices. The separation of church (work) and state (home) is eroded. Virtual hearings – universally regarded as a particularly draining way of conducting litigation - now take place just metres from where one eats or sleeps.

28. As far as we can determine, little (if any) thought has been given to the effect which all of this might have on physical and mental health. The experience of the junior juniors tends, however, to suggest that it will be harmful. In cases where it falls short of harmful, job satisfaction will nevertheless be chipped away at. And the junior junior will again be affected to a disproportionate extent. A home office requires space which the junior junior may not have and equipment which the junior junior might struggle to afford. Starved of contact with colleagues, the support network which once existed

becomes unavailable to those who need it most. There is a not insignificant risk that junior juniors will be driven away from the bar altogether.

Conclusions

29. For the reasons set out herein (and elsewhere), the proposals undermine (rather than improve) the quality of justice. They are, therefore, without a rational basis.

30. From the perspective of the junior juniors, the proposals represent a particularly insidious threat to professional development. The wider significance of that should not be underestimated. A weaker junior bar will lead to a weaker senior bar. A weaker senior bar will one day lead to a weaker bench. In that sense, the proposals seem incredibly short sighted.

31. The law should be influenced not by the weather of the day but by the climate of the era. The administration of justice should not be reactionary. To adopt the proposals would be to lose sight of that most basic of principles. At a time when the steady hand of the judicial branch is perhaps more important than ever, the consultation paper has the feel of something knee-jerk.

32. To paraphrase Justice Breyer, it is not often in law that so few have so quickly changed so much. To what end? Money will not be saved and the quality of justice will not be improved by the proposals. There is no case to be made for them.

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