



RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES

IN RELATION TO

PART 5 OF THE CORONAVIRUS (RECOVERY AND REFORM) SCOTLAND BILL

1. Faculty has restricted its observations to Part 5 of the Bill which relates to “Temporary Justice Measures”.
2. Faculty is concerned about the provisions in Ch.2 of the Schedule. This will seek to remove the legal requirement for “a person” to attend physically at a court or tribunal unless that person is giving evidence.
3. The proposals in the Bill in this regard risk conflicting with new rules of court which are soon likely to provide for a more flexible system but with certain default settings. The Bill should be amended so that the provisions on attendance at court mirror rather than conflict with that new system.
4. The dangers and practical problems of conducting court business by virtual means should not be under-estimated. Any extended use of the virtual system should only be adopted after careful consideration of those dangers and problems some of which are recorded in what follows.

Ongoing consultation re attendance at court

5. There is a very important matter of context which needs to be borne in mind when considering Part 5 of the Bill. This is a live consultation at the instance of the Scottish Civil Justice Council on the matter of the mode of attendance at court hearings. This consultation remains ongoing.
6. In the later part of 2021, the SCJC consultation sought views on amending the rules of the civil courts with regard to the means by which parties and their representatives attend, i.e., in person or virtually.
7. A substantial number of responses (82 in total) were made to the SCJC consultation. These came from, amongst others, both branches of the legal profession in Scotland (and a number of sub-groups within the same) and also the judiciary. They can be viewed here:

<https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-responses-mode-of-attendance-at-court-hearings>.

8. An analysis of those responses by the SCJC can be viewed here:

https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/31-january-2022-scjc-meeting/analysis-of-responses---mode-of-attendance.pdf?sfvrsn=d3bd2e6f_2.

Preponderance of opinion on the importance of attendance at court

9. The vast majority of responses were to the effect that there should only be a presumption in favour of virtual court hearings for routine procedural business.
10. Most responses favoured the view that substantive hearings (i.e., those where the court is being asked to dispose of a case whether on the basis of legal arguments alone or after evidence) should take place in person and in a physical court room. That is unless the parties agree otherwise; or unless the court considers that it is in the interests of justice to have a virtual hearing.
11. Faculty's own response to the SCJC proposals can be summarised as follows. Many of the points made overlap and apply to what is proposed in the Bill:
- i. Faculty recognises that it is important to seek to retain, where appropriate, the beneficial elements of the way in which the civil courts have been forced to work as a result of the health crisis.
 - ii. Equally, Faculty considers it important to recognise that there are a number of inefficiencies and inequalities that arise out of the use of virtual hearings.
 - iii. Faculty is concerned that the proposed rules strike the wrong balance. In particular, it is concerned about and opposes the proposed adoption of a default setting for contentious and substantive hearings in the vast majority of civil cases in Scotland.
 - iv. Faculty does not consider that there is any clear evidence which suggests that litigants, the judiciary, counsel, solicitors or the general public desire a civil justice system which would operate in the way proposed by the draft rules.
 - v. Faculty considers that the proposals, if implemented, would create problems with access to justice, the quality of justice and inequality.
 - vi. Faculty would support a proposal to introduce a general default setting of virtual hearings for procedural business supplemented by the ability of parties to apply for an in-person hearing which can be granted by the court if considered appropriate in the interests of justice.
 - vii. However, Faculty considers it essential that the default position for contentious and substantive business should be in-person and in a court room.

viii. Parties should however enjoy the right to apply for a virtual hearing in whole or in part which the court can grant if considered appropriate in the interests of justice.

12. It is worth considering the response on behalf of Scotland's senior judiciary to the SCJC Consultation. In their response the Senators of the College of Justice said this (emphasis added):

"Having now had substantial experience of conducting such hearings by video, we are satisfied that **they should *not* become the norm** in the Court of Session.

There are two problems about conducting substantive hearings by video conference.

The first difficulty is that **a video conference simply cannot match the many advantages of a hearing that takes place with the main participants present together in a courtroom.** A hearing based in a physical courtroom is, in our view, the best way of presenting complex legal arguments and contested evidence to a court. A court room hearing allows for witnesses to be effectively (and where appropriate vigorously) challenged and for the truth and reliability of their evidence to be tested to the limit. This is as it should be. Moreover, legal arguments can be thoroughly examined and explored in the course of constructive debate. None of this can be done as well over a video hearing. The technology amounts to a barrier against effective court room communication. It is much more difficult for the judges to intervene and to engage with the participants constructively and openly. Exchanges are stilted and awkward.

We understand that most of the lawyers do not like these hearings. They have found that they do not allow them to put forward their clients' cases as they would wish. The latencies inherent in internet-based data transmission impair free-flowing dialogue, which should be at the heart of a court hearing conducted under our adversarial system. Technical problems interrupting the hearing are common.

At the end of the day the reality is that video hearings are sub-optimal for most substantive business.

Secondly, the dignity and solemnity of the court room are missing in a video conference. There is an absence of the formality that should characterise a court hearing. **The court as a physical place supports the public's acceptance of the legitimacy and authority of the court and the law itself. In a video conference these essential features are lost."**

13. Faculty agrees with Scotland's senior judges on all of these points.

14. Accordingly, Faculty considers that the same approach suggested by the Faculty and Scotland's senior judiciary as above should be adopted in the Bill when it comes to the question of the mode of attendance at court hearings.
15. It would not make sense to have, on the one hand, a new set of procedural rules which are thought likely to reflect the approach outlined above and, on the other hand, a conflicting provision in primary legislation which takes a different approach.
16. If the SCJC promulgates rules which reflect the approach suggested above (which is thought likely standing the weight of the responses) then judges will be armed with the necessary flexibility to direct that hearings can proceed virtually if circumstances reasonably dictate. Such circumstances could be a future health emergency; or they could be something much more mundane.
17. The point is that the court already has and will have the flexibility to address those circumstances, whatever they are.
18. But flexibility should reside in a system which retains and promotes the authority of the court when it is tasked with making major decisions affecting the rights and interests of the people who bring or are faced with defending legal proceedings.
19. Significant decisions affecting the rights and interests of Scottish litigants should be made by the court after an optimal and not a sub-optimal hearing.

Proposed Amendments

20. Faculty considers that Ch. 2 of the Schedule should be amended to provide for a 'virtual default' for procedural hearings with the option of such hearings calling in person if the court so directs; and an 'in person default' for substantive hearings such as trials, proofs, legal debates and appeals but with the option of such hearings proceeding virtually if the court so directs.
21. Separately, the use of 'person' as adopted in the draft provisions is liable to cause problems. Whilst this might not be the intention, a provision in primary legislation which excuses 'a person' from attending at court unless they are giving evidence could be utilised by anyone and that would therefore include judges, lawyers, clerks, macers and court staff.

Major changes with 'temporary' powers

22. As a general point, Faculty does not see any reasoned justification for the need to extend the emergency powers in relation to the court system into 2023 and, potentially, 2025 (see clause 40 in Part 5).
23. It does not seem appropriate to effect such a significant change to the workings of Scotland's courts on the footing that it is a "temporary" measure when the temporal periods under consideration run into many years.
24. The courts already have the procedural tools they need and it is anticipated that the option of having virtual hearings for appropriate types of business will soon be put on

to a permanent footing and in a way supported by those responsible for the working of Scotland's justice system in the judiciary and legal profession. The Bill should compliment rather than contradict that new and flexible system.