

Scottish Government

Covid recovery: public health, services and justice system reforms



A response by the Association of Personal Injury Lawyers

November 2021

Introduction

We welcome the opportunity to respond to the Scottish Government's consultation on supporting Scotland's recovery from coronavirus. While we are content for the provisions for the conduct of business by electronic means to be extended beyond March 2022, and support the greater use of technology for procedural matters, there must be a return to a default position of face-to-face proof hearings as a matter of urgency.

We have responded to questions within our remit, only.

23) It is proposed that the provisions for Topic J1 (Courts and tribunals: conduct of business by electronic means) as described will be extended beyond March 2022. Which of the following best describes what you think about this?

- I think the provisions for Topic J1 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J1 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J1 should be extended or made permanent
- Unsure
- I have no view

We are content for the provisions for conduct of business by electronic means to be extended beyond March 2022 and made permanent. We support the greater use of technology for procedural matters, including the signing and sending of documents electronically and we welcome the efficiency this has brought.

Q24) It is proposed that the provisions for Topic J2 (Courts and tribunals: virtual attendance) as described will be extended beyond March 2022. Which of the following best describes what you think about this?

- I think the provisions for Topic J2 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J2 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J2 should be extended or made permanent
- Unsure
- I have no view

We do not believe that there should be a blanket extension of the rules relating to virtual attendance at court beyond March 2022. We would urge the Scottish Government to re-instate the default position of proofs being heard in person as a matter of urgency, for the reasons highlighted below. In personal injury cases, in both the Court of Session and the All Scotland Sheriff Personal Injury Court, in terms of section 9 and 11 of the Court of Session Act 1988, and sections 41 and 63 of the Courts Reform (Scotland) Act 2014, a pursuer has a

right to have his or her case heard by a civil jury. While we appreciate temporary measures have been adopted to allow civil jury trials to proceed remotely, it is undoubtedly far more appropriate that these take place in person.

1) Access to the internet

We note that the Scottish Government has promised to invest in increased broadband coverage in rural areas; supporting disadvantaged groups through the provision of devices, training and internet connections, and the funding of access to digital assistance through relevant third sector organisations. These changes would need to be made in advance of any rule changes to make the use of remote hearings more permanent. While the vast majority of the population have access to the internet, this does not necessarily mean that they have quality access – there are huge problems with Wi-Fi quality in rural areas – and even where there is “access”, this does not mean that people will have the knowledge or confidence to take part in an online hearing competently. Many people will also not have access to the appropriate technology required to be able to join a hearing remotely. While many will have access to the internet via a mobile phone, far fewer will have access to a laptop, and joining a hearing via a mobile phone camera is far from ideal.

There must be caution exercised to ensure that the whole population is able to continue to access the courts on a level playing field. It should not be the case that whether a person can be heard is dependent on whether they have quality WiFi or whether they are of a generation or in a profession which means that they are comfortable using online technology. One member reported that even in the Lord Reid Building within the Faculty of Advocates, WiFi has been unable to cope with the demand resulting in some attendees being frozen or disconnected from the call, only for those hearings to proceed without those attendees. Another example has been given whereby a crucial witness in a recent Fatal Accident Inquiry was forced to give their evidence over the telephone due to unstable WiFi and ultimately a failed internet connection. This is not acceptable.

2) Threat to open justice

We are also concerned about the impact that increased use of remote hearings has had on the principle of open justice. In place of simply being able to go to a court building and watch a hearing, for remote hearings, journalists and members of the public have to apply to the court for a dial-in number to hear telephone hearings, and while journalists can apply to see and hear video hearings, members of the public are limited to only an audio link for video hearings, at present. This restriction on the public is in place until appropriate safeguards can be devised to deal with potential contempt of court issues, i.e. unauthorised recording. There are barriers to open justice in relation to virtual hearings that are not present with in-person hearings, and this important principle is currently being ignored. Virtual hearings must be conducted in as much of an open manner as those that are conducted face-to-face

3) Inappropriate behaviour

Members report that remote hearings tend to encourage a more casual attitude from parties. This is inappropriate. Members have given examples of people joining a hearing while walking down the street, or during a train journey. There are other examples of appellants being contacted to attend a hearing remotely and simply hanging up their phone because they are at work. Others have not dialled into their appeal hearing at all. It is assumed that this is because they have abandoned their appeals, but in the absence of a formal

withdrawal, the courts have had no choice but to continue the appeals as it could not be determined for certain why the appellants had not attended, therefore wasting court time and resources. There have also been issues of the conduct of parties when joining remotely, including examples of parties swearing and conducting themselves in a manner that they perhaps would not have done had they attended court in person

4) Transparency of process

For proof hearings in particular, the power and potency of pursuers being able to give their evidence in person should not be underestimated. Vulnerable pursuers, for example survivors of child abuse, would be particularly disadvantaged if the default method of hearing were to become a remote hearing.

Pursuers must be entitled to a court hearing, and have the confidence that their case was fully and properly articulated and that the other side's contentions were tested. Parties are also entitled to know why their case was won or lost, and how the justice process operates. This transparency and openness of the process is somewhat lost in virtual hearings where there may be technical difficulties. Judgments also tend to take the form of written statements. To have proofs heard remotely as a matter of course would chip away at the fundamental fairness of the law. The Equal Treatment Bench Book, which provides guidance to the judiciary in England and Wales, echoes this point in their guidance on remote hearings. The guidance sets out the importance of the process, rather than merely the result of a hearing, as a significant consideration in terms of the delivery of real justice. Proceedings must be "transparently just", where the needs of all are considered, and the parties felt engaged in the process and the outcome explained. This is far more challenging in remote hearings than in-person, and we believe that it is simply not possible to achieve the correct level of transparency in the conduct of remote hearings for proofs.

5) Impact on defendant behaviour

There has also been an impact on defendant behaviour in having proofs take place remotely. Parties will know that there will be usually only one remote hearing per day, especially in the All Scotland Personal Injury Court, and so if a case is lower down the list, defenders know that their case is unlikely to be heard that day. In members' experience, this will lead to defenders making low-ball offers or no offers to settle at all. This behaviour will exacerbate the anxiety of pursuers, especially those who are particularly vulnerable such as survivors of abuse.

6) Increased costs

If the default position for proofs was to be a virtual hearing, the cost of litigation would increase. There is a greater degree of work required earlier in the process in cases heard virtually – bundles have to be prepared to be shared electronically and links for the parties need to be prepared ahead of any hearing. If remote attendance becomes the default position for cases, there will be increased use of court resources before a hearing, which may ultimately end up settling before the hearing takes place. Anecdotally, it has been reported that expenses for those cases heading for a virtual proof have been higher than if the case was heard in person.

Any queries about this response should be, in the first instance, directed to:

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