



Compass Chambers

**Response to the Consultation Paper on Rules
Covering the Mode of Attendance at Court
Hearings**

November 2021

About Compass Chambers

1. Compass Chambers is a stable of members of the Faculty of Advocates¹. Our members include 20 Queens Counsel and 33 Junior Counsel practising in diverse legal fields, but primarily specialising in Dispute Resolution, Professional Negligence, Reparation, Regulatory Crime, and Inquiries.

Introduction

2. Compass Chambers welcomes the opportunity to respond to the Consultation Paper.
3. Our members broadly support the proposals which have been made by the Faculty of Advocates in response to the Consultation. Our response to the Consultation should be seen as supplementary to the response of the Faculty of Advocates, with the aim of reflecting the views and experiences of our members.

The Draft Rules

RCS

4. **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?**
5. Compass Chambers considers that the default position ought to be that hearings are conducted in person. Our members agree with the observations of the Faculty of Advocates that a single list specifying hearings which are to be conducted remotely would be preferable and serve to underline that such hearings should be seen as a deviation from the norm.
6. As to which hearings ought to be included in that list, our members are concerned by the prevailing view that all procedural business should be conducted by remote means by default.
7. We observe that cases which are under Chapter 42A of the RCS (and 36A of the OCR), are subject to robust case management from an early stage. Our members have expressed the view that such hearings ought to be conducted in-person. Whilst case management hearings might be regarded as procedural

¹ Members of the Faculty of Advocates who subscribe to the services provided by Faculty Services Limited each belong to a group of Advocates known as a 'stable'. Each stable has its own system of governance, including selection of its members.

in nature, important and contentious decisions are often made at case management hearings. Such hearings shape the substantive progress of a case. Our members report that case management has not been as effective by remote means, when compared with in-person hearings for the following reasons:

- Parties are less able to interact directly during remote hearings. Having parties together and able to discuss matters in-person leads to better communication, which ultimately results in more effective case management and resolution of issues.
 - Experience demonstrates more effective communication from the bench at in-person hearings when compared with hearings by remote means. This applies generally but is particularly important in cases which are subject to the enhanced case management provisions of Chapter 42A.
 - Direct in-person engagement between parties both before and after hearings brings invaluable benefit to the effective progress of a case.
8. Our members consider that hearings which can lead to the disposal of a case should, by default, be heard in person. At present the draft rules allow for in-person hearings where there is a significant issue of credibility of a party or witness which depends upon an analysis of that person's demeanour or character. We do not support distinguishing between in-person and remote hearings based on whether a significant credibility issue arises. Issues of credibility and reliability arise in almost every proof. They are invariably significant issues to the parties. The rules do not provide objective factors to be considered in assessing whether the issue of credibility is 'significant' or otherwise. As currently framed, the draft rules contain no provision for the process by which the court should determine whether 'significant issues of credibility' arise.
9. In relation to debates and appeals, our members observe that the test of 'general public importance' or 'particular difficulty' sets a very high threshold. Our members do not agree with this approach. We reiterate that all hearings which can dispose of a case ought to be heard in-person, by default. As with 'significant issues of credibility', the draft rules contain no provision for the process by which the court should determine whether the test is met, nor do they provide any guidance in relation to which factors ought to be considered in reaching that determination.
10. We would highlight that the need for in-person hearings is particularly important in personal injury cases. Personal injury cases in the Court of Session and Sheriff Courts will tend to involve individuals who have undergone life-changing and very personal experiences. That observation applies equally to an injured person, as it does to a person accused of negligence. In the ordinary course, it will take many years from the date of injury for a case to progress to

a proof. Such persons ought to be afforded the opportunity to have direct contact with the decision maker, and to be afforded their place and time in court with dignity. Evidence given remotely can be far from satisfactory in this regard. By way of example, one of our members reported having to take evidence from three grieving family members in relation to the death of their only son, which due to a lack of available technology, they all required to give by taking turns to use one mobile phone. Such witnesses ought to be afforded the dignity, respect, and solemnity of an in-person Proof.

11. 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?

12. Compass Chambers' response to this question is largely reflected in our response to question 1. We agree with the Faculty of Advocates re-formulation of the rules to include a single list but highlight our observations that consideration should be given to in-person hearings by default in cases involving robust case management procedures, such as those under Chapter 42A.

13. 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.

14. Compass Chambers agrees that lodging a motion is the appropriate mechanism for parties to apply to change the mode of attendance. This will afford both parties notice of the intention to make any change and allow parties time to consider and, if so advised, to formulate opposition.

15. Determination of any opposed motion should be dealt with by the court at a hearing assigned for that purpose, in accordance with current practice.

16. 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

17. Compass Chambers agrees that the court should ultimately have the final say in determining the mode of attendance, particularly in the context of determining motions as envisaged by question 3.

18. However, our members are concerned that draft rule 35B.5 permits the court, of its own accord, to alter the mode of attendance by means of a direction, without any need for input from the parties who will be affected by that decision.
19. If the court is to retain a discretion to alter the mode of attendance of its own accord, we suggest that provision should be made that where the court is considering changing the mode of attendance, parties ought to be given notice and the opportunity to make oral submissions prior to any determination being made.
20. The draft rules do not make clear any test to be applied other than a change '*not being prejudicial to the fairness or contrary to interests of justice*'. The rules do not indicate factors which the court should have regard to in reaching a decision. The lack of any clear or positive test to be applied is likely to lead to opposed motions being brought to determine what criteria are being applied by the court.
- 21. Question 5 - Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?**
22. The draft rules do not seem to expressly provide for a 'hybrid' mode of attendance to be adopted at Proof. There may be situations where a hybrid model would be beneficial, such as having in-person attendance for factual witnesses and remote attendance for expert witnesses.
23. It is worth pointing out that our members have expressed concern at the loss of collegiality, the loss of opportunity to learn by doing or observing, and more generally concerns as to the long-term health implications of a presumption of remote business for members of the legal profession.
24. An area of concern across our membership has been that of access to justice, by which we mean both justice being seen to be done, and that all citizens have the right to meaningfully engage in the system of civil justice. We endorse the observations of the Faculty of Advocates in their preliminary observations to the consultation paper in that regard.

OCR

- 25. 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?**

26. Compass Chambers' response in relation to the Court of Session draft rules applies generally to the proposed Sheriff Court rules. See Compass Chambers' response to question 1.
27. **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?
28. See Compass Chambers' response to question 2.
29. **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
30. See Compass Chambers' response to question 3.
31. **Question 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.**
32. See Compass Chambers' response to question 4.
33. **Question 10 – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?**
34. See Compass Chambers' response to question 5.

Conclusion

35. Remote attendance is a useful addition to the toolkit of the court. However, its use should not come at the expense of the quality of justice delivered, nor the fundamental principles that justice should be seen to be done and be readily accessible to the public whom the legal system serves.
36. We propose that further consultation should be carried out in respect of any revised rules, and that the rules which are implemented should be kept under review in consultation with relevant stakeholders.