



THE FACULTY OFFICE OF THE ARCHBISHOP OF CANTERBURY

NOTARIES (CONDUCT AND DISCIPLINE) RULES 2015 (as amended in September 2019)

Response to the Consultation on Remote Hearing amendments

The Faculty Office consulted on its intention amend the Notaries (Conduct & Discipline) Rules 2015 (as amended in September 2019) to facilitate the holding of remote hearings of the Court of Faculties and apply gender neutral language. The consultation ran from 14th September 2020 and closed on 19 October 2020.

Background of the Rules

The Notaries (Conduct and Discipline) Rules 2015 came into force on 1 November 2015. The Rules were subsequently amended in 2019 to ensure proceedings and decisions of the Court of Faculties are more transparent and to revise the suspension powers of the Registrar and the Court. The Faculty Office is now proposing to make further amendments to the Notaries (Conduct & Discipline) Rules 2015 (as amended in September 2019).

Introduction

In response to the Covid-19 pandemic the UK Government imposed a series of restrictions designed to prevent further spread of the disease. These included but were not limited to:

- Prohibition on non-essential use of public transport
- Social distancing requirements
- Shielding advice and requirements etc.

These restrictions could have impacted the ability of the Court of Faculties to hold disciplinary hearings in person, although no hearings in fact have been due to take place during the period.

It is important that the Court of Faculties continues to be able to hold disciplinary hearings in a way that is compliant with all relevant law on health and safety and Government guidance. It is because of the need to allow disciplinary hearings to be conducted when movement and meetings are restricted which has prompted the Faculty Office to make the proposed amendments.

Proposal

It may be of substantial benefit in terms of cost and convenience if Hearings take place remotely. The Faculty Office considers that a reliance on the inherent powers of the Commissary to be a

temporary fix. Instead the Faculty Office proposes to make amendments to the Rules enabling the Court of Faculties to hold remote hearings both now, during the current pandemic, and into the future to cater for other occasions where physical attendance cannot be obtained. It is the current view of the Faculty Office that physical hearings are better, but if they cannot take place for whatever reason, or if one or more parties are precluded from being present, then participation by remote means should be facilitated.

The proposed amendments to the Rules, as consulted on are available [here](#) and shown in tracked changes.

Gender neutral language

The Faculty Office is committed to promoting equality and diversity within the notarial profession and believes that such work should start at home. Using the masculine gender as a default has been understood by some to reinforce historic gender stereotypes. While the Interpretation Act 1978 (which is expressly incorporated into the Rules) provides that "words importing the masculine gender include the feminine", the Faculty Office considers that it is possible to draft in a gender neutral way which avoids that possible association with gender stereotypes while not sacrificing grammatical accuracy. That is why the Faculty Office is committed to ensuring all of its publications are drafted in gender neutral language.

Whilst making the proposed amendments to facilitate remote hearings of the Court of Faculties the Faculty Office is proposing to take this opportunity to make further amendments to the Rules to ensure the Rules are drafted in a gender neutral way. In so doing it has had regard to a [Guide to Gender Neutral Drafting](#) based on guidance by the Office of the Parliamentary Counsel. See also the following easy to read [article](#) produced within the Civil Service.

These proposed amendments to the Rules are also attached and shown in tracked changes.

Questions about the proposed amendments

1.	Do you agree that the Court of Faculties should be able to hold remote hearings?
2.	Do you agree that parties should be able to apply for permission to attend via video link?
3.	Do you agree that 21 days is a reasonable amount of time to make an application?
4.	Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ?
5.	Do you agree that the Rules should be drafted in gender neutral language? Would you like to see this applied retrospectively to past notaries rules?
6.	Do you have any other comments on the proposed amendments?

The Responses

The Faculty Office received 15 responses to the consultation, fourteen from individuals and one from The Society of Scrivener Notaries – one of the two representative bodies for members of the notarial profession. We are very grateful to those who have taken the time to respond.

- **Do you agree that the Court of Faculties should be able to hold remote hearings?**

All respondents agreed that the Court of Faculties should be able to hold remote hearings provided that all the relevant parties had access to the technology necessary to be able to fully participate. The Society of Scrivener Notaries noted that a case had been conducted on the basis of the papers alone with no need for an oral hearing where all parties were in agreement in terms of both the facts and penalty. The Faculty Office is pleased to note the unanimity but also takes note of the proviso which must, of course, be adhered to in order to ensure that all parties can have a fair hearing in the interests of justice.

- **Do you agree that parties should be able to apply for permission to attend via video link?**

Again, there was broad agreement from respondents that parties should be able to apply for permission to attend via video link. The Society of Scrivener Notaries agreed with the proposal but noted that it might be contentious if the complaint is being contested; they asked whether the Rules should make provision for whether, and how, a party may make objections to an application to attend by video link and what notice period a party should have to lodge such objections. Another respondent indicated that the default position should be an offer of remote hearing and that parties should notify the Court if they wish to attend in person and/or required other parties to attend in person.

The Faculty Office agrees that, whilst it still views the holding of a physical hearing with the parties present as the preferred option, there may be circumstances outside of the current pandemic restrictions which would make a virtual/remote hearing appropriate.

[need to think about our view as to the opportunity for a party to oppose an application from the other party to appear remotely – advice of the Advisory Board sought.]

- **Do you agree that 21 days is a reasonable amount of time to make an application?**

All but one respondent agreed that 21 days is a reasonable time to make an application, with one adding that the 21 day period should run from the date of receipt of the Notice and another adding that the Court ought to have discretion to shorten the period where appropriate to do so. The dissenting respondent thought that a 28 day period was more reasonable.

The Faculty Office believes that 21 days is reasonable in all the circumstances subject to the Court's inherent power to extend (or shorten) the period in appropriate situations.

- **Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ?**

All respondents agreed that the Commissary should have power to determine if a hearing should be conducted via video link provided there is serious need. One respondent felt that the parties should be given the opportunity to provide good reason why a hearing should not proceed in such manner, perhaps because of a lack of access to the requisite technology.

Another respondent encouraged the Faculty Office to go further and make the option of a hearing via video link available in all circumstances citing the cost, time and environmental impact of parties travelling to, and being accommodated in, London where necessary. The respondent felt that there should be a step in the normal procedure for the parties to set out their preference for the format of the hearing, the reasons for that preference including an estimate of the cost of attending and, if a physical hearing is preferred, their preferred location with the Commissary being required to take all factors into account.

The Faculty Office intended that the provision to allow a party to apply to attend by video link not be limited to situations where this is *required* (eg due to the Covid-19 pandemic lockdown) but rather wherever this would be more convenient or appropriate provided that it did not unduly impact on the fair conduct of the hearing. The existing Rules also allow the Commissary to determine where a hearing should take place and, if appropriate, this could be in a location which is convenient to the parties. Indeed the Court has, in recent years, sat in Cardiff for this reason.

However, in the light of this comment, the FO agrees that the reference to 'if there is some serious need' in rule 18A.8 should be removed and replaced with 'if it is deemed appropriate having regard to the circumstances' to offer greater flexibility as to the manner of the hearing.

The same respondent also queried whether a full hearing, whether with the parties in physical attendance or appearing remotely, is required in all cases and whether specific provision ought to be made for a determination to be reached by the Commissary and Assessors on the basis of written submissions alone with the consent of the parties. The Society of Scrivener Notaries, as noted above, have referred to one case that was concluded on that basis. The FO agrees that this possibility ought to be specifically provided for and a new clause 18A.9 will be included:

"18A.9 On the joint application of the Complainant and the Respondent and with the consent of the Commissary the hearing of a complaint either by physical attendance or by remote attendance may be dispensed with and the Court may determine the complaint on the basis of such written submissions as the Commissary may direct."

- **Do you agree that the Rules should be drafted in gender neutral language? Would you like to see this applied retrospectively to past notaries rules?**

The majority of respondents agreed that the Rules should be prepared in gender neutral (gender inclusive) language going forward. The Society of Scrivener notaries cautioned against a "crude find and replace approach.....swapping singular pronouns for plural ones can result in some ungainly results." Another respondent indicated no view on the need for gender neutrality citing the greater importance of "clear and comprehensible" language but conceding that gender neutral language "will come to be seen as modern and courteous, whether or not necessary to meaning."

The majority of respondents also agreed that there was no need for the FO to spend time and resources making changes to existing Rules to incorporate gender neutral language. However, one respondent was strongly supportive of a retrospective approach: "it is an anachronism that our rules are drafted using "he" it is just unnecessary and inappropriate in the 21st Century and relying on the Interpretation Act 1978 to justify it is lazy. We need to do more to be a modern and open profession welcoming to all no matter what their sex/gender identity."

The FO is committed to the use of gender neutral language in its Rules and communications going forward and, whilst accepting completely the view of the 'dissenting' respondent noted above, the majority view of the FO staff supported by the majority of respondents is that the proposal to use

gender neutral language should not apply retrospectively but rather take steps to review and update its existing sets of Rules when they otherwise need updating.

- **Do you have any other comments on the proposed amendments?**

A number of respondents pointed to some drafting anomalies in the proposed draft Rules in connection with the use of gender neutral language for which we are grateful. Appropriate amendments will be made to the draft before they are submitted to the LSB for approval.

Anonymised versions of the responses are provided in the Appendix to this note.

The Faculty Office

26 November 2020

APPENDIX

RESPONSE # 1

1.

Do you agree that the Court of Faculties should be able to hold remote hearings?

Yes. We are aware that at least one complaint came before the Court in 2019 where the Respondent asked to have the matter dealt with “on the papers” rather than at a full hearing.

2.

Do you agree that parties should be able to apply for permission to attend via video link?

Yes, although we suggest that this may be contentious if the complaint of misconduct is itself being contested.

With this in mind, should the Rules make provision for whether (and how) an “opponent” may make objections to an application for permission to attend via video link?

What is the proper amount of notice that should be given to the “opponent” if the application has been successful? (This may be particularly significant for preparation for any hearing.)

3.

Do you agree that 21 days is a reasonable amount of time to make an application?

Yes.

4.

Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ?

Yes.

5.

Do you agree that the Rules should be drafted in gender neutral language? Would you like to see this applied retrospectively to past notaries rules?

We agree with the principle but caution against a crude “find and replace” approach. Swapping singular pronouns for plural ones can result in some ungainly results.

Examples here are:

5.1 – “them” – refers to the singular “Commissary” despite the presence of the plural “Assessors”

7.3.2 – is “they” referring to the notary or the client?

7.4 – Who is giving “reasonable assistance” – the notary or the OLC?

As far as other Rules are concerned, we prefer the gradual approach which we understand to have recommended by the Advisory Board.

6.

Do you have any other comments on the proposed amendments?

No.

RESPONSE # 2

- Do you agree that the Court of Faculties should be able to hold remote hearings?
 - Yes.

- Do you agree that parties should be able to apply for permission to attend via video link?
 - Yes.

- Do you agree that 21 days is a reasonable amount of time to make an application?
 - Yes.

- Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ?
 - Yes.

- Do you agree that the Rules should be drafted in gender neutral language? Would you like to see this applied retrospectively to past notaries rules?
 - Yes to Rules going forwards but it is unnecessary to amend any Rules retrospectively. As a woman in the profession I am not offended by the default masculine drafting but I have no objections to gender neutral language.

- Do you have any other comments on the proposed amendments?
 - No

RESPONSE # 3

- 1/ I agree that the Court of Faculties should be able to hold remote hearing.
- 2/ I agree that parties should be able to apply for permission to attend via video link.
- 3/ I agree that 21 days is a reasonable amount of time to make an application.
- 4/ I agree that the Commissary should have powers to determine if a hearing should be conducted via video link.
- 5/ I agree that the Rules should be drafted in gender neutral language – I do not consider it necessary for this to be applied retrospectively.
- 6/ I have no other comments to make.

RESPONSE # 4

I have considered the consultation about remote hearings and my responses to your questions are as follows:

1. Do you agree that the Court of Faculties should be able to hold remote hearings?

Yes, I agree that this would be beneficial though it is essential that all parties have the facilities to conduct a hearing remotely before it is held.

2. Do you agree that parties should be able to apply for permission to attend via video link?

I think that the default position should be that a remote video link is offered to all parties and the parties should notify the court if they wish to attend in person and if they wish other parties to also attend in person with reasons.

3. Do you agree that 21 days is a reasonable amount of time to make an application?

21 days is a reasonable amount of time provided that the parties receive the notices in time. The time should be 21 days from the date of receipt of the notice.

4. Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ?

Yes but I do believe that that even if the decision is made that the hearing is suitable for video link, the parties should still be given the choice in case they have good reason for the hearing to occur in person and/or they do not have the requisite technology.

Use of Skype and Zoom is restricted unless the Court subscribes to a business package or uses the online cloud hearing platform.

5. Do you agree that the Rules should be drafted in gender neutral language? Would you like to see this applied retrospectively to past notaries rules?

I think that this is a waste of time. Going forward they should be drafted in gender neutral language but there is no point in spending time and money in amending older rules.

6. Do you have any other comments on the proposed amendments?

RESPONSE # 5

1. Do you agree that the Court of Faculties should be able to hold remote hearings?

Answer: Yes.

2. Do you agree that parties should be able to apply for permission to attend via video link?

Answer: Yes.

3. Do you agree that 21 days is a reasonable amount of time to make an application?

Answer: Yes.

4. Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ?

Answer: Yes. But I would go further. There many reasons why a particular hearing should be conducted by video link, not just Covid-19 related. If any of the parties live away from London, the cost, time and environmental impact of travelling and being accommodated in London can be massive. I would prefer to see a step in the procedure where the parties are required to set out their preference for the format of hearing, the reasons for that preference, an estimate of the cost of attending a physical hearing and, if there is to be a physical hearing, the preferred location. The Commissar should be required to take these factors into account when determining the format of a hearing.

As an analogy, an arbitration tribunal formed through the London Maritime Arbitrators Association, is required to decide whether a hearing is to be oral or based on written submissions. The LMAA Terms state, "*In the absence of agreement it shall be for the tribunal to decide whether and to what extent there should be oral or written evidence or submissions in the arbitration. The parties should however attempt to agree at an early stage whether the arbitration is to be on documents alone (i.e. without any oral hearing) or whether there is to be such a hearing.*" In LMAA arbitrations, parties often do agree on the format of the hearing and in other cases the tribunal is left to decide, based on the submissions of the parties.

5. Do you agree that the Rules should be drafted in gender neutral language? Answer: Yes.

Would you like to see this applied retrospectively to past notaries rules? Answer: Yes, I would like to see it applied, possible by way of an over-arching Rule. Due to funding issues I do not see it as a priority to expend costs on updating existing Rules unless they are being revised for other reasons.

6. Do you have any other comments on the proposed amendments?

Thank you for asking for the views of notaries on this topic.

RESPONSE # 6

1. Do you agree that the Court of Faculties should be able to hold remote hearings? **YES**
2. Do you agree that parties should be able to apply for permission to attend via video link? **YES**
3. Do you agree that 21 days is a reasonable amount of time to make an application? **YES. SAVE FOR A DISCRETION TO SHORTEN PERIOD WHERE REASONABLE TO DO SO.**
4. Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ? **YES**
5. Do you agree that the Rules should be drafted in gender neutral language? Would you like to see this applied retrospectively to past notaries rules? **YES BUT NOT RETROSPECTIVELY.**
6. Do you have any other comments on the proposed amendments? **NO**

RESPONSE # 7

Many thanks for this. No further comments.

RESPONSE # 8

Questions about the proposed amendments

1. Do you agree that the Court of Faculties should be able to hold remote hearings? YES
2. Do you agree that parties should be able to apply for permission to attend via video link? YES
3. Do you agree that 21 days is a reasonable amount of time to make an application? YES
4. Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ? YES
5. Do you agree that the Rules should be drafted in gender neutral language? YES
Would you like to see this applied retrospectively to past notaries rules? NO
6. Do you have any other comments on the proposed amendments?

Rule 18A1 – presumably the he is and he has on line 3 should be they are/they have
Rules 18A2 – shouldn't it be include not includes and then are not, rather than is not?

RESPONSE # 9

My responses to the consultation questions are as follows:

1. I agree that the Court of Faculties should be able to hold remote hearings.
2. I agree that parties should be able to apply for permission to attend via video link.
3. I agree that 21 days is a reasonable amount of time to make an application.
4. I agree that the Commissary should have powers to determine whether a hearing should be conducted via video link, provided that there is a “serious need”.
5. I neither agree nor disagree that the Rules should be drafted in “gender neutral language”; and I neither agree nor disagree that “gender neutral language” should be applied retrospectively to past notaries rules. The only important factor is that the language used should be clear and comprehensible. However, no doubt the use of “gender neutral language” will take hold as the norm, and its adoption will come to be seen as appropriately “modern” and courteous, whether or not necessary to the meaning.
6. I have no other comments on the proposed amendments.

RESPONSE # 10

Re the questions:

1. Yes.
2. Yes but it should remain at the discretion of the judge whether this is permitted in the circumstances.
3. 21 days appears reasonable.
4. Yes.
5. Yes and yes – it is an anachronism that our rules are drafted using “he” it is just unnecessary and inappropriate in the 21st Century and relying on the IA 1978 to justify it is lazy. We need to do more to be a modern and open profession welcoming to all no matter what their sex/gender identity. However, see below re the approach taken in the draft rules with which I do not agree.
6. On many occasions the third person “they” is used. However, this can in itself be ambiguous and trips up the reader. I feel **very strongly** that a better convention would be simply to follow modern drafting practice and repeat the term itself.

For example, in rule 5.1: *“will be heard by the Commissary sitting with two Assessors chosen by **them**”*.

While the following wording clarifies, *prima facie* it is unclear who the “them” is – the Commissary (third person singular) or the Assessors (third person plural)?

It would be simpler and clearer to say: *“will be heard by the Commissary sitting with two Assessors chosen by the Commissary”*.

For example, again, in rule 5.3: *“Where the Master is required to hear any application, appeal or other matter whether under rules made by **the Master** or under **their** inherent jurisdiction **they** may direct that the matter shall be heard by the Commissary.”*

Is “their inherent jurisdiction” the inherent jurisdiction of the rules or of the Master” and does “they may direct” refer to that the Master may direct or the rules may direct?

It would be simpler and clearer to say: *“Where the Master is required to hear any application, appeal or other matter whether under rules made by **the Master** or under*

the Master's inherent jurisdiction the Master may direct that the matter shall be heard by the Commissary."

I would have **serious** reservations about simply changing to third person plurals, especially if this convention were to be applied to all rules. In my view, modern drafting techniques should be employed and defined terms or nouns used where possible rather than pronouns (this also avoids the issue of people's pronoun choices).

RESPONSE # 11

Questions about the proposed amendments

1. Do you agree that the Court of Faculties should be able to hold remote hearings? YES
2. Do you agree that parties should be able to apply for permission to attend via video link? YES
3. Do you agree that 21 days is a reasonable amount of time to make an application? YES
4. Do you agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need' ? YES

5. Do you agree that the Rules should be drafted in gender neutral language? NO

- Would you like to see this applied retrospectively to past notaries rules? NO

6. Do you have any other comments on the proposed amendments? YES

If 'gender-neutral language' is to be used, line 3 of Rule 18A.1 needs to be amended.

RESPONSE # 12

1-5.....Yes

6.....Nothing to add

Thank you

RESPONSE # 13

1. Yes
2. Yes
3. Yes
4. Yes
5. No
6. Yes.

I have read the Government's guidance.

I am afraid that I don't agree with the wholesale replacement of 'his' with 'them' etc. which it needs to be handled with care, particularly when drafting legislation. 'They' 'them' and 'their' are primarily plural words. In any event, there are some strange results in the sense: e.g. Paragraph 8. In the paragraph are two persons, the Registrar and the notary. Where subsequently the words 'he' and 'his' are used it is obviously a reference to the Registrar but when 'they' and 'their' are substituted the sense is that 'they' and 'their' refers to both the Registrar and the notary which is obviously wrong. The Guidance suggests as an alternative to repeat the word 'Registrar'

Unfortunately English language does not have a singular non-gender personal pronoun. The only non - gender pronoun is 'it' and that cannot be acceptable! Using 'they' etc. in my view is lazy English. To be gender neutral, I prefer 'he or she', 'him or her,' 'his or hers' . Unfortunately in drafting legislation, this becomes very clumsy. In legislation, the existing clause 'words importing the masculine gender include the feminine gender' is far preferable.

RESPONSE # 14

In answer to the consultation questions

1. Yes
2. Yes
3. Yes
4. Yes
5. Yes, to gender-neutral rules.
No, to retrospective (they can be gender-neutralized as they are revised/replaced in due course, and it is not cost-effective or useful to over-strive for such political correctitude)
6. Might it be provided that
Audio-recording by an authorized person can be permitted on application made N days in advance of [the hearing] , provided that
 - (i) no such authority shall be granted otherwise than for audio-recording made for and only for the purpose of transcription of the hearing including any evidence ruling or judgement, and
 - (ii) no such transcript shall without the prior imprimatur of the Court be published to any person [??or be used otherwise than in-house by the authorized person??]

RESPONSE # 15

1. I agree that the Court of Faculties should be able to hold remote hearings.
2. I agree that parties should be able to apply for permission to attend via a video link.
3. I do not agree that 21 days is a reasonable amount of time to make an application. I consider that 28 days would be a reasonable amount of time.
4. I agree that the Commissary should have powers to determine if a hearing should be conducted via video link, provided there is 'serious need'.
5. I agree that the Commissary should have powers to determine whether a hearing should be via video link if it is shown that there is 'serious need'.
6. I agree that the Rules should be drafted in gender neutral language and would like to see this applied retrospectively to the rules previously enacted.