

INQUIRY INTO PROCEDURAL FAIRNESS FOR INQUIRY PARTICIPANTS

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fairness for inquiry participants**

The procedural rules that cover inquiry participants in the Scottish Parliament are relatively modest. Sections 23 and 24 of the 1998 Scotland Act, that created the Parliament, give committees the power to compel witnesses to attend and provide relevant documents. These powers are carried through in the relevant Standing Orders of the Parliament:

Rule 12.4 Witnesses and documents

1. A committee may, in connection with any competent matter, invite any person—

(a) to attend its proceedings for the purpose of giving evidence; or

(b) to produce documents in that person's custody or under that person's control, and may exercise the power conferred upon the Parliament by section 23 (power to call for witnesses and documents) to require any person to do so but subject to and in accordance with the terms of sections 23 and 24 (notice provisions in relation to witnesses and documents).

2. For the purposes of section 26(1), the convener of a committee may administer an oath or solemn affirmation to any person giving evidence in its proceedings and require that person to take an oath or make a solemn affirmation.

In practice these powers have never been formally used, a reference to their existence normally being enough to persuade an unenthusiastic witness.

Similarly, the Guidance for Committees on oral evidence only refers obliquely to issues of procedural fairness:

Oral evidence

5.26. In addition to considering written evidence, committees will normally use the power given to them in Rule 12.4.1 to invite witnesses to attend the committee to give oral evidence. The statutory power (under section 23 of the Scotland Act) to require witnesses to attend has not yet been used.

5.27. It is important to note that whereas any individual or group can submit written material to a committee, there is no right to give oral evidence. It is entirely a matter for the committee to decide from whom it wishes to hear. Committees will normally agree their initial selection of witnesses to give oral evidence at the start of the inquiry based on their knowledge of stakeholder groups and interested parties. However, this list can be added to as the inquiry progresses and the committee's knowledge develops. It may well be expanded after a committee has considered the written evidence. Early identification of witnesses allows witnesses to prepare for their appearance before the committee and to consider what further papers they wish to provide to the committee by way of background information.

5.28. Where an invitation is issued to an organisation, it may specify the individuals from whom the committee wishes to hear. There may, however, be scope to amend or extend the invitation to ensure that the witnesses combine appropriate seniority with the in-depth knowledge required to provide meaningful answers to members' questions. Organisations may find it useful to discuss such matters with the committee clerks.

5.29. It is possible for witnesses to give evidence by video conference and this can be a cost effective method, in appropriate circumstances, of obtaining evidence from witnesses in remote locations. Committees can also consider evidence submitted by non-interactive technology although this has its drawbacks in that members are not given the opportunity to challenge or question witnesses. Where a non-interactive format is the only option available, a transcript should be provided for the assistance of the Official Report and the content must be authenticated to the committee's satisfaction.

5.30. Committees sometimes invite "panels" of witnesses or hold "round tables" where individuals and representatives from a number of organisations give evidence at the same time. "Round tables" can be an effective method of gathering information in a short timescale in a way that allows interaction between witnesses.

5.31. Wherever possible, committee agendas give the full names and designations of all the witnesses who will be giving evidence. This is important for people who are trying to keep track of committee proceedings and should be departed from only in exceptional circumstances (e.g. a last minute substitution of a witness representing a particular organisation).

5.32. Rule 12.4 does allow a committee to take evidence from a witness who is not listed on the agenda – although it is anticipated that this would only occur in exceptional circumstances. See also [Annexe D](#).

5.33. There is a general expectation that oral evidence will be supported by a written submission to the committee. This should be submitted well in advance and no later than 3 working days before the meeting to allow it to be circulated to the members for the meeting at which the evidence is to be taken.

5.34. Conveners may invite witnesses to make an opening statement. However, this is not invariably the practice and will depend on the preferences of members as well as on the time available to the committee. Witnesses can find it helpful to discuss in advance with the clerks whether they wish, or will be expected, to make an opening statement. If permitted, an opening statement will normally be time limited and should be used to emphasise key issues. It is particularly important for witnesses to avoid the tendency simply to repeat their written submission as it does not require to be "read into the record".

5.35. Members can ask witnesses any questions which are relevant to the inquiry topic, including, but not limited to, questions based on the written submission. Witnesses may find it helpful to make contact with the committee clerk in advance of the meeting to discuss the structure of the session. The clerks will be able to provide some general advice and briefing, including briefing on the possible areas that questioning might cover. Witnesses, should, however, bear in mind that committee members are always free to ask any questions that they consider relevant and hence that lines of questioning can never be fully anticipated in advance.

5.36. Witnesses should normally answer the member who has asked the question and there is no need to answer each question through the chair. Witnesses should refer to members by their names (or as "convener") which appear on the name plates in front of the members.

5.37. The length of each evidence session may vary depending on the complexity of the topic and also on the number of other items on the committee agenda. In general, each witness or group of witnesses tends to be at the table for around 45 minutes to one hour. A "round table" session will normally take longer than an hour, depending on the topic and the number of witnesses.

5.38. Committee meetings are regulated by the Parliament's Standing Orders and constitute "proceedings of the Parliament". Accordingly, under section 41 of the Scotland Act 1998 any statements made at a committee meeting are absolutely privileged for the purposes of the law of defamation. This provides witnesses, as well as members, with a defence of privilege in the event that an action for defamation is brought arising from statements made during the meeting. Committees may, however, be reluctant to provide a platform to allow potentially defamatory comments to be made and it is a matter for the convener to decide whether to allow a witness (or member) to continue to make such remarks. It is important to distinguish between meetings of the committee which are part of the proceedings of the Parliament and other informal information gathering exercises by committee members which are not regulated by Standing Orders and which do not constitute part of the proceedings of the Parliament. If a witness is in any doubt about the status of the event, he or she should obtain clarification from the clerk prior to giving evidence.

5.39. It is possible for committees to take evidence in private, although this is very rare and a committee would require to be satisfied that there was a good reason for so doing. A committee would, however, consider whether to take evidence in private if it wished to hear sensitive personal information, to take evidence from a vulnerable witness or to maintain commercial confidentiality. Any witness who feels that his or her evidence should be taken

in private should contact the committee clerks well in advance to discuss the matter. The decision is, however, one for the committee and not for the witness. Normally, there is no *Official Report* of evidence taken in private.

5.40. There is provision in section 26(1) of the Scotland Act 1998 and Rule 12.4.3 for witnesses to be required to give evidence under oath. In practice, however, this has scarcely been used.

5.41. With all committee proceedings in public, a substantially verbatim record of any oral evidence is taken by the Official Report and is normally published in hard copy and electronic form shortly after the meeting. Witnesses are sent a copy of the *Official Report* and given the opportunity to make any corrections. This is, however, limited to correcting any errors of transcription and cannot be used by witnesses to alter the substance of what they said.

Procedural fairness is generally encouraged therefore through the ways in which committees operate in practice, rather than formal rules. A number of points are relevant here, some of them touched upon by the Guidance:

- **Taking evidence in private** - Whilst most committee business is conducted in public, a witness can request that their evidence be given in private. Committees have tended to accept these requests, particularly if the evidence relates to the witness's own personal circumstances.
- **Briefing in advance** – witnesses are encouraged to contact the clerks in advance to discuss any issues and ensure that they are fully prepared for the evidence session. In addition they will normally be supplied with evidence by other witnesses, which is in any case published on the Parliament's website in advance of the meeting.
- **Written evidence** – when submitting written evidence, the submitter can request that this is treated confidentially and not published. This is normally agreed to by committees.
- **Role of Convener** – it is the committee convener's role overall to maintain order within a committee session. This might, on occasion, include curtailing questioning by another member if they judge it is too aggressive or not relevant to the matter in hand.
- **Vulnerable witnesses** – where a committee wishes to take evidence from vulnerable witnesses, for example people with mental health issues, it will either arrange to do this via a private informal session or, where a public session is desirable, take steps to reduce the impact on the vulnerable witnesses. This might include for instance, inviting them in some weeks in advance to see the committee room, meet the convener etc, having a supporting person with them on the day, coming into the committee room before the meeting starts to meet the committee members and generally get comfortable.

Under the Parliament's Code of Conduct, if anyone has a complaint about a Member's conduct in committee they can submit a formal complaint to the committee convener. If the complaint concerns the convener, the complaint is submitted to the Presiding Officer.

I hope this brief outline of the Scottish Parliament's practices in relation to the treatment of witnesses is helpful.