



## Briefing for the Public Petitions Committee

**Petition Number:** [PE1712](#)

**Main Petitioner:** Laura Hunter

**Subject:** Soul and conscience letters

Calls on the Parliament to urge the Scottish Government to review the use of soul and conscience letters in criminal proceedings and to produce guidance for the courts and GP practices on the use of these letters, including alternatives to court appearances if an accused person is deemed unfit to attend in person

### Background Information

A soul and conscience letter from a doctor is the appropriate mechanism for seeking the court's consent to an accused person or a witness (prosecution or defence) being absent from a court hearing because of illness or injury.

It is in effect a medical certificate stating that a person is unfit to attend court on a particular date. Guidance produced for the High Court notes that the certificate may state either: "I certify this on soul and conscience"; or "I certify and solemnly and sincerely affirm this to be true".<sup>1</sup>

Other guidance, also relating to the High Court, states that:

"Where any person required as a witness is unable, or likely to be unable, to attend a proposed trial diet because of illness or injury, the party wishing to have that person attend the trial as a witness shall produce at the preliminary hearing<sup>2</sup> a medical certificate vouching the proposed witness's inability to attend court to give evidence. Any such certificate:

- (a) shall be given on soul and conscience;
- (b) shall, where necessary, explain what symptoms the witness suffers that prevent attendance at court or the giving of evidence;
- (c) shall contain a prognosis estimating when the witness is likely to be fit to give evidence; and
- (d) shall state whether the witness is fit to give evidence on commission and, if so, under what conditions.

<sup>1</sup> See [High Court Practice Note 2 of 2018](#).

<sup>2</sup> A preliminary hearing is a type of pre-trial court hearing at which issues relevant to the forthcoming trial can be considered (eg the readiness of defence and prosecution).

In the event of it becoming apparent, after the preliminary hearing, that a proposed witness is likely to be unable to attend the trial diet because of illness or injury, a medical certificate vouching that fact shall be provided to the court as soon as practicable. Any such certificate shall comply with subparagraphs (a) to (d) of paragraph 39 above.”<sup>3</sup>

The quoted guidance notes the possibility of a witness giving evidence on commission – a procedure which allows the evidence of a witness to be recorded in advance of a trial. However, it should be noted that the practice note does not deal specifically with accused persons. Section 92 of the Criminal Procedure (Scotland) Act 1995 generally provides that no part of a trial shall take place outwith the presence of the accused.

Both sets of guidance referred to above deal with procedures in the High Court. However, the guidance they contain in relation to soul and conscience letters may be considered in the lower courts on the basis that it represents good practice.

The decision to postpone a trial is a matter for the court. Where the defence or prosecution seeks postponement because an accused or witness cannot attend, the court can seek further information in support of excusal. If the issue hinges on the contents of a soul and conscience letter, this may include further medical evidence – which could involve the doctor being asked to attend court. If the advice in a soul and conscience letter is not accepted by the court, the accused/witness should be advised accordingly.

Decisions on whether a prosecution should be discontinued in the interests of justice is a matter for the prosecution. The health of the accused can be a factor to consider in the light of all the circumstances of the case. The Crown Office & Procurator Fiscal Service has published relevant information in its [prosecution code](#):

“where the decision has been taken to commence criminal proceedings the prosecutor remains under a duty to ensure that the decision remains appropriate in the public interest. Where there is a change of circumstances or where the prosecutor receives new information it will be necessary to consider whether the prosecution should continue. Where it is no longer in the public interest to prosecute or where it is no longer considered that there is sufficient evidence the prosecutor should not proceed with the case.” (p 11)

In relation to the initial decision on whether to prosecute, it notes that:

“the prosecutor may consider that ill health or other adverse personal circumstances on the part of an accused person may justify the exercise of discretion in favour of action other than prosecution” (p 7).

In providing a soul and conscience letter, it is important that the doctor has a good understanding of what the giving of evidence will involve, including what

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<sup>3</sup> See [High Court Practice Note 1 of 2005](#) (paras 39-40).

measures can be put in place to assist the witness. The Law Society of Scotland has noted that lawyers will often contact the doctors concerned to clarify such matters and that this can result in the advice of doctors changing.

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27 November 2018

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