RESPONSE

BY

AXIOM ADVOCATES

TO THE

CONSULTATION PAPER OF THE

SCOTTISH CIVIL JUSTICE COUNCIL

(I) Introduction

1. Axiom Advocates ("Axiom") is a leading group of advocates practising principally in the fields of commercial and public law in Scotland. Axiom is made up of 23 senior counsel, 25 junior advocates and three arbitrator members.

2. The purpose of this document is to set out Axiom's response to the consultation paper issued by the Scottish Civil Justice Council entitled *Rules Covering the Mode of Attendance at Court Hearings* (the "Consultation Paper").

3. In what follows, the Rules of the Court of Session will be referred to as the "RCS"; the Ordinary Cause Rules applicable in the Sheriff Court as the "OCR"; and the draft rules which form part of the Consultation Paper as the "Draft Rules".

4. In advance of preparing this response, Axiom has had the benefit of seeing the Faculty of Advocates' response to the Consultation Paper which was published on the Faculty's website on 5 November 2021 (the "Faculty Response"). Reference will be made to the Faculty Response, as appropriate.

(II) Axiom's response in relation to the proposal to make online hearings the default position

5. In his remarks at the start of the legal year in September 2021, the Lord President made it clear that, from the perspective of the court service, the proposal in relation to civil cases that online court hearings should become the default position – even in a post-pandemic world – was not something which was driven by cost considerations. That is a helpful and important point of clarification: it is not being suggested that remote hearings will save public money.

6. Viewed from the perspective of litigants, the experience of Axiom's members over the last 18 months is that the move to online court hearings has not reduced the costs of civil litigation at all.

7. Accordingly, supposed cost savings are not a justification for virtual hearings becoming the default position.

8. In assessing the proposals made in the Consultation Paper, therefore, the key question is whether a move to make online hearings the default position in civil cases – with the result that many more cases would be dealt with remotely, rather than in-person as before the pandemic – is likely to deliver a better quality of justice and/or improve access to justice in Scotland.

9. First of all, the argument that because other parts of modern life are going online, so too should the courts, is without merit. The courts are not a service like any other. Court proceedings should be different. Justice is being dispensed. The parties' rights and obligations are being determined by an arm of the State. The courts are a critical part of the rule of law. The solemnity and importance of court proceedings are, in our view, diminished by the virtual hearing format. We do not consider that the significance of this point should be downplayed.

10. Furthermore, there is no empirical evidence that we are aware of which demonstrates that a fundamental shift to online hearings would improve the quality of justice being delivered in the Scottish courts. Nor are we aware of any empirical evidence showing a substantial demand from practitioners, litigants or the general public for a move to virtual hearings as the default format for a court hearing in Scotland. No such evidence has been referred to in the Consultation Paper.

11. The experience of Axiom's members is that the online court format is sub-optimal for judges, advocates, solicitors, litigants and witnesses. Even if the technology works effectively (which is often not the case), the reality is that a virtual hearing is often a reductive and depersonalised exercise, as compared to an in-person hearing. As one American judge has put it, a remote hearing reduces court proceedings to a "smaller, mirror image of reality".

12. This is particularly true of substantive hearings, such as debates, proofs and reclaiming motions.

13. Axiom considers that the case for substantive hearings being dealt with in-person remains a compelling one. With regard to debates and reclaiming motions, the quality of advocacy and interventions from the bench are inevitably diminished when the case is conducted online. No-one can seriously argue that communication is better via video technology as compared to the in-person experience. Hence a single, unified physical space allowing face-to-face interactions amongst the participants remains the optimal court setting. In short, the quality of justice is poorer online than in the case of in-person hearings.

14. This is perhaps even more pronounced when it comes to proofs. The determination of factual disputes is one of the court's most important roles. The leading of evidence by one party and the challenge of it by the other side are at the heart of the adversarial process. But the ability to take witness evidence online – as well as the court's ability properly to assess it – is undoubtedly impaired when compared to the in-person experience. Hearing evidence using video technology is plainly second best. In a non-emergency situation, the courts should not seek to conduct cases in that way as a general rule.

15. Thus, in Axiom's view, there is no proper basis for suggesting that the quality of justice is improved by a substantive hearing being dealt with online, rather than in-person.

16. With regard to access to justice, Axiom's members are not aware of any issue in that connection – either in the commercial or in the public law sphere. In situations outwith the emergency created by the pandemic, we have no experience of litigants or other interested members of the public being unable or unwilling to travel to court, such that they are denied the opportunity of participating properly in the court process. If the suggestion is that members of the public should be able to view the courts online from the comfort of their homes, that is an argument for live streaming of court cases on the internet, rather than abandoning in-person hearings.

17. Consequently, it is Axiom's overarching view that the case for making the move contemplated in the Consultation Paper has simply not been made out. In short, there

is an absence of any substantive, empirical basis on which it could properly be concluded that online hearings are *better* than in-person ones or that there is any substantial demand for the proposed change.

18. Axiom does not, however, suggest that civil litigation in Scotland should return, without any change, to the way in which it was conducted before the pandemic.

19. It is accepted that, despite the downsides of the virtual hearing experience, routine procedural business can be appropriately conducted online in the manner in which that has been done during the pandemic. The downsides of 'transacting' such business remotely can, we consider, be justified because parties' substantive rights are not being determined by the court in such hearings (as they are in debates, proofs, reclaiming motions and other substantive hearings). That said, the relevant court rules should allow for the possibility of a party applying to the court to have procedural business dealt with by way of an in-person hearing if it can be shown that doing so would be in the interests of justice.

20. In conclusion, Axiom is of the view that, when it comes to substantive court hearings in Scotland, the default position should remain that an in-person hearing should take place in a physical courtroom with all participants in attendance.

21. Such hearings should not be reduced, as a permanent feature of the judicial system, to just another type of video call.

(III) Axiom's answers to the questions posed in section 5 of the Consultation Paper

Question 1

22. Axiom does not consider that the general presumption contemplated in the current version of the Draft Rules, at rule 35B.2, is appropriate.

23. Rather, the default position for all substantive hearings in the Court of Session should be that they should be held in-person in a physical courtroom with all participants in attendance. Refer to the points made in section (II) above.

24. Axiom makes six additional points.

25. First, the proposed change, in the form of rule 35B.3(2)(f) of the Draft Rules, that all hearings in commercial cases, including proofs, should as a default be conducted online is in our view completely unjustified. There is no evidence of any significant demand for such a change from commercial court practitioners, litigants in the commercial court, the business community or the wider general public. Indeed, our experience is that litigants in the commercial court continue to see great benefit in having their cases heard by a judge(s) in person, in court. They recognise the inherent value of a substantive hearing being dealt with in a physical court room where the judge(s), counsel and (in the case of a proof) the witnesses can engage with each other face to face, thus allowing a proper discussion of the arguments and, where relevant, testing of the evidence.

26. Second, by parity of reasoning we take the same view in relation to the proposed change relative to petitions for judicial review, as contained in rule 35B.3(2)(c) of the Draft Rules.

27. Third, rule 35B.2 of the Draft Rules envisages that legal debates and reclaiming motions raising a point of law of particular difficulty or importance should be heard in-person. There will be very few commercial court debates or reclaiming motions where the point is not one of difficulty or importance. This simply underscores that the proposed default rule, in rule 35B.3(2)(f) of the Draft Rules, that commercial action hearings should be heard online makes no sense. The same applies to the proposal to make an online hearing the default setting for debates or reclaiming motions in judicial review proceedings. Such proceedings will, almost by definition, involve a point of importance regarding the relationship of the petitioner and a public authority. Once again, this serves to demonstrate that such cases should, as a default, be heard in-person and in court, and not by way of a virtual hearing.

28. Fourth, as noted, Axiom considers that the default position should be that substantive hearings in the Court of Session should be dealt with by way of an in-person hearing in a physical courtroom with the participants in attendance. Axiom acknowledges that, in any revisions to the RCS, it would be appropriate to provide for the ability of a party to apply to the court to change that default position, and to have the relevant hearing conducted online (either in whole or in part). The test for the court granting such an

application – i.e., acceding to a request to conduct the hearing remotely – should be that changing from the default mode of attendance (a) will not prejudice the fairness of the proceedings and (b) will not otherwise be contrary to the interests of justice. Both parts of the test would require to be satisfied for the application to be granted.

29. Fifth, Axiom has a specific concern in relation to commercial court proofs in which it is a frequent occurrence that witnesses are based in other parts of the United Kingdom or even abroad. When conducting an online proof, on what basis is the Scottish court exercising jurisdiction in respect of such witnesses? Axiom's view is that there is considerable uncertainty as to the answer to this question. There is certainly no clear basis on which the Scottish court exercises jurisdiction relative to such witnesses (who are outwith its territorial jurisdiction). We consider that this is a significant practical point regarding the basic functioning of a proof which simply does not seem to have been addressed in the period in which virtual hearings have become the norm.

30. Sixth, as to suggested revisions to the Draft Rules, Axiom adopts the position set out in the Faculty Response in relation to question 1.

Question 2

31. For the reasons previously set out, Axiom does not consider that the general presumption contemplated in the current version of rule 35B.3 of the Draft Rules is appropriate.

32. Only hearings involving routine procedural business should be dealt with by means of a virtual hearing. In that connection the relevant court rules should provide for the possibility that a party can, if it is in the interests of justice, apply to have the relevant piece of procedural business dealt with by way of an in-person hearing in court.

33. With regard to suggested revisions to the Draft Rules, Axiom aligns itself with the position set out in the Faculty Response.

Question 3

34. It would be appropriate for an application of the type contemplated by this question to be made by motion.

35. The parties should, however, have the right to argue such a matter before the court by way of an oral hearing. The mode of attendance is a critical aspect of the conduct of a court case. There may be many elements and nuances which are relevant to the ultimate determination of the type of application referred to in question 3. It would not, in our view, be appropriate for the court to determine such a fundamental matter simply 'on the papers'.

Question 4

36. We do not consider that the court should have the final say in the matter.

37. If the parties are agreed that they want their substantive hearing conducted in a physical courtroom with the participants in attendance, they should be entitled to that and the court should facilitate it. This would be consistent with the courts being a public service which the parties should be able to access physically and in-person if they wish do to do so. Such an approach would also be consistent with the principle of open justice.

38. Axiom considers that the court should only have a role to play in determining the mode of attendance at the hearing if one of the parties makes an application to change the default position provided for in the relevant court rules (see our answer to question 1, at para 28 above).

Question 5

39. There are three final points which we would wish to make.

40. First, in Axiom's view the fundamental constitutional principle that the administration of justice should take place in open court must be protected. As Lord Diplock observed in *Attorney-General v Leveller Magazine Limited*, [1979] AC 440, at p 450A:

> "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice … requires that they [proceedings in court] should be held in open court to which the press and public are admitted…"

41. In a similar vein, the European Court of Human Rights has confirmed that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6 of the European Convention on Human Rights: see *Diennet v France,* [1995] 21 EHHR 554, at para 33. Public hearings are, it was emphasised, one of the means by which confidence in the court system is maintained.

42. In the present Scottish context, there are unresolved issues about how to enable members of the public to access online hearings – for example, the public can sometimes hear, but not see, some proceedings. Axiom considers that, were online hearings to become the norm, there would be a real risk that the principle of open justice would be degraded.

43. Secondly, we are concerned by the wellbeing implications of the proposal that online hearings should become the default format for civil cases in the Scottish courts. The experience of Axiom members thus far has been that virtual hearings exact a toll on the judges, counsel and witnesses involved in the hearing. The need to stare at a computer screen for hours a day with very high levels of concentration being required has been found to be debilitating even if breaks are taken during the course of the hearing. The long term negative effects on the physical and mental health of those involved – especially those involved in longer hearings – have not been examined in Scotland.

44. Thirdly, Axiom endorses the revised version of the draft Rules produced by the Faculty of Advocates as part of the Faculty Response.

Question 6

45. Axiom's response to this question concerning the OCR can be taken as being the same as the response relative to the corresponding proposed changes to the RCS.

Question 7

46. Axiom's response to this question concerning the OCR can be taken as being the same as the response relative to the corresponding proposed changes to the RCS.

Question 8

47. Axiom's response to this question concerning the OCR can be taken as being the same as the response relative to the corresponding proposed changes to the RCS.

Question 9

48. Axiom's response to this question concerning the OCR can be taken as being the same as the response relative to the corresponding proposed changes to the RCS.

Question 10

49. Axiom has no further comments on the proposed changes to the OCR.

Axiom Advocates
8 November 2021