RESPONSE ON BEHALF OF CMS CAMERON MCKENNA NABARRO OLSWANG LLP TO THE SCOTTISH CIVIL JUSTICE COUNCIL'S CONSULTATION ON THE MODE OF ATTENDANCE AT COURT HEARINGS

We welcome the opportunity to respond to this consultation.

RCS Questions

Question 1

Part 1 of Q1: Do you think the general presumption given is appropriate?

The question refers to a single general presumption, however, there are a number of general presumptions within the proposed draft rule, which is the subject of this question (35B.2).

In the circumstances, we do not agree that the general presumptions in the draft rule are appropriate.

We have set out the areas of particular concern below.

1. **Civil proofs**:

   a) At 35B.2(3) only one small category of civil proofs has been identified as appropriate for an in-person hearing, namely, those raising "*a significant issue of credibility of a party or witness which is dependent upon an analysis of the party's or witness's demeanour or character*" (the **Credibility Exception**).

   b) We consider that **all** civil proofs should be, by default, in-person, subject to the parties (either on a consensual or non-consensual basis) being at liberty to seek an alternative mode of hearing as envisaged in draft rule 35B.4.

   c) The draft rules appear to assume that the only characteristic of civil proof hearings that might make them appropriate to be in-person is where there is *"a significant issue of credibility of a party or witness"*. We do not agree that this is the case, nor in any event is it clear how such an issue can be assessed in advance of evidence actually being heard. There are significant challenges that arise in relation to the preparation and conduct of civil proofs, as distinct from other types of hearing, that make virtual proof hearings particularly challenging and much more expensive for litigants than in-person hearings. For this reason, we consider that all proofs should, by default, be conducted in-person. We have set out a short, non-exhaustive list of issues below. This does not include some of the well-documented advocacy issues that have been raised by various legal commentators e.g. with regards to the effective examination and cross-examination of witnesses:

(i) There are significant limitations on who can speak and see/be seen at any given time;

(ii) There are significant limitations on the ability of parties and agents to effectively communicate with counsel during the course of the hearing;

(iii) Virtual hearings impose significant extra costs on parties e.g. additional lawyer resource is required to enable matters to proceed efficiently; considerable background support from IT and facilities teams is required; in some cases transcription and other third party services require to be paid for by parties, for example, in relation to the presentation of documents during the hearing or the engagement of legally qualified observers in the same location as a witness;

(iv) Substantial additional preparation is required to manage witnesses and documents. Agents are reliant on witnesses following joining instructions and being able to set up both IT and lighting/sound arrangements correctly. Once the hearing is underway, it is very difficult to assist with any technical issues that may arise and this can have a material and often detrimental impact on effective case presentation and the continuity of the hearing;

(v) There are issues over the recoverability of the substantial additional costs virtual hearings involve. At present adequate provision does not exist for recovery of such expenses;

(vi) Virtual hearings can increase any imbalance between the parties – it is far easier for parties with more resources to deal with the practical and technical challenges as well as the additional expenses that are involved. This exacerbates any existing imbalances, disadvantaging parties with fewer resources in presenting their cases. It is not an answer to these issues, nor appropriate, to oblige parties with greater resources to incur a higher proportion of the costs / preparation for the proof; and

(vii) Technical difficulties – these remain commonplace and can cause participants to miss critical exchanges, slow down proceedings significantly, and adversely impact the effectiveness of case presentation.

While some of these issues are undoubtedly capable of being resolved over time, they should be properly reviewed, identified, and addressed by way of appropriate technical and procedural measures.

This is not to say that virtual hearings are completely without merit – they have benefits, and we believe that in a number of cases, court users may request a remote proof. However, as matters currently stand (and subject to further review and consideration) we are of the view that, at this point in time, court users should be entitled to an in-person proof as a matter of right where all parties are in agreement with this approach.

2. The Commercial Court:

a) The draft rule (35B.2(3)(b)) draws a distinction between Commercial Court and other civil business, defaulting all Commercial Court hearings (including proofs) to be conducted on a virtual basis. We see no objective justification for this distinction.

b) This is particularly concerning in relation to proofs. There is just as much (if not a greater) likelihood of issues of credibility arising in a Commercial Court case as in other categories of civil business. The fact that the draft rule 35B.2 includes the Credibility Exception for other civil proofs suggests that it is accepted that there are certain aspects of witness evidence that can more appropriately/effectively be assessed in person. To treat Commercial Court proofs differently,

excluding them from the Credibility Exception in 35B.2 would, we believe, send an unfortunate message, namely that the Commercial Court offers a reduced level of service as compared to other forums.

c) We are of the view that the proposed approach to Commercial Court business would be likely to have an adverse impact on the selection of the Commercial Court as a forum for complex and high value disputes. Potential litigants in these types of dispute are unlikely, at this time, to select a forum in which the default expectation is that an in-person proof will not be allowed.

3. Debates, reclaiming motions and appeals, judicial review hearings

a) The proposals regarding debates, reclaiming motions and appeals are also of potential concern. The draft rule envisages that these will only be allowed to proceed as in-person hearings where they raise "*a point of law of general public importance/particular difficulty or importance*" (the **Importance Exception**). It is unclear what this means and once again how and when these factors will be assessed.

b) We note from the minutes of the Scottish Civil Justice Council (**SCJC**) meeting on 19 July 2021 that the SCJC discussed the possibility of a practice note to "*narrow the discretionary windows in order that the key principles* [are] *seen as robust*". If it is envisaged that such a practice note would provide further information regarding the threshold(s) for the Importance Exception, it would be helpful to see that in conjunction with the draft rules in order that their likely impact can be fully assessed.

c) If any Importance Exception is implemented, this should, in our view, also apply to dispositive **judicial review hearings**. See also our further comments on judicial review hearings in our response to Q2.

d) In summary, while we are of the view that, in principle, debates, reclaiming motions, appeals and dispositive judicial review hearings are more suitable for virtual hearings than proofs, we have concerns about the general structure and approach of the draft rules, in particular the lack of clarity around how it is envisaged the tests set out in 35B.2(2)(f) and 35B.2(3) would be applied. In view of this, we do not support the implementation of the draft rules in their current form.

4. The general approach - additional comments regarding the general approach of the draft rules and the scope of the consultation exercise

a) The consultation paper recognises that there is a significant and ongoing debate. However, the issues that are the subject of that debate have not been set out in the paper and no specific questions seeking views on these issues have been posed. Rather, the consultation poses a small number of specific questions regarding particular aspects of the draft rules. We are of the view that before permanent changes of this nature are taken forward, there should be a full consultation exercise that considers the broader issues in detail.

b) For the avoidance of doubt, we are of the view that virtual and hybrid hearings have a significant and vital role to play in civil justice and we are very supportive of the increased use of technology in the courts. We consider that the Scottish Courts and Tribunals Service (**SCTS**) is to be commended on its COVID-response and the continued operation of civil justice during lockdowns. We also agree that it is vital to take forward these successes into the future. Furthermore, we recognise that there are backlogs and operational pressures in the system as a result of COVID

which require to be addressed. In our view, however, it would be a mistake to allow these pressures to influence the longer-term approach to the delivery of civil justice prior to a full and considered review.

c) We suggest that, alongside a full consultation, a detailed evidence-gathering exercise is appropriate (for example, by way of a call for evidence) at this time. Such an exercise would be useful in:

   (i) Allowing a more informed view to be taken of the cases in which in-person (and/or hybrid) hearings are more suitable;

   (ii) Identifying the capacity- and capability-building required to enable effective and efficient delivery of and participation in virtual and hybrid hearings (both in the public and private sectors); and

   (iii) Facilitating a broader conversation as to how the use of technology can be optimised to allow cases to be presented in virtual and hybrid environments as efficiently and cost-effectively as possible, thereby building confidence in the virtual model.

d) In the meantime, as noted above, we recognise that operational arrangements may require to be put in place to manage resources and overcome backlogs that have arisen over the course of the COVID lockdowns. We suggest that, at this point in time, any such arrangements ought to be temporary and ought not to include what amounts to a broad and indefinite prohibition on certain types of in-person hearings in the Scottish civil justice system before there is reliable data to support that approach.

e) By way of illustration, one alternative would be to put in place a simpler rule (to fill any that may be left by the repeal of the emergency legislation referred to in paras 33 and 34 of the consultation paper) pending more detailed consideration. That rule could simply provide for:

   (i) all procedural business to proceed as virtual, by default; and

   (ii) that a determination should be made on a case by case basis as to the mode of hearing that ought to be adopted for any substantive business (proofs, debates, reclaiming motions, appeals, dispositive hearings in judicial reviews).

   The courts have, throughout the pandemic, provided useful rolling guidance outlining their approach to operational matters in response to changing circumstances. A rule of this type could be supported by such guidance pending a fuller review of the longer-term approach.

<u>Part 2 of Q1: Would you make any additions or deletions and if so why?</u>

For the reasons set out in our response to Q1 above, we do not agree with the general approach that has been taken in this draft rule and do not consider it should be implemented in this form at this time.

If, however, draft rule 35B.2 was to be implemented, we suggest that:

- all civil proofs, regardless of forum, should, by default, be in-person hearings; and
- dispositive judicial review hearings should also be subject to the Importance Exception in draft rule 35B.2(2)(f) thereby enabling them to take place in-person.

Question 2

Part 1 of Q2: Do you think the general presumption given is appropriate?

The question refers to a single general presumption, however, there are a number of general presumptions within the proposed draft rule which is the subject of this question (35B.3).

In the circumstances, we do not agree that the general presumptions in the draft rule are appropriate.

The comments we have made in paragraphs 1-4 in our response to Q1, apply equally to this question and draft rule 35B.3.

We make the following additional points:

1. We are of the view that, in principle, procedural business is generally suitable by default to virtual hearings. However, for the reasons set out at paragraph 4 of our response to question 1, we do not support the implementation of the draft rules in their current form at this time.

2. With regard to **judicial review hearings**, we consider these merit careful and separate consideration. Judicial review cases often involve a significant imbalance between the parties (with individuals and small organisations against the state). They may also raise matters of significant public importance and public interest, engaging questions of open justice. We consider there would be merit in properly exploring other modes of hearing for judicial review cases e.g. a hybrid mode option where, even were parties to request an in-person hearing, the proceedings are also broadcast.

Part 2 of Q2: Would you make any additions or deletions and if so why?

For the reasons set out above, we do not agree with the general approach taken by this draft rule and we do not consider it should be implemented at this time.

However, if draft rule 35B.3 was to be implemented, we suggest that:

3. 35B.3(f) be deleted i.e. that Commercial Court hearings be treated the same as other general civil business. In particular Commercial Court proofs should default to in-person under draft rule 35B.2 in the same way as other civil proofs.

4. For completeness, and although they are not explicitly mentioned in draft rule 35B.3, **no** civil proofs should fall under draft rule 35B.3. These should all default to in-person hearings under draft rule 35B.2 for the reasons set out in our response to Q1.

Question 3

For the reasons set out in our responses the earlier questions, we do not agree with the general approach taken by these draft rules and we do not consider they should be implemented at this time.

If this approach was nevertheless to be implemented, we do not agree that lodging a motion would be the correct approach whenever a party wishes to seek a different mode of hearing from the default mode.

While a motion may be the appropriate procedure for applications in relation to certain procedural hearings (in particular, for those initiated in any event by motion), we consider that there should be conscious consideration by the court, on a case by case basis, of the appropriate mode of hearing for each and every substantive hearing (proofs, debates, reclaiming motions, appeals, and dispositive judicial review hearings). This could readily be included as part of existing procedure, e.g. in relation to a Commercial Court action, this might be considered at the RCS 47.12 procedural hearing when other related issues will be under consideration.

Question 4

For the reasons set out in our responses to the earlier questions, we do not agree with the general approach taken by these draft rules and we do not consider they should be implemented at this time.

If this approach was nevertheless to be implemented, we suggest that in the case of civil proofs, parties should have the right to an in-person hearing if all parties consent to that and the court should only be in a position to override that in exceptional circumstances (for example, in cases where this would result in excessive and unacceptable delay). If there is a lack of consensus, the court should have the final say, taking all the relevant circumstances into account.

Question 5

Our comments at paragraph 4 in our response to Q1 apply to this Q5.

Additional comments:

1. The consultation paper refers to a desire to deliver improved consistency and increased predictability to court users as to the modes of hearing. Whilst we can see the operational benefits of these aims to SCTS, these aims should be balanced with other considerations such as fairness to court users, efficiency, cost and effectiveness of hearings. As noted above, these are matters on which evidence ought to be collected and in our opinion, a broader public consultation should take place.

2. There is no specific question in the consultation about the test(s) or threshold(s) the court will apply in determining how the Credibility Exception for proofs or the Importance Exception for debates, reclaiming motions and appeals will be judged, nor is any indication given as to at what stage in the procedure it will be determined whether a case falls into one of these categories. See also the comments in paragraph 3 of our response to Q1.

3. There is no specific question in the consultation about how the courts will assess applications for an alternative mode of hearing. The draft rules indicate such applications will be subject to a 'reasonableness' test (whether the mode of appearance would prejudice the fairness of proceedings or otherwise be contrary to the interests of justice) but do not indicate what factors may be taken into account by the court in considering such applications. See also the comments in paragraph 3 of our response to Q1.

4. We note that reference has been made to the Scottish Government's revised Digital Strategy which "*supports the preference for an ongoing shift to digital public services where that can improve the*

overall user experience" (our emphasis). While the use of virtual hearings to enable civil justice to continue during the COVID lockdowns has, in our view, been a success, there is not at this time a clear evidence base to support the contention that shifting all hearings (particularly proofs) to a virtual model would "improve the overall user experience".

5. There should be a broader conversation as to how technology may best be used to present cases in virtual, hybrid and in-person environments as efficiently and cost-effectively as possible. In particular, the traditional structure of court hearings, with long days, a fixed order of business etc. has largely been adopted wholesale for virtual hearings during the pandemic, albeit with minor tweaks. This may not be the best approach.

6. The proposed draft rules will have a material impact on other aspects of civil procedure, for example, recovery of documents and judicial expenses. There requires to be a full review of the impact of these proposed changes on other aspects of civil procedure. This should take place before these measures are implemented. It may be appropriate to do this as part of the Rules Rewrite project which we understand the SCJC intends to restart shortly.

OCR Questions

Question 6

Our comments in response to Question 1 apply to this Question 6.

Question 7

Our comments in response to Question 2 apply to this Question 7.

Question 8

Our comments in response to Question 3 apply to this Question 8.

Question 9

Our comments in response to Question 4 apply to this Question 9.

Question 10

Our comments in response to Question 5 apply to this Question 10.