

## **ANNEX A – CONSULTATION RESPONSE FORM**

### **RCS**

**Question 1** – For the categories of case listed as suitable for an in-person hearing:

- Do you think the general presumption given is appropriate?

***It is our understanding from the draft rules (35B.2 and 35B.3) that the general presumption is that all hearings involving the giving of evidence by a witness will proceed in person. We agree that any substantive hearings i.e. which involve the giving of evidence by a witness ought to be presumed to proceed in person.***

and

- Would you make any additions or deletions and if so why?

***Our understanding is that draft rule 35B.3(j)(i) excludes hearings involving the giving of evidence by a witness from the general presumption that a hearing will proceed remotely. It therefore appears to follow that such hearings will be presumed to proceed in person (apart from commercial action Proofs which are specifically provided for to be presumed to proceed remotely). Rule 35B.2(3)(a) provides that hearings where there is a significant issue of credibility etc. will be presumed to proceed in person. We would suggest that all hearings involving the giving of evidence by a witness are added to rule 35B.2 and ought to be presumed to proceed in person. The exception to this would be in relation to the evidence of expert witnesses. We consider that the presumption for them should be that they give their evidence remotely unless there is cause shown for them to present it in person. Broadly, the reasons for supporting the return of substantive hearings as proceeding in person rather than by electronic means include:***

- ***Technical difficulties that can arise for both witnesses and agents/Counsel;***
- ***Effectiveness of putting documents to witnesses and ability to examine their credibility/reliability during same;***
- ***Varying strength of broadband connectivity for those using the WebEx platform which can lead to delay (often significant) and has knock on cost implications;***
- ***Potentials for abuse of the remote hearings system by inappropriate behaviour e.g. witnesses being able to access the platform and hear witness evidence prior to giving their own or disconnecting from the platform if a difficult question is put to them during cross-examination;***
- ***Ensuring open justice.***

**Question 2** – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- Do you think the general presumption given is appropriate?

***We agree that it is appropriate to presume that any hearing involving procedure ought to proceed by electronic means. We do not agree that substantive hearings, in particular, Proofs, ought to be presumed to proceed by electronic means subject to the caveat above concerning expert witnesses. The default position should be for such hearings to proceed in person.***

and

- Would you make any additions or deletions and if so why?

***It is our position that all substantive hearings ought to be presumed to proceed in person for the reasons outlined above. We would therefore support deletion of substantive hearings from the categories of cases listed as suitable for attendance by electronic means.***

**Question 3** – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- Do you think lodging a motion is the right way to do that? Please explain your answer.

***We agree that the lodging of a motion would be the appropriate way for parties to seek departure from the general presumption. In the event that such a motion was to be opposed, we do not agree that determination by the Court without a hearing is appropriate per draft Rule 35B.4(4). Parties ought to be able to make oral submissions in the usual way where such a motion is opposed.***

**Question 4** – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- Do you agree that the court should have the final say? Please explain your answer

***It is our position that if parties have agreed the mode of attendance, there does not appear to be any justification for the Court having an inherent power to alter that mode of attendance. We consider that the rules suitably provide for a procedure whereby a party/parties can make a motion to alter the mode of attendance which allows for the Court to make a determination if parties are not agreed. We do not have any difficulty with the proposal that the principles underlying such a determination ought to be prejudice to the fairness of the proceedings and whether it is in the interests of justice, as provided for in Rule 35B.4(5) and 35B.5(1).***

**Question 5** – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

***We have no further comments to add beyond those set out above.***

OCR

**Question 6** – For the categories of case listed as suitable for an in-person hearing:

- Do you think the general presumption given is appropriate?

***In our view, the rules applying to the Sheriff Court ought to, as far as possible and where relevant, mirror those applying to the Court of Session. Our above responses therefore apply equally to the questions relating to the draft Sheriff Court rules.***

and

- Would you make any additions or deletions and if so why?

***We have no further comments to add beyond those set out above.***

**Question 7** – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- Do you think the general presumption given is appropriate?

***We have no further comments to add beyond those set out above.***

and

- Would you make any additions or deletions and if so why?

***We have no further comments to add beyond those set out above.***

**Question 8** – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- Do you think lodging a motion is the right way to do that?

***We would refer to our response at question 3.***

- Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

***As above, we would refer to our response at question 3.***

**Question 9** – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- Do you agree that the court should have the final say? Please explain your answer

***We would refer to our response at question 4.***

**Question 10** – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?

***We have no further comments to add beyond those set out above.***

## ANNEX B - RESPONDENT INFORMATION FORM

Please note this form **must** be returned with your response to ensure that we handle your response appropriately.

### Name / Organisation

Lindsays LLP Personal Injury Team

### PERSONAL DETAILS

#### Title *(Optional)*

Mr

#### Forename

David

#### Surname

Armstrong

### CONTACT DETAILS

#### Address and postcode

100 Queen Street, Glasgow, G1 3DN

#### Phone

0141 221 6551

#### Email

[davidarmstrong@lindsays.co.uk](mailto:davidarmstrong@lindsays.co.uk)

## 1. PERMISSIONS

I am responding:

- As an individual  (*complete section (a)*)
- On behalf of a group/organisation  (*complete section (b)*)

### INDIVIDUALS

(a) If responding as an **individual**:

- (i) **Do you agree to your response being made available to the public (on the Scottish Civil Justice Council website)? (Please tick as appropriate)**

Yes  No

- (ii) **If you are content for your response to be published, please tell us how you wish us to make your response available to the public:**

*Please tick ONE of the following boxes:*

Make my response, name and address all available

Make my response and name available, but not my address

Make my response available, but not my name and address

### ORGANISATIONS

(b) If responding as a **group or organisation**:

- (i) **The name and address of your organisation will be made available to the public on the Scottish Civil Justice Council website. Are you content for your response to be made available?**

Yes  No