CONSULTATION RESPONSE FROM CLYDE & CO (Scotland) LLP

As a firm we are in favour of the increased use of digital technology as part of the overall modernisation of the court system. We consider that electronic hearings carry benefits in certain circumstances. However, there are significant disadvantages when compared to in-person hearings in relation to substantive or contentious hearings. It is necessary for a balance to be struck.

In our view, the Draft Rules do not achieve that balance. They are also premature in that they have been drafted with insufficient consultation and research. In some instances, they raise questions about fairness and access to justice. The draft rules would advance wholesale changes at a time when the proposed extensions to the legislative powers of the Scottish Government in the case of courts and tribunals are themselves only temporary. The draft rules would make permanent presumptions against a background of ongoing temporary legislative provisions.

The consultation is not supported by any empirical data. We have concerns that the necessary technological infrastructure and support for the permanent introduction of electronic hearings is not yet available. A survey of Law Society of Scotland members earlier this year indicated both the technological and practical problems encountered by practitioners during electronic hearings. Some respondents stated that seeking instructions and obtaining full participation from their clients were challenges. Proposed platform changes such as breakout rooms to allow private consultations between clients and representatives serve to emphasise that the platforms are not completely fit for purpose. Whilst we accept that the current platforms are not minimum viable products by any means, there is still considerable work to be done to achieve the full and necessary functionality required for the largely digitised hearing system proposed by the draft Rules.

Some respondents to the Law Society of Scotland survey reported a lack of training or inadequate internet facilities themselves.

Access to justice is rightly emphasised in the consultation document as a key concern yet no empirical data on the impact of the proposals on the public is provided. The question of the *perception* of access to justice is not considered. There will inevitably be questions from those pursuers and defenders who proceed via remote means about whether they have had 'their day in court'.

Correspondingly, the *quality* of access of justice must also be paramount. To take one such proposal, we note that the draft Rules propose that an in-person hearing for a debate or appeal will be appropriate that the debate or appeal requires a point of law of importance or difficulty of the point of law. This proposal suggests that there is an implicit acceptance that in-person hearings are a superior option to electronic hearings in certain instances, and ties into the perception of justice via remote means.

Finally, we understand that guidance has recently been provided to judges and magistrates in England and Wales that judicial powers and authority are to be exercised on court and tribunal premises. Whilst there is an acceptance that virtual hearings will continue to occur, and that participants will attend remotely, the guidance is that judicial attendance should only occur off-site in '*exceptional and unavoidable circumstances*.' Clarification on whether such guidance will be provided to the judiciary in Scotland would be welcomed.

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

- *Do you think the general presumption given is appropriate? and*
- *Would you make any additions or deletions and if so why?*

Civil proofs

Draft Rules 35B.2(2)(d) creates a presumption that civil proofs in an ordinary action should be in heard in-person, only *"where there is 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."*

We disagree that such a presumption should be made.

First, there will need to be a mechanism for determining whether there is a significant issue of credibility. Issues of credibility and reliability of witness occur very frequently in cases which proceed to proof. The question of whether the issue is "*significant*" is highly subjective. Parties may well disagree. It is not clear how such disputes will be resolved.

Secondly, there is no principled reason why the distinction drawn by the draft rule should be made. The draft rule presumably recognises that it is harder to assess a witnesses' evidence when it is heard remotely. That rather begs the question of why evidence from witnesses which will have a material bearing on the outcome of the proof should ever be heard remotely.

We would propose that the presumption should be that all civil proofs should take place in person unless the parties agree otherwise (effectively a hybrid system as set out below). The reasons for this submission can be summarised as follows:

- Difficulty in taking evidence from witnesses –
    - Dealing with advocacy in a remote setting can be challenging, with limited assessment of body language and behavioural cues which form part of the natural question and answer process. It is harder for an advocate to gauge the judicial mood and to adapt the line of questioning or argument accordingly.
    - As recognised by the draft rule, it is harder for the judge to assess a witnesses' credibility and reliability.
    - There are challenges in ensuring that witnesses are alone and not being influenced in some unseen manner by a party to the proceedings/third party who may have a vested financial interest in the proceedings.
    - By the same token, ensuring that witnesses do not have access to the video proceedings prior to their own evidence may be difficult.
- Technological limitations
    - It is common experience that parties will encounter technological issues during longer hearings.
    - Parties require a reliable, high-speed internet connection.
    - There is often a loss of connection or problems with lag.
    - It has become apparent that there are some compatibility issues between the Webex platform and certain browsers.
    - IT issues are not easily fixed when they occur leading to delays and significant stress for those unable to connect.
- Open and accessible justice –

    - It is apparent that the solemnity of some of the procedure around giving evidence such as taking an oath is diluted in an online/remote setting.
    - Therefore, there remains a risk with conducting proofs entirely on online platforms that the Proof is relegated in status in the eyes of the participants and the public. Where the process remains rooted in court buildings, in-person interactions remain the norm, retaining a level of importance in the eyes of those taking part. We believe that in-person interaction should be sought in the most appropriate and important circumstances
- Collegiality and communication between court attendees.
    - The importance of interaction between agents, counsel, clients and opponents cannot be understated. Ensuring that civil proofs are heard (in the most part) within the court building will continue to foster those relationships, which often assist in the progress of the proof by way of agreement of matters in dispute and even settlement
- Training of junior lawyers –
    - Those junior members of our profession can only learn the unwritten rules and practice of dealing with witnesses, court officials, sheriffs, judges, clients and other lawyers during the course of a proof by experiencing the proof in person. In circumstances where a remote proof is used, we consider it likely that junior lawyers to be excluded from important conversations around the running of the proof if those proceedings and the participants are all remote from each other.

Procedure Roll Debates, Reclaiming Motions & Other Substantive Hearings

The draft rules draw the distinction between such hearings which raise a point of general public importance, particular difficulty or importance. Again, disputes may arise in relation to whether a particular case falls within that definition giving rise to unnecessary procedural disputes. We do not understand how the perceived importance or difficulty of a particular case makes it more appropriate for an in-person hearing that one which is not considered to fall within that category. There is an implicit acceptance that in-person hearings are a superior option to electronic hearings.

We consider that substantive hearings including debates, reclaiming motions and appeals should be heard in-person with parties having the ability to agree to a remote hearing if they wish to do so in a particular case. Many of the disadvantages of remote hearings noted in relation to proofs (above) apply similarly to substantive legal hearings.

Our Proposal

We consider that the default should be that all substantive hearings should be heard in person. It should remain open to parties to agree that all or part of a substantive hearing should proceed remotely. That can largely be accommodated within the existing rules, where it has been possible for many years for parties to apply to have evidence heard by video conference. The comparative rarity of that happening perhaps demonstrates a general feeling that hearing evidence in such a way was second best.

One potential practical innovation in personal injury actions would be the introduction of a section within the current Pre-Trial Meeting Minute (Form 43.10) on the "mode of attendance". Parties would note in the minute whether they wished the proof to be in person, remote or hybrid with witnesses categorised as either in person or remote. If parties cannot agree or if the Court wished to be addressed on it, a By Order hearing could be assigned. In the event of a dispute the ultimate decision as to which witnesses would be required to provide evidence in-person would remain with the Court.

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

As above, we do not agree that the general presumption is appropriate.

We agree that the introduction of electronic hearings has demonstrated some advantages for straightforward procedural business. This is borne out by the responses to the Law Society of Scotland survey in which indicated that 91% of respondents believe that the process itself worked well. However, we reiterate that any such continuation of these measures should be subject to the proportionate improvement of the remote hearing platforms. It should also bear in mind the other deleterious effects on lawyer's learning, development and collegiality.

As above, we consider that substantive hearings should not be included in the general presumption.

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 any new rules will require to provide a formal mechanism to allow the mode of hearing to be changed and to resolve any disputes. A motion is, in our view, the correct mechanism to allow that to be done. If a motion is required, it should be dealt with in the same manner as any other motion. If it is opposed, there should be a hearing in relation to it. If it is unopposed, and the judge is content to grant it, there should be no need for a hearing.

One alternative would be for the matter to dealt with administratively via email if parties agree. However, if parties are not agreed, we do not consider that it would be appropriate for the court to form a view without having heard from parties orally.

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*

As stated above, we believe that measures should be in place to allow the parties to both apply for and seek to agree upon a change in the mode of attendance.

The draft rule permits the court to alter the mode of hearing of its own volition by means of a direction. We consider that parties are generally best placed to decide the appropriate mode of hearing. If parties are not in agreement, then an opposed motion can be determined by the court. However, we do not agree that the court should unilaterally be able to alter the mode of hearing against the wishes of both parties.

However, we agree that if the parties are unable to reach a conclusion and oral representations have been made at a hearing, then the Court should have the final say.

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

We are not aware of support within the solicitors' profession for the approach proposed by the draft rules. We consider that the appropriate balance to be struck is for a presumption that interlocutory matters should be dealt with remotely but that substantive or controversial matters should be dealt with in person.

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

- *Do you think the general presumption given is appropriate? and*
- *Would you make any additions or deletions and if so why?*

It is our view that the Court of Session and Ordinary Cause Rules should be complementary, and therefore, we refer you to our answer to Question 1.

The provision in 28ZA.2 should be amended to confirm that a person is not excused from attendance in person at civil proofs, and thus the exception provided for at paragraph (3) is removed.

As set out within our response to Question 1, the Chapter 36 and 36A of the Ordinary Cause Rules could also be amended to include a provision that where a civil proof is required, a section within the current Minute of Pre-Proof Conference (Form 10f or Form P17) be introduced on the "mode of attendance". Parties would note in the PPC Minute whether they wish the proof to be in person, remote or hybrid and witnesses are categorised as either in person or remote. If parties cannot decide or if the Court wishes to be addressed on it would there by a case management hearing assigned.

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

As per Question 6, the Court of Session rules and Ordinary Cause Rules should be complementary, and therefore, we reiterate the issues raised in our response to Question 2.

Accordingly, in summary it is the submission of Clyde & Co that:

- There should be a presumption for in person hearings for substantive business before the Sheriff Courts (and Sheriff Appeal Court).
- Substantive business includes legal debates and appeals.

- Any presumption should remain subject to the parties' ability to seek, appropriate directions as envisaged by draft Rules 28ZA.4 and 28ZA.5.
- Draft Rule 28ZA.3(2)(g) should be deleted.
- Draft Rule 28ZA.2(2)(e) should be amended to read "legal debates;".
- The Act of Sederunt (Sheriff Appeal Court Rules) 2015 ought to be amended in relation to establishing the appropriate presumption for appeals in the Sheriff Appeal Court.

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

The Court of Session rules and Ordinary Cause Rules should be complementary, and therefore, we reiterate the issues raised in our response to Question 3.

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*

The Court of Session rules and Ordinary Cause Rules should be complementary, and therefore, we reiterate the issues raised in our response to Question 4.

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

The Court of Session rules and Ordinary Cause Rules should be complementary, and therefore, we reiterate the issues raised in our response to Question 5.