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RESPONSE ON BEHALF OF GILSON GRAY LLP

To the Consultation Paper on Rules covering the Mode of Attendance at Court Hearings issued by the Scottish Civil Justice Council

1 This submission comprises Gilson Gray LLP's response to the Consultation by the Scottish Civil Justice Council on the Rules covering the Mode of Attendance at Court Hearings launched in September 2021.

2 Gilson Gray LLP welcomes this consultation and the opportunity to respond.

Use of Remote Hearings during Covid

3 During the Covid-19 pandemic, Gilson Gray LLP has participated extensively in remote hearings at all levels of the Scottish Court system. These include:-

a) Acting in one of the first Court of Session Commercial proofs to be conducted remotely;

b) Acting for the Petitioner in a high profile Judicial Review hearing which was the subject of significant media interest;

c) Acting in Court of Session Inner House, Ordinary, Commercial and Personal Injury hearings;

d) Conducting Sheriff Court Proofs, Debates, Opposed Motions, Options Hearings, Procedural Hearings and case management hearings in Sheriff Courts across Scotland both remotely and in person;

e) Conducting proceedings in the Sheriff Appeal Court.

f) Conducting a multi-day arbitration hearing before a panel of 3 arbitrators with multiple witnesses.

4 Gilson Gray LLP acknowledges the vital role which technology has had in allowing civil business to be conducted while public health restrictions restricted access to the Court Estate.

5 Notwithstanding this, Gilson Gray LLP have experienced of a number of difficulties in conducting remote hearings. These include :-

a) A Reclaiming Motion being interrupted on several occasions when one or more Judges lost internet connection;

b) Concerns arising, which could not be verified, that a witness was receiving third party assistance during cross-examination and another concern, again unverifiable, that a witness was referring to notes which were not part of the process;

c) A highly contentious child-related case requiring to default to a telephone hearing due to the court's internet connection being unstable. As Counsel were instructed on both sides, the maximum number of individuals able to participate by telephone was exceeded, with the result that Parties required to 'listen in' to a telephone hearing over Zoom"

d) Documents which had been lodged in advance of a Hearing being unavailable during the Hearing;

e) Difficulties in communication between clients, solicitors & counsel during substantive hearings;

f) Clients feeling remote from proceedings and that they had not "had their day in Court" despite significant sums of money being expended on the litigation.

6 As a training firm, Gilson Gray LLP feel that the advocacy training which can be provided to junior members of staff has been more difficult due to the almost exclusive use of remote hearings.

7 Balanced against this, Gilson Gray LLP consider there are advantages in Sheriff Court proceedings to principal solicitors being able to attend procedural hearings without incurring travelling expenses. This can offer a significantly improved quality of representation at reduced cost to clients, and, in our experience, has been greatly welcomed by the bench. An obvious example of this working well is a hearing for an interim order in an out of town Sheriff Court where the principal solicitor who has drafted the writ and presented any affidavit evidence in support can make the actual submission for an interim order; said hearings tend to be brief but can involve extremely important issues. The ability of a principal solicitor to conduct such a hearing by WebEx has been welcomed.

<u>Comments on the General Approach to the Draft Rules</u>

8. Gilson Gray LLP greatly appreciates the efforts the Scottish Civil Justice Council in preparing the draft rules. Nonetheless Gilson Gray LLP has some concerns at the overall approach taken.

9. The draft rules attempt to provide a comprehensive list of types of actions and hearings where the default will be attendance in person and, conversely, types of actions and hearings where the default will be attendance by electronic means. Gilson Gray LLP does not consider this is an appropriate starting point. Gilson Gray LLP considers that Substantive Hearings in all types of actions should by default be heard in person. Conversely all procedural hearings, with the exception of Family Actions, should by default be dealt with remotely.

10. This would have various benefits. For procedural hearings, a default position of remote hearings would allow substantial efficiency gains and cost savings for the

SCTS, practitioners and clients. Any limitations created on open justice (see below) would be limited and, in our view, proportionate.

11. In relation to substantive hearings, the Consultation document highlights the benefits of these including the ability of the public and media to observe, the ability of a free and independent press to report, a better means of assessing the credibility and reliability of witnesses and of conveying the gravitas of the Court. The consultation document accepts that not all of these advantages are presently available for remote hearings. Gilson Gray LLP does not understand why such benefits should be seen as relevant only to certain types of actions such as Family cases or to actions which involve points of law of general public importance or particular difficulty or importance. We also do not see why Commercial actions should be entirely excluded from such considerations. The Commercial Court (in both the Court of Session and Sheriff Court) is one of the biggest assets in Scottish civil justice, producing high quality and efficient adjudication of disputes. Gilson Gray LLP believe we should be careful to ensure that the hard earned reputation of the commercial procedure is not interfered with for the sake of it.

12. Gilson Gray LLP would point out that court users pay significant fees when using the Scottish courts. Those fees are the same regardless of whether the dispute involves an issue of general public importance/is of particular difficulty. As such these proposals risk creating a two tier system of justice where cases which are perceived to create a point of general public importance will justify access to fully open justice via in person hearings whereas other cases, which cost the same to pursue, do not.

13. Gilson Gray LLP also has concerns at the proposed test for whether proofs will be held in person, namely whether there is "*a significant issue of a credibility of a party or witness which is dependent upon an analysis of the party's or parties demeanour or character.*" In our experience, there are relatively few proofs which do not depend to a significant degree on credibility of a party or witnesses. In addition, it is often not possible to say in advance whether or not the credibility of a party or witness will be an issue. The question can arise during the course of evidence and can be influenced, by, for example, the evidence of other parties or a response to documents put during cross-examination.

14. Gilson Gray LLP is concerned that if in-person hearings are not available in commercial actions and only in other types of actions in limited circumstances, this will act as a deterrent to use of the Scottish civil justice system in favour if other jurisdictions or use of arbitration.

15. Further, the Consultation paper itself acknowledges that there remains a cohort (said to be around 6.3%) of the adult population that have never used the internet. The Consultation paper acknowledges that these people will be unable to access remote hearings but suggests that this will be dealt with by "*the Scottish Government and others ….. taking practical steps that will help reduce these barriers over time such*

as continuing to invest and increate broad band coverage in rural areas; supporting disadvantaged groups through the provision of devices, training and internet connections; and, the funding of access to digital assistance through relevant third sector organisations."

16. The draft rules appear not to fully address this issue. The measures quoted above will take time to have an effect. As importantly, no account is taken of the different levels of IT access and competence among those who use the internet. The speed and reliability of internet access varies considerably geographically. This can have a significant impact on presentation of a witness's evidence. In addition the quality of available technology and support to use it will also vary considerably between witnesses. Those using modern devices with multiple screens and IT support from their employer or solicitor will clearly be at a significant advantage over witnesses using, for example, mobile phones or who do not have IT support with, for example, navigation of documents. This discrepancy creates inbuilt disadvantages and may impact the assessment of reliability.

17. While the draft rules allow a party to apply by motion to change the mode of attendance, a party may not be aware of the IT position of its potential witnesses in advance of the proof. A party seeking to change the mode of attendance will also have to satisfy the court of various matters in order to do so.

18. Gilson Gray LLP agrees that parties should always retain the option to apply by motion to alter the default mode of appearance for both procedural hearings and substantive hearings.

19. Finally the consultation paper notes the importance of open justice. It notes that this is achieved in in-person hearings through the ability of public and media to attend court and report freely. In the context of electronic hearings it is suggested this can be achieved by having registered journalists apply for access to both see and hear video hearings while the public may apply for a dial in number to listen to the Hearings only without being able to see them. It is suggested at paragraph 19 of the Consultation Document that this is a temporary restriction and that these challenges can eventually be resolved through technology leading to the restrictions being lifted.

20. It seems to Gilson Gray LLP that the inability of the public and unregistered media to view remote hearings is very significant and is not addressed by the draft rules. An ability to view proceedings enhances the public and media's understanding, which in turn underpins public support for the civil justice system. While the Consultation envisages technology will resolve this issue in time, it is noted that there is no timescale or technical solutions proposed. We have significant experience of acting in cases which attracted significant media interest and take the view that the right of the public and media to view proceedings is critical to the operation of the civil justice system.

Comments on Particular Issues arising from the Draft Rules

21. Gilson Gray LLP have already made Submissions on the approach in the draft rules to dividing hearings between those heard in person and remotely. The following are in addition to those comments.

22. Draft rules 35B.2(c), 35B.2(f) and 28ZA.2(2)(e) contain a test as to whether a Debate or Reclaiming motion should be heard by electronic means or in person. In each case the test is whether the matter raises an important point of law of general public importance/particular difficulty or importance. However the draft rules do not state when or by what procedure a decision would be made as to whether the matter raises an important point of law of general public importance/particular difficulty or importance. While the rules allow for a motion to alter the default mode of attendance, they do not provide for how the default mode is to be established for debates and reclaiming motions. The difficulty of a case and its importance may be assessed differently by different courts. It may also change over time. There would, therefore, be considerable uncertainty in advising clients on for such hearings.

23. Similar points are made in relation to Rule 35B.2(3)(a). This rule concerns whether proof should be held in person, which is dependent on whether there is a significant issue of credibility of a party or witness which is dependent upon an analysis of the parties or witness's demeanour or character. Again there is no provision within the rules to establish when or by what procedure such a decision is to be made.

24. It is anticipated that the operation of both tests will lead to significant sums being spent by parties trying to gain strategic advantage or exhaust an opponent's funds. This will be a particular issue in lower value, Sheriff Court actions where recoverable expenses are already a concern for many litigants. Case management orders issued in advance of contentious motion hearings, which can often be helpful, can also make the cost of even making such an application prohibitive for lower value ordinary actions in the Sheriff Court. A litigant would therefore be disadvantaged by having to engage in an additional step of procedure, and potentially take the risk of an adverse cost award, imply to seek an in person proof. We would submit that in the case of ordinary procedure, all decision concerning in person proofs or otherwise should be dealt with at the Options Hearing (or any continuation thereof).

25. Gilson Gray LLP have concerns about Rule 35B.2(3)(f). This requires all hearings in Commercial actions including proofs to be heard remotely regardless of whether there are significant issues of credibility or points of law of general public importance/particular difficulty or importance. While some Commercial actions may not involve significant issues of witness credibility, many others do. Gilson Gray LLP have dealt with a number of Commercial actions where allegations of fraud, breach of duties or personal conduct were in issue and witness credibility was key. We have also dealt with cases in which the credibility of competing expert witnesses, both experts in the law of a foreign jurisdiction, was central to the outcome.

26. We consider Commercial actions should be treated the same way as ordinary actions. They should be classified in the same way and subject to the same tests.

27. We also note the Draft Rules make no provision for blended hearings. We consider such a procedure would be advantageous. For example, if expert witness testimony is narrow and brief, and the witness is not based locally, the ability to have their witness testimony by video link/remotely would assist. That should not, however, necessitate other witnesses, such as witnesses to disputed fact, also having to give evidence by video link.

28. The draft rules provide for motions to alter the mode of attendance with the motion decided by a Senator or Sheriff on the basis of the application and answers only i.e. without an oral hearing. In our view this is inappropriate. It does not meet the requirements of access to justice or open justice and we see no justification for treating such a potentially important motion differently to other motions.

29. We would also suggest the Draft Rules should make provisions for commissions. In our view, whether these are held remotely or in person will vary and decision on which is more appropriate should be made at the hearing when the motion is granted.

30. We note that the Draft Rules do not make provision for hearings involving interpreters. In our experience, some Sheriffs automatically assign in person hearings in such circumstances but that practice does not appear to be uniform. In our experience, virtual hearings involving interpreters are extremely difficult to follow and control. We would suggest the default should always be in person.

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

Please see comments above. In summary Gilson Gray LLP do not consider the general presumption is appropriate. In our view that there should instead be a presumption that procedural hearings in all actions with the exception of Family actions are heard electronically and a presumption that all substantive hearings are heard in person.

However, if the proposed categorisation is to be maintained, we would suggest that all proofs, debates and Reclaiming Motions including those in commercial actions be categorized as suitable for in person hearings.

Question 2 *- For the categories of cases listed as suitable for attendance at a Hearing by electronic means, both video or telephone attendance:*

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

Please see answer to question 1 above.

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 believe a motion is the appropriate way to apply to change the mode of attendance but consider there should be an oral hearing to determine the motion, if opposed, given the importance of such a step to a client and the requirements of open justice.

Question 4 *- The court 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.*

Gilson Gray LLP consider the court should only change the mode of attendance on a motion by one of the parties and not *ex propio motu.*

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

Gilson Gray LLP have no comments beyond those already made in these submissions.

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

Gilson Gray LLP do not consider the general presumption is appropriate. In our view that there should instead be a presumption that procedural hearings in all actions with the exception of Family actions are heard electronically and a presumption that all substantive hearings are heard in person.

However, if the proposed categorisation is to be maintained, we would suggest that all proofs, debates and appeals be categorized as suitable for in person hearings.

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

- *Do you think the general presumption given is appropriate? And*

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

Please see answer to question 6 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?*
- Is *there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers*

We believe a motion is the appropriate way to apply to change the mode of attendance but consider there should be an oral Hearing to determine the motion, where opposed, given the importance of such a step to a client and the requirements of open justice. We consider an accompanying application form would be useful, not least to standardise procedure across both courts. See also comments above with regard to dealing with determinations within existing procedure when appropriate (e.g. Options Hearing)

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*

Gilson Gray LLP consider the court should only change the mode of attendance on motion by one of the parties and not *ex propio motu.*

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

Gilson Gray LLP have no comments beyond those already made in these Submissions.