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 additions or deletions and if so why?

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

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.

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

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

The sheriffs principal do not respond to the consultation insofar as it relates to the Rules of the Court of Session.

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?

The sheriffs principal are strongly supportive of the availability of hearings by electronic means.

In particular, where all parties to an action wish a hearing (of whatever type) to proceed by such means, the courts should accommodate such a request wherever possible and practicable, subject to the court being satisfied that to do so would not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice.

Insofar as the general presumption is concerned, the view of the sheriffs principal is that, as a broad default, substantive (as opposed to procedural) hearings should take place in person. It appears to us to be necessary to have a default or presumption to facilitate the procedure for determining how a substantive hearing should proceed. We support what is proposed in draft rule 28ZA.2. This is, however, subject to what we say below with regard to ASSPIC.

A wide range of business is conducted in the sheriff courts. The presiding sheriff is best placed to determine how any hearing, including those of the types listed in the draft rule 28ZA.2, should proceed.

For example, there are many examples of diets fixed under rule 24.2(1) proceeding successfully by electronic means; and of child welfare hearings proceeding in a similar manner.

There are obvious difficulties in dealing with reluctant / difficult witnesses when they are not within a courtroom. The issues identified in paragraph 19 of the consultation paper apply equally to parties and witnesses. These require to be addressed satisfactorily. However fortunately in civil proceedings such instances are relatively rare. This is not a reason to avoid online proof but rather it is a factor in favour of 'in person' proof if there is any apprehension that the proceedings are likely to be 'high conflict' or lead to prevarication.

Parties require to address any such potential difficulties with the court in any application in terms of Rule 28ZA.4 or directions motion. In family proceedings the sheriff in the family court will be aware of the likelihood of such factors coming in to play and we expect that these will be discussed at procedural hearings or the case management hearing.

Particular considerations apply in a specialist court with national jurisdiction (for example ASSPIC). The enhanced access to such courts, which attendance at both substantive and procedural hearings by electronic means facilitates, is an important and compelling consideration.

In relation to draft rule 28ZA.2, the sheriffs principal consider that subsection (3) should remain. This will enable sheriffs to consider with parties the extent to which the credibility of witnesses, truly analysed, will be an issue at proof. However, there are other important considerations which will point in favour of or against 'in person' hearings which the sheriff is best placed to assess.

We have seen the response by the Sheriffs' Association and the Summary Sheriffs' Association to this consultation and endorse what is proposed with regard to the inclusion of a further provision for cases in which the efficient management of the court hearing requires the hearing to be in person. The sheriffs must decide the most suitable arrangements for proof to achieve the efficient determination of the action. The efficient or effective management of the proof and how parties and witnesses attend is an important factor in achieving a just outcome to the parties' dispute.

Consideration might also be given to amending OCR 9.12, to require the sheriff at the Options Hearing to have regard to and determine the means by which any proof (or

proof before answer) allowed is to be conducted (and to make similar provision in OCR 10.6 in respect of a procedural hearing). There will be a case management hearing in family proceedings under Chapter 33AA.

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

The sheriffs principal strongly support the conduct of procedural hearings by electronic means. The general presumption given is appropriate. We do not propose any additions or deletions.

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

The presiding sheriff is best placed to determine how any substantive hearing, should proceed. That should be determined at the point the substantive hearing is allowed or at a case management hearing. A motion and application form would not be necessary (or proportionate) in the sheriff court.

If, however, a party subsequently seeks to change how the substantive hearing is to proceed, the sheriffs principal agree that lodging a motion is the appropriate means by which parties can make such an application.

An application form (in similar terms to RCS) should accompany such a motion. That will ensure that the court has the fullest information available to determine the motion (particularly in circumstances where it is not opposed).

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

As noted in our answer to Question 6 above, the presiding sheriff is best placed to determine the method by which any hearing should proceed. Parties may have differing views on the issue. The presiding sheriff should determine whether or not a hearing by electronic means would prejudice the fairness of proceedings; or otherwise be contrary to the interests of justice.

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

We have no other comments to make.