In making this response I would associate my self with the response already given by the Faculty of Advocates as a whole. I have had the opportunity to consider the response and would associate myself with what it said there. I have a few observations of my own that I would make.

It is notable that the entire consultation seems to be predicated on the idea that more important cases should default to in person suggesting that in person hearings are "better".

Question 1 – For the categories of case listed as suitable for an in-person hearing:
o Do you think the general presumption given is appropriate? and
o 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):
o Do you think the general presumption given is appropriate? and
o Would you make any additions or deletions and if so why?

I would propose to take questions 1 and 2 together, as they seem to relate to essentially the same point. If a case should be removed from one category then it necessarily should be in the other.

I understand that the Rules Council has formed the view that two lists are appropriate but I am unsure as to why that is the case. If a general "all other cases" category is to be included then listing particular applications may not be necessary for that procedure – i.e. there can be one list which defaults to one particular procedure and all other cases follow the other procedure.

Urgent hearings

It can be difficult to try to get an urgent hearing by Webex. I would propose that any urgent motion should be dealt with in person.

Motions

The timetable for motions is erratic and motions take longer to be fixed with under the remote procedure than under the in-person procedure. There is a well-established clear timeframe for in-person motions which appears to have been completely lost. This would seem to be undesirable.

General observations

It may be that cases which are important to the individual require to be in-person. Article 8 of the ECHR, for example, provides that there requires to be sufficient involvement of the person proportionate to what is at stake for them. It may be that an in person hearing is the only proper way to afford the individual sufficient involvement.

All other cases

Remote hearings are an innovation. There will inevitably be unforeseen circumstances arising in the application of the new rules. At the moment the default "all other hearings" is in the remote hearing category. Until things are more established, I would suggest that the default for that category be in person hearings.

Some of the categories are fairly mechanical – X sort of hearing results in Y sort of procedure. That should not pose a difficulty.

However, there are a range of largely subjective exceptions – such as "general public importance". How does the court decide if a case meets that test? I would echo the concerns raised by the faculty as a whole.

In any event, I would suggest that the category be hearings where evidence is lead rather than proofs. For example, although unusual, it is far from unheard of for judicial review proceedings to require parole evidence. Moreover, the special treatment of commercial actions would seem unwarranted. The commercial judges already exercise quite considerable case management powers.

Moreover, it is not just proofs where there are issues of credibility that might justify an in-person hearing. There are issues with productions that do not appear to be resolved – it is not apparent what the intention is in relation to them? The production of large bundles will be time consuming, costly and may serve to increase disadvantages suffered by less affluent litigants.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:
o Do you think lodging a motion is the right way to do that? Please explain your answer.

I have little to add to the Faculty response.

The only thing that I would add is that having the motion to change procedure be determined without a hearing would seem to be objectionable from a legal perspective and I would imagine would be the subject of challenge.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:
o Do you agree that the court should have the final say? Please explain your answer

I have nothing to add to the Faculty response.

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

At the moment it is not clear if the decision in relation to mode would be final in the Outer House – facts bearing on credibility might emerge during preparation for proof (or something else important) – if the court has already determined to hold a remote hearing (or an in-person hearing) injustice might result. It may be prudent to permit the mode to be revisited either at specific times or generally.

Question 6 – For the categories of case listed as suitable for an in-person hearing:
o Do you think the general presumption given is appropriate? and
o Would you make any additions or deletions and if so why?

Public law family cases

Cases in terms of the Children's Hearings (Scotland) Act 2011 seem not to be within the in-person exception. Whatever the rationale for having private law family cases be in-person would seem to be equally applicable to public law cases so presumably they should also be in-person by default.

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):
o Do you think the general presumption given is appropriate? and
o Would you make any additions or deletions and if so why?

I have nothing to add to the Faculty response.

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:
o Do you think lodging a motion is the right way to do that?
o Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

I have nothing to add to the Faculty response.

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:
o Do you agree that the court should have the final say? Please explain your answer

I have nothing to add to the Faculty response.

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

Again, at the moment it is not clear if the decision in relation to mode would be final or if it could be re-visited.

General observations applicable to both sets of rules

Public Access and Recording

I have very real concerns about open justice if remote hearings are extended. The faculty response highlights that the consultation appears to pay insufficient regard to this important constitutional principle.

More generally this would seem to be an opportunity to revise the rules in relation to the recording of court proceedings. It was never clear to me what the rationale for prohibiting recording was.

I note the suggestion within the consultation that once issues of contempt are dealt with video transmission can be rolled out to the public – why should there be issues of contempt at all? Recording could be available to the parties or more generally. Why is it that recording is not to be permitted?

In relation to the parties there would seem to be no reasonable basis on which to prevent recording. It would prevent disagreements of recollection if proceedings could be recorded. It might also save costs in relation to appeals. Some appeals would not be taken and the scope of others would be reduced. I personally have had experience where an appeal was not insisted upon once the taped recording of the hearing was listened to (that was in relation to Tribunal proceedings where there is already recording of the proceedings).

Attendees at the moment require to rely upon their notes or recollection – permitting reliance upon a digital record would seem to be entirely sensible. There would seem to be no good reason to suggest that that should be a contempt of court and so unlawful.

In relation to general recording: so long as the recording is accurate, I fail to see how there could be any difficulty. Surely the accurate preservation of what has transpired is of benefit to everyone? If the court hearing is open to the public why should it not be capable of being recorded? Moreover, if the recording is accurate why should it not be broadcast more widely?

There would be an obvious increase the transparency of our justice system. All manner of proceedings could be recorded.

I would suggest that it is difficult to see why recording ought not to be permitted if greater use is to be made of remote technologies. Recording should certainly be available to the parties, if not more generally.

It may be that there are issues with further or onward transmission but that can already be the subject of court orders as appropriate and only relates to a very limited subset of cases. In any event an order prohibiting recording could be made in relation to particular hearings where that was felt appropriate. Rather than having a blanket ban on recording, such as exists at the moment, there should be far more limited case specific proportionate limits.

Other issues

Remote hearings move the need for a quiet space from the court – which is an environment that is fairly easy to regulate - to the individual's home - or where ever else they are able to access the technology from. This may be very difficult for some individuals to manage and there is the possible sanction of contempt if the individual acts unwisely. Outwith the precincts of the court an individual may not properly appreciate the requisite behaviour that ought to be maintained.

It is clear that, as in other areas, greater wealth contributes to better representation. As an obvious example, it is easier, and more expensive, to deal with cases on multiple screens than with a single screen. Having a referral bar helps to alleviate these difficulties but they should not be underestimated. A well-funded litigant can already enjoy a significant advantage – remote hearings seem to increase that advantage.

Equality Impact

In relation to the Equality Impact Assessment, although one might expect it to be the case in the majority of cases, it is not universally easier for people with childcare commitments to attend a remote hearing. There have been a number of occasions on which participants in video calls have been interrupted by their children. Moving the requirement for a quiet undisturbed space from the court to people's homes may put unexpected demands on people.

There is clearly scope for greater access through the use of technology but there are equally real challenges in the use of technology by vulnerable adults. AWI processes, for example, deal with individuals who, by definition, have an incapacity of some sort.

As noted above, remote hearings appear to exacerbate inequalities created by differences in wealth – it is easier to participate more effectively in a remote environment when one has access to more expensive technology and other elements.

David Leighton