Scottish Civil Justice Council

ANNEX A – CONSULTATION RESPONSE FORM

RCS

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

oDo you think the general presumption given is appropriate? and

oWould you make any additions or deletions and if so why?

Having a default position, with discretion to depart from this in certain circumstances makes sense, as it allows greater consistency and predictability for users of courts – both parties and their agents. As a general rule, short procedural hearings may lend themselves to being heard remotely more than lengthy evidential ones, or those with multiple parties.

In general, the costs (financial and otherwise) of different approaches should be proportionate to the consequences in terms of the impacts on the parties and wider society, taking into account the accessibility of hearings to the public and the likelihood of multiple parties and witnesses being present, including potentially vulnerable witnesses.

While categorisation based on the type of hearing creates a clear and consistent approach, a more difficult but perhaps more flexible approach would be to incorporate the presumptions or criteria that might indicate either an in person or remote hearing. This is, in effect, the approach taken to proofs, debates, reclaiming motions and appeals, where the default of an in person hearing is qualified by reference to specific criteria. The presumptions or criteria might reflect the principles set out at paragraph 37 of the paper and/or others, perhaps including:

- the needs of the court users, taking into account equalities impacts, and considering any negative impacts of face to face hearings as well as remote ones;
- accessibility of the hearing, however it proceeds;
- substantive and procedural fairness;
- transparency

Alternatively, such principles, presumptions or criteria could be set out in the rules to frame the court's determination of any request for a departure from the default mode of attendance (whether agreed by the parties or otherwise) i.e. an elaboration of the tests set out in rules 35B.4.(5) and 28ZA.4.(5), which are otherwise very broad.

In relation to hearings under paragraph (c) and (f), it seems likely that many such hearings might be expected to raise a point of law of general public importance, particular difficulty or importance, but it is unclear why such factors should make

it either necessary or advantageous for the hearing to be in person. The presumption appears to be that important or difficult matters are better dealt with face to face, but we are unclear as to the basis for that presumption.

In relation to hearings under (a), (b), (d) and (e) – we can see that there may be circumstances in which an in person hearing may be necessary for substantive and procedural fairness e.g. where this would assist in assessing credibility or reliability, or where remote management of the hearing may be challenging as there are multiple participants in the hearing. It is unclear that such factors will be relevant all of the time and so it may be unnecessary for all such hearings to default to in person.

In addition, there may actually be some advantages to remote hearings in terms of assessing credibility and reliability. Although not being able to see a person's body language *may* be a disadvantage, if the technology is operating effectively, the ability to see the persons' face and reactions might be enhanced by remote attendance and there could be fewer distractions than in an person hearing. Paragraph 3(a) should perhaps therefore be made conditional on an assessment by the judge that credibility or reliability would be better assessed in person, rather than assuming that this will always be the case.

We are also aware of examples of complex multi-party remote hearings being managed successfully.

We can also see that some vulnerable people may face difficulties in giving evidence remotely, due to inability to access technology, or a private place. This may be one of the most compelling reasons for these types of hearing being in person by default, although it should be remembered that in some instances vulnerabilities may in fact be better addressed remotely and where a person may not be able to do so from home there may be other solutions that are preferable to in person attendance, such as a person being able to give evidence remotely from a designated place, or with appropriate assistance.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means(both video or telephone attendance):
oDo you think the general presumption given is appropriate? and
oWould you make any additions or deletions and if so why?

Yes, the general presumption is appropriate.

See answer to question 1 above. Consideration could be made to making remote hearings the default for all hearings, subject to clear criteria that can be used by the court to allow in person hearings where they are needed.

The consultation does not distinguish between telephone and video formats for remote hearings. In our experience, telephone hearings can work perfectly well in some circumstances and indeed can be accessible to some people who may either not have access to or may struggle with video based solutions. In other circumstances telephone can be a poor substitute for either video or in person attendance. These distinctions should perhaps be made explicit in the rules: a rule

that simply provides for a default of a remote hearing may be entirely inappropriate where the only remote solution is telephone but perfectly acceptable where video is on offer. We would not wish concern that telephone would be inappropriate for certain types of hearings to result in the default in the rules being switched to in person.

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

Consideration ought perhaps to be given to making the draft rules less prescriptive in relation to how the application can be made, given that the reason for requesting a different mode of attendance might relate to a disability or other accessibility issue, or to the fact that someone is a party litigant. Lodging that motion might be a barrier for a party who is not legally represented.

The draft rules state the motion will be considered by the lord ordinary without an oral hearing – if the motion is opposed an oral hearing on the benefits of a substantive hearing taking place in person/remotely, or at least detailed submissions on the pros/cons of this, might be appropriate. At very least, the rules should provide scope for the lord ordinary to seek further submissions either in writing or orally in order to make a decision if they feel this is necessary.

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

It is sensible to allow the courts to have the final say, rather than allowing one or other party to have a veto, provided that there are clear criteria on which decisions are made – so that there is transparency, consistency, predictability of decision making and accountability. As noted above, the current criteria are rather broad. We also note that the onus of the rule is that the judge can *only* change from the default if they are satisfied that the test set out is met. This suggests a strong presumption in favour of the default. The rule could perhaps be expressed instead in a way that presumed that a request would be granted *unless* the judge is *not* satisfied that the test is met.

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

Whether hearings are held remotely or face to face, the key issue is that the hearing is conducted in a way that ensures that it is effective, meets user needs, is accessible, held in accordance with legal principles, fair and transparent.

Consideration ought to be given to how both face to face and remote courts work for people with particular protected characteristics, particularly in types of proceedings where there are high numbers of party litigants. Changes to court rules as a result of COVID have provided an opportunity to reassess this not just for remote hearings, but for in-person hearings too. Widespread use of remote hearings is much more recent than in-person hearings, so it is important to evaluate different ways of conducting hearings remotely as some may be better than others. Poor quality technology or design of what were initially intended to be short term, interim systems or processes should not be a reason to revert to in-person hearings.

Requirements to lodge written submissions in advance by email and attend procedural hearings by WebEx rather than telephone – the joining details of which are only given out to litigants emailing in advance – can be barriers to people to being able to attend at all. Although video hearings are likely to be more effective for some types of proceedings, they could be a barrier to attendance for some, so where that could be the case, consideration should be given to participants having the option to phone in. Although written submissions can be very helpful in some circumstances where they are not necessary, or a barrier to participation they should not be required.

OCR

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

It is unclear why hearings in relation to the withdrawal of solicitors (paragraph 2(a)) should default to in person –a remote (telephone or video as appropriate) hearing might be more appropriate here for some people.

Otherwise similar considerations apply to those already outlined in relation to the Court of Session rules

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

Yes the general presumption is appropriate. Consideration should be given to the same matters as for Court of Session cases.

Question 8-The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: oDo you think lodging a motion is the right way to do that?oIs there any need for an

application form to accompany the motion (in similar terms to RCS)? Please explain your answers

The observations made above at question 3 also apply here.

As the intention is for equivalent provisions to be made in respect of other procedural rules we would observe that there is no motion procedure in summary cause cases. Instead an Incidental Application would require to be lodged – but unlike motions these are always warranted with a calling date regardless of whether or not they are to be opposed. Further, in some heritable courts, due to court loads, Incidental Applications are often given calling dates several weeks away. If the case already has a calling date they are often put in to call at the same time. Therefore if an Incidental Application was required to ask for the mode of hearing to be changed this could result either in a lengthy delay in that request being dealt with which could affect how people prepare for the hearing, or a perverse situation where parties are required to attend an in person/remote hearing to argue that the hearing should be taking place the other way.

The application is helpful in guiding the applicant and the court to the sorts of factors that might be considered, but consideration should be given to how easy it would be for a party litigant to use in conjunction with drafting a motion.

A better alternative might be to introduce a specific procedure for ordinary causes, summary cause and simple procedure, where a specific form is completed requesting the mode of hearing be changed with the reasons why, which would be intimated to the other side with a set time to oppose and then the court would consider with option to request further submissions, in writing or orally, if required. This could allow decisions to be made administratively relatively quickly in all types of case.

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

See our observation at question 4.

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

See our observations at question 5.

In addition, consideration ought to be given to how court rules can ensure that participants in remote hearings continue to access advice and representation services, including duty schemes and helpdesks, as easily as they would be able to for in person hearings.