AMPERSAND STABLE OF ADVOCATES

RESPONSE TO SCOTTISH CIVIL JUSTICE COUNCIL CONSULTATION:

Rules covering the mode of attendance at court hearings

GENERAL RESPONSE

SUMMARY

1. The Covid pandemic and accompanying public health measures have been unprecedented, with the resulting legislation and restrictions representing perhaps the most invasive and draconian package of measures to have been introduced in Scotland in peacetime.
2. While the use of online hearings in civil cases, as a temporary response to the Covid emergency, may have been reasonable and proportionate, it does not follow that online hearings should become the default mode in civil cases after the emergency phase of the pandemic has ended.
3. Our members have conducted online hearings on a daily basis since such hearings were introduced approximately one and a half years ago, and have considerable experience of both online and in-person hearings, and the relative advantages and disadvantages of each.
4. Based on our experience to date, we have no doubt that for substantive hearings (i.e. proofs, debates, appeals and other important or controversial hearings), online hearings are a poor substitute for in-person hearings and that it is in the interests of justice for such hearings to revert to being conducted in-person, in public, without delay.
5. Fundamentally, our justice system must serve the interests of the public. The sitting of our courts and tribunals in public and in-person is one of the fundamental benchmarks of our justice system. Amongst many benefits, in-person and in public hearings ensure that justice is dispensed in an open, fair, equal and transparent manner and that the authority of, and respect for, our courts is maintained.
6. For the reasons set out below, we are of the view that our civil justice system should revert to having in-person and in public hearings for all substantive or contentious matters, with online hearings, in general, restricted to short and formal procedural business.

STRUCTURE

7. Our general response is structured as follows:
    - Our concerns in relation to online hearings.
    - Hearings that could appropriately be held online.
    - Suggested general principles to guide policy in this area.
    - Conclusion.
8. At the end of our general response we have set out our response to the particular questions asked in the consultation paper.
9. We have also included an appendix giving examples of some of the problems with online hearings that have been experienced by our members.

OUR CONCERNS IN RELATION TO ONLINE HEARINGS

10. Our concerns in relation to online hearings fall under the following general headings (which to some extent overlap), which we will address in turn, namely:
    (1) Access to justice.
    (2) Open justice.
    (3) Parties' experience of the justice system.
    (4) Quality of justice.
    (5) Authority of the court.
    (6) The impact on the legal profession.
    (7) IT problems.
    (8) Increased cost and expense.
    (9) The need for an evidence-based approach.

(1) Access to justice

11. There is, of course, a constitutional right of access to the courts.
12. We are concerned that a permanent shift to online hearings will put various obstacles or impediments in the way of parties' access to the courts, and will risk infringing that right.
13. That is particularly so for the poorest, most marginalised and vulnerable members of society. Many people do not have, or cannot afford, expensive technology to enable them to give evidence in an optimum manner (or at all). Many people (in particular, in rural areas) do not have good internet connection (or may have

variable and unreliable connection, depending on other internet usage in their household, workplace or local area). Many people do not have a large house with a separate study or quiet room where they can give their best evidence, without distraction. Some members of the legal profession, particularly junior members, do not have that luxury. Giving evidence, or making legal submissions, from a kitchen or bedroom is deeply unsatisfactory and is no substitute for giving evidence or making legal submissions in a courtroom.

14. Furthermore, it is unsatisfactory for the courts, as an emanation of the state, to intrude into what would normally be someone's place of privacy and family life. The long-term effects of such intrusion are unknown.
15. Many of our members' consultations with clients during the pandemic have been by video meetings. Many such video meetings have been on clients' mobile phones, which is far from ideal, and which is an informal indication that many individuals do not have access to the more expensive technology that is better able to facilitate online hearings. Sharing documents onscreen (as, of course, happens during online proofs) is not practical if a client is joining the proof by video on their mobile phone.
16. In our experience, many pursuers, including but not restricted to, the elderly and the disabled (including those with brain injuries and psychiatric conditions) and those who have lost loved ones, find it particularly difficult and stressful to consult remotely, far less, to give evidence under oath.
17. There is no IT hardware, support or assistance available "on tap" for parties with IT difficulties, who either do not have the necessary technology or are not fully trained in its use. Despite the best efforts of parties' lawyers during the pandemic to assist their clients with these matters, lawyers are, of course, just that i.e. lawyers. Lawyers are not IT advisors or support assistants and it is unrealistic to expect all (or, even, most) individuals in Scotland to have access to the necessary technology and internet connection to enable them to participate in online hearings in an optimal and efficient manner.
18. Were the present proposals to be adopted, there is a danger that parties, witnesses and legal representatives with the best technology and technological "know how" (in relation to the most suitable type of background, lighting, quality of camera, microphone and headphones etc) will make the best impression on the judge (even if only at a sub-conscious level). Also, those parties, witnesses and legal

representatives who are more experienced and comfortable with using technology (and speaking to camera in an unself-conscious manner and seeing themselves on a screen) are likely to give more flowing and confident evidence (or, in the case of representatives, more confident submissions) and are, again, likely to make a more favourable impression (regardless of the content of the evidence or submissions).

19. No litigant, witness or lawyer should be judged (or risk being judged) on the environment and means by which they give evidence or make submissions.
20. The risk of an unfair playing field in the way in which evidence is given or submissions are made is not present when hearings are conducted in the usual manner, namely, when all witnesses and legal representatives are present in the same courtroom and give evidence, or make submissions, in exactly the same environment and under exactly the same conditions. It is only when all participants are in the same courtroom that they can truly be said to have an equal voice and to have an equal opportunity to make a good (or bad) impression on the judge.
21. We are also concerned that the present proposals appear to give insufficient thought to the duties of the courts and the government under the Equality Act 2010 and whether the present proposals will directly or indirectly discriminate against particular groups in society who may be disproportionally affected by these proposals (whether on the grounds of disability, age or race etc). In short, there is a real risk of discrimination, which does not appear to have been properly evaluated.

(2) Open justice

22. The principle of open justice is a fundamental constitutional principle.
23. It is important that any member of the public is able to walk into any courtroom in the country to observe how justice is being dispensed. Private court hearings (i.e. where members of the public are excluded due to concerns in relation to child or vulnerable witnesses etc.) are the exception rather than the norm. A wholesale move to online hearings will invert that position with most hearings being, *de facto*, in private with members of the public requiring the permission of the court to observe proceedings.

24. That is an extraordinary state of affairs and is fundamentally at odds with the principle of open justice.
25. We have serious concerns that, at present, members of the public are, in effect, excluded from observing court proceedings in Scotland, while such hearings remain online. We consider that position to be intolerable in a liberal democracy governed by the rule of law.
26. Given the fundamental importance of the principle of open justice, not only should the present proposals be shelved, but steps should be taken immediately (subject to any insurmountable public health concerns) to return to the open and transparent system of justice offered by in-person, in public, hearings.
27. In relation to any ongoing public health concerns, such concerns appear to be being satisfactorily addressed by the success of the vaccination programme and it is not obvious why people may congregate and mix in busy bars, restaurants and large scale music and sporting events etc. but may not attend court to have their cases determined in a courtroom.

(3) Parties' experience of the justice system

28. Even if the hurdles of access to justice and open justice can be overcome (and, at present, they are not), we are concerned that parties' experience of the justice system will be significantly diminished by the present proposals.
29. Parties pay significant fees to exercise their constitutional right of access to the courts. They are entitled to expect the state to facilitate that right with appropriate resources, including courtrooms in which their cases can be heard and resolved in-person.
30. Standing back a little, there is an expectation that important life events will be attended with some degree of formality (which, no doubt, helps to legitimise such events in both the private and public consciousness). It is unlikely to meet with public approval, for example, to pass a law requiring that important events in people's lives (such as weddings and funerals etc.) must be held online, unless, in individual cases, members of the public can persuade the authorities that such events may take in-person, in a more formal setting. Yet that is very similar to what is being proposed in relation to our civil justice system.

31. Parties are at the heart of the justice system and their expectations and experience of, and views on, in-person and online hearings should, equally, be at the heart of any proposed reforms.
32. We are unaware of any research having been carried out in Scotland during the last one and half years of online hearings to find out parties' experience of online hearings (and how that experience compares with in-person hearings). To propose such far-reaching change without, as far as we are aware, any such research having been undertaken, is self-evidently unsatisfactory.
33. Parties, of course, often come to court for the determination of an issue of major significance to them and the decision of the court is likely to have a huge impact on their lives. While attending court in-person is a stressful experience for parties, their legal representatives are at least on hand to provide explanation and reassurance before, during and after their attendance at court.
34. In contrast, it is very hard (and, probably, impossible) to provide a similar level of explanation and reassurance before, during and after online hearings. That makes what is already a stressful experience for parties and witnesses even more stressful. That stress is increased further by the use of Webex software with which parties and witnesses will be unfamiliar and the, almost inevitable, IT problems that routinely arise during online hearings. For parties and witnesses, the type of IT problems that routinely arise are likely to cause significantly increased levels of stress. Examples include when they cannot join a hearing at which they are due to give evidence or if, in the middle of their evidence, an unexpected IT difficulty arises which means that their evidence is interrupted while attempts are made to fix the problem.
35. Increased, and unnecessary, stress should be avoided for all parties and witnesses. That is particularly important in those types of case where parties are likely to be particularly emotional and vulnerable, such as in personal injury and clinical negligence actions, fatal claims and in family law proceedings.
36. That is also so, however, in other types of case where parties and witnesses will also be subjected to additional and unnecessary stress when giving evidence when IT problems arise. Many commercial cases, for example, involve small or medium sized businesses (which businesses make up the bulk of our economy), many of which are family owned. In cases involving such businesses, court decisions are likely to have a significant impact on the business and, in some cases, may result

in the business ceasing to trade or becoming insolvent. That, in turn, will have a knock-on effect on the owners and employees of the business and may result in people losing their jobs (and, in the case of the owners, their savings or homes etc). Even in commercial (and other) cases, therefore, one should not underestimate the need to reduce unnecessary stress and anxiety on parties and witnesses (as well as, of course, ensuring that parties feel that they been given a fair hearing).

37. We further note that in online hearings, parties view hearings remotely, on a screen, and are likely to feel detached and excluded from their own case. If parties feel excluded from the hearing of their own case, they are likely to be left feeling that justice has not been done or seen to be done. This issue is readily apparent in relation to pursuers who are the victims of accidents at work, road traffic accidents, fatal cases, historical abuse and medical negligence. Many such individuals may also be vulnerable witnesses and have psychiatric injuries or mental health difficulties. It is, however, also apparent for many other types of pursuer, including the pursuer in a family law action who may be going through a crisis in his or her life, and in the many commercial actions, as noted above, where the outcome of the litigation is of critical importance to the continuance of the business and may have drastic consequences for the owners and employees of the business. The moment of the court hearing will often mark an important transition for these parties to the next phase of their life (whether for better or for worse, depending on the decision of the court).
38. In online hearings, it is very hard for counsel conducting an examination or making submissions to seek the views of, or take into account points made by, parties or other members of the legal team (e.g. junior counsel and/or an instructing solicitor). It is also difficult for the views, comments and observations of parties to be fed back to counsel "in real time" (as would occur in an in-person hearing by the party simply speaking to the instructing solicitor who, in turn, would pass the information to counsel). In online hearings, it is very difficult, or impossible, for counsel to seek instructions from a client without seeking an adjournment of proceedings.
39. In short, in online hearings, the most important participants (i.e. the parties) are, in effect, excluded from their own case in these important respects. That cannot be right and cannot be in the interests of justice.

40. Illustrating the importance of parties' experience of the justice system, we note the following words of the Judicial College of England and Wales, namely: *"The process, rather than merely the result, is a significant consideration in terms of the delivery of real justice. An individual is more likely to accept an adverse conclusion where it has been arrived at after a process which has been transparently just, where the needs of all have been considered, and where they have felt engaged in the process and the outcome is explained. Such acceptance both avoids further appeals and contributes to public confidence in the judicial system. Conversely, a hearing that is perceived as unfair can fuel mistrust and legal argument for years to come"*. (Good Practice for Remote Hearings).
41. We also note Lady Smith's recent comments in the Scottish Child Abuse Inquiry that: "*Justice is not a service, and those who call for it where it has been denied are not customers of a service that may or not be available depending on the choice of the administration of the day"*.
42. In summary, parties are entitled to justice and if they are not at the heart of the justice system (or do not feel that they are), including in relation to important questions of the means by which their case is determined, they are more likely to be left with a feeling that justice has not been done, and has not been seen to be done, thereby eroding trust and confidence in the justice system.

(4) Quality of justice

43. We have serious concerns that the routine use of online hearings for substantive hearings will lead to a decline in the quality of justice.
44. There are practical and pragmatic reasons for having the judge, parties, their legal representatives and witnesses in one room, namely, the courtroom.
45. We have noted above the difficulty in parties communicating their views, or instructions, to counsel during online hearings.
46. Moreover, communication with the judge (or judges, if an appeal) is impaired, resulting in a less interactive, dynamic and efficient hearing. These are issues that affect the quality of the submissions made by counsel, the quality of the discussion and, ultimately, the quality of the eventual decision reached.
47. In respect of evidential hearings, there are many significant issues relating to the quality of the evidence. In particular:

(1) *Technical issues:* it is a fact of life that technical problems cannot be eradicated altogether. We emphasise that the IT problems with online hearings that continue to arise are not "teething problems" – these problems continue to occur on a routine basis, despite over one and a half year's use of the technology.

(2) *Policing witnesses:* it is difficult (and probably impossible), to effectively "police" evidence given remotely. The court cannot be sure what documents the witness has available when giving evidence, whether witnesses are looking at a "crib sheet" or aide memoire or whether another person may be influencing the witnesses' evidence (whether in the same room as the witness or by remote means). That, again, can be contrasted with in-person hearings, where all parties and witnesses are subject to the great "leveller" of giving their evidence in the same environment, in the courtroom, without the risk of "props" or prompts. Similarly, it is probably impossible to police unauthorised recording of the proceedings by those participating or observing online.

(3) *Perceptions of credibility/reliability:* even where witnesses have access to technology for giving evidence remotely, they may be anxious about, or lack confidence in, its use. As noted above, this lack of confidence and anxiety may impact on a witness' demeanour and the quality of their evidence, and lead to unwarranted concerns (even at a sub-conscious level) in relation to their credibility or reliability.

(4) *Assessing the evidence:* there is an atmospheric sense of a courtroom and the impact of oral evidence in-person that simply does not exist on camera. Moreover, it is well known that much of our communication is non-verbal and often highly nuanced. The loss of ability to see and hear a witness in person impacts on counsels' ability to effectively examine the witness. In addition, it strips the first instance decision-maker of the privileged position enjoyed to date when seeking to determine issues of credibility and reliability. This privileged position has been respected by the appellate courts for decades, if not centuries, including in a series of high profile Inner House and Supreme Court decisions refusing to overturn findings of fact made at first instance. If a video recording of the first instance proceedings is available then an appellate court will see and hear exactly what the first instance judge saw and

heard and the argument that the first instance judge had an advantage in assessing the evidence falls away. There is a risk, therefore, that the greater use of online hearings will lead to more appeals and an increased need for court resources.

(5) The authority of the court

48. We are concerned that the authority of the court risks being diminished by the present proposals.
49. An element of formality and gravitas should attach to any court hearing. Giving evidence in court is a serious matter and it is important that it be understood to be so. Most people readily appreciate that when attending court. Online hearings are, experience shows, far more informal, relaxed and conversational. This has an impact on how the court is perceived by parties and witnesses and risks diminishing the standing and authority of the court.
50. If a witness requires to be reminded or warned of their duties when giving evidence, such a reminder or warning is likely to carry far greater weight when delivered by a judge in-person, in a formal courtroom, wearing judicial robes, from an elevated position. In contrast, when such a reminder or warning is given by a judge during an online hearing the judge will simply present as just another "talking head" on the screen, in the comfort of the witness's own home, and we doubt that the judge's words will have the same force or effect.
51. If the formality and authority of the court comes to be diminished over time through the widespread use of online hearings, we are concerned that it will be very difficult for that authority to be restored.

(6) The impact on the legal profession

52. The move to online hearings is likely to reduce the learning opportunities for new practitioners, which would have a detrimental impact on the standard of the profession and thus the future of our justice system.
53. For trainee and newly qualified advocates, there is no better way to learn than by watching and listening to experienced practitioners and members of the judiciary at work. That is best done through in-person attendance at court, which provides an opportunity for trainee and newly qualified advocates to form part of the discussions before a hearing, to be present during the hearing, and to have an

informal debrief discussion after hearings. That also provides an opportunity for trainees and newly qualified members to be present during discussions with clients and opposing legal representatives, before and after hearings.

54. Much valuable learning and experience is gained of how the law works in practice from such in-person attendance and discussion and, with the best will in the world, it is simply not possible to replicate that experience before, during and after online hearings.

55. In addition, law students, trainee and newly qualified advocates and solicitors can gain valuable experience of how the law works in practice by walking into any court in the country (subject to evidence being taken from child or vulnerable witnesses etc). That valuable educational resource will be lost by the widespread use of online hearings.

56. Aside from the impact on the education, learning and advocacy skills of junior members of the legal profession, there are other concerns about the impact on junior advocates, namely:

    (1) *Investment in IT:* the increased use of technology creates a further barrier to entry to the Faculty of Advocates. Joining the Faculty requires a significant investment in terms of fees, and involves the loss of income during the year of Devilling. The move to remote hearings, and the consequent emphasis on the wholesale use of electronic documents, requires greater investment in technology by junior members at the outset of their careers.

    (2) *Remote working:* junior advocates were able to informally seek advice and support from more senior advocates when the Court of Session sat in-person and when many or most advocates attended Parliament House. As a result of the pandemic, advocates have largely worked from home and it is harder for more junior advocates to seek such support and advice. They are more likely to feel isolated and alone at a critical stage in their careers.

    (3) *Building a sustainable practice:* newly called advocates rely on building relationships with instructing agents quickly after calling. Those relationships are cultivated by meetings in person (e.g. at Parliament House), whether coincidental or in the context of a hearing taking place. Further opportunities arise from internal networking at the Faculty of Advocates. If there continues to be a substantial reduction in the number of hearings taking place at Parliament House, there is likely to be a reduced attendance at Parliament Hall

and the Advocates' Library, and the loss of both of these important networking opportunities for junior advocates.

57. Importantly, the impact of remote hearings on practitioners' health has been keenly felt while online measures have been in place. Yet, as far as we are aware, no research has been carried out into this important issue before advancing the present proposals. As to the physical effect, some members have found spending hours and days in online hearings more physically draining than being in court. As to the mental effect, working remotely from home is an isolating experience, as well as being more demanding mentally. There is less opportunity for "switch off", or discussion with colleagues, when all of one's time is spent working remotely.
58. An advocate bears a heavy responsibility in hearings. Cases are often complex and of high value. Decisions during hearings require to be taken quickly and under pressure. At such times, it is particularly helpful and important to be able to discuss matters with the wider legal team or with colleagues who are also at Parliament House. Again, with the best will in the world, that cannot be effectively replicated when hearings are held online. Online hearings have had the unintended consequence of seriously damaging the collegiality of Parliament House and the support network that that provides to all advocates including, in particular, those starting out in their careers and who are most in need of such support and assistance.

(7) IT problems

59. Experience to date has shown that remote hearings are often beset by technical problems. We emphasise, again, that these are not "teething problems" and, instead, continue to arise on a regular basis, despite online hearings now having been in use for approximately one and a half years. We have listed some of the problems experienced by our members with online hearings in an appendix attached to this response.
60. One of the biggest problems appears to be with witnesses (or legal representatives) having a consistent and reliable internet connection. That problem is not solved by testing connectivity in advance of a hearing as internet connection (for whatever reason) is often variable and even if the "test" before the hearing is satisfactory, problems may still arise during the hearing.

61. Even if these problems are capable of being overcome (and our experience to date suggests that these are ingrained and chronic), there will remain a disparity in the technical capabilities of witnesses when giving evidence remotely. This is likely to place professionals and organisations at an advantage over individuals. The consultation document recognises that this will be an issue. It also recognises that this issue has not been, and may not be capable of being, addressed (noting simply that practical steps are being taken to '*help* ***reduce*** *those barriers over time…'*).
62. No such barriers arise during in-person hearings in a courtroom, which is another strong indication that in-person hearings remain the most appropriate mode of hearing in most instances.

(8) Increased cost and expense

63. Our experience of online hearings is that the IT problems that routinely arise require time to fix and add to the length of the hearing (in addition, of course, to disrupting the flow of the evidence, submission or discussion).
64. In addition, in our experience, online hearings result in a more "arm's length" relationship between parties' legal representatives, with less opportunity for informal discussion of cases. These informal discussions often lay the groundwork for settlement of disputes at an earlier stage (or, at least, narrowing their scope) and, insofar as the Faculty is concerned, are facilitated by a collegiate spirit among members (a spirit which depends upon opportunities to interact in person at Parliament House).
65. Members have reported that parties have become more entrenched, or otherwise have not enjoyed similar opportunities to engage in informal discussions, where hearings have taken place remotely and we suspect that the present proposals may lead to less cases settling and more hearings proceeding. Regardless of whether that is thought to be a good or a bad thing, it is likely to lead to additional cost to parties and a need for increased court resources.
66. We consider remote hearings unlikely to create the desired efficiencies. Rather, there is greater scope for delay, additional court time and additional expense. The following issues are highlighted:
    (1) *Arrangements for remote hearings:* much time is taken up in practice in coordinating the attendance of witnesses remotely, and developing detailed procedural rules to regulate the proceedings.

(2) *Documentation:* more time is spent by legal representatives on preparing PDF bundles of documents (which sometimes go through several iterations if additional productions are lodged).

(3) *Motions for issues:* the apparent acceptance that civil jury trials are to be deemed suitable for in-person hearings is likely to lead to more motions for issues, with the consequent need for jury attendance.

(4) *Settlement of cases:* the lost opportunity, or inclination, to settle cases at an earlier stage has been noted above.

(9) The need for an evidence-based approach

67. For the reasons set out above, we cannot support the proposals in their current form. If implemented, they risk seriously undermining the civil justice system.

68. Given these concerns, it is particularly important that there is an evidence-based approach to decide on the correct policy in this area before fundamentally departing from the way in which justice has traditionally been dispensed in this country (including through national emergencies such as wartime).

69. Our justice system has evolved gradually, over time, with constant reflection and improvements in the rules, practice and procedure. This is akin to "open loop" decision making, where what has worked and not worked is constantly fed back into the system, resulting in organic improvement and a justice system that works well and is held in high regard.

70. The evidence to justify such a far-reaching change in practice (to wholesale and permanent online hearings) is, as yet, wholly lacking.

71. Introducing such a fundamental change in the absence of evidence to justify such change is likely to lead to unintended and unforeseen adverse consequences, to the detriment of parties, witnesses, legal representatives, judges and the justice system as a whole.

72. Moreover, the absence of such empirical evidence upon which to base future policy and decision-making means that there cannot be a properly informed consultation exercise on this fundamental proposal.

HEARINGS THAT COULD APPROPRIATELY BE HELD ONLINE

73. Despite our considerable concerns about the present proposals, we acknowledge that online hearings offer some advantages and may be appropriate for some hearings, in particular, for short and routine procedural business.
74. In particular, we recognise that it is not efficient for legal representatives to have to travel to court (whether the Court of Session or Sheriff Courts) for short, formal or uncontroversial procedural hearings. That is particularly so if parties are given a particular time at which the hearing will take place (as happens, for example, in the Court of Session but not in ASPIC).
75. We recognise, too, that in particular cases, or in particular types of hearing, parties or their legal representatives may prefer for the hearing to take place online rather than in-person. We appreciate, for example, that online hearings may be more convenient for those juggling childcare and work, for those caring for other family members and for those with certain health conditions. Provision should, therefore, be made for cases and hearings to take place online where parties so agree, and with the permission of the court.
76. We recognise, also, that there may be advantages to online hearings in reducing travel and waiting time for witnesses, in particular, expert witnesses, and, again, provision should be made for the evidence of particular witnesses, on a case by case basis, to be taken online, where parties so agree and, again, with the permission of the court.
77. More generally, we recognise that the aim of reducing unnecessary travel may be consistent with policies to reduce carbon emissions. Against that, however, must be balanced the interests and needs of the justice system and any concerns about reducing carbon emissions can be addressed by the government and public bodies taking steps to promote the use of public transport or electric vehicles.

SUGGESTED GENERAL PRINCIPLES TO GUIDE POLICY

78. We turn, now, to suggest three main general principles to guide decision-making and policy in this important area, namely:
    (1) In-person hearings should remain the default position for substantive or contentious hearings in all civil cases (i.e. for proofs, debates, appeals and other important or controversial hearings).
    (2) There may be a departure from that default position if parties agree (and with the approval of the court).
    (3) Short and routine procedural hearings should be dealt with online, unless cause is shown to the contrary in relation to a particular case or hearing.

79. We expand upon these general principles as follows.

(1) There should be a general presumption in favour of in-person, in public, hearings for all substantive or contentious hearings in all types of civil case

80. By substantive hearings, we mean hearings where evidence is led from a witness (i.e. proofs), debates, appeals and other important or controversial hearings.
81. In relation to other important hearings, we have in mind hearings such as opposed motions. Obvious examples are motions for summary decree or for interim damages. There will, no doubt, be other examples.
82. Provision should be made for the evidence of some witnesses (in particular, some expert witnesses) to be taken remotely, by agreement of the parties or on cause shown (i.e. what is sometimes referred to as a "blended proof").
83. There is also an argument for By Order Adjustment Roll and Procedural Hearings in chapter 42A cases to be dealt with in-person, given the greater complexity of these cases. Whether the default position for procedural hearings in chapter 42A cases should be in-person or online is something that requires further evidence gathering and consultation.
84. As noted above, we are of the view that in-person hearings should remain the default position in <u>all</u> civil cases. It is not obvious why the present proposals only select family law cases for in-person hearings. For the reasons discussed in this response, we are of the view that all, or at least most, types of case benefit from in-person hearings.

(2) There may be a departure from the above general presumption if all parties agree to an online hearing

85. In some cases, the benefits of an online hearing may outweigh the disadvantages. We have noted above, for example, the greater flexibility (and reduced travel time) that an online hearing may offer, including for those with other responsibilities or with health conditions. There may be other cases where parties and their witnesses are geographically distant from the court and would prefer to have an online hearing. Importantly, however, we consider that the decision whether to hold a substantive hearing online or in-person should primarily remain one for the parties, so that parties retain confidence in the justice system and the means by which their case is disposed of.
86. Parties' wishes in that regard may require to be subject to the court's final approval or authority.

(3) Routine procedural business should normally be dealt with by online hearings

87. As noted above, we recognise that there are advantages to online hearings, in particular, for short and routine procedural business (which is normally neither contentious or substantive) and we consider that it would be appropriate for the default position to be that such business is dealt with by online hearings, unless cause is otherwise shown.
88. By routine procedural business, we mean uncontroversial By Order hearings, starred and unopposed motions.
89. Further consultation is required on whether short and opposed motions (e.g. for further procedure or in relation to a Specification of Documents etc) should ordinarily be dealt with in-person or online.
90. Any online hearings should take place by video and not by telephone. This approach preserves at least the benefit of seeing the participants to a hearing and avoids the problem that arises during telephone hearings of participants talking over each other because one cannot see when other participants, including, in particular, the judge, has finished speaking. There is no technological justification, in 2021, for telephone hearings.
91. Even in hearings which, by default, will be held online, it is essential that the option of an in-person hearing, on cause shown, remains available.

CONCLUSION

92. While advocates have managed to deal with the frustrations and drawbacks of online hearings in recognition that such hearings were a temporary and pragmatic response to an unprecedented global health emergency, it would be a serious mistake to assume, as the present proposals appear to do, that online hearings have worked well and have had, and will have, little or no adverse consequences.

93. In our view, the three general principles we have set out above more appropriately recognise the advantages that technology can bring to the courts, while avoiding all of the disadvantages, thereby improving, and not undermining, our system of civil justice.

OUR RESPONSE TO THE SPECIFIC QUESTIONS ASKED IN THE CONSULTATION PAPER

Rules of the Court of Session (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?

1. No.

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

2. We refer to the three general principles we have set out above, which contain our views on how any rules relating to remote hearings should be structured. We also make the following additional observations:

    a. **35B.2(2):** hearings in-person should be the default position for evidential and important hearings in all types of civil case. There is no good reason for restricting in-person hearings to family law actions.

    b. **35B.2(3)**: the rules provide that a proof should be in person where '*there is a significant issue of credibility of a party or a witness which is dependent upon an analysis of the party's or witness's demeanour or character'.* Issues relating to credibility must, in terms of this rule, be known in advance of the hearing being fixed. The reality, however, is that issues of credibility often only emerge during the proof itself. The rule is, from this perspective, unworkable. Moreover, the rule does not mention the reliability of a witness' evidence, an assessment of which is also informed by the witnesses' demeanour, and is even more difficult to gauge in advance of seeing the witness in person (in particular, it is less likely to be apparent from any documents available in advance of the proof). For the

avoidance of doubt, the default rule should be that proofs, debates and appeals, in all cases, are in-person.

c. **Procedural arrangements:** the judge, counsel, solicitors and parties should be expected to be in the same courtroom for substantive hearings (similar to the High Court model), even if other witnesses (including, for example, expert witnesses) may be allowed to give their evidence remotely, with the agreement of parties or on cause shown.

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?

3. No.

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

4. We, again, refer to the three general principles above, which set out our view on how any rules relating to remote hearings should be structured. We make the following additional observations:

    a. **RCS 35B.2(2)**: We would comment as follows:

        i. We would observe that it can be difficult to predict at the outset whether a particular point taken is one of wider significance. In our view, the default position should be that debates are held in person.

        ii. the default rule should be that all proofs, not just those in ordinary actions, are held in person.

        iii. The default rule should be that, like debates, all reclaiming motions are held in person.

b. **RCS 35B.2(3)**: The default rule should be that proofs are held in person. Few proofs do not give rise to some issue of credibility or reliability, so we do not consider the proposed criterion to be helpful.

c. **RCS 35B.3(2):** We would make a number of points here:

   i. Judicial review. Many petitions for judicial review give rise to hearings which are substantive or contentious or both. Petitions in relation to children or the liberty of an individual to remain in the United Kingdom may have life-changing consequences. The default rule for the substantive hearing of a petition should be in-person.

   ii. Hearings '*in relation to procedure'*. This reference would be intelligible if it were the general provision. But instead the rules seek to list in detail the hearings to which a default rule should apply. Opposed motions might be considered to be incidental procedure though, by definition, they are normally contentious. The provision does not therefore recognise that such hearings can be extremely complicated and important to the overall resolution of the case. Hearings under Chapter 42A provide an example, as well as the examples of motions for summary decree and interim damages highlighted above.

   iii. Debates. Most debates in contemporary practice go beyond questions of specification. These are substantive hearings. It is difficult to predict whether a point taken may turn out to be a point of wider public importance.

   iv. It is difficult to understand the rationale for treating proofs in a commercial action separately from that in an ordinary action. The issues of credibility and reliability, and the need to assess witness evidence, apply equally. The general principle that contentious or substantive matters should be in-person, applies also to the

commercial court, subject to the case management powers of the commercial judge.

v. The default rule should be that all appeals are held in person. The proposed limitation under reference to what sounds like the second appeals test is not appropriate.

vi. We consider that this default rule is too wide. There are many court hearings, particularly under petition procedure, which are not listed but which may be contentious or substantive or both. They too should be conducted by way of an in-person hearing.

d. **Telephone hearings:** the rule should be clear that a hearing 'by electronic means' is restricted to a video hearing. There should be no general use of telephone hearings.

e. **Petitions.** The proposed RCS provisions generally focus on actions rather than petitions. But the same principles as we have identified should apply to petitions: contentious or substantive hearings should be in person.

f. **OCR Provisions:** The principles which have been identified for the proposed RCS provision apply *mutatis mutandis* to the proposed OCR provisions. We would, however, make two short points:

i. OCR 28ZA.3(2)(o) seeks to default all of chapter 28 to an online hearing. But OCR 28.10-12 deal with the taking of oral evidence of a witness on commission. The default rule for such oral evidence should be in-person.

ii. OCR 28ZA.3(2)(t) would have online hearings the default rule for the first and all subsequent hearings in a multiplepoinding. This should be a reference to subsequent "procedural" hearings. A proof or debate in a multiplepoinding should be in person.

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.

5. In principle, we agree that a motion provides an effective vehicle for parties to put the issue before the court. We note, in this regard, that Rule 35B.4(5) gives the court discretion to change the mode of attendance of a person, or the method by which the hearing is to be conducted. The motion is determined without an oral hearing (Rule 35B.4(4)). Parties should at least be entitled to make oral submissions for/ against the motion.

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

6. No. Refer to general principle two above.

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

7. Refer to general response above.

<u>Ordinary Cause Rules (OCR)</u>

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

Do you think the general presumption given is appropriate?

8. No.

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

9. Refer to the answer to Question 1 above.

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?

10. No

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

11. Refer to the answer to Question 2 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? Please explain your answer

12. Refer to the answer to Question 3 above.

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

13. No. Reasons should be given within the body of the motion. The detailed reasons, and any opposition thereto, ought to be developed further at a hearing on the motion.

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

14. Refer to the answer to Question 4 above.

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

15. Refer to our general response above.

Appendix

Examples of problems experienced with online hearings

- Witnesses being unable to join online hearings (despite having been admitted to the "waiting room")
- Witnesses losing internet connection during their evidence (and their image freezing)
- Inability to see witnesses in full (due to the compressed image available over Webex)
- Witnesses leaving the hearing during objections to their evidence and being unable to log back in
- Legal representatives losing internet connection during their submissions (or during another parties' submissions)
- Legal representatives having to move room (or building) during a hearing to try and obtain better internet connection
- Problems with echo and feedback (resulting in one counsel, during a four week proof, having to press mute after every question asked of almost every witness and having to press unmute after each answer)
- Judges and counsel having to remain muted throughout a proof (resulting in problems and delay in the judge seeking clarification on a point arising during the evidence and, importantly, in delayed objections to a particular question or line of evidence, which delay can be fatal to an objection)
- Judges and counsel forgetting to unmute when speaking (thereby interrupting the flow of proceedings)
- Parties having difficulty joining online hearings to observe proceedings after they have given their evidence
- Difficulties in interaction between counsel and agents over a separate electronic channel during the course of a hearing
- Risks in relation to the separate line of communication between the legal team being open and the line of communication being left unmuted in error
- Strategic discussions between an opponent's legal team during the course of a hearing being overheard by the court

- Private discussions between the judge and their clerk being overheard by parties and their representatives
- Diminished communication with the court (e.g. lack of eye contact and inability to properly see a judge's reactions over Webex), leading to difficulties in understanding, and fully responding, to questions raised
- Handing documents to the Bench is cumbersome and time-consuming
- Observers have been unable, or not allowed, to join hearings (in clear contravention of the principle of open justice)