

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 additions or deletions and if so why?
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I consider that all substantive business, including debates, proofs, appeals and opposed motions etc should be heard in person.

There are so many reasons why a hearing by electronic means is not suitable. I shall identify some, but this will not be an exhaustive list.

Access to open justice. It is all very well to say that anyone can apply to be given access to an online hearing, but that in itself is part of the problem – the need to apply. That presupposes that sufficient intimation has been given that a hearing was to take place. When Courts are open, it is possible to simply drop in to a court room to watch and listen to what is happening. This is important for the public, as well as to the legal profession.

Training of younger solicitors and advocates. For years it has been widely accepted that one of the best learning tools for young or inexperienced lawyers is for them to sit in a courtroom and to listen and learn to how business is conducted. From doing so they learn advocacy skills and court craft, when to speak and when not to, even when to stand and where to sit. That cannot possibly be replaced by watching online.

When dealing with contentious business – debates, proofs, opposed motions – an electronic hearing is no substitute for an in person hearing. Discussions with the Court or the opponent are stilted and artificial; it is hard to “read” the judge and to know when a submission requires to be developed further or can rest; examination of witnesses does not allow a proper exchange to be constructed; there is very limited scope for communication between client and solicitor and solicitor and counsel; the exchange of information between parties and/or the Court is not efficient.

Mental health- many practitioners who have conducted a contentious hearing lasting even an hour on WebEx will speak to the additional strain placed on them (and their eyesight). For hearings that last longer, the strain can be intolerable. Additional breaks are welcome, but they serve to interrupt the flow of the case and inevitably mean that any hearing lasts longer, with clear cost implications.

I.T. issues. Not every user of the Courts has access to a reliable internet connection. Even in the centre of Edinburgh, it is not uncommon for my connection to a court to be broken or distorted. Not every court user has access to the number of screens that are required, or IT backup.

That said, the use of electronic hearings for procedural or administrative hearings is welcome.

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?

See above (1)

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.

This would appear to be the appropriate method

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.

Only if there is a clear set of guidance to be followed, arrived at after full consultation with all branches of the profession and other court users. We already see a huge discrepancy between courts, even between judges in the same courts about the form of a hearing. The final say should not come down to the court's personal preference, eg whether the judge would find it more convenient to hear the case from his or her home.

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

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

See (1) 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
- **This would appear to be the appropriate method, although it must be recognised that in some courts it can take several weeks for an opposed motion to be heard.**

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

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- Do you agree that the court should have the final say? Please explain your answer

See (4) above

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