

ANNEX A – CONSULTATION RESPONSE FORM

RCS

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?

I believe that the general presumption in Court of Session cases should be for all hearings to take place in person. These cases are generally of the highest value and/or of highest significance in our system and there are many benefits to holding the hearings in person. See Answer 5. Counsel and Solicitor Advocates are well used to in person appearances in Edinburgh and there is little convenience to be gained by them appearing remotely.

As a minimum all Reclaiming Motions, Debates, Jury Trials and Proofs should be in person with provision for the evidence of specific individuals on-line on application and special cause shown. Case Management Hearings should also be in person by default as the physical gathering of parties often facilitates discussion and progress in addition to the benefits conferred by the Judge hearing argument and making orders.

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?

As above, I believe that all hearings should be in person. But there are some examples where I feel particularly strongly that there should not be a presumption in favour of on-line hearings and I give further reasons at Answer 5:

- i i. Evidential hearings – Witnesses should come to Court
- ii ii. Case management hearings – Parties meeting in person aids progress
- iii iii. Judicial review – The potential importance merits in person hearings

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.

If we are to have presumptions in favour of on-line hearings then applications for in person hearings should be by motion and there should always be a hearing. It would be contrary to the interests of justice if a Judge could decide in Chambers on a matter of such importance, particularly if there is any possibility of that decision being delivered without an oral or published written judgement which would offer guidance for future cases.

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

Yes but again there should be a hearing where both parties are afforded the opportunity to make submissions and the judgement is given in Court or in a published written judgement.

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

There are many benefits to in person hearings over remote hearings:

- • Emphasising the importance and gravity of a Court appearance including the Oath to all involved in the process.
- • Better assessment of the credibility and reliability of witnesses. This is the cornerstone of a large proportion of Proofs.
- • Minimising the potential for influence over witnesses. It is not hard to imagine family members sitting in the same room as witnesses giving evidence from home, or employers sitting in the same room as employees giving evidence from the workplace.
- • Appropriate facilities for court hearings. We should remember that modern offices and the Advocates' library are not equipped for multiple people conducting multiple court attendances at a time.
- • Separation of Court and the home. Court appearances can be stressful and difficult events for all involved. For the mental well-being of the participants we should not accept that they routinely take place from somebody's home.
- • Court buildings are available to all. Many Court participants do not have access to technology for on-line hearings and would be disadvantaged over those participants in any case who do.
- • Lawyers, trainees and students learn by observing other cases calling in Court. Moving the majority of Court business on-line risks deskilling our profession.
- • The public and press have access to court rooms to observe court business. Due to IT constraints there is no provision for that currently. Any permanent changes in the Court of Session should not be implemented until this can happen. It is important for a modern democratic society.

It would be very unfortunate if changes made temporarily in response to Covid resulted in permanent changes which removed these benefits. I believe that the Court system, the legal profession and justice in Scotland would be the worse for it. In England & Wales there is a return to in person Court business and Scotland risks becoming second choice for litigation if these changes are made.

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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?

I would strongly favour all Proofs/evidential hearings, Jury Trials, Debates and appeal hearings taking place in person. See Answer 5 for the benefits. These advantages far outweigh any convenience in

holding these hearings on-line. There could be provision for the evidence of specific individuals on-line by application and on special cause shown.

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?

There is a benefit in procedural business in Sheriff Courts being conducted on-line as it allows Principal Solicitors to appear whereas previously they would have instructed local agents with no prior involvement in the case. I would agree with a presumption in favour of the following being conducted remotely - Options hearings, additional procedure hearings, Pre Proof Hearings, case management hearings, 18.3 hearings, QOCs hearings, taxations.

I believe that any Debate or evidential hearing should continue to be conducted in person. Debates involve complicated legal argument best presented in-person.

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

See Answer 3.

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

See Answer 4.

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

See Answer 5 above for the benefits of in person hearings over on-line hearings. With Sheriff Court business the benefit of the Principal Solicitor conducting procedural hearings, rather than a local agent with no prior involvement in the case, which is facilitated by remote hearings tips the balance in favour of conducting these hearings on-line. It is important that the Courts make arrangements for the public and press to have access to these hearings as a priority.