

## Response by Burness Paull LLP

### 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?

Burness Paull supports the use of remote hearings. They are a positive development in the Scottish civil justice system, particularly for procedural hearings. We broadly endorse the move towards remote hearings in most circumstances.

There is, however, one change to the formulation of the rules which we think is appropriate and measured. This relates to the process by which, in commercial actions, decisions are made about the mode of hearing for Proofs. There are two points we wish to make:

1. we consider it desirable, for sound commercial reasons, that the Scottish approach is largely in line with that being adopted in England & Wales; and
2. with that in mind, our view is that parties should have the opportunity to engage in advance of a decision about whether a Proof is heard in-person or remotely, as opposed to the current formulation of the draft rules where parties have to seek to overturn a default presumption that an evidential hearing will be heard remotely in all cases.

We recommend that, in relation to Proofs, the rule should be formulated to match that which is being adopted in England & Wales, namely that parties are asked to express a reasoned preference for an in-person or remote hearing; the preference is either stated in writing or orally at a pre-Proof hearing; and the final decision on the mode of hearing is then at the judge's discretion in light of the interests of justice and all of the circumstances of the case.

Expressing a preference is a flexible approach as opposed to a fixed “one size fits all” default position. Such flexibility would encourage active engagement by the parties and be a credit to the Scottish civil justice system.

**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?

See the response to question 1.

**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.

See the response to question 1.

**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

See the response to question 1.

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

Rule 35B.3 “Directions for attendance at hearings”

35B.3(2) – the drafting is ambiguous. Should it read “In proceedings to which rule 35B.3 applies the court may direct that a person must attend a hearing physically only if it is of the opinion that allowing a person to ~~attend the hearing by electronic~~ [to do so] would not ....”?

## OCR

For the remaining consultation questions, see the response to question 1 which also applies to commercial hearings in the Sheriff Court.

**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?

**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?

**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

**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

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