RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES TO THE CONSULTATION PAPER ON RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS ISSUED BY THE SCOTTISH CIVIL JUSTICE COUNCIL

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1. Faculty welcomes the opportunity to respond to this Consultation Paper.

Executive Summary

2. Faculty's position in relation to the proposals set out in the Consultation can be summarised as follows:

   (i) Faculty recognises that it is important to seek to retain, where appropriate, the beneficial elements of the way in which the civil courts have been forced to work as a result of the health crisis.

   (ii) Equally, Faculty considers it important to recognise that there are a number of inefficiencies and inequalities that arise out of the use of virtual hearings.

   (iii) Faculty is concerned that the proposed rules strike the wrong balance. In particular, it is concerned about and opposes the proposed adoption of a default setting for contentious and substantive hearings in the vast majority of civil cases in Scotland.

   (iv) Faculty does not consider that there is any clear evidence which suggests that litigants, the judiciary, counsel, solicitors or the general public desire a civil justice system which would operate in the way proposed by the draft rules.

   (v) Faculty considers that the proposals, if implemented, would create problems with access to justice, the quality of justice and inequality.

   (vi) Faculty would support a proposal to introduce a general default setting of virtual hearings for procedural business supplemented by the ability of parties to apply for an in-person hearing which can be granted by the court if considered appropriate in the interests of justice.

   (vii) However, Faculty considers it essential that the default position for contentious and substantive business should be in-person and in a court room.

Parties should however enjoy the right to apply for a virtual hearing in whole or in part which the court can grant if considered appropriate in the interests of justice.

(viii) Faculty has produced a set of draft rules which give effect to its views. It is suggested that these rules strike a better balance between retaining the benefits of the new way of working and the quality and integrity of the system which existed before.

Background: Temporary Measures under the Coronavirus Legislation

3. The Coronavirus Act 2020, the Coronavirus (Scotland) Act 2020 and associated legislation is the most dramatic package of legislation to have been implemented in decades. Virtual hearings were introduced in order to ensure that the administration of justice continued during lockdown and subsequent restrictions. But these measures represented a departure from the general and fundamental constitutional principle of the courts sitting physically and in public. Faculty's response proceeds on the basis that the temporary emergency legislative provisions, in particular under the Coronavirus (Scotland) Act 2020, schedule 4, come to an end.

The Consultation and Constitutional Principles

4. The Consultation engages at least two fundamental constitutional principles: the open justice principle and the constitutional right of access to the courts and tribunals.

Open Justice

5. The Consultation rightly refers to the "open justice" principle (para 16) and records that public access to electronic hearings is provided "where practicable" (para 18) and that, in practice, "The temporary restriction on the public being able to view hearings conducted by electronic means is expected to remain in place until appropriate safeguards can be devised." The Consultation continues (paragraph 20):

> The vision for truly open justice should be one in which the public and the media should be able to see and hear video hearings. In the longer term that should ideally be achieved without having to make an application.

6. However, this is neither a new nor an optional ideal. The Court of Session Act 1693 (APS cap 42; *12mo* cap 26; RPS, which remains in force, provides:

> "That in all tyme comeing, all bills, reports, debates, probations and others relating to processes shall be considered, reasoned, advised and voted by the Lords of Session with open doors, where parties, procurators and all others are hereby allowed to be present, as they used to be formerly in time of debates, but with this restriction, that in some special cases the said Lords shall be

> allowed to cause remove all persons, except the parties and their procurators…"

7. There was accompanying primary legislation for the High Court of Justiciary: see the Act 'Anent Advising Criminal Processes with Open Doors' (APS cap 43; *12mo* cap 27).

8. The significance of the "open justice" principle, as embodied in the 1693 Act, was reiterated by the Supreme Court in *A v British Broadcasting Corporation* [2014] UKSC 25, 2014 SC (UKSC) 151 at [24] per Lord Reed.

9. As Lord President Hope held in *Sloan v B* 1991 SC 412, 442, "… the general principle which applies equally in the sheriff court as it does in the Court of Session is that the court sits both for the hearing of cases and for the advising of them with open doors…"

10. The Consultation, however, appears to propose amendments to rules of procedure which will not comply with the open justice principle "until appropriate safeguards can be devised" (paragraph 19). That is not "truly open justice" as understood even in the seventeenth century. Faculty does not consider that proposal to be acceptable. Conversely, it is not at all clear that there is universal support for the view that legal proceedings should be live streamed, even to interested parties.

Constitutional Right of Access to the Courts

11. The Consultation (paragraph 30 ff) properly identifies the "Access to justice" issues that may arise from the proposals. But it is important to recall the content of the constitutional right of access to the courts, as set out by Lord Reed in *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869, [66]:

> [66] The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings….

12. As the Supreme Court in *UNISON* held, the operation of courts or tribunals goes to the core of the operation of the rule of law in a democratic society. The suggestion in certain debates that courts should be seen as a service, rather than a place, is thus a false dichotomy. The Court provides both a facility and a service.

13. *UNISON* also holds that the curtailment of the constitutional right of access to the court requires clear statutory enactment ([76]). The Coronavirus (Scotland) Act 2020 provided, on a temporary emergency basis, the curtailment of the right to attend in-person as much as the excuse for not attending in-person. The present consultation relates to rules which would apply on a permanent basis after the temporary emergency legislation is no longer in force. Faculty does not consider that there is

justification nor a statutory basis, for removing the constitutional right of access to a court in the form of an in-person hearing for contentious matters.

14. In so far as the courts do provide public service – for which users pay significant fees – those users, in exercise of their constitutional rights, and having paid contributions to the cost of that service, should always be entitled, at the very least, to ask that the state provides a physical venue, appropriately staffed, for the hearing of the case. Refusal of such a request would require some firm statutory basis.

Role for Technology

15. There is a role for using technology in the administration of justice, as the powers in the Courts Reform (Scotland) Act 2014, s.103(2)(c) and s.104(2)(c) envisage. The Consultation provides an opportunity for reflection on the profound changes proposed to the time-honoured practice to courts sitting in-person and in public in Scotland. The observations which follow are critical of the proposed rules but they are offered in a constructive spirit. They contain concrete suggestions for new rules which accord an appropriate role to technology to allow remote attendance at certain hearings, but which seek to give practical effect to the fundamental constitutional right of access to the courts and the open justice principle.

Observations on the conduct of remote hearings

16. Faculty recognises that remote court hearings are likely to be an important feature of the judicial system in the future. Members of Faculty have extensive experience of conducting different types of hearing by remote means throughout the Covid pandemic. Inevitably, the views of individual members on the suitability of remote hearings will vary, often depending on their own experience of conducting such hearings. Faculty carried out two surveys of members in August 2020 and April 2021[1]. A clear majority considered that an in-person hearing was to be preferred to a remote hearing. Whilst most Members considered that remote hearings were a useful addition to the options available for court hearings, only procedural hearings came close to a majority when considering whether remote technology should be the default. Faculty notes that surveys carried out by the Law Society of Scotland and the Judicial Institute had similar results.

17. In terms of the positive benefits of remote court hearings, Faculty does recognise the following:-

    (i) A number of complex hearings have been dealt with via Webex during the pandemic. This has not been without its challenges, but such remote hearings have enabled parties' disputes to be heard and determined (in particular,

[1] See Faculty's Discussion Paper on Remote Courts Post Covid-19 published at https://www.scotcourts.gov.uk/docs/default-source/aboutscs/civil-justice-conference---may-2021/paper-by-faculty-of-advocates---discussion-paper-and-survey-results-on-remote-courts-post-covid-19.pdf?sfvrsn=659f185e_2

where parties have had the resources to put in place additional hardware for witnesses; to fund legal support services such as document handling and transcription services; to arrange for written statements from witnesses; or even organising rooms from which witnesses are able to give evidence).

(ii) There has been a benefit in avoiding the need to travel to court. Although the convenience of practitioners is not a matter of significant weight, there is no doubt that for those who live some distance from Court, the ability to attend remotely for short procedural matters is seen as a significant benefit.

(iii) Although Faculty is not in a position to evaluate the full environmental benefits of remote hearings, it does acknowledge the potential benefits if travel to court is reduced.

(iv) A greater acceptance of remote hearings may benefit some practitioners and court users with disabilities or acute health issues. It may represent a barrier to others.

18. There are however, also a number of real concerns in relation to remote hearings. In addition to the fundamental constitutional issues, the most common practical difficulties of which Faculty is aware are:-

(i) In relation to substantive court hearings such as debates, proofs or appeals, Faculty does not see how a remote hearing can be an improvement on an in-person hearing. At best, a remote hearing may occasionally be as good as an in-person hearing. While there may be some secondary benefits in terms of convenience, more often, in our experience, the remote hearing is likely to be less satisfactory. There are a number of reasons for that. In practice, it has been rare for a remote hearing not to give rise to technical issues which have disrupted the flow of the case and prolonged the hearing. Interaction with the court is more stilted, particularly in the appellate context. There are practical difficulties of lodging documents during a hearing. Putting documents in cross-examination is more difficult and therefore less effective. There are more difficulties with stating and then dealing with objections. It is more difficult to take instructions. Opportunity for discussion between opposing parties to focus issues is much more limited. The court also loses a degree of control where witnesses are not present in court (see paragraph (iv) below).

(ii) Remote court hearings place certain litigants or witnesses at a disadvantage. In practice, remote court hearings can work relatively well if a litigant or witness has (i) access to a good broadband and wi-fi connection; (ii) has one or two large screens on which to communicate with the court and view documents; and (iii) has a quiet room in which to give their evidence. Faculty has found however, that broadband and wi-fi connections are not consistently good and it is not unusual for hearings to be disrupted as a result of lost or slow connections. There have been difficulties with certain browsers and the Webex system used by the Scottish Courts and Tribunals Service. One

particular problem which concerns Faculty is where witnesses have given their evidence through a mobile device connection. The visual display provided to the witness and to the court via a mobile device can be limiting. It has also been difficult for witnesses to view and comment on documents shared on screen. It cannot be assumed that witnesses have access to the hardware or software which is required for a remote court hearing to operate efficiently. It has also been a common experience that some witnesses do not have access to a quiet room from which to provide their testimony. In order to overcome some of these difficulties, hearings have often been conducted from solicitors' offices or from Faculty's consulting rooms. Absent the pandemic, it would seem nonsensical for hearings to continue to be conducted from several locations which may be geographically close, but with the attendant issues of a remote hearing.

(iii) Where a case is heard in-person, all witnesses in a case are faced with a broadly similar experience. They will all attend an unfamiliar court room to give their evidence. To that extent, the procedure seeks to treat all witnesses equally and their evidence is assessed by the judge in that environment. With remote hearings, an imbalance will occur with witnesses being able to choose where they give their evidence from. Some will give their evidence from their home while others may attend an office. Some witnesses will need to manage all the technical issues of connecting to the court hearing on their own while others may have technical assistance via a legal team. For those unfamiliar with technology, that process can be daunting. These differences may affect the manner in which their evidence is given and hence how the court assesses their evidence.

(iv) The court will inevitably lose a degree of control over the proceedings where they proceed remotely and important procedural safeguards may be lost. This may be a particular issue where party litigants are involved or where a witness is uncooperative. A witness might be able to gain access to the remote hearing to listen to evidence from other witnesses before their own testimony. There is scope for a dishonest witness to have access to unauthorised documents or other electronic feeds while giving evidence, and this may be very difficult to detect. There is also the possibility that a witness could sever their internet connection at crucial parts of cross-examination. Faculty does not believe that such misconduct on the part of a witness will be commonplace but these possibilities do demonstrate that remote hearings involve a loss of judicial control. More commonly, the view of a witness may be affected by poor lighting or the placement of the device or camera. Technical issues, including delay, poor sound or a poor connection, which are outwith the control of the decision maker, can also impact.

(v) As far as Faculty is aware, there is no empirical evidence available in Scotland in relation to parties' satisfaction or dissatisfaction with remote hearings during the Covid pandemic. It is very important to gauge whether litigants have

been satisfied with remote hearings and whether they would favour their increased use.

(vi) As noted above, effective use of remote technology for court hearings requires investment. This ability is not available to all and therefore impedes access to justice. It may also increase cost for the litigant, given the additional work which is required and the duration of hearings.

(vii) There is a further important point to recognise in relation to issues of privacy. By giving their evidence remotely from their home, the court and members of the public watching the court proceedings have a view into the home of the witness or practitioner. That may well be a matter of concern.

(viii) A significant concern for the legal profession as a whole is whether the increasing role of remote hearings will reduce the training opportunities for junior members of the profession. Most court practitioners recognise that their skills have, in part, been developed through watching more experienced practitioners present cases in court. This will be harder to retain, especially if substantive hearings proceed remotely.

(ix) There are concerns about the potential health risks presented by remote hearings. It has been generally accepted by judges that it is harder for parties to concentrate on a screen for lengthy periods of time. Hence, a greater use of short breaks during the court day is essential, but is not applied consistently. Some practitioners report concerns in relation to the deterioration of their eyesight. There are also concerns about the impact on mental health and wellbeing of extensive remote working. Prior to implementation of any new rules, a risk assessment must be carried out.

The draft Rules

19. Faculty has produced a re-written version of the draft Rules to accompany this response. The re-written version is not put forward as providing a wholly comprehensive code. Rather, it is put forward as an outline of an alternative approach to the allocation of civil court hearings between in-person hearings and remote hearings. The re-written draft rules proceed on the assumption that any rule changes are intended for a post-Covid period where there are no restrictions on the ability of parties, witnesses or practitioners to attend court in-person. It is noted that not all court hearings are covered by the Rules of the Court of Session and the Ordinary Cause Rules – in particular, hearings in the Sheriff Appeal Court. It is assumed that once the issue of principle is decided, changes consistent with that will be effected.

20. In terms of the particular rules for remote hearings, Faculty has approached the draft rules with certain key principles in mind:-

(i) Remote hearings took place during the pandemic as a matter of necessity. While that experience has demonstrated the possibility of increased use of

remote hearings after the end of the pandemic, the logical approach would be to start with limited use of remote hearings while the benefits and disadvantages are being assessed.

(ii) Once in-person hearings become available again, the default position should be that all substantive court proceedings continue to be in court.

(iii) The option to hold a substantive hearing (or part thereof) remotely should be available but parties should not be automatically required to have their substantive hearings heard remotely.

(iv) The court rules should seek to avoid the situation whereby parties may engage in significant tactical disputes in relation to the mode of hearing. Thus, the rules should, insofar as possible, clearly identify how each litigation, or stage of litigation, will be dealt with.

(v) The court rules should allow a party to make an application to change the mode of hearing.

(vi) Where case management procedures govern the particular proceedings, it should be for the judge case managing the case to deal with the mode of hearing in that context.

(vii) There is a default approach to hearings (as a matter of current law and practice) for hearings to be in- person. It is therefore simpler, and only necessary, for the rules to define a single list of hearings for which a different approach is to apply. The draft rules for consultation are unnecessarily complicated by the use of multiple cross- referring hearings lists.

(viii) Telephone hearings should not be an option.

RCS

21. 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?

22. Faculty does not agree with the structure of these proposals or with some of the categorisations used for identifying the cases suitable for in-person hearings. In terms of the structure, Faculty considers that it would be preferable to have a single list of defined hearings which will take place remotely with all other hearings remaining as in-person hearings. This avoids the risk of uncertainty in relation to hearings which are not identified in either list. It also underlines that remote hearings are a departure from the normal form of court hearing.

23. A further problem with the current draft rules is that there is a high degree of subjectivity in the description of the listed hearings. As drafted, proofs would only be heard at an in-person hearing if there is a significant issue of credibility of a party or witness which depends upon an analysis of that person's demeanour or character. Issues of credibility arise in many proofs and issues of reliability arise in virtually every proof. As drafted, this rule would result in disputes as to whether an issue of credibility was likely to be "*significant*" or not. On the current wording, a significant issue of reliability would not be sufficient to justify an in-person hearing. There will be cases in which a party may not wish to identify in advance of the proof diet precisely what the credibility issues are, since to forewarn the other party or witness will blunt the challenge at proof. It also should be recognised that a number of judges have questioned whether issues of credibility and reliability are harder for them to assess where the evidence is taken remotely so the premise behind this draft rule is not supported by recent judicial experience[2]. Faculty does not support a distinction being drawn between proofs without significant credibility issues and proofs raising significant credibility issues.

24. The draft rules are also silent as to when or who makes the determination that a proof involves significant issues of credibility. There is no procedure set out whereby a party is required to identify whether it seeks an in-person proof on account of significant issues of credibility. As drafted, parties could be proceeding towards a proof date with quite different views on what the appropriate mode of hearing will be with one party assuming a remote hearing while the other anticipates an in-person hearing. This may be less likely where there is case management but it is an issue for ordinary actions. In relation to personal injury actions, it might be expected that some discussion on the mode of hearing would take place at a pre-trial meeting but this would be too late. If, contrary to Faculty's views, the current draft rules are to be adopted then it is imperative that timescales are built into the rules so that parties identify the appropriate mode of hearing at an early stage.

25. In relation to legal debates and reclaiming motions, the draft rules seek to differentiate on the basis of the proceedings raising a point of law of general public importance or particular difficulty. This phrase which closely mirrors the second appeal test is a high test. It indicates that the norm would be for legal debates and reclaiming motions to be heard remotely. Faculty considers that the draft rule is subjective with the likely consequence that parties will engage in disputes as to whether the point of law is of general public importance or of particular difficulty. There might be tactical reasons for parties to engage in a skirmish over the mode of hearing for a legal debate, reclaiming motion or appeal, in order to support or detract from any future argument for permission to appeal to a higher court. It may not always be apparent at an early stage of the litigation whether it does raise a point of law of general public importance or particular difficulty. Fundamentally, Faculty does not see how the general importance or otherwise of the point of law in issue ultimately makes one mode of hearing more appropriate than the other.

[2] See *One Blackfriars Limited (in liquidation)* 2021 EWHC 684 at paras 20-22

26. Faculty would support in-person hearings being retained for family actions.

27. Faculty has redrafted the rules to reflect the content of this response. They are appended. In summary, the reformulated rules seek to move away from the two lists of hearings in favour of a single list of hearings which will proceed remotely. Unless listed for a remote hearing, the default position applies whereby the hearing will proceed as an in-person hearing. The general dividing line is drawn between substantive hearings which are retained as in-person hearings while most procedural hearings will be carried out remotely. This seems to be the clearest and most natural dividing line to apply for the different modes of hearing. It would, of course, remain open for parties to innovate by applying to have a substantive hearing, or parts of the substantive hearing, proceed by way of remote hearing. It would also be possible that a party might seek to apply for a procedural hearing to proceed in-person. Faculty accepts that there will be some hearings which could be viewed as both substantive and procedural. For example, some motions such as summary decree motions, can be determinative of a whole case and, as such, are more readily seen as substantive hearings. Other motions are more procedural in nature. In Faculty's re-formulation of the draft rules, the majority of motions are not listed for remote hearing and are therefore presumed to be in-person. Faculty does, however, recognise that it would be possible to seek to further define the types of motion which can proceed by way of remote hearing.

28. 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?**

29. As a preliminary comment, this question assumes that remote hearings may take place via a video link or a telephone attendance. Faculty considers that all remote hearings should proceed by way of a video link given that the technology is readily available. A telephone link is not consistent with the Consultation's own aims for "digital justice". In practice, telephone hearings have resulted in parties and counsel instructed for the case not being called to join the hearing. The conduct of a telephone hearing is problematic with no ability to see the participants or screen share documents. Taking the evidence of a party or a witness at a proof by telephone link is not appropriate. Procedural hearings and opposed motions are also difficult to conduct by telephone. There seems no good reason to continue to allow for telephone hearings.

30. Faculty's response to this question follows from the preliminary observations and our response to question 1. A number of the categories listed in draft rule 35B.3 would, under Faculty's re-formulation, also be allocated to a remote hearing. To that extent, Faculty agrees that such hearings are suitable to proceed as remote hearings. However, substantive hearings such as proofs, legal debates, reclaiming

motions/appeals and opposed motions should not be included in a list of procedures presumed to be determined remotely. Nor does Faculty accept that commercial cases as a class should be included in a list for remote hearings. Commercial cases should be dealt with consistently with other forms of action. They will of course be case managed from the outset and Faculty considers that the mode of hearing can be dealt with in that context. In relation to the commercial court, all that is required is to ensure that the commercial judge has the appropriate powers to direct that parts of the cause, or particular witnesses, may give their evidence in-person or remotely. Faculty would expect that the commercial court will make significant use of remote hearings. It is preferable for the commercial judge to determine what aspects of often complex cases are best dealt with in-person, or remotely, or partly in-person, and partly remotely.

31. 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.

32. Faculty agrees that the rules will need to allow parties to make applications to alter the mode of hearing. A motion is the appropriate method of making an application to the court. Faculty is content with the test set out in draft rule 35B.4(5).

33. Faculty does not agree with the proposal in draft rule 35B.4(4) that the motion will be determined by the court without a hearing. It may not be necessary to have a hearing of the motion if it is unopposed and a judge is content with what the parties propose. However, an opposed motion in relation to the mode of hearing should be determined after parties have made oral submissions in the normal manner.

34. 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

35. Faculty has greater concerns in relation to this question. Draft rule 35B.5 permits the court, on its own motion, to alter the mode of hearing by means of a direction. The direction may move the hearing from being an in-person hearing to a remote hearing, or *vice versa.* A party can seek to revoke any such judicial direction by way of a motion although the motion will be determined without an oral hearing. Faculty considers that the Court should only have a role to play in determining the mode of hearing if one or both parties makes an application to change the normal mode of hearing. If there is a dispute between the parties on the most appropriate procedure then it is obvious that the court will require to determine the dispute. It is also reasonable for the court to retain a degree of control, even if parties are agreed that the normal mode

of hearing should be altered. However, Faculty does not agree that the Court should retain an inherent power to alter the normal mode of hearing on its own volition where parties are content to accept that norm. Litigants pay substantial sums towards the court costs of a litigation. If those litigants are agreed on the mode of hearing which suits their case, and the mode proposed is identified in the rules as the normal mode for that type of hearing, there seems to be no justification for disappointing the expectations of the litigants. It is also objectionable if parties are prevented from accessing their preferred mode of hearing without having the benefit of making oral submissions to the court.

36. Draft rule 35B.5 adopts different wording depending on whether the court is making a direction changing from an in-person hearing to remote hearing or vice versa. By virtue of draft rule 35B.5(1), a person appears to be given the option of attending remotely rather than in-person since the wording is permissive, i.e. "*may attend a hearing by electronic means*" whereas draft rule 35B.5(2) provides that a person who was to attend remotely may be the subject of a direction such that they "*must attend a hearing physically*". Faculty does not consider that the permissive language in 35B.5(1) is appropriate and it is not in-keeping with the mandatory language used in draft rule 35.3(1)(b). As a general observation, it is likely that giving a party or a witness the option whether to attend in-person or electronically will create confusion and not result in the efficient management of hearings. It should also be noted that Faculty has revised the draft rules so that they focus on the hearing rather than the person attending those hearings. As originally drafted, the rules appeared to impose a requirement on a person to attend a hearing and it was not clear whether that was the party or their legal representative.

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

38. Faculty has no further comments and would simply refer back to the preliminary observations to this consultation paper.

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39. 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?

40. Faculty's response in relation to the Court of Session draft rules is also applicable to the proposed Sheriff Court rules. Faculty would wish to see a common approach taken to both sets of rules insofar as possible.

41. 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?

42. Faculty has no further comments beyond those above.

43. 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

44. See Faculty's response to question 3.

45. 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

46. See Faculty's response to question 4.

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

48. Faculty has no further comments beyond those above.

Conclusion

The changes proposed in the draft rules are so fundamental to the administration of justice and access to the court, that Faculty considers that there may be a need for further consultation on any revised draft before implementation. In addition, once any new rules have been in operation for a period, a review should be undertaken in consultation with all stakeholders.