ANNEX A – CONSULTATION RESPONSE FORM

RULES OF COURT OF SESSION

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?

Yes

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

No

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?

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

We are of the view that where hearings are procedural in nature and unlikely to be complex or lengthy in duration then the presumption of attendance by electronic means is appropriate. We understand that, in such circumstances, it is often more efficient in terms of time and cost to conduct hearings electronically and we recognise the benefit of doing so.

There is, however, great concern amongst practitioners at our firm about the presumption as it applies to substantive (non-procedural) hearings, in particular proofs. We suggest that the presumption ought to be reversed so that evidential hearings are presumed to be in person. We would suggest that parties could, however, agree to dis-apply the presumption if they are in agreement that electronic participation would be suitable (clearly, this will vary case by case).

There is concern that many of our clients do not have the capabilities to actually get online and those who are able to get online may have difficulty accessing online platforms effectively. This may be for a variety of reasons, including lack of IT equipment, poor internet connection and lack of digital skills, all of which cause us great concern with regards to ability to participate effectively in a proof. Our firm has first-hand experience of conducting remote proofs in the Court of Session during the pandemic and so is in a position to comment with knowledge of the issues which can and do occur in such circumstances.

In one proof, the key witness, the pursuer, had to access court documents on one device (a laptop computer) and give evidence via another device (in this case a mobile phone) due to IT issues. This witness had two separate devices available which enabled to proof to proceed (in less than satisfactory circumstances) but this may not be true for all witnesses. The use of two devices not only created difficulties for the witness as they required to divide their attention between two different platforms throughout the hearing but it also created challenges for the practitioners involved, who had to try to ascertain whether the witness understood/heard questions properly and was viewing the correct productions at any given time. It also made it difficult to interpret the witness' evidence as non-verbal cues such as facial expressions could be hard to read due to lack of eye contact and him switching his attention between different devices.

Agents, Counsel and the court all require to process and assess the information put before them, including oral witness evidence which, if not important, would not be led. Witness evidence does not only consist of what is actually said by a witness (i.e. their choice of words) but how is it said in terms of structure, phrasing and intonation, in addition to crucial non-verbal cues, such as body language. It is widely accepted, and indeed there is much academic literature supporting, that the majority of human communication is non-verbal in nature. It is, therefore, imperative that agents, Counsel and the court are able to adequately view and assess the body language of witnesses in person, in addition to hearing the oral evidence presented in order to fully comprehend the communication in its entirety and make informed judgments based on this.

There are often questions of credibility and reliability of witnesseswhich cannot adequately be assessed and determined where evidence is being given via electronic means. It is often not until during proceedings that questions of credibility and reliability arise and it would be very difficult, if not impossible, to identify all cases in which they may be in dispute in advance of the substantive hearing itself.

It is submitted that subtle non-verbal cues conveyed by witnesses are easily missed where evidence is being given electronically due to IT difficulties such as delays in transmitting information, lost internet connections and witnesses requiring to view multiple screens, for example, where they are being directed to look at electronic productions. Further, it can be difficult for practitioners to appreciate whether the pacing of questioning/leading evidence is appropriate for witnesses or the court as individuals may be directing their attention to various screens and so facial expressions are difficult to make sense of; this is much clearer in an in-person court setting.

Of note, IT issues are not exclusive to our clients and we have seen both Counsel and expert witnesses experiencing difficulties during remote proofs. In one remote proof IT issues undoubtedly led to difficulties in Counsel and expert witnesses effectively participating in proceedings. Delays caused by IT issues resulted in markedly more court time being required, increased costs and ultimately caused significant disruption to the proper presentation of the case;the running order of witnesses had to be altered, at short notice and on numerous occasions due to the timings being off.

It might be suggested that where witnesses are required to attend via electronic means they may not afford the same level of gravitas to the provision of their evidence as they would if they were attending in person. An in-person court attendance dictates a certain formality which may be lacking with an electronic attendance. Further, parties can be certain that witnesses only have visibility of any productions/evidence put before them whilst attending court physically and that their responses are given without additional input from others. However, the same cannot be stated for electronic participation in hearings.

Attendance via electronic means can make it difficult for clients to give instructions to agents in real time and can also make communication between agents and Counsel more protracted. In a physical court setting, it is easy for agents to attract Counsel's attention and to discuss any matters arising during the course of proceedings timeously and without delay (such as suggested further questions to be put to a witness). However, where agents and Counsel are based in different locations, there is an added layer of complexity to any communications, as both will require to agree the method of communication in advance of the hearing, messages may not be received by Counsel instantaneously and there is the risk that ultimately the communication will not be received. It is contended therefore that substantive hearings conducted by electronic means effectively exclude agents from making meaningful contributions (or at the very least render it exceptionally difficult for them so do so) during proceedings as they lack the ability to be seen or heard by the court. This can

be contrasted with in-person hearings during which agents and Counsel are able to communicate with ease (as occurs frequently) and which the court has full visibility of. In our experience of many years of attending in-person substantive hearings, where the court has witnessed interactions between agents and Counsel the court will ordinarily allow Counsel the opportunity to briefly consider any comments before they relay the appropriate communication to the court. The same opportunity is not as readily available in the context of a hearing conducted by electronic means. Even where Counsel and agents are able to establish a method of communicating via digital means (such as email or text message) during proceedings, this is less than satisfactory. Such communications can be distracting for Counsel as they divert their attention away from the job in hand (requiring them to focus on another device) meaning they are more likely to miss important points made the opposition; alternatively where Counsel is so focused on the proceedings they may miss an agent's input altogether (again rendering them obsolete in the process which is not acceptable nor in the best interests of their client).

In the recent remote Court of Session proof conducted by a practitioner at our firm during the pandemic, Counsel and instructing agents (for both parties) agreed to attend the same physical location in a socially distanced manner to try to circumvent such issues. In cases litigated by our firm, agents and Counsel work collaboratively and agents have a comprehensive understanding of the crucial issues which Counsel require to put before the court. It is, therefore, imperative that agents are able to effectively participate/contribute in substantive hearings through their communications with Counsel throughout, which is very difficult in an electronic format for the reasons outlined above.

The subject matter of the actions which we litigate on behalf of clients is often very sensitive in nature (such as in Clinical Negligence matters) and the outcomes of such litigation have significant direct impact on our client's (mainly pursuers) lives. Our clients can be involved in the court process for a number of years, therefore, to have a final evidential hearing conducted electronically, and with the aforementioned complications, is not satisfactory nor is it indicative of true access to justice. It is imperative that our clients feel that they are effectively able to participate in the court process (as they are entitled to do so) whether through the effective delivery of their own witness evidence, leading witness evidence in support of their case or through being able to properly hear and consider the evidence being led by their opposition. A physical, in-person proof can serve as a psychological "end point" for pursuers, and it is suggested that attendance via remote means may not accord the required level of gravitas or accurately convey the importance of the matter. Even where a pursuer is not required to give evidence in their case, they may have a desire to attend a hearing in person to witness justice in action and our understanding is that there is no provision for this based on the proposed arrangements with regard to remote hearings. We have concerns about the ability for the public to attend remote hearings with the same ease as in-person hearings. It is important that justice is seen to be done and as such that hearings are accessible to the public. Our understanding is that it will be more difficult (at least initially) for members of the general public to access remote hearings which is not, in our view, acceptable.

We recognise that, in order to run proofs during the pandemic, measures had to be taken which involved deviation from ordinary practice (i.e. in person hearings). Further, we acknowledge that being a new concept which was developed at speed (out of necessity), remote hearings during the pandemic would not occur without teething problems. However, in a post-pandemic society where in-person hearings are not precluded, even with foreseeable resolution of certain IT issues, we do not agree that attendance at substantive hearings should be presumed to be electronic. Any

perceived benefits cannot outweigh a pursuer's ability to effectively access justice which must be the priority.

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.

Yes, no concerns regarding use of a motion to do so.

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

We are of the view that where the parties are agreed as to the most appropriate mechanism for attendance for a particular case, the court should not intervene/should not have the ability to overrule that agreement (which we are aware has occurred during the pandemic when blended proofs have been sought but refused by the court). We submit that the parties are best placed to understand the particular complexities of each case and to recognise the benefits and difficulties of each available mode of attendance and, where there is no dispute, the court should not be involved. If there is dispute between parties as to the most appropriate mode of attendance in any given case, then the court should have the final say after consideration of both parties' respective positions.

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

No

ORDINARY CAUSE RULES

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?

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

The general presumption is more or less appropriate (including the presumption that Child Welfare Hearings (CWH) be in person) save for its application to proofs only in the limited circumstances detailed; we consider that the presumption should extend to all proofs. It is in the interests of justice that proofs are conducted in person for a number of reasons.

It could reasonably be inferred that the very act of calling a witness to give evidence means that credibility and reliability are at stake; if credibility and reliability were not considerations, then evidence would be agreed in advance. In the event significant issues of credibility and reliability are not in dispute in advance of a proof, then they may well become apparent during the running a proof itself (by which point it is, presumably, too late/difficult to change the mode of attendance/participation). It would be very difficult to identify all such cases in advance, prior to evidence being led.

Our firm has experience of participating in Fatal Accident Inquiries during the pandemic. In a recent Inquiry, one practitioner required to question the most important witness over the telephone as she was unable to access WebEx. While FAIs are non-adversarial by nature, it was, nonetheless, important to be able to assess the credibility and reliability of the witness and the practitioner was unable to do so to the full extent due to this technical issue. Additionally, the practitioner had no knowledge as to whether the witness may have been referring to notes during the provision of her evidence or whether anyone else was present in the room at the time to guide her answers.

No doubt similar issues could arise, and likely have arisen, in other civil evidential hearings, resulting in agents/Counsel having difficulty properly assessing witness evidence and adapting their questions in response. This invariably means that the Sheriff does not hear the best evidence which could significantly impact their decision-making process and affect the overall outcome.

It is extremely difficult to ensure equal access to justice for clients in every virtual proof setting. There may be issues with a client being able to access the virtual platform, either because of technical difficulties or lack of access to the required equipment and data. This could cause an issue with equality of arms, for example, in child protection cases where one party is a state organisation and the other a private individual. It is also much more difficult to take instructions in a virtual proof; for example, when conducting cross-examination of an opponent, it is far easier to have your client pass you a note or attract your attention than rely on electronic forms of communication which, again, requires a requisite IT ability and access to messaging apps/email/ data. This limits an agent's ability to effectively take instructions from clients during a proof.

Furthermore, it is important, from a psychological perspective, that those involved in court processes be able to physically attend court in person for the final evidential hearing/an Inquiry as this signifies the process (which may have been ongoing for some time) drawing to a conclusion; it might be suggested that this has not been accorded due significance in the proposed rules. In particular, with regard to FAIs, the family of the deceased may prefer to attend in person as there is a certain emotional detachment/separation from viewing proceedings online (which may, otherwise,

take place in one's home or similar). Further, a bereaved family member or pursuer may perceive that there is less significance in a hearing being conducted electronically than one which is conducted in person.

Any evidential hearing presents an excellent opportunity for inexperienced solicitors to observe how Counsel conduct a hearing, including their questioning of witnesses and presentation of the evidence. Any solicitors looking to gain advocacy experience will surely benefit from an in-person appearance. There is concern that remote hearings, in particular substantive hearings such as proofs/FAIs, may lead to a lost generation of Advocates. Undoubtedly, many individuals join the Bar because they relish the physical courtroom attendance before peers, the judge and perhaps the public. Remote hearings might be considered to diminish this experience.

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

We consider that there ought to be a definition provided for the word "person". It is unclear whether this refers to 'parties' or 'parties and/or their representatives'.

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?

For similar reasons as expressed above, it is our view that substantive procedural hearings and all proofs/FAIs be heard in-person. The only matters that should be dealt with via electronic attendance are procedural hearings which are straightforward, uncontested and/or which can be dealt with in in a short time domain. Although such hearings can be a way for inexperienced court agents to gain advocacy experience and build confidence in this regard, the time and cost of travelling to attend such hearings are disproportionate to the time spent partaking in the oral advocacy.

With regard to FAIs, preliminary hearings are, by their nature, intended to give the Sheriff an update on investigations with little dispute and so, in our view, can appropriately be conducted via electronic means. Notwithstanding this, such hearings are opportunities for inexperienced court agents to gain advocacy experience and appearing in-person has greater benefits in this respect. These hearings are often of longer duration than simple procedural hearings, often some 20-30 minutes, which is a reasonable period of time in which to not only obtain solid advocacy experience, but to also observe how other agents conduct themselves.

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

Yes, but we believe there ought to be a new streamlined process in the Sheriff Court created for a motion in that particular circumstance. In our view, the current process is too cumbersome. We would suggest that a streamlined process be created, with a 'pro forma' completed, intimated and lodged and a shorter timeframe for opposition e.g. 48 hours. The difficulty with the current process in the Sheriff Court is that there is a 7 day period of notice and the mechanism for having that shortened often takes as long as the 7 day notice in any event. The concern would be that the 7 day

notice period may take you beyond the hearing date, rendering the process for applying to change the mode defunct.

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

No, the parties are best placed to come to a view as to most appropriate mode of attendance; if parties are in agreement, then the court should not intervene.

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

In terms of the running of the electronic courts, we consider that it would be helpful to have a 'call over' process, in the same way as 'in-person' courts operate, so that the agreed cases call early on the roll. Different Sheriff Courts operate different procedures in that regard, but it detracts from the perceived benefits in terms of efficiency if parties are engaged in virtual hearings for many hours, waiting for agreed matters which could be dealt with at the start of the roll. The loss of the opportunity to speak with your opponent and the clerk before the case calls has disadvantages, and this is one of them, which could be rectified by communication from the clerk at the start of the court.