Westwater Advocates is a multi-disciplinary set of advocates covering mainly civil practice. Our members are involved in a wide range of civil work, including human rights, public and administrative law commercial, personal injury, housing and immigration but with particular experience in family and employment law. We appear in all levels of courts and tribunals. Over the last 18 months we have substantial first-hand experience of remote hearings including hearings conducted simply on written submissions, telephone hearings and WebEx hearings.

Our general position is that:

- Hearings conducted on written submissions only have resulted in substantial problems, eg as in *MB v Principal Reporter* 2021 SLT 383 where the submissions were not put before the decision-maker. An oral hearing of some sort is generally essential to the administration of justice as it ensures that a party is actually heard, both in the sense of that party's position being put before the court, and in the sense of the position being comprehended.

- Telephone hearings are highly unsatisfactory. They restrict communication such that it is difficult for advocates to assess whether they are being heard and understood. Parties have little appreciation that they are "in court". It is exceptionally difficult to confer with a client or take instructions in the course of such a hearing. Telephone hearings exclude those with limited means who cannot afford long calls. Cases where interpretation is required are particularly difficult as the interpreter either speaks over the advocate or there are long delays while interpretation takes place. As a temporary expedient telephone hearings provided a limited stop gap. They should be discontinued in all courts as quickly as possible.

- The speed at which SCTS responded to lockdown, rolling out and then improving WebEx hearings has been impressive. We appreciate all that the court service has done, in a very short time, to allow the civil justice system to deal with cases. Valuable lessons have been learned on how to take evidence and submissions remotely. Our general position is however that this does not provide a basis to make the far-reaching changes contemplated in the proposed rules.

Our responses to the specific questions raised are as follows:

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?

We do not agree with the general presumption. Based on our experience we maintain that the general presumption should be that all civil proofs, debates and appeals should be conducted by in-person hearings and that WebEx hearings for such cases should be the exception, rather than the rule.

We note that the House of Lords Select Committee on the Constitution, Covid 19 and the Court published in March 2021 commented:
"292. Regardless of the type of case, more data and analysis are needed on the effects of remote proceedings on the outcomes of cases and the satisfaction of participants in them (see Chapter 4). There is insufficient research at present to be certain about the effects of virtual hearings, but there is enough evidence to suggest that caution is required in expanding their use beyond the areas where they are universally seen to work well." https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/257/25708.htm

It is our submission that at the very least, there should be a trial period of 2 – 5 years where remote hearings are an option, rather than a default position. Such an investigation would provide an evidential basis for any proposed long-term change, should radical change be considered appropriate. There is not enough evidence available to support the current proposal.

We also draw attention to the approach of the Business and Property Courts for England and Wales which may be thought to provide a simple and sensible template for an interim period of testing and fact-finding:
" While the mode of hearing is ultimately a judicial decision, the default position for all hearings under half a day will be for such hearings to take place remotely. The Court will consider a live hearing in such cases only if there is a particular reason why an in person hearing is more appropriate. Such hearings include:
– The Chancery Division's Applications Court
– The Commercial Court and Technology and Construction Court's Friday applications lists
– Adjudication enforcement in the Technology and Construction Court.
The approach in relation to longer application hearings and trials will be a matter for decision by a judge on the facts of each
case." https://www.judiciary.uk/announcements/remote-hearings-guidance-to-help-the-business-and-property-courts/

We recognised that Scottish Court's proposal for remote hearings not only raises questions about how the legal system should function but how our society will function as technology advances. There is a lot of learning to be done and we do not consider that the judicial system should rush into this.

The proposed changes will profoundly affect relations between the state (in the form of the courts) and the citizen. There should, surely, be a wider public debate to provide a mandate for the radical changes being proposed.

It is a key principle of our legal system that litigation should be conducted in public; not in private. Telephone access is inadequate. Listening on a phone does not convey the whole of the event. Such feedback as we have received is that listening to a hearing on the telephone is wearing and can be difficult to follow, particularly in the case of lengthy hearings. Access by telephone excludes those unable to afford lengthy calls. Livestreaming would provide better public access, but still does not give full access. Our experience of remote hearings to date is that cases proceed pretty much as if being conducted in private. There is no sense of the public at large having access in the way it would in a court. Justice not only has to be done, it has to be seen to be done. That is not taking place in an effective manner.

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?

We do not agree with the general presumption.

<u>Case management hearings</u>
We agree that case management hearings and pre-proof hearings in family actions may conveniently be conducted by electronic means. We now have substantial experience of these hearings and they have on the whole worked well. They save on travel time and allow the efficient conduct of business. However the convenience of counsel, which is served by these hearings, may not be the most appropriate yardstick for fundamental reform

We are conscious that, to some degree the remote procedural hearings work well in family actions because they generally involve a small group of advocates and a few family judges, all of whom are familiar to one another. The advocates know what the judges will wish to see by way of case management and preparation. The judges appreciate the knowledge and expertise of the advocates. If remote hearings persist, there is a risk that this level of familiarity will recede. This makes it all the more important that there are regular in-person hearings in the Family Court. The situation in the Family Court is not replicated in other aspects of the business of the Court of Session.

It is a drawback of remote hearings that there are no opportunities for discussion between counsel. Counsel states a position to the court, and then logs off. Effective conduct of a litigation requires more.

Members of Westwater who work in other areas of the law agree that remote case management hearings do have the benefit of convenience but the drawback of limiting constructive dialogue. They work better when there is familiarity between the court and

counsel and between counsel themselves, which cannot easily be fostered by the remote hearings themselves.

Proofs

We welcome the recognition that family justice demands in-person hearings. It is of importance to parties that they are seen and heard, and that they have direct sight of the decision-maker in what will generally be a life-changing case.

It is the experience of our family law practitioners that 'on the ground' instructions, negotiations with other counsel and the ability to conduct a court hearing as it unfolds is severely restricted when WebEx is used. The control of the court room by both judge and advocates is impacted, to the detriment of the administration of justice. This is particularly so in cases regarding children, where responsiveness and sensitivity are vital.

The proposal for family courts recognises that in-person hearings are a superior form of procedure. These are not, however the only cases where this is of importance. As practitioners we would say that the presumption should be that proofs in all cases should generally be taken in person, where possible.

Some of our members practice in the area of personal injury and medical negligence. They wish to express concern that they would have great difficulty in running such cases virtually, particularly where there are lay witnesses and extensive reference to documents (which is the norm).

Question and answer is considerably more difficult when a screen is interposed. Development of a line of questioning is harder. The rhythm of question and answer is difficult to maintain. Demeanor and facial expression are lost if the witness moves out of direct line of the camera. This makes both advocacy and decision-making more difficult.

Sharing documents on screen results in the witness being reduced to the size of a postage stamp and much of the communication is lost.

Technical difficulties reported by members trying to conduct proofs by WebEx include:

- Lack of availability of technology, particularly in child cases, where families are on the margins of society.
- Unreliable connections.
- Failure to notice that there has been an interruption in the link for a party or participant, with the result that it is not clear what has been lost.
- A participant announcing they are about to run out of 'charge'.

Advocacy difficulties have included:

- Impaired ability to assess the effectiveness of cross-examination, both in relation to the witness and the decision-maker.

- Problems with stating timeous objections to evidence. Raising an 'icon' of a hand will be ineffective to prevent an objectionable question being answered, unless instantly spotted by the judge or sheriff.
- Difficult decisions having to be taken as to whether to forgo lines of cross-examination when the technology fails, in order to try and conclude evidence within the court time available, both having regard to timetables and the expense of the litigation.

The efficacy of courts is to a large measure dependent on the authority wielded by the decision-maker. Courtrooms are designed to be imposing, and judges are generally robed, for good reason. There is an immediate visual impression of authority. Witnesses are expected to dress and conduct themselves with appropriate dignity, to match the authority of the court. This does not happen with a remote hearing. Judges appearing from the comfort of their own homes are diminished. Witnesses sitting in their own homes do not have an appreciation of the nature of the exercise in which they are engaged. They often do not dress for a court appearance. This is not just a matter of clothing. Some of the accoutrements of virtual hearings (eg large pink earphones) are inappropriate and distracting. The authority of the court has been reduced. It is a trend which in our opinion should be reversed, if the Court of Session is to remain effective.

In our experience much time has been lost when connection with a witness proves difficult to establish, or breaks down. We have experience expedients such as putting witnesses into taxis to try and get them to a site where there is better connection. This is despite a previous test of the connection being satisfactory. By the time the witness appears on screen they are stressed and in a poorer position to give effective evidence. The decision-making may then be impaired. Time has been lost, as has momentum and the lack of efficiency has rendered the proof more expensive. In Court of Session terms this can be very serious, as each Outer House day costs each party £2,130 (the Inner House equivalent being £5,320). In addition parties have the additional costs of counsel, solicitors and any experts kept waiting.

The proposed rules do not address the issue of citation of witnesses. Not all witnesses are willing to give evidence. A form of citation tells a witness where and when to attend to give evidence. A failure to do so is potentially contempt of court. A warrant may be issued for a witness who fails to attend. How is a witness to be compelled to 'attend' a remote hearing? What will be the sanction for a failure to log into a hearing? Determination of a complaint of contempt will be difficult. If witnesses come to realise that they can disregard with impunity a requirement to log into a court, this has the potential to undermine the justice system.

The lack of "congregation" of counsel and parties at the commencement of proofs have in our experience resulted in cases proceeding to proof that might not otherwise have done. There has been the loss of an important final opportunity to discuss with clients the disadvantages of proceeding. There is no "courtroom door" to persuade a final review of the risks of going ahead. Likewise there are no opportunity for "last-minute" discussions between counsel. It is fair comment to say settlement should have been achieved earlier, but there are always cases where the reality of a court is the final persuader. Absent a court hearing, the final persuader vanishes.

Judicial review, debates, reclaiming motions and appeals

We would argue that judicial review and procedure roll debates should in general be in-person, as should commercial actions, reclaiming motions and appeals. Communicating complex arguments and referring to multiple cases or documents becomes difficult when a hearing is conducted virtually.

It is also much more difficult to focus on communication with the decision-maker when presented with a screen-full of faces, in random and changing order. There is the constant distraction of other faces (as well as one's own).

The judge is the decision maker and part of the skill of the advocate is to identify non-oral cues on the judge's thinking. The ability to do so is lost on the Webex platform when the judge's appearance on screen is minimal or, depending upon the display, can be effectively non existent.

General comment

We are concerned that the proposals impoverish the legal system generally by removing opportunities for young advocates to watch cases. Westwater's most recently called members comment that they have not been able to see older and more experienced advocates in action. While they may have been able to make some special arrangements to "attend" virtual hearings if they happen to hear about these, they have lost the opportunity to spend time in court when they had some free time and could slip into the back of the courtroom to watch and learn.

There is also the loss of collegiality in the Faculty. Remote hearings limit the opportunities for discussion as we do not meet. The Faculty of Advocates has been distinguished by its focus on general practice and its members have enjoyed the benefit of dialogue across different disciplines. This produces a quality of legal thought and practice. It encourages cross-disciplinary partnerships between senior and junior counsel. Importantly, it allows junior members to seek informal support and assistance from more senior advocates.

Collegiality is also a factor in well-being. It reminds advocates that they belong to a profession and allows them to develop a strong and supportive community. What is proposed will weaken that community, and weaken the profession as a whole.

While these factors may not be considered of direct and immediate concern to the court service, it is in the longer-term in the interests of SCTS that there is a lively, well-informed and vibrant bar. The measures proposed are liable to damage the bar, to the detriment of justice.

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.

In our view the general presumption should be for in-person hearings, with an option of remote or hybrid hearings. The type of hearing should be an aspect of discussion at the pre-proof hearing. If, for any reason, that does not take place, then the logical course is for a motion to be enrolled.

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

Parties may disagree and it is then for the court to arbitrate. Provided there is a general presumption for in-person hearings, we agree that the court, as decision-maker, should be able to decide whether all or part of a hearing should be taken remotely.

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

We have nothing further to add.

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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?

We refer to our answer to question 1 above.

Child welfare hearings occur exclusively in the sheriff court. It is our view that child welfare hearings should generally involve personal appearance in court of parents. We are concerned to hear that in some areas parties have been excluded from child welfare hearings when they are conducted by telephone. The ability for sheriffs to address parties directly is of benefit in what can be contentious matters. These hearings are designed to allow the sheriff to engage directly with a party, who will generally be a parent. The point and utility of these hearings will largely be lost if they do not take place in person.

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?

We refer to our answer to question 2 above. In the sheriff court there may be a wider group of representatives, and more limited opportunities for discussion. In these circumstances a physical presence of representatives and clients at hearings is even more important, to facilitate effective discussions out of court and representation in court.

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

Please see our answer to question 3 above. We would support the proposal that motions should be accompanied by reasons.

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

Please see answer to question 4 above.

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

We have nothing to add.