Scottish Civil Justice Council 1 ANNEX A - CONSULTATION RESPONSE FORM

Initial observations: The draft rules make changes for all Court of Session business and all Sheriff Court ordinary business. They do not make any changes for Sheriff Appeal Court business nor Sheriff Court Summary Cause or Simple Procedure business. This is assumed to be an oversight. We anticipate that further draft rules will be produced dealing with such civil business as is not covered in the current draft.

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?

Answer 1 -

It is appropriate for a general presumption for physical attendance at certain hearings and, as explained in this answer, on certain instances.

We suggest that this general presumption should be extended to cover all instances of a witness to fact giving evidence. Such evidence nearly always involves an assessment of credibility and / or reliability which assessment is likely to be more informed and therefore more accurate if the witness gives evidence in person so that full account may be taken of all voluntary and involuntary gestures, comportment and demeanour. This would also remove any difficulty in the application of the test of whether "there is a significant issue of credibility of a party or witness which is dependent upon an analysis of the party's or witness's demeanour or character". In fact, there is an inherent difficulty with this test because parties may disagree on whether it applies and where there is dispute there is no mechanism provided for the court to determine whether there is any such issue. In the situation where one party considers there to be such a significant issue but the other party does not, on whom does the onus lie to move the court to determine the mode of hearing? Further, what if - as is entirely foreseeable - a significant issue of credibility of a party or witness arises during the course of that person giving evidence by electronic means? Presumably the evidence of that person should be brought to an end for the person to physically attend court? This could be avoided by a general presumption of all witnesses to fact giving evidence in-person. The foreseeability of a significant issue of credibility only arising during the course of a party or witness giving evidence is increased by the fact that the defender's agents may not speak at any time with the pursuer before the pursuer gives evidence, and vice versa, and not all witnesses may volunteer to speak with both sets of agents before proof.

It also strikes us as unsatisfactory and arguably contrary to justice for there to be two classes of witness: one whose evidence is expressly doubted before they have even spoken because of the fact that they are giving it in person rather than by electronic means and the other whose credibility is not doubted at the outset because they are allowed to give evidence remotely. It is conceivable that allowing a witness to give evidence remotely could even be taken to waive or at least undermine any right to subsequently cast doubt on that witness' credibility. May it not also be considered potentially prejudicial or as showing apparent bias for the court to conclude, in advance of a witness giving evidence, that there is a "significant issue of credibility" with that witness' evidence?

As a general presumption, we would be content for witnesses who are held out as skilled to give evidence by electronic means. The way in which such people give their evidence, in terms of gestures

and demeanour, tends not to be as significant as what such witnesses say and, moreover, the reasoning provided for what is said, in addition to the qualifications and experience of the witness.

A separate point worth consideration is that no mechanism is set for determining whether a legal debate or appeal raises "a point of law of general public importance or particular difficulty" such that it should be heard in-person rather than remotely. Are parties intended to agree whether or not this applies? If parties agree that this applies, is that determinative of the matter? Where there is dispute, on whom does the onus lie to move the court to determine the mode of hearing? Insofar as the court has power, of itself, to determine this matter, until when may this power be exercised? There appears to be no "cut-off" date for the court's exercise of power in this area which could give rise to a need to make very late changes to arrangements made which may not be satisfactory. It may be better for there to be an additional change to the debate and appeal rules to provide that this question must be determined by the court at a preliminary hearing at which both parties may make representations. In the context of debates, it may, in fact, be better to remove the test altogether such that all debates are to be heard remotely by default, noting especially that detailed notes of argument and written submissions are normally submitted in advance of a debate.

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?

Answer 2 -

It is appropriate for a general presumption for attendance by electronic means at certain hearings.

We refer to Answer 1 for instances that should, in our view, be removed from a general assumption that they should be dealt with remotely. Our comments above on witnesses to fact apply equally in commercial actions. We see no policy rationale why commercial actions should be treated differently to other actions in the context of witnesses to fact.

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.

Answer 3 -

Yes, we agree that motion procedure is the right way for parties to seek departure from the general presumption. We see no need for an application form to be lodged in addition to a motion.

It may be preferable for there to be a "cut-off" date, subject to late applications on cause shown, for such motions to reduce the risk of arrangements having to be changed at a late stage, especially when they may involve witnesses who may have been cited on a particular basis (though we refer again to the points made at Answer 1 for all witnesses to fact giving evidence by default in-person).

We disagree that motions seeking a departure from the default position should be dealt with without an oral hearing. Proceeding without an oral hearing is arguably contrary to open justice.

We do not consider the "test" as presently drafted to add anything to the discretion of the court in determining motions for an in-person hearing rather than by electronic means by default. The "test" is expressed in negative terms: a motion may be granted only if it would not "prejudice the fairness of the proceedings" or "otherwise be contrary to the interests of justice". It is almost impossible to

conceive of circumstances where an in-person hearing as opposed to an electronic one would be unfair or contrary to the interests of justice. Hence the test in these circumstances simply becomes one of apparently unfettered discretion. If there is to be no appeal against court decisions on these matters, what, if any, are the constraints of this discretion? May some decisions be influenced by judicial preference on a judge-by-judge basis, noting that certain judicial preference for in-person or electronic hearings as a matter of principle or generality, has already been made known?

"On cause shown" may be a better formulation of the test for departure from the norm. We refer to the points made in Answer 1 as showing cause for all witnesses to fact giving evidence in person by default.

Clarification is also sought on the competence of an appeal against a decision of the court on these issues.

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

Answer 4 -

Yes, this is reasonable though we make the following points:

- We refer to the points made in Answer 3 on the unsuitability of the "negative test" which should be reformulated as "cause shown".

- We consider that, where the court is thinking of making a direction to depart from the norm, the matter should be ventilated first at an open hearing. This may reduce subsequent need for motions to revoke decisions made unilaterally by the court and in private and would also allow the court to demonstrate cause.

- There is a drafting error at s.35B.5(2): the words "attend the hearing by electronic means" should be deleted and replaced with "do so" (though we refer again to the unsuitability of the "negative test" in this context such that wider re-drafting is required).

- It is not considered appropriate for the court to consider a motion to revoke a direction on the mode of hearing without an oral hearing for reasons of open justice.

- Clarification is sought on the competence of an appeal against a decision of the court on revocation.

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

Answer 5 - No.

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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?

Answer 6 -

We refer to the points made in Answer 1 which are, in our submission, of equal weight in the Sheriff Court context.

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?

Answer 7 -

We refer to the points made in Answers 2 and 1 which are, in our submission, of equal weight in the Sheriff Court context except for the points made on commercial actions and appeals.

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

Answer 8 -

We refer to the points made in Answer 3 which are, in our submission, of equal weight in the Sheriff Court context.

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

Answer 9 -

We refer to the points made in Answer 4 which are, in our submission, of equal weight in the Sheriff Court context, albeit the reference to s.35B.5(2) in Answer 4 is replaced with s.28ZA.5(2)

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

Answer 10 - No.