ANNEX A

Consultation Response Form

Member: BRIAN FITZPATRICK, ADVOCATE

Rules of the Court of Session

Question 1 – For the categories of case listed as suitable for an in-person hearing:

- **Do you think the general presumption given is appropriate?**

Answer: My practice at the Scottish Bar principally is in the representation of pursuers in serious or complex workplace personal injury claims arising from breaches of statutory duty; victims or relatives of victims of road traffic collisions (often in cases where there have been criminal proceedings, if not convictions) and other civil damages claims where citizens bringing occupiers' or third party liability claims. The documents and language of the current consultation ignore or take limited account only of the underlying realities of the cases brought by this cohort of litigants and the need for the interests and rights of such litigants to be a core focus for any proposed civil Court reforms. It is a telling omission that the discussion omits acknowledgement, still less discussion, of the significance the primary mode for enquiry in such cases: Jury Trial. The Proof is, itself, a default form of inquiry adopted where the Court, on special cause shown, departs from the procedural presumption that a citizen's statutory right to jury trial should be met and protected by the Court system. The Pursuer in a Court of Session action routinely is a one-time litigant. Her rights in her case may have life-changing results. Likely, she will be required to make some of the most important decisions of her life. But, almost certainly, she will be proceeding absent the availability to her of any civil legal aid but with the benefit of some form of speculative or damages-based feeing agreement. She will be met by well-resourced, often serial defenders and/or their equally well-resourced employers' and public liability insurers. Most such damages claims (up to about 95%) are resolved without having to proceed to the final stages of Jury trial or Proof and, while detailed information is not available, it is safe to proceed on the basis that the great preponderance of such cases are resolved with a payment of damages having been made to the Pursuer and an agreement as to payment of her

legal expenses. Accordingly, while recognising the essential requirements that the Court should be impartial and fair in its procedures and decisions – the framework for whole-scale procedural reforms, on the scale proposed, must in a democracy reflect the stark fact that, for the most part, such litigants will be ordinary citizens properly be vindicating rights that have been breached and breached by one or other of the other parties convened to the action. Those other parties likely do not include the vulnerable, the digitally excluded or otherwise disadvantaged citizens. It seems an odd Consultation that addresses the technology for delivery of judicial determinations but ignores the procedures and context of such proceedings. A pressing and urgent issue in PI cases, with consequential effects on the use of judicial resources and access to justice, including speedy justice is the continued latitude afforded evasive and obstructive defences. In an electronic age, where a claim has already been in process between claimant and insurers why then is there a long notice period of the raising of the action, a further delay for the lodging of defences and a willingness to permit further time in cases for "further investigations". Why does it remain routine in PI cases to read standard averments in answer of "not known and not admitted" or even denials of basic facts such as employment, NI number, GP records, hospital records? Those obstacles might properly be addressed by modest adjustments to current practice, utilising electronic filing and a more creative judicial approach to procedure and pleadings,, at modest costs, if any.

There is a substantial risk, already detectable in those cases which have proceeded to Proof electronically during the Covid19 pandemic, that that central focus on the Pursuer is diluted such that the Pursuer becomes just another witness, and not even an expert witness at that, whose evidence simply is to be adduced before the Court.

I would submit that serious consideration be given to augmenting the proposed Rules such that any departure from existing arrangements would either 1) depend on the consent of such Pursuers to the proposed new procedures or 2) require the Court to be satisfied that, on special cause, the necessity of such a departure notwithstanding the objection of the Pursuer, has been established by the party advocating such a departure. Such a departure should require the Court to address issues of access, support and digital exclusion and, where necessary, order that any associated costs are met from public funds.

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

Answer: I would suggest the key test in respect of whether Proofs are to proceed remotely or in person should NOT be questions as to credibility (while recognising that where there are said to be such issues remote hearings, by whichever electronic means, might not be suitable). Strong safeguards will be needed in the event that such a test is to be applied. Credibility as a likely issue can be identified early in some cases but might only become apparent at a very late stage in proceedings. It is a highly controversial area. Is it suggested that issues as to credibility are readily identified from documents or other productions or, indeed, to be argued on the mere ipse dixit of an interested party? How will the Court, absent evidence having been led, fairly decide such claims? Does the potential not arise for such claims to set hares running about credibility and reliability (note the current vogue for allegations that a Pursuer is somehow "fundamentally" dishonest in their pursuit of a claim)? Is it appropriate that the existence of such issues, and prima facie decision-making about what is to be done about them, are made - likely on the Motion Roll? What protections will be afforded to parties as to what is said about them in open Court in protected proceedings? What arrangements will be needed to ensure that the Judge eventually deciding the case is left as master of the key decisions as to credibility and reliability? What sanctions are proposed for those who invoke issues of credibility but, after Proof, no issue of credibility is found? It seems also that there is a risk of too much focus on "credibility". In many cases, even where such issues arise they have limited, if any, impacts on issues of causation or quantum.

Further, it is regrettable that the Consultation has not given specific consideration to the implications of the proposed reforms for two types of application most similar to a final determination of the issues: 1) applications for interim damages and 2) motions for summary decree, including motions seeking dismissal, either on the merits only or on merits and quantum, I suggest that such applications, being occasions of central significance and import, should be recognised as such in any change to the Rules. Again, I would suggest that the presumption should be that there should be in-person Hearings of such motions and that the Pursuer essentially should have a veto on such Motions being determined, otherwise than in person.

Insufficient attention has been given to those cases where there is a lengthy citation of authority. Such cases notoriously benefit from the informal case management or, indeed, Practice Note compliant conduct of in-person hearings.

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?**

  Answer: No. Video technology is improving rapidly but still does not render an equivalent "in-person" hearing. It would be absurd to propose that the legal system somehow should stand aside from the inevitable digitisation of society and human transactions. I type this Submission from a lap-top. I will submit it electronically. There is a great utility and efficiency in the Court process being digitised. Presently, electronic filing with SCTS is not adequate. The Consultation is silent on what funds will be available to arrange a smooth transfer to full digitisation. But, in my limited personal experience since the onset of the current pandemic (but an experience likely equivalent or more to many PI practitioners) taking evidence by video, particularly from lay witnesses, always is a second best. If a case is of sufficient importance as to be convened in the Court of Session or the All-Scotland Sheriff Personal Injury Court ("ASSPIC£), it should merit more than a telephone call hearing. Phone call hearings are a departure too far and lend themselves to important procedural matters being rushed, badly discussed and therefore badly decided. (The levels of preparation and discussion in the equivalent telephone Pre-Proof conferences versus in-person Pre-trial meetings are interesting and anecdotal evidence, if borne out, suggests significantly lower levels of case settlement prior to, during or in the immediate aftermath of PPCs than PTMs). Parties do not approach phone call hearings with the same levels of attention, preparation or seriousness. In the age of Zoom, Webex and Microsoft teams, who thinks a phone call a superior forum? A citizen vindicating her rights is entitled to expect the Court system to address the determination of her claim via human judicial interactions, in person not a phone exchange.

Commented [BF1]:

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

Answer: Yes. Remote hearing of legal debates should require the consent of the parties. Where there is expected to be extensive citation of authority, in -person hearing of the debate should be available.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- **Do you think lodging a motion is the right way to do that? Please explain your answer.**

Answer: In the event that this course is embarked upon, some form of Notice or application of any making of such a proposal is required and the Motion system seems a useful vehicle. Again, fair notice would suggest a Motion will require to be more comprehensive in its terms, and accompanying material, than in current practice. There is a risk that the Motion becomes a pale imitation of the debate. If it is accepted that a Pursuer should not be deprived of her statutory right to a Jury Trial or its default Proof (almost inevitably an in-person Hearing) without special or other cause having been shown, similar protections will be needed where it is claimed by another party that some change of circumstances warrants re-visiting the mode of enquiry.

The decisions made at hearing of Motions and legal debates can be determinative of key aspects of cases and, not infrequently, the issues in a case. Aside from a general aspiration that better, not presently available, technology might permit public hearings at some unspecified date nothing else is proposed by the Consultation document to promote public access, transparency and accountability. Justice needs not only to be done but to be seen to be done. I suggest the how, when and why of securing public access to the hearing of such arguments must be resolved BEFORE any whole-scale transfer of Court business to essentially private, remote hearings is contemplated. The Consultation puts the cart before the horse. It is not sufficient to say that Court access will be protected. Presently, SCTS operate a system whereby Webex links are issued to the legal representatives attending Hearings. The public might, perhaps, know how to request to be an on-looker. But a citizen interested to observe Court proceedings either generally or in respect of a particular case cannot simply "wander in and out" online. The vindication of rights in Courts, as a matter of

principle, should not be a private affair save in cases where confidentiality, vulnerability, or State secrets are issues.

Question 4 – 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**

  Answer: No. The Court regulates its procedures and individual judges ensure those procedures are adhered to but the Judge should not become the driver of procedure, not least in PI cases and, broadly, for the reasons outlined above. The State essentially has departed the field so far as access to justice for PI pursuers are concerned. Until such time as the State is ready to fund access for such citizens, the State in the form of its judiciary should not be the driver of procedure and its attendant costs.

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

Answer: Yes. It seems the Consultation sees no need to consider the wider, perhaps unforeseen or unintended consequences, of such a widespread change. Litigants already bear a considerable proportion of the costs of the Court by dint of regularly increased Court dues and fees. Where a pursuer is to be expected to conduct key stages, including perhaps the Proof, from her front room – why should she bear anything like the costs extracted from litigants permitted to use the comfort or convenience of Court 9 or the modern Courts in the Supreme Court annex. When she completes her evidence, does she simply log off? How is it proposed she has effective and on-going contact with her Counsel and solicitors in the same easy, straight-forward way achieved at an in-person Hearing?

Further, most such Hearings will be undertaken by Advocates. Actual Court appearances by solicitors-advocate in substantial PI Hearings are few. Advocates practice solo and the Court system benefits greatly from the results of the "soft skills" interactions by highly qualified professionals. Very many cases still are resolved by a walk, virtually or otherwise, up and down Parliament Hall. Our system's efficiency relies on those levels of reasonableness and settlement. Remote hearings risk remote proceedings and very remote, if any, human interactions. Some research would be useful but, anecdotally, reports suggest after an initial surge of settlement of claims more entrenched positions re settlement are being adopted during the current pandemic and a tendency towards delay and avoiding discussions towards settlement. Current arrangements have produced a system that very broadly works.

The professional development of the Bar is a further concern. If the necessity of a strong, independent referral Bar (in PI cases, with a strong tradition of representing people on modest incomes on speculative terms) is recognised as a vital component of a vibrant democracy, the consequences of the proposed reforms for the Bar might properly be discussed absent any complaints of self-interest. I doubt many sole practitioner advocates opted for the Bar so as to permit them to conduct large parts of their professional life from a video cubicle at their home or elsewhere. Advocacy, in no small part, goes on in public Courts before the public, be they a Jury, a Judge sitting as the jury or witnesses or passing citizens. Young advocates create a practice not least from being seen and observed undertaking procedural argument before observers who might thereafter instruct them. The readiness to embrace useful technology should not wipe out or push to the margins consideration of the potential impacts on the Bar, and in consequence the availability of access to reliable, competent, independent advice and representation for the ordinary citizen.

The Consultation gives only cursory consideration to the complex issues arising from digital exclusion. It should not be assumed that time itself will resolve those issues. Persons living with disability, of reduced means, from poor educational levels, or suffering language barriers or inadequate housing all are at risk of further exclusion by a sudden shift, as a matter of course, to remote Hearings. Their needs are barely met under the current in-person arrangements but there is at least the availability of Court premises and ready oversight by the Court of arrangements. Anecdotally, I have declined to proceed with a remote Proof during the current pandemic in circumstances where the Pursuer had a poor internet connection and lived in a shared house where the only access to the kitchen facilities was through the sole public room – which was where the router was situated. I have consulted with Pursuers living in such circumstances where the only space available to them has been a cramped bedroom. The incidence of our fellow-citizens living in such conditions is not so low as to be discounted. The Consultation is silent on how such persons might be assisted and supported. Should the Court, when determining any issues on further procedure by remote means, be charged with ensuring equality is achieved and have powers to make provisions for support and/or suitable accommodation and equipment to be made available?

Ordinary Cause Rules

I would simply repeat the foregoing in answer to the equivalent questions re the Sheriff Courts, save for the further observations that:

1. If remote Hearings are to be the default position for procedural business in the ASSPIC, such an innovation needs to go hand-in-hand with a revisit of how that Court currently manages the remote hearing of procedural business. It is a wasteful, out-dated and very expensive approach to conduct a Motions or Procedural court on the basis that parties and/or representatives are expected to be present and "attend" Court until their own case is called and do so by waiting with video camera and microphone switched off or muted. The usual visual cues as to the progress of business are unavailable. It is nigh impossible to do other than the most pedestrian of administrative tasks meantime and little, if any, indication is given as to when parties are likely to be heard.
2. Further, the current limitations on document uploads cannot be permitted to persist. PI claims nearly always include extensive medical records and more so in fully litigated cases. That the national specialist PI court requires parties to submit such productions in size-limited "dribs and drabs" is unacceptable and does not bode well for the Court adapting to a wholly electronically based system.
3. There does not seem to be any indication of what further funding will be available to local Sheriff Courts such that the requisite technology is in place before any changes.
4. The Consultation makes no mention of the likely Cost savings for the SCTS and the availability of proceeds of disposal of redundant Court buildings. Is it contemplated that the same Courts estate will be required when the arrangements anticipate that most civil business is NOT being conducted on the premises? Where Sheriffs and Judges are deciding most civil business from their Chambers or home is there not scope for reduced charges for litigants given those reduced outgoings? Are citizens pursuing legitimate civil claims to have their cases determined remotely while our public Court buildings become the reserve of those accused of criminal charges? Civil cases, particularly PI claims, are NOT the pressure on our courts system.

Question 6 – For the categories of case listed as suitable for an in-person hearing:

- **Do you think the general presumption given is appropriate?**

  Answer: [see above]

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

  Answer: [see above]

Question 7 – 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?**

  Answer: [see above]

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

  Answer: [see above]

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- **Do you think lodging a motion is the right way to do that? Please explain your answer**

  Answer: [see above]

- **Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answer**

  Answer: [see above]

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**

  Answer: [see above]

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

Answer: [see above]