



# Scottish Civil Justice Council

## **CONSULTATION RESPONSE: for the rules on Attendance at Hearings**

Issued: 10 March 2023

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- *Business and Regulatory Impact Assessment (BRIA)*
- *Equalities Impact assessment (EQIA)*

## SECTION 1 - INTRODUCTION

### Purpose

1. This paper summarises the decisions taken by the Council (post-consultation) on the new rules agreed for Attendance at Hearings.

### Background

*The timeline:*

2. The timeline for the Council consulting with users was:

MAY 2021 – The Judicial Institute hosted a conference with the legal profession to discuss their experiences in response to the pandemic. The outcome report from that conference informed the Council’s decision to proceed with a consultation;

SEP 2021 - The Council initiated its Public Consultation on an initial set of rules to cover the mode of attendance at hearings. That consultation opened 6 September 2021 and closed 15 November 2021 with 82 responses;

NOV 2021 – Respondents provided permission with 70 of those responses, which were published online on 25 November 2021;

FEB 2022 – The online Analysis of Responses report was published on 15 February 2022, summarising the feedback received from respondents; and

MAR 2023 – The Consultation Response (*this report*) was published online to accompany the new rules that were agreed by the Council on 20 February 2023.

*The feedback from respondents:*

3. There were 82 responses received, of which 70 respondents (refer annex 2) provided permission to publish:

CATEGORY OF RESPONDENT	NUMBER OF RESPONSES			% Mix (by category)
	Organisations	Individuals	COMBINED TOTAL	
Judiciary	3	1	4	4.9%
Legal Profession - Advocates	9	4	13	15.9%
Legal Profession - Solicitors	42	10	52	63.4%
Justice System - Service Providers	3		3	3.7%
Justice System - User Groups	1		1	1.2%
Other Public Bodies	1		1	1.2%
Consumer Bodies	1		1	1.2%

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Advice Agencies	1		1	1.2%
Other	5	1	6	7.3%
TOTALS	66	16	82	100.0%
% mix (by response type)	80%	20%	100%	

*The policy objectives set for this consultation:*

4. The objectives set for developing these new rules were:
  - To deliver **increased predictability** for court users (*so that they are informed on how and why a decision on mode might be taken*); and
  - To deliver **improved consistency** across the courts (*to resolve any inconsistencies of practice that may impact on court users*).

*The user perspective:*

5. The proposition made in the [draft rules](#) circulated by the Council in September 2021 was that there should be two lists supporting two general presumptions:
  - The first list setting out those case categories where the general presumption would be in favour of in-person hearings; and
  - A second list setting out those case categories where the general presumption would be in favour of virtual hearings.
6. The respondents took the view that a) providing those two lists based on general presumptions was too blunt an instrument and b) if implemented those proposed rules would not help the courts strike the right balance. For new rules to be successful there needed to be a far less complex scheme that supports the courts taking a flexible approach on a case-by-case basis.
7. The Council agrees and has withdrawn the rules as consulted on. The new rules developed post consultation deliver on that user ask for a less complex scheme.

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## SECTION 2 - THE DECISIONS TAKEN

8. This section outlines the policy decisions taken by the Council when approving the new rules on Attendance at Hearings.

### Providing a less complex scheme

9. For any hearings where evidence may be led or a final disposal made, user feedback favours the holding of an in-person hearing, with the discretion to seek a virtual or hybrid hearing where that may better suit the circumstances for one party (but not necessarily the other). That results in natural tensions between

parties which adds significant complexity when drafting. In turn those tensions can also result in barriers to gaining user acceptance to any complex new rules that did emerge. For that reason the Council has opted to be more pragmatic - the approved rules cover procedural hearings only in order to deliver the less complex scheme sought by users.

*The updates made in the procedural codes*

10. To meet the Council's guiding principles; comparable rules have been inserted as new chapters into the two main procedural codes:

- Rules of the Court of Session (RCS):
  - RCS Chapter 12C: Mode of Attendance at Court Hearings.
- Sheriff Court - Ordinary Cause Rules (OCR):
  - OCR Chapter 4A: Mode of Attendance at Court Hearings.

11. Once those rules have had time to bed in, the Council will consider whether to duplicate those same rules across the other procedural codes.

*The preference for using virtual hearings for procedural business:*

12. *RCS rule 12C.2 / OCR 4A.2* – these rules convey that the court has a preference to use virtual hearings when a hearing is fixed to only consider procedural business. In practice that preference mainly applies to routine procedural hearings convened for legal practitioners, the judiciary and court officials to progress technical matters. The rules disapply that preference if one or more parties is a) unrepresented or b) using an interpreter.

*The freedom to choose the alternate mode:*

13. *RCS rule 12C.3 / OCR 4A.3* – these rules add the flexibility for the court to take decisions on mode on a case by case basis, in the event that a party intends to appear at a hearing fixed to deal only with procedural matters. The straightforward method for a change in mode would be a) an oral or written motion being lodged on “cause shown” or b) the court making a decision at its own hand, after the parties have made representations about their desired mode of attendance.

*The ability to facilitate a mix of modes*

14. *RCS rule 12C.4 / OCR 4A.4* – to maximise flexibility these rules recognise that the court has the technical capability to support any mix of virtual / in person / hybrid appearances both during the one hearing, or over a range of hearings.

### **SECTION 3 - THE NEXT STEPS**

15. The new Attendance at Hearings rules were approved by the Council on 20 February 2023. Those rules will additionally require suitable repeal regulations, given the paragraphs related to virtual hearings within schedule 1 of the [Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#). Following discussions with the Scottish Government, the target commencement date is 3 July 2023.
16. Following the online publication of this report, the Council will propose these new rules to the Court of Session for consideration and approval.
17. If approved, an Act of Sederunt will then be laid with the Scottish Parliament and published via legislation.gov.uk.
18. The new rules would come into force with effect from 3 July 2023.

**Secretariat to the Scottish Civil Justice Council  
March 2023**

## ANNEX 1 – BIBLIOGRAPHY

### *Consultation:*

- CONSULTATION: Rules Covering the Mode of Attendance at Court Hearings (Sep 2021, SCJC)  
[https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-rules-covering-the-mode-of-attendance-at-court-hearings/consultation-paper.pdf?sfvrsn=60b3e256\\_2](https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-rules-covering-the-mode-of-attendance-at-court-hearings/consultation-paper.pdf?sfvrsn=60b3e256_2)
- ANALYSIS OF RESPONSES: To the Mode of Attendance consultation (Jan 2022, SCJC)  
[https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/31-january-2022-scjc-meeting/analysis-of-responses---mode-of-attendance.pdf?sfvrsn=d3bd2e6f\\_2](https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/31-january-2022-scjc-meeting/analysis-of-responses---mode-of-attendance.pdf?sfvrsn=d3bd2e6f_2)

### *Impact Assessments:*

- Business and Regulatory Impact Assessment (BRIA) (Mar 2023, SCJC)
- Equality Impact Assessment (EQIA) (Mar 2023, SCJC)

### *Legislation:*

- The Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Attendance at Hearings) 2023 (Mar 2023, [legislation.gov.uk](https://www.legislation.gov.uk))