

## SCOTTISH CIVIL JUSTICE COUNCIL FAMILY LAW COMMITTEE

### INFORMATION PAPER: RESEARCH ON THE CIVIL JUSTICE SYSTEM'S PANDEMIC RESPONSE

#### Introduction

1. This is an **open** paper by the Scottish Government.
2. At the last meeting of the Committee on 24 April 2023, the Scottish Government agreed to provide a summary of the research on the Civil Justice System's Pandemic Response. The research largely focussed on remote hearings.
3. The research has been published on the Scottish Government website and is available [here](#). The views expressed in the report are those of the researchers and do not necessarily represent those of the Scottish Government or Scottish Ministers.
4. [Chapter 4](#) of the report specifically covers family law hearings.
5. References in this paper to page numbers in the report are to page numbers in the PDF version.
6. Members of the Family Law Committee are invited to:
  - Note this research
  - Note this research has been published.
  - Provide comments as appropriate.

#### Scope of research

7. The four case types included [see page v of the research] were:
  - Commercial
  - Family law
  - Mental Health Tribunal for Scotland (MHTS)
  - Health and Education Chamber (HEC) - Additional Support Needs cases.

#### Methodology of research

8. The report draws on a number of data sources [see pages v and vi of the research], including:
  - **A rapid review of existing evidence** relevant to the different elements of the Scottish civil justice system's pandemic response. Pages 50/51 note consultations carried out in 2020 in England and Wales at the request of the President of the Family Division by the Nuffield Family Justice Observatory. Page 51 notes that in Scotland in May 2021 the Judicial Institute organised a

Civil Justice Conference to provide a forum for discussion amongst interested parties about how Court of Session and Sheriff Court civil business might be conducted once the pandemic was over or manageable and a return to in person hearings was feasible.

- **An online survey of professionals involved in the civil justice system** across the court/tribunal and case types covered. This was conducted in September-October 2022 and aimed at providing a broad picture of professional views and experiences of remote hearings. Page 51 notes that there were responses from 153 professionals with experience of family hearings.
  - **Qualitative interviews with 30 parties** in family law cases, commercial actions, the MHTS and the HEC who had experience of a remote hearing since March 2020. Interviews were conducted in late 2022 and early 2023.
  - **Qualitative interviews with 53 professionals**, including members of the judiciary (13), clerks of court (8), tribunal members (10), legal representatives (12) and other stakeholders (10) working across the case types covered by the research
9. Page 52 notes that qualitative interviews included 15 parties to family law cases, and 14 professionals with family law experience, including four members of the judiciary, five Sheriff Court clerks and a Court of Session clerk, representatives of three organisations that work closely with parents likely to be involved in family law cases, and a family law solicitor. There were more male parties and more female professionals.

### Summary

10. The annex to this paper outlines general findings from the executive summary; findings in chapter 4 on family law hearings; and general conclusions and considerations for the future in chapter 7.
11. Key findings on remote hearings are:
- The research found diverse views, both across and within particular court/tribunal settings, on the perceived impacts of remote hearings on parties, their representatives, clerks and the judiciary: there was no single, consistent opinion on their impact or their continued use.
  - There was more support for remote hearings for procedural matters than for substantive matters. However, this distinction between procedural and substantive hearings was less clearly made by parties in family law cases. Remote hearings generally not seen as suitable for Child Welfare Hearings.
  - Video hearings are generally favoured over telephone hearings but video hearings are more subject to IT glitches.
  - Professionals are concerned about party litigants in remote family hearings but party litigants themselves perhaps less concerned. (One suggestion in the report is that better information is needed on the number of party litigants).
  - Problems with IT support in court.
  - Clerks noted that remote hearings led to changes in their role.
  - Points raised on body language in court.

- Points raised about communication between clients and their legal advisers and between professionals.
- Points raised on preserving the dignity and solemnity of the courts.
- Concerns raised about it being harder to retain privacy and confidentiality in remote family hearings.
- Concerns raised about the impact of remote hearings on wellbeing, particularly judicial wellbeing.

## **Conclusion**

12. Members of the Family Law Committee are invited to:

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- Provide comments as appropriate.

**Scottish Government**  
**October 2023**

## **Annex: GENERAL FINDINGS: FINDINGS ON FAMILY LAW HEARINGS; GENERAL CONCLUSIONS AND CONSIDERATIONS**

### **Findings - general**

1. The Executive Summary of the research notes the following points:
  - “A review of the existing evidence on the impact of remote hearings in civil cases in Scotland prior to the current research found little information on the impact on parties, and a particular lack of data drawn from parties’ own accounts rather than that relayed by legal professionals.” [page vi]
  - “Evidence relating to the views and experiences of legal practitioners, mostly drawn from surveys conducted by their professional bodies, revealed that solicitors in Scotland were more positive about remote hearings than advocates were.” [page vi]
  - “Negative aspects of remote hearings were identified by legal professionals as being their potential impact on access to justice, concerns about digital inequalities, and changes to the nature and conduct of hearings and to their own working methods. On the other hand, the increased use of electronic documents was seen as a positive consequence of the move to remote hearings.” [Page vi].
  - The report notes that across the case types there were issues around technical problems, digital exclusion, and digital literacy. On technical problems. “In general, telephone hearings were seen as creating greater issues around communication (with the possible exception of their use for procedural elements of commercial hearings), although they were viewed by participants as being less prone to technical glitches than video hearings”. [Page ix].
  - “While professionals working in both commercial and family cases expressed a strong view that party litigants experienced greater barriers in remote hearings, this division was much less clear cut in the views of family law party litigants and represented parties interviewed for this study. Family law parties also varied in whether they thought it was harder to communicate in an in-person or a remote hearing: some felt the loss of body language obscured their ‘real personality’ (which they thought was essential to convey in a context where their parental role was being discussed); others felt it was easier to communicate and interject in a remote hearing.” [pages ix and x]
  - “Professionals working in the courts all described technological issues that had presented barriers to effective hearings, such as participants dropping off calls or having problems joining. Issues around their own access to suitable devices appeared to be experienced most acutely by tribunal members. Judges were frank in their assessment of the poor quality of broadband in many public buildings, including the court estate, while clerks noted that

courtrooms were not always equipped with sockets and screens to enable video or hybrid hearings.” [page xi]

- “Members of the judiciary observed that there was little IT support when things went wrong, beyond what clerks were able to provide. Clerks themselves noted that, while they had received some training on the videoconferencing platform, this had not equipped them to ‘trouble-shoot’ the problems other participants might experience accessing hearings.” [page xi]
- “Across both commercial and family cases, there was a marked difference between professionals’ perceptions of the impact of remote hearings on their workload, and the impact on their wellbeing: the survey indicated that, on balance, more felt that remote hearings had a positive than a negative impact on workload, while the reverse was true with respect to wellbeing.” [page xi]
- “With respect to both workload and wellbeing, solicitors working in the courts were perhaps less negative than other professionals interviewed, describing the benefits in terms of reduced travel and more efficient time use. Advocates and members of the judiciary working in the courts were more negative. Judges described a lack of ‘downtime’ between hearings, and frustrations with the slowness of some elements of digital processes as creating additional workload. They reported feeling more ‘intellectually tired’ from long periods on screen. For advocates, and for some solicitors, the impact on wellbeing was linked to the perceived erosion of key elements of their professional life, including greater social isolation and loss of informal learning opportunities.” [page xi]
- “Clerks felt that some elements of remote hearings, including setting up video hearings and finding email contact details for all participants, were more time consuming compared with in-person hearings. Court clerks were also required to stay in the hearings to manage the videoconferencing platform and let in witnesses – something bar officers would have dealt with pre-pandemic.” [page xii]
- “issues around body language were frequently raised by professionals. However, as with parties, there were mixed views on whether and how the loss of ‘non-verbal’ communication impacted on proceedings. Solicitors and advocates, particularly those working in the courts, expressed concerns that the reduction in non-verbal communication associated with remote hearings (particularly telephone hearings, but also video) created difficulties in assessing witness credibility and reliability. There was some resistance to this view among judges, however, who felt that body language was not (and should not be) a central part of their assessment.” [page xii]
- “tribunal members and judges working on family law cases in particular commented that the loss of body language and non-verbal cues could be an issue in terms of being able to identify when a party is struggling or needs to take a break. A slightly different point was made by sheriffs, who felt that body language could make an important contribution to child welfare hearings

in enabling them to set the tone and establish good personal interactions to support the problemsolving nature of the hearing.” [page xii]

- “The degree of formality that was appropriate in a court or tribunal hearing, and the impact of hearings being held remotely on this, was another recurrent theme among professionals. In the court setting in particular, there was concern from professionals that remote hearings had led to an erosion of formality – in terms of dress, language, and joining locations – which had in turn undermined the solemnity of proceedings and the weight that they carried for participants. .... At the same time, both parties and professionals questioned whether an element of reduced formality, as afforded by remote hearings, could be helpful in enabling some parties to participate more effectively.” [page xiii]
- “Many substantive family actions are ... private, and the concerns raised in respect of family hearings tended to relate more to preserving this privacy and avoiding the potential recording or sharing of remote hearings (something which interviewees gave real life examples of).” [page xiii]

## Findings – Family Law

2. Key points in the chapter 4 on family law hearings are summarised at the beginning of that chapter on page 47:
  - “For substantive family law cases, and in particular Child Welfare Hearings (CWHs), there was a strong consensus among professionals that remote hearings did not work well and were not appropriate.”
  - “Where remote hearings were used, there was a clear preference across professionals for video over telephone. However, there was less agreement among parties, whose preferences tended to be based on their experiences at hearings more generally rather than on the specific mode used.”
  - “Parties who had access to suitable technology, were IT proficient and had the right home set-up felt more positive about remote hearings generally although, for some of those dealing with issues of domestic abuse, intrusion into their home setting was problematic.”
  - “Professionals expressed ongoing concerns around digital exclusion, particularly in respect of party litigants.” •
  - “The availability of clerks varied across different court settings, with some sheriffs expressing a lack of support with managing technology during hearings.”
  - “Parties’ views on their ability to participate in remote (telephone or video) and in-person hearings varied, with some finding it difficult to communicate in remote hearings compared to in person and others finding it easier.”
  - “Represented parties noted difficulties in communicating effectively with their solicitors in remote hearings.”
  - “Sheriffs felt that good personal interaction, including non-verbal communication, was essential in CWHs due to their problem-solving nature. “

- “Professional groups agreed that formality and the authority of the judge aided compliance with the outcomes of hearings and thought that this was easier to achieve in person.”
- “Although it was recognised that remote hearings could aid efficiency in some contexts, any assessment of efficiency must take account of other factors including the objectives of the system and different needs and perspectives of all those involved.”

### **General conclusions and considerations for the future**

3. Chapter 7 of the report provides conclusions and considerations for the future.

#### Remote versus in person

4. The report says on page 94 that “The clearest agreement among professionals, at least those working in the courts, was that remote hearings were viewed as relatively more beneficial and/or less problematic in the context of procedural rather than substantive hearings.....However, this distinction between procedural and substantive hearings was less clearly made by parties in family law cases”.
5. Suggestions for improvements in relation to appropriate choice of mode are (page 95):
  - “Improving the resources to support both in-person and hybrid hearings”
  - “ Developing a ‘triage’ system or guidance on mode”

#### Equipment

6. On equipment, page 96 says that “the use of video hearings varied across Sheriff Courts and appeared to be more limited [than in the Court of Session], even when pandemic restrictions were in place, in some Sheriff Courts (notably Glasgow).” and “There was a general consensus across the four case types that it was very difficult for parties to participate effectively in a video hearing on a mobile phone, while lack of access to a second screen created difficulties reading documents during hearings. Joining on shared devices could also create potential security issues.”

#### Security and confidentiality

7. The report notes on page 96 that “Around 1 in 8 family law professionals who responded to the professionals’ survey were worried about the illicit recording of family hearings, a concern that was shared by some of the parties, sheriffs and support organisations interviewed, with reports that such recordings had been shared online.”

#### Connectivity

8. On connectivity and WiFi, page 96 says that “Even where parties had access to an appropriate device, issues with poor internet access could prevent them

being able to join or participate fully in hearings, while mobile phone reception could cause issues if they were phoning in (described by clerks as a ‘back up’ option where parties were unable to join by video). Internet connections had also created issues with witnesses giving evidence remotely. WiFi coverage in both courts and (for MHTS) hospital buildings was also described by professionals as an ongoing issue. A lack of good WiFi coverage across the court estate was a barrier to, for example, agents sharing documents effectively when attending remote or hybrid hearings.”

### Suggestions for improvement of technology

9. On pages 97/98, there are a variety of suggestions for improvement of the technology to support remote hearings:-
  - Ensuring professionals are provided with appropriate equipment
  - Taking a systematic approach to addressing digital inequality among parties
  - Improving the WiFi in public buildings
  - Improving functionality within available platforms. On this “some professionals commented on additional functionality that would improve efficiency, such as the ability to record hearings and make use of automated transcription. It was suggested that this would help bring down the costs to parties of accessing court transcripts (something perceived to impact disproportionately on party litigants).”
  - SCTS-wide guidance on how to manage hearings when technical issues do arise
  - Improving the speed of ICMS [Integrated Case Management System].
  - Making greater use of emails, including allowing party litigants to email papers – this was raised specifically with reference to family cases, where it was noted that party litigants currently had to use sheriff officers, at additional expense
  - Improving the digital document system.
  - Enabling greater access to electronic documents for party litigants.

### Communication between people

10. On communication, page 99 makes a number of points:
  - Communication between parties and representatives [There is a comment that “the tug of the gown” can’t really happen on-line]. There is a suggestion for improvement on page 100 that family law parties ... wanted to have the ability to message their solicitor privately within video hearings.”
  - Communication between professionals. “There was a belief that the loss of the informal contact between legal representatives that occurs outside the courtroom around an in-person hearing had a detrimental impact on the ability to move cases forward, or to come to agreements without the need for formal hearings.”
11. The report discusses body language. On page 100: “another concern about the loss of non-verbal cues among some sheriffs in family law cases and



tribunal members, which is that without being able to observe party and witness demeanour it was more difficult for them to identify if they were becoming upset and/or to intervene to handle sensitive hearings in an appropriate way”.

12. The report goes on to note on page 100 that “there may be a need for further discussion among professionals (and potentially with parties too) about the relative importance of body language to the judiciary and others in performing their roles, and what the implications of this might be within the context of different types of remote hearings.”

### Party litigants

13. On party litigants, page 101 says that. “There was a strong perception among legal professionals and the judiciary that remote hearings were particularly problematic for party litigants.... However, among the family law parties interviewed for this study, there was not such a clear distinction between party litigants and represented parties – positive and negative views and experiences of remote hearings were expressed by both. Given the relatively small number of party litigants interviewed for this research, and the fact that individuals may be represented or not at different stages in the process, caution should be applied in extrapolating these findings too widely. At the same time, the data does indicate that party litigants (and represented parties) themselves do not have a consistent preference for in-person over remote hearings.”

14. The report notes suggestion for improvements for parties on page 102:

- Improved guidance around technological issues / practicalities - Family law parties interviewed for this study (both party litigants and represented parties) expressed a desire for more guidance and support (including video tutorials and accessible leaflets) around accessing remote hearings, including providing clear instructions on how to join the hearing, what operating system you need to run the video hearing platform, how to use key features of the platform, and prehearing test calls.
- What to expect in hearings more generally
- improvements to the sending of advance information to parties,
- SCTS reviewing the guidance that is currently available [on attending remote hearings] and considering whether it can be made more accessible to all parties.

### Professionals

15. In relation to professionals, pages 103/104 say:

- “The professionals survey found that among those working in the courts, on balance more felt remote hearings had a negative than a positive impact on their wellbeing. This was particularly the case among members of the judiciary and advocates, and was not solely or mainly attributable to workload impacts. In fact, on balance more professionals felt that remote hearings had a positive

than a negative impact on their work-life balance. Rather, it appeared to be associated with the perceived intensity or nature of working with remote hearings. For example, professionals discussed the draining impact of being in hearings on a screen all day, while tribunal members and advocates in particular discussed the negative impacts on their wellbeing from loss of social interaction. Feeling unable to support parties as they would wish could also have a significant emotional impact for professionals.”

- “The impacts of the move to remote hearings on professional wellbeing was strongly linked by some participants to their perceived impact in changing the nature of their professional role within the court system in particular. The impact of removing inperson contact with peers was experienced by advocates in particular as a fundamental change to the nature of their job, as well as having a negative impact on their opportunities for professional development. Members of the judiciary also reported their roles changing in unexpected and, in some cases, unwelcome ways, perhaps encapsulated by the perception of one sheriff that they had become a ‘call centre’ sheriff. Clerks too felt that expectations of their role had shifted, with parties in particular expecting them to provide a level of IT support they did not feel equipped to provide and did not view as a part of the role of clerk.”
- “On training, members of the judiciary and other professionals interviewed for this study indicated that they would have welcomed greater formal training on remote hearings, as well as greater system-wide guidance, particularly with respect to the Sheriff Courts. There was also a perception that training for clerks of court had been “fairly basic” and could be improved. Clerks themselves noted that the training they had received on the video hearing platform did not include showing them how the platform is accessed by other participants, which might enable them to provide better support.”

16. Suggested improvements on page 104 are:

- Providing (more) information, guidance and training on remote hearings
- Alongside enhanced training for clerks of court .... it was suggested that specialist IT support be available in court buildings
- Introducing a function to add a link to video hearings on the SCTS website, rather than Clerks having to email out links to each participant.

17. On dignity and solemnity, suggestions for improvement on page 106 are:

- Doing more to replicate the court room environment within a video hearing
- Standardised directions on conduct during remote hearings.

### General

18. The report notes some general points at the end:

- strengthening the collection and recording of data about the mode of individual hearings would enable analysis of variations in their use across the court estate.

- recording whether one or both parties are party litigants would enable more accurate analysis and support future discussion around the experiences of this group in particular.
- considering a programme of further survey research to monitor how well supported and trained clerks and members of the judiciary feel with respect to remote hearings specifically, and what further training or support they feel they need.
- gathering structured feedback from a sample of parties who participate by different modes could help further assess whether the right balance has been struck between remote and in-person, and whether there are further improvements that could be made to support the effective participation of parties, whether remotely or in person.

**The Scottish Government  
October 2023**