



Scottish  
Civil Justice  
Council

## BUSINESS & REGULATORY IMPACT ASSESSMENT (BRIA):

### For the proposed court rules on: ATTENDANCE AT HEARINGS

Prepared by: The Secretariat to the Scottish Civil Justice Council (SCJC)

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#### Step 1 – POLICY BACKGROUND

##### **Purpose and intended effect**

###### *Background:*

The option of holding court hearings by electronic means is a proportionate means of modernising the civil courts. The ongoing availability of that service delivery option can help to deliver accessible services for a particular subset of court users (i.e. those who are able to engage effectively with a digital service).

###### *Policy Objectives:*

With the development of any supporting rules covering the mode of attendance for court hearings, the policy objectives are:

- To help **inform decision-making** on the most appropriate mode of hearing;
- To **provide greater predictability** in the likely outcomes for court users; and
- To **promote consistency** in procedure between courts where practicable;

###### *Definitions:*

For the purposes of this paper:

- *An electronic hearing* - is one where all participants would attend remotely by electronic means (either by video or by telephone).
- *An in-person hearing* - is one where all participants would physically attend a courtroom or hearing room.
- *A hybrid hearing* - is a mixture of the two.

## Rationale for this intervention

Over recent years, the availability and use of electronic hearings within the civil justice system has gradually expanded, with their use rapidly accelerated as part of the emergency response to COVID 19. In terms of user experience during the pandemic, participants see electronic modes of attendance as beneficial for some but problematic for others. That has led to an ongoing debate on the policy arguments for and against the increased use of remote hearings both within Scotland and internationally across all legal jurisdictions.

Awareness of this significant ongoing policy debate falls firmly within the Councils' statutory function of keeping the civil justice system under review. The debate highlights the pragmatic need for the parties and the courts to strike the right balance when deciding on the mode of attendance for a hearing.

The Council decided it could usefully assist in that debate by promoting discussion through the draft rules that it put out for [Public Consultation](#) (from Sep to Nov 2021). Feedback on those draft rules came from all sides of the debate including the general public, party litigants, represented parties, practitioners, the judiciary, third sector bodies and civil society in general. The subsequent analysis of that feedback will support the Council to determine the nature and scope of any future rules that might assist in this area.

The reason for taking action now was:

- To agree any new court procedure in advance of the emergency Coronavirus legislation being repealed (on 31 Mar 2022 unless extended).
- To inform court users of the range of factors considered relevant when deciding on the most appropriate mode of appearance for a civil court hearing.
- To ensure a consistency of approach across the courts, so that court users have predictability on the most likely mode of appearance for their case.

## **Consultation**

### Public Consultation

The council issued a [Consultation Paper](#), illustrative rules and draft EQIA on 6 September 2021, along with a response form and a respondent information form. The original duration was 6 weeks with a closing date on 18 October 2021. Following requests for additional time, the council extended the closing date for all respondents by 4 weeks to 15 November 2021.

There were 82 [responses received](#). Council members will consider a report on the analysis of responses at their January meeting.

## **Sectors and groups affected**

Proposals for new court rules are specific to the civil justice system.

### Who is affected?

Those recurrent users who interact with the court on an almost daily basis:

- The judiciary, and the court staff who support them
- The legal practitioners who routinely appear in civil court
- Expert witnesses, who routinely appear in civil court
- Third sector organisations who provide advice to court users, and may appear in court

Other civil court users who on average will interact with the court on only a few occasions during their lifetime:

- Most represented parties
- Most unrepresented parties (i.e. party litigants)
- Most witnesses called under civil court procedure

#### How they are affected?

New court rules provide a vehicle to add new information into the public domain, to inform both recurrent and occasional court users on the factors that may influence the court's decision-making within what is very specific subject area.

### **Options**

#### Option 1 - Do Nothing

The do nothing option would maintain the status quo where the choice on mode of attendance continues at the discretion of the court, and in line with the interests of justice. A court order fixing a diet for a hearing would reflect the information to hand within the case papers and/ or after the court has heard the parties.

#### Option 2 - New Rules

This option would see new court rules used as a vehicle to add new information into the public domain. The aim is to help clarify the decision making process. The benefits sought are to reduce any inconsistencies of practice and deliver greater predictability for court users

The structure of the new rules as consulted on was to:

- List the case types which may be appropriate for in-person hearings
- List the case types which may be appropriate for hearings by electronic means; and
- Set out the procedures to change that default mode of hearing on application by the parties, or on the direction of the court.

### **Benefits**

#### Benefits - Option 1 - Do Nothing

None – Issuing orders on mode of attendance on a case-by-case basis remains an entirely valid choice for the courts, but any inconsistencies of practice would remain.

#### Benefits - Option 2 - New Rules

The benefits from providing added information into the public domain through new rules are:

*IMPROVED CONSISTENCY* – feedback to date has raised concerns around inconsistencies of practice between sheriffdoms and across individual courts. The information set out in the new rules as consulted on should support a greater consistency of practice when the courts issue an order fixing a diet for a hearing.

*INCREASED PREDICTABILITY* – The new rules as consulted on provided two detailed lists setting out the mode of attendance considered most likely to be suitable for an individual case. Having added information in the public domain should: help to clarify the factors relevant to that judicial decision; provide parties with a general

steer on the mode of attendance most likely to apply if their case proceeds to a hearing; and inform parties that they do have the option to request the non-default mode of attendance.

## **Costs**

### Costs - Option 1 - Do Nothing

Nil

### Costs - Option 2 - New Rules

*Consultation Costs* - the existing annual running costs for the Council and the Lord Presidents Private Office covered the costs for preparing and running the Public Consultation, and the costs for legal drafting. The Council proceeded with an in-house analysis of consultation responses.

*Implementation Costs* - if the Council proceeds to implementation of new rules there will be:

- *Familiarisation Costs* - practitioners will need to familiarise themselves with new rules, and new Forms, in the laying period immediately prior to commencement.

## **Step 2 – ASSESSMENT OF LIKELY IMPACTS – ON BUSINESS**

### **Impacts – for anyone who attends a virtual hearing**

The capability to hold virtual hearings is already in place as part of the pandemic response and predates these rules. That said there is a need to restate the following impacts that can arise for anyone that does attend a virtual hearing:

#### Digital Exclusion

- *Negative impacts* – Anyone who lacks the digital equipment, connectivity, or skills to use digital services will struggle to participate in a virtual hearing.
- *Reasonable Adjustments* – New rules would reflect how the factors that underpin digital exclusion receive judicial attention, so that the court reflects on those factors when issuing directions on the mode of attendance.

#### Health & Wellbeing:

- *Negative impacts* - Prolonged time spent in front of screens can cause eyestrain and fatigue for all involved.
- *Reasonable adjustments* - The courts do schedule regular breaks in hearings to help minimise the adverse health effects that can arise. Some participants will choose to print documents rather than rely wholly on electronic versions.

### Effective Communication:

- *Negative Impacts* - For anyone with communication difficulties the use of video hearings can create a sense of separation from the other people involved in the hearing, which will be heightened where the use of complex legal language and processes in any way hinders their own understanding and ability to participate
- *Reasonable adjustments* - There is an existing duty on the judiciary to monitor that anyone with impairments can understand what is happening during a virtual hearing, with proceedings adjusted to support their effective participation.

### Open Justice

- *Positive Impacts – for Registered Journalists* – the ability for the media to access joining instructions to “see and hear” video hearings, or dial in codes to “hear” telephone hearings has facilitated improved access for those journalists who may otherwise have been unable to observe proceedings from the public gallery in a courtroom. Their subsequent reporting of those hearings does enable wider dissemination of information.
- *Positive Impacts – for the General Public* – anyone otherwise unable to physically attend the public gallery in a courtroom has gained the ability, on application, to “hear” either phone or video hearings, which improves access to justice.
- *Negative Impacts – for the General Public* – anyone who wants the full ability to “see and hear” a virtual hearing without the need to make an application will remain frustrated until such time as the courts put further safeguards in place and offer that service.

The Councils updated Equalities Impact Assessment (EQIA) narrates the potential impacts on those with protected characteristics in more detail.

### **Impacts – on the legal profession, and the legal services market**

The additional impacts raised in consultation responses include:

#### Continuing Professional Development

- *Negative Impacts – Training Opportunities* - If trainees end up attending more virtual hearings than in-person hearings, there is a concern that their ability to build oral advocacy skills within the cut and thrust of a live courtroom will be impaired. They will suffer from a lack of the networking opportunities that are essential to building a professional practice.
- *Positive Impacts – Training Opportunities* - The ability for trainees to make application to observe virtual hearings can give them exposure to an increased number of cases they might otherwise miss if that required their attendance at a physical courtroom (having significant cases recorded for training purposes may assist).

#### Career Development

- *Negative Impacts – Interactions with colleagues* - If trainee solicitors routinely end up attending more virtual hearings than in-person hearings, there is a concern that their ability to build professional contacts is impaired, which will harm their career path, and their ability to generate business when establishing a private practice.

### Remote Working

- *Negative Impacts – Isolation* – Where a practitioner’s workload mix means they attend more virtual hearings than in-person hearings it can lead to a sense of isolation, particularly if accompanied by long periods of home working.

### Effective Communication

- *Negative Impacts – Interactions with clients* – practitioners perceive the environment within specialist court buildings as being more conducive to the essential client discussions that take place before, during and after an in-person hearing. Many see that as an essential part of being able to reach settlement at the door of the court.
- *Reasonable Adjustments* – the SCTS is in discussions with Cisco Webex regarding the use of virtual breakout rooms to support confidential interviews during a hearing. Until that becomes available, practitioners use other technology solutions (text, email, WhatsApp) in order to address their need to interact with client’s pre and post hearing. Those alternatives lack the immediacy of communication that accompanies ‘the tug of the gown’ during an in-person hearing.
- *Negative Impacts – Interactions with colleagues* – practitioners perceive the environment within specialist court buildings to be more conducive to the discussions with other practitioners that take place before, during and after an in-person hearing. The inability to replicate that in a virtual hearing is perceived as detracting from the collegiality of the legal profession in Scotland, and potentially a barrier to settlement of disputes prior to a court hearing.

### Recruitment

- *Negative Impacts – Judicial Recruitment* – One potential career path for a law student is from trainee to qualified practitioner to judge. There is a perception that if their experience of oral advocacy in a live courtroom is not tested then it will inevitably reduce the pool of suitable candidates available for future recruitment rounds run by the Judicial Appointments Board for Scotland.

### What other feedback has arisen from business engagement?

The [individual responses](#) to the Public Consultation on Modes of Appearance are available via the Councils website. The Analysis of Responses report will be considered by the Council at the next scheduled meeting. Any policy decisions taken would be set out in a formal Response to Consultation paper that would be issued in due course.

### Step 3 – ASSESSMENT OF LIKELY IMPACTS – ON COMPETITION

To support initial screening for competition impacts, the Council uses the checklist of four questions recommended<sup>1</sup> by the Competition and Markets Authority (CMA):

Will the measure directly or indirectly limit the number or range of suppliers?

- *Digital Capabilities* - Suppliers within the legal services market that do not operate digitally will have struggled to compete throughout the pandemic response. Clarifying information via these rules will not be the root cause of problems with their ongoing viability.
- *Instruction of Local Agents* – historically central belt legal firms would instruct local agents to appear in court on their behalf: for in-person appearances at rural courts. As part of the pandemic response, those central belt firms have been able to appear virtually. If that becomes a permanent feature of the post-Covid approach then it may affect the financial viability of those rural firms if such agency work forms a dominant part of their income.

Will the measure limit the ability of suppliers to compete?

- *Digital Capabilities* - Suppliers within the legal services market that do not operate digitally will have placed their own limits on their ability to compete, and may well have exited the market already if they were unable to participate effectively during the pandemic response. Clarifying information in rules will not be the root cause of problems with their ability to compete.

Will the measure limit suppliers' incentives to compete vigorously?

NO - Adding clarity of information within new rules will not change the incentives to compete. Given the hourly rates charged, it is reasonable to expect that the party paying for legal representation might raise challenges to the quality of service provided if they perceive their legal representative is not competent with technology.

Will the measure limit the choices and information available to consumers?

NO – New rules would do the opposite i.e. they should clarify choice and provide additional information.

### Step 4 – ASSESSMENT OF LIKELY IMPACTS – ON CONSUMERS

To support initial screening for consumer impacts, the council mirrors the best practice<sup>2</sup> guidance from Scottish Government, which uses the following six questions:

Does the policy affect the quality, availability or price of any goods or services in a market?

- *Pressure for price changes* – legally represented consumers may perceive that virtual hearings are a lower cost option than in-person and they might push for differential pricing. An analogy would be the current calls for universities to reduce student fees, in response to shifting most course content to online learning platforms.

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<sup>1</sup> [Competition impact assessment: part 1 overview \(Sep 2015, CMA\)](#)

<sup>2</sup> [BRIA Guidance \(Oct 2015, SG\)](#)

- *Instruction of local agents* – historically central belt legal firms would instruct local agents to appear in court on their behalf: for in-person appearances at rural courts. As part of the pandemic response, lawyers in those central belt forms have been able to appear virtually. We assume consumers may perceive that as an increase in quality i.e. a principal lawyer with knowledge of their case should better represent their interests, in comparison to a local agent who may only have minimal detail before making an appearance.

Does the policy affect the essential services market, such as energy or water?

NO

Does the policy involve storage or increased use of consumer data?

YES - Significant data is already captured, stored and shared as part of the case management activities within the courts, and as part of disclosure of case specific information between parties. The SCTS publishes selected data into the public domain on court rolls, for those cases that do proceed to hearings. The increase in data that arises when adding the remote hearings option includes a) issuing joining instructions for virtual or hybrid hearings, and b) performance monitoring of cloud hosted systems such as Webex.

Does the policy increase opportunities for unscrupulous suppliers to target consumers?

NO – The digital systems operated by the SCTS comply with Digital Standards to safeguard against unauthorised access. Data is not shared or sold to third parties.

Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?

YES – New rules should clarify the factors that make some case categories suitable for a given mode of attendance, and make it clear that there is a right to request the non-default option on a case-by-case basis.

Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?

NO – The routes for complaints remain unchanged by the issue of these new rules. The routes to advice also remain unchanged, but advice providers should become better informed through the information added into the public domain by new rules.

### **Test run of business forms**

Does this proposal introduce new legal forms that are materially different in style and content to the existing legal forms in general use?

NO - new legal forms would only set out a general format, with some prompts for the information required and the order in which to provide it. That style is entirely consistent with other legal forms used on a daily basis so further user testing is not required.

## Digital Impact Test

There is an increase in public services delivered online. To test for relevant opportunities the Council mirrors the best practice<sup>3</sup> guidance from Scottish Government and uses the following five questions:

Does the measure take account of changing digital technologies and markets?

YES

Will the measure be applicable in a digital/online context?

YES

Is there a possibility the measures could be circumvented by digital / online transactions?

NOT APPLICABLE

Alternatively will the measure only be applicable in a digital context and therefore may have an adverse impact on traditional or offline businesses?

NO – The digital option of using a virtual or hybrid hearing is not mandatory, and the option of choosing an in-person hearing remains an equally valid choice. New rules provide information that goes to how to strike the right balance when making that choice.

If the measure can be applied in an offline and online environment will this in itself have any adverse impact on incumbent operators?

NO – The existing business model for most legal service providers has oral advocacy taking place face-to-face at in-person hearings as their unique selling point. In practice, those providers can readily support virtual hearings but their clearly expressed preference is to revert to in-person hearings as much as possible. We expect the market will find its own equilibrium post pandemic.

In theory, adverse impacts could arise if one provider made expertise in virtual hearings their unique selling point, but only if they could expect to gain significant market share as a result.

## Step 5 – ASSESSMENT OF LIKELY IMPACTS – ON REGULATIONS

### Legal Aid

Will the proposal require changes in legal aid regulations?

INDIRECTLY – individual line items may require amendments for any perceived costs and benefits accruing to practitioners from any sizeable shift to virtual appearances e.g.:

- Savings in travel time to and from court.
- Savings through reduced waiting time in court buildings (*although for bulk courts there can be a corresponding wait in a virtual waiting room*).
- Added costs if written submissions prepared prior to virtual hearings prove to be a demonstrably heavier burden (*compared to oral submissions at in-person hearings*).

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<sup>3</sup> [BRIA Guidance \(Oct 2015, SG\)](#)

- Added costs to hyperlink and scan productions (*compared to current practice when framing inventories*).

## Recovery of Costs Awarded

### Will the proposal require changes in Judicial Taxation regulations?

INDIRECTLY – individual line items may require amendments for any perceived costs and benefits accruing to practitioners from any sizeable shift to virtual appearances e.g.:

- Savings in travel time to and from court.
- Savings through reduced waiting time in court buildings (*although for bulk courts there can be a corresponding wait in a virtual waiting room*).
- Added costs if written submissions prepared prior to virtual hearings prove to be a demonstrably heavier burden (*compared to oral submissions at in-person hearings*).
- Added costs to hyperlink and scan productions (*compared to current practice when framing inventories*).

## Enforcement and/or sanctions

New rules would only provide a general steer on mode of attendance, and safeguards for choosing the alternate. The final decision on which mode of attendance is appropriate should remain a matter for the courts discretion.

### Will compliance be enforced, and if so how?

If an abuse of process occurred, the court would treat that as a contempt of court issue.

### Are there sanctions for non-compliance?

If an abuse of process occurred, the court would treat that as a contempt of court issue.

## Step 6 – ASSESSMENT OF LIKELY IMPACTS – WITH IMPLEMENTATION

### Implementation Plan

#### What is the timescale for this proposal to be implemented?

Implementation of any new rules would be linked to the dates on which emergency legislation expires. That date for revocation is a matter for Scottish Ministers to decide in terms of both:

- Extending the dates under the existing sunset clauses within the emergency legislation which come to an end in March 2022 (or September 2022 if extended); and
- The likely commencement date of the subsequent Permanence Bill signalled within the Programme for Government, and the parallel consultation on Covid Recovery.

#### How will this proposal be implemented?

Following consultation, the next steps for the council are:

- Publish the individual responses to consultation. (*complete*)
- Analyse the responses, and prepare a report. (*complete*)
- Consider the report and decide whether to proceed or not.

If there is a policy decision to proceed, the subsequent steps for the council are:

- Issue drafting instructions (*to amend RCS and OCR rules, and to extend the essential features of those amendments to other procedural codes*);
- Liaise with Scottish Government (*on revocation of the emergency legislation*);
- Prepare finalised rules for consideration by council; and if agreed
- Propose the new rules for consideration by the Court of Session.

On receipt of any proposed rules from Council, the next steps for the Court of Session are:

- Consider the proposed new rules as set out in the Act of Sederunt;
- Decide whether to approve or reject the new rules; and if approved
- Arrange publication of the new rules.

Following publication of any Act of Sederunt, its content is also subject to consideration by the Delegated Powers and Law Reform Committee (DPLRC) of the Scottish Parliament.

## **Monitoring**

Will the resultant changes be monitored, and if so how?

YES – If the new rules do come into effect, arrangements for monitoring would include:

*Qualitative Monitoring:*

- Reviewing any requests lodged for clarification or amendment of the rules
- Monitoring for any appeals lodged
- Monitoring for any media coverage relative to the rules in use
- Seeking feedback on the rules in use (from court staff, judiciary and practitioners)

*Quantitative Monitoring:*

- The number of - motions lodged seeking a change of mode
- The number of - court orders issued on mode of attendance

## **Post Implementation Review**

Will a post implementation review be undertaken, and if so when?

YES – this is a Council generated initiative and, if new rules do come into effect, a Rules Review exercise would be programmed to start within 18 months from the commencement date of those new rules.

## ANNEX 1 – LATEST PUBLISHED DATA ON CIVIL COURT BUSINESS

Source: [SCTS Annual Report 2020-21](#)

### The incoming volumes of civil actions:

#### Court of Session:

	2020-21	2019-20	2018-19
Cases registered	882	975	987
Proofs proceeding	63	58	58
Court of Session: civil appeals/reclaiming motions	188	229	180
Civil petitions registered	1,067	1,185	1,279

#### All-Scotland Courts:

	2020-21	2019-20	2018-19
Sheriff Appeal Court - civil appeals lodged	132	294	266
Personal Injury Court: registrations	2,944	3,220	3,591

#### Sheriff Courts:

Ordinary Cause	2020-21	2019-20	2018-19
Ordinary Cause registered	18,091	23,089	22,776
OC Proofs and Debates proceeding	216	543	563

Summary Cause/Small Claims/Simple Procedure	2020-21	2019-20	2018-19
Cases registered	20,502	45,953	43,645
SC Proofs Proceeding	85	368	379

### The scale of the civil court programmes:

	2020-21	2019-20	2018-19
Court of Session - judge days	1,240	1,328	1,424