



**Scottish
Civil Justice
Council**

**Consultation: Rules Covering the Mode of
Attendance at Court Hearings**

September 2021

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SECTION 1: RESPONDING TO THIS QUESTIONNAIRE

Written responses to this consultation are invited by **18 October 2021**.

Please complete the Consultation Response Form (Annex A) if you wish to lodge a response to this consultation. You can provide your response in a separate document but you will need to clearly indicate in your response which questions you are commenting on.

In line with current public health guidance the SCJC Secretariat staff continue working from home. **Please send your response by email only** to scjc@scotcourts.gov.uk with CONSULTATION RESPONSE as the subject.

If you have any queries please contact the SCJC Secretariat at scjc@scotcourts.gov.uk.

How your response will be handled

This is a consultation to gather feedback from all court users, including members of the general public. We need to know how you wish your response to be handled and, in particular, whether or not you are happy for your response to be made public.

Please complete the Respondent Information Form (Annex B) and send this with your response to make sure that we handle your response as you wish. Your response will not be published on the SCJC website if you ask us not to make it public.

However, all respondents should be aware that the SCJC is subject to the provisions of the Freedom of Information (Scotland) Act 2002. This means that if the SCJC receives a Freedom of Information request about the responses to this questionnaire, any of the responses (including those not published) may have to be made available under the request.

Where respondents have given permission for their response to be made public (and as long as they contain no potentially defamatory material) responses will be made available to the public on the SCJC website.

SECTION 2 - EXECUTIVE SUMMARY

Overview

1. This consultation seeks views on proposed new rules covering the most appropriate mode of attendance at civil court hearings in the Court of Session and in the sheriff courts. The proposed new rules are intended to provide a general presumption as to:
 - the types of hearings generally considered suitable for an in-person hearing;
 - the types of hearings generally considered suitable for a attendance by electronic means;
 - how the parties can apply to change the mode of attendance if an individual's circumstances justify a departure from the general presumption; and
 - how the court can direct a change in the mode of attendance if that is required in the interests of justice.

Who we are

2. The Scottish Civil Justice Council (SCJC) is a statutory public body established under the *Scottish Civil Justice Council and Criminal Legal Assistance Act 2013*. In relation to this consultation on new civil court rules the relevant parts of our remit are the functions of:
 - reviewing practice and procedure in the civil courts and making proposals for new rules for consideration by the Court of Session; as well as
 - keeping the wider civil justice system under review and making recommendations for its improvement.

Why we are consulting

3. As part of the Scottish response to the Covid 19 pandemic, the majority of civil court hearings proceeding since lockdown in March 2020 have taken place by electronic means (either by video or telephone attendance). That reflected a pragmatic need for the courts to continue to operate whilst managing footfall within court buildings and ensuring that business was conducted in a safe environment in accordance with public health guidance.
4. There is an ongoing public debate about the merits of remote hearings. For some court users the attendance at hearings by electronic means has been perceived as delivering significant benefits in terms of reduced travel time and

inconvenience, as well as more efficient hearings. For other court users it has raised concerns over how best to facilitate effective participation, maintain the gravitas of the court and respond to the availability of technology.

5. The new rules proposed within this consultation, incorporate our views by listing the case types which might be regarded as appropriate for in-person hearings and the case types appropriate for attendance by electronic means, along with procedures for that mode to be changed on application by the parties, or on the direction of the court.

SECTION 3 – GENERAL BACKGROUND

6. This section discusses the wider context within which decisions on the most appropriate mode of attendance need to be made.

What we mean by mode of attendance

7. In a very practical sense the three choices available when deciding on the potential mode of attendance for a civil court hearing are:
 - *an in-person hearing* - where all participants physically attend in a court building;
 - *a hearing with attendance by electronic means* - where all participants make a remote appearance by electronic means (either by video or by telephone); and
 - *a hybrid hearing* – which enables participants to attend through a mixture of both attendance by electronic means and attendance in-person.
8. When exercising that choice, there is a need to ensure that the chosen mode of attendance would not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice.

The operating model for hearings

9. Historically the civil courts have used in-person hearings as the mode of attendance for civil cases. This reflects that the majority of civil business could be accommodated in suitable spaces within the court buildings that are located within communities across Scotland.
10. As part of the Covid 19 response, the civil courts shifted to a hearing model whereby the majority of civil court business over the last eighteen months has taken place using attendance by electronic means. That change has freed up physical spaces within court buildings to enable the courts to focus on criminal case backlogs and those civil and tribunal cases that required an in-person hearing.
11. To support the Covid 19 response, the SCTS rapidly expanded its infrastructure by providing suitable technology platforms to support the required increase in attendance at hearings by electronic means:
 - the Cisco WebEx cloud hosted video platform enables remote appearances by video.

- Conference platforms were introduced enabling remote appearances by telephone. These have also preserved media and public access to hearings during the unprecedented pandemic period. The BT Meet Me platform is an audio conferencing service that only requires access from a fixed or mobile phone to enable virtual meetings with up to 40 participants and in some hearings in the sheriff courts, Cisco Conference call is used.
- The SCTS advise that its aim is for WebEx to be the default platform for hosting all electronic hearings where public or media access to the proceedings may be required, improving access and eliminating the need for them to dial in to hearings by telephone.

12. Relevant [information and guidance](#) on the use of these options is available online via the SCTS website.

Is that model consistent with the general direction of travel?

13. As society in general moves increasingly online, there is a need for modernisation of the courts so that they can keep pace with user expectations and can take advantage of the potential benefits offered by digital technologies.
14. The rapid addition of the two options for attendance at hearings by electronic means, as a direct complement to in-person hearings, is a strategic choice that is consistent with the direction set out in the [SCTS Digital Strategy 2018-2023](#) and its aim of reducing the need for unnecessary personal appearances in court. The Scottish Government's recently revised Digital Strategy: [A changing nation: how Scotland will thrive in a digital world](#) supports the preference for an ongoing shift to digital public services where that can improve the overall user experience.
15. Technology never stands still. The current user experience of attendance at hearings by electronic means is continually evolving in line with the incremental steps being taken by the SCTS to deliver continuous improvement in the underpinning platforms it uses to support such hearings. That includes a focus on potential changes within WebEx to incorporate breakout rooms so that better provision for private consultations between solicitors and their clients can be achieved during such hearings.

Support for the principle of open justice

16. The principle of open justice is often paraphrased as “the need for justice to be seen to be done”. This is so that the public can understand how the justice system works and why decisions are taken.

17. In the context of an in-person hearing, open justice is primarily achieved through the ability of the public and the media to observe civil court proceedings from the public gallery within a courtroom and the transparency and accountability that comes from the ability of a free and independent press to report on the outcome of those proceedings.
18. In the context of a hearing being conducted by electronic means, the approach to court users observing traditional court proceedings is mirrored where practicable:
- *registered journalists* - can apply to the court a) for dial-in numbers to hear telephone hearings and b) for joining instructions as attendees so that they may both see and hear video hearings.
 - *the public* - can apply to the court for a) a dial in number to hear telephone hearings and b) more limited joining instructions that, at present, will restrict them to only being able to hear video hearings.
19. The temporary restriction on the public being able to view hearings conducted by electronic means is expected to remain in place until appropriate safeguards can be devised to deal with potential contempt of court issues; i.e. the unauthorised recording and storage of images and sound, and the potential for misuse of that material through unauthorised broadcasting during hearings. Once these operational challenges can be resolved satisfactorily through technology, that restriction is expected to be lifted.
20. The vision for truly open justice should be one in which the public and the media should be able to see and hear video hearings. In the longer term that should ideally be achieved without having to make an application.

The ongoing public debate on in-person hearings versus hearings conducted by electronic means

21. In normal circumstances, the change to hearings conducted by electronic means since the Covid 19 pandemic began would have been consulted on and subjected to significant piloting before any national rollout. The pandemic overtook those conventions and the use of WebEx tools to support electronic attendance at hearings was introduced by the SCTS at pace.
22. The practical outcome is that over the last eighteen months the majority of civil court business has, of necessity, been progressed via attendance at hearings by

electronic means. The use of in-person hearings has been reserved for those particular cases that needed to be progressed through face-to-face appearances.

23. For some, the advent of electronic attendance at hearings has been transformational with significant perceived benefits such as avoiding unnecessary travel time to and from courts and reductions in the unproductive time spent sitting in court or in court waiting rooms.
24. For others, that shift is perceived as a step too far. They express a desire to revert to a greater use of in-person hearings which they see as a better means of assessing the credibility and reliability of witnesses, and of conveying the gravitas of the court.
25. The significant public debate on the merits of conducting hearings by electronic means as against in-person hearings is continuing both within Scotland and internationally.

The Scottish Context

26. On 10 May 2021, the Judicial Institute for Scotland hosted a Civil Court Conference exploring the user experience of the judiciary and legal practitioners whilst they have been responding to the Covid 19 pandemic. It sought their views on the perceived advantages and disadvantages of the increase in the use of electronic hearings that has taken place over the last eighteen months, and any efficiencies that the justice system should look to retain.
27. The conference Outcome Report is available [online](#) along with copies of all the papers submitted by speakers in advance of the conference. That evidence base reflects the extent of the public debate, and the strength of feeling both for and against an increased use of electronic hearings.
28. Striking the right balance between in-person hearings and electronic hearings will never be an exact science. At a remote video meeting on 24 May 2021, the Council concluded that it could usefully support the ongoing public debate by setting out its own thinking in draft rules. The rules cover what types of business should be under consideration when deciding which option might be the most appropriate mode of attendance for given hearing types. That is in-person attendance, attendance by electronic means or a hybrid approach.
29. The Council's preliminary views are set out in the proposed new rules that are included as a supporting document to this consultation.

Addressing the potential barriers in access to justice

30. Whilst attendance at a hearing using electronic means for video will be a suitable choice for those court users who are confident in using digital services, it may remain problematic for those who are not. Some of the barriers that can limit access to justice for those who are not digitally confident include:

Digital Exclusion

- Numerous surveys reflect the fact, that there remains a cohort (around 6.3%¹) of the adult population that have never used the internet. They will be unable to access digital services unless assisted by others. The reasons underlying such digital exclusion can be a personal choice or arise due to a range of factors that may inhibit access: e.g. a lack of relevant digital skills or the confidence to use them, an inability to afford the equipment or the broadband connectivity, or living in a geographical area where there is no or insufficient broadband connectivity.
- The Scottish Government and others are taking practical steps that will help reduce those barriers over time such as continuing to invest in increased broadband coverage in rural areas; supporting disadvantaged groups through the provision of devices, training and internet connections; and, the funding of access to digital assistance through relevant third sector organisations.

Differential Usage of the Internet

- In comparison to the general population, there are recognised differences in the way in which the internet is used by certain groups with protected characteristics, in particular the elderly and the disabled.
- To the extent that those parties cannot get online, they will be excluded from utilising digital services such as those that support attendance at hearings by electronic means (video). The Council has looked to make reasonable adjustments within its proposed rules in order to respond appropriately to the challenges faced by some elderly and disabled individuals.

Health and Wellbeing

- The use of screens can cause eyestrain and fatigue for those using devices for prolonged periods. To mitigate that risk, the courts respond where possible with the scheduling of frequent breaks.

¹ <https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2020>

Legal Terminology

- The language used by the legal profession along with any complex processes used by the courts can be intimidating and difficult to understand for lay courts users. This can be even more so for those with impairments. To mitigate such issues, the Council aims to express court rules in a manner that is as easy to use and understand as possible, whilst enabling the legal profession to work effectively.
31. When preparing draft rules to help mitigate potential access to justice issues, the Council is providing functions of a public nature. Under the Public Sector Equality Duty we must have due regard to the general equalities duties which are to eliminate discrimination, advance equality of opportunity and foster good relations.
32. Further detail on the steps we are taking to mitigate these potential access to justice issues, along with the reasonable adjustments that we can make within our proposed new rules, is included within our Equality Impact Assessment which is available as a supporting document to this consultation paper.

Timing

33. The emergency legislation supporting the increased use of electronic hearings is in part 1 of [Schedule 4](#) to the Coronavirus (Scotland) Act 2020. It covers the suspension of any requirements for physical attendance at court (para 2) in lieu of attendance by electronic means (para 3).
34. The legal choices around when our proposed rules would come into effect need to be settled but it would be no later than the point at which the emergency legislation is repealed. We are proposing a different approach that entails a greater level of choice than provided for in paragraphs 2 and 3 of [Schedule 4](#).

Other consultations

35. A recently issued Scottish [Government consultation](#) is seeking general feedback on which of the emergency measures could be suitable for retention, including general views on the use of electronic hearings (at paragraphs 148 to 152 of their consultation). The responses received will inform the development of any subsequent Bill tabled by the Scottish Government. The Scottish Parliament will then take the final decisions on any of those emergency measures that they support being made permanent within primary legislation.
36. Subject to consideration by members, the Council's likely response to the Scottish [Government consultation](#) is that we do support electronic hearings

becoming a more permanent feature within the justice system; and would suggest that clauses within a permanence Bill are drafted to support the greater level of choice indicated within our proposed rules.

SECTION 4: DEVELOPMENT OF THE NEW RULES

The instructions for drafting these rules

37. At the Council's meeting on 19 July 2021, the principles that should underpin the drafting of new rules to clarify decision making on the mode of attendance were discussed. The outcome of those discussions are summarised as:

- There should be new rules developed covering court procedures within both the Court of Session and the sheriff courts, with the aim of :
 - delivering improved consistency across courts (*given some of the feedback received to date on inconsistencies of practice between sheriffdoms and across individual courts*); and
 - delivering increased predictability for court users (*so that they may have a more informed view of why a decision might be taken*).
- The new rules should be issued for public consultation and there should be an accompanying Equalities Impact Assessment.
- The likely structure of the new rules on mode of appearance should reflect the following principles:
 - There should be a list of those categories of case considered most suitable for an in-person hearing. Examples might include:
 - proofs where there might be a significant issue of the credibility of parties or witnesses.
 - legal debates and appeals where there is a point of general public importance or particular difficulty and the in-person appearance of advocates may help the resolution of cases.
 - most hearings relating to family actions
 - There should be a corresponding list of those categories of case considered most suitable for a hearing where participants attend by electronic means. Examples might include:
 - procedural business.
 - business not involving the appearance of witnesses; e.g. legal debates.
 - business that can be carried out most expeditiously by electronic means even if it does involve the appearance of witnesses; e.g. commercial cases.
 - To support access to justice, there must be a safeguard provided in terms of a method for the parties to apply for an alternate mode of

attendance where there is cause for doing so; e.g. health conditions or disability, issues of digital exclusion, unreasonable travel distances etc.

- There should be a safeguard in terms of a method whereby the court can direct an alternate mode of attendance at its own hand, along with the test that it should apply when doing so.

The pre-requisites to an efficient hearing

38. The content of the proposed rules has been kept very specific to the case types relevant when fixing a preferred mode of attendance. For completeness, there are some other procedural matters that can help to underpin the efficient running of any electronic hearing:

Written Submissions

39. Guidance within Practice Notes can require the parties to provide written submissions to support the effective running of an electronic hearing. Some practitioners perceive this as creating an additional burden as they could otherwise make those submissions orally at an in-person hearing. Others consider that written submissions can assist the court by making information available in advance. That in turn can dramatically reduce the duration of a hearing. There is a balance to be struck between those competing viewpoints and the relative costs that each impose on the justice system.

Electronic Transmission of Documents

40. The efficiency of any electronic hearing is reliant upon the ability to share electronic documents that have been lodged in process in the knowledge that they have already been shared with the court and disclosed to other parties. This approach dramatically reduces the need for printing and provides a more environmentally sustainable process.

41. The SCTS has continued to expand the practical options available for lodging electronic documents including: the use of email for courts with smaller volumes; the use of the Civil Online portal for Simple Procedure documents and for documents (other than initiating documents) under Ordinary Cause Procedure; and, the selective use of Objective Connect software for the sharing of very large documents.

Electronic Bundles

42. For substantive hearings such as proofs, the guidance within Practice Notes may go further and require the parties to lodge an electronic bundle. That is an indexed, paginated and hyperlinked bundle of selected electronic documents and lists of authorities that is prepared for a substantive hearing in order to support all participants in a court case referring to the same item at the same time. On the potential benefits that can be retained, the feedback from one attendee at the recent Civil Justice Conference is highly relevant:

“We should put the days of unwieldy lever arch files behind us”.

Specialist Support Services

43. The court needs to be made aware of a) any specific requirements for specialist support services such as interpretation services, or supporters for vulnerable witnesses and b) how those particular needs may or may not be met within a system of electronic hearings.

The Council’s guiding principles

44. When proposing new rules, the Council must have due regard to the four guiding principles set out within the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013:

<i>Guiding Principles</i>	<i>Commentary</i>
The civil justice system should be fair, accessible and efficient	<p><i>Fairness</i> is supported by providing a general presumption only (by case type) along with safeguards for the parties, or the court, to respond to personal circumstances.</p> <p><i>Accessibility</i> is supported through having attendance at hearings by electronic means as an available option for those who are capable of using digital services and/or telephone conferencing services, and the availability of in-person hearings for those who are not.</p> <p><i>Efficiency</i> is supported for those cases that are appropriate for attendance at a hearing by electronic means, the participants can gain potential benefits i.e. reduced travel time, reduced waiting time at court.</p>

Rules relating to practice and procedure should be as clear and easy to understand as possible	These rules (as far as practicable) are narrated in a manner specific to addressing one very narrow question i.e. the most appropriate mode of attendance for a civil court hearing. This approach helps to counteract the complexity of the legal language that is still needed when describing each of the case types.
Practice and procedure should, where appropriate, be similar in all civil courts	The rules are underpinned by coherent policy and drafted in a manner that is designed to achieve procedural consistency within the Court of Session and the sheriff courts.
Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted	<i>Not Applicable</i> - these rules relate to cases where it has been determined that a court hearing needs to proceed.

The proposed new rules

Essential Features:

45. For each set of rules to be amended, the essential features of those new rules are the same:

- There are two lists provided that indicate a default position for cases suitable for in-person hearings and cases suitable for attendance at hearings by electronic means (both video and telephone); and
- There are safeguards provided through the two mechanisms (applicant led and court led) that allow for a non-default option to be taken.

Reasonableness Test:

46. When the mode of appearance is to differ from the default position, the rules include a reasonableness test. The court must be of the opinion that the mode of appearance would not a) prejudice the fairness of proceedings or b) otherwise be contrary to the interests of justice.

The sets of draft rules available for this consultation:

47. To test the general approach for the new rules, we have amended the two main sets of procedural rules (the Rules of the Court of Session (RCS) and the sheriff

court Ordinary Cause Rules (OCR)) in order to convey what we mean by the essential features.

48. Once we have received consultation feedback we will finalise the RCS and OCR as consulted on, and proceed to amend the other relevant procedural rules to mirror the agreed approach.
49. The draft Act of Sederunt setting out the proposed new rules is included as a supporting document to this consultation.

SECTION 5 – CONSULTATION QUESTIONS

50. Consultees are invited to consider the draft Act of Sederunt that sets out the proposed new rules for the mode of attendance at court hearings and thereafter respond to the following questions:

Rules of the Court of Session (RCS)

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

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

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

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.

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

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

Ordinary Cause Rules (OCR):

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

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

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

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

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

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

SECTION 6 – NEXT STEPS

51. Following the closing date for this consultation, individual responses will be published as soon as practicable on the consultation page of the Council's website (where respondents have given their approval for publication).
52. All consultation responses will be analysed by the Council's staff who will prepare a Response to Consultation paper for consideration by Council.
53. Having considered that analysis, the Council will issue appropriate drafting instructions for a) any proposed amendments to the draft rules as consulted on and b) extending that agreed approach across other relevant court procedural rules.
54. The proposed draft rules will be finalised and, subject to approval by the Council, will then be submitted to the Court of Session for consideration.
55. In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, the Court of Session must consider any draft civil procedure rules submitted to it by the Council and where approved, it must embody these approved rules in an Act of Sederunt and lay this with the Scottish Parliament.
56. The Act of Sederunt, when laid, will be considered by the parliament's Delegated Powers and Law Reform Committee.

ANNEX A – CONSULTATION RESPONSE FORM

RCS

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

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

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

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.

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

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

OCR

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

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

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

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

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

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

ANNEX B - RESPONDENT INFORMATION FORM

Please note this form **must** be returned with your response to ensure that we handle your response appropriately.

Name / Organisation

PERSONAL DETAILS

Title (*Optional*)

Forename

Surname

CONTACT DETAILS

Address and postcode

Phone

Email

1. PERMISSIONS

I am responding:

- As an individual (*complete section (a)*)
- On behalf of a group/organisation (*complete section (b)*)

INDIVIDUALS

(a) If responding as an **individual**:

- (i) **Do you agree to your response being made available to the public (on the Scottish Civil Justice Council website)? (Please tick as appropriate)**

Yes No

- (ii) **If you are content for your response to be published, please tell us how you wish us to make your response available to the public:**

Please tick ONE of the following boxes:

Make my response, name and address all available

Make my response and name available, but not my address

Make my response available, but not my name and address

ORGANISATIONS

(b) If responding as a **group or organisation**:

- (i) **The name and address of your organisation will be made available to the public on the Scottish Civil Justice Council website. Are you content for your response to be made available?**

Yes No