



Scottish
Civil Justice
Council

BUSINESS & REGULATORY IMPACT ASSESSMENT (BRIA):

For the court rules on: ATTENDANCE AT HEARINGS

PREPARED BY: The Secretariat to the Scottish Civil Justice Council (SCJC)

REGARDING: The Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Attendance at Hearings) 2023

LAST UPDATED: **10 March 2023**

Step 1 – POLICY BACKGROUND

Purpose and intended effect

Background:

The option to hold procedural court hearings by electronic means is a proportionate means of modernising the civil courts, which helps to deliver accessible services for a particular subset of court users; those who are able to engage effectively with a digital service.

Policy Objectives:

The policy objectives are:

- To **provide information** to inform users when deciding on the most appropriate mode;
- To **provide greater predictability** in the likely outcomes when deciding on mode; and
- To **promote consistency** in procedure between courts.

Definitions:

The three modes available are:

- *An electronic hearing* - has all participants attending remotely by electronic means (either by video or by telephone).
- *An in-person hearing* - has all participants attending a courtroom or hearing room.
- *A hybrid hearing* - is a hearing that combines a mixture of the above two modes.

Rationale for this intervention

The availability and use of electronic hearings within the civil justice system rapidly accelerated as part of the emergency response to COVID 19. User experience during the pandemic indicated the use of electronic hearings was seen as beneficial by some but problematic by others. A debate continues on the arguments for and against the increased use of remote hearings both within Scotland and internationally across all legal jurisdictions.

That debate falls within the Councils' statutory function of keeping the civil justice system under review. It highlights the pragmatic need for the parties and the courts to be able to strike the right balance when deciding on the right mode of attendance for a hearing.

The four reasons for taking action now are:

- To agree a new procedure in advance of the [Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#) reaching its next expiry date of 30 November 2023 (which may be extended).
- To convey the courts preference for hearings dealing with procedural business only to take place by electronic means.
- To convey to users that they can lodge an oral or written motion to seek an alternate mode.
- To support a more consistent approach across the courts.

Consultation

Public Consultation

The Council issued a [Consultation Paper](#), illustrative rules, EQIA and BRIA on 6 September 2021, along with a response form and a respondent information form. That consultation closed 15 November 2021 with 82 [responses received](#) and the [Analysis of Responses](#) report was published 7 January 2022. The Councils response to that feedback has been:

- To withdraw the draft rules instrument as consulted on;
- To finalise a new rules instrument that reflects the feedback received.

Sectors and groups affected

These new rules are specific to hearings in the civil justice system.

Who is affected?

The '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

The 'occasional users' who interact with the court on very 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?

These new rules add information on the courts preference into the public domain, to inform both recurrent and occasional court users.

Options

Option 1 - Do Nothing

This maintains the status quo. The choice on mode is made at the discretion of the court, and in line with the interests of justice. A court order fixing a procedural diet would reflect the information to hand within the case papers, and representations from the parties.

Option 2 - New Rules

The new rules add information on the courts preference into the public domain, to help inform the same decision making process on mode. The benefits sought are:

- A reduction in any inconsistencies of practice across courts; and
- An improvement in predictability of the mode most likely to be appropriate when a hearing is dealing with procedural business only.

The information provided will:

- Communicate the courts preference for procedural hearings to take place by electronic means (where practicable).
- Convey to users a simple procedure for choosing an alternate mode.

Benefits

Benefits - Option 1 - Do Nothing

None – seeking orders on mode of attendance on a case-by-case basis remains an entirely valid choice, but some inconsistencies of practice may remain.

Benefits - Option 2 - New Rules

The benefits from providing this information are:

IMPROVED CONSISTENCY – Adding information on the courts preference should support a greater consistency of practice when fixing diets for procedural hearings.

INCREASED PREDICTABILITY – The general steer given to users is that:

- The court has a preference for procedural hearings to take place by electronic means (where practicable); and
- The parties are able to request the mode (virtual, in-person or hybrid) which they think is most appropriate for their hearing.

Costs

Costs - Option 1 - Do Nothing

Nil

Costs - Option 2 - New Rules

Consultation Costs - the Council met the costs for running the Public Consultation, analysing the consultation responses, and maintaining the BRIA and EQIA. The Lord Presidents Private Office met the costs for preparing the draft rules for consultation.

Implementation Costs - the costs for implementing these finalised rules includes:

- *Drafting Costs* - The Lord Presidents Private Office meets the costs for preparing, making and laying these new rules.
- *Familiarisation Costs* - prior to commencement practitioners will incur costs in familiarising themselves with the new rules, which will be minor as practitioners are already familiar with participating in virtual hearings.

Step 2 – ASSESSMENT OF LIKELY IMPACTS – ON BUSINESS

Impacts – for anyone who attends a virtual hearing

The technical capability to hold virtual hearings predates these rules. It was put in place as part of the pandemic response. The impacts for those attending any virtual hearing are:

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* – the factors underpinning digital exclusion are subject to judicial attention at the point where the court considers the mode that should apply, and issues the order fixing that diet.

Health & Wellbeing:

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

Communication Skills:

- *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 individual proceedings adjusted to support 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 improved access for those journalists who would otherwise have been unable to observe proceedings from the public gallery in a courtroom. Subsequent reporting of those hearings enables wider dissemination of case outcomes.
- *Positive Impacts – for the General Public* – anyone otherwise unable to physically attend the public gallery in a courtroom 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 have put safeguards in place and offer that service.

The Council has published a separate Equalities Impact Assessment (EQIA) which narrates the potential impacts on those with protected characteristics in more detail.

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

The impacts are:

Continuing Professional Development

- *Negative Impacts – Training Opportunities* - If a trainee ends up attending more virtual hearings than in-person hearings, their ability to build oral advocacy skills within the cut and thrust of a live courtroom can be impaired. They may 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 had required their physical attendance at a courtroom. There is an opportunity for further improvement where significant cases are recorded and made available for training purposes.

Career Development

- *Negative Impacts – Interactions with colleagues* - If a trainee solicitor routinely ends up attending more virtual hearings than in-person hearings their ability to build professional contacts may be impaired, which may harm their career and their ability to generate business when establishing a private practice.

Remote Working

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

Communication Skills

- *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 being an essential part of being able to reach settlement at the door of the court.
- *Reasonable Adjustments* – practitioners use a range of technology solutions (text, email, WhatsApp) in order to interact with client’s pre and post hearing. Those alternatives can lack the immediacy that accompanies ‘the tug of the gown’ during an in-person hearing. There is an opportunity for further improvement if Webex updates the use of virtual breakout rooms to better support confidential interviews during a hearing.
- *Negative Impacts – Interactions with colleagues* – the physical environment within specialist court buildings can 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 may detract from the collegiality of the legal profession in Scotland, and act as a barrier to the settlement of disputes pre-hearing.

Recruitment

- *Negative Impacts – Judicial Recruitment* – a potential career path for a law student may run from trainee to qualified practitioner to judge. If experience of oral advocacy in a live courtroom is not fully tested it might potentially 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 and the [Analysis of Responses](#) report are available via the Councils website. The policy decisions taken in response are reflected in the new rules that have been agreed.

Step 3 – ASSESSMENT OF LIKELY IMPACTS – ON COMPETITION

To support initial screening for competition impacts, the Council uses the checklist of four questions recommended¹ by the Competition and Markets Authority (CMA):

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

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

- *Digital Capabilities* - Suppliers within the legal services market that do not operate digitally will struggle to compete. Clarifying information via these rules will not be the root cause of any ongoing viability problems for those suppliers.
- *Instruction of Local Agents* – historically central belt legal firms instructed local agents to appear in court on their behalf for in-person appearances at rural courts. Post pandemic several central belt firms prefer to appear virtually. That may impact the financial viability of some rural firms; if agency work was a dominant part of their income.

Will the measure limit the ability of suppliers to compete?

- *Digital Capabilities* – any suppliers within the legal services market that do not operate digitally have placed their own limits on their ability to compete. They would have already exited the market if they did not participate effectively during the pandemic. The information added by these rules will not be the root cause of their inability to compete.

Will the measure limit suppliers' incentives to compete vigorously?

NO - Improving the information within rules does not change the incentives to compete. Given the hourly rates charged, it is reasonable to expect that a party paying for legal representation would challenge the quality of service provided if a firm lacks a demonstrated competence with technology.

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

NO – These new rules do the opposite. They clarify choice and indicate a preference.

Step 4 – ASSESSMENT OF LIKELY IMPACTS – ON CONSUMERS

To support initial screening for consumer impacts, the Council mirrors the best practice² 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 virtual hearings in general as a lower cost option and push for differential pricing. An analogy would be the calls for universities to reduce student fees, in response to shifting a significant amount of course content to online learning platforms.
- *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. Post pandemic, lawyers in those central belt forms can appear virtually. Consumers will perceive that as an increase in quality i.e. a principal lawyer with knowledge of their case would better represent their interests, compared to a local agent with minimal previous involvement.

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

² [BRIA Guidance \(Oct 2015, SG\)](#)

NO

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

YES - Significant data is captured, stored and shared as part of the case management activities within the courts, and as part of the disclosure of case specific information between parties. The SCTS publishes selected data into the public domain on court rolls, where cases do proceed to hearings. The increased data when extending the use of remote hearings includes a) the joining instructions issued for virtual or hybrid hearings, and b) the performance monitoring data for 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 are required to comply with the Digital Standards set by Scottish Government; in order 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 – The new rules clarify the preference of the court, and clarify user choice.

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

NO – The routes for complaints remain unchanged. The routes to advice remain unchanged. Advice providers will be better informed through the information added.

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

Digital Impact Test

There is an increase in public services delivered online. To test for relevant opportunities the Council mirrors the best practice³ 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?

³ [BRIA Guidance \(Oct 2015, SG\)](#)

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 is not mandatory. An in-person hearing remains an equally valid choice. The information added supports striking a balance in 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. The same providers readily support virtual hearings.

In theory; adverse impacts could arise if one provider made expertise in virtual hearings their unique selling point with the aim of gaining significant market share as a result.

Step 5 – ASSESSMENT OF LIKELY IMPACTS – ON REGULATIONS

Covid

Will the proposal require changes in any Covid related measures that remain in force?

YES – arrangements for virtual hearings in both criminal and civil courts were part of the emergency measures put in place during the response to the pandemic, which were continued as part of the Coronavirus (Recovery and Reform) Act 2021. Regulations are to be made for the repeal of some of the arrangements made under schedule 1 of that Act.

Legal Aid

Will the proposal require changes in legal aid regulations?

INDIRECTLY – individual line items for practitioners may require amendment for 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*).

Recovery of Costs Awarded

Will the proposal require changes in Judicial Taxation regulations?

INDIRECTLY – individual line items may require amendments for any 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

The new rules only provide a general steer on mode of attendance, with the safeguard of being able to choose the alternate. To support natural justice, the final decision on mode of remains a matter for judicial 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 is linked to the dates on which the [Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#) reaches its next expiry date of 30 November 2023 (which may be extended). The Ministers support prior revocation, with a target commencement date of 3 July 2023.

How will this proposal be implemented?

The Court of Session will:

- Consider the proposed new rules;
- Decide whether to approve or reject the new rules; and if approved
- Arrange publication of the new rules.

Following publication of the Act of Sederunt, its content will be 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 – the arrangements for monitoring include:

Qualitative Monitoring:

- Monitoring requests lodged for clarification or amendment of the rules;
- Monitoring media coverage relative to the rules in use; and
- Seeking feedback on the rules in use.

Quantitative Monitoring:

- The level of motions lodged seeking a change of mode.

Post Implementation Review

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

POSSIBLY- if there is an evidence base of negative user experience, the secretariat would trigger a Rules Review exercise.

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