



Scottish
Civil Justice
Council

EQUALITY IMPACT ASSESSMENT:

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

What is the purpose of this policy?

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 appropriate mode;
- To **provide greater predictability** in the outcomes when deciding on mode; and
- To **promote consistency** in procedure between courts.

Definitions:

The three modes 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.

Why is this policy being developed or revised now?

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 indicates that 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 electronic 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 court 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 that the court has a preference for hearings that are 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.

How are staff and / or customers affected by this policy?

Court Users

The new rules provide the parties to civil proceedings, practitioners and the media with greater visibility of:

- The courts preference for procedural hearings to take place by electronic means; and
- The use of motion procedure for choosing an alternate mode.

That will improve user understanding of how the civil courts take these decisions.

Court Staff

The new rules clarify the guidance and enable staff to convey that information to others. Otherwise, these new rules have minimal impact as existing business processes support each mode of attendance (electronic (video or telephone), in-person or hybrid). Staff have experience with each hearing type. Staff may notice some shifts between hearing types as the judiciary, practitioners and parties adjust to the new rules.

Judicial Office Holders

The rules support transparency and consistency in judicial decision-making. Future judicial feedback on the rules in use will support the Council in monitoring their suitability and responding to suggested improvements (e.g. updates to training, guidance, or rules).

Council Members

A disproportionate number of motions lodged, for changing mode, would indicate a potential need for review.

What research has influenced the development of this policy?

Judicial Decision Making

Equal Treatment Bench Book – The [equal treatment bench book](#) sets out in some detail the way in which the judiciary in Scotland currently respond to the needs of all those with protected characteristics.

Judicial Discretion - There is an overarching duty on the court to protect the right to a fair hearing and to ensure that cases do proceed in the interest of justice. To do that, the court regularly makes directions that take into account the specific circumstances affecting the parties to civil proceedings; including decisions on the mode of appearance chosen so that all parties can participate effectively during such hearings.

Business Levels

Backlogs – The Covid 19 pandemic negatively affected the operations of the courts with significant delays arising in the backlog of criminal trials. Running additional courts is helping to reduce those backlogs, and prioritising the use of courtrooms for criminal business can assist that recovery. In a practical sense, the number of civil cases diverted to a virtual hearing helps to support the reductions in system backlogs.

Technology

Digital Strategy – Over the last decade, court jurisdictions were progressively introducing the use of electronic hearings as an additional option for both criminal and civil business. That provides a substantial literature base on the advantages and disadvantages of an electronic model, along with the key lessons learned on that journey. That background underpinned the [SCTS Digital Strategy 2018-2023](#). It sets a clear direction of travel based on the gradual adoption of digital technologies within the courts, with a particular emphasis on reducing the need for unnecessary personal appearances in courtrooms.

In March 2021, the Scottish Government refreshed its own digital strategy and published [A changing nation: how Scotland will thrive in a digital world](#). When moving services online there is a need to ensure that: everyone can access services, there is a reduction in inequalities, and that the least advantaged in society are not excluded from the services they may need the most.

Digital Standards – In February 2021, the Scottish Government launched the [Digital Scotland Service Standard](#) as a replacement for the previous Digital First Service Standard. When designing and delivering digital services the SCTS works towards meeting those standards. Standard number 5 (make sure everyone can use the service) is of particular relevance regarding equality impacts.

Video Platform - the rollout of the WebEx platform to support video hearings enabled a key element of the [SCTS Digital Strategy 2018-2023](#). Its use rapidly accelerated as part of the pandemic response and it is subject to continuous improvement. That includes

ongoing development of breakout rooms to improve the way in which parties can consult their legal representatives in confidence during a live hearing.

Telephone Platform – The SCTS uses the BT MeetMe service to support electronic hearings taking place via telephone. It is an instant audio conferencing service that requires access from a fixed or mobile phone to enable virtual meetings with up to 40 participants. SCTS also use Cisco Conference call for some hearings in the sheriff courts. Some participants in electronic hearings prefer video hearings over telephone hearings, particularly for Child Welfare Hearings. Guidance from Sheriffs Principal supports a shift towards the increased use of video hearings. Most hearings in family cases (including Child Welfare Hearings) should be conducted in-person.

Equalities

Inclusive Justice: A System Designed For All, – In June 2020, the Equality and Human Rights Commission published the outcome of their [review](#) into the way in which those with disabilities are treated by the justice system in England and Wales, and in Scotland. The report has a particular emphasis on the way technology roll out takes place and its potential impacts on the disabled accused.

User Experience

Civil Justice Conference (May 2021) – the Judicial Institute hosted a video conference for the judiciary and practitioners to share their experiences of handling civil business remotely during the response to the Covid pandemic. The outcome report, and papers circulated by speakers, are available [online](#). The conference captured a wide range of views on user experience of remote hearings, along with the advantages and disadvantages.

Public Consultation (Sep-Nov 2021) – the Councils own public [consultation](#) exercise on modes of attendance ran for 10 weeks and generated 82 [individual responses](#) covering the experiences of court users in some detail. The Council published the [Analysis of Responses](#) report in January 2022.

How does this policy support the public sector equality duty?

The Council does not provide front line public services. It does provide ‘functions of a public nature’ when proposing draft court rules for consideration by the Court of Session, so it does give ‘due regard’ to the general equality duties under the Equalities Act 2010:

Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.

To ensure they are neutral in their effect on those with disabilities and those without, the new rules were drafted so that:

- They only convey a preference for ‘procedural hearings’ taking place by electronic means, with users making representations on which of the three modes (*virtual, in-person or hybrid*) they believe most appropriate for their hearing.

A number of those with impairments prefer not to disclose the nature of their impairment. The drafting approach is consistent with that preference, although where an impairment might affect a person’s ability to participate effectively that should be flagged to the court. The court can then direct the mode of attendance that best facilitates effective participation.

Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.

The rules provide a general steer only. For those with impairments, disclosure to the court of factors unique to their circumstances can help support effective participation. That will increase equality of opportunity for some people with protected characteristics:

- Virtual hearings can benefit those with mobility or stamina related disabilities who may otherwise be unable to travel to court to attend in-person.
- In-person hearings can benefit those with a learning disability who can participate effectively through face-to-face contact but struggle attending by electronic means.

Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The new rules should assist both those with disabilities and those without in their understanding of the way in which the justice system works and how the courts approach the task of issuing directions on the appropriate type of hearing.

How has feedback from equality groups helped to this shape the policy?

Feedback from a wide range of Equalities Groups across multiple jurisdictions is already in the public domain as part of the debate on the advantages and disadvantages of electronic court appearances. The information provided within this EQIA incorporates that feedback along with the engagement work undertaken by the SCTS with equalities groups, and the responses received in response to the Councils consultation.

Step 2 – ASSESSMENT OF LIKELY EQUALITY IMPACTS

When considering equality impacts, readers should note the differing roles of the organisations that support the judiciary:

- The “rule making” function sits with the Scottish Civil Justice Council (SCJC) - it is responsible for making reasonable adjustments within any proposed rules, to anticipate the needs of those with impairments.
- The “service delivery” function sits with the Scottish Courts and Tribunal Service (SCTS) - they deliver the frontline digital services (*websites, video platform,*

telephone platform, helpdesks etc.) that support the rules in use. They make reasonable adjustments within the front line services.

This EQIA is narrated from the Council's perspective with a focus on the rule making function. For completeness we signpost some work the SCTS undertakes to continually improve delivery of frontline digital services.

**ALL
COURT
USERS**

DIGITAL EXCLUSION

DATA - The Office of National Statistics (ONS) provides a statistical bulletin on [UK Internet Users](#) which indicates that 92% of adults were recent internet users in 2020 (up from 91% in 2019). The same bulletin indicates that 6.3% of adults in the UK have never used the internet (down from 7.5% in 2019)

That 6.3% of the adult population represents a significant volume of individuals who remain digitally excluded and some of their underlying reasons for not using the internet include:

- *Digital Skills* – individuals may lack digital skills or not have the confidence to engage with and use a digital service or simply choose not to use the internet.
- *Digital Devices* – some individuals cannot afford to buy their own equipment, or are unable to gain access to such equipment through friends or local support providers.
- *Connectivity* – some individuals may have both the equipment and skills but still cannot get online effectively e.g. they cannot afford a broadband connection, or their connection speed is too poor to support video or they live in a remote rural area that has yet to receive high quality broadband coverage.

Steps being taken to mitigate the effects of digital exclusion on the population of Scotland include:

- *Support Providers* – a number of third sector providers such as Citizens Advice and Age Scotland provide access to devices and connectivity for their particular client groups, along with digitally confident staff to support those who lack digital skills or confidence.

NOTE - the pandemic did constrain the level of face-to-face assistance that could be provided at that time

- *Improving Access to Devices and Skills* – the Scottish Government's "Connecting Scotland" project responded to the pandemic by providing an internet connection, training and support and a laptop or tablet, so that most vulnerable and digitally excluded people in Scotland can access services online. It aims to bring 55,000 people online by the end of 2021.

- *Improving Connectivity* - the £463m invested in Digital Scotland's "Superfast Broadband Programme" has resulted in 950,000 homes and businesses having access to extended fibre broadband, and that includes 75% in Shetland and 79% in the Western Isles. That said 20% of Scotland are yet to get full 4G coverage and this programme continues to address that gap.

In order to maintain the interests of justice, an overarching aim for the courts is for all parties to be able to participate effectively in their proceedings. The extent to which parties cannot access suitable IT equipment, or the skills to use it, is a known barrier to the use of electronic hearings:

Reasonable adjustments in court rules:

- *Effective Participation* – the rules reflect that the judiciary will take the factors that underpin digital exclusion into account when fixing the mode of attendance.

Reasonable adjustments in digital services

- *Accessibility* – any digital services provided by the SCTS need to be compliant with the [Digital Scotland Service Standard](#) including: accessibility standards for websites, support for assistive devices etc.
- *Information and Guidance* – the SCTS provides a range of information to assist court users including [online](#) guidance for electronic attendance at hearings. To support video hearings that guidance includes: advice on technology requirements and testing of connections before hearings, advice on court etiquette, links to online support from WebEx for troubleshooting, and details for joining hearings by telephone as a backup if required.
- *Assisted Digital Support* – the SCTS continues to develop its strategy for assisted digital services so that there is support for those who have difficulty engaging with electronic hearings due to digital exclusion.

LEGAL TERMINOLOGY

The legal profession does use complicated legal terminology that can make the procedures in the civil courts difficult to understand for

both party litigants and represented parties. That becomes far more problematic for those with more complex communication needs.

Electronic Hearings – negative impacts

- *Video Hearings* – For those 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 if the complex legal language and processes hinders their understanding and ability to participate

Reasonable adjustments in court rules:

- *Information & guidance* – the statutory guiding principles of the SCJC require the making of rules that are “as easy to use and understand as possible”. These rules are narrated with that principle in mind.
- *Effective Participation* – these rules are consistent with the existing duty on the judiciary to monitor that those with impairments can understand what is happening during hearings, and that proceedings can be adjusted to support their effective participation

All court rules are available online via the rules tab on the SCTS website. For lay users the ability to access those rules does require prior knowledge, along with the skills required to navigate webpages.

HEALTH AND WELLBEING

Electronic Hearings – negative impacts

- *Video Hearings* - Prolonged time spent in front of screens can cause eyestrain and fatigue for all involved

Reasonable adjustments in working practices:

- *Regular Breaks* - to help minimise the adverse health effects that can arise for all participants during a video hearing, the courts schedule regular breaks and some users revert to using printed versions of documents.

OPEN JUSTICE

For electronic hearings that take place by phone: – the SCTS provides both registered journalists and members of the public with dial in links so that they can “hear” those civil proceedings.

For electronic hearings that take place by video: - the courts are exploring further safeguards in order to a) identify any potential

	<p>abuse of process where images of participants (or productions) are recorded and broadcast inappropriately and b) enable any transgressors to be held in contempt in a legally effective manner.</p> <p>At present:</p> <ul style="list-style-type: none">• Registered journalists are able to apply for “attendee” status so they can “see and hear” those civil hearings that take place by video.• Members of the public are limited to dial in access that means they can only “hear” those civil hearings that take place by video. <p>Once the courts improve the safeguards for video hearings, the public should gain the same access as the press and be able to “see and hear” video proceedings. That can deliver a step increase in the ability for justice “to be seen to be done”.</p> <p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none">• <i>Registered Journalists</i> – 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 may otherwise have been unable to observe proceedings from the public gallery in a courtroom• <i>General Public</i> – for those members of the public who would otherwise be unable to attend the public gallery in a courtroom, the added ability to “hear” either telephone or video hearings has partially improved their access to justice. <p><u>Electronic Hearings – negative impacts</u></p> <ul style="list-style-type: none">• <i>General Public</i> – those members of the public who want the full ability to “see and hear” an electronic hearing without the need to make an application will remain frustrated until such time as the courts offer that service. <p>REASONABLENESS</p> <p>The legal test is that: the court needs to be of the opinion that the chosen mode of appearance would not a) prejudice the fairness of proceedings or b) otherwise be contrary to the interest of justice.</p> <p>SUITABLE PLACE</p> <p>The guidance given to those capable of engaging with a digital service is that they should do so from a suitable place that is quiet,</p>
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	<p>free from interruptions and appropriate for making a court appearance. Not all participants have access to such a place, particularly if they have caring commitments or multiple people work from the same home.</p>
<p>AGE</p>	<p>DATA – Compared to the general population there remains a large cohort of the elderly that do not use the internet through personal choice or because they find the use of technology challenging. The Office of National Statistics (ONS) statistical bulletin on UK Internet Users indicates that only 54% of adults aged 75 or over were recent internet users (compared to 99% of adults aged 16 to 44). That means the elderly are more likely to be excluded from meaningful participation in an electronic hearing unless they have access to support from friends and family or can access assistance through suitable support providers.</p> <p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Elderly court users who are digitally confident</i> - will be able to appear online confidently allowing them to avoid the inconvenience of travelling to court, and any unnecessary waiting time in court buildings. • <i>Children and vulnerable adults</i> – the ability to appear electronically can help to reduce the fear and apprehension, and potential trauma, involved when a child or vulnerable adult attends a hearing personally in a court building. Many see access to video hearings as an improved service compared to the existing special measure of a Live TV link. Switching a camera off during a remote hearing can be used to mirror the special measure of physical screens as used within a courtroom. <p><u>Electronic Hearings – negative impacts</u></p> <ul style="list-style-type: none"> • <i>Elderly court users who are not digitally confident</i> - will struggle to engage with an electronic video hearing particularly if there is any failure to meet accessibility standards via the WebEx platform which would hinder navigation and reading of information, or if there is an inability to support their use of assistive devices. <p><u>Reasonable Adjustments in court rules</u></p> <ul style="list-style-type: none"> • <i>Safeguards</i> – the new rules safeguard the elderly as they are able to seek either an in-person hearing or a hearing by electronic means, or the court can direct a change.

	<ul style="list-style-type: none"> • <i>Safeguards</i> – the new rules safeguard a child or vulnerable adult as they can seek either attendance at a hearing by electronic means or an in-person hearing, or the court can direct a change. <p><u>Reasonable adjustments in digital services</u></p> <ul style="list-style-type: none"> • <i>Accessibility</i> – the digital services provided by the SCTS need to be compliant with the Digital Scotland Service Standard including: accessibility standards for websites, support for assistive devices etc. • <i>Information and Guidance</i> – the SCTS provides a range of information to assist court users including online guidance for attendance at hearings by electronic means. To support video hearings, that guidance includes: advice on technology requirements and testing of connections before hearings, advice on court etiquette, and links to online support from WebEx for troubleshooting. The guidance includes details for joining hearings by telephone as a backup. • <i>Assisted Digital Support</i> – the SCTS continues to develop its strategy for assisted digital services so that those who have difficulty engaging with electronic hearings due to an impairment are supported to do so.
<p>DISABILITY</p>	<p>DATA –The Office of National Statistics (ONS) statistical bulletin on UK Internet Users indicates that the number of disabled adults who were recent internet users in 2020 reached almost 11 million (81% of disabled adults) up from just over 10 million (78% of disabled adults) in 2019. Compared to the general population figure (92% recent internet users) that leaves a significant cohort of disabled people (19%) who do not use the internet and they will be excluded from effective participation in an electronic video hearing (unless they have access to suitable support)</p> <p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Disabled court users who are digitally confident</i> - will be able to confidently attend a hearing by electronic means which allows them to avoid unnecessary travel to court, and unnecessary waiting time in court buildings. For some it will also avoid the considerable organisation and expense that can be involved in arranging support for their travel to and from court buildings • <i>Disabled court users with access to support services</i> - will be able to attend a hearing by electronic means if they have access to appropriate assistance to accommodate their particular

	<p>disability. Where that's practicable it allows them to avoid unnecessary travel to court, and unnecessary waiting time in court buildings</p> <p><u>Electronic Hearings – negative impacts</u></p> <ul style="list-style-type: none"> • <i>Disabled court users who are not digitally confident</i> - will struggle to engage with attendance at a hearing by electronic means, particularly if there is any failure to meet accessibility standards via the WebEx platform, or there is an inability to support their use of assistive devices. • <i>Disabled court users with significant communication needs</i> - may be unable to participate effectively in any hearing where attendance is by electronic means and there is a risk that the court could misinterpret their attitude / responses during such a hearing. <p><u>Reasonable adjustments in court rules</u></p> <ul style="list-style-type: none"> • <i>Safeguards</i> –those with a disability are able to seek an in-person hearing or a hearing by electronic means, or the court can direct that change. <p><u>Reasonable adjustments in digital services</u></p> <ul style="list-style-type: none"> • <i>Accessibility</i> – the digital services provided by the SCTS need to be compliant with the Digital Scotland Service Standard including: accessibility standards for websites, support for assistive devices etc. • <i>Information and Guidance</i> – the SCTS provides a range of information to assist court users including online guidance for attendance at hearings by electronic means. To support video hearings that guidance includes: advice on technology requirements and testing of connections before hearings, advice on court etiquette, and links to online support from WebEx for troubleshooting. The guidance includes details for joining hearings by telephone as a backup. • <i>Assisted digital support</i> – the SCTS continues to develop its strategy for assisted digital services so that there is support for those who have difficulty engaging with electronic hearings due to an impairment.
<p>GENDER REASSIGNMENT</p>	<p>No significant impacts identified</p>
<p>MARRIAGE & CIVIL PARTNERSHIP</p>	<p>No significant impacts identified</p>

PREGNANCY & MATERNITY	<p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Pregnant women who are digitally confident</i> - will be able to attend hearings by electronic means and reduce the anxiety that can be involved in terms of managing their health during pregnancy. That can allow them to avoid the inconvenience of having to travel to court and the unnecessary waiting time in court buildings. If they already have children or other dependants, it can also assist with working around caring commitments.
RACE	<p><u>Electronic Hearings – negative impacts</u></p> <ul style="list-style-type: none"> • <i>Users where language is a barrier</i> – for those who use English as a second language, or do not understand English at all, there will be significant added complexity when trying to utilise an interpreter during an electronic video hearing. The act of translating within a video hearing can take significantly more time in comparison to a translation in a physical court setting. <p><u>Reasonable adjustments in court rules</u></p> <ul style="list-style-type: none"> • <i>Safeguards</i> – these rules disapply the courts preference for a virtual hearing if an interpreter is required.
RELIGION & BELIEF	<p>No significant impacts identified</p>
SEX	<p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Children and vulnerable adults</i> – appearing electronically can help to reduce the fear and apprehension, and potential trauma, involved when a child or vulnerable adult attends a hearing personally in a court building. That can apply particularly for those whose civil action may have arisen from a situation of domestic abuse. Some court users see access to electronic video hearings as an improved service compared to the existing special measure of a Live TV link. Switching a camera off during a remote hearing can be used to mirror the special measure of physical screens as used within a courtroom. • <i>Users with caring responsibilities</i> – Parties with younger children often have to arrange carers or work around drop off and collection times for school runs and nursery runs. Attendance at a hearing by electronic means can assist with meeting those caring commitments whereas an in-person hearing may require alternative care arrangements to accommodate any delays at court and potential travel times. <p><u>Electronic Hearings – negative impacts</u></p> <ul style="list-style-type: none"> • <i>Children and vulnerable adults</i> – in comparison to a personal appearance in a court building; appearing electronically can help to reduce the fear and apprehension, and potential trauma, involved when a child or vulnerable adult attends. However, for

	<p>some users (particularly for those whose civil action may have arisen from a situation of domestic abuse) revisiting their personal and sensitive issues via a virtual appearance from their own home will still cause distress and increase their sense of isolation. It may also carry a fear of reprisal.</p> <p>DATA - Parental caring duties are the responsibility of both parents, however in the UK, Office of National Statistics¹ data show that women carry out an overall average of 60% more unpaid work (than men) when it comes to childcare, cooking and housework. Where these proposals do assist with caring responsibilities, it can benefit women in particular.</p>
SEXUAL ORIENTATION	No significant impacts identified.

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<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womensshouldertheresponsibilityofunpaidwork/2016-11-10>