Scottish Civil Justice Council

ANALYSIS OF RESPONSES: To the Mode of Attendance consultation

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SECTION 1: INTRODUCTION

Purpose

1. This paper provides an analysis, by the secretariat to the Scottish Civil Justice Council, of the eighty-two (82) responses received to the Council's consultation on the Mode of Attendance at court hearings.

Key facts

2. During 2021, the Council ran a full public consultation exercise seeking views on draft rules covering the Mode of Attendance at court hearings. The key facts are:
   - The Mode of Attendance consultation was run over a ten-week period that opened 6 September 2021 and closed 15 November 2021;
   - Views were sought on the ten consultation questions summarised in annex 1;
   - The Council received eighty two (82) responses, and a list of those respondents is included as annex 2 of this paper; and
   - Permissions were given to publish seventy (70) of the responses received, which were made available for viewing online from 25 November 2021.

Why the consultation was undertaken?

3. The Councils statutory remit includes keeping the civil justice system under review and within that context:
   - A rapid increase in the use of remote hearings has been an essential feature of the emergency response to the Covid pandemic over the last twenty one months; and
   - That has led to a significant and ongoing debate on the merits of remote hearings and the desirable scope of their continued use in Scotland.

4. The Council took the view that the promulgation of draft rules was a useful vehicle to help progress what has been a highly polarised debate. The policy objectives for any new rules that might emerge following this consultation process were:
   - To deliver **increased predictability** for court users *(so that they have a more informed view on how and why a decision on mode might be taken);* and
   - To deliver **improved consistency** across the courts *(to resolve any inconsistencies of practice that may be impacting on court users).*

Timings

5. The emergency legislation that supports the increased use of electronic hearings can be found in part 1 of Schedule 4 to the Coronavirus (Scotland) Act 2020. That schedule covers the suspension of any requirements for physical attendance at court (para 2) in lieu of attendance by electronic means (para 3).

6. That emergency legislation is now due to expire on 31 March 2022, although the Scottish Ministers may choose to seek a further extension until 30 September 2022. If Ministers do not seek that extension, or if the Scottish Parliament overturns that request, the Council may need to seek enabling powers as a prerequisite to making rules that enable the option of fixing a remote hearing to continue within the civil courts.

Responses

7. There were eighty-two (82) responses received to this consultation: sixty-six (66) from various organisational groupings and sixteen (16) from individuals.

8. Those eighty-two (82) responses can be broadly grouped into the following categories:

	NUMBER OF RESPONSES			
CATEGORY OF RESPONDENT	Organisations	Individuals	COMBINED TOTAL	*% Mix (by category)*
Judiciary	3	1	4	*4.9%*
Legal Profession - Advocates	9	4	13	*15.9%*
Legal Profession - Solicitors	42	10	52	*63.4%*
Justice System - Service Providers	3		3	*3.7%*
Justice System - User Groups	1		1	*1.2%*
Other Public Bodies	1		1	*1.2%*
Consumer Bodies	1		1	*1.2%*
Advice Agencies	1		1	*1.2%*
Other	5	1	6	*7.3%*
TOTALS	66	16	82	*100.0%*
% mix (by response type)	*80%*	*20%*	*100%*	

9. Views from those who work within the civil justice system as a matter of routine dominated the responses received at 89%. Responses from other public bodies, consumer bodies, advice agencies, other organisations and individual citizens formed the remaining 11% of the responses. Given the absence of a significant volume of balancing responses from litigants and the general public, **readers should note the strong potential for bias** when professional responses dominate the respondent views covered by this analysis.

10. In line with the permissions given, the secretariat uploaded seventy of the individual responses to the consultations page of the Councils website on 25 November 2021. That reflected eleven respondents who asked for their names not to be published and twelve respondents who asked for their individual response not to be published.

Supporting documents

11. A number of the professional respondents noted how training opportunities and career development for new entrants to the legal profession could suffer if virtual hearings were to continue as the dominant form of civil proceedings and how consequential changes might then arise for a) the legal services market b) legal aid regulations and c) the costs recoverable in a judicial taxation. Those responses have largely been reflected in the Business and Regulatory Impact Assessment (BRIA) which accompanies this paper.

12. Most respondents made comment on how the use of remote hearings can impact on the personal health and wellbeing of participants, and the differential impacts that remote hearings can have for the elderly, the disabled and others with protected characteristics. Those responses have largely been reflected in the Equalities Impact Assessment (EQIA) which accompanies this paper.

Summary

13. This report, which should be read in conjunction with the accompanying BRIA and EQIA, aims to provide an objective analysis of the range of views submitted by respondents relative to the draft rules as circulated by the Council. The content of this report, and each of the individual responses, contributes towards the evidence base that underpins what will be an ongoing debate on the use of remote hearings.

14. Any policy decisions which the Council may wish to take in response to this analysis will be published as a separate document in due course.

The next steps

15. Following the publication of this report the next steps are:

- JAN 2022 – this Analysis of Responses report along with the supporting EQIA and BRIA will be considered at the next meeting of the Scottish Civil Justice Council on 31 January 2022.

SECTION 2: RESPONSES – TO THE DRAFT COURT OF SESSION RULES

16. This section captures the feedback from respondents on questions 1 to 4. It summarises the comments that were specific to the content of the draft rules proposed for use within the Rules of the Court of Session (RCS).

Methodology

17. For the purposes of quantitative analysis, all eighty-two responses were broken down into four categories: agree, disagree, other responses and nil responses:

RESPONSE CATEGORY	*INDICATES*
AGREE	The response did include a very clear statement in support
DISAGREE	The response did include a very clear statement against
OTHER	The response addressed the question asked, without a clear statement for or against
NIL RESPONSE	The response included general feedback, but did not specifically answer the question asked

Having a presumption in favour of in-person hearings

18. The first proposition in the draft rules for the Court of Session was that there should be a general presumption in favour of in person hearings, for civil actions that fall within the list of case categories set out in section 35B.2 of the draft rules. Respondents were asked for their views on a) the use of such a general presumption and b) any alterations they would make to the listed case categories.

***Q1** – 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?*

19. Relative to **question 1**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	14 (17%)
DISAGREE	24 *(29%)*
OTHER	26 *(32%)*
NIL RESPONSE	18 *(22%)*

20. Less than one in five respondents supported the use of a general presumption. Most respondents took the view that using a general presumption was too blunt an instrument and the draft rules would strike the wrong balance. Their preference was for a less complex scheme that can support the courts taking a more flexible approach on a case-by-case basis. The range of reasons given for taking that view included:

CASE CATEGORIES – several respondents perceived the use of case categories as too cumbersome. It implied a "one size fits all" approach that is inconsistent with the variability they see arising within decisions on individual cases within each of those case categories. It can also imply that some rights (e.g. cases involving families and children) are to be viewed as being more important than others, which may be inappropriate given that most civil litigation has a significant impact on the rights of individuals and the obligations of corporate bodies.

HEARING TYPES - most respondents elected to express their feedback relative to hearing type (rather than case category). The core distinction made was between procedural hearings and substantive hearings as a generality, but the responses did provide comment on a very wide range of specific hearing types (across the 54 types currently specified within the courts Integrated Case Management System (ICMS)).

CREDIBILITY - for the selected case categories that would default to an in-person appearance at proof, the rules at 35B.2 (3) included qualifying statements regarding "a significant issue of credibility of a party or witness which is dependent upon an analysis of the party's or witness's demeanour or character". That statement appeared to add confusion rather than clarity. Where respondents did comment, they perceived that subjective test as potentially unworkable as it covers matters that are more likely to emerge as part of the live cross-examination of a witness during a hearing rather than objective facts that could be determined well in advance of that witness attendance. There were also concerns that to secure an in-person hearing you would have to give advance notice of your intention to impugn the credibility of a witness, which would disadvantage you and forewarn the other party. Another respondent noted that for a witness to be called it is implicit that credibility and reliability is a consideration, otherwise that evidence could be agreed in advance.

PUBLIC IMPORTANCE / PARTICULAR DIFFICULTY - for legal debates, and reclaiming motions that default to an in-person appearance, the rules at 35B.2 (c) and 35B.2 (f) included qualifying statements regarding a point of law of "general public importance or particular difficulty or importance". That appeared to add confusion rather than clarity. Respondents saw that as a highly subjective test. It was not clear from the rules how, when or by whom that test could be determined.

USER CHOICE – where all the parties to a case have already expressed a wish to proceed with a particular type of hearing (either virtual or in-person), most respondents expressed a view that it should be up to the court to accommodate that request (if practicable). A small number of respondents added that this level of user choice was justified given the high level of court fees paid by end users.

<u>Alternative approaches</u>

21. Several respondents suggested a shift to an alternative layout with a more straightforward rule that would state a general **presumption in favour of in-person hearings for all substantive business**, with that presumption departed from at the courts discretion; on application by the parties or on the courts own initiative.

22. Other respondents suggested that court rules could more readily support taking decisions on mode of attendance during existing steps in legal process:

    CASE MANAGEMENT – for those court procedures that already incorporate active judicial case management, a decision on mode of attendance is something that arises as a matter of routine within case management discussions. For commercial actions in particular, respondents value the flexibility that comes with the case management procedure under RCS Chapter 47, in conjunction with Practice Note 1 of 2017 and the online guidance provided. They expressed a preference to retain the

flexibility the parties and the commercial judges already have to decide between virtual and in-person appearances on a case-by-case basis.

USER PREFERENCE – several respondents suggested that court rules should require parties to state their individual preferences for a virtual or in-person mode of attendance, with reasons, as early as possible in the legal process i.e. pursuers when lodging an initial writ and defenders when notifying an intention to defend.

ATTENDANCE CLAUSES – the Council could avoid the need for any stand-alone rules setting out a general presumption (and the mechanism for changing it) if the relevant chapters covering procedural hearings in each procedural code provided new or revised clauses that put an obligation on the parties to address the court on mode of appearance during that procedural step.

Suggested additions and deletions

23. If the Council did decide to progress the continued use of a general presumption in favour of in-person appearances, respondents suggested the following as potential alterations to the case categories listed in section 35B.2 of the draft rules:
    - Specifying in-person appearances as the default for all substantive business i.e. proofs, debates, reclaiming motions.
    - Specifying in-person appearances as the default for all cases requiring a witness of fact to give evidence *(whilst acknowledging that for expert witnesses and overseas witnesses a remote appearance might be more practicable).*
    - Adding proofs for: Judicial Review cases and commercial cases.
    - Adding any cases with unrepresented parties.
    - Adding any cases requiring the use of interpreters.
    - Adding any cases with multiple parties.
    - Adding any cases requiring third party support: lay supporters, in-court mediators.
    - Adding any cases requiring significant citation of legal authorities.

Drafting queries

24. One respondent noted the existing RCS Chapter 35B *(Lodging Audio or Audio-visual Recordings of Children)* which implies that a renumbering will be required if these draft rules are progressed. The same respondent queried whether rules for the use of live links for taking witness evidence (RCS 93.1, OCR 32A) would remain active.

Having a presumption in favour of hearings by electronic means

25. The second proposition in the draft rules for the Court of Session was that there should be a presumption in favour of hearings by electronic means, for civil actions falling within the list of case categories set out in section 35B.3 of the draft rules. Respondents were asked for their views on a) the use of such a general presumption and b) any alterations they would make to the listed case categories.

Q2 *– 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?*

26. Relative to **question 2**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	12 (15%)
DISAGREE	29 *(35%)*
OTHER	22 *(27%)*
NIL RESPONSE	19 *(23%)*

The context for change

27. A number of respondents expressed a view that virtual hearings have been appropriate, but only as a response to an emergency. Before making virtual hearings a more permanent feature within the civil justice system, they remain concerned about the absence of empirical evidence to support the rules as consulted on. They would prefer such a fundamental policy change to be more evidence based with further data from user satisfaction surveys, pilots or wider consultation.

The definition of hearings by electronic means

28. A number of respondents queried why the rules include both video hearings and telephone hearings as viable options when defining 'hearings by electronic means'. They perceive video hearings via Webex as offering greater benefits in comparison to telephone hearings. Difficulties with the latter can include people talking over each other, not being able to see who else may be on the call, difficulties in sharing documents or ensuring people talk to the right document, not having clarity on who is addressing the court, not being able to see the presiding judge etc. Those respondents would prefer that telephone hearings are phased-out or withdrawn.

29. Some respondents put the contrary view: they acknowledged that in cases where digital exclusion arises an appearance by telephone would continue to provide a useful option.

Suggested additions and deletions

30. If the Council did decide to pursue continued use of a general presumption in favour of appearances by electronic means, respondents suggested the following as potential alterations to the case categories currently listed in section 35B.3 of the draft rules:
    - Excluding appearances by electronic means for all substantive business i.e. proofs, debates, reclaiming motions.
    - Excluding appearances by electronic means for all cases requiring a witness of fact to give evidence *(whilst acknowledging that for expert witnesses and overseas witnesses a remote appearance might be more practicable).*
    - Excluding proofs for: Judicial Review cases and commercial cases.
    - Excluding any cases with unrepresented parties.
    - Excluding any cases requiring the use of interpreters:
        - *A number of respondents suggested that Webex technology is not yet at a standard that can effectively support real time translation during a virtual hearing, and that the current delay that translation adds into any virtual hearing should be seen as unreasonable.*
    - Excluding any cases with multiple parties:
        - *A number of respondents suggested that multiple parties can render a virtual hearing as being overly complex to organise, too difficult to run effectively,*

and potentially prejudicial to the fairness of proceedings. Some respondents put the contrary view: they had experience of complex multi-party actions managed successfully via virtual hearings.

- Excluding any cases requiring third party support: lay supporters, in-court mediators.
- Excluding any cases requiring significant citation of legal authorities.

The ability to ask the court for an alternate mode of appearance

31. To support the use of the two general presumptions, the draft rules set out in section 35B.4 included the safeguard of being able to request an alternate mode of appearance by lodging a motion with the court. Respondents were asked for their views on the use of motion procedure for making such requests.

Q3 *– 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.*

32. Relative to **question 3**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	35 *(43%)*
DISAGREE	6 *(7%)*
OTHER	19 *(23%)*
NIL RESPONSE	22 *(27%)*

33. A significant number of respondents agreed with the need to lodge a motion, and they did so on the basis that it was a familiar and well-established method for making a request of the court. The content specified for such a motion should ensure sufficient information was provided to inform the judicial decision, in a manner that can support fairness in proceedings.

34. Some respondents had a preference for the request being made more efficiently as part of general discussion at a pre-proof hearing with motions only enrolled if that discussion had not taken place. Others suggested the need for clarification on whether an oral motion at the bar would be considered (in lieu of a written motion). Some respondents agreed with the use of motions procedure but with the caveat that any opposed motions must be arguable at an oral hearing.

35. Respondents who disagreed with the use of motions procedure gave a range of reasons:
    - The mode of attendance is something that could readily be determined at a case management / procedural hearing without the need to lodge a motion. Lodging a motion creates a burden on the court and an unnecessary expense for parties.
    - To meet the requirements of open justice the parties should be provided with the opportunity to be heard on mode of attendance, but that conflicts with rule 35B.4 (4) which implies that both opposed and unopposed motions would be decided on the papers. That approach in rules could be subject to legal challenge.
    - Motion procedure includes the ability to object which may put an additional and unnecessary burden on the courts.
    - Using the test of "on cause shown" may be more appropriate.
    - As an alternative approach the parties could lodge a note for further procedure, or submit requests by email (if the parties have jointly agreed to use email).
    - A simpler option should be made available as parties will be charged a fee for every motion lodged, unless they qualify for a fee exemption.

- A simpler option should be made available as it is unrealistic to expect party litigants to be able to enrol a court motion without support, particularly those with additional support needs.

36. One respondent suggested that where a motion constituted a request for a reasonable adjustment under the Equalities Act 2010, it would be illegal for the court to charge a fee.

37. One respondent considered that the accompanying forms were unnecessarily complex.

38. One respondent suggested that a cut-off date should be set within the rules to avoid arrangements having to be changed at a late stage.

Confirming whether the courts should have the final say on mode of attendance

39. The proposition set out in section 35B.5 of the draft rules was that, rather than the parties having a right of veto, the court should have the final say on the mode of attendance in each case. Respondents were asked for their views on whether it was appropriate for the court to be the final arbiter on these decisions.

***Q4** – 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*

40. Relative to **question 4**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	22 *(27%)*
DISAGREE	7 *(8%)*
OTHER	32 *(39%)*
NIL RESPONSE	21 *(26%)*

41. Several respondents addressed question 4 on the basis that judicial oversight is always required and whilst the views of parties should weigh heavily they should not be determinative. In their view, the courts should always be the final arbiter in those cases where it does become necessary to weigh how a given mode of appearance might influence the fairness of proceedings or the interests of justice. That would apply in particular where the court decides that a given mode of attendance is essential to; ensuring that all parties can understand and participate effectively in proceedings; or to avoid excessive and unreasonable delay in proceedings.

42. Most respondents who expressed a contrary view thought it was essential for the courts to give due weight to the wishes of the parties. In their view; the court should respect the parties agreed positions as a matter of routine and only intervene if a motion is lodged requiring a disagreement to be resolved. Some of those respondents indicated that if the courts do need to intervene the parties should have the opportunity to be heard, the court should explain the reasoning behind its decision, and the decision taken should be appealable (with the leave of the court).

43. Several respondents expressed concerns that the draft rules gave the court the ability to intervene *ex proprio motu* (at its own hand) in positions already agreed by the parties. If the court was ever perceived to be making arbitrary decisions that overruled the interest

of the parties in lieu of the efficiency of the court, or the personal preferences of a judge, then those respondents would perceive that power as being a step too far. One respondent flagged that decisions in this area could generate unnecessary appeals.

44. One respondent suggested the draft rules should be reworded a) to focus on 'the hearing' rather than 'the person attending the hearing' and b) to ensure consistency in the drafting approach as rule 35B.5 (1) uses permissive terminology and the corresponding rule 35B.5 (2) uses mandatory terminology.

45. The test proposed in the draft rules is "without prejudice to the fairness of proceedings or otherwise contrary to the interests of justice". One respondent indicated that it would be helpful to set out the factors the court would consider relevant when applying that test whereas others indicated they have no difficulty in applying that test.

SECTION 3: RESPONSES – TO THE DRAFT SHERIFF COURT RULES

46. This section captures the feedback from respondents on questions 6 to 9, summarising comments that were specific to the draft rules as proposed for use under Ordinary Cause Procedure (OCR) within the sheriff courts:

Methodology

47. For the purposes of quantitative analysis, all eighty-two responses were broken down into four categories: agree, disagree, other responses and nil responses:

RESPONSE CATEGORY	*INDICATES*
AGREE	The response did include a very clear statement in support
DISAGREE	The response did include a very clear statement against
OTHER	The response addressed the question asked, without a clear statement for or against
NIL RESPONSE	The response included general feedback, but did not specifically answer the question asked

Introducing a presumption in favour of in-person hearings

48. The first proposition in the draft rules for the sheriff court was that there should be a general presumption in favour of in-person hearings, for civil actions falling within the list of case categories set out in section 28ZA.2 of the draft rules. Respondents were asked for their views on a) the use of such a general presumption and b) any alterations they would make to the listed case categories.

Q6 *– 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?*

49. Most responses did reflect a view that where practicable the approach taken in the sheriff court should be consistent with the approach taken in the Court of Session

50. Relative to **question 6**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	16 *(19%)*
DISAGREE	22 *(27%)*
OTHER	27 *(33%)*
NIL RESPONSE	17 *(21%)*

51. Less than one in five respondents supported the use of a general presumption.

52. Most respondents took the view that using a general presumption was too blunt an instrument and the draft rules would strike the wrong balance. Their preference is for a less complex scheme that can support the courts taking a more flexible approach on a case-by-case basis. The range of reasons given for taking that view included:

CASE CATEGORIES – several respondents perceived the use of case categories as too cumbersome. It implied a "one size fits all" approach that is inconsistent with the variability they see arising within decisions on the individual cases arising within each

of those case categories. It can also imply that some rights (e.g. cases involving families and children) are to be viewed as being more important than others, which may be inappropriate given that most civil litigation has a significant impact on the rights of individuals and the obligations of corporate bodies.

HEARING TYPES - it is instructive that most respondents elected to express their feedback relative to hearing type (rather than case category). The core distinction made was between procedural hearings and substantive hearings as a generality, but the responses did provide comment on a very wide range of specific hearing types (across the 54 types currently specified within the courts Integrated Case Management System (ICMS)).

CREDIBILITY - for selected case categories that default to an in-person appearance at proof, the rules at 28Z.2 (3) included qualifying statements regarding "a significant issue of credibility of a party or witness which is dependent upon an analysis of the party's or witness's demeanour or character". That statement appeared to add confusion rather than clarity. Where respondents did comment, they perceived that subjective test as potentially unworkable as it covers matters that are more likely to emerge as part of the live cross-examination of a witness during a hearing rather than objective facts that could be determined well in advance of that witness attendance. There were also concerns that to secure an in-person hearing you would have to give advance notice of your intention to impugn the credibility of a witness, which would disadvantage you and forewarn the other party. Another respondent noted that for a witness to be called it is implicit that credibility and reliability is a consideration, otherwise that evidence could be agreed in advance.

PUBLIC IMPORTANCE / PARTICULAR DIFFICULTY - for legal debates that default to an in-person appearance, the rules at 28Z.2 (2) (e) include a qualifying statement regarding a point of law of "general public importance or particular difficulty or importance". That statement appeared to add confusion rather than clarity. Respondents saw that as a highly subjective test. It was not clear from the rules how, when or by whom that test could be determined.

USER CHOICE – where all the parties to a case have already expressed a wish to proceed with a particular type of hearing (either virtual or in-person), respondents expressed a view that it should be up to the court to accommodate that request (if practicable). A small number of respondents added that this level of user choice was justified given the high level of court fees paid by end users.

Alternative approaches

53. Some respondents did suggest a shift to an alternative layout with a more straightforward rule that would state a general **presumption in favour of in-person hearings for all substantive business**, with that presumption departed from at the courts discretion; on application by the parties or on the courts own initiative.

54. Other respondents suggested that court rules should support taking decisions on mode of attendance during other existing steps in legal process:

- *CASE MANAGEMENT* – for those court procedures that already incorporate active judicial case management, a decision on mode of attendance is something that arises as a matter of routine within case management discussions. For commercial actions in particular, respondents value the flexibility that comes with case management procedure. They expressed a preference to retain the flexibility the parties and the commercial judges already have to decide between virtual and in-person appearances on a case-by-case basis.

- *USER PREFERENCE* – several respondents suggested that court rules should require parties to state their individual preferences for a virtual or in-person mode of attendance, with reasons, as early as possible in the legal process i.e. pursuers when lodging an initial writ and defenders when notifying an intention to defend.

- *ATTENDANCE CLAUSES* – the Council could avoid the need for any stand-alone rules setting out a general presumption (and the mechanism for changing it) if the relevant chapters covering procedural hearings in each procedural code provided new or revised clauses that put an obligation on the parties to address the court on mode of appearance during that procedural step.

Suggested additions and deletions

55. If the Council did decide to progress the continued use of a general presumption in favour of in-person appearances, respondents suggested the following as potential alterations to the case categories listed in section 28ZA.2 of the draft rules:
    - Specifying in-person appearances as the default for all substantive business i.e. proofs, debates, appeals.
    - Specifying in-person appearances as the default for all cases requiring a witness of fact to give evidence *(whilst acknowledging that for expert witnesses and overseas witnesses a remote appearance might be more practicable).*
    - Adding proofs for: commercial cases
    - Adding all hearings for adoption or permanence proceedings.
    - Adding any contested hearings for adults with incapacity.
    - Adding all cases under the Adoption and Childrens (Scotland) Act 1997
    - Adding all cases arising under the Childrens Hearings (Scotland) Act 2011
    - Specifying all child welfare hearings
    - Excluding hearings in relation to withdrawal of solicitors (as they can be electronic)
    - Adding any cases with unrepresented parties, particularly eviction and mortgage repossession cases.
    - Adding any cases requiring the use of interpreters.
    - Adding any cases with multiple parties.
    - Adding any cases requiring third party support: lay supporters, in-court mediators.
    - Adding any cases requiring significant citation of legal authorities.

Operational matters

56. One respondent suggested that it would be helpful if documents could be shared by someone other than the solicitor appearing *(given the difficulty of addressing the court at the same time as sharing a document).*

Introducing a presumption in favour of hearings by electronic means

57. The second proposition in the draft rules for the sheriff court was that there should be a presumption in favour of in-person hearings, for civil actions falling within the list of case categories set out in section 28ZA.3 of the draft rules. Respondents were asked for their views on a) the use of such a general presumption and b) any alterations they would make to the listed case categories.

    ***Q7** – 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?*

58. Relative to **question 7**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	15 *(18%)*
DISAGREE	21 *(26%)*
OTHER	27 *(33%)*
NIL RESPONSE	19 *(23%)*

The context for change

59. A number of respondents expressed a view that virtual hearings have been appropriate, but only as a response to an emergency. Before making virtual hearings a more permanent feature within the civil justice system, they remain concerned about the absence of empirical evidence to support the rules as consulted on. They would prefer such a fundamental policy change to be more evidence based with further data from user satisfaction surveys, pilots or wider consultation.

The definition of hearings by electronic means

60. A number of respondents queried why the rules include both video hearings and telephone hearings as viable options when defining 'hearings by electronic means'.

61. Those respondents perceive video hearings via Webex as offering greater benefits in comparison to telephone hearings. Difficulties with the latter can include people talking over each other, not being able to see who else may be on the call, difficulties in sharing documents or ensuring people talk to the right document, not having clarity on who is addressing the court, not being able to see the presiding sheriff etc. Those respondents would prefer that telephone hearings are phased-out or withdrawn, particularly in the context of Child Welfare Hearings.

62. Some respondents put the contrary view: they acknowledged that in cases where digital exclusion arises an appearance by telephone would continue to provide a useful option.

Suggested additions and deletions

63. If the Council did pursue the continued use of a general presumption in favour of appearances by electronic means, respondents suggested the following as potential alterations to the case categories currently listed in section 28ZA.3 of the draft rules:
    - Excluding appearances by electronic means for all substantive business i.e. proofs, debates, appeals.

- Excluding appearances by electronic means for all cases requiring a witness of fact to give evidence *(whilst acknowledging that for expert witnesses and overseas witnesses a remote appearance might be more practicable).*
- Excluding proofs for commercial cases.
- Excluding any cases with unrepresented parties, particularly with eviction or mortgage repossession cases.
- Excluding any cases requiring the use of interpreters:
    - *A number of respondents suggested that Webex technology is not yet at a standard that can effectively support real time translation during a virtual hearing, and that the current delay that translation adds into any virtual hearing should be seen as unreasonable.*
- Excluding any cases with multiple parties:
    - *A number of respondents suggested that multiple parties can render a virtual hearing as being overly complex to organise, too difficult to run effectively, and potentially prejudicial to the fairness of proceedings. Some respondents put the contrary view: they had experience of complex multi-party actions managed successfully via virtual hearings.*
- Excluding any cases requiring third party support: lay supporters, in-court mediators.
- Excluding any cases requiring significant citation of legal authorities.

Operational matters

64. Some respondents suggested it would be helpful to have more specific timings provided for virtual hearings, rather than the long timeslots allocated for attending bulk courts. One respondent indicated that the associated waiting times could lead to a preference for telephone hearings as they did provide practitioners with a fixed time slot.

The ability to ask the court for an alternate mode of appearance

65. To support the use of the general presumption, the draft rules set out in section 28ZA.4 included the safeguard of being able to request an alternate mode of appearance by lodging a motion with the court. Respondents were asked for their views on a) the use of motion procedure for making such requests, and b) whether it is necessary for an application Form to accompany that request.
***Q8** – 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*

66. Relative to **question 8**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	37 *(45%)*
DISAGREE	6 *(7%)*
OTHER	19 *(23%)*
NIL RESPONSE	20 *(25%)*

67. A significant number of respondents agreed with the need to lodge a motion, and they did so on the basis that it was a familiar and well-established method for making a request of the court. The content specified for such a motion should ensure sufficient information was provided to inform the judicial decision, in a manner that can support fairness in proceedings.

68. Some respondents had a preference for the request being made more efficiently as part of a general discussion at a pre-proof hearing with motions only enrolled if that discussion had not taken place. Others suggested the need for clarification on whether an oral motion at the bar would be considered (in lieu of a written motion). Some respondents agreed with the use of motions procedure but with the caveat that any opposed motions must be arguable at an oral hearing.

69. Respondents who disagreed with the use of motions procedure gave a range of reasons:
    - The mode of attendance is something that could readily be determined at a case management / procedural hearing without the need to lodge a motion. Lodging a motion creates a burden on the court and an unnecessary expense for parties.
    - To meet the requirements of open justice the parties should be provided with the opportunity to be heard on mode of attendance, but that conflicts with rule 28ZA.4 (2) which implies motions would be decided on the papers and without an oral hearing. That approach in rules could be subject to legal challenge.
    - Motion procedure includes the ability to object which may put an additional and unnecessary burden on the courts.
    - Using the test of "on cause shown" may be more appropriate.
    - A streamlined motion procedure may be required with much tighter timetables to ensure motions are being dealt with before the hearing takes place.
    - As an alternative approach the parties could lodge a note for further procedure, or submit requests by email (if the parties have agreed to its use), or telephone the court with that request.
    - A simpler option should be made available as parties will be charged a fee for every motion lodged, unless they qualify for a fee exemption.
    - A simpler option should be made available as it is unrealistic to expect party litigants to be able to enrol a court motion without support, particularly those with additional support needs.

70. One respondent suggested that where a motion constituted a request for a reasonable adjustment under the Equalities Act 2010, it would be illegal for the court to charge a fee.

71. One respondent considered that the accompanying forms were unnecessarily complex.

72. One respondent suggested that a cut-off date should be set within the rules to avoid arrangements having to be changed at a late stage. Another respondent noted the significant delay that can arise with the processing of opposed motions in some courts.

<u>Views on adding an application form</u>

73. Only eleven respondents addressed this point. Those expressing support for adding an application form gave the following as reasons:
    - There should be consistency between the Court of Session and the sheriff courts.
    - Forms can include useful prompts for parties to generate useful information.
    - In practice separate papers often accompany the motions lodged at present.

    Those expressing a contrary view did so on the basis that the necessary information could readily be specified within the motion itself.

Confirming whether the courts should have the final say on mode of attendance

74. The proposition set out in section 28ZA.5 of the draft rules was that, rather than the parties having a right of veto, the court should have the final say on the mode of attendance in each case. Respondents were asked for their views on whether it was appropriate for the court to be the final arbiter on those decisions.

    ***Q9** – 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*

75. Relative to **question 9**, the count of responses received was:

RESPONSE CATEGORY	*COUNT*
AGREE	21 *(26%)*
DISAGREE	8 *(10%)*
OTHER	34 *(41%)*
NIL RESPONSE	19 *(23%)*

76. Several respondents addressed question 9 on the basis that judicial oversight is always required and whilst the views of parties should weigh heavily they should not be determinative. In their view, the courts should always be the final arbiter in those cases where it does become necessary to weigh how a given mode of appearance might influence the fairness of proceedings or the interests of justice. That would apply in particular where the court decides that a given mode of attendance is essential to; ensuring that all parties can understand and participate effectively in proceedings; or to avoid excessive and unreasonable delay in proceedings.

77. Most respondents who expressed a contrary view thought it was essential for the courts to give due weight to the wishes of the parties. In their view; the court should respect the parties agreed positions as a matter of routine and only intervene if a motion is lodged requiring a disagreement to be resolved. Some of those respondents indicated that if the courts do need to intervene the parties should have the opportunity to be heard, the court should explain the reasoning behind its decision, and the decision taken should be appealable (with the leave of the court).

78. Several respondents expressed concerns that draft rule 28ZA.5 (3) gave the court the ability to intervene *ex proprio motu* (at its own hand) in positions already agreed by the parties. If the court was ever perceived to be making arbitrary decisions that overruled the interest of the parties in lieu of the efficiency of the court, or the personal preferences of a judge, then those respondents would perceive that power as being a step too far. One respondent flagged that decisions in this area could generate unnecessary appeals.

79. The test proposed in the draft rule 28ZA.5 (1) is "without prejudice to the fairness of proceedings or otherwise contrary to the interests of justice". One respondent indicated that it would be helpful to set out the factors the court would consider relevant when applying that test. Another respondent indicated they would have no difficulty in applying that test.

SECTION 4: RESPONSES – ON THE USE OF REMOTE HEARINGS IN GENERAL

80. This section reflects the additional feedback received in relation to the two open questions posed within the consultation paper i.e. question 5 and question 10.

Background on the public debate

81. At paragraph 21 to 29 of the consultation paper, the Council acknowledged the ongoing public debate on the use of remote hearings and provided links to the Judicial Institutes Report on the Civil Justice Conference of 10 May 2021. As part of that debate, that report summarises most of the positions taken both for and against the use of remote hearings.

82. As a precursor to providing specific feedback on the draft rules, a number of respondents provided very similar feedback to that report when reflecting on their own experience with remote hearings. For ease of use that later feedback has been narrated briefly under five general themes:
    - The user experience with virtual hearings (by phone);
    - The user experience with virtual hearings (by video);
    - The user experience for the digitally excluded;
    - The challenges with achieving open justice; and
    - Other operational matters arising with remote hearings.

The user experience with virtual hearings (by phone)

83. As a general theme; telephone hearings are perceived as providing a poor user experience in comparison to Webex which users perceive as a better service. Some of the practical constraints with telephone hearings include:

    Caps on the number of participants – respondents reported several instances where key parties were excluded from joining a telephone call, or dropped out during a call.

    Call costs are problematic – respondents expressed concerns about the level of call costs being passed on to vulnerable clients, and the denial of access to justice for those litigants that simply do not have access to suitable devices or may lack sufficient credit on their devices.

    Sharing documents is problematic – respondents expressed concern that in a telephone hearing you have less assurance that the witness is talking to the right document (in comparison to the use of screen sharing via Webex).

    Managing objections is problematic - respondents indicated several instances of parties being requested to leave a telephone call whilst an objection is heard but then being unable to re-join that same call. In some cases the end result was a decree in absence, which materially affected the lives of litigants.

    Joining late is problematic – where a call is on hold (e.g. for an adjournment) then anyone not previously on that telephone call has no way of knowing whether the hearing is still live, or whether something was wrong with the way they tried to join that call. By way of comparison, in a Webex event a holding card is used to inform users of the status of that live hearing.

84. Several respondents expressed a clear preference for telephone hearings to be withdrawn completely *(particularly in the context of child welfare hearings).*

The user experience with virtual hearings (by video)

85. As a general theme; it appears that most respondents perceive virtual hearings as providing a significantly lower standard of service in comparison to their experience of an in-person hearing. The perceived shortcomings include:

Equality of Arms – Whenever a lay participant struggles to even join a virtual hearing, they will not have access to the same legal and IT support structures that larger legal firms and other organisations are able to call on. That can put lay participants at a significant disadvantage relative to other professional participants.

In-court Advisers – the shift to virtual hearings as part of the pandemic response has dramatically reduced the ability to use in-court advisers, or to signpost relevant court users to the existence of those support services.

Limitations with using mobile devices – often a mobile phone will be the only device available for a participant who wishes to attend a virtual hearing. That mobile phone may capture and send their image to the court successfully but it will provide that court user with a suboptimal experience e.g. shared documents may be unreadable given the screen size, and thumbnail views of participants will be of little practical value.

Muting of participants – a typical response by the court when technical issues arise is to mute the video and/or audio from individual participants, in order to get to a base performance level that can allow the virtual hearing to continue. Any added delay whilst a judge or practitioner then mutes and unmutes their device can be detrimental to seeking clarification of a point, or potentially fatal if trying to lodge an objection.

Poor internet connectivity – even for those who are digitally competent, the quality of people's home or work broadband connections will be highly variable. That variability in internet connectivity currently acts as a brake on the ongoing development of virtual hearings and current quality constraints are evident on a daily basis through: buffering delays, noise and echo on calls, failures when sharing documents, screens freezing, failed connections etc.

Private conversations may be overheard – a reliance on court users having alternate communication channels to support private conversations using tools such as text or WhatsApp does carry with it an increased risk of human error. Because that error can be as simple as not muting a device, it is much easier for instances to arise where the court, or the opposing party, will see or hear communications which should otherwise have remained private to the parties. In some cases that error could potentially lead to a miscarriage of justice.

Raising objections is problematic – raising a virtual hand within a Webex hearing does not have the urgency of a voice or physical gesture in a courtroom. That can mean a damaging comment will be stated in full before any objection is heard, which has the effect of making that objection irrelevant.

Recordings of proceedings – some respondents highlighted instances of a failure to record evidence during a virtual hearing, or finding out post hearing that the recording made was of poor quality.

Taking instructions from clients is problematic – an in-person hearing provides the ability in real time to have whispered conversations with instructing solicitors in the well of the court or to take short adjournments to confer with clients. With virtual

hearings, practitioners are expected to set up alternate communication channels using text or WhatsApp groups but that approach has proved problematic: devices diverting practitioners at key points in testimony; the delayed receipt of messages making a timeous communication irrelevant, adjournments unnecessarily extending the duration of hearings etc.

Witnesses - assessment of credibility – in a virtual hearing the view of a witness reduces to a thumbnail when screen sharing documents. That does hinder the assessment of their demeanour or credibility when giving evidence relevant to that shared document.

Witnesses - not joining – instances have arisen of witnesses not being able to join despite prior testing of their connectivity, or of getting to the virtual waiting room but not being admitted into the virtual hearing when called.

Witnesses – not re-joining – once a witness has given their evidence in an in-person hearing they have the option of sitting in the public gallery for the remainder of the hearing. For a virtual hearing, witnesses should be able to do the same but several instances have arisen where the witness has been unable to re-join.

Witnesses - failing to follow guidance – several respondents noted daily instances of witnesses failing to follow guidance i.e. appearing from distracting public environments, dressing inappropriately, swearing or otherwise being disrespectful of the court etc.

Witnesses – unfair influence – several respondents noted the increased risk of the witness being influenced or assisted off screen during a virtual hearing, or referring to unauthorised documents, aids or prompts that would not be acceptable during an in-person hearing.

The user experience for the digitally excluded

86. As a general theme; most respondents reinforced that a lack of digital equipment, or the skills to use it, continues to exclude a significant number of court users from being able to participate in the use of any digital services, and that includes virtual hearings. That particularly applies to the vulnerable, the disabled, the elderly, and those from economically deprived areas.

87. Further detail on digital exclusion (as it impacts on those with protected characteristics) is narrated in the Equalities Impact Assessment (EQIA) that accompanies this paper.

The challenges with achieving open justice

88. Within paragraphs 16 to 20 of the Consultation Paper, the Council indicated a preference for the public and the media to be able to see and hear video hearings, ideally without having to make an application. Several respondents expressed their support for that view, in order for the courts to be seen as delivering truly open justice.

89. The Council acknowledged that in practice a restriction was currently placed on the general public being able to view virtual hearings. The courts had imposed that restriction pending appropriate safeguards being developed to support an appropriate response to any potential contempt of court issues such as unauthorised broadcasting

during hearings and / or the potential misuse of recorded images or sound from virtual hearings.

90. One respondent noted that as major technology companies had not been able to come up with technology solutions to address that safeguard then it is unrealistic to await such solutions. That view potentially implies that the courts should:
    - Accept the risk, remove the restriction and allow the general public to see and hear all relevant virtual hearings; and
    - Rely on the more limited safeguard that goes with the threat of imposing sanctions for contempt if an abuse of process is subsequently brought to the courts attention.

Other operational matters arising with remote hearings

91. Respondents provided the following as suggested areas where they thought the consistency of practice across the courts could be improved:

    COURTROOMS – some respondents perceived that the SCTS would need to make a considerable investment in its courtroom infrastructure if it wants to support a more consistent user experience with hybrid hearings.

    COURT ROLLS: – one respondent indicated that the routine publication of joining instructions on court rolls would improve the accessibility of virtual hearings for citizens in general.

    COURT START TIMES: - one of the perceived benefits associated with remote hearings is the ability for practitioners to avoid the lost time spent sitting in waiting rooms within court buildings. Gaining that wait time back assumes that a short procedural hearing held virtually will start on time allowing the practitioner to move onto other business. Bulk courts with one fixed start time still require multiple practitioners to sit for hours in a virtual waiting room, meaning that waiting time is still being lost. The suggestion is that if more courts could adopt staggered appointment times then practitioners would be able to achieve the expected benefit, and the justice system as a whole could work more efficiently.

    PRACTICE NOTES – as part of the pandemic response there has been a heavy reliance on practice notes issued by sheriffdom. Some respondents perceived that to be the source of considerable inconsistencies of practice. One suggestion made is that the response to any future pandemics would be future proofed if the courts could agree a consistent approach that is promulgated as national practice notes.

    REPORTING TECHNICAL ISSUES – there was a suggestion made that it would be helpful if there was a mechanism for technical difficulties to be reported in real time; so that the court does not assume a failure to attend in cases where in fact there was a simple inability to log on or dial in.

    WRITTEN SUBMISSIONS: – several respondents queried the variation in practice where some courts insist on receiving written submissions in advance of a hearing whereas other courts do not. In those courts where written submissions were a requirement, respondents expressed concern at the increased cost for the preparation of witness statements, written submissions and electronic bundles in advance of each virtual hearing.

ANNEX 1 – SUMMARY OF THE CONSULTATION QUESTIONS

Consultees were invited to consider the draft rules as circulated with the Consultation Paper and thereafter respond to the following ten 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?

ANNEX 2 – LIST OF RESPONDENTS

Number	Name	Category
1	- *Withheld*	Solicitor
2	Addleshaw Goddard LLP	Solicitors
3	- *Withheld*	Solicitor
4	- *Withheld*	Solicitor
5	Graham A Fordyce	Solicitor
6	- *Withheld*	Judge
7	Burness Paull	Solicitors
8	Liddle & Anderson LLP	Solicitors
9	Jackson & Co Ltd	Solicitors
10	Fred Mackintosh Q.C.	Advocate
11	Westwater Advocates	Advocates
12	Litigation Team, Moray Council	Solicitors
13	- *Withheld*	Solicitor
14	Watermans Solicitors Limited and Watermans Legal Limited	Solicitors
15	Alan Meechan	Solicitor
16	- *Withheld*	Solicitor
17	- *Withheld*	Individual
18	Faculty of Solicitors of Dumbartonshire	Organisation
19	Citizens Advice Scotland	Organisation
20	Consultative Committee on Commercial Actions	Organisation
21	Faculty of Advocates	Organisation
22	Axiom Advocates	Advocates
23	Equality and Human Rights Commission	Organisation
24	- *Withheld*	Solicitor
25	Sheriffs Association & Summary Sheriffs	Judiciary
26	Scottish Young Lawyers Association	Organisation
27	Scottish Law Agents Society	Organisation
28	Senators of the College of Justice	Judiciary
29	CMS Cameron McKenna Nabarro Olswang LLP	Solicitors
30	Faculty of Advocates Juniors	Organisation
31	Which? The Consumer Association	Organisation
32	Harper MacLeod	Solicitors
33	Dentons UK and Middle East LLP	Solicitors
34	Legal Services Team, Aberdeen City Council	Solicitors
35	BLM Solicitors	Solicitors
36	- *Withheld*	Advocate
37	Brian Fitzpatrick	Advocate
38	Drummond Miller LLP	Solicitors
39	Compass Chambers	Advocates
40	Ampersand Advocates	Advocates
41	Lindsays LLP	Solicitors
42	Scottish Association of Law Centres	Organisation
43	Clyde & Co (Scotland) LLP	Solicitors
44	Forum of Insurance Lawyers	Organisation
45	Kennedys Solicitors	Solicitors
46	TLT Solicitors LLP	Solicitors
47	- *Withheld*	Solicitor
48	Advocates Family Law Association	Organisation
49	Allan McDougall Solicitors	Solicitors
50	Association of Personal Injury Lawyers	Organisation

ANNEX 2 – LIST OF RESPONDENTS…*continued*

Number	Name	Category
51	Legal Team, Scottish Government Civil Recovery Unit	Solicitors
52	DAC Beachcroft Scotland LLP	Solicitors
53	Davidson Chalmers Stewart LLP	Solicitors
54	Devils at Faculty of Advocates	Advocates
55	Digby Brown LLP	Solicitors
56	DWF LLP	Solicitors
57	Innes & MacKay Ltd	solicitors
58	Justice Scotland	Organisation
59	Law Society of Scotland	Organisation
60	Ledingham Chalmers LLP	Solicitors
61	MacRoberts LLP	Solicitors
62	Gilson Gray LLP	Solicitors
63	Medical and Dental Defence Union of Scotland	Solicitors
64	Morton Fraser LLP	Solicitors
65	National Westminster Bank Plc	Organisation
66	Optimum Advocates	Advocates
67	Pinsent Masons LLP	Solicitors
68	Scottish Legal Action Group	Organisation
69	Scottish Courts & Tribunals Service	Organisation
70	Shared Parenting Scotland	Organisation
71	Sheriffs Principal	Judiciary
72	Shoosmiths LLP	Solicitors
73	Society of Solicitor Advocates	Organisation
74	Thompsons Solicitors Scotland	Solicitors
75	Brodies LLP	Solicitors
76	David Leighton	Advocate
77	Litigation Team, Midlothian Council	Solicitors
78	Scottish Legal Aid Board	Organisation
79	- *Withheld*	Solicitor
80	Shepherd & Wedderburn	Solicitors
81	Office of the Advocate General	Organisation
82	Scottish Women's Aid	Organisation