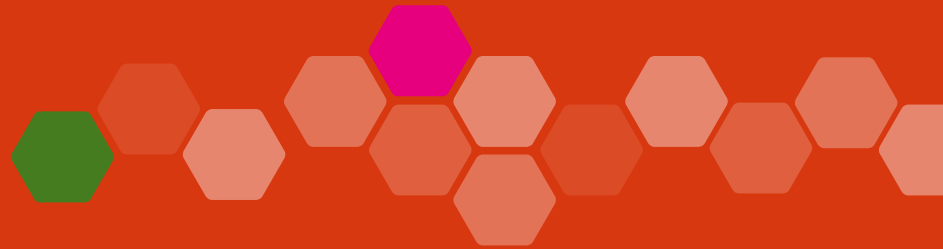


Civil Justice System's Pandemic Response



CRIME AND JUSTICE

Civil Justice System's Pandemic Response

REPORT

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Responsibility for this report lies solely with the authors.

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Abbreviations and Glossary

Abbreviations

CORO	Compulsion Order and Restriction Order
CTO	Compulsory Treatment Order
CWH	Child Welfare Hearings
FoA	Faculty of Advocates
FFR	Full Findings and Reasons
HEC	Health and Education Chamber
IA	Independent Advocate
ICMS	Integrated Case Management System
LSS	Law Society of Scotland
MHO	Mental Health Officer
MHTS	Mental Health Tribunal for Scotland
NP	Named Person
OCR	Ordinary Cause Rules
PRR	Parental Responsibilities and Rights
RCS	Rules of the Court of Session
RMO	Responsible Medical Officer
SCJC	Scottish Civil Justice Council
SCTS	Scottish Courts and Tribunals Service

Glossary

Access to justice	A basic principle of the rule of law which denotes the ability of all citizens (particularly those who are vulnerable) to exercise their legal rights.
Advocate	A member of the legal profession and the Faculty of Advocates who specialises in courtroom advocacy and the provision of legal advice. Advocates have rights of audience in all courts in Scotland as well as the UK Supreme Court (equivalent of a barrister in England and Wales).
Bar officer	A court official in the Sheriff Court who provides general assistance in court hearings and is responsible for keeping order in court.
Clerk of court	A court official in both the Court of Session and Sheriff Courts who deals with the administration of the court.
Hybrid hearing	A court hearing in which some participants are in the courtroom (usually the judge and legal representatives) and some appear remotely (typically an expert witness).
Judiciary	Judicial office holders in the Court of Session and Sheriff Courts.
Judge	In this report when used generically the term may refer to a Court of Session Judge or a Sheriff (a judge in Scotland's Sheriff Courts)
Party	The term used in this report to denote litigants in a court case; and in the Mental Health Tribunal for Scotland the term includes patients and named persons.
Party litigant	A party to a Scottish court action who represents themselves in court proceedings without the assistance of a solicitor or advocate (litigant in person in England and Wales).
Sheriff	A judge in Scotland's Sheriff Courts.
Solicitor	A member of the legal profession authorised by the Law Society of Scotland to represent and advise clients. Solicitors can appear in court hearings in the lower courts.
Solicitor advocate	A solicitor who has extended rights of audience to represent clients in all courts in Scotland as well as the UK Supreme Court.

Teleconference

A hearing or meeting held over the phone, with participants dialling in to the call from a number of separate locations.

Executive summary

Main messages

- The adoption and use of remote hearings varied considerably between different court and tribunal settings covered by this research, including between different Sheriff Courts.
- The research found diverse views, both across and within particular court/tribunal settings, on the perceived impacts of remote hearings on parties, their representatives, clerks and the judiciary: there was no single, consistent opinion on their impact or their continued use.
- However, there were some common themes in terms of the benefits and challenges associated with remote hearings.
- Common challenges identified across the case and court/tribunal types under study included: issues arising from technical problems; digital exclusion and literacy (particularly, though not only, among parties); and challenges around communicating, both verbally and non-verbally.
- In general, telephone hearings were seen as creating greater issues around communication (with the possible exception of their use for procedural elements of commercial hearings), although they may be less prone than video hearings to technical glitches.
- Remote hearings were seen as having potential benefits for certain groups of vulnerable court users (such as children and young people with additional needs, and parties who had experienced domestic abuse) in terms of allowing easier, more effective participation.
- Benefits in terms of time, costs and comfort for parties and professionals, and work-life balance for professionals, were also discussed across court/tribunal settings. However, views varied on whether or not these benefits outweighed the challenges noted above.
- Suggestions for improvement that would help ensure remote hearings, where they are used, function more effectively for parties and professionals included: improving resources (in terms of IT equipment, internet access, and equipment available to support video hearings); developing a 'triage' system to determine which mode of hearing is appropriate; taking systematic action to address digital inequality among parties; improving or making greater use of functionality within available platforms; improved advanced information and improved guidance around technological issues and practicalities for parties; greater consideration around emotional support and advice for parties attending remotely; enhanced access to electronic documents for party litigants; and further guidance and/or training for judges and clerks.

Aims, scope and methods

This report presents findings from research exploring the impacts of remote hearings and other measures introduced or expanded during the Covid-19 pandemic on Scotland's civil justice system. The research was commissioned to improve and expand the existing evidence base, so that any decision on whether remote hearings and other 'pandemic measures' should continue to be used, adapted or discarded is informed by relevant, current and high quality research. It aimed to address three key research questions:

1. In what way have the courts/tribunals under study adapted their processes and procedures as a result of the pandemic?
2. What has been the impact of the pandemic measures adopted by the courts/tribunals, specifically remote hearings, on service users, staff and the judiciary?
3. Do changes need to be made to the pandemic measures, specifically remote hearings, to ensure access to justice for service users? If so, what changes would be suggested?

It would not have been feasible to cover the entirety of Scottish civil justice within a single study. Given this, four specific case types were selected to ensure the research included variety in terms of the nature and sensitivity of case types, the characteristics of the parties involved, and different court/tribunal settings (including those that were and were not already using remote methods prior to the pandemic). The four case types included were:

- **Commercial** (heard within either the Sheriff Courts or Court of Session)
- **Family law** (heard within either the Sheriff Courts or Court of Session)
- **Mental Health Tribunal for Scotland (MHTS)** cases, and
- **Health and Education Chamber (HEC) Additional Support Needs** cases.

The report draws on multiple data sources, including:

- **A rapid review of existing evidence** relevant to the different elements of the Scottish civil justice system's pandemic response, as it pertains to the court/tribunal and case types under consideration.
- **An online survey of professionals involved in the civil justice system** across the court/tribunal and case types covered. This was conducted in September-October 2022 and aimed at providing a broad picture of professional views and experiences of remote hearings.
- **Qualitative interviews with 30 parties** in family law cases (15), commercial actions (2), the MHTS (6) and the HEC (7) who had experience of a remote hearing since March 2020. Interviews were conducted in late 2022 and early 2023, and explored how pandemic measures shaped their experience of the process and their access to justice.
- **Qualitative interviews with 53 professionals**, including members of the judiciary (13), clerks of court (8), tribunal members (10), legal representatives

(12) and other stakeholders (10) working across the case types covered by the research.

Existing evidence on the use of remote hearings in civil cases

A review of the existing evidence on the impact of remote hearings in civil cases in Scotland prior to the current research found little information on the impact on parties, and a particular lack of data drawn from parties' own accounts rather than that relayed by legal professionals. Where such data did exist, it was confined to specific case types, making it difficult to draw wider conclusions. No existing evidence on the impact of remote hearings on court and tribunal staff working in the civil justice system and very little on their impact on the judiciary was identified in Scotland. Evidence relating to the views and experiences of legal practitioners, mostly drawn from surveys conducted by their professional bodies, revealed that solicitors in Scotland were more positive about remote hearings than advocates were.

Legal professionals were more supportive of the use of remote hearings for non-contentious or procedural matters with many opposing their use in any proceedings where parties are present. Even among those legal professionals who were supportive of the continued use of remote hearings, concerns still existed about their use as a 'default', with most favouring choice, especially between video and in-person hearings, and fewer supporting the continued use of telephone hearings. Negative aspects of remote hearings were identified by legal professionals as being their potential impact on access to justice, concerns about digital inequalities, and changes to the nature and conduct of hearings and to their own working methods. On the other hand, the increased use of electronic documents was seen as a positive consequence of the move to remote hearings.

The remainder of this executive summary outlines the findings from the primary research conducted for this study, structured around the three key research questions.

How have the courts/tribunals under study adapted their processes?

A general issue in assessing the extent of use of remote hearings in the civil cases under study is the lack of data on the number of hearings held by different modes – this was not routinely collected across the courts or tribunals included for the period under study, with the exception of the HEC. However, it was clear from interviews with professionals that there were differences both between the courts and tribunals under study and within them (particularly between different Sheriff Courts) in terms of the pace of introduction of remote hearings and the modes of remote hearings adopted.

The Court of Session had made very limited use of remote hearings for commercial and family cases prior to the pandemic. The court briefly moved to teleconferencing after March 2020 for procedural hearings, but adopted video hearings swiftly after a videoconferencing platform was made available, from June

2020. This videoconferencing platform was then used routinely in the Court of Session for both procedural and substantive hearings until a return to court was allowed. From 25 April 2022, guidance for the Outer House stated that procedural hearings should continue to use video hearings but substantive hearings should return to the physical court room.¹ Although it was open to parties to move away from this default, there were reported to be few examples of this being requested in either commercial or family cases.

The Sheriff Courts presented a more mixed picture prior to, during, and after pandemic restrictions, with practice reported to vary between and within Sheriffdoms. Pre-pandemic, teleconferencing was in regular use for commercial case management hearings in a number of commercial courts, including Glasgow, Edinburgh and Aberdeen. It was also reportedly used for case management in family actions in Glasgow Sheriff Court. However, clerks interviewed for this study indicated that remote hearings were generally not in common use for family actions before the pandemic. Video hearings appear only to have been used on rare occasions – they were mentioned primarily with respect to allowing international witnesses to join commercial cases.

It was challenging to establish a precise timeline for the introduction of remote hearings in the Sheriff Courts. Civil business was initially paused after lockdown in March 2020. At first, Sheriff Courts moved to telephone hearings, combined with doing some business administratively (on the basis of written submissions). Thereafter, it appears that some Sheriff Courts moved relatively quickly to video hearings in the second half of 2020 (although somewhat later in 2020 than in the Court of Session), while others reverted to in-person hearings with physical distancing in place, and some made greater continued use of teleconferencing. Edinburgh Sheriff Court, for example, continued to use teleconferencing for all commercial procedural hearings, while Glasgow used telephone for all commercial business except proofs. Glasgow also reportedly made more limited use of video hearings for family cases, with the exception of proofs during the pandemic, and reverted to in-person child welfare hearings in advance of central guidance from sheriffs principal² recommending a routine return to court for these (issued in July 2022).

General guidance for civil cases was issued by sheriffs principal in July 2022³ stating that, unless otherwise agreed, all procedural business and debates should be conducted remotely and all proofs and substantive hearings in person. However, as of late 2022/early 2023 when this research was conducted, the situation in practice appeared to be more ‘fluid’ for commercial cases, with some sheriffs conducting most business remotely and others returning to the courtroom for all business, including procedural hearings. Similarly, an advocacy organisation noted

¹ [Guidance for Supreme Court Users](#), para 2.2

² [Guidance for Court Users: Child Welfare Hearings in the Sheriff Court](#)

³ [Guidance for Court Users](#), paras 2.1 and 2.2

variations in approach between individual Sheriff Courts, with some believed to be continuing to hold child welfare hearings remotely in early 2023.

The MHTS was one of the first settings to introduce remote hearings post-lockdown, moving swiftly to implement teleconferencing hearings with effect from 23 March 2020. By the end of March 2021 over 5,000 MHTS hearings had been conducted by telephone and by November 2021 over 8,000 such hearings had taken place. Use of video hearings has been limited in the MHTS – by January 2023, video facilities were only available in four hospitals. While some in-person hearings restarted from July 2020, their use was initially limited by restrictions on suitable venues. By November 2021, in-person hearings were possible in eight hospitals, while by January 2023 it was possible to schedule in-person hearings at 23 hospital venues. However, in-person hearings required completion of a ‘Hearing Preference Form’, and in her introduction to the 2021/22 annual report, the MHTS President noted that “completion rates of these forms remain low”.⁴

The HEC, which has a much smaller caseload in comparison with the MHTS (202 cases in 2022/23), was the first Scottish tribunal to use video hearings. It conducted 52 hearings between August 2020 and September 2022 following a pilot in July 2020. Video hearings have continued to be used in the HEC, alongside a phased reintroduction of in-person and hybrid hearings. As of February 2023 in-person and hybrid hearings were available, but in a more limited number of SCTS venues across Scotland compared with in-person hearings prior to the pandemic (when in-person hearings were held across Scotland in a larger number of venues, including hotel conference rooms).

In addition to remote hearings, the pandemic also resulted in the acceleration of a number of other uses of digital technology across the courts and tribunals under study, specifically greater use of electronic documentation (instead of paper bundles), greater use of screensharing of documents (in video hearings), and use of e-signatures in the Court of Session and Sheriff Courts. The use of electronic documents in particular had begun pre-pandemic, but this was extended as a result of the move to remote hearings.

What has been the impact of pandemic measures on service users, staff and the judiciary?

There was no single, consistent picture in terms of the perceived impacts of remote hearings on parties, their representatives, clerks and the judiciary. As noted above, the specific case types were selected to ensure that the breadth and diversity of parties, sensitivities, settings and previous experiences of remote hearings that exist within the civil justice system were captured as far as possible, rather than to be representative of all civil cases, or of the most common types of civil cases. It is therefore necessary to apply caution in generalising from the findings based on these four case types to all other civil cases (particularly given that debt cases, the

⁴ [MHTS Annual Report 2021-22](#), President’s Foreword, 1

most common form of civil action, were not covered). However, what is evident from this research is that there is no 'one size fits all' answer in terms of whether or not remote hearings 'work' for civil cases, either for all court users, or for all hearing types.

At the same time, some issues were highlighted repeatedly by parties and professionals across the four case types. Technical problems, digital exclusion and digital literacy (particularly, though not only, among parties), and challenges around communicating, both verbally and non-verbally, were highlighted as creating challenges in remote hearings across case types. In general, telephone hearings were seen as creating greater issues around communication (with the possible exception of their use for procedural elements of commercial hearings), although they were viewed by participants as being less prone to technical glitches than video hearings. Meanwhile, the potential for remote hearings to offer easier, more effective participation for certain groups of vulnerable courts users (such as children and young people with additional needs, or parties who had experienced domestic abuse) was also highlighted across case types (albeit less so for commercial cases). Again, while caution is required in generalising to other civil case types, given that these issues were identified across these deliberately diverse case types it might reasonably be expected that they would also be relevant to other civil hearings.

Impacts on parties

There were some common themes in terms of the perceived impacts of remote hearings on parties, including:

- The perceived detrimental impacts of **technological issues** on their ability to join and participate effectively, particularly for parties who were digitally excluded in terms of access to an appropriate, private device(s) or who lacked digital skills and confidence.
- Challenges around **communication**, in particular between parties and their legal representatives during hearings.
- The loss of the ability to convey information through **non-verbal communication**, including body language.

Professionals in all contexts expressed concerns about these issues. However, the extent to which they were viewed as significant barriers to access to justice in practice varied between contexts. Moreover, there was less consensus among parties even *within* some contexts over the extent to which they had affected them in practice.

Family law parties, in particular, expressed mixed views on how far each issue had been a barrier for them in practice, and as a result expressed very different attitudes and preferences around remote hearings. While professionals working in both commercial and family cases expressed a strong view that party litigants experienced greater barriers in remote hearings, this division was much less clear cut in the views of family law party litigants and represented parties interviewed for this study. Family law parties also varied in whether they thought it was harder to

communicate in an in-person or a remote hearing: some felt the loss of body language obscured their 'real personality' (which they thought was essential to convey in a context where their parental role was being discussed); others felt it was easier to communicate and interject in a remote hearing.

For the small number of commercial parties interviewed, not feeling able to communicate effectively with their legal representatives during remote hearings had been a major frustration. The loss of informal communication (the 'tug of the gown') inside and outside the courtroom between legal representatives was also viewed by professionals (and commercial parties) as something that could negatively impact on the likelihood of settlement in both commercial and family cases, to the detriment both of parties and the efficiency of the court system.

The issues raised around parties' participation in the MHTS reflected the dominance of telephone as the main mode for remote hearings. However, again, there was a perception among professionals that telephone hearings could have positive or negative impacts for parties, depending on their needs. Some young people might be more comfortable about taking part without being seen, for example, while other groups, such as those with dementia, struggled to follow what was happening in a telephone hearing. Remote hearings were also viewed as creating particular difficulties for community patients, who may be joining on their own from home and be left without support after receiving a potentially distressing decision.

In contrast, although there were still some concerns among HEC professionals around these issues, HEC parties generally indicated that they had experienced fewer issues around either technology or communication than they had expected. In fact, the move to remote hearings was perceived as having potentially made it easier for some children and young people involved in HEC cases to take part, by enabling them to view part of a hearing and decide whether or not they would like to contribute from the comfort of their own home.

Benefits to parties in terms of time, costs and comfort were also discussed across the four court/tribunal settings. However, whether or not these benefits were seen to outweigh the challenges discussed above varied depending on other elements of parties' experiences. In the HEC, the benefits of being able to join from home in terms of time, comfort, and the feasibility of fitting hearings around childcare commitments (which could be especially difficult to arrange for parties whose children had additional support needs) were seen as major positives. However, in the MHTS, parties discussed the fact that, although in some respects they felt more comfortable joining from home, they were not always convinced this was 'right' when decisions were being taken that had a significant effect on their future.

Impacts on professionals

As with parties, there were some common themes in the perceived impacts of the move to remote hearings on professionals, including:

- Technological issues, support and training

- Impacts on workload and roles, and
- Impacts on their wider wellbeing.

However, again perceptions of the nature and level of impact of these issues varied, not only between different court/tribunal contexts, but also between and within different professional groups.

Professionals working in the courts all described **technological issues** that had presented barriers to effective hearings, such as participants dropping off calls or having problems joining. Issues around their own access to suitable devices appeared to be experienced most acutely by tribunal members. Judges were frank in their assessment of the poor quality of broadband in many public buildings, including the court estate, while clerks noted that courtrooms were not always equipped with sockets and screens to enable video or hybrid hearings. HEC tribunal members also emphasised that if video hearings are to be an ongoing feature of their work, then equipping them appropriately was a basic necessity.

Support and training around both technology and managing remote hearings more generally was also raised as an issue, although again experiences differed across contexts. Professionals in HEC hearings tended to be very positive about the level of support for remote hearings (particularly that provided by clerks), while one advantage of the use of telephone in the MHTS was that it was easy and did not require special training or instructions. In the courts, however, professionals described more challenges. Members of the judiciary observed that there was little IT support when things went wrong, beyond what clerks were able to provide. Clerks themselves noted that, while they had received some training on the videoconferencing platform, this had not equipped them to ‘trouble-shoot’ the problems other participants might experience accessing hearings.

Across both commercial and family cases, there was a marked difference between professionals’ perceptions of the impact of remote hearings on their workload, and the impact on their wellbeing: the survey indicated that, on balance, more felt that remote hearings had a positive than a negative impact on workload, while the reverse was true with respect to wellbeing.

With respect to both **workload and wellbeing**, solicitors working in the courts were perhaps less negative than other professionals interviewed, describing the benefits in terms of reduced travel and more efficient time use. Advocates and members of the judiciary working in the courts were more negative. Judges described a lack of ‘downtime’ between hearings, and frustrations with the slowness of some elements of digital processes as creating additional workload. They reported feeling more ‘intellectually tired’ from long periods on screen. For advocates, and for some solicitors, the impact on wellbeing was linked to the perceived erosion of key elements of their professional life, including greater social isolation and loss of informal learning opportunities.

Legal representatives and independent advocates working in the two tribunals discussed the negative impacts for their own wellbeing of feeling less able to support their clients emotionally as well as legally when they could not be in the

same room for a hearing. In the MHTS, there were, however, some personal safety concerns among legal representatives around being alone with clients in the community in order to support them in this way. Tribunal members in both the MHTS and HEC were keen to stress that the impact on their own workload was secondary to the ability of the system to work well for parties. However, as with those working in the courts, they regretted the loss of social interaction and opportunities for informal learning from colleagues, with HEC members also reflecting on the additional tiredness that can result from concentrating for hours on screen.

Clerks felt that some elements of remote hearings, including setting up video hearings and finding email contact details for all participants, were more time consuming compared with in-person hearings. Court clerks were also required to stay in the hearings to manage the videoconferencing platform and let in witnesses – something bar officers would have dealt with pre-pandemic. However, clerks working in the HEC noted that they had benefited significantly from reduced travel time, since they had previously had to facilitate hearings across Scotland.

Other impacts

In addition to direct impacts, professionals also discussed a range of broader impacts of remote hearings relating to the perceived effectiveness of hearings and to the rule of law, including:

- Issues around body language and non-verbal communication
- Issues relating to formality and the rule of law, and
- Issues relating to the transparency of hearings.

Issues around **body language** were frequently raised by professionals. However, as with parties, there were mixed views on whether and how the loss of ‘non-verbal’ communication impacted on proceedings. Solicitors and advocates, particularly those working in the courts, expressed concerns that the reduction in non-verbal communication associated with remote hearings (particularly telephone hearings, but also video) created difficulties in assessing witness credibility and reliability. There was some resistance to this view among judges, however, who felt that body language was not (and should not be) a central part of their assessment. Similarly, tribunal members in the MHTS and HEC commented that there could be advantages in not being able to see body language, in terms of avoiding unjustified assumptions based on a person’s appearance or demeanour.

However, tribunal members and judges working on family law cases in particular commented that the loss of body language and non-verbal cues could be an issue in terms of being able to identify when a party is struggling or needs to take a break. A slightly different point was made by sheriffs, who felt that body language could make an important contribution to child welfare hearings in enabling them to set the tone and establish good personal interactions to support the problem-solving nature of the hearing.

The degree of **formality** that was appropriate in a court or tribunal hearing, and the impact of hearings being held remotely on this, was another recurrent theme among professionals. In the court setting in particular, there was concern from professionals that remote hearings had led to an erosion of formality – in terms of dress, language, and joining locations – which had in turn undermined the solemnity of proceedings and the weight that they carried for participants. Even in the deliberately more relaxed setting of the HEC, a degree of formality was considered important by both professionals and parties as a reminder that it is a legal process which should be taken seriously by all those involved. At the same time, both parties and professionals questioned whether an element of reduced formality, as afforded by remote hearings, could be helpful in enabling some parties to participate more effectively.

Transparency of hearings, in the sense of public (and press) access, was only discussed in detail with respect to commercial hearings. MHTS and HEC hearings are largely held in private, something that has not changed as a result of remote hearings. Many substantive family actions are also private, and the concerns raised in respect of family hearings tended to relate more to preserving this privacy and avoiding the potential recording or sharing of remote hearings (something which interviewees gave real life examples of). While ‘open justice’ could be regarded as something of a theoretical concern in commercial actions, given the general level of public interest in these hearings, it was nonetheless a significant concern for professionals, particularly the judiciary, as a ‘core component of the rule of law’. There was a perception that there were too many obstacles for members of the press or public to overcome to join remote hearings, and that the process needed to be made easier.

Do changes need to be made to the pandemic measures?

Suggestions for improvement to remote hearings and other pandemic measures to better ensure access to justice for service users again varied between different case types and contexts. Drawing on both suggestions from parties and professionals and the issues identified in this research, possible improvements included:

- **Improving the resources to support both in-person and hybrid hearings** – in the courts, this was particularly focused on better IT equipment and internet connections in court buildings; in the tribunals, it was particularly focused on expanding the number of venues suitable for in-person hearings (as it was reported that a number of venues previously used for tribunal hearings have been re-purposed or are no longer used for hearings since the pandemic) and (particularly for MHTS) expanding equipment for video and hybrid hearings. Equipping professionals was also considered important.
- **Developing a ‘triage’ system and guidance on deciding on mode**, to support offering choice to parties in the tribunals, and to help the courts determine when it may be appropriate to vary from the default recommendations.

- **Taking a systematic approach to addressing digital inequality among parties**, including considering providing appropriate spaces and equipment to join remote hearings in courts or other public buildings.
- **Improving, or making greater use of, functionality within available platforms**. This could include greater use of messaging facilities and private meeting rooms within the video conferencing platform to facilitate communication between parties and their representatives, as well as making of recordings and automated transcripts, to reduce costs to parties (particularly party litigants). Improving security measures and protocols to reduce security risks around third parties joining private hearings or hearings being recorded may also be helpful. Another suggestion, from those professionals who felt remote court hearings would benefit from greater formality, was that more could be done to replicate the court room environment within a video hearing (this was not suggested for the tribunals).
- **Improved guidance around technological issues and practicalities for parties**. This was highlighted particularly by family law parties, but is potentially relevant across contexts. It may also be worth considering developing SCTS-wide guidance on how to manage hearings when technical issues do arise, since even with the improvements above these are still likely to occur from time to time.
- **Improved advance information for parties generally**. In addition to ensuring that parties (particularly party litigants) received joining details for remote hearings in a timely manner (raised in relation to family hearings specifically), it was suggested that parties would also benefit from improved advance information about what to expect (and what is expected of them – for example in terms of dress) in hearings more generally.
- **Greater consideration of issues around the advice and emotional support that parties might need**, particularly where (as in the MHTS and HEC, and potentially in family law cases), they are potentially vulnerable, or where (as in the MHTS) they may be joining remote hearings alone at a time of crisis.
- **Enabling greater access to electronic documents for party litigants**, in addition to other improvements to the digital document system to enhance speed, efficiency and accuracy for all court users.
- Finally, in addition to recommendations to improve the experience of remote hearings and other pandemic measures for parties, it was also suggested that judges and clerks in particular might benefit from **enhanced guidance and/or training** to better equip them for this element of their role, and to enable them to better support parties and (for clerks) the court.

1. Background and methods

This report presents findings from research exploring the impacts of remote hearings and other measures introduced or expanded during the Covid-19 pandemic on Scotland's civil justice system. This introductory chapter provides a brief overview of the context, scope, aims and methods for the research. It discusses the limitations of the research and sets out the structure and conventions that apply to the remainder of the report.

The Scottish civil courts and tribunals

The **Scottish Courts and Tribunals Service (SCTS)** is an independent body corporate established by the Judiciary and Courts (Scotland) Act 2008. It provides administrative support to all Scottish courts and tribunals. Business is split between the criminal jurisdiction, the civil jurisdiction and the devolved tribunals. The service registers approximately 70,000 civil cases per year (compared with around 100,000 criminal cases)⁵ and over 10,000 tribunal cases.⁶ In 2021-22, SCTS's gross expenditure was £214.9m.⁷

The civil courts

Civil actions involve the settlement of disputes concerning the rights and obligations of individuals and organisations and are characterised by party-to-party litigation. The **Sheriff Courts** and the **Court of Session** are central to Scotland's civil justice system. The Sheriff Courts have exclusive jurisdiction to hear cases worth up to £100,000 at first instance. The Court of Session, the highest civil court in Scotland, is divided into the Outer House, which includes the Commercial Court, and deals with certain types of complex case and those worth over £100,000, and the Inner House, which hears appeals from the Outer House and the Sheriff Appeal Court.

The civil courts are involved in both **procedural** and **substantive** hearings. Procedural hearings generally provide an opportunity to determine the further procedures which are to be followed in a case. No evidence will be heard and no decisions which have any bearing on the merits of the case will be taken. A '**debate**' (or 'procedure roll' hearing in the Court of Session) is a hearing on legal arguments which will be appropriate where a preliminary legal issue, such as relevance or jurisdiction, needs to be resolved before any factual dispute can be considered. No witness evidence is heard at a debate. The hearing of evidence in a case takes place at a civil trial known in Scotland as a '**proof**'. A 'proof before answer' is a hearing on both factual and legal issues which will be appropriate where the court needs to hear the evidence before addressing the legal issues. The

⁵ [SCTS Corporate Plan 2020-3](#)

⁶ [SCTS Annual Report and Accounts 2021-22](#) (figures based on tallying the numbers of receipts to the Upper Tribunal, First-tier Tribunals and other tribunals administered by the SCTS, from the tables on pp75-77)

⁷ [SCTS Annual Report and Accounts 2021-22](#)

civil courts may also have non-evidential hearings which can be substantive in nature: Child Welfare Hearings (CWH) in family cases are an example. ⁸

Although parties can be legally represented in civil actions, there is no requirement that they must be. **Solicitors** can represent parties at all hearings in the Sheriff Court but only **advocates** or **solicitor advocates** or lay representatives can appear in the Court of Session. A person who is involved in civil court proceedings without representation from a solicitor or advocate is referred to in Scotland as a '**party litigant**'. A party litigant can ask the court for permission for someone who is not a lawyer to represent them at a hearing in the form of a **lay representative**. Alternatively, the rules of court allow for party litigants to be accompanied by someone for moral support and advice (a courtroom or **lay supporter**), but that person is not allowed to speak on behalf of the litigant.

The Scottish Tribunals

The Scottish Tribunals consist of two tiers. The **First-tier Tribunal** is divided into a number of chambers with specialist jurisdictions including the **Health and Education Chamber (HEC)**. The Upper Tribunal hears appeals from the chambers of the First-tier Tribunal. In addition, a number of self-standing specialist tribunals are administered by SCTS including the **Mental Health Tribunal for Scotland (MHTS)**.

Introduction of remote hearings and other 'pandemic measures'

The overall purpose of SCTS is supporting justice. As summarised in its Corporate Plan, SCTS seeks to deliver on this purpose by focusing on "improving access to justice, reducing delay and cost within the justice system and maximising the use of technology to improve our services".⁹

Providing digital services across court and tribunal business was a key element of SCTS's plans for achieving its aims pre-pandemic, as set out in its Digital Strategy for 2018-2023, which stated:

"Whilst significant cases will always involve formal hearings in a court or tribunal people increasingly expect us to work flexibly and transact digitally. Those using the system will struggle to understand if simple administrative business is carried out on paper alone or if routine steps in cases can only proceed if a wide range of people attend a hearing at a particular place and time."¹⁰

Plans included: a continuation of the shift from paper based to electronic processes; an uptake in digital services which would reduce the number of people attending court and tribunal facilities; online access to information and advice in line

⁸ For further exploration of the nature and use of CWHs see the 2017 report by R. Whitecross and C.Lindsay, "[Use and Implementation of OCR Chapter 33A in Section 11 Order Proceedings](#)".

⁹ [SCTS Corporate Plan 2020-3](#), 8

¹⁰ [SCTS Digital Strategy 2018-23](#), 1

with public expectations; and digital delivery of services. In 2019 the Civil Online service was launched in the Sheriff Courts for simple procedure cases (which, along with the All-Scotland Sheriff Personal Injury Court, account for 49% of all civil court business¹¹), representing a fully digital service for around 40% of the civil caseload. By integrating digital case files, the online submission of cases and lodging of documents, and online court fees' payment processes, all stages of a case could be dealt with digitally.¹²

However, the Covid-19 pandemic dramatically changed the context for the digitisation agenda, accelerating the introduction of digital measures to enable SCTS to be able to continue delivering court and tribunal services in Scotland while Covid-19 restrictions remained in place. In August 2020, SCTS published 'Respond, Recover, Renew', which set out how it had responded to the imposition of 'lockdown' restrictions in March 2020.¹³ Within the civil justice system, this focused on the use of remote hearings, using both telephone and videoconferencing. A videoconferencing platform, was purchased and rolled out by SCTS for use across the Court of Session and Sheriff Courts as well as the HEC during 2020, while MHTS hearings moved to teleconferencing. Other 'pandemic measures' included wider adoption of electronic or digital procedures, for example in the distribution of paperwork, notifications, and collection of signatures.¹⁴ It should be noted that this report does not reference the videoconferencing platform purchased by SCTS by name to ensure the discussion of video hearings reflects the more general strengths and weaknesses of this mode of hearing, as opposed to any specific strengths or weaknesses of the platform itself. Where the name of the platform appears in direct quotations, it has been removed and replaced by either 'video hearing' or 'videoconferencing platform'.

The exact nature and timing of the various pandemic measures adopted in civil justice in Scotland varied between different courts and tribunals. Moreover, the extent of the continued use of remote hearings since the lifting of Covid-19 restrictions has also varied between different courts and case types. Both these points are discussed in more detail in the introductions to subsequent chapters of this report.

Aims and scope of the research

Aims

The main aim of this research was to improve and expand the existing evidence base on remote hearings and other pandemic measures adopted by the Scottish courts and tribunals, so that any decision on whether they should continue to be used, adapted or discarded is informed by relevant, current and high quality

¹¹ [Civil Justice Statistics Scotland 2021-22](#), 9

¹² [SCTS Corporate Plan 2020-3](#)

¹³ [SCTS Respond, Recover, Renew \(2020\)](#)

¹⁴ The rollout of electronic documents and signatures was already underway as part of SCTS's digital strategy but was accelerated and written into law by the [Coronavirus \(Scotland\) Act 2020](#)

research. To meet this aim, the research was structured around the following key questions:

1. In what way have the courts/tribunals under study adapted their processes and procedures as a result of the pandemic?
2. What has been the impact of the pandemic measures adopted by the courts/tribunals, specifically remote hearings, on service users, staff and the judiciary?
3. Do changes need to be made to pandemic measures, specifically remote hearings, to ensure access to justice for service users? If so, what changes would be suggested?

Across questions 2 and 3 in particular, a key consideration was the extent to which pandemic measures were believed to impact – positively or negatively – on access to justice for court and tribunal users. The definition of access to justice adopted in this research consists of four parts:

- **Access to the formal legal system** – understood in this context as the ability to join a hearing
- **Access to a fair and effective hearing** – taking into consideration not only whether people are able to join a hearing, but whether they are able to participate and follow proceedings in a meaningful way, as well as whether that hearing proceeds in an effective manner for all concerned, particularly parties
- **Access to a decision**
- **Access to an outcome** – both access to a decision and access to an outcome include considerations of whether these are arrived at in a timely manner, and whether decisions are conveyed to parties in a manner that enables them to understand the outcome.¹⁵

Court and case combinations included in this research

SCTS oversees an extremely wide range of civil cases. As it would not have been feasible to cover all case types within a single research project, the Scottish Government (in consultation with SCTS) decided to limit the research to four specific case types:

- **Commercial** (heard within either the Sheriff Courts or Court of Session)
- **Family law** (heard within either the Sheriff Courts or Court of Session)
- **Mental Health Tribunal for Scotland (MHTS)** cases, and
- **Health and Education Chamber (HEC)** cases.

These case types were selected to ensure the research included breadth and diversity in terms of the nature and sensitivity of case types, the characteristics of

¹⁵ N. Byrom (2019) Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice, Report and recommendations arising from two expert workshops (Legal Education Foundation), 5

the parties involved, and different court/tribunal settings (including those that were and were not already using remote methods prior to the pandemic).

Family law actions were among those categories of cases considered most suitable for in-person hearings in the Scottish Civil Justice Council's 2021 consultation on the Rules Covering the Mode of Attendance at Court Hearings, while commercial cases were among those considered most suitable for a hearing where participants attend by electronic means.¹⁶ The caseloads of both tribunals are concerned with the rights of parties from particularly vulnerable groups: children and young persons in the case of the HEC, and those with ongoing mental health conditions who may be detained and subject to compulsory treatment orders under the Mental Health (Care and Treatment) (Scotland) Act 2003 in the case of the MHTS.

Further detail about the types of cases included within each of these settings is provided at the start of each substantive chapter in this report.

Research methods

The research conducted to inform this report comprised:

- **A rapid review of existing evidence** relevant to the different elements of Scotland's civil justice system's pandemic response, as relevant to the court/tribunal and case types under consideration
- **An online survey of professionals involved in the civil justice system** across the court/tribunal and case types covered, aimed at providing a broad picture of professional views and experiences of remote hearings
- **Qualitative interviews with parties** in family law cases, commercial actions, the MHTS and the HEC since March 2020, exploring how pandemic measures shaped their experience of the process and their access to justice
- **Qualitative interviews with professionals**, including members of the judiciary (Court of Session judges, sheriffs, tribunal members), clerks of court, legal representatives, and other stakeholders working across the case types covered by the research.

The online survey of professionals was live in September/October 2022 and was disseminated via SCTS and a variety of other professional networks and contacts (including legal newsletters, professional bodies, and contacts identified via the Research Advisory Group). The overall profile of respondents to the survey by professional group and case type is shown in Table 1.1, below. The questionnaire was developed by the research team, with input from the Scottish Government and Research Advisory Group – see Annex B for the full question wording.

¹⁶ [Consultation: Rules Covering the Mode of Attendance at Court Hearings \(2021\)](#)

Table 1.1: Online survey of professionals – sample profile (by case type)

	Family law	Commercial	MHTS	HEC	TOTAL
Members of the judiciary	42	22	2 ^a	0	52
Solicitors/advocates	55	39	45	8	128
Tribunal members	4	2	128	12	136
SCTS staff	32	12	13	5	49
Lay representatives or supporters	11	0	64	1	68
Health and social care professionals	7	0	270	0	270
Total	153	77	530	27	714

Note: The totals of individual columns do not sum to the overall total (714), as the case types were not mutually exclusive – the same respondent may have experience of more than one case type and therefore answered questions about their views on the use of remote hearings in both.

a – all MHTS panel members are judicial members. It is likely that these two respondents are tribunal members who selected judiciary rather than the ‘tribunal member’ category.

Qualitative interviews were conducted from September 2022 to January 2023 by members of the research team. Flexible topic guides were developed to ensure that similar issues were covered across interviews, while allowing for different experiences and perspectives to be explored (see Annex C). Interviews were primarily conducted by telephone or video interview, although a small number were in person (at the request of interviewees). The profile of qualitative interviewees is shown in Tables 1.2 and 1.3. Interviews with parties were all either individual or paired interviews. Interviews with professionals included a mix of one-to-one and (for Sheriff Court clerks and HEC and MHTS tribunal members) small group interviews.

Table 1.2: Qualitative interviews with parties

	Number of interviewees
Family law parties	15
MHTS parties ^a	6
HEC parties ^b	7
Commercial parties	2
<hr/>	
Total Party Interviewees	30

a – includes family members of detained parties, acting as named persons/supporters, and parties who were previously detained (but were not detained at the time of the interview, and were able to give informed consent to participating in the research)

b – interviewees were primarily parents of young people for whom the HEC hearing was held, as well as one young person who had attended their hearing.

Table 1.2: Qualitative interviews with professionals

Professionals	Number of interviewees
Members of the judiciary (sheriffs and Court of Session judges) ^a	13
Clerks of court / Tribunal clerks ^b	8
HEC tribunal members	4
MHTS tribunal members	6
Solicitors / advocates representing parties in commercial actions	7
Solicitors and/or representatives of organisations working with family law parties ^c	4
Solicitors and representatives of organisations working with MHTS parties ^d	8
Solicitors and representatives of organisations working with HEC parties	3
Total Professional Interviewees	53

a – included sheriffs from all six Sheriffdoms and Court of Session judges with commercial and/or family law experience

b – included Sheriff Court clerks from four Sheriffdoms, clerks to the HEC, and a Court of Session clerk

c – including one solicitor and three interviews with representatives of organisations working with parents as they go through family law cases

d – including two solicitors and six Independent Advocates from four advocacy organisations

Limitations of the research

Any research is subject to limitations and it is important to be clear about these when interpreting and using the findings.

Scope and generalisability

A key limitation on the scope of this research was the decision, taken at the tender stage, to focus on four specific case types. Given the breadth of the civil justice system, limiting the scope of the research was necessary to ensure it was feasible to complete the study within the available time and resources. However, it inevitably has consequences for the wider generalisability of the findings in this report to other kinds of civil case or other tribunal context. This has informed the structure of this

report, which examines the impact of pandemic measures within each of the four specific case types separately. The final chapter considers where there is divergence and common ground across these findings and provides an indication of what general conclusions may be drawn about remote hearings or other pandemic measures that might be applicable across other civil court and tribunal contexts.

Existing data and evidence

The start of each chapter on a specific case type includes a brief overview of the number of cases of this type that come before a court or tribunal in Scotland, and a summary of the pandemic measures that applied to the specific court/tribunal and case combinations being considered. Ideally, this would include more detailed consideration of the profile of cases and hearings – for example, the proportion of cases being heard remotely by different modes and the proportion heard in-person pre- and post-March 2020. However, this information was not readily available. There was also relatively little information recorded about the profile of parties – specifically, there is no accurate record of the number of unrepresented parties in civil cases in the Scottish courts. While the report considers, where possible, whether remote hearings are perceived to have impacted differently on party litigants and represented parties (drawing largely on qualitative interviews), we do not have a clear picture of how many party litigants might be impacted by these issues.

Survey sample profile

The views included in this report inevitably reflect the profile of people who took part in the professionals survey and the qualitative research.

On the survey, it is important to note that, as shown in Table 1.1, there were very different levels of response from people with experience of the four case types – ranging from 27 respondents with experience of HEC hearings to 530 with experience of MHTS cases. Given the very different case types reflected in respondents' answers, this report largely presents the survey findings separately for each rather than looking at views across the whole sample. However, caution should be applied to drawing firm conclusions from survey findings where the sample size is small, particularly with respect to the HEC.

There were also very different sample sizes for different professional groups – from 49 members of SCTS staff (largely clerks) to 270 health and social care professionals (who largely responded in relation to the MHTS). Views on remote hearings within case types will reflect the specific mix of professionals with experience of that case type who responded to the survey. For example, views of the MHTS are strongly reflective of the views of health and social care professionals, who accounted for over half of MHTS respondents. However, given the size of sub-groups of professionals within case types, it is not generally possible to analyse differences in the views of different groups of professionals on specific case types (for example, looking at views of members of the judiciary on commercial actions compared with their views on family law).

Sample and interpretation of qualitative interviews

A number of overarching considerations and limitations relating to the qualitative data are worth noting at the outset.

First, the aim in qualitative research is not to achieve a sample that is statistically representative of the wider population, but to identify as much diversity of experience as possible. Overall, 81 participants is a fairly large sample for a qualitative study. However, within this total, the number of participants interviewed with experience of each individual case type was more limited. There are therefore some inevitable limitations to the diversity of the sample of parties and professionals for each case type (discussed further in the introduction to each substantive chapter).

Ideally, the research would have included more interviews with parties, particularly for the MHTS and commercial actions. The research team pursued multiple recruitment routes for parties – including contacts through various organisations working with parties to the different cases, links suggested by the tribunal chairs, and solicitors or other representatives that had worked on these cases. However, identifying and accessing parties who have been through the civil justice system and who are willing and able to participate in research is a challenge.¹⁷

With the exception of some areas where reengagement with the civil justice system might be an ongoing occurrence,¹⁸ most of those using the civil courts and tribunals as parties do so with low frequency or as a one-off experience so that, once an individual has disengaged from the system, they can be very difficult to track or contact for research purposes. Even where contact has been possible, this one-off engagement means that parties might have had little or nothing to compare the post-pandemic experience to, making it difficult for them to reflect on impact.

In the context of this study, while ideally the research would have heard directly from more parties, interviews with organisations working with parties to family law, MHTS and HEC cases (including advocacy and support organisations) did focus primarily on parties' experiences of remote hearings and other pandemic measures.

Timing

This research was commissioned in early 2022, at which point Covid-19 restrictions on public gatherings and physical distancing in public settings had not been fully lifted. This changed over the course of the research project, as did guidance and practice within the courts and tribunals under study. Key developments in guidance and practice within each context are discussed at the start of each substantive

¹⁷ Nicole Busby, Morag McDermont, [Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal](#) (2020) *Industrial Law Journal*, Volume 49, Issue 2, 159–198

¹⁸ The obvious example being parties who appear before the MHTS for periodic review of compulsory orders. An insurance company executive interviewed for the commercial chapter of this report was another example.

chapter, but it is important to keep in mind when reading this report that participants were commenting on a picture that was (and is) still evolving.

Report structure

The remainder of this report is structured as follows:

- Chapter 2 summarises findings from existing research relating to remote hearings and other pandemic measures in Scotland. This chapter focuses on research relevant across civil justice – where there was evidence specific to the four case types, this is covered at the start of the relevant chapter.
- Chapters 3 to 6 present findings on the introduction and perceived impacts of remote hearings and other pandemic measures in each of the four case types covered by this research: commercial actions, family law, MHTS and HEC hearings.
- Chapter 7 discusses key themes from across the different contexts and presents suggestions for improvement, drawing on both suggestions made directly by participants and the issues emerging from this study.

Report conventions

This report draws on findings from various data sources, as described above. Chapters are structured thematically, rather than by method.

Where findings are based on qualitative data, the report avoids the use of quantifying language (including terms such as ‘most’ or ‘a few’) as far as possible, since the purpose of qualitative data is to identify the range of views and experiences on an issue, rather than to estimate prevalence.

Anonymised quotes from qualitative interviewees are included to illustrate key points. In order to preserve confidentiality, parties are identified only by a reference number and general description (e.g. MHP01, MHTS patient). Professionals are identified only by their professional group and a reference number.

This work was carried out in accordance with the requirements of the international quality standard for market research, ISO 20252.

2. Existing evidence on the impact of remote hearings in civil cases

Key points

- Existing professional surveys and other sources indicated that there were mixed views on the continued use of remote hearings among different legal practitioners, with solicitors being somewhat more positive than advocates.
- Existing sources indicated that support among legal professionals was stronger for remote hearings to be used for non-contentious or procedural matters. Some professionals would oppose the use of remote hearings in any proceedings where parties are present.
- Drawing on professional survey results, among those legal professionals who supported the continued use of remote hearings, concerns still existed about their use as a 'default' with most favouring choice especially between video and in-person and fewer supporting the continued use of telephone hearings.
- Objections to the continued use of remote hearings were based on a range of grounds, including access to justice, concerns about digital inequalities, changes to the nature and conduct of hearings and to the working methods of legal practitioners.
- Existing evidence showed that the increased use of electronic documents had been widely welcomed by legal practitioners.
- Overall, there was little existing evidence on the impact of remote hearings in civil cases on parties in Scotland prior to the present study. Where it did exist, it was either relayed by legal professionals or confined to specific case types arising from in-house studies such as those conducted by the tribunals covered in this research (see Chapters 5 and 6).
- There was no existing evidence on the impact of remote hearings on court and tribunal staff working in the civil justice system in Scotland and little data on the impact on the judiciary, beyond the Judicial Attitudes Survey which covers judges in both the criminal and civil justice systems.

Introduction

Before embarking on this research, the project team conducted a rapid review of available existing evidence on the impact of remote hearings and other pandemic measures in civil cases. This review was primarily focused on Scotland but also sought out and reviewed evidence from the rest of the UK¹⁹ and, where directly

¹⁹ Janet Clark, HM Courts and Tribunals Service, [Evaluation of remote hearings during the COVID 19 pandemic](#) (2021)

relevant, looked at international sources for comparative purposes. As the project progressed between the period from February 2022 to March 2023, sources were updated and evidence as it relates to Scotland added. The relevant findings of this review are summarised in this chapter. Where there was prior evidence specific to the case types covered in the current research, this is presented at the start of the relevant chapter.

Evidence on the views and experiences of parties

From the initial review, it was clear that there was a dearth of evidence on the impact of remote hearings and other pandemic measures on the courts and tribunals in Scotland. This remained largely the case by the end of the study, and was particularly true regarding evidence on the experiences of parties as compared with professional groups. The lack of evidence of the impact on parties is likely to be linked to the unprecedented nature of the changes which, in most of the courts and tribunals under consideration, were introduced very quickly. This meant that those involved in administering the system were working at full capacity to put arrangements in place and to ensure as smooth a transition as possible, making it difficult to collect meaningful data simultaneously. At the time of writing, the qualitative data presented in this report was therefore the only targeted research undertaken in Scotland on parties' experiences and perceptions of remote hearings in the civil justice system that the authors had identified (other than some limited targeted research conducted by the tribunals themselves, discussed in chapters 5 and 6).

Early evidence from England and Wales on the impact of pandemic measures on parties²⁰ shows that concerns regarding the move online were unsurprisingly focused on issues of access and participation. These included: stress caused by reductions in levels of communication from the court prior to hearings and administrative support available at court; accessibility of technology and other resources necessary to access proceedings online; difficulties for litigants in person²¹ in creating and accessing electronic bundles; and barriers to effective communication between parties and their legal representatives. The impact of these factors is summed up in the conclusion:

²⁰ Natalie Byrom, Sarah Beardon, Abby Kendrick, [The impact of COVID-19 measures on the civil justice system](#) (2020) Civil Justice Council and Legal Education Foundation

²¹ The equivalent term in England and Wales for 'party litigants'.

“a combination of restricted access to legal advice due to COVID-19 and difficulties with navigating unfamiliar technology alongside unfamiliar legal processes compounded pre-existing practical and emotional barriers to effective participation.”²²

The HMCTS study²³ was conducted later in the pandemic and includes users of both the criminal and civil justice systems. The resulting data indicated that some of these early concerns were either not commonly held by public users, or had been alleviated in full or in part as arrangements settled in. 63% of public users (defined as members of the public using the court and tribunal service including appellants, applicants, claimants, defendants and respondents) who had attended a remote hearing were satisfied with the overall experience compared with 56% who attended a hearing in person. Those who joined via video were particularly likely to be satisfied with their overall experience (67%) compared to those who joined via audio (60%). The report notes that:

“Drivers for satisfaction were strong judge moderation, comfort and security of joining from home, less travel time and costs, time off work and childcare needed.”²⁴

Evidence on the views and experiences of professionals

Data on professionals’ experiences and perceptions of remote hearings and other pandemic measures tell a slightly different story to the (limited) evidence on the impacts on parties. Most of the existing evidence arises from surveys seeking members’ views on remote hearings in the Scottish civil justice system conducted by the professional bodies which represent the two branches of the legal profession: the Law Society of Scotland (“LSS 2021”, covering a survey undertaken in February / March 2021)²⁵ and the Faculty of Advocates (“FoA 2021”, which covers two surveys – one conducted in August 2020 and a second in April 2021).²⁶ These surveys tell us much about the views of solicitors and/or advocates in early 2021. However, it is important to note that the arrangements themselves and their application to the different courts and tribunals covered in this research have evolved since both surveys were conducted.

Some later supplementary data on the views of professionals can be drawn from two public consultations conducted by the Scottish Civil Justice Council (“SCJC

²² Byrom et al, 2020 (see full reference above), 10

²³ Janet Clark, HM Courts and Tribunals Service, 17. For a review of the available evidence from England and Wales, see House of Lords Select Committee on the Constitution, [COVID-19 and the Courts, 22nd Report of Session 2019–21 HL Paper 257](#)

²⁴ Janet Clark, HM Courts and Tribunals Service (full reference above), 17

²⁵ Law Society of Scotland, [Civil Courts Online Survey Summary- Analysis of Research](#) (2021)

²⁶ Faculty of Advocates, [Covid Remote Working Post-pandemic Survey](#) (2021)

2022”)²⁷ and the Scottish Government (“SG 2022”).²⁸ The Law Society of Scotland and the Faculty of Advocates submitted written responses to SCJC 2022,²⁹ which also attracted a high number of individual and organisational responses from legal professionals. SG 2022 is the most recent source of data on views of remote hearings, but is limited by the fact that responses are not disaggregated either between those with experience of civil and criminal justice, or (for individual respondents) between professionals and parties. Of the 130 organisational responses received, 27 were from ‘legal / justice’ organisations.

Data on the impacts on Scotland’s judiciary are mostly limited to the Judicial Attitudes Survey Scotland 2020 which included a small number of targeted questions about how the pandemic had affected judges’ working lives. In addition, one of the individual responses to SCJC 2022 was from a judge (identity withheld) and three of the organisational responses³⁰ were from judicial organisations.

Further details on these sources can be found in Annex D to this report.

The judiciary

Data on judges’ experiences of remote hearings can be drawn from the two most recent rounds of the Judicial Attitudes Survey (JAS). The most recent survey ran from 14 June through the end of August 2022 and the previous one from 27 May to 22 June 2020.³¹ In the 2020 survey, the response rate for salaried judges in Scotland was 79%.³² The 2022 survey was extended to cover both fee paid and salaried judges in Scotland and the response rates were 83% for the salaried judges and 41% for the fee-paid judges.³³ It should be noted that the data makes no distinction between those sitting in the criminal and civil courts, or between members of the judiciary working in courts and in tribunals.³⁴

Although the 2020 survey was not specifically designed with the impacts of the pandemic in mind, several questions asked about judges’ experiences of working during the Covid-19 emergency. The survey took place during the very early months of the pandemic but, given that the impacts of Covid-19 measures on

²⁷ [Analysis of Responses to the Mode of Attendance Consultation](#) (2022)

²⁸ [Consultation on the Coronavirus \(Recovery and Reform\) \(Scotland\) Bill and Analysis of Responses](#) (2022)

²⁹ [Law Society of Scotland consultation response](#) (2021); [Faculty of Advocates response to Consultation paper on rules covering the mode of attendance at court hearings](#) issued by the Scottish Civil Justice Council (2021)

³⁰ [Sheriffs Principal of Scotland, Senators of the College of Justice and The Sheriffs Association and the Summary Sheriffs’ Association](#) (joint response)

³¹ Cheryl Thomas [2022 UK Judicial Attitudes Survey, Report of findings covering salaried judges in Scotland](#) (2022) UCL Judicial Institute.

³² Cheryl Thomas, [2020 UK Judicial Attitudes Survey, Report of findings covering salaried judges in Scotland](#) (2021) UCL Judicial Institute. Previous surveys were conducted in 2014 and 2016

³³ Fee-paid judges are paid according to the number of sittings or days worked.

³⁴ For specific data on the experiences of tribunal judges in England and Wales see Natalie Byrom and Sarah Beardon, [Understanding the impact of COVID-19 on tribunals The experience of tribunal judges](#) (2021) Tribunals Judiciary and Legal Education Foundation

judges' working lives are not recorded elsewhere, the survey results are an important source of evidence.

At that early stage of the pandemic, 61% of Scottish judges were somewhat or extremely concerned about the reduction in in-person hearings. Almost three quarters of Scottish respondents (73%) said they were going in to work at their court occasionally in the early months of the pandemic. Under half rated their IT equipment (46%) and internet access (45%) for remote working as either excellent or good. Around a third (31%) said the IT support available to them when working remotely was excellent or good.

In the 2022 survey the judiciary's experiences and perceptions of remote hearings were specifically probed with the addition of some further questions to cover the increase in remote hearings which has continued following the pandemic. Only 26% of salaried judges felt that the increase in remote hearings had been beneficial to their work, whereas 46% of fee-paid judicial office holders felt remote hearings had been beneficial to their work. For those salaried judges who completed the survey, the largest perceived negative effect of remote hearings was on the interactions between parties (72%), quality of advocacy (66%), parties' behaviour during hearings (67%), the ability of others to observe hearings (69%) and the resolution of cases (58%).

When asked to assess the quality of technology in court for remote hearings in JAS 2022, a majority of both salaried judges and fee-paid office holders reported that this was excellent/good or adequate. However, 35% of both salaried and fee-paid judges reported that it was poor/non-existent. Salaried judges reported improvements to the standard of internet access at court since 2016, with 46% rating it as excellent/good, compared with 15% in 2016 and 29% in 2020.

Responses to SCJC 2022 from judicial organisations show that the continued use of remote (video) hearings and electronic communications for procedural matters were largely supported. However, there was wide agreement that video hearings should not become the norm for substantive matters. Referring to the Court of Session, the Senators of the College of Justice argued that complex legal arguments and contested evidence cannot be dealt with as effectively by video hearings which produce barriers to judicial communication, and that the "dignity and solemnity" of court is missing in video hearings:

"The court as a physical place supports the public's acceptance of the legitimacy and authority of the court, and the law itself. In a video conference these essential features are lost."³⁵

The Sheriffs' Association and Summary Sheriffs' Association, although generally in agreement with the proposition in the draft rules that procedural business would be dealt with by remote hearings and substantive matters by in-person hearings, noted that a judge should make the ultimate decision about the appropriate form of hearing. They suggest that this would enable account to be taken of issues of

³⁵ See [Senators of the College of Justice response](#), para 6

digital poverty, noting that "...it is important that sufficient resources are provided, whatever form a hearing takes, if the quality of access to justice is to be maintained".

Sheriffs principal supported the proposed default for remote procedural hearings and in-person substantive hearings but felt that, where all parties were in agreement that a hearing of whatever type should take place by electronic means, such a request should be accommodated wherever possible and practicable. The presiding sheriff would be best placed to decide on the most suitable form of hearing and there may be particular factors in favour of an in-person proof, for example if the proceedings are likely to be "high conflict" or lead to prevarication".

Legal professionals

Overall views and experiences of remote hearings

Although not asked to provide a satisfaction rating for remote hearings, 78% of solicitors responding to the LSS survey stated that they would like to continue with them post-pandemic. Positive factors included reductions in travel and waiting time and cost savings. 75% of respondents felt that remote court access was a useful addition to physical court appearances, and 70% that it increased efficiency in court business. Just 11% felt it did not improve the civil justice system. Negative factors³⁶ for solicitors included technological issues such as not having the right equipment (9%) or a good internet connection (15%) or appropriate training (19%). 59% reported no technical difficulties.

However, although positive overall, 58% of respondents to LSS 2021 stated that there were inconsistencies in the approach of different courts to remote hearings. These included different time limits for and/or rules on written submissions, the use of different remote platforms,³⁷ different arrangements for telephone hearings regarding dialling in / being phoned by the court, and differences in timings with some courts allocating specific times for each hearing and others allocating a fixed time for all hearings on a particular day.

Responses to FoA 2021 show that 88% of advocates had experience of using SCTS' videoconferencing platform for court submissions, and 83% for procedural hearings. Although 91% agreed that remote hearings were a useful addition to court options, 71% found remote hearings worse than in-person hearings. There was a clear preference for video over telephone, which had increased by the second survey in April 2021, probably reflecting greater levels of experience of the videoconferencing platform by that point. Perceived benefits of remote hearings and other electronic measures for advocates were similar to those cited by solicitors: convenience; savings in travel time and costs; improved court processes

³⁶ Respondents were able to select multiple responses.

³⁷ Although SCTS adopted one official platform for remote video hearings, a later closed question (Q8) which asks about preferred methods for appearing remotely lists alternative remote videoconferencing platforms(as well as telephone) as possible options.

through the use of electronic documents; reductions in storage requirements; and improvement in data security. In addition to problems with technology, perceived difficulties included: picking up non-verbal cues; engaging with the judge; challenges in managing presentation; and tiredness.

In SCJC 2022, users' experiences of telephone hearings were generally poor,³⁸ while video hearings were viewed as providing a significantly lower standard of service for parties in comparison to their experiences of in-person hearings.³⁹ The range of problematic issues identified if remote hearings were to continue largely corresponded with the concerns raised in LSS 2021 and FoA 2021.⁴⁰

The use of remote formats for procedural and substantive hearings

In LSS 2021, 91% of solicitors thought that procedural hearings were working particularly well remotely as they were short, enabling a larger number to be undertaken with faster determination. In contrast, 69% said that proofs and 68% said that evidential hearings did not work well remotely. The main perceived issues related to the character of substantive hearings and issues of participation, including: difficulties in assessing witness credibility and/or reliability remotely; the loss of formality; the lack of opportunity for face to face interaction with other agents, witnesses and the bench; and clients feeling disconnected or disengaged from proceedings.

These aspects were reflected in FoA 2021; advocates viewed substantive matters as more difficult to conduct remotely than procedural because of perceived negative impacts on engaging with the judge(s) and difficulties in picking up on non-verbal cues and dealing with witnesses. Further, when asked whether remote hearings should be the default for procedural business, only 50% of advocates agreed. There was low support among advocates for having remote hearings as default for submissions/argument (19%) or witness evidence in civil cases (4%).

In its response to the SCJC Consultation, the Civil Justice Committee of the Law Society of Scotland noted that the proposed rules did not reflect the "overwhelming opinions expressed" in LSS 2021 and FoA 2021. Of particular concern was that "the starting point for the draft rules is to seek to exclude proofs, evidential hearings, debates and appeals from live hearings in the court buildings."⁴¹

The Faculty of Advocates' response to SCJC 2022 acknowledged the importance of retaining the beneficial elements of remote working necessitated by the pandemic. However, similarly to the LSS, the Faculty expressed strong objections to the proposed adoption of remote hearings by default for contentious and substantive matters in the majority of civil cases, arguing that there was no evidence that litigants, judiciary, council, solicitors or the general public wanted this, and that it would create problems with "access to justice, the quality of justice, and

³⁸ SCJC (2022) (full reference above), 9

³⁹ SCJC (2022) (full reference above), 21

⁴⁰ SCJC (2022) (full reference above), 20/21

⁴¹ [Law Society of Scotland response to the SCJC draft rules](#), 3

further inequality” (at p.1 of the Faculty of Advocates’ response). There was, however, a recognition that parties should be able to request remote hearings. The move to a general default of virtual hearings for procedural business was supported, although the view was that this should be confined to video only as telephone hearings provided “no ability to see the participants or screen share documents” (at p.10).

Less than one in five professional individual or organisational respondents to SCJC 2022 supported a general presumption that certain types of cases were suited to in-person and remote hearings in the Court of Session with most taking the view that a general presumption was “too blunt an instrument and the draft rules would strike the wrong balance.” The main preference was for a less complex scheme, capable of supporting a more flexible approach by the courts on a case-by-case basis.⁴² The responses to the same question in relation to the Sheriff Courts were remarkably similar.⁴³

Perceived impacts on access to justice for parties⁴⁴

In LSS 2021, solicitors raised concerns about their clients’ ability to engage and participate in remote hearings, including practical difficulties in obtaining clients’ instructions (45%) and clients struggling to fully understand and participate (41%).⁴⁵ Meanwhile, 61% of advocates responding to FoA 2021 agreed that remote hearings could, if used appropriately, increase access to justice, but 52% felt that they were less accessible for parties. The perceived impact on individuals’ access to justice was primarily linked by advocates to digital literacy and exclusion.

Although 75% of advocates agreed the cost of attendance was lower for parties to remote hearings, 62% agreed that the increased need for written advocacy in place of oral evidence in remote hearings would result in additional costs for parties. It was noted that the impacts resulting from the increased use of written statements were poorly understood and required more research. The use of written statements as an associated impact of the move to remote hearings was also identified by some of those interviewed for the current research.

In its analysis of the findings from FoA 2021, the Faculty highlighted the impact of remote hearings on access to justice as comprising two distinct considerations: the principle of open justice, and the right of the individual to have their dispute determined “fairly, effectively, at a reasonable cost and within a reasonable timeframe”.⁴⁶

⁴² SCJC (2022) (full reference above), 6

⁴³ SCJC (2022) (full reference above), 13

⁴⁴ For a commentary on access to justice issues, particularly for party litigants, see Tracey Reilly, [We need to ensure access to justice in this digital world](#) (2022) Citizens Advice Scotland

⁴⁵ Respondents were able to select multiple responses.

⁴⁶ FoA (2021) (full reference above), 6

Impacts on open justice (public and press accessibility)

The issue of open access was raised by advocates in FoA 2021, with 64% agreeing that remote hearings were less accessible for members of the public. Although the pandemic had justified moving online and thus reducing the transparency of hearings to press and public,⁴⁷ responses to the surveys made it clear that the safeguarding of open justice post-pandemic was viewed by advocates as being of the utmost importance.

Impacts on how legal professionals work

Respondents to FoA 2021 identified differences in carrying out their role online compared to in person which they believed had negative effects, including the loss of the opportunity to ‘read the room’, and the very different quality and nature of online advocacy. This raised concerns regarding impacts on their professional development and networking opportunities. Particular concerns related to trainee advocates (known as ‘devils’) and junior members of the Faculty and their ability to benefit from “collegiality, attitudinal and informal learning”⁴⁸ if hearings were to remain remote.

In its response to SCJC 2022, the Faculty of Advocates raised issues around the conduct of remote hearings as compared to in-person, including that interactions with the court could be ‘stilted’ and that there was a danger that the court could lose control of the proceedings, for example where party litigants are involved or witnesses are uncooperative. It was also noted that there was limited opportunity for discussion between opposing parties. Some advocates had experienced difficulties with taking instructions during remote hearings, alongside practical issues such as lodging documents during a hearing.

Impacts on health and wellbeing⁴⁹

FoA 2021 included a question on the impact of increased remote working on advocates’ mental health. 45% expected that it would make no difference, whilst 44% thought it would worsen and 11% that it would improve their mental health. Fears about the worsening impact on mental health were possibly linked to the fact that 42% had seen their workload increase due to remote working, compared to only 14% who said it had decreased.⁵⁰ However, in its analysis, the Faculty drew wider links with the impact on the role of advocates, noting:

⁴⁷ For a general, non-Scotland specific account of how public access to courts was affected by the pandemic, see Judith Townend & Paul Magrath, [Remote trial and error: how COVID-19 changed public access to court proceedings](#) (2021) *Journal of Media Law*, 13:2, 107-121

⁴⁸ FoA (2021) (full reference above), 14

⁴⁹ US research on the psychological impact on legal professionals of conducting hearings remotely is reported in [Berkeley Research Group](#) (2021)

⁵⁰ FoA (2021) (full reference above), 15

“the overall sense of remoteness causing problems with mental health ought not to be surprising. At its base, the practice of litigation remains about people.”⁵¹

The future

The responses to SG 2022 highlight some significant differences in the views of organisational and individual respondents on the continued use of remote hearings. While most organisational respondents (81% of those giving a view) supported the permanent or extended use of conducting business by electronic means on the grounds of increased efficiency and reduced delays in the court system, only 16% of individual respondents agreed, citing digital exclusion and concerns about security.⁵² Similarly, just 16% of individuals, compared with 67% of organisations giving a view,⁵³ were in favour of extending or making permanent virtual attendance at hearings.

Perceived benefits from extending the measures included the modernisation and improvement of court processes, while perceived disadvantages were similar to those identified in LSS 2021 and FoA 2021, including: digital inequalities; difficulties in assessing witness credibility; perceived negative impacts of parties not being able to see each other; security challenges relating to the use of electronic signatures and the emailing of documents; and communication between parties and their legal representatives. Concerns were raised that virtual attendance could diminish the justice system, as dialling in to a hearing:

“did not convey the same gravitas or seriousness of proceedings as attending in-person and that this was sometimes evident in the poorer behaviour of some attendees.”⁵⁴

If remote hearings were to continue, most individual and organisational respondents agreed that both in-person and online options should be available to allow flexibility and adaptations to different circumstances. Most in the legal and justice sector called for default in-person attendance for civil proofs and jury trials, with less opposition to remote procedural hearings.

Conclusion

The existing evidence provides useful insights – particularly into the views of solicitors and advocates. However, there are significant limitations, both in terms of coverage of different perspectives (there is little data on the views of judges, still less on SCTS staff or on parties) and timing (much of the existing evidence is from

⁵¹ FoA (2021) (full reference above), 14.

⁵² As noted above, it is not possible to tell whether these individual respondents were professionals or parties.

⁵³ Extending the measures on a more permanent basis was supported by a number of organisations of relevance to the current research including SCTS, the Senators of the College of Justice, Society of Messengers-at-Arms and Sheriff Officers, Scottish Independent Advocacy Alliance, and Scottish Women’s Aid

⁵⁴ SG (2022) (full reference above), commentary on responses to J2

early in the pandemic). This takes us onto the findings from the primary research conducted for this report, which aims to help fill these gaps.

3. Commercial actions

Key points

- Most professionals working in the commercial courts were positive about remote hearings for procedural business, due to increased flexibility and efficiency savings, with a preference for video over telephone.
- In general, professionals agreed that hybrid hearings were a useful addition to the suite of available options, particularly for expert witnesses, due to time and cost savings.
- Advocates overall were less positive about remote hearings than commercial judges and solicitors, perhaps reflecting the performative nature of their role and the environment in which they work.
- There was general consensus among all professional groups that remote hearings were not appropriate for party litigants.
- Professionals noted that all types of commercial hearing present great difficulties for vulnerable parties and witnesses, although remote technology may increase accessibility for some.
- Several barriers to accessing remote hearings were identified, echoing themes from the existing evidence: digital exclusion and technological barriers; poor quality internet in public buildings; and inadequate levels of technical support during hearings. As well as being time-consuming, these factors could have negative impacts on the effective conduct of a hearing.
- Legal professionals did not generally perceive remote hearings to have had a negative impact on the outcome of cases.
- However, judges observed that fewer cases settled during the pandemic, and that more cases had been heard remotely which arguably should not have come before the court at all.
- Communications between solicitors and advocates and between parties and their legal representatives were found to be more difficult in remote hearings than in person, but as restrictions eased solicitors often created 'satellite courts' which allowed all parties to be together in a unified space.
- The loss of non-verbal communication was perceived to be a significant issue by some solicitors and advocates. However, judges expressed confidence in their ability to assess witness credibility and reliability in a remote context.
- All professional groups expressed concern about the loss of public and press access to remote court hearings.
- Judges and advocates, in particular, felt that their wellbeing had been negatively affected by the move to remote hearings during the pandemic.
- Professionals generally agreed that more extensive digitisation of court processes and documentation was a welcome development.

Overview of commercial actions and remote hearings in the Scottish civil courts

Commercial actions in Scotland

Commercial actions include any transaction or dispute of a commercial or business nature, for instance commercial contracts and leases, professional negligence, partnership disputes, or the international sale and supply of goods and services. Official civil justice statistics classify commercial actions mainly under the rubrics of 'debt' or 'damages' but behind these classifications lie a wide range of legal issues.⁵⁵ Litigation regularly involves banks and insurance companies, and more recently Scottish football teams. A discrete commercial procedure, facilitated by specialist judges, has been in place in the Court of Session since 1994 to allow the court to handle commercial cases with speed and flexibility.

One important innovation in commercial actions was the introduction of preliminary hearings. These hearings are more akin to a chaired discussion between the parties than a formal court hearing (for instance, formal court dress is not worn). The judge is actively involved in discussions, helping to narrow the legal issues and establish points of agreement. This would usually lead to a more formal procedural hearing to focus the issues sufficiently to allow the case to be sent for debate or proof. There are currently four specialist commercial judges in the Court of Session, who oversee the progress of a case from a preliminary or procedural hearing (references to procedural hearings in this chapter include both) through to a debate or proof.

Since 2001 Sheriff Courts have been able to adopt a modified form of the commercial procedure⁵⁶ overseen by specialist commercial sheriffs, in which the initial case management conference is the equivalent of a preliminary hearing in the Court of Session. It is a decision for sheriffs principal whether to adopt the commercial procedure and not every Sheriffdom does so. Most of the larger Sheriff Courts in Scotland now have commercial courts, the latest two in Hamilton and Airdrie were recently established in November 2022.⁵⁷

⁵⁵ [Civil Justice statistics 2021-22](#), Main Tables, see Tables 12, 13, 19 and 20; commercial actions in the Court of Session are not shown separately from ordinary actions in the Outer House (note 33, Main Tables)

⁵⁶ Sometimes referred to as "Chapter 40 procedure" - the Act of Sederunt (Ordinary Cause Rules) Amendment (No.3) (Commercial Actions) 2000 inserted a new chapter (Chapter 40) into the Ordinary Cause Rules 1993. Glasgow Sheriff Court was the first to do so, with four designated commercial sheriffs

⁵⁷ [Practice Note 1 of 2022](#)

Table 3.1 Volume of commercial business

	2020-21	2021-22
Court of Session		
Evidential	242	174
Procedural	715	607
Sheriff Courts		
Evidential	41	64
Procedural	700	805

Data provided by SCTS⁵⁸ shows that in the most recent figures for 2021-22 there were 174 evidential and 607 procedural hearings in the Court of Session, and 64 evidential and 805 procedural hearings in the Sheriff Courts. The volume of commercial hearings is broadly similar in both courts although it might be anticipated that hearings are likely to increase in the Sheriff Courts as new commercial courts are established.

Remote hearings in the Court of Session

Prior to the pandemic all commercial hearings in the Court of Session took place in person. After lockdown restrictions were introduced in March 2020 teleconference calls, which were already available across the Court of Session estate,⁵⁹ were used briefly for procedural hearings. Videoconferencing technology was introduced and adopted swiftly and the first commercial proof via video was heard in June 2020. Thereafter, the videoconferencing platform was routinely used throughout the pandemic for commercial business until a return to court was permitted.

Remote procedural hearings were conducted using what was described as “the clerk’s personal room”, with all hearings separately scheduled in specific time slots, mirroring in-person hearings. For substantive business the clerk would host a practice session in the videoconferencing platform’s virtual waiting room in order to check that technology was working well for all participants, before moving everyone into a ‘live’ session where the judge was also present. Solicitors pointed out that only the judge and counsel are visible on screen, while others in attendance (for

⁵⁸ Data provided to the research team by SCTS case management system as of 14th July 2022. These figures are more up to date and differ slightly from Civil Justice Statistics in Scotland 2021-22

⁵⁹ Confirmed by SCTS digital team. Teleconferencing facilities are provided throughout the court estate by Cisco Conference Now, see [SCTS Teleconferencing Guide](#)

instance solicitors, parties, court staff) are ‘muted’ with cameras off, and witnesses appear on screen when called.

From 25 April 2022, SCTS guidance outlines presumptions for the Outer House, including the Commercial Court, to the effect that procedural hearings continue to use videoconferencing software and substantive hearings (including proofs and debates) return to the physical courtroom.⁶⁰ Currently these presumptions are being applied for commercial actions and while it is open to parties to move away from the default position, as of January 2023 “there are no examples yet of parties wanting to change”.

Remote hearings in Sheriff Courts

Sheriff Courts present a more mixed picture prior to and during the pandemic, and practice varies considerably between and within Sheriffdoms. Prior to the pandemic teleconferencing was used regularly for case management hearings in a number of commercial courts, for instance in Glasgow, Edinburgh and Aberdeen.⁶¹ The general picture described by court staff and legal professionals interviewed for this study suggests video hearings had been used on very rare occasions. For instance, one solicitor had experience of a Sheriff Court accommodating an international witness by video; another had used a very poor quality video link for Stornoway Sheriff Court.

In the early period of the pandemic, commercial hearings in the Sheriff Courts moved initially to telephone hearings (from around June/July 2020), combined with doing more business administratively (i.e. on the basis of written submissions). Thereafter it has been challenging to produce an accurate timeline for the adoption of video hearings and the use of different technologies in different Sheriffdoms. Some courts moved quickly to video hearings, others continued to do as much in person as was possible with physical distancing in place, and some used teleconferencing routinely as an alternative to video.

The SCTS Change and Digital Innovation Unit indicated that the videoconferencing platform was rolled out across the whole court estate at the same time so that every Sheriff Court ought to have had access as early as the Court of Session did. Sheriff clerks were not certain when video hearings had routinely replaced telephone, but indicated it was later in 2020 than in the Court of Session. From discussion with clerks and members of the judiciary it seems that video hearings became an option in some locations mid-2020 (for instance Edinburgh Sheriff Court), and in some courts “became more frequent, even the norm” in the last three months of 2020. Few of the sheriffs interviewed had experience of conducting video hearings until late 2020 and some not until 2021.

⁶⁰ [Guidance for Supreme Court Users](#), para 2.2

⁶¹ These are also among the busiest courts for civil business, see Civil Justice statistics 2021-22, Supplementary Data, Table S1

Even after video hearings became available some Sheriff Courts continued to use teleconferencing to a significant extent.⁶² Glasgow and Edinburgh Sheriff Courts have the highest volume of civil business and between them accounted for 31% of cases initiated in the Sheriff Courts and 27% of cases disposed of in the year 2021-22.⁶³ Detailed figures are not available specifically for commercial business but it would be reasonable to assume they also conduct the highest volume of commercial hearings. Edinburgh Sheriff Court has continued to use teleconferencing for all commercial procedural hearings throughout the pandemic and up to the present (as of March 2023). Glasgow's Commercial Court has used teleconferencing for procedural hearings for many years, including for contentious motions.⁶⁴ According to a commercial sheriff it was therefore "a perfectly natural progression" after lockdown to move virtually all commercial business (including debates) to telephone hearings. Only commercial proofs were excluded until a solution could be found.

A commercial sheriff drew our attention to one particular case in which the court came under "sustained pressure" from solicitors to conduct a remote proof, thereby accelerating the introduction of videoconferencing technology in Glasgow Sheriff Court.⁶⁵ The sheriff noted that at that point, in the latter part of 2020, the court had no facility to conduct a video hearing. Arrangements were then rapidly put in place and thereafter video hearings were used in a limited way for some proofs and debates. As of late 2022, a commercial sheriff indicated that video hearings, while they had been discussed and offered to parties as an option in appropriate cases, had not been used in the previous six months and that the majority of commercial business in Glasgow had returned to teleconferencing.

According to solicitors most Sheriff Courts conduct 'bulk courts' (replicating a physical court) for commercial procedural business whereby all parties are given the same video hearing link with a running order of cases and turn on their cameras and microphones when their case is called. The clerk checks that everyone is present before letting the sheriff into the meeting. Other Sheriff Courts use individual timed slots for each hearing. For telephone hearings there are two methods of joining: either the sheriff or sheriff clerk calls the parties in an allotted time slot or, alternatively, agents are given a number and a time slot to dial into the conference call, with a passcode.

At the time of conducting interviews for this study, there appears to be no consistent approach across Scotland. Guidance setting out similar presumptions as for the Court of Session was issued by sheriffs principal on 19 July 2022.⁶⁶ This

⁶² It is not clear to what extent teleconferencing continued to be used in all Sheriffdoms, but data is reliable for Glasgow and Edinburgh Sheriff Courts

⁶³ Civil Justice Statistics Scotland 2021-22, Supplementary Data, Table S1. 19% were initiated in Glasgow, 12% in Edinburgh; 17% were disposed of in Glasgow, 10% in Edinburgh

⁶⁴ Despite some negative comments from the Inner House about the practice of transacting court business by private telephone conference call in *Jackson v Hughes Dowdall* 2008 SC 637 and *ASC Anglo Concrete v Geminax* 2009 SLT 75

⁶⁵ The solicitor advocate involved in this case has written about the experience, see [Where are the courts with their use of technology?](#)

⁶⁶ [Guidance for Court Users](#), paras 2.1 and 2.2

states that, unless otherwise agreed, “all procedural business and debates” will be conducted remotely and “proofs and other substantive hearings” will return to in-person hearings. At the time this research was conducted, some Sheriff Courts were applying these presumptions, but the situation was more ‘fluid’ for commercial cases, according to one sheriff. Some sheriffs were choosing to conduct almost all commercial business using a videoconferencing platform, even proofs, unless there was a specific request for an in-person hearing. Others had returned to the courtroom for all business, including procedural hearings. One advocate described the situation in Sheriff Courts as “very à la carte” with a wide variety of practices depending on the preference of individual sheriffs.

Overall attitudes to remote hearings in commercial actions

Between October 2022 and February 2023 the research team conducted interviews with professionals and parties who had experienced a remote hearing. Sixteen interviews were conducted with legal professionals in the commercial field: eight judges (five of the six Sheriffdoms were represented as well as the Court of Session), three advocates and four solicitors. All of these interviewees had many years of experience in the Court of Session or Sheriff Courts as solicitors, advocates or judges, sometimes over the course of their careers in more than one of those roles. We spoke to both male and female professionals located in both urban and rural settings. In addition, a group interview was conducted with sheriff clerks representing four Sheriffdoms.

Considerable efforts were made to include the voices of commercial litigants: a number of solicitors and advocates disseminated information about the project and SCTS sent invitations directly to parties recently involved in a remote commercial hearing. The response to those efforts was disappointingly low, but the researchers were able to interview two commercial parties. One had experience of a proof conducted via videoconferencing in the Court of Session; the other was an insurance executive with experience of attending many commercial actions prior to and during the pandemic, mostly in the Court of Session. We were unable to speak with parties who had experience of remote commercial hearings in the Sheriff Courts.

To date, there does not appear to have been any other research (apart from the current study) specifically about remote commercial hearings.⁶⁷ A specific section on relevant literature is therefore omitted from this chapter.

Reflecting findings from earlier surveys of professionals, discussed in chapter 2, the professionals survey found a clear difference in attitudes to the use of remote technology for evidential and procedural commercial hearings, although compared with family law, the divide was perhaps slightly narrower – 79% of respondents thought video hearings worked very or fairly well for commercial procedural hearings in Sheriff Courts, while 40% felt they worked well for evidential hearings

⁶⁷ Helpful contributions from a commercial perspective were, however, made by Lord Tyre and Lord Justice Flaux to the [Report on the Civil Justice Conference of 10 May 2021](#). A number of practitioners have also written about their own experience, for instance [“Remote hearings: finishing ahead?”](#)

(compared with 81%/31% for family law) (see Annex A, Table A.1b). Views on remote hearings were similar among the smaller group of respondents with experience of commercial hearings in the Court of Session.

The dominant view of remote hearings among commercial professionals interviewed for this study was also largely positive in relation to procedural hearings (which constitute the vast majority of hearings in commercial actions) in terms of both flexibility and efficiency. However, the picture was more complex with respect to substantive business. Judges in both Court of Session and Sheriff Courts generally welcomed a return to the courtroom for substantive business, although they felt remote 'hybrid' hearings remained a useful option, particularly for expert witnesses. At the same time, as discussed above, some sheriffs have continued to conduct all commercial business via videoconferencing and felt most solicitors appearing before them were content to do so. Advocates interviewed had more reservations about remote hearings, perhaps reflecting the nature of the role they perform in the court system. There was general consensus across all groups that remote hearings were not appropriate for party litigants. Both commercial parties interviewed expressed negative views about their experience of a substantive remote hearing but acknowledged remote hearings could be useful for earlier procedural stages. The reasons underlying these views are explored in greater detail below.

Telephone vs video hearings

In the professionals survey there was a preference among commercial respondents for video over telephone as the mode most likely to work well – 79% vs 56% for Sheriff Court procedural cases. However, qualitative interviews indicated a marked contrast between the views of sheriffs who conduct telephone hearings and solicitors who experience them. Sheriffs in Edinburgh and Glasgow had positive views about the benefits of teleconferencing: it was perceived to be quicker and easier than video hearings and there were fewer technical problems (for instance, a telephone line is a more stable connection than broadband, and there are no issues with participants dropping out). While there was no resistance to using video hearings in principle, teleconferencing was seen as a better solution for procedural hearings and, in the case of Glasgow, even for more complex hearings such as contentious motions and debates. These views may also reflect greater familiarity with a long-standing procedure, as one sheriff acknowledged.

Sheriff Court clerks had mixed views on the use of telephone or video for procedural business, which generally appeared to reflect the views of the sheriffs they worked with. One thought telephone was preferable to video, as sheriffs in their area were happier using it and it had less impact on clerks' workload as sheriffs ran telephone hearings themselves from chambers. However, others felt sheriffs in their areas were less happy with telephone hearings, even for procedural business, although they recognised that the ability to dial in by telephone was a useful back-up if participants experienced problems with the videoconferencing platform.

Solicitors with experience of telephone hearings in the Sheriff Courts felt somewhat less positive about them than sheriffs. Some expressed puzzlement at why some courts have retained them:

“I don't really see why we would go back to having a slightly lesser version by telephone.” (Solicitor, ProfC3)

They described difficulties with people talking over one another (perceived to happen frequently when there are no visual cues) and not being able to pick up non-verbal cues, for instance, when someone might want to interrupt, or when the bench wants to say something. Some solicitors also said it was anxiety-inducing waiting for a sheriff to call and, for the alternative method of dialling in, some had experience of appearing in someone else's hearing if it was running behind time.

One advocate was particularly critical of Glasgow's Commercial Court:

“Glasgow has resolutely refused to have anything to do with [SCTS' videoconferencing platform], even if perversely everyone wants them to be back by [SCTS' videoconferencing platform].” (Advocate, ProfC4)

Some solicitors expressed the view that commercial sheriffs in Glasgow were not resistant to video hearings but that there were wider training and resourcing issues that prevented the use of video technology. It is perhaps not surprising that the volume of business in Scotland's busiest court may act as a deterrent to technological experimentation. Sheriff clerks perceived that video hearings took more time both to set up and to conduct the hearing itself, in comparison with a more familiar telephone hearing. A commercial sheriff was of the view that video hearings would become a more frequent request from “tech savvy” solicitors and supported that direction of travel.

Hybrid hearings

Even professionals who were on balance negative about remote hearings acknowledged that retaining the possibility of hybrid hearings would be a useful additional format, particularly for expert witnesses: they save time, and avoid lengthy travel and court waiting times. In one recent Court of Session case witnesses were able to give evidence remotely from a number of different locations including Peru, Malta, Zimbabwe and the south of England.

“Broadly speaking, I think that's one of the benefits of the pandemic. We've now got that hybrid flexibility.” (Court of Session judge, ProfJ10)

Some judges felt that the benefits of appearing remotely would not usually apply to non-professional witnesses, however, and that it would be preferable to have them in court; nor would it be appropriate if issues of credibility and reliability were central to the case. Further caveats were expressed that taking evidence in a hybrid format depends on good quality technology, and that it remains a challenge to share documents via the videoconferencing platform if they are lengthy and complex. One sheriff felt that a hybrid option would be useful for commercial hearings, but

commented that a general lack of confidence in the technology had prevented their introduction:

“you don't want it to fail if you've got an expensive witness who's about to join.”
(Sheriff, ProfJ3)

One commercial party was more negative about their experience of hybrid hearings on grounds of having a level playing field between the two sides in a case. A solicitor expressed frustration that the option of a hybrid hearing depended on individual sheriffs, having been refused this option in a recent case where the witness was in Pakistan.

Perceived impacts of remote hearings on access to justice

The factors at play in commercial actions appear at face value to be somewhat different from those experienced in the other case types examined in this research. It might be conjectured that the image of well-resourced litigants represented by technically proficient law firms is one of the reasons why commercial actions were considered suitable for remote hearings in the Scottish Civil Justice Council's recent consultation, both for procedural hearings and even those that “involve the appearance of witnesses”.⁶⁸ However, judges in particular were keen to point out that this is not always the case. Commercial Courts also deal with unrepresented and vulnerable parties. Similarly, while commercial actions may not appear to deal with such personal matters as, say, family cases, parties may stand to lose their business and potentially their means of making a living, which is clearly distressing.

A major focus of this research is an assessment of the extent to which remote hearings have a positive or negative impact on access to justice for court users. As discussed in chapter 1, the definition of access to justice adopted for the purposes of analysis has four elements:⁶⁹ access to the formal legal system; access to a fair and effective hearing; access to a decision; and access to an outcome. Many of the themes which arose in interviews relate to how easy it is to access the legal system remotely and whether or not hearings are fair and effective. However, some themes cannot be easily categorised, or may fit in more than one of these categories: for example technical barriers may prevent access to the legal system and are also likely to impact on the conduct of the hearing itself, the combined effect of which may ultimately impact on the outcome of a case. Nevertheless while there is some artificiality in the categorisation, it is a helpful way of examining the information that legal professionals, court staff and commercial parties provided about their own experiences.

Access to the formal legal system and to a fair and effective hearing

Technology, training and support

⁶⁸ [Consultation: Rules Covering the Mode of Attendance at Court Hearings](#) (2021), para 37

⁶⁹ This borrows from the work of N. Byrom (2019) *Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice*, Report and recommendations arising from two expert workshops (Legal Education Foundation), 5

Many of the perceived barriers to accessing a remote hearing related to digital exclusion and technological issues. In the professionals survey those with experience of commercial cases said that technical barriers to joining hearings was the most common difficulty parties faced accessing and participating in remote hearings – 70% of commercial respondents said it was at least fairly common for parties to experience technical issues joining video hearings, though this was lower (40%) for telephone hearings (see Annex A, Table A.2b).

The most common and almost universally negative views about video hearings related to internet connection problems. Professionals described situations where witnesses had to log out and try reconnecting, or where they had to disconnect and call in to the hearing by audio only because the connection was not strong enough for video. One sheriff had experience of not being able to speak to all parties at the same time:

“I had to speak to two sides separately because they were unable to both connect at same time, so I put one side on pause while I spoke to the other side.” (Sheriff, ProfJ9)

In addition to preventing participants from joining in the first instance, inadequate technology can also be a barrier to the effective conduct of a hearing. Judges emphasised many times that the success or failure of a remote hearing depends on having high quality, stable broadband. Lack of connectivity can cause screens to freeze or can cause delays (drop-out) in responding to a question. These difficulties were viewed as having potentially significant consequences in a court hearing:

“It's not uncommon for there to be a slight time lag, just maybe a second or two but there are a number of consequences of that: one is it's just enough that you're conscious of it, so it's therefore just enough to be slightly distracting, both probably for the speaker and for the listener; it means that sometimes, particularly where there is evidence being led, the risk of people talking across each other happens and for the decision maker that's difficult because you then aren't getting everything that people are saying.” (Sheriff, ProfJ6)

Serious consequences may ensue when lack of connectivity causes someone to drop out of a hearing entirely. One judge gave an example where an advocate left the hearing, leaving the judge unsure whether it was intentional. A commercial party had attended a remote hearing where a participant experienced intermittent loss of signal and also “the judge’s signal dropped out a few times, and the hearing just continued without him being there.” A lack of good quality broadband was also an issue for commercial hearings because of the common practice of viewing large and complex documents by screen-sharing.

A number of judges were frank in their assessment of the poor quality of broadband in many public buildings (for instance, prisons and police stations) and throughout the court estate. Although things had reportedly improved since the early stages of the pandemic, there was nonetheless a good deal of frustration among legal professionals at how often technology remained an issue in remote hearings.

In the survey of professionals lack of access to a suitable device was less likely to be seen as a common issue for commercial parties compared with family parties (29% said it was at least fairly common for commercial parties not to be able to join due to lack of a suitable device, compared with 46% for family cases – see Annex A, Tables A.2a and A.2b).⁷⁰ This may reflect the different profile of commercial clients, many of whom are well resourced and most legally represented. Commercial professionals did, however, give examples where the lack of an adequate digital device had been an issue in relation to witness evidence, for instance where a witness's face had been partly obscured because they were using a smart phone screen or, more frequently, where using a mobile phone meant that a witness had been unable to see other participants in the hearing or to view electronic documents. In the professionals survey 38% felt parties in commercial hearings commonly had difficulties reading documents on screen (Annex A, Table A.2b).

Members of the judiciary observed that very little IT support was available when things went technically wrong in a hearing beyond what clerks were able to offer, and felt that having support in court buildings would make a significant difference:

“That's not their [clerks'] fault, it's not their job, but they're being called upon to manage the immediate crisis in the courtroom when the tech is not working and I'm not convinced that the resources for supporting them are as good as they could be.” (Sheriff, ProfJ6)

Clerks themselves reported receiving some training on how to use the videoconferencing platform from the SCTS training team (the Education and Learning Unit). However, they did not feel this fully equipped them to help other people, as they were only familiar with how it worked from their perspective, as the meeting organiser:

"We didn't know what other people were seeing, solicitors or participants. ... from my side I know what to do but I didn't know what solicitors had to do or how they logged on." (Sheriff clerk)

The SCTS Change and Digital Innovation Unit indicated that (unlike in England and Wales) there was a limited assisted digital programme in Scotland and that support to participants in hearings was to be delivered via clerks. They suggested that specialist support officers should have been available for every hearing if the clerk flagged that a remote hearing was taking place. However, it was not clear that clerks were aware of the possibility of additional technical support, and none of the judges interviewed mentioned this facility.

One sheriff, who felt that remote hearings did not serve the interests of justice and had conducted only a few video hearings of any kind throughout the pandemic, noted that the lack of a stable internet connection played a large part in this assessment, as well as access to justice concerns more widely.

⁷⁰ Other differences in the proportion of family law and commercial law respondents saying issues were common were not statistically significant.

Potentially vulnerable participants and party litigants

Commercial professionals' views on which parties might find it easier to access hearings remotely than face-to-face were broadly similar to those of family law professionals who responded to the survey conducted for this study. Unrepresented adults and adults with learning disabilities in particular were seen as likely to find face-to-face hearings easier than either video or telephone (62% felt unrepresented adults would find face-to-face easier than video, and the same proportion felt they would find it easier than telephone). Views on other groups were more finely balanced. However, where commercial professionals drew a distinction they tended to say face-to-face would be easier for parties. One exception was wheelchair users; commercial professionals felt that wheelchair users might find remote hearings (by video or telephone) easier than face-to-face (see Annex A, Tables A.3b and A.4b).

In interviews with professionals, there was a clear view that for vulnerable parties and witnesses both in-person *and* remote court hearings are very difficult. It was also suggested that there may in fact be advantages for some parties in using remote technology. Judges in particular recognised that remote hearings ought to provide an accessible way to come to court, noting that for some vulnerable parties solicitors sometimes offer their offices as a 'satellite court', which is seen as a good alternative. However this was not always possible, and clearly would not apply to unrepresented parties.

Professional interviewees reported that party litigants are not frequently encountered in the commercial context⁷¹ and where they are "they tend to be relatively sophisticated": for instance, company directors wishing to appear as lay representatives for the company; or litigants who wish to continue their action against legal advice or where their representative has withdrawn. However, professionals acknowledged that remote hearings were challenging for party litigants and raised questions about effective access to the legal system. One sheriff gave an example where a party litigant's technology had prevented him from joining a hearing, with potentially serious consequences:

"They had tried to dial in to a hearing but the court was unaware of that and decree *in absentia* had been granted. It was subsequently appealed, and rightly so, but shouldn't ever have happened." (Sheriff, ProfJ5)

Judges had made efforts to accommodate unrepresented parties in particular cases by putting additional measures in place to enable more effective participation: for instance, ensuring documents were delivered in person, adjusting the time of the hearing, and insisting the other side articulate legal arguments in advance. Another had ordered a hearing involving a party litigant to take place in person early in the pandemic "for access to justice reasons" and to ensure equality of arms.

⁷¹ As noted in chapter 1, exact numbers of party litigants are not available from SCTS data

Communication difficulties: 'the tug of the gown'

In the survey many commercial professionals felt it was at least fairly common for parties to experience difficulties speaking to their representative during a remote hearing (57% said this was very or fairly common in video hearings, slightly lower at 41% for telephone hearings – Annex A, Table A.2b). It was also a common theme in interviews with professionals and commercial parties that their internal communications in a remote hearing were much more difficult.

Communications between solicitors and counsel, often quick corrections or instructions in relation to particular legal issues, have to be done digitally in a remote hearing. Indeed, the role of junior solicitors and advocates in a remote hearing was reported to involve setting up WhatsApp or text communications between participants and to monitor incoming messages or send questions during the hearing:

“The tug of the gown so to speak, can't really happen online. You have to say ‘My Lord or Lady, could I have a moment while I take instructions?’ and that's physically, you know, getting a text or WhatsApp message from the solicitor - you can't lay your head back and somebody whisper in your ear.” (Advocate, ProfC1)

The problem of internal communication was perceived to be worse in the Court of Session where solicitors have their cameras off and are unable to indicate if they wish to communicate with counsel. Solicitors suggested that there should be a facility to have a short discussion if needed, for example, in response to a question from the bench, without needing an adjournment.

Both commercial parties felt that not being able to communicate effectively with their legal representatives had been both frustrating and detrimental to the conduct of their cases. One party had been part of a WhatsApp group with their solicitor and counsel during the hearing but compared it unfavourably with the subsequent appeal hearing which was in-person and they could have a chat at lunchtime. Solicitors felt that remote hearings could lead to clients feeling “isolated” and “disengaged from the process”:

“I was dealing with the person that was the CFO [Chief Financial Officer], and they knew the case inside out at that stage and they sat in on the [video hearing]. But you miss the social interaction with clients – the morning recess for the coffee break, ‘How do you think it's going?’ and the chat about it.” (Solicitor, ProfC5)

Judges also felt that something of the “gentle ribbing” of the courtroom was not possible online, affecting the relationship between agents and sheriffs:

“I can say ‘Mr. X, you know that that's not the law, you can't do that, that's not competent, is that really wise?’. All of that is lost on screen.” (Sheriff, ProfJ9)

Some of these are perhaps subtle and immeasurable interactions but professionals clearly felt they were missing from the online environment to the detriment of all participants. As meeting in person became possible again, commercial

professionals said that often all the professionals, including trainees, junior counsel and perhaps even the client, meet in the solicitor's office in order to try and create "a single unified physical space where people are able to interact".

Non-verbal communication: 'law as poker'

The commercial party who was an insurance executive had a unique perspective on the 'tactics' of the courtroom, which they felt were adversely impacted by remote hearings. They strongly felt that it was crucial to have everyone in the same room in order to be able to pick up "small nuances and non-verbal communication". Even a glance at the solicitor could convey whether the other side was reaching the end point of negotiations:

"there's a point when it stops being law and it becomes poker. And I don't know whether virtual poker or computer poker might work, but there's an awful lot that you have to see the players' faces." (Commercial Party 2)

Witness credibility

One oft-cited concern in the literature, as discussed in chapter 2 of this report, is the question of whether witness evidence can be assessed adequately in a remote hearing. Some advocates and solicitors interviewed for this study shared this concern, pointing out that the nature of the case would play a large part in assessing credibility. For instance, if the essence of the case was that somebody had to be lying, questions of credibility would be central to the hearing:

"It really needed to have a sheriff listen to just how unfeasible one party's position was and to read the body language.... Their evidence was incompatible. It was the sort of thing that I don't think could ever be done other than an in-person hearing." (Solicitor, ProfC7)

On the other hand, it was pointed out that video evidence where there are even small time delays could give a false impression and on a subliminal level people may think the witness is calculating or lying.

However, judges interviewed for this study largely disagreed with the view that credibility and reliability were more difficult to assess in a remote hearing than in person (with the exception of one sheriff who felt strongly that they were). Some felt there may even be advantages, for instance, the witness's face is closer than in the courtroom, and the judge is better able to see facial expressions and reactions. Moreover, judges pushed back on the notion that assessment of witness evidence should primarily be about their demeanour or facial expressions. They made the point that psychologists would suggest that behaviours (or 'tropes' as one judge put it), including taking too long to answer or avoiding eye contact, are not reliable indicators of whether someone is lying. The predominant view among judges interviewed for this study was that in general they were able to assess credibility and reliability in a remote format in most commercial hearings because their assessment of evidence was a more rounded process:

“In most cases credibility of a witness is not likely to be determinative in a commercial case ... There are so many other markers - you've got the contractual context, the evidence of other parties, conduct that's consistent or inconsistent, whether there is an ulterior commercial purpose, and so on that I didn't myself find difficulty in making really hard determinations about credibility.” (Court of Session judge, ProfJ13)

Access to a decision and to an outcome

Legal professionals did not generally perceive remote hearings to have had a negative impact on the outcome of commercial actions per se, particularly not on the judge's ultimate decision. However, there were other aspects of working in a virtual environment which were seen as affecting the progress of cases and perhaps the number of cases coming before the courts for a decision.

Narrowing the legal issues: 'oiling the machine'

All groups of professionals were of the view that remote hearings are not sympathetic to the efficient running of cases. Advocates felt that the fact of not physically being in the same building had led to a reduction in interactions between counsel, often with detrimental effects:

“They would very often, if not invariably, have a chat try and work out if issues could be dealt with informally by agreement or without having to have them determined by the court, and that's what I would describe as 'oiling the machine' - that made the machine work more efficiently and resulted in fewer arguments having to be taken before the court, and probably less time being taken before the court.” (Advocate, ProfC2)

Both advocates and solicitors clearly regarded these soft skills of relationship-building and negotiation as integral to their role, part of the legal process and part of what clients were paying for.

Settlement of cases

Some judges interviewed for this study observed that fewer cases settled during the pandemic, and thought that some cases had been heard remotely which should not have come before the court at all. Detailed court data on settlement rates is not publicly available. However, some judges ascribed it to the negative impact of remote hearings on the usual communication channels, particularly for advocates:

“The lack of informal communication meant that more cases ran, even those where you could see it was like a slow motion car crash, because structures precluded settlement.” (Court of Session judge, ProfJ13)

Some judges were unsympathetic to the difficulties of achieving settlement in a remote context, taking the view that negotiations ought to take place long before the parties arrive in court and not on the day of the hearing. Solicitors were also aware of this change, noting that their practice had changed as a result:

"You lose the door of the court type settlement, at the last minute pacing the Hall. You have to be more organised about it, which is perhaps a good thing, and have settlement discussions earlier." (Solicitor, ProfC5)

One commercial party had an interesting additional perspective on "not being in the room". They were clear that from an insurance company's point of view the goal is always to settle, and many of the tactics employed in court are non-verbal communications designed to lead to that outcome. This party strongly believed that there was more chance of settlement in an in-person hearing:

"If a system gets developed that stops the parties getting together, then that is an obstacle towards resolution and that will always just increase costs."
(Commercial Party 2)

The question of digital skills may also have an impact on the outcome of a case. One commercial party had experienced a remote proof in the Court of Session and believed the case had been prejudiced because their expert witness had not been digitally confident or technologically skilled. As a result when giving evidence he became "flustered" and, they felt, was thrown by technology, unable to follow the documentation and faltering in expressing himself. This contrasted with the opposing expert witness who was "slick and savvy" and clearly used to presenting online. This party, rightly or wrongly, felt that the judge had been unable to make that distinction and that the result might have been different in a physical courtroom. Comfort with technology may lead to different criteria in the selection of expert witnesses in the future.

Other perceived impacts of remote hearings

Some themes emerged in interviews which broadly relate to the impact of remote hearings on the ability of legal professionals to carry out their role effectively. These may appear relevant only to legal 'insiders', but their impact on judges, advocates and solicitors is significant enough ultimately to have an impact on the conduct of hearings and perhaps even the outcome for litigants. Themes that emerged from interviews centred on training and support for professionals and the broader effects of remote hearings on the authority of the court itself.

Authority of the Court

Some of the issues raised in discussion with commercial professionals related broadly to the proper functioning of the legal system itself and to the rule of law. Many were reflective about the impacts of remote hearings on the proper functioning of the courts, not in a procedural sense but as the 'place' where justice is done and must be seen to be done.⁷² The concerns that emerged related predominantly to a perceived loss of the court's authority. A number of commercial professionals were concerned that the sense of formality and solemnity involved in a court hearing is lost in the virtual world:

⁷² Lord Pentland emphasises the importance of the court as a physical place in his contribution to [Report on the Civil Justice Conference of 10 May 2021](#)

“Commercial cases can also be life changing, even if less dramatic than criminal - the vindication of your rights. And maybe that's the point of ceremony and the wigs and gowns and so on, that this is not an elevated form of entertainment on a par with other things you might be clicking through on the screen.” (Court of Session judge, ProfJ13)

Many professionals gave colourful examples of witness demeanour that was deemed inappropriate for a court hearing including overly informal dress, inappropriate language and tone to address the court, and unsuitable locations from which to give evidence:

“I have seen the inside of too many people's bedrooms, frankly, and people giving evidence from the driving seat of their vans. I have had people thanking me and saying ‘cheerio mate’ as their evidence finishes.” (Sheriff, ProfJ6)

Some were more relaxed about witness behaviour and felt it was better to hear their evidence than not at all, one judge taking the view that it may even make witnesses less inhibited and “a little bit more forthcoming”. Others felt strongly that the “authority of the rule of law” was not a matter of personal preference, but that it reinforced the seriousness of proceedings for those coming before the court about potentially life-changing matters.

One further issue for commercial judges was the sense that they had little control over a witness’s remote environment, for instance whether they were alone, or potentially being coached. Furthermore, and in stark contrast to the usual powers of an in-person court, they had few sanctions to compel witnesses to comply with the court’s orders:

“But we have a difficulty with the person who's sitting at home... I have made baseless threats about a policeman coming round to your house and things like that, but the bottom line is I haven't got any power to actually do that.” (Sheriff, ProfJ9)

Training and support

The professionals survey conducted for this study indicated relatively high levels of confidence in their own technical skills – 81% said they were very or fairly confident they had the technical skills to join and participate in video hearings, 97% said the same for telephone hearings (Annex A, Table A.13). However, the qualitative interviews with legal professionals suggested that not all professionals were digitally confident or proficient, which could have a significant impact.

One judge gave an example of a senior solicitor who “didn’t know the difference between his volume and his camera” and had wanted to delay the hearing as a result. Across members of the judiciary (and clerks), those who were already familiar with computers and technology in general felt comfortable in the new digital environment, while others found it much more challenging and would have welcomed better training and support. Judges indicated that they themselves had not been offered any formal training either on the videoconferencing platform or

more generally on conducting remote hearings, and many would have welcomed it. There was a sense that everyone was “making their own way”, trying to create new rules and procedures that would make remote hearings work. In some Sherifffdoms, sheriffs had met as a group to try to invent new systems and ways of working, and individual judges had drafted their own guidance for witnesses (a standard style is now available). However, there was a perceived lack of system-wide guidance.

Impact on transparency

‘Transparency’ of proceedings is largely understood to mean ‘open justice’ – that is, the principle that court proceedings are conducted in public and that members of the public and the press may attend any court hearing and witness justice in action, should they choose to do so. In the survey, commercial professionals were more likely to say it was easier for the public to attend hearings face-to-face than remotely: 46% felt it would be easier for the public to attend in person than by video, compared with 20% who thought video was more accessible (8% felt there was no difference and 26% were unsure – see Annex A, Table A.5). Responses were similar for telephone hearings.

The loss of automatic public and press access to court hearings was a significant concern among all groups of professionals, particularly for the judiciary. The unanimous view was that the public gallery is an essential element of the justice system, open justice being “an aspect of the rule of law in a democracy”.⁷³ Some professionals pointed out that this may be a somewhat theoretical concern with respect to the commercial courts, as they do not generally attract much public interest (with the notable exception of hearings concerning football teams). At the same time, as a matter of principle it was felt to be of cardinal importance.

In contrast to the perceived ease of attending court in person, all groups of legal professionals observed that there are a number of obstacles that a member of the public or press would need to overcome in order to join a remote hearing. The procedure to request access at the time of writing was by phoning or emailing clerks of court for a link to the hearing, although where courts operate a system of links for individual hearings it was recognised that it would be an onerous process to attend more than one. For some Sheriff Courts, public access to court staff was perceived to be limited, attributed in part to resourcing issues:

“At the moment there is really very limited public access to the clerks. If they're lucky, they can send an email which goes into a general email box and might be answered in a few weeks”. (Sheriff, ProfJ3)

Clerks also raised the fact that public access was more difficult for remote hearings and noted that video hearings were not publicised on their website as “open court”. Exceptions had been made for cases deemed to be of significant public and media interest where joining details had been posted on the courts’ website. For instance, in an early video hearing involving relegation decisions taken by the Scottish Professional Football League, the presiding judge was aware of over 900 people

⁷³ [A \(Respondent\) v British Broadcasting Corporation \(Appellant\) \(Scotland\)](#) [2014] UKSC 25 per Lord Reed at para 23.

listening in by telephone. Legal professionals also provided examples where audio access had been requested and granted in particular cases.

Solicitors were concerned that trainee solicitors had also encountered difficulties attending video hearings, for instance if they needed to watch a case for a client who may have an interest. It was described as being “like pulling teeth” to get information about the timing of hearings with a video link. Some solicitors (and advocates) felt that being unable to attend court in person was a significant barrier to learning for new members of the profession.

A slightly different issue was raised by a commercial party, who felt uncomfortable that the names of attendees were made public in a remote hearing. In the past they had on occasion “slipped into the public gallery” of a court to take stock of a case. They suggested that providing for the possibility of “anonymised attendance in an additional gallery would mirror the real life version”.

Impact on efficiency

In the survey, commercial professionals were divided on whether remote hearings save time overall (see Annex A, Table A.6). A third said video hearings took longer than face-to-face, a quarter said they took less time, while another quarter felt they were about the same. Around a third also felt telephone hearings took longer than face-to-face, while another third said they took less time, and around one in five felt they were about the same. Among the small number of commercial respondents (43) with experience of hybrid hearings, most (65%) felt they took longer than face-to-face hearings.

Qualitative interviews found mixed views among professionals when asked to assess whether or not remote hearings had had an impact on the efficiency of the Commercial Courts. Commercial solicitors were the most positive group in relation to efficiency because remote hearings saved them hours of travel time and in court waiting rooms. This was particularly beneficial for those who do not live in the central belt. Some professionals also noted the positive environmental impact of reduced travel both for themselves and for expert witnesses.

One solicitor estimated that remote procedural hearings probably represented half the cost of an in-person hearing, savings which were passed on to clients. Solicitors also noted a preference for the ‘bulk court’ approach to procedural hearings; individually timed slots were regarded as less efficient (“if there was slippage the whole day was held up”).

Another efficiency appreciated by commercial solicitors was being able to do procedural hearings themselves rather than instructing local agents. This was again perceived to save time and costs for clients (including time spent briefing agents). In addition, they felt that the principal agent is much better placed to answer questions (which in the past often led to delays). A sheriff, in agreeing with this view, noted that having the principal agent in the hearing created “a much more meaningful engagement” with the court.

Judges were also broadly positive about the overall impacts on efficiency of Commercial Court proceedings. Remote commercial hearings were perceived to be more “concise and succinct” due to having submissions in advance, notification of joint positions, and faster disposal of cases which were able to be dealt with administratively. Judges also pointed to greater flexibility if they needed to schedule urgent motions, enabling quicker access to justice. However, they also observed that any time they personally saved in attending remote hearings was often “directly the converse” for preparation and reading electronic documentation in advance of a hearing. One sheriff felt that the conduct of remote hearings, even for procedural business, took much more of their time overall:

“In person you could call the case in 30 seconds, now it takes 3 or 4 minutes longer as you have to organise people into different rooms. Greater court time generally.” (Sheriff, ProfJ5)

Judges also had mixed views about whether remote commercial hearings were efficient in relation to court staff time. Remote hearings did free up courtrooms and consequently staff time directly associated with in-person hearings (for instance, Bar Officers). However, the workload for clerks in particular was perceived to have increased. Although remote hearings themselves could be quicker than face-to-face (particularly bulk procedural courts), clerks confirmed that they spent more time managing hearings and supporting participants. For in-person hearings they would generally leave the hearing and be able to do other work. However, they had to stay in remote hearings to manage witnesses joining (or re-joining); to hand over controls for screen sharing; or to help share productions if there were technical problems.

Impact on wellbeing and work-life balance

In the professionals survey, participants were asked about the impact of remote hearings on their work-life balance and, separately, on their wellbeing. The former question was intended to focus on workload issues and the latter on more personal aspects of working remotely. There was a marked difference in responses: more professionals felt that remote hearings had had a positive than a negative impact on their workload, while the reverse was true with respect to wellbeing.

In the commercial context, 39% of commercial professionals felt remote hearings had a positive impact on their work-life balance, compared with 29% who felt the impact had been negative (see Annex A, Table A.9). However, this picture was reversed when it came to the perceived impacts on their overall wellbeing – 45% reported a negative impact, compared with 26% who felt remote hearings had been positive. Looking across the professional groups that responded to the survey as a whole and across all four case types, it is clear that members of the judiciary were the most likely to feel remote hearings had a negative impact on both their work-life balance (50% negative, 23% positive) and wellbeing (58% negative, 13% positive). Taken together solicitors and advocates were far more positive than the judiciary about the impact on their work-life balance (59% positive, 20% negative). However, in relation to their personal wellbeing advocates were considerably more negative: 60% felt that remote hearings had a negative impact on their wellbeing, compared

with only 24% of solicitors.⁷⁴ The negative impact on wellbeing was reflected in qualitative interviews with commercial professionals, linked to the perceived erosion of key elements of their professional life, including the lack of social interaction and the loss of informal learning opportunities.

Commercial professionals were, on the whole, keen to discuss the impact of remote hearings on their personal and professional wellbeing. Judges and advocates felt that their wellbeing had been negatively affected and were aware that this was also the case for colleagues. Advocates we spoke to experienced this most acutely.

Judges in both the Court of Session and Sheriff Courts reported feeling more “intellectually tired” in video hearings and more conscious of the need to build in breaks, as would be the case for in-person hearings when the court rises. There were mixed views about the impact on work-life balance and workload more generally. Some professionals did not detect any negative impact; others found they were working more evenings and weekends than before the pandemic because of the lack of any “downtime” between hearings in which to write. For one sheriff this was directly linked to frustration at the operating speed of ICMS (the courts’ Integrated Case Management System). They described the process of doing a batch of electronic signatures – calling up individual documents, appending an Adobe signature, saving it and moving on to the next document – as “cumbersome” compared to putting wet signatures on a batch of paper documents because each stage of the digital process involved a “spinning wheel” of delay on screen. As a result, they ended up working at home in the evenings to complete the task:

“The system works faster in the evenings when no-one else is using it, so it has definitely had an impact on family life.” (Sheriff, ProfJ9)

A key aspect of wellbeing that emerged from interviews with commercial professionals was the lack of social interaction with colleagues. It was suggested that the effect of social isolation on the profession should not be underestimated because “litigation lawyers are sociable beings”. The loss of the lunch meeting, the chat over a cup of coffee or the walk back from court with a colleague were sadly missed.

“I mean we operate in a collegiate environment where we have been accustomed to having a lot of contact with colleagues. The idea that one comes into one’s room in Parliament House, sits down at 9am and looks at a screen all day, it’s not what most judges signed up for.” (Court of Session judge, ProfJ11)

Advocates we spoke to appeared to feel this sense of isolation most acutely. The collegiality of Parliament House was viewed as an intrinsic part of being an advocate in Scotland. One advocate explained that the lack of informal contact meant, for instance, the loss of a colleague’s advice on a difficult legal problem and the generosity that is characteristic of the Bar. Another spoke of the loss of a “support network” to talk things through with if a hearing goes badly. At the time

⁷⁴ It should be noted that only 25 commercial advocates responded to the survey

interviews took place, it was reported that many advocates had still not returned to the Advocates Library and “to the way things were” before Covid. There was concern for younger colleagues that they would miss out on learning opportunities gained by attending hearings, as discussed above, and that they may be cut off from the wider social benefits of the advocates’ community.

Commercial solicitors interviewed for this study were less concerned at the impact of remote hearings on their wellbeing. While acknowledging missing the camaraderie of the courtroom, some even thought it had had a positive impact on their wellbeing, since the more efficient use of their time had improved their work-life balance. One solicitor echoed concerns from advocates, however, over whether, in the longer term, the lessening of social contact may hinder the ability to develop good professional relationships and trust between colleagues.

In addition to discussing the impact on their own wellbeing, judges voiced concern about the wellbeing of clerks, who have had to embrace a different role and a different way of working. This was perceived to have been particularly acute in the early stages of the pandemic when they were expected to facilitate hearings without necessarily having the resources at home to do so; an example was given from early in the pandemic where a clerk was facilitating a hearing from home with a laptop balanced on an ironing board. Clerks themselves did not report major impacts on their work-life balance and wellbeing. They did, however, note that managing their workload can be more difficult when they have a mix of video and in-person hearings, along with other court business in between.

Views on other current and potential adaptations

The use of digital technology has been an important feature of commercial actions from the inception of the Commercial Court. Prior to the pandemic court papers were able to be lodged electronically by email and “voluminous” productions (i.e. documentary evidence) by physically lodging a USB memory stick.⁷⁵ However, digitisation was limited in that the digital documents had to be accompanied in many cases by a paper copy (for instance any document exceeding 20 pages, or in colour, or requiring a signature). Only a very limited category of documents, including productions, did not require hard copies (and even then hard copies could be requested). Court hearings could be conducted using digital documents and screens were in place for counsel to use with their own laptops. The process of further digitisation has, by necessity, been accelerated by the pandemic.

In the early stages of Covid-19, paper bundles had to be sent to witnesses’ homes which created “lots of audio problems with leafing through documents”. The commercial courts were quickly able to accept electronic documentation. In Court of Session remote hearings documents began to be shared on screen, which led to the installation of multiple screens to allow participants to view documents and see one another at the same time. One advocate pointed out that accompanying measures such as sockets, cabling, digital ports and larger tables to accommodate multiple screens were, at the time of interviews, still needed to complete a fully

⁷⁵ [Commercial actions: guidance for practitioners](#) (2017).

functional digital environment. However, by and large commercial professionals viewed these developments as a significant improvement:

“The pandemic has been an absolutely horrible experience for people affected by illnesses, but the court system has moved on to somewhere it wouldn't have been within the next 15 to 20 years.” (Court of Session judge, ProfJ10)

Commercial solicitors, many of whom already operated in a paperless environment, were particularly positive. Some noted that being able to create joint electronic bundles and email everything to the court saved time and reduced the environmental impact of hearings. However, it was pointed out that the amount of work involved may be challenging for smaller firms with fewer staff and without access to specialist software.

While other professionals were broadly supportive of digitisation, they felt that it had made some processes slower, particularly in the Sheriff Courts. These comments were principally concerned with the speed of the ICMS system, which was already an issue in some locations prior to Covid. However, it became a more significant issue during the pandemic as more business was conducted digitally, such as greater use of electronic documentation and e-signatures. Problems were also sometimes experienced when documents (or amendments) were filed close to the hearing date, which could cause a delay in papers being available to the judge.

Some professionals thought it would be beneficial if courts had specialist commercial staff trained specifically in managing electronic documentation both prior to and during hearings. For this reason, in high value cases in the Court of Session some advocates felt it was worth hiring external document management companies to manage the joint bundle, screen-sharing of documents, and to produce a very speedy transcription. Judges (and other professionals) felt that recording and transcription of hearings would be a considerable benefit.

Some judges are clearly more adept with technology, monitoring activity on multiple screens (being “an air traffic controller”) or navigating lengthy pdf documents. A lack of confidence in technology may partly explain why some still prefer to print documents, although it may also reflect a more specific lack of confidence in court technology, as well as the familiarity and speed of marking up a paper document in preference to a digital one:

“I'm afraid my brain is wired in a way that is paper based. Maybe another generation will be different. I require the documentation in front of me and I can mark things, I can write annotations on it, I can put post-its down and highlight and I can fold pages, you know, for ease of reference. No doubt there are digital equivalents for all of these, I've never been trained in it.” (Sheriff, ProfJ3)

This view was echoed by clerks of court, who noted that different judges had a preference for either electronic or paper documents. They did not see electronic papers as having made much difference to their own workloads (although there was some frustration around late submission and poor naming of documents by solicitors). They also confirmed that the electronic document route was not well

supported by the available equipment in court at present, citing examples of courtrooms with no docking station.

One advocate had more reservations about digitisation of the court process, taking the view that it might “narrow” the arguments that can be made in court. The spontaneity of picking up a particular piece of paper to put before a witness may be curtailed by the difficulty of finding that reference within potentially thousands of digital pages. A commercial party also noted that they had found it extremely difficult in a remote hearing to follow the detail referred to in multiple complex spreadsheets.

Conclusions

Reflecting back on the original impetus for creating an expedited and efficient commercial procedure in the Court of Session, there remains a concern at senior levels of the profession that Scotland can do better. Although welcome progress has been made as a result of pandemic measures introduced, there was a strong belief both that in-person hearings need to remain an option for commercial business, and that there needs to be greater investment in technical infrastructure and well-trained staff to support commercial hearings:

“we need to make sure our product is as good as it can be and I think an element of that is retaining the in-person hearings for substantive business because clients still want their day in court physically, but also making sure that the delivery of the judicial process in terms of the infrastructure, the environment is of a commensurate standard to that you would find in London.” (Advocate, ProfC1)

Different concerns were expressed with respect to commercial actions in the Sheriff Courts where legal professionals, fully aware of the flaws and difficulties, on balance welcomed the new digital world. Subject to the provision of high quality broadband, professionals felt that remote commercial hearings allowed them to process procedural business more efficiently; that hybrid hearings gave them greater flexibility; and digitisation meant savings in time and reduced the environmental impact of the courts.

4. Family law hearings

Key points

- For substantive family law cases, and in particular Child Welfare Hearings (CWHs), there was a strong consensus among professionals that remote hearings did not work well and were not appropriate.
- Where remote hearings were used, there was a clear preference across professionals for video over telephone. However, there was less agreement among parties, whose preferences tended to be based on their experiences at hearings more generally rather than on the specific mode used.
- Parties who had access to suitable technology, were IT proficient and had the right home set-up felt more positive about remote hearings generally although, for some of those dealing with issues of domestic abuse, intrusion into their home setting was problematic.
- Professionals expressed ongoing concerns around digital exclusion, particularly in respect of party litigants.
- The availability of clerks varied across different court settings, with some sheriffs expressing a lack of support with managing technology during hearings.
- Parties' views on their ability to participate in remote (telephone or video) and in-person hearings varied, with some finding it difficult to communicate in remote hearings compared to in person and others finding it easier.
- Represented parties noted difficulties in communicating effectively with their solicitors in remote hearings.
- Sheriffs felt that good personal interaction, including non-verbal communication, was essential in CWHs due to their problem-solving nature.
- Professional groups agreed that formality and the authority of the judge aided compliance with the outcomes of hearings and thought that this was easier to achieve in person.
- Although it was recognised that remote hearings could aid efficiency in some contexts, any assessment of efficiency must take account of other factors including the objectives of the system and different needs and perspectives of all those involved.

Overview of family law actions and the use of remote hearings

Defining family law

As noted by a sheriff interviewed for this research, “when people say family, the first thing is to be clear what we mean by family”. ‘Family actions’ are those which fall within Chapter 33, Ordinary Cause Rules (OCR) which govern procedure in the

Sheriff Courts⁷⁶ and rule 49.1 of the Rules of the Court of Session (RCS).⁷⁷ For the purposes of civil justice statistics, however, Scottish Government defines family law in slightly broader terms as covering “a wide range of areas related to families, couples and children”.⁷⁸ The latter specifically include adoption and permanence, which do not fall within Chapters 33 or 49 of court rules.

Family disputes are often complex and may cross legal and conceptual boundaries, for example, the boundaries between private and public law, the latter including the statutory frameworks for regulating child protection and children’s hearings. How individuals experience personal and relationship issues will not necessarily or consistently align with professional classifications or court categorisation. The focus of this research is principally on private family law and actions which would fall within Chapter 33, OCR or Chapter 49, RCS. However, it is important to keep in mind that while these are distinctions clearly drawn in court procedure, they are not always so clearly experienced in family life, or by participants interviewed for this research. Child Welfare Hearings (CWHs) were the particular type of hearing discussed most often by both parties and professionals, perhaps reflecting the distinctive nature of these hearings.

The Civil Justice Statistics in Scotland for the first full year of the pandemic, 2020-21, report a 41% decrease in all civil cases (43,632) initiated in that period, as compared to the previous year, with a 14% decrease in family law cases from 12,251 in 2019-20 to 10,546 in 2020-21. However, the total number of civil cases initiated rebounded in 2021-22, up 23% on the previous year (although still lower compared with 2019-20). Family law cases also increased 17% between 2020-21 and 2021-22.⁷⁹ With civil justice statistics reflecting the principal cause of action, family law cases made up 22% of the total in 2021-22. Within family law itself, actions for divorce and dissolution of civil partnership accounted for 74% and those relating to parental responsibilities and rights (PRR) made up 20%⁸⁰: with the proportions remaining broadly similar to those of 2019-20 at 72% and 21% respectively.⁸¹

Remote hearings in family actions

There were some limited pre-pandemic examples of a move away from the physical courts for family cases. It has been reported, for example, that “case management hearings in family actions in Glasgow Sheriff Court have been conducted by telephone since 2017”.⁸² However, in interviews for this research, sheriff clerks indicated that remote hearings had not been used commonly, or at all, for family actions prior to the Covid-19 pandemic.

⁷⁶ [Chapter 33, OCR](#)

⁷⁷ [Chapter 49, RCS](#)

⁷⁸ [Civil Justice Statistics in Scotland 2020-21](#), 18

⁷⁹ [Civil Justice Statistics in Scotland 2020-21](#), 3 and [Civil Justice Statistics in Scotland 2021-22](#), 9.

⁸⁰ [Civil Justice Statistics in Scotland 2021-22](#), 19

⁸¹ [Civil justice Statistics in Scotland 2019-20](#), figure 9

⁸² Sheriff Principal Anwar, [Contribution to Civil Justice Conference](#), 10 May 2021

With the first national lockdown, family court business, in line with other civil business, was initially paused. The Lord President issued a short statement of *Guidance on Compliance with Court Orders Relating to Parental Responsibilities and Rights*, designed to offer general guidance to parents or carers in respect of children who were subject to court orders in respect of Parental Responsibilities and Rights. In it he stressed that parents were free to agree their own modification of whatever orders were in place in order to adapt arrangements relating to, for example, residence and contact, to the current Coronavirus regulations. Specifically it was stated that:

“No non-urgent business is currently being dealt with in court. For the avoidance of doubt, non-urgent child welfare hearings are not proceeding in court. In urgent cases, the court will consider an application for one to be fixed but will have to be satisfied that it is essential.”⁸³

This Guidance was updated in July 2020, and the position in respect of court hearings was stated as follows:

“Urgent and non-urgent business is now being dealt with by the court. ... Procedural and substantive hearings will be conducted remotely. ... Cases involving children will be given priority. For the avoidance of doubt, all child welfare hearings are proceeding by way of remote means and parties are not required to attend court buildings for child welfare hearings unless directed to do so by a sheriff.”⁸⁴

In July 2022, following the lifting of all restrictions on physical distancing, sheriffs principal issued joint *Guidance for Court Users: Child Welfare Hearings in the Sheriff Court*⁸⁵ intended to ensure consistency across all Sheriff Courts. It provided, at 2.1, that:

“In respect of all family actions which commence on or after 13 July 2022 and in which a party seeks a crave for an order in terms of section 11 of the Children (Scotland) Act 1995, the interlocutor will direct that the first child welfare hearing will call in person.”

In actions which commenced prior to 13 July 2022,

⁸³ Lord President, Coronavirus Crisis: [Guidance on Compliance with Court Orders Relating to Parental Responsibilities and Rights](#), 27 March 2020

⁸⁴ Lord President, [Coronavirus Crisis: Updated Guidance on Compliance with Court Orders Relating to Parental Responsibilities and Rights](#), 16 July 2020

⁸⁵ [Guidance for Court Users: Child Welfare Hearings in the Sheriff Court](#)

“at the next scheduled child welfare hearing calling after 13 July 2022, the sheriff will discuss the mode of hearing for any further child welfare hearings with parties. Further child welfare hearings will be conducted in person unless otherwise directed by the sheriff.”

In interviews with sheriff clerks for this research, it was reported that, following the suspension of most in-person hearings, there was an initial move to telephone hearings, followed by, from mid to late 2020, the adoption of videoconferencing across all courts. However, as discussed in the previous chapter, video hearings were never adopted on a widespread basis in Glasgow, except for proofs during the pandemic. It was also reported that Glasgow Sheriff Court reverted to in-person hearings for both proofs and Child Welfare Hearings (CWHs) in advance of formal central guidance to this effect being issued. At the time this research was conducted (late 2022), Glasgow was still using telephone hearings to deal with some procedural elements of family law cases, and not using video hearings at all, except in exceptional circumstances (for example, where one party did not live in Scotland). Clerks from other courts who participated in this study reported continuing to use the videoconferencing platform for procedural hearings but having returned to in person for other family hearings (including CWHs). However, an advocacy organisation noted that they thought some Sheriff Courts were continuing to hold CWHs remotely in early 2023, contrary to the guidance recommending they be face-to-face.

The Court of Session followed a similar pattern. While a video link had been available for witnesses joining from outwith Scotland pre-pandemic, fully remote hearings had not been used for family hearings prior to 2020. The Court of Session initially moved to telephone hearings in mid-2020, and were routinely using video hearings by late 2020/early 2021. As of late 2022, they were following the guidance recommending that procedural hearings use the videoconferencing platform and substantive hearings be face-to-face. It was noted that any party can make a submission to move away from this default position (in either direction – so to request a face-to-face hearing rather than video, or a video hearing rather than a face-to-face one). As was the case for commercial hearings, such requests were, however, reported to be rare.

Existing evidence on remote hearings in family law actions

Family courts in England and Wales were quick to adjust to the pandemic and “rapidly adapted to using telephone and video hearings”.⁸⁶ The speed, significance and timing of this shift led to the President of the Family Division asking “the Nuffield Family Justice Observatory to undertake a rapid consultation on the use of remote hearings in the family court. The consultation ran for a two-week period from 14 to 28 April 2020 and well over 1,000 people responded.”⁸⁷ A further consultation was conducted between 10 and 30 September 2020.⁸⁸ This research

⁸⁶ For an early comment on the difference in pace between the systems see, Pryde, [A tale of two systems: COVID-19 and the courts.](#), 2020

⁸⁷ NFJO, [Remote hearings in the family justice system: a rapid consultation.](#)

⁸⁸ NFJO, [Remote hearings in the family justice system: reflections and experiences.](#)

generally shows an improvement, for parties and professionals, in the use of remote options during those early months.

In May 2021, in Scotland, the Judicial Institute organised a Civil Justice Conference “to provide a forum for discussion amongst interested parties about how Court of Session and Sheriff Court civil business might be conducted once the pandemic is over or manageable and a return to in person hearings is feasible.” While family law was not the sole focus of any contribution, it was highlighted by several speakers. Sheriff Wendy Sheehan noted that:

“Sheriffs often preside over problem-solving courts. This involves skilled interaction with agents and parties, the use of mediation skills and emotionally intelligent, well- timed interventions. This is very challenging on a digital platform.”⁸⁹

Lady Wise highlighted the personal and often sensitive nature of family law, and the adverse impact which dealing with such matters remotely might have on both “parties and decision makers”. She referred to a particularly harrowing account involving “the judge being asked by the mother, a litigant in person: Are you going to take my child away from me on an iPad?”⁹⁰ The personal and sensitive nature of family law was a point further stressed by Sheriff Sheehan with particular reference to adoption, permanence decisions and parental orders.⁹¹

Overall attitudes to remote hearings in family law actions

The online survey of professionals conducted for this study included responses from 153 professionals with experience of family hearings (see chapter 1 for breakdown by profession). Echoing findings from early surveys of solicitors and advocates in Scotland, discussed in chapter 2, this shows a clear split in attitudes to the use of remote for evidential and procedural hearings.⁹² For example, 81% of respondents with experience of attending family law hearings thought video hearings could work very or fairly well for procedural hearings in Sheriff Courts, but only 31% thought they worked well for evidential hearings (Annex A, Table A.1a). Of the different options for remote, video was clearly preferred to telephone for family hearings – while 81% felt video could work well for procedural family law hearings in Sheriff Courts, 49% said the same for telephone hearings. Overall views on remote hearings were similar among the smaller group of respondents with experience of family law hearings in the Court of Session.

⁸⁹ Sheriff Wendy A Sheehan, President, Sheriffs’ Association, [Civil Justice Conference](#), May 2021.

⁹⁰ The Hon Lady Wise, [Procedural Hearings and Debates in the Scottish civil courts post-pandemic](#), Civil Justice Conference, May 2021. Note that the example was of an English judge, explaining the use of the term “litigant in person” rather than the Scottish usage of “party litigant”.

⁹¹ Sheriff Wendy A Sheehan, President, Sheriffs’ Association, [Civil Justice Conference](#), May 2021.

⁹² Note that the questionnaire asked identical questions about hearings ‘where evidence is heard’ and hearings that are ‘purely procedural’ for each of the four case types. CWHs arguably fall outwith this binary categorisation: a point highlighted by the decision of the Sheriff Appeal Court in [LA v JJH](#); J Forsyth, [“Wake-up call’ on evidential child hearings”](#).

Qualitative interviews for this study included 15 parties to family law cases, and 14 professionals with family law experience, including four members of the judiciary, five Sheriff Court clerks and a Court of Session clerk, representatives of three organisations that work closely with parents likely to be involved in family law cases, and a family law solicitor. It should be noted that the sample was not gender balanced, with more male parties and more female professionals.

In terms of remote hearings, as in the survey there was a clear preference across participants for video over telephone. Concerns about not being able to see who was 'in the room' with telephone hearings were particularly evident in the context of family law cases. Telephone hearings were time-consuming for clerks to set up and a sheriff looking back on early experience of telephone hearings described it as "truly desperate".

The dominant view among clerks (both Sheriff Court and Court of Session) was that remote hearings work well for procedural hearings, but not for substantive business. There was some dissent from this view but that appeared in part, to be linked to how hearings were scheduled in a particular court. Video procedural hearings were generally viewed by clerks as a more efficient use of everyone's time, and as making it easier for parties to join (something which, it was noted, happened less often when procedural hearings were held in person). In interviews with sheriffs, there was general recognition that for procedural business, particularly where parties were represented, video hearings could work reasonably well and were convenient, particularly for solicitors. For party litigants, however, they were less appropriate.

For substantive family law cases, and in particular CWHs, there was a strong consensus among professionals that remote hearings did not work well and were not appropriate. The detrimental impact of making and delivering decisions, remotely, about fundamental family matters, the particular needs of party litigants and the perceived benefits of 'being in the room' for the problem-solving work of family courts were highlighted as key reasons.

While there was broad consensus among clerks, professionals and advocacy organisations around the telephone/video and the procedural / substantive splits, the views of family law parties were much less consistently divided. Whereas professionals were looking at their caseload across phases of the pandemic or broad types of business, and were more able to distinguish between different types of hearing and different formats, unsurprisingly, for parties, it was their case and they tended to see the whole process in a more holistic sense. Parties did not always, or often, distinguish between their experience in various hearings as either 'procedural' or 'substantive'. For some, whether remote worked well or not was linked to the experience of a particular occasion: "I found it extremely helpful to have this kind of option. But then obviously it has gone wrong a couple of times ...". For another, the categorisation was neither procedural or substantive but rather: "For all nonserious civil cases, should be remote".

Perceived impacts on access to justice

Access to the formal legal system and to a fair and effective hearing

Joining hearings: technology, location, support

As with commercial actions, technical barriers to joining remote hearings was a key theme in the survey of family law professionals:

- 69% said it was at least fairly common for parties to experience technical issues with joining video hearings. It was less common in telephone hearings, at 39%
- 59% said it was common for parties to struggle to join because their device was not well suited to video-conferencing
- 46% said that it was very or fairly common for parties to be unable to join video hearings due to lacking a device (See Annex A, Table A.2a for detail).

While parties reported a range of experiences and preferences around remote hearings, generally, those that had appropriate technology, were confident in their IT skills and had the right home set-up, felt more positive about them. As in the previous chapter on commercial actions, where parties joined using a phone this was viewed as putting them at a disadvantage because the screen was not big enough to see the rest of the people involved clearly. Other examples included parties having laptops too old to support the videoconferencing platform, or having no suitable device and having to join from their solicitor's office or a friend's house.

In these cases, parties reported additional stress, not least because, instead of investing the time preparing the hearings, they had to invest it in looking for a device or making alternative arrangements to join. And as in the previous chapter, even where suitable equipment was available, there could be problems of connectivity. These technical issues could have significant consequences, with parties interviewed for this study describing family law hearings being postponed or the party missing part or all of hearings as a result. Receiving access details for remote hearings very late in the day had also created difficulties in joining for family law parties.

The views of parties as to the level of technical support they were offered were mixed. While some of these differences in experience may reflect recall issues, there was clearly a perception – particularly among those who were less confident in their IT skills – that parties would have benefited from more active technical support and information.

Not all parties had a quiet or suitable space from which they could join the call privately. Having an appropriate setting made a difference to how comfortable and confident parties were during hearings, with some parties reporting that they felt stressed about being distracted. This was reflected in the professionals survey: 40% of family law respondents said it was at least fairly common for parties to experience issues relating to lack of privacy or interruptions during video hearings (31% for telephone hearings).

For parties who had experienced domestic abuse, feeling the hearing took place in a 'safe space' was key. However, the different experiences of two women interviewed for this study highlight that there is no straightforward answer as to whether remote hearings help or hinder in this regard. One participant felt it was "very very important" not to have to be in the same physical room as her abuser so the remote element had removed much of the stress of the court process; another described feeling exposed, via a computer screen, to intrusion by their former partner into their domestic space.

Family law professionals interviewed for this study, and in particular sheriffs, highlighted serious concerns around digital exclusion, particularly in respect of party litigants. For sheriffs, privacy and suitable space for parties was also a key concern, with frequent examples of parties joining from unsuitable locations including supermarkets, cars, public places, bed and even a crane cab. In the latter example, as the sheriff commented, "aside from the obvious health and safety concerns, there was a significant 'access to justice' point."

Despite sheriffs beginning by setting the ground rules and reminding parties that they should be alone, particularly in CWHs which are private, they had no way of 'policing' this. There were reports of "unsuitable people" being present for family law hearings, such as a child or a "new wife". There were also concerns expressed (and at least one actual example cited), by parties and professionals, about remote hearings being inappropriately recorded.

Technical issues were not only viewed as a barrier to joining for parties but affected sheriffs too. Dialling everyone onto the call could take so long that there was little time left to deal with the business of the court. This was a particular concern in the context of 'bulk' procedural family courts where there could be 50-60 'black boxes' on the screen. For sheriffs, the move from telephone to video was a significant improvement and, with time and experience, the videoconferencing platform itself became easier although it was noted that there had been little, if any, training and that it was largely a case of trial and error. A key factor was the availability of clerks to provide support and, in this respect, there was evidence of difference in practice in different courts. At worst, sheriffs felt that they had become "call centre sheriffs". Even for those who had, or had developed, considerable technical competence, there was a strong sense that managing the technology took precious time and attention away from what they should be doing.

For sheriffs, their own technical set up was important. All described working from the court building, some with a clerk beside them or at least in the building. It is "the responsible thing to do", to be "in an environment where I can get help". Some described a set up of two screens, with documents on one and the videoconferencing platform on another and, for another, there were three. In the middle is a laptop with a camera, to the left a screen with ICMS showing the list of cases, to the right a third screen, open on email to communicate with the clerk. While this might be seen as the ideal set-up from a technical perspective, there was again a sense of multi-tasking:

“I’m looking at the three at the same time, with also a pen and paper to hand... it’s quite intense.” (FLJ03, Sheriff)

Participation and representation

The survey found that around 4 in 10 professionals working in family law hearings felt parties commonly experienced difficulties understanding the questions asked (37% said this was fairly common in video hearings, 40% in telephone hearings).

What emerged most strongly from interviews was a range of different expectations around ‘participation’. For parties, the focus was often on their own personal participation, for example, their ability to speak out, to ask questions, to “have their say”; whereas for sheriffs their concern was for ‘effective’ participation and a ‘fair’ hearing. What parties expect or want from their family law hearing may be very different from what lawyers, clerks or members of the judiciary consider appropriate or effective. These are complex and contested notions which go far beyond the scope of this study but it is interesting the extent to which remote hearings disrupt long-established norms and exacerbate pre-existing differences in perception.

Professionals, and in particular sheriffs, were clear that there was a key distinction between party litigants and those who were legally represented, and there was a strong concern around the impact of remote hearings on the ability of party litigants to participate effectively. Sheriffs were clear that party litigants were the most affected by remote hearings. While in some courts, they were reported to be relatively rare, in others there were “loads of party litigants”. There was a sense among sheriffs that party litigants have increased in number, with “perhaps more during the pandemic”. It is difficult to assess the actual number of party litigants in family actions, not only because of the absence of available statistics (noted in chapter 1) but because the situation may frequently change in the course of the process, with parties being represented at the outset but becoming self-represented later, or vice versa.

Some of the challenges facing party litigants clearly go beyond remote hearings, with unrepresented parties “not being given advice, not being given the opportunity to discuss strengths and weaknesses”. However, there was a strong perception that these problems are exacerbated when combined with issues of digital poverty. One point on which all sheriffs were agreed, and which transcended the procedural / substantive divide, was that, “the minute you start to have party litigants, it should be in person”. While recognising that there could be exceptions, particularly where the party had good IT equipment and experience of online platforms in other contexts, for example work, there was a general sense that “party litigants do not understand what is happening. They don’t understand the procedure. They tend not to have high connectivity”. All of that was viewed as having a significant impact on their effective participation.

For parties themselves, however, the picture was much less consistent. For some parties, communication was more unnatural and disjointed in remote hearings compared to face-to-face, while for others it was easier to command attention with everyone looking at a screen because “when you are talking, the focus is on you”.

Being legally represented or not did not appear to have a clear impact on parties' perceptions of remote hearings. A point stressed by sheriffs is that parties may be represented or not at different stages in the process of their action and that may be a factor. Although views varied, there were examples of party litigants expressing a strong preference for remote hearings, which stand in contrast to the views of legal professionals and the judiciary that they were almost always less appropriate for party litigants:

“If you were to take me to court on a civil matter and it was [a video hearing], I'll be delighted ... if anything it would be better because you don't have to attend court, you don't have to get up earlier, it is little things, like if you have to go to an interview, if you are doing an interview at home, you don't have to be worried to get there and be worried about traffic and all that.” (FLP04 Family law party litigant)

Where parties had legal representation in remote hearings, that could affect their perception of the extent to which they were directly able to participate, particularly where they felt unable to communicate effectively with their solicitor. Parties felt especially frustrated when they thought that their solicitor missed an opportunity to challenge something that was said and they could not point it out to them. As in the previous chapter, solutions to this included: joining from the same room as the solicitor; text messages to the solicitor's personal phone; and exchanging emails right before the hearing with some key points. However, text messages were not always useful because the hearings are short, and parties might not have the time to write a message while paying attention to what is being said. For one party, there was a contrast between previous experience of in-person hearings, where it was possible “to get my point across” by turning round and speaking to the solicitor, and in remote hearings, where the party felt “shut down” by the sheriff who “would not allow” them to speak because they were represented:

“you sort of feel helpless, what is the point of being here if I can't articulate or react to something that is a dynamic situation?” (FLP03, Family law represented party)

Over half of family law respondents to the professionals survey reported that these types of issues, where parties experience difficulties speaking to their representative, were at least fairly common (55% for video hearings, 51% for telephone hearings). Clerks and sheriffs noted that, while it was technically possible to put parties and their solicitors into a breakout room using the videoconferencing platform, time constraints on court business and limited functionality meant this option was little used. The limited evidence which was reported of use of breakout rooms (for example, for brief discussions between parties and solicitors) did, however, suggest there was scope for development.

One potentially positive impact of remote hearings that was mentioned by professionals, support organisations and parties was improved access to legal representation and legal aid firms, since parties could potentially be represented from elsewhere in the country. However, one interviewee from an advocacy organisation, held the view that some firms had capitalised on the possibility of

representing people remotely to provide what the interviewee viewed as an inadequate service to a larger number of clients across Scotland.

Body language and non-verbal cues

Family law parties expressed strong views on the perceived impacts of remote hearings in relation to body language and non-verbal cues. For some, their concern was more about how they might be perceived: “In the cold, procedural, impersonal interaction” online, the sheriff might not be able to see their “real personality”, “how they behave and react”. They were concerned that remote hearings did not give them the opportunity to dress smartly, to behave well, and to make a good impression. For others, the concern was more that, in remote hearings, others might not see that they “are struggling” whereas in person, they would “see the white of people’s eyes” and “might back off”. A common theme was the exacerbation of parties’ feeling of power imbalance between themselves and legal participants. Several parties commented that, in person, they were better able to “interject”, put their hand up or “use non-verbal communication to speak to the sheriff”.

“[in face to face hearings] you are able to interject or put your hand up or you are able to use non-verbal communication to speak to the sheriff ... The sheriff might, on occasion, direct a question towards me in the [face to face] courtroom and I was able to respond appropriately but that was never the case in the remote hearings, it was always to my representative” (FLP03, Family law represented party)

However, there were also examples of both represented parties and party litigants who felt the opposite – that it was easier to participate, communicate or interject in a video hearing compared with in-person:

"Virtually, I think because there is that kind of once removed stage, it is easier to talk or to be heard as well, because when you are talking the focus is on you. ... I definitely think it is easier to be involved and to be, what is the word, like effectively involved, you know, not just being present." (FLP13, Family law represented party)

"(It's) easier to interrupt a screen than an in-person sheriff". (FLP04, Family law party litigant)

Issues relating to body language, personal interaction and behaviour were also raised by sheriffs in the specific context of CWHs. As noted above, the intention is that there will be an element of mediation in a CWH; that while the sheriff will direct it, it will be more of a discussion. However, it was reported that, by telephone, a CWH was “not even a CWH” but “more like opposed motion hearings” with parties often not joining the call and, where they did, not speaking. CWHs are not intended to be “too intimidating” but for sheriffs the opportunity to be “quite stern at the beginning” was seen as important in “steering them in the right direction”. While it was recognised that there might be limited circumstances where it would be appropriate to conduct a CWH remotely, for example where there are concerns of

domestic abuse and parties were at a distance, and that there was an ongoing place for video technology, there was consensus that CWHs by telephone were not appropriate. Good personal interaction, including through body language and non-visual cues, was seen by sheriffs as essential to CWHs because of their particular problem-solving nature:

“You don’t get to the core unless you can actually connect with people.” (FLJ03, Sheriff)

The behaviour of parties in family law cases was also a concern for sheriffs more generally. While parties might feel more in their “comfort zone” at home, and better able to contribute to constructive discussion that could sometimes lead to “shouting and aggression”. For sheriffs, managing behaviour and maintaining the solemnity of the court, in the remote context, was a significant challenge, particularly when these are held by telephone. They have to begin by explaining the ground rules, including that “you have no right to interrupt”. It was recognised that “people do get upset, they want to have a rant and a rave” and that is not always a bad thing but, in order to maintain the effectiveness of a hearing, it needs to be managed. To facilitate effective participation and, for the reasons discussed below relating to maintaining the gravity of the process and ensuring compliance, it was commented that parties “need the trappings of court”. There was some recognition of the need for general guidance on behaviour from parties too, with a request for:

“Some orchestration like explanation of how one behaves in a court room, because frankly, most people, it is new to most people and you need to be...certain things need to be explained, you know.” (FLP17, Family law represented party)

Access to a decision and an outcome

Clerks and sheriffs did not believe that hearings being remote affected the substance of outcomes, but there was a perception that it might negatively impact on the speed of decisions by removing opportunities to resolve issues in informal discussions between solicitors. This was a view echoed by an advocacy organisation, commenting that: “quarter an hour before the court hearing is often a time when you can actually resolve the issue”. The impact on timing was felt particularly in the context of CWHs where issues would come back to court more frequently. There was some evidence of sheriffs using breakout rooms, and there was recognition of the potential to do this more to facilitate settlement.

A common theme, raised frequently by sheriffs, and endorsed by an advocacy organisation, was not about the decision making itself but about *compliance* and here professionals, including an advocacy organisation, highlighted the “formal surroundings of a court” with the “power or authority of the sheriff” as being “more likely” to result in compliance with decisions in family cases than a decision delivered by telephone or on video.

Substantial minorities of family law respondents to the survey also felt that it was fairly common for parties to experience difficulties *understanding* the decisions

made during video (27%) and telephone (32%) hearings. This was also a concern highlighted by sheriffs, particularly in respect of party litigants:

“they are plunged into nothingness at the end of the hearing. What just happened? What happens next?” (FLJ03, Sheriff)

In contrast with professionals, there was a belief among family law parties that mode of hearing might impact on the substantive outcome. Where this view was held, it was either linked to the difficulties they had experienced giving instruction to their solicitor during a remote hearing (discussed above), or to their perceptions of the impact that not being able to see body language might have had on the sheriffs’ decisions:

“100%, definitely, yes, I think things would have been different if I had been able to discuss with my solicitor at a point when there was a chance to challenge the other side and challenge the report, things would have been different.” (FLP16, Family law represented party)

“Yeah, I do [think the fact that the hearings were held remotely impacted on the outcome], in our case, I feel that, I just feel, because there was that lack of ability to see genuine reactions in person body language, the way you are talking and being able to be more natural with your responses, I think that did impact it” (FLP14, Family law represented party)

Other perceived impacts of remote hearings

Impact on transparency

There was no clear consensus among family law respondents to the survey over whether members of the public would find it easier to attend hearings remotely or face-to-face: while 37% felt the public would find it easier to attend face-to-face than by video, 24% thought they would find it easier to attend by video, 20% felt it would be just as easy for the public to attend either way, and 19% were unsure one way or the other (Annex A, Table A.5). Slightly more respondents felt it would be easier for the public to attend by telephone (31%, vs. 24% for video), but again there was no consensus on telephone versus face-to-face in terms of access to hearings for the general public.

Many substantive family actions, including CWHs, are private and therefore the issue of transparency was not deemed relevant. Concerns were more about preserving the appropriate privacy of substantive family business rather than about any lack of public transparency. In the survey, meanwhile, around 1 in 8 professionals expressed concerns about potential recording or sharing of family law hearings; a concern which was endorsed by some parties, sheriffs and support organisations, including, as noted, real examples of recordings having been shared online.

Impact on efficiency

Family law professionals were, on balance, more likely to say that video hearings and, in particular, hybrid hearings took longer than face-to-face hearings:

- 41% felt video hearings took longer than face-to-face, while 26% said they took less time (18% felt they were about the same and 15% said it varied too much to say or were unsure)
- 56% said hybrid hearings took longer, while just 11% felt they took less time.

Views were more divided on telephone hearings – 38% said they took comparatively longer than face-to-face hearings, but the same proportion felt they took less time (Annex A, Table A.6).

As discussed in the previous chapter, any assessment of efficiency must take account of the objectives of the system and the different needs and perspectives of those involved. While some elements of the system might seem more ‘efficient’, the costs and inefficiencies may simply have been moved elsewhere. For example, where sheriffs are themselves taking on more administrative tasks (as was reported by sheriffs dealing with both family law and commercial actions), such as dialling-in participants, printing off documents, managing the ‘mute’ function or breakout rooms, calling solicitors or parties who have switched off their camera during a procedural court – “wakey, wakey, we are calling your case” – costs and workload are simply being displaced and to those who are paid at a much higher level: “it’s just a poor use of resources”. In assessing efficiency and “what works”, there is also a need to be clear about the purpose of the system and its outcomes. As a sheriff commented:

“It’s not about whether it is easier for me to sit at home on a laptop, it’s about what gives parties a good experience and a fair hearing.” (FLJ03, Sheriff)

From the perspective of family law parties, there was general recognition of the benefits in terms of travel time and costs for both themselves and, importantly, their witnesses – one party litigant noted their main witness would have been unlikely to be able to attend an in-person hearing. Benefits in terms of being able to fit remote hearings around childcare responsibilities were also noted. However, these benefits in terms of time and cost did not always outweigh parties’ preferences for in-person hearings, where they felt that these were preferable on participation and access to justice grounds discussed above.

"If the Scottish government’s reasoning is that it gets quicker and it costs less money that is not a reason for it to work, because it is not about shortness and money, it is about the quality of interactions and the quality of the outcome for the wellbeing of the child." (FLP16, Family law represented party)

Impact on wellbeing and work-life balance

Overall, as with commercial professionals, family law professionals were more positive than negative about the impact of remote hearings on their personal work-life balance: 43% felt it had a positive impact on their work-life balance, compared

with 30% who felt the impact had been negative (30% felt it had not made any difference either way). However, this picture was reversed when asked about the impact on their wellbeing – 41% felt remote hearings had a negative impact on their wellbeing, compared with 31% who felt it had been positive (Annex A, Table A.9).

Even where individual family law professionals might have experienced an improvement in workload or work-life balance, there were wider and longer term changes in working practices which were viewed as having had, or being likely to have a detrimental impact on wellbeing. As with commercial work, frequent reference was made to the lack of opportunity for solicitors and advocates to benefit from the normal social interaction that occurs around court and a growing recognition of its importance in balancing the intense and often distressing nature of their work in family cases.

In general, the message from sheriffs was of an increase in workload and a shift in the nature of that work, which combined is likely to impact negatively on wellbeing. For them and – in the view of sheriffs – for the clerks, the harm caused by cumulative impact and a longer term normalisation of increased workload was noted. What started off as “crisis management” has simply carried on, meaning that “a lot of us are just tired ...”. In addition to generic effects of remote working, particular examples were highlighted of a lack of adjustment to individual needs, including in relation to eye health. There was a sense of lip service being paid to the protection of professional wellbeing.

However, similar to solicitors in commercial actions, family law solicitors were identified, by themselves, by other advocacy organisations and by sheriffs, as potentially benefitting in terms of less travel and more efficient use of time, particularly in the context of the procedural family hearings which operated by video.

Other perceived impacts

A theme which emerged from interviews with various professionals was not only a higher workload but a shift in roles. These might be subtle but, over time, significant.

There was often an expectation that clerks would manage the technology needed for remote hearings, not only setting up the courts and sending out the links, but also offering support to parties and professionals. While some of this might be viewed as a different way of doing the same role, there was evidence of their role becoming ‘enhanced’ and a shift in responsibility, as this example shows:

"the issue with chasing for email addresses, telephone numbers, invites for [video hearings] is it takes the onus off the person on their responsibility to show up at court at the date and time in which they have been appointed to do so and puts it on us. ... we're holding hands of people who should be within the court process and are failing on their end. ... it's making you into an email monkey. So yeah, it changes a wee bit the function of our role as a sheriff clerk." (Sheriff Court Clerk)

Clerks also observed that the use of remote hearings, particularly for substantive hearings, could make it more difficult for members of the judiciary to carry out their role: a point reflected too by sheriffs. For sheriffs, there were frequent references to the challenge of going from call handler, to managing the technology, to keeping control and ultimately exercising their authority. Not only did this amount to added work but it was part of a perceived shift in authority and an erosion of "respect for the court".

Sheriffs made similar comments to those discussed in respect of commercial actions about family law parties' changing understanding of the nature of the court and judicial system. Referring to a financial provision on divorce proof on the videoconferencing platform, one sheriff described it as the parties having the opportunity to appear on screen and "have your say". But, as the sheriff commented, "that's not really what a proof is about." Another commented on parties "referring to being in a meeting" but they were not in "a meeting", it is a court.

Views on other current and potential adaptations

The principal example of other adaptations discussed in interviews about family law cases was electronic documents generally and specifically the Integrated Case Management System (ICMS).

40% of professionals with experience of family law hearings felt parties commonly had difficulties reading documents on screen. Parties reported that, even if they had access to relevant electronic documents during remote hearings, they were not always able to look at them or follow them effectively. This was due to a variety of factors, sometimes in combination: lack of suitable screen or laptop, poor connectivity, limited understanding of procedure and the relevance of particular documents, and pressure of time and fear of distraction. There was little comparative insight into whether they were better able to follow documentation during face-to-face hearings but it was suggested that at least in person, for represented parties, their solicitor would be able to point out relevant information.

Relying on electronic documents, during remote hearings rather than having them printed off, was also highlighted by sheriffs as "taking up huge time and mental energy". This was particularly the case in high volume, specialist family procedural courts. It was acknowledged that there had been significant improvements in ICMS and that what was previously just a list of separate documents was now presented as "virtual processes". While that generally works well, for many it still takes longer than flicking through a folder of papers and takes no account of individual needs or impact on eyesight.

5. Mental Health Tribunal for Scotland

Key points

- The nature and high volume of the MHTS's case work resulted in a very rapid move to telephone hearings during Covid which has had a lasting impact on the working arrangements of all relevant professionals and the availability of choice for parties, despite a phased return to in-person hearings.
- Phone hearings were viewed as having positive and negative impacts on parties' wellbeing depending on individual needs. They were viewed as potentially more suitable than in-person or video hearings for some parties, such as some young people, whereas in-person hearings were seen as more suitable for those with conditions such as Alzheimer's and other forms of dementia.
- Existing barriers to engagement and participation experienced by some MHTS parties were believed to have been exacerbated by the use of telephone hearings.
- Legal representatives, independent advocates and family members reported finding it harder to offer advice, representation and support to parties in telephone hearings, particularly if attending from different locations.
- The use of telephone hearings in the MHTS has had negative impacts on the health and wellbeing of legal representatives, despite some gains in work-life balance and efficiency through the use of electronic documents.
- MHTS panel members agreed that choice and flexibility regarding the mode of hearing are essential, and that decision-making should be based on the party's needs and wishes wherever possible.

Overview of MHTS cases and the use of remote hearings

The two primary functions of the Mental Health Tribunal for Scotland (MHTS) are to consider and determine applications for compulsory treatment orders (CTOs)⁹³ and to consider appeals against compulsory measures made under the 2003 Act. A CTO specifies a number of conditions that allow for a person to be treated for their mental illness in hospital or in a community setting.

The Tribunal discharges its functions through three member panels consisting of a legal member, who acts as convener, a medical member and a general member. An application for a CTO is made by a Mental Health Officer (MHO), who is a specially trained social worker with duties under the 2003 Act. Responsible Medical Officers (RMOs), patients or their named persons (see below) may also make certain types of application.

⁹³ Under the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the Act")

The individuals who are the subjects of hearings at the MHTS are referred to as 'patients' by professionals and tribunal members and in all relevant legislation. Patients may be in hospital at the time of their hearing or in a community setting, including in their own home. In either case, they will be entitled to attend and to participate in the hearing.⁹⁴ Their attendance is expected but is not compulsory. Sometimes the individual may be unable to attend at the time of the hearing, for example due to ill health, or may decide that they do not want to attend. In either case, the hearing can go ahead without the patient present.

Patients are sometimes supported by an independent advocate (IA) whose role at the hearing will vary depending on the needs of the individual.⁹⁵ The IA does not advise or represent the patient but will communicate their views if needed, usually by preparing a written statement in collaboration with the patient using the individual's own words wherever possible. In some cases, where the patient is unable to convey their thoughts and wishes directly to the IA, the advocacy will be 'non-instructed' and the IA will find alternative ways of communicating to ascertain the party's views.

Individuals known as 'curators ad litem' may be appointed in some cases to represent the patient's interests.⁹⁶ This may be appropriate where the individual is incapable of understanding the proceedings and does not have anyone to represent their interests, for example because they do not have the capacity to appoint a solicitor.

Family members, friends or carers of the party may perform a variety of functions at the hearing: providing moral and other support to the patient with no formal function, or as the patient's 'named person' (NP) with the primary role of looking after their interests.⁹⁷ An NP is also a party to the case so that the views of the NP must be taken into account by the Tribunal, unless it is unreasonable or not practical to do so.

All patients and all NPs are eligible for non-means tested legal aid for proceedings before the Tribunal (most of the parties, including NPs, interviewed for this research were legally represented).⁹⁸

Hearings before the MHTS may involve multiple participants and it is usual for there to be seven or more people in attendance – for example, the patient and their legal representative, IA and supporter or NP (who may also have a legal representative),

⁹⁴ For guidance to parties see: [A Guide for Service Users](#) and Website [Frequently Asked Questions](#)

⁹⁵ For further information, see [What is Independent Advocacy?](#)

⁹⁶ Under the Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005

⁹⁷ See [The New Mental Health Act: A Guide to Named Persons](#)

⁹⁸ Anecdotal accounts indicate that most parties are legally represented at MHTS hearings, although it has not been possible to verify this by way of published statistics

the MHO and/or RMO, alongside members of nursing staff, may all be in attendance as well as the three Tribunal members.

The MHTS is a high-volume tribunal with the number of applications continuing to rise in recent years. In 2021/22, 5,105 applications were received compared with 5,095 in 2020/21, 4,631 in 2019/20 and 4,605 in 2018/19.⁹⁹ CTO applications constitute the largest percentage of applications received, followed by applications to revoke short-term detentions.¹⁰⁰

Prior to the pandemic, MHTS hearings took place in person in hospital or community settings. The Tribunal has a statutory obligation to provide adjudication in the range of cases specified under the Act.¹⁰¹ Furthermore, where an application for a CTO is made under section 63 of the Act for a person currently detained in hospital, a statutory time limit of five working days from the expiry of a patient's short-term detention certificate applies. Thus, with the onset of the pandemic:

“It would not have been acceptable to cease consideration of applications, bearing as they do on vital questions involving the liberty of individuals and serious issues relating to mental health.”¹⁰²

All MHTS hearings were therefore moved to telephone conference calls with effect from 23 March 2020. From the time that this change was implemented to 31 March 2021, over 5,000 hearings took place by telephone.¹⁰³ In July 2020, the Tribunal held its first in-person hearing in four months, with a small number continuing to take place for those patients for whom a remote hearing was unsuitable. This was limited by the restriction of suitable venues which in turn was dependent on access to relevant buildings being permitted and precautionary health measures being in place.¹⁰⁴

In August 2020, the Tribunal held its first video hearing. In May 2021, the President of the MHTS reported that videoconferencing technology had “been used for 20-30 hearings and remains available for some hearings”.¹⁰⁵ By the end of November 2021, in-person hearings were restored to eight hospital venues, although the arrival of the Omicron variant in December 2021 meant that they were temporarily withdrawn in most cases until February 2022.¹⁰⁶ By January 2023, video hearings

⁹⁹ Statistics are drawn from the MHTS Annual Reports for 2018/19, 2019/20, 2020/21. 2021/22 all available on the [MHTS Website](#).

¹⁰⁰ MHTS Annual Report 2021/22, 3

¹⁰¹ For a breakdown of 2020/21 applications, see [MHTS Annual Report 2020-2021](#), Applications, Appeals, References and Reviews dealt with by the Tribunal in 2020/2021, by individual sections of the Mental Health (Care and Treatment) (Scotland) Act 2003, 4

¹⁰² [MHTS Annual Report 2019-2020](#), President's Foreword, 2

¹⁰³ [MHTS Annual Report 2020-2021](#), President's Foreword, 1

¹⁰⁴ [MHTS Annual Report 2020-2021](#), President's Foreword, 1

¹⁰⁵ MHTS Service Users, Carers and Advocacy Workers Forum, [Ways of holding hearings – discussion](#), accessed late 2022.

¹⁰⁶ [MHTS Annual Report 2021-22](#), President's Foreword, 1

were available at four hospitals¹⁰⁷ and it was possible to schedule in-person hearings at 23 hospital venues across Scotland by completing a Hearing Preference Form when lodging an application either as a party or on behalf of a party as their legal representative or family member.¹⁰⁸ In her introduction to the 2021/22 annual report, the President noted that “the completion rate of these [hearing preference] forms remains low, a matter which we are seeking to address”.¹⁰⁹ At the time of writing, there was no publicly available data on the exact number of in-person hearings that have taken place since the pandemic.

Existing evidence on remote hearings in the MHTS

In-house research

In May 2021, as a supplement to its newsletter, the MHTS produced a summary of the findings from in-house research.¹¹⁰ This report provided some quantitative comparisons of patient attendance at hearings between the years 2019/2020 and 2020/2021 as well as the results of a small study gathering semi-structured written or telephone feedback from 13 patients who had attended telephone hearings.

The comparison of patient attendance at hearings pre- and post-Covid was undertaken because of a concern about a potential decline in attendance with the move to telephone hearings.¹¹¹ However, the statistics show that, despite an overall increase in the numbers of applications, patients’ attendance rates remained fairly static: the range of monthly attendance rates over the two years was 53-56% in 2019/20 and 49-58% in 2020/21.

The small patient feedback study found that most agreed it had been easy to join telephone hearings. Suggestions for improvement included the need for better audio quality and changes to the process, such as the need for an advance agenda and clearer instructions about when to speak. When asked their preference for an in-person or telephone hearing in the future, there was no consensus: of the eight who had attended both types of hearing, two were neutral, three indicated that they would prefer a telephone hearing, and three that they would prefer an in-person hearing.

The report, which was used to improve certain aspects of telephone hearings, noted that conveners should take time to explain proceedings, particularly to those appearing for the first time, and to ensure that all parties can hear clearly, checking

¹⁰⁷ Royal Cornhill in Aberdeen, the State Hospital in Carstairs, Forth Valley Royal in Larbert and Mid Argyll Hospital in Lochgilphead

¹⁰⁸ [MHTS, News Page.](#)

¹⁰⁹ [MHTS Annual Report 2021-22](#), President’s Foreword, 1

¹¹⁰ MHTS, [A year of telephone hearings: some findings from the year 2020-2021](#)

¹¹¹ MHTS, [A year of telephone hearings: some findings from the year 2020-2021](#), 1

at intervals that this remains the case.¹¹² It concludes by noting that, although there was nothing to suggest that telephone hearings are not appropriate:

“The role of the convener in explaining and conducting the hearing is critical to the success of the hearing, perhaps more so than when the participants are gathered in a tribunal venue.”¹¹³

Feedback through the service users’ forum

As part of its engagement with stakeholders, the MHTS holds two meetings per year with service users, carers and advocacy workers which, since lockdown, have taken place online. At its meeting in May 2022, the stakeholders group discussed modes of hearings.¹¹⁴ This highlighted themes including: the central importance of patient choice; the importance of systems working across the board, since the MHTS is legally obliged to provide a good service to everyone; the need to take account of digital disadvantage in determining mode; the greater flexibility afforded by telephone conference hearings; and environmental questions around choice of mode and impacts of travel.

Feedback from attendees on their experiences of the different types of hearings found that:

- There was a mix of patient preference between telephone and other types of hearings. Some were apprehensive about technology and appreciated face-to-face interaction with tribunal members. Some found remote hearings, including video, quite confusing.
- Hybrid hearings were thought not to work so well (although it is not specified why this was felt to be the case).
- Informed choice is important to support patients’ participation. It was suggested that a document with the pros and cons of each type of hearing might assist with patients’ decision-making about what type of hearing would suit them.
- Patients appreciate having advocacy workers physically with them (as opposed to in a separate location) during telephone hearings.

These findings are broadly in line with those resulting from the quantitative and qualitative research conducted for the current project, which are presented below.

Wider reviews of mental health law in Scotland

September 2022 saw the publication of two comprehensive reports on mental health law and its operation in Scotland.¹¹⁵ Both are broader in scope than the

¹¹² MHTS, [A year of telephone hearings: some findings from the year 2020-2021](#), 10

¹¹³ MHTS, [A year of telephone hearings: some findings from the year 2020-2021](#), 10

¹¹⁴ [MHTS Service Users, Carers and Advocacy Workers Forum](#)

¹¹⁵ Jill Stavert, Michael Brown Aimee McDonald (2022) [The Mental Health Tribunal for Scotland: the views and experiences of Patients, Named Persons, Practitioners and Mental Health Tribunal for Scotland members](#) and [The Scottish Mental Health Law Review 2022, final report](#)

current research. However, many of their conclusions relate to issues raised in the qualitative findings presented below, for example in respect of parties' participation and available levels of support, particularly in community settings,¹¹⁶ and those relating to the need to guarantee assistance with communication and the appointment and role of named persons.¹¹⁷

Overall attitudes to remote hearings in the MHTS

The remainder of this chapter discusses findings from the survey of professionals and from qualitative interviews with professionals and parties conducted for this research. As discussed in chapter 1, the profile of respondents to the professionals survey with experience of MHTS cases was very heavily weighted towards health and social care professionals involved in making applications for CTOs (RMOs and MHOs). It is important to keep in mind when interpreting the survey data on remote hearings in the MHTS that views will be skewed to the perceptions of this group and may not be representative of other groups of professionals within the MHTS such as panel members, legal representatives or IAs. This imbalance is not replicated in the qualitative research for which in-depth interviews with a range of different professionals were conducted.

Given that remote hearings in the MHTS took place almost exclusively by telephone until November 2021, it is unsurprising that far more MHTS respondents had experience of this compared with video hearings (486 vs 119). Moreover, in contrast with respondents commenting on the other hearing types covered by this research, those in the MHTS were more positive about the use of telephone hearings, both in general and for evidential hearings – 79% said telephone hearings worked very or fairly well in hearings where evidence was heard, compared with 39% who said the same for video hearings (see Annex A, Table A.1c). This relatively high positive rating for telephone hearings is likely to reflect the views of health and social care professionals who will typically attend in their role as RMO or MHO, often as part of a busy working day, and for whom the convenience of phoning in may be of paramount importance. Other participant groups (professionals and parties) in the qualitative research had different views of telephone hearings and were generally less positive about their experiences of them (see below).¹¹⁸

Qualitative data on views of remote hearings in the MHTS collected for this study included interviews with six parties (three patients and three named persons (NPs)), six independent advocates (IAs), two legal representatives and a group discussion with six tribunal members. As discussed in chapter 1, ideally the researchers would have interviewed more parties, but as they proved particularly

¹¹⁶ Stavert et al (full reference above), Chapter 4

¹¹⁷ [The Scottish Mental Health Law Review 2022, final report](#), recommendations 4.12 (at 48) and 5.4 (at 166)

¹¹⁸ A relatively higher proportion of MHTS respondents said they did not know how well remote hearings worked for 'procedural' hearings. This reflects the different nature of MHTS hearings, which are not divisible into procedural and evidential business.

difficult to recruit within the time frame, the number of interviews with IAs was increased as a 'proxy' for hearing from parties directly.

Most participants acknowledged that telephone is an easy medium to use and is familiar to most so that no special training or complex instructions are needed. Technical difficulties were reported to be both reasonably rare and to have reduced over time. However, there was no clear consensus among either professionals or parties in terms of their preference between telephone and in-person hearings. Phone hearings were seen as suiting some patients, such as some young people and those with PTSD, whereas in-person hearings were deemed to be more suitable for those with cognitive difficulties and some of those with conditions such as Alzheimer's and other forms of dementia.

This point can be illustrated by two examples provided by IAs who work with different groups of service users:

- One IA who works with children and young people aged 6 to 21 years in various settings including schools, care centres and hospitals was very positive about telephone hearings, noting that those she had worked with reported that they preferred them as "they don't have to look the parent, doctor, [panel] chair in the eye" and that they liked the informality of being in a familiar setting, such as home or school.
- Another IA who provides advocacy services for those under short term detention orders and CTOs outlined an example of a party with early onset dementia who, having joined a telephone hearing alone from her home, struggled to connect, had difficulties using the telephone for this purpose and found the whole hearing very confusing as she was unable to see anyone.

Views about the use of video hearings were less clear, probably because it has been the least used mode for MHTS hearings to date although, when asked about the future, most IAs and parties interviewed for this study expressed a preference for the option of using video over telephone if hearings remain remote.

Perceived impacts on access to justice

Access to the formal legal system and to a fair and effective hearing

Most survey respondents with experience of the MHTS felt that access issues and issues around participation and understanding were relatively uncommon for those joining MHTS hearings by telephone. However, substantial minorities felt parties experienced a range of issues that might limit their access to a fair and effective hearing and a clear outcome in telephone hearings:¹¹⁹

¹¹⁹ We focus on findings for telephone hearings here since this is by far the most common mode within the MHTS. However, the Tables in Annex A also include views on video hearings, among respondents with experience of MHTS. It is possible that some of these professionals have attended MHTS hearings by video. However, as this has been relatively uncommon, it could also be because some of those professionals who attended MHTS hearings also took part in other types of hearing by video.

- 34% said it was at least fairly common for parties to experience technical difficulties joining telephone hearings
- 31% said it was at least fairly common for parties to experience difficulties speaking to a representative during a hearing
- 26% said parties commonly experienced difficulties understanding questions asked
- 12% said it was common for parties to have difficulties understanding the decisions made (See Annex A, Table A.2c for more detail).

Survey respondents were divided over whether a legally represented adult subject to a compulsory treatment order would find a telephone hearing easier than face-to-face or vice versa – 23% felt a telephone hearing would be easier for these parties, 33% that face-to-face would be easier, and 33% felt they would be about the same (Annex A, Table A.4c). However, on balance MHTS respondents were almost twice as likely to feel that an unrepresented adult would find a face-to-face hearing easier as to say they would find telephone easier (37% vs 19%, with 35% saying they would find them “about the same”). As with family law and commercial respondents, MHTS respondents were also much more likely to feel that a legally represented adult with a learning disability would find face-to-face hearings easier (58%, vs 11% who felt telephone hearings would be easier).

Joining hearings: technology, location, support

There was a perception among both legal representatives and IAs interviewed for this research that many patients decide not to attend MHTS hearings when they find out the hearing will take place by telephone. However, as discussed above, data collected by the MHTS in the year before the move to telephone hearings and the year in which hearings were conducted predominantly by telephone show little change in patients’ attendance in the year following the move to telephone hearings.¹²⁰

Participants across all of the groups interviewed expressed concern about the impact of inequalities relating to digital and other resources on parties’ (patients and named persons) ability to join and take part in remote hearings. In addition to the inequalities discussed in previous chapters (lack of digital and technical know-how and ability of some patients; lack of access to suitable equipment; and variations in WiFi/telephone connectivity depending on geographical location) issues around the location from which patients are able to join and the support available to them to enable them to join in a safe, supported manner were also raised.

Variations in different hospital settings were noted by both parties and IAs, with some offering dedicated facilities for patients to attend hearings and others relying on the availability of a nurses’ office or shared patients’ space and/or the use of a busy ward phone or personal/borrowed mobile phone and/or poor WiFi connection.

¹²⁰ MHTS [A year of telephone hearings: some findings from the year 2020-2021](#)

Children's facilities were generally described as comfortable and fit for purpose, but it was noted that some children are placed in adult facilities.¹²¹

Professionals noted a reluctance for discharged patients to want to return to a hospital setting for a hearing, even if that option were widely available. This is understandable given that they may associate hospital with being very ill, being detained and assessed against their will, and being prescribed non-consensual medical treatment. If the hearing is by telephone, community patients are thus more likely to attend from home, which can create challenges if they are attending alone. As one party noted:

“...what happens if the person goes into a crisis during the hearing? There are health and safety reasons why they should be face to face. Who would help someone in crisis?” (MHP03, MHTS patient).

Interviewees also discussed some specific challenges around the support available to patients to enable them to access and participate in hearings. This support may be provided by a legal representative, an IA, a friend or family member or, for those joining from hospital, a member of the nursing staff.

Legal representatives take different approaches, with some travelling to be with the client during the telephone hearing and others dialling in from a separate location (reasons for which are discussed further below, under [Impacts on professionals' wellbeing and work-life balance](#)). The small number of legal representatives interviewed (two) agreed that they would rather attend an in-person hearing with their client as they felt communication and client participation were hindered when joining remotely from separate locations. These views aligned with the concerns expressed by tribunal members about solicitors' ability to give advice and to receive instructions, for example to challenge evidence, during remote hearings:

“ (In) the majority of cases the solicitor and/or advocacy worker, but particularly the solicitor, is not in the room with their client to take instructions. I am amazed how often, and I haven't spoken to solicitors about this in private practice, but they seemed to be prepared to do it like that. I just don't think it can be easy to do the best for their client.” (MMH02, MHTS tribunal member)

The location of the IA also varied following the move to online service provision as a result of the pandemic restrictions, with most of those interviewed attending from a separate location from the party. Likewise, geographical distance and other factors meant that NPs and family members also joined from different locations. This meant that some patients joined the call alone. Tribunal members expressed

¹²¹ The Mental Welfare Commission monitors and reports on the number of young people under the age of 18 admitted to non-specialist hospital wards, primarily adult wards, in Scotland. The reasons for such placements are a shortage of specialist beds, and a lack of certain types of provision: [Young people monitoring report 2021-22](#)

concern that this could impact negatively on the patient's wellbeing as well as on their ability to participate in and understand proceedings.

On the other hand, when friends or family are physically present when patients join a remote hearing, this can also be problematic. Issues of privacy may arise in relation to family members including children being in the home when the hearing takes place and, thus, able to overhear proceedings. The patient being alone with their NP can also be the cause of difficulty:

“What about if the patient has a difficult relationship with their named person? This isn't unusual - relationships can be unbalanced and even violent - how would the panel and professionals know if they are on a phone?” (MHP01, MHTS patient)

If the person is in hospital at the time of the hearing, they will generally be accompanied by a member of the nursing staff who often helps with joining the call and may provide other practical or technical assistance. However, if the medical care provided is being challenged, this too may present a feeling of discomfort or even conflict making the patient less willing to speak out at the hearing:

“...with the greatest respect to medical staff, it is a bit of a power dynamic isn't it, an unequal power dynamic to have them there... if they wanted to say, 'I think their treatment is shocking' or 'I don't agree with this', to have to say it in front of the very people who are trying to provide the treatment.” (MMH05, MHTS tribunal member)

Participation and engagement

In general, patients and family members reported that, although they were apprehensive about joining a telephone hearing and would have preferred to attend in-person if possible, the experience of participating had been better than they anticipated. Some noted unexpected positives, such as the ability to use the mute button and vent when the evidence presented or discussion of it became difficult to hear or overwhelming, something that is not an option in person.

On the other hand, patients themselves noted that, in comparison with in-person hearings, they could experience a lack of a mental connection to telephone hearings, meaning the process did not seem as real. Therefore, although it might seem easier, less stressful or more comfortable to join by phone from home, concerns were voiced by patients about whether this was, in fact, a good thing given the high stakes at play, such as loss of liberty and/or decisions about the continuation of compulsory treatment. For example, despite being able to join from home with his partner and dog at his side, one individual noted that he was “not sure whether it is quite right” that the telephone hearing felt less stressful as the hearing would determine his freedom and “I just had a coffee and got back to work” (MHP01, MHTS patient).

Participation and engagement mean different things to different people and even patients who are unable to actively join in might benefit from being able to see the

other participants rather than only hearing the proceedings. A family member (and named person) of one patient (T) who had joined from hospital and was very ill at the time of his hearing recounted that T did not have a good understanding of what was happening and did not understand the nature of the hearing despite good support from his IA. It was very difficult for T to follow things by phone and he had only met his solicitor, who joined from a different location, once before. Although T did not take part directly and his IA spoke for him, his family member felt that video would have enabled T to get a sense of what was being said about him and by whom.

Family members themselves may also experience MHTS hearings as very upsetting and stressful and the use of telephone was perceived to exacerbate this in some cases. A family member who attended a hearing as an NP found the experience to be “process driven and clinical” and worried that the panel could “miss people’s vulnerabilities” without visual cues. Although the convener and panel members were good at encouraging engagement, this individual found it hard to participate:

“It is a very emotional experience for family members and this should be more accounted for especially as it is harder to engage remotely and phone is especially hard.” (MHP05, Family member)

Regardless of hearing mode, the patients, family members, legal representatives and IAs interviewed almost unanimously agreed that MHTS panel members do their best to make sure that the patient, named person and others can contribute as far as possible. The convener is seen as critical in this respect as he or she will manage and steer the proceedings. Participants noted that conveners are generally very good at this.

Body language

In common with the other case types discussed in this report, patients, family members, IAs, legal representatives and tribunal members all voiced concerns about the loss of non-verbal cues and body language when hearings are conducted by telephone. In the context of MHTS hearings, this inability to ‘read the room’ was seen as having potential consequences for patient welfare:

“...there have been a couple of occasions where we as a panel...have not realised how distressing some information may have been for somebody until the point that we have gone to them, and we actually realise they are in tears. That is obviously not an experience you want anybody to have.” (MMH06, MHTS tribunal member).

Similar to the hearings outlined in other chapters, tribunal members were also concerned that only being able to hear the voices of witnesses and parties (patients and named persons) meant that they might miss important nuances in the evidence presented. However, as in earlier chapters, alternative views were offered by some tribunal members that the use of telephone may remove the risk of (unjustified) assumptions based on a person’s appearance or demeanour.

Legal representatives and IAs noted that some patients, notably young people and those with acute anxiety, actually prefer telephone hearings as they do not want to be seen or to see the tribunal panel and medical witnesses talking about them. As one IA commented:

“Professionals might find body language useful but do young people?”
(Prof_MHAdv_07, Independent Advocate)

Impact on timing of decisions

When hearings are held in person, parties and representatives are sent out of the hearing room at the end of the hearing so that the tribunal members can discuss the evidence and reach a decision. The time before the party is called back to be told of that decision varies but, in the experience of the legal representatives interviewed, is usually between 20-40 minutes. In contrast, at the end of an MHTS remote hearing, the convener will sign off and invite the patient, named person and their legal representatives to phone back within a certain timeframe once the panel has conducted its deliberations and reached a decision. One legal representative who attends from the same location as his clients noted that this timeframe can be “shockingly short” with some told to phone back in as little as five minutes.¹²² The effect of this on the patient, for example if the decision is that they are to be detained for six months, can be devastating and is perceived as showing a lack of respect for them, making them feel that their case (and they) have not been taken seriously and that the outcome is a foregone conclusion.

Impact on the outcome of decisions

None of the professionals interviewed reported any discernible impact on the decisions taken or the outcomes of hearings when conducted by telephone as compared to in person. Some expressed the view that outcomes were unaffected because the orders being reviewed or appealed are rarely lifted or amended whether the hearing takes place in person or remotely because decisions are based on medical evidence which would be the same in either case.¹²³

Medical tribunal members reported some dissatisfaction, however, with the circulation and agreement of the written outcomes document known as the ‘Full Findings and Reasons’ (FFR) for corrections. Following the end of an in-person hearing, the panel will jointly agree a form of words, whereas in remote hearings FFRs are drafted by the legal member with a discussion about what to include sometimes conducted with other members by text message and full drafts shared by email. Medical members reported being less likely to ask for substantive changes in this format beyond the correction of typos:

¹²² In face-to-face hearings, parties and all others present apart from the tribunal members are sent out to wait until the decision is made. It seems that this generally happens at a more leisurely pace than in telephone hearings, or at least the time taken is not specified as it is for telephone hearings.

¹²³ This view is echoed in Stavert et al. which reports that parties and others as well as professional respondents saw the outcomes of hearings that they had been involved with as a “foregone conclusion”, see Stavert et al (full reference above), 42 and 68.

“I can only speak for myself, I wonder if people hesitate to question some of the more subtle parts of the FFR, like have we really explained our reasoning properly for this criteria?” (MMH03, MHTS tribunal member)

The view was also expressed that the online format for agreeing FFRs might make dissent more difficult for panel members:

“...when you lose those non-verbal cues and the ability to see how each other is reacting ... I think sometimes it is harder for people to disagree constructively.” (MMH01, MHTS tribunal member)

Other perceived impacts of remote hearings

Impact on transparency

No impacts on the public transparency of proceedings were discussed, as MHTS hearings are always conducted in private, whether in person or by telephone.

Impact on efficiency

MHTS professionals who responded to the survey were more likely, on balance, to feel telephone hearings took less time than face-to-face ones: 35% said they took less time, compared with 17% who said they took longer. However, around a third (32%) said they were about the same in terms of time, and 17% were unsure or said it varied too much to say (Annex A, Table A.6).

Among those interviewed, all professional groups reported that some specific efficiencies had resulted from the move to telephone hearings. For example, panel members can ‘double up’ by taking part in two separate hearings on the same day where the parties are in different geographical locations. However, legal representatives and IAs noted that any time saved, for example in terms of travel, was generally filled with other work due to the rise in MHTS cases.

All of those interviewed spoke very highly of the central administration of the MHTS and its management of the swift, decisive and generally smooth move to telephone hearings during the pandemic which had prevented a backlog of cases from accruing:

“The service should be commended for this. In the civil courts by comparison, things were not done well.” (MHA01, legal representative)

Another legal representative echoed this sentiment, but noted the need for more staff within the service:

“I can't speak highly enough of MHTS and can only commend the service and how it is run in terms of admin. However, better resourcing is needed as the number of cases rise [there are] not enough clerks.” (MHA02, legal representative)

Parties (patients and named persons) had mixed views on the impact of the move to telephone hearings on their own time. Some patients felt that it had had no

impact as they were in hospital when the hearing took place and, thus, limited in what they were able to do. Others noted that family members did not have to travel, but also felt they would have been willing to do so, if the hearing had been in person. One patient who was at home in a geographically remote location at the time of his hearing requested an in-person hearing at a location with better WiFi and facilities. This request was denied and his perception was that joining from home with all other participants in different locations took much longer as the hearing was disrupted by various IT issues.

Impact on parties' wellbeing and work-life balance

Interviewees across groups discussed potential negative impacts on parties' wellbeing if hearings were conducted by telephone. Patients and named persons suggested the distress of being "talked about" and having very personal medical evidence discussed could be exacerbated by not being able to see the faces of witnesses and panel members. At the same time, supporting patients through this process was perceived to be more difficult when hearings were by telephone – for example, an IA who works primarily with young people and joined hearings from a different location from the patient felt that this made it very hard for her to offer support, especially if the outcome was difficult. This also had repercussions for her own wellbeing as it could be "hard to switch off".

However, parties (patients and named persons), IAs and legal representatives also reflected on examples of positive impacts from telephone hearings on the wellbeing of certain groups, such as those with social anxiety and/or some young people, including the benefits of not having to be seen or being able to "hide" body language, as discussed above. Another potentially positive impact on the wellbeing of patients, discussed by a medical member of the tribunal, was that, as remote hearings are more strictly chaired and rely more on written submissions, there was less verbal repetition of the individual's medical history and other evidence "that can be difficult or distressing for patients to hear" during a telephone hearing compared with one in person.

Panel members were also of the view that telephone hearings were easier for family members and NPs to participate in, and this could have a positive impact on the patient's wellbeing as well as on that of the relative or NP.

Impact on professionals' wellbeing and work-life balance

The survey results show that MHTS professionals were, on balance, positive (more so than either family law or commercial professionals) about the impact of remote hearings on their work-life balance (68% positive, 8% negative) and wellbeing (47% positive vs 15% negative – 36% felt the move to remote had made little difference either way) (see Annex A, Table A.9).

There was little difference in the views of health and social care professionals and tribunal members¹²⁴ on the impact on their work-life balance: 71% in each case felt

¹²⁴ This includes both MHTS and HEC tribunal members, but responses were primarily from MHTS members

remote hearings had been positive in this respect. However, tribunal members were a little more divided than health and social care professionals about the impact on their overall wellbeing: 45% of tribunal members (compared with 51% of health / social care professionals) felt the move to remote had been positive, but 24% reported a negative impact on their general wellbeing (compared with just 9% of medical / social work professionals (see Annex A, Table A.10).

The interview data revealed that improvements in the work-life balance of professionals was strongly linked to the reduction in travel time and overnight stays and the potential to work more flexibly. However, given the demands on those who work as legal representatives and IAs within this busy jurisdiction, work can often expand to fill the time gained.

For legal representatives the move to telephone hearings in the MHTS had thrown up particular challenges that had resulted in negative impacts on their own wellbeing. Those representing community patients were confronted with specific risks to their own health and safety if attending a hearing from their client's home rather than (as in pre-Covid days) at a community hearings suite. This could be a high stress situation due to the instability of some clients, particularly when dealing with the additional trauma of a hearing. One representative spoke of how he has had to deal alone with clients' behaviour, feeling unable to speak openly to the tribunal members on the call who may in any case be unable to hear what is happening if the call is muted. Examples included clients smashing phones, "screaming, shouting, spitting". In a hospital setting this is easier to manage as there will be staff to assist and the convener can send the patient back to the ward. He reflected:

"Phone hearings can be extremely stressful...(legal) trainees cannot be expected to cope with this." (MHA02, legal representative)

This view was echoed by another representative and personal safety concerns were a reason she declines to attend hearings from clients' homes. Although she now travelled less for work and found the administration easier "...representing my clients is much harder" and she felt that managing stressed clients during telephone hearings has had a very negative impact on her own health.

Tribunal members' reflections on their wellbeing focused on how tiring it was to concentrate on the telephone sometimes for up to eight hours. In common with professionals in other settings, it was also noted that reduced social interaction could lead to "diminished job satisfaction" and reduced informal learning opportunities, that might arise when colleagues were engaged in "post-hearing broader discussions" enabling the exchange of ideas and good practice. However, some said that they found electronic paperwork and the remote medium less stressful than in-person hearings. It should be noted that members were quick to downplay their own needs and health impacts and tended to reflect that ensuring the right outcome for the party was the priority. As a legal member commented:

“There is a lot of pressure on the conveners having to juggle everything, they are noting all the evidence, they are managing it all, they are not being able to see everybody, it is a long day. It is straining, but again, I keep coming back to, it shouldn't really be about us, and that is the most important thing for me in all of this.” (MMH02, MHTS tribunal member)

Human rights

In addition to the issues discussed above, the question of whether/how the continuation of the use of remote hearings would comply with human rights requirements given the issues at stake, such as the loss of a person's liberty, was raised by legal professionals working in the MHTS. According to a legal representative:

“this is not the MHTS's fault - hospital venues used for hearings before Covid have not been given back and tribunal suites are now being used for other things. The shortening of time of hearings and especially in terms of time taken by the panel to reach their decision...due process is important and so is the client's perception of this.” (MHA02, legal representative)

At the time of writing, the MHTS's ambition was that, now remote hearings are not necessitated by the pandemic, patients should have choice over the mode of hearing.¹²⁵ However, the loss of tribunal suites within hospitals during Covid and the lack of tribunal centres or suitable locations for hearings outside of the central belt, particularly in remote and rural areas, were raised as restrictions on choice if the party wanted an in-person or video hearing.

Security risks

Tribunal members mentioned potential additional security risks to the confidentiality of MHTS proceedings relating to telephone hearings. Examples given included that of a rogue participant being on a call and parties joining early/staying later when the panel were engaged in confidential discussions:

“...on two spectacular occasions somebody had logged into the call early, so that the panel had their discussion unaware that there was another person on the call. Now the clerk had the ability to spot the number of people on the call, but on both of these occasions had actually missed that there was an extra person on the call.” (MMH03, MHTS tribunal member)

Views on other current and potential adaptations

Tribunal members and IAs reflected on the impacts of moving to electronic documents, largely through the lens of impacts on efficiency. Although the MHTS has always been a paper-free tribunal in its civil work, in hearings relating to an order made by a criminal court (a compulsion order and a restriction order or 'CORO') papers were, until recently, printed and sent out to tribunal members in advance of the hearing. This practice has been discontinued over the past year for

¹²⁵ [MHTS Annual Report 2021/22](#), President's Foreword, 1

reasons of information security unrelated to the pandemic. The increased use of electronic documents was generally welcomed by tribunal members but, as in other contexts, it was reported that managing the volume of papers in a bundle can be challenging in remote hearings, sometimes requiring the simultaneous use of screen, printouts and phone. The paperwork required for MHTS hearings could be lengthy and complex, for example a CORO can be 300+ pages long. The difficulty in managing everything on screen was exacerbated for some tribunal members as not all have the same level of IT skills and/or technical knowledge.

Legal representatives agreed that administration was easier to manage since the paperwork was handled electronically – seen as “one improvement since Covid” (although, as noted above, the increased use of electronic documents has not in fact been led by the pandemic in this context). However, the views of IAs were more mixed. The electronic submission of written advocacy statements and the increased use of email had improved things for some. On the other hand, this group also noted that delays in the party receiving paperwork, including the application papers for CTOs¹²⁶ (which were reported to be received very close to the hearing in many cases), meant the written statement, which must be submitted in advance of the hearing, often had to be prepared “very last minute”. Once prepared, the statement is submitted electronically, in advance of the hearing, but:

“I never get a receipt...I have to phone to check whether it was received.”
(MHA04, independent advocate)

The increased emphasis on written statements associated with remote hearings meant these were experienced as additional pressures.

Panel members had a long discussion on the methods of circulation of the FFR which can vary somewhat depending on different conveners’ practices. The shared view is that this should be standardised using secure email for correspondence and circulation with the use of text messaging in this context, however minimal, completely eliminated.

Conclusions

As the survey and interview data show, there are mixed views across the different groups who participated in this research on the past and future use of remote hearings in the MHTS. Given the size and diversity of the tribunal’s jurisdiction, this is unsurprising and points toward the need for choice and flexibility regarding mode of hearing and associated arrangements. Many of the research participants offered views on suggested improvements that could be made to remote hearings in the MHTS. These are included in chapter 7.

¹²⁶ The IA does not receive their own copy but relies on the party sharing relevant paperwork

6. Health and Education Chamber

Key points

- Following a three-month cessation of hearings at the outset of the pandemic, the HEC was the first Scottish tribunal to move to remote video hearings. This early adoption has resulted in expertise in the use of the videoconferencing platform among professionals, notably clerks, but also tribunal members and legal representatives.
- Parties were generally positive about their experiences of remote video hearings at the HEC and felt they had positive impacts for their wellbeing. Video was generally deemed to be a more suitable mode for many of the children and young people who attend hearings at the HEC compared with appearing in person.
- Despite some early technical issues, video hearings at the HEC have tended to run smoothly, although professionals continue to be concerned about the impact of digital inequalities and exclusion for some parties.
- Legal representatives reported some difficulties in communicating with their clients during hearings which they felt made it harder for them to provide the necessary support.
- Professionals raised some concerns about ensuring the integrity of evidence in remote video hearings: it could be difficult to ensure that witnesses were not accompanied by others and did not have access to information outwith the agreed bundle during the hearing.
- Despite acknowledging the positive impact of remote hearings on efficient time use and work-life balance, professionals reported some negative impacts on their own wellbeing arising from the loss of social interaction and tiredness from spending hours on-screen.
- Parties and professionals were very positive about the level of support for remote hearings in the HEC especially that provided by the clerks.
- The use of electronic documents was generally positively perceived by professionals, although some parties found them difficult to manage.

Overview of HEC cases and the use of remote hearings

The Additional Support Needs (ASN) jurisdiction sits within the Health and Education Chamber of the First-tier Tribunal for Scotland (HEC). The ASN Tribunal decides different types of cases in relation to school education concerning applications (called references) made under the Education (Additional Support for Learning)(Scotland) Act 2004 and claims under the Equality Act 2010. It hears references brought by parents and by young people aged 16 and above appealing decisions of education authorities regarding the provision of educational support and placing requests which decide which school the child or young person shall attend. Since January 2018, children aged between 12 and 15 years who have

capacity to make a reference and where their wellbeing will not be adversely affected by doing so have been able to make two types of reference. These are: (1) a reference in relation to a coordinated support plan (CSP); and (2) a reference appealing the education authority's assessment of the child's capacity or wellbeing (which is undertaken when the child seeks to exercise one of the rights available under the 2004 Act).¹²⁷ The Tribunal also decides claims regarding disability discrimination arising in school education under the Equality Act 2010. Claims are made by children, young people and parents/carers. These can be broad in scope and have included exclusions and expulsions from school and the use of restraint and seclusion in schools.

A tribunal consists of one legal member and two specialist members. The specialist members may have backgrounds in additional support needs, education, social work or health. In certain types of cases a legal member can sit alone. Each tribunal is supported by a case officer, usually assigned to the case for its duration, who deals with all enquiries in relation to the hearing and the progress of the case.¹²⁸ Hearings often last for more than one day and can sometimes take place over two or three days.

The HEC has a much smaller caseload in comparison with the MHTS. Data on the number of applications received by the HEC over the last three years reveals a drop in the total from 146 in 2019/20 to 83 in 2020/21.¹²⁹ However, in the Annual Report for 2021/22, the President reports "This reporting year saw a return to pre-pandemic case levels, the second highest on record (133 cases – increase of 50 from last year)".¹³⁰ The HEC recorded its highest number of cases ever in the year 2022/23 with 202 applications.

Prior to the pandemic, hearings in the HEC took place in person with all participants including parties (parents/carers and/or the child or young person if they are attending), tribunal members and witnesses attending the Glasgow Tribunals Centre or in other locations across Scotland in rooms booked for the purpose of the hearing (for example, other SCTS hearing venues or hotel rooms). Following the announcement of the first national lockdown in March 2020, the HEC ceased hearings completely for a three-month period. In July 2020, hearings recommenced by video through the use of a videoconferencing platform following a successful pilot hearing.

The HEC was the first Scottish tribunal to use video hearings, conducting 52 hearings over 121 days between August 2020 and September 2022.¹³¹ Learning on the use of the videoconferencing platform, gathered by HEC clerks and

¹²⁷ [Justice Delivered: A report into the impact of the COVID-19 pandemic on the delivery of justice in the Health and Education Chamber](#) (2022), 4

¹²⁸ Health and Education Chamber, [Information on Additional Support Needs](#).

¹²⁹ See Case Work Overview in [Tribunal Forum \(Virtual\) September 2022 – Presentation](#)

¹³⁰ [Scottish Tribunals Annual Report 2021-22, Health and Education Chamber of the First-tier Tribunal for Scotland](#), 22

¹³¹ Justice Delivered (full reference above), 16

caseworkers, was shared more widely with other chambers and tribunal jurisdictions to support the rollout of remote video hearings across Scotland's tribunals.¹³²

The HEC's use of video hearings has continued into the post-pandemic period, alongside a phased reintroduction of in-person or hybrid hearings. Phase 1 hearings, in which the three tribunal members meet in person with all other participants joining via videoconferencing, were introduced in April 2022. Phase 2 hearings, in which all participants were able to attend in person at the Glasgow Tribunals Centre apart from witnesses who appear online, began in October 2022.¹³³ Phase 3 will see a full return to the option of in-person hearings. On 6 February 2023, it was announced that Phase 3 would begin on 27 February in a limited number of venues.¹³⁴

Existing evidence on remote hearings in the HEC

Feedback gathered by the HEC on experiences of video hearings (from clerks, members, parties and their representatives and supporters and witnesses), covering the period March 2020 to September 2022, informed the 'Justice Delivered' report on the impact of the pandemic on the HEC, published in September 2022.¹³⁵ A members' survey for this report (completed by 26 out of 34 members¹³⁶) found 88.5% in favour of the continuation of video hearings as an option alongside in-person hearings, with 11.5% against. The reflections and comments of other users were also generally positive. This is in line with the findings from the quantitative and qualitative research conducted for the current study, reported below.

Although the HEC has returned to the option of in-person hearings, it is clear that for a variety of reasons, first and foremost the emphasis placed on the importance of choice, the use of video (or, more rarely, telephone) hearings will remain part of a suite of options available to parties.

In 'Justice Delivered' the Tribunal identifies the elements required for such hearings "to be effective and to remain a viable alternative to in-person hearings in the future", many of which overlap with the themes and suggestions emerging from this study, including:¹³⁷ well supported judiciary, with access to a robust and secure internet network; IT support and equipment, including a minimum of two screens

¹³² Justice Delivered (full reference above), 17

¹³³ Justice Delivered (full reference above), 25

¹³⁴ The President issued new hearings guidance, revoking the former guidance which applied to the COVID-19 outbreak, see [Guidance to Tribunal Members](#) (Feb, 2023). The guidance states (at para 17) that, to facilitate SCTS sanitisation routines, "In-person hearings must take place in a Scottish Courts and Tribunals Service (SCTS) venue until the President advises otherwise. These include the sensory hearing suite in the Glasgow Tribunals Centre, or Inverness Justice Centre, or George House, Edinburgh".

¹³⁵ Justice Delivered (full reference above), 4

¹³⁶ Justice Delivered (full reference above), 26

¹³⁷ Justice Delivered (full reference above), 13

and a headset; e-bundles, consistent with documentary evidence guidance; clear guidance to members, parties, witnesses and other participants; and well trained judiciary, clerks and caseworkers.

The report also lists the conditions required to ensure the effective participation of those taking part in such hearings as a key element of access to justice. These are:

- Access to a robust home/office network and a room where they will not be interrupted or overheard
- Regular comfort breaks, reassurance and explanations during the course of the hearing
- Clear (and age/accessibility appropriate) guidance, and
- Test sessions before the hearing to allow any IT issues to be ironed out and provide confidence to participants.¹³⁸

Again, these findings correspond closely with the quantitative and qualitative data gathered for the current research.

Overall attitudes to remote hearings in the HEC

Survey Findings

The number of respondents to the professionals survey with experience of HEC hearings was very small (n = 26). While Annex A includes tables for HEC responses, caution should be applied in interpreting these. However, among the small group of professionals with experience of HEC cases, most (around 8 in 10) felt that video hearings could work very or fairly well for evidential hearings, as well as for procedural business.¹³⁹ This is in line with the levels of support for the continuation of video hearings expressed in the HEC's own survey,¹⁴⁰ discussed above. Most (again, around 8 in 10) of the small number with experience of telephone hearings also felt that telephone could work well for procedural business in the HEC, which in this context refers to judicial case management meetings.¹⁴¹

Interview Data

As discussed in chapter 1, interviews relevant to this chapter included seven parties (primarily parents, but including one interview with a young person), a group

¹³⁸ Justice Delivered (full reference above), 14

¹³⁹ 35% were unsure how well video hearings work for procedural hearings. As with the MHTS, this may reflect the different nature of HEC hearings, which do not split as obviously into procedural and substantive business as in the courts. However, once those who said they did not know are removed from the base, most respondents said video can work well for both procedural and evidential hearings in HEC.

¹⁴⁰ Of tribunal members (of which there are 34 in total) split between 14 legal and 20 ordinary members

¹⁴¹ There were too few participants with a view on the use of telephone for evidential hearings in the HEC or of hybrid hearings in general to draw more than very tentative conclusions, although the figures indicate telephone is viewed less favourably than video in this context.

discussion with four tribunal members, and interviews with two legal representatives, one independent advocate and two HEC clerks.

Overall, the HEC parties interviewed for this study reported positive experiences with remote hearings: all said they would be happy to or would prefer to take part by video in the future. The key elements that were seen by parties to work well were similar to those discussed in previous chapters, including benefits of participating from a familiar and comfortable space, and saving time and money around travel / accommodation. Reducing logistical barriers in terms of travel or childcare were viewed as particularly impactful for those with a health condition or disability or those with children with additional support needs. There was also a perception that participating by video could make it more accessible and less intimidating for children or young people to take part in the hearing. Where parties discussed what had worked less well, they tended to mention technical difficulties.

Legal representatives, IAs and tribunal members echoed the view of parties that children and young people who are disabled or neurodiverse (e.g. autistic or with other conditions such as ADHD) and/or who experience social anxiety and/or communication difficulties tend to be more relaxed in their home settings and can use video hearings “creatively and flexibly”. Being able to join remotely has also made it easier to organise witnesses and to ensure their attendance – for example teachers are able to join the hearing as part of their working day. The whole process was generally viewed as less time consuming for all, as hearing time is “kept to a minimum”. However, there was also general agreement among professionals that what works best (in terms of remote, in person or hybrid) will vary depending on the individual party’s needs and personal preference.

While professionals reported no change to **outcomes** with the move to video hearings they reflected in some detail on differences in **process** between hearings conducted in-person and those conducted remotely by video. These differences were perceived as having had both positive and some negative impacts for those involved. These issues are discussed in more detail below.

Perceived impacts of remote hearings on access to justice

Access to the formal legal system and to a fair and effective hearing

As discussed above, given the very small sample size, survey findings can only give a tentative indication of HEC professionals’ views. However, with this caveat in mind, of the issues the survey asked about relating to parties’ access to and participation in hearings, the main issues identified by HEC respondents as being at least fairly common in video hearings¹⁴² were:

- technical issues joining remotely (most thought this was at least a fairly common issue for HEC parties)

¹⁴² As video hearings are by far the most common type of hearing in the HEC, with very little use of telephone hearings, findings from the survey in the remainder of this chapter focus on views of video hearings.

- parties struggling to join because their device was not well suited to videoconferencing (while most thought this was not very common, around 4 in 10 said it was fairly common)
- parties experiencing difficulties speaking to a representative during a hearing or difficulties reading documents on screen (again, more thought these were not very common issues, but around 3 in 10 said they were at least fairly common issues for HEC parties).

On balance, among the small sample of HEC professionals who responded to the survey, more felt that a legally represented child or young person (either with or without additional support needs) would find it easier to take part by video, rather than face-to-face. However, around a quarter to a third were unsure either way (Annex A, Table A.4d).

Joining hearings: technology, location, support

All of the HEC parties interviewed had successfully joined their remote hearing with few issues. Participants had generally received clear information in advance via email about how to join, along with a link, and were usually asked to test the link beforehand and offered a test call if needed. Parties reported having designated technical support (presumably the clerk, though this was not always completely clear) to attendees to help if things went wrong, which was seen as helpful in overcoming technical anxieties:

“I’m not a technophobe, but nor am I very technical, so you know, there was almost the fear of what if something goes wrong. I don’t know how to fix this. But it was all really smooth and really well organised, and I know the technical person was around the whole time.” (HECP03, HEC party, parent)

However, as in all the other hearing types discussed in this report, technical issues in accessing the hearing did still sometimes occur as a result of issues with parties’ devices, WiFi connections, or digital skills and ability. In common with previous chapters, participants agreed that, over time, people got better at using the technology and that some of these issues had reduced. At the same time, legal representatives and tribunal members raised ongoing concerns about digital inequality and exclusion and how this might affect parties’ and some witnesses’ ability to attend and to take part in a hearing. Examples were given of clients joining using mobile phones (again, not viewed as suitable for video hearings) and having to share equipment with others (“one iPad per household”), limiting their access and privacy and potentially compromising security (for example, if others were able to access tribunal-related paperwork). Tribunal members reported that most parties who appear before the Tribunal are represented which improves access to justice overall. However, it was also noted by members that some parties relied on their legal representatives for access to and support with IT equipment.

Parties themselves indicated that legal representatives typically helped to prepare them for the hearing and explained how it would work and what to expect. They also highlighted the importance of clerks in ensuring everybody knew what was going on during the hearing, including the schedule and any breaks. They felt it was

useful to have clear introductions at the beginning of a video hearing so that they knew who everyone on the call was and what their specific role was.

Parties described various ways in which they felt video hearings had made it easier, or even possible, for them to attend when they may not have been able to attend an in-person hearing. As noted above, there were perceived to be particular benefits for those with a health condition, disability, or additional support need which could present additional challenges for traveling or being in a new, potentially physically inaccessible, place. One participant who is severely sight-impaired explained that, if she had been required to travel, she would have needed somebody to guide her and to be in a space that enabled her to use a cane. Another participant with a health condition noted that being at home meant that they had things they needed, such as their medication, close to hand.

Similarly, where interviewees had supported children or young people as family members and IAs to join and contribute to hearings themselves, the fact that the hearing was held by video was thought to have played an important role in enabling this. They reported that children could decide more spontaneously whether they felt comfortable taking part after watching some of the proceedings, were less intimidated by not having to be in the room with others, and felt more comfortable taking part in a familiar and safe environment:

“Because of conditions or just their age, they sometimes need to be doing something else...playing on a phone, colouring... and this is harder in person. They can be present at an online hearing but also occupied.” (HECLR1, legal representative)

Tribunal members and clerks thought that children were more likely to attend hearings by video than if they were conducted face to face.¹⁴³

Tribunal members and legal representatives raised concerns, however, about the need to ensure that the party or witness was on their own when giving evidence and the difficulty of being able to do this if the person was taking part remotely. There was a perceived risk that a third party present in the room could influence or distort the evidence being given:

“I have noticed that legal members are now checking that the person is on their own, that they are in private and that nobody else is actually there.” (MHEC01, HEC tribunal member)

There was also some concern that witnesses could look up information not contained in the official bundle of documents provided by the Tribunal on their computers during the hearing.

¹⁴³ It has not been possible to verify if this has in fact been the case by way of statistical information

Participation and engagement

HEC parties generally felt that it had been easy to take part in video hearings and get their views across effectively. One participant thought that occasionally it was not as easy to hear everything that was said, but that this was not a major difference compared to in-person discussions.

The general view from all professional groups was that children and young people prefer video hearings to in-person hearings. Tribunal members noted that they find that children and young people's evidence is more natural as they appear to be more relaxed in their home settings:

“... the quality of that participation I think is higher because they are more relaxed [when] they are at home... a huge advantage in a jurisdiction where there is a statutory duty on us to seek the views of the child, the young person, then being able to fulfil that duty I think far more often than we used to.”
(MHEC04, HEC tribunal member)

Interviewees reported that some children and young people do not want to appear on screen and are able to switch their cameras off when giving evidence (although it was noted that the tribunal members usually like to see them at some point). Others at the hearing could also make use of the facility to switch cameras on and off so that the party can only see one person on screen at a time, making communication easier.

Body language

Parties mentioned some initial concerns around getting across their personality or strength of feeling without seeing people face-to-face or the use of body language, but this was not thought to be an issue in practice in HEC hearings. However, they felt they had been able to make a better impression during the hearing by having the ability to turn their video off or mute their audio. They would do this if they felt they were getting too emotional or anxious, and felt that this improved their ability to engage with the hearing as they did not have to worry as much about controlling their emotional response to discussions:

“I wouldn't be able to storm out the tribunal room, but at least I could put the camera off, put the sound off, and just 'raarh', and then go back in.” (HECP01, party, parent)

On the other hand, as in previous chapters, legal representatives did worry about non-verbal cues being lost on video, and how this might affect their cross-examination of witnesses. There was also a perception that it might affect the legal representative's ability to pick up on the non-verbal cues of tribunal members, for example an unspoken signal that they should change their questioning strategy. This aspect was also mentioned by tribunal members in terms of both credibility and participant welfare: there was a perception that picking up important signals can be more difficult by video, for example spotting when a witness is getting tired

or when someone is distressed, or "...hesitation in that witness that wasn't necessarily visible on the screen".

Communicating during hearings

As in previous chapters, parties and their legal representatives and/or IAs discussed using various methods to communicate during hearings, including WhatsApp and texts. Breaks can also be requested to enable phone calls. While parties did not raise any concerns about the level of communication with their legal representative, they did imagine (when prompted) that they would have communicated more had the hearing been in person.

Legal representatives themselves reported that they found it harder to support clients online than in person. Representatives have to remember to check in regularly and to remind clients to take breaks especially if they are distressed which is "harder if you're not beside them". If a child or young person becomes upset or aggressive in response to something said at a hearing, it was felt to be much easier to reassure them in person. A further concern voiced by tribunal members was that the appearance of members from behind their (sometimes multiple) computer screens might present a physical barrier to communication, engagement and participation of the party "...that a pad of paper wouldn't".

Impact on timing of decisions

There was no mention by parties of remote hearings having an impact on the timing of hearing decisions. Likewise, professional groups did not note any impact in this respect. This is probably because decisions from HEC hearings are deferred and are given in writing and this element does not differ between video and in-person hearings.

Impact on the outcome of decisions

There was also general agreement among professional groups that the mode of hearing had had no impact on the outcome of the case. However, one tribunal member did report feeling less confident in their own judgments when the hearing was conducted remotely. They attributed this to the loss of non-verbal cues and body language and greater reliance on written rather than oral evidence (see below):

"I don't find the experience anything like as, well I'm going to say fulfilling, but I don't have the same, quite the same confidence in my judgments as I do in person." (MHEC03, HEC tribunal member)

There was also general agreement among parties that the mode of video hearings had not impacted on decisions in a negative way:

"I worried a little bit that it would [impact the outcome] because of the remoteness of it and not actually having met, not seeing the body language, etc. [...] but clearly [...] it didn't impact, they took the information on board." (HECP04, party, parent)

In fact, for those parties who felt that the mode of the hearing had better enabled them to participate, there was a feeling that this might have positively impacted on the outcome of the hearing:

“In a way I think it [being remote] might have [impacted the outcome] because I was less anxious and felt more supported by my parents. It meant I was a bit more free to...I felt a bit more confident in saying what I was saying.” (HECP02, Party, young person)

Another participant believed that the fact her daughter had been able to take part in the hearing *because* it was remote had directly impacted on the tribunal’s decision,

“I do [think having it remotely impacted outcome] because I think them speaking to my daughter [...] I think that really impacted on their decision in a positive way.” (HECP06, Party, parent)

Other perceived impacts of remote hearings

Formality

Concerns expressed in previous chapters that holding a hearing remotely would cause people to treat it with less formality or take it less seriously were not generally reflected in the experiences of the HEC parties interviewed. However, there was one incident of a witness joining from an inappropriate location, in an outdoor public space where they could be overheard. They were asked to leave and the (parent) interviewee felt this was dealt with effectively by the tribunal chair:

“One of the witnesses came on and they were outside [...] so an element of professionalism was skewed with that witness because they weren’t there in person [...] Some people might think that when it’s remote there’s [less] formality. [...] I was concerned because obviously they were discussing my daughter and quite private things about her education and about her needs.” (HECP06, party, parent)

A legal representative noted that a degree of formality in their hearings could be a positive for young people: although they might find formal processes daunting, some formality assured them that their case is being taken seriously. The President has issued guidance about the need for formal attire for tribunal members, witnesses and representatives and the legal representative had discussed this with one of his child clients who felt this made it different from other meetings they attended and that such standards were important.

Tribunal members were generally of the view that a level of informality was a good thing as it helped the party and witnesses to relax and enabled children and young people to give their evidence in a more natural way. However, they agreed that there is a balance to be struck between parties and witnesses being comfortable and being “too relaxed” and losing the sense of formality of the hearing as a legal process. There were some mixed views among members on the impact of remote hearings on this. One member reflected:

“I think most of our witnesses still feel very nervous, and still feel that this is a very formal occasion and have done a lot of preparation beforehand.” (MHEC01, HEC tribunal member)

However, another member worried that the move to video hearings could lessen their perceived importance to witnesses:

“What should you feel as a witness when you're about to give evidence in a case of some magnitude? How should you feel about that? Should you feel, you know, ‘I’ll fit it into my working day, oh, I’m doing other stuff and I’m distracted?’ Or should you actually be giving up your day to go along to the building because that is important and you need to be focused.” (MHEC04, HEC tribunal member)

Impact on transparency

HEC hearings are almost exclusively held in private, so the impact of remote hearings on public transparency of hearings was not relevant. Although the HEC can consent to public hearings, these are rarely if ever requested and none of those interviewed had any experience of them.

Impact on efficiency

Although the small sample of HEC respondents to the professionals survey were generally quite positive about video hearings, they did not appear to consider them more efficient in terms of time – around 3 in 10 felt video hearings took longer than face-to-face, while a third felt they were about the same (Annex A, Table A.6).

Overall, the parties interviewed reported that they had saved time by joining hearings remotely as opposed to in person, primarily due to removing travel time. At the same time, despite not experiencing any major issues joining a remote hearing, both parties and professionals described various technical difficulties that could cause disruption and take up extra time, similar to those discussed in previous chapters. Tribunal members also noted that hearings rarely start on time and that they are not necessarily shorter than in-person hearings because of the need to build in breaks.

Both legal representatives and tribunal members were complimentary about the leadership, management and administration of the HEC service overall. Although hearings had been halted for three months from the end of March 2020, after that there had been a rapid move to video with no backlog. The fact that the number of cases was lower than for some other services within the civil justice system had undoubtedly helped with this but, nonetheless, the quick changeover was commended. Clerks were also singled out as contributing to the smooth and efficient running of the service.

Impact on wellbeing and work-life balance

As discussed above, the parties interviewed highlighted the positive impacts of being able to take part from their own home in terms of comfort and accessibility (particularly for those with disabilities or additional support needs). Some parties felt

that taking part in hearings remotely and from a distance could reduce the intensity of the experience, defusing feelings of anxiety and helping them to manage conflict:

“I think I was probably more comfortable with it being done online rather than face to face, because I was in my own environment [...] clearly for me, it was going to be a very emotional process because we were talking about my son and his placement in the future. The fact that I was in a place where I was comfortable made it easier for me. [...] I was able to break, to have things around me, to have easy access to a cup of tea, to food, to a glass of water.” (HECP03, Party, parent)

“You didn't have to face being in the same room as the people you are basically going ‘against’.” (HECP04, Party, parent)

Video hearings could also enable parties to better manage caring responsibilities, by reducing the need to arrange childcare which could be particularly challenging for HEC parties, given they are more likely to have children with additional support needs or disabilities. A participant with caring responsibilities also highlighted that the time saved by attending remotely meant they did not have to lose respite time for themselves.

However, the lack of separation between hearing and home was not always ideal for parties: for example, one participant said that taking part from home meant she did not have the time to “de-compress” afterwards which could make it harder to recover if the discussion had caused her to feel stressed or upset.

Moreover, while for most parties the ability to take a break was not an issue, one participant felt that requesting a break was more difficult in a remote environment compared to being face-to-face. For this participant, being able to take a break quickly was important for health reasons, but she had to text her solicitor and wait for them to see it before she was able to leave. However, the participant felt that, on balance, being sick at an in-person hearing would have been worse.

Parties commented on the important role that clerks could play in helping parties to feel at ease during hearings:

“...she was a clerk [...] I think having someone who is very calm, can speak very clearly, has a kind of a pleasant demeanour, she had, she smiled a fair amount, I felt quite relaxed when she started speaking [...] I also felt very appreciative of the fact that she spoke up for me when it was time for me to be questioned, that she obviously was taking my kind of wellbeing into consideration.” (HECP03, Party, parent)

All of the professionals interviewed highlighted that the wellbeing of the party in any hearing was a central priority. They echoed the views expressed by parties, above, that the move to video hearings had resulted in many positive impacts for parties. In terms of their own wellbeing, professionals cited reductions in travel and overnight stays as having had a positive impact on time at home and with their families.

Legal representatives in this field provide specialised support and representation services and so their work takes place on a national scale. This means that the distances involved and frequency of travel to in-person hearings could be significant and video hearings had obviously reduced this. However, video hearings, including the use of written witness statements, meant that their work was “front loaded” with preparation. Furthermore, HEC hearings can be long and complex, and the specialist services offered by legal representatives are often over-subscribed, so that there was a perception that any time gained was quickly reallocated to other cases or different aspects of their work, thus reducing any positive impact on their wellbeing.

As in previous chapters, this ambivalence on the part of professionals about the impact of remote hearings on their own wellbeing was reflected in the survey data. Among the small sample of the HEC respondents, most (7 in 10) felt the move to remote hearings had a positive impact on their work-life balance. Views on the impact on their wellbeing were more divided, however, with similar numbers reporting positive and negative impacts.

One legal representative, when asked about the impacts on their wellbeing, pondered whether the dilution of concentration that came with remote hearings might not be a good thing:

“If [you are] away at a hearing this might be all you focus on whereas if you are online you are juggling with other work and distractions at the same time.”
(HECA02, legal representative)

As in previous chapters on other court and tribunal settings, all professional groups regretted the loss of human contact and social interaction in their day-to-day work. Tribunal members also reported tiredness and difficulties in concentrating for hours at a time onscreen but were keen to stress that their own wellbeing or convenience is not a primary concern as their focus is always on the wellbeing of the party.

Views on other current and potential adaptations

All participants (legal representatives, parties, witnesses, tribunal members) now receive a full electronic bundle of documents sent in pdf form by email. The use of full written statements submitted in advance, sometimes in place of oral evidence, has been taking place over some time and predates the pandemic measures. Other documents, such as outline written submissions, are also used frequently. As in the MHTS, the electronic bundle is lengthy and can be several hundred pages long in some cases.

In common with other contexts discussed in previous chapters, all professionals felt that the sharing of papers electronically in advance with professionals, parties and witnesses was generally an improvement in terms of efficiency. However, again, preferences for electronic documents over hard copy varied. There was a strong view that it is too difficult to manage the bundle entirely onscreen, alongside the appearance of seven or eight participants and the typing of notes. There was also a

suggestion that the circulation of replacement versions to which new documents had been added was confusing.

Parties had mixed views on how well digital bundles worked, again reflecting on the advantages of being able to search on an electronic device, but also the challenges of accessing documents and engaging in a video call on the same device.

Conclusions

As the quantitative and qualitative data show, parties and professionals were generally positive about the use of video hearings in the HEC. However, there were some important and nuanced views reported on specific aspects of remote hearings, for example, challenges for legal representatives in providing support for clients during hearings, and also across different groups of parties, including ongoing concerns about digital inequalities and exclusion for some. This suggests that there is no “one size fits all” for hearings in the HEC.

7. Conclusions and considerations for the future

This final chapter looks across the findings presented in the preceding five chapters to draw out the key themes and challenges that will need to be considered in any future decisions about remote and hybrid hearings. These themes comprise: multiple perspectives on the advantages and disadvantages of remote hearings; issues relating to the technology required to support remote and hybrid hearings; communication within remote and hybrid hearings; supporting parties in remote and hybrid hearings; supporting professionals working in remote and hybrid hearings; and issues relating to formality, the rule of law and open justice.

Under each theme, any similarities or differences between the court, tribunal and case contexts under study are also discussed. Suggestions for improvement, drawing on the professionals survey and the interviews with professionals and parties, are included (highlighted in bold), with a particular focus on what people think can be done to improve the experience of remote hearings and other uses of digital technology in the civil justice system for each of these different groups. The final section considers what indicators might be used to assess whether and how remote hearings “work well” for service users, staff and the judiciary in the future.

This concluding chapter draws from suggestions arising from those interviewed across the four different settings included in this research. However, as a number of the issues raised by commercial interviewees were quite specific to that setting, some of the suggestions for improvements in commercial actions (chapter 3) are represented in more detail in the chapter itself.

A blended future?

A key overarching finding from this study is that, on many of the issues discussed, experiences differed – sometimes significantly – resulting in multiple perspectives with no clear consensus: the perceived advantages and disadvantages of remote hearings vary across and within different contexts and for different participants.

The clearest agreement among professionals, at least those working in the courts, was that remote hearings were viewed as relatively more beneficial and/or less problematic in the context of procedural rather than substantive hearings. This broadly reflects the current guidance for both the Sheriff Courts and Court of Session which, since mid-2022, has provided that substantive hearings (including child welfare hearings) shall be in person and that procedural business and debates¹⁴⁴ shall continue by electronic means unless otherwise directed by the court.¹⁴⁵

¹⁴⁴ Debates are included in substantive in-person hearings in the Court of Session, but are presumed to be remote in the Sheriff Courts

¹⁴⁵ [Guidance for Court Users: Proceedings in the Sheriff Courts \(July 2022\)](#); [Guidance for Supreme Court Users \(April 2022\)](#); [Guidance for Court Users: Child Welfare Hearings in the Sheriff Court](#)

However, this distinction between procedural and substantive hearings was less clearly made by parties in family law cases, and is less relevant in any case to MHTS and HEC hearings. Within the MHTS and HEC, there was clearly a desire among professionals to be able to offer parties choice between modes, taking account of their particular needs and circumstances. At present, this appears to be more feasible within the HEC and, subject to certain constraints, within the MHTS due to room availability and IT access and quality in hospital and other settings.

Suggestions for improvement: appropriate choice of mode

- **Improving the resources to support both in-person and hybrid hearings** – improvements to the IT resources required to support remote hearings are discussed further below, but with respect to the MHTS, the lack of suitable rooms for in-person hearings, both in hospitals and community settings, was seen as a major issue which had been exacerbated by the pandemic. In the HEC, it was noted that hybrid hearings were currently restricted to Glasgow because of the equipment needed but that facilities should be available elsewhere in Scotland. At an even more basic practical level, the table size and shape at the Tribunal Centre was found by some to be problematic in terms of hybrid hearings (it could be difficult to make enough space to accommodate tribunal members' laptops). Similar issues around equipment were reported in the courts, with one advocate suggesting a need for mobile screens that could be positioned flexibly.
- **Developing a 'triage' system or guidance on mode** – whether there is a desire to offer choice of mode to parties (as in the tribunals), or where courts are in a position to vary from the default, a decision-making process is needed. One suggestion (from HEC tribunal members – but possibly applicable in other contexts with adaptations) was that a triage system could be introduced to determine mode, based on the circumstances of each case. A set of principles, tests or relevant factors could be developed and applied to facilitate independent decision-making about the most suitable format based on the needs and possible vulnerabilities of the party (including whether they are legally represented or not) or witnesses, and any other relevant circumstances. A suggestion from an advocacy organisation of how this approach might be applied in the family law context was that, where cases are particularly complex but there is no sheriff with extensive experience of family cases, it might be possible for a sheriff with such experience, based outwith that Sheriffdom, to hear the case remotely.¹⁴⁶

Technology – soluble and insoluble issues

Technological challenges around remote hearings featured strongly across the different case types, courts and tribunals considered in this study. Although in all cases these were considered to have lessened since the earliest days of the

¹⁴⁶ With respect to a triage system, it was also noted that new family court rules have recently been introduced, requiring a case management hearing at the same time as the first child welfare hearing to give the court chance to assess the complexity of the case and whether it should be 'fast-tracked' to proof – see rule 33.36J, which comes into force on 25 September 2023 [SSI 2022 No. 289](#).

pandemic, as people became more familiar with the platforms used, a number of issues persisted, with negative impacts for parties and professionals.

Variability in the use of video hearings and equipment to support this

At the time of writing, video hearings were almost always used for HEC hearings, while telephone remained the dominant mode for MHTS hearings (reflecting the high volume and limitations on the number of NHS settings able to support video hearings). Participants noted that there were still some issues around equipment to support video hearings in the Court of Session (for example, docking stations not always functioning). However, in general Court of Session judges appeared to be fairly well equipped in terms of multiple screens and other equipment required to support video hearings. In contrast, as discussed in chapter 3, the use of video hearings varied across Sheriff Courts and appeared to be more limited, even when pandemic restrictions were in place, in some Sheriff Courts (notably Glasgow). In the HEC too, where most hearings from mid-2020 onwards were video hearings and where there was a strong desire to retain video hearings to maximise choice for parties, tribunal members noted that they were still often using their own laptops and tablets for hearings.

Equity of access to equipment to enable effective participation was arguably an even greater issue with respect to parties. There was a general consensus across the four case types that it was very difficult for parties to participate effectively in a video hearing on a mobile phone, while lack of access to a second screen created difficulties reading documents during hearings. Joining on shared devices could also create potential security issues.

Security and confidentiality issues

Heightened risks to the security of confidential information in remote hearings were raised as an issue of concern. Around 1 in 8 family law professionals who responded to the professionals' survey were worried about the illicit recording of family hearings, a concern that was shared by some of the parties, sheriffs and support organisations interviewed, with reports that such recordings had been shared online. Security risks raised by some MHTS members interviewed were related to the confidentiality of proceedings in telephone hearings where those unconnected with the case had gained entry to a hearing.

Connectivity and WiFi

Even where parties had access to an appropriate device, issues with poor internet access could prevent them being able to join or participate fully in hearings, while mobile phone reception could cause issues if they were phoning in (described by clerks as a 'back up' option where parties were unable to join by video). Internet connections had also created issues with witnesses giving evidence remotely. WiFi coverage in both courts and (for MHTS) hospital buildings was also described by professionals as an ongoing issue. A lack of good WiFi coverage across the court estate was a barrier to, for example, agents sharing documents effectively when attending remote or hybrid hearings.

Suggestions for improvement: technology to support remote hearings

The most common suggested change cited by professional survey respondents with experience of the court system was to improve the reliability of equipment or provide better IT resources (mentioned by 17% respondents with experience of the Court of Session and 15% of those with experience of Sheriff Court – Annex A, Table A.14). Respondents with experience of MHTS suggested increased use of videoconferencing (22%) and improving the reliability and quality of IT resources (12%), while a quarter of the small number of HEC respondents also mentioned improving IT resources and equipment.

Suggestions from the in-depth interviews included:

- **Ensuring professionals are provided with appropriate equipment**, whether at home or in a court or other public building. It was suggested that those routinely joining remote hearings required computers with appropriate security, multiple screens, and electronic readers. As a HEC tribunal member put it:
“...it's just basic equipment that we need, because well we need it and we can't conduct a remote hearing without a computer...obviously it has all happened very quickly and nobody expects you suddenly to magic up all the equipment straight away, but it is three years now or two and a half whatever it is, so I think probably it is time that we are actually equipped to do the job.”
(HECLM2)
- **Taking a systematic approach to addressing digital inequality among parties** – for example, an advocacy organisation noted that in some countries, video kiosks had been set-up in libraries for use by those attending court hearings remotely. Family law parties suggested that court buildings themselves could offer quiet spaces with appropriate phone reception, strong and stable internet connections, appropriate devices and IT support, so that parties who lacked any of these were still able to join remote hearings. HEC professionals suggested that any cost savings from reduced travel and accommodation for tribunal members and clerks should be reinvested in overcoming digital inequalities among parties and witnesses.
- **Improving the WiFi in public buildings** – as noted above, inconsistent or non-existent WiFi signals in public buildings, including courts and, for the MHTS, hospitals, was viewed as a significant issue in terms of being able to join remote hearings.
- **Improving functionality within available platforms** – As most participants were only familiar with SCTS' selected videoconferencing platform as an option for remote hearings, there was little discussion of potential alternatives. However, some professionals commented on additional functionality that would improve efficiency, such as the ability to record hearings and make use of automated transcription. It was suggested that this would help bring down the costs to parties of accessing court transcripts (something perceived to impact disproportionately on party litigants). Although not specifically suggested by any participants, enhanced security measures and the adoption of related protocols

in all remote hearings would alleviate the potential security risks identified in the family courts and MHTS.

Finally, while the suggestions above might help address some technical issues, occasional issues around connectivity and equipment are likely to be an enduring feature of remote hearings. Given this, it may also be worth considering whether there is a need for clearer, **SCTS-wide guidance on how to manage hearings when technical issues do arise** – for example, when a hearing should be paused or suspended if a participant’s internet connection fails.

In addition to suggestions for improvement to the functionality of the video hearing platform, interviewees also wanted to see improvements to other court systems and processes in order to improve efficiency, reduce professional workloads, and enhance access to justice, particularly for party litigants. Suggestions included:

- **Improving the speed of ICMS** to make it more efficient for the judiciary and others to use.
- **Making greater use of emails**, including allowing party litigants to email papers – this was raised specifically with reference to family cases, where it was noted that party litigants currently had to use sheriff officers, at additional expense.
- **Improving the digital document system.** Facilitating better access to documents was mentioned as a suggested improvement by 14% of professionals with experience of the Court of Session and 10% of Sheriff Court respondents. Solicitors interviewed for this study suggested granting access to the ICMS system so that they could upload documents directly rather than emailing clerks (something clerks noted could add to their workload when revised documents were received late in the day). It was suggested this would improve efficiency and accuracy. Legal representatives in the HEC also felt there should be a central online document depository and handling/sharing centre as they were still emailing lengthy documents to each other, and email data limits can cause difficulties. Centralised document management would enable secure access to information about each case when needed (although it is recognised that there may be security issues to address in implementing such a system).
- **Enabling greater access to electronic documents for party litigants.** There was a perception among some of those working with party litigants that better use of the full functionality of electronic systems could help to redress perceived imbalances between party litigants and represented parties in terms of ease of access to the system:

"I think there is still very much a them and us system, if you're a lawyer handling your client's case you get involved with it, but if you are a party litigant, you are representing yourself, they don't...the arrangements aren't made so easily. This happens within the civil procedural cases, they have recently introduced new ways that lawyers can get all the case material through a civil procedure, and I made an enquiry at that point and said, are you making this arrangement for party litigants, and they said, 'Not yet'."
(Advocacy Organisation)

Communication

Perceived differences in the nature and quality of communication within and around remote hearings was another key theme across case types and settings. Even when there were no issues with the technology, interviewees highlighted a number of communication challenges that need to be considered when hearings are held remotely.

Communication between parties and representatives

Issues relating to how parties are able to communicate with their legal representatives are encapsulated by an advocate's comment that "the tug of the gown, so to speak, can't really happen online". Solicitors, advocates and parties had established various ways of accommodating this, including joining hearings together from the legal representative's offices, making use of instant messages or texts, and allocating junior solicitors or advocates to monitor client instructions via these separate channels. However, none of these options were ideal, and both professionals and parties expressed frustrations with the impacts both on the flow and effectiveness of representation and clients' ability to give instruction and to engage with proceedings.

Fewer concerns about communication between parties and legal representatives were expressed by parties involved in HEC cases (although legal representatives nonetheless reported finding it harder to support clients online than in-person). While some caution should be applied given the relatively small number of interviews involved, it is perhaps worth noting that HEC hearings appeared to make relatively greater use of the text chat function on the videoconferencing platform and to schedule breaks, both of which may help support communication between parties and legal representatives.

Communication between professionals

In addition to communication within the hearing, professionals involved in the Sheriff Court and Court of Session also discussed the perceived impact of remote hearings on communication outwith hearings. There was a belief that the loss of the informal contact between legal representatives that occurs outside the courtroom around an in-person hearing had a detrimental impact on the ability to move cases forward, or to come to agreements without the need for formal hearings.

Body language and non-verbal cues

In addition to verbal communication within and outwith hearings, body language and non-verbal cues were recurrent themes in discussion of the impact of remote hearings across professional groups and parties within the four court and tribunal settings. However, while there was a consensus that it was more difficult to observe body language in video hearings (and impossible in telephone ones), there was no clear consensus on the implications.

For example, some commercial solicitors and advocates placed a strong emphasis on body language in assessing witness credibility and were concerned at the loss of this in remote hearings. However, this view was challenged by both sheriffs and

Court of Session judges, who felt that body language was not and should not be determinative in this regard. Similarly, tribunal members in the MHTS noted that a potential advantage of telephone hearings was their removal of unjustified assumptions based on appearance or demeanour.

Parties too were divided in their views on the loss of body language – while one view among parties (particularly among family law and commercial parties interviewed for this study) was that the sheriff being unable to see their body language (or sometimes that of the other party, witnesses or solicitors) had been detrimental. However, others were less concerned about this, while HEC interviewees in particular highlighted perceived advantages to being able to “hide” body language, such as being able to switch the camera off when they were feeling particularly emotional.

However, this latter point relates to another concern about the loss of non-verbal cues among some sheriffs in family law cases and tribunal members, which is that without being able to observe party and witness demeanour it was more difficult for them to identify if they were becoming upset and/or to intervene to handle sensitive hearings in an appropriate way.

Suggestions for improvement: communication in and around remote hearings

With respect to communication between legal representatives and parties, family law parties interviewed for this study wanted to have the **ability to message their solicitor privately within video hearings**. It may be worth reflecting on whether greater use could be made across court/tribunal settings of the functionality of videoconferencing platforms to support communication between representatives and parties – whether using the text chat function or having the option of using a separate ‘meeting room’ within the same videocall.

There were no direct suggestions for improvements relating to body language other than avoiding the use of telephone or video hearings altogether, for those who felt strongly about its loss either as a means of assessing credibility or responding appropriately to participants. However, if remote hearings remain a feature of the civil justice system in the future, there may be a **need for further discussion among professionals (and potentially with parties too) about the relative importance of body language** to the judiciary and others in performing their roles, and what the implications of this might be within the context of different types of remote hearings.

Supporting parties

Appearing at a court or tribunal is a daunting prospect for most people, and particularly for those who are representing themselves or who have additional vulnerabilities, such as age, disability, or neurodiversity, that may present a barrier to meaningful engagement with proceedings. It is important to consider how these barriers may be either exacerbated or, potentially, ameliorated in a remote context.

Party litigants

Party litigants were primarily discussed with respect to family law and commercial actions. There was a strong perception among legal professionals and the judiciary that remote hearings were particularly problematic for party litigants. Existing challenges in engaging with court proceedings were perceived to be exacerbated in remote hearings and the implications of any technical difficulties even more significant if the party did not have a legal representative attending for them. It was also suggested that party litigants had experienced more issues around obtaining the correct information to enable them to join remote hearings in the first instance.

However, among the family law parties interviewed for this study, there was not such a clear distinction between party litigants and represented parties – positive and negative views and experiences of remote hearings were expressed by both. Given the relatively small number of party litigants interviewed for this research, and the fact that individuals may be represented or not at different stages in the process, caution should be applied in extrapolating these findings too widely. At the same time, the data does indicate that party litigants (and represented parties) themselves do not have a consistent preference for in-person over remote hearings.

Potentially vulnerable parties

Both the survey and interviews indicated that professionals are particularly concerned about the potential impacts of remote hearings for parties with additional vulnerabilities. However, again, the perceived impacts were not straightforward. Views varied depending on the mode of hearing, the specific vulnerability in question, and the wider context around their participation (for example, whether they were attending alone or with other support). These questions dominated discussion among those involved in the MHTS and HEC in particular, given the nature of these cases and particular vulnerabilities of parties.

In the MHTS, while telephone hearings were viewed as potentially more suitable for some parties, such as some young people, there were strong concerns about the ability of other parties, such as those with Alzheimer's, to engage effectively (or at all). There was a perception among professionals that more clerks were needed to provide technical support for parties. There were particular concerns among professionals and family members about their ability to offer sufficient support to parties in telephone hearings to enable them to understand what is happening and to deal with any distress associated with the process or outcome, particularly where it is not possible for them to attend from the same location as the party. The short timescale sometimes specified for MHTS parties to call back to get the outcome of a remote hearing (five minutes in some cases, compared with an estimated 20-40 minutes when tribunals meet in person) was interpreted by some as indicating that the decision was a foregone conclusion or that little consideration had been given to their case.

Similar concerns about their ability to provide sufficient support were expressed by legal professionals involved in the HEC. However, the HEC parties interviewed for this study were generally positive about their experiences of video hearings, and

indicated that they had been well supported through the process by clerks, tribunal members and legal representatives. There was a perception among professionals that the move to video hearings may have resulted in more children participating directly, as they are able to view part of the hearing from home and then decide whether they wish to contribute (something that would not be feasible with an in-person hearing).

Suggestions for improvement: support for parties

Many of the suggested improvements to the support provided to parties around remote hearings related to improved guidance and information, including:

- **Improved guidance around technological issues / practicalities** - Family law parties interviewed for this study (both party litigants and represented parties) expressed a desire for more guidance and support (including video tutorials and accessible leaflets) around accessing remote hearings, including providing clear instructions on how to join the hearing, what operating system you need to run the video hearing platform, how to use key features of the platform, and pre-hearing test calls.
- **What to expect in hearings more generally** - Legal representatives and IAs working in the HEC felt that parties need to have the process of remote hearings explained to them in terms of how the video format will work, what is expected of them and what they can expect from others. There was a suggestion that it would be good if the Tribunal could do this in a standardised and reassuring way at the video hearing itself, supported by prior information in accessible formats (for example the animated videos with relevant information for use by children which the HEC plans to introduce).¹⁴⁷
- There were also calls **for improvements to the sending of advance information to parties**, particularly to party litigants, who were still thought to be missing out on joining details or other advance information in some cases.
- The SCTS website does already provide some guidance on preparing for virtual court or remote attendance, including guidance for party litigants.¹⁴⁸ However, those interviewed for this study did not appear to be aware of this guidance. The HEC has also produced guidance documents, available on its website, targeted at different participants,¹⁴⁹ including accessible guidance which can be tailor-made to suit the needs of individual children and young people.¹⁵⁰ Given calls for participants for improved guidance, it may be worth SCTS **reviewing the guidance that is currently available and considering whether it can be**

¹⁴⁷ Back in May 2022, the MHTS service users' forum had suggested that a document with the pros and cons of each type of hearing might assist parties in deciding what type of hearing would best suit them. See Chapter 5, 66

¹⁴⁸ [Virtual courts \(scotcourts.gov.uk\)](https://scotcourts.gov.uk)

¹⁴⁹ See [Information Note No 01/2021](#) for parties, representatives, witnesses and supporters; guidance on the use of electronic bundles [President's Guidance to Administration and Parties 01 2022: Documentary Evidence](#).

¹⁵⁰ Health and Education Chamber, [Social Story about Additional Support Needs](#).

made more accessible to all parties – both in terms of content and format, and in terms of how easy it is to find (SCTS guidance currently appears on the SCTS website alongside a fairly long list of other documents relating to remote hearings).

- In terms of providing the advice and emotional support during hearings that may be required by vulnerable participants, legal representatives in the HEC suggested that **tribunals should offer dial in and out breaks** without these having to be requested (under the current system, parties are placed in an online ‘waiting room’ during breaks). In the MHTS there had been difficulties during breaks on occasion when parties had been able to hear what tribunal members were saying.
- The **issues raised with respect to patients in the community joining MHTS hearings alone are difficult to address**. This may need to be a factor in considering both the overall balance between in-person and remote hearings in the MHTS, and whether or not an individual hearing is held remotely. MHTS guidance could also stipulate that **decisions in remote hearings are to be given after a specified period of time (e.g. 15 minutes) has elapsed**.

Supporting professionals

The report has also identified issues around the extent to which professionals feel they have the training and support they need to conduct their roles effectively within remote hearings, as well as perceived impacts on the nature of those roles.

Impacts on professional wellbeing

The professionals survey found that among those working in the courts, on balance more felt remote hearings had a negative than a positive impact on their wellbeing. This was particularly the case among members of the judiciary and advocates, and was not solely or mainly attributable to workload impacts. In fact, on balance more professionals felt that remote hearings had a positive than a negative impact on their work-life balance. Rather, it appeared to be associated with the perceived intensity or nature of working with remote hearings. For example, professionals discussed the draining impact of being in hearings on a screen all day, while tribunal members and advocates in particular discussed the negative impacts on their wellbeing from loss of social interaction. Feeling unable to support parties as they would wish could also have a significant emotional impact for professionals.

Impacts on professional roles

The impacts of the move to remote hearings on professional wellbeing was strongly linked by some participants to their perceived impact in changing the nature of their professional role within the court system in particular. The impact of removing in-person contact with peers was experienced by advocates in particular as a fundamental change to the nature of their job, as well as having a negative impact on their opportunities for professional development. Members of the judiciary also reported their roles changing in unexpected and, in some cases, unwelcome ways, perhaps encapsulated by the perception of one sheriff that they had become a ‘call centre’ sheriff. Clerks too felt that expectations of their role had shifted, with parties

in particular expecting them to provide a level of IT support they did not feel equipped to provide and did not view as a part of the role of clerk.

Training and resources

As discussed above, SCTS have published a range of guidance documents intended to support professionals, as well as parties, around remote hearings. In addition to guidance on the SCTS website, the Judicial Hub was used to share the Digital Courts Toolkit and Digital Innovation Support and Help Portal, which includes various briefing papers and videos sharing tips for video hearings. However, members of the judiciary and other professionals interviewed for this study indicated that they would have welcomed greater formal training on remote hearings, as well as greater system-wide guidance, particularly with respect to the Sheriff Courts. There was also a perception that training for clerks of court had been “fairly basic” and could be improved. Clerks themselves noted that the training they had received on the video hearing platform did not include showing them how the platform is accessed by other participants, which might enable them to provide better support.

Suggestions for improvement: support for professionals

Suggestions for improvement to the support offered to professionals largely focused on guidance and training.

- **Providing (more) information, guidance and training on remote hearings** was spontaneously suggested as an area for improvement by 17% of Sheriff Court respondents, 16% of those with experience of the Court of Session, and 10% of MHTS respondents. As discussed, SCTS have already provided some limited guidance and training materials, but members of the judiciary (particularly those working in the courts) interviewed for this study clearly felt **formal training could be enhanced**.
- Alongside **enhanced training for clerks of court** including in areas of specialism (for example the management of documentation in commercial cases within the Sheriff Courts), to enable them to support remote hearings as effectively as possible, it was suggested that **specialist IT support be available in court buildings** to help resolve technical issues.
- There were suggestions from sheriff clerks about improving the ease of organising video hearings, specifically by introducing a **function to add a link to video hearings on the SCTS website**, rather than Clerks having to email out links to each participant.¹⁵¹

There were fewer practical suggestions around responding to the perceived impacts on professional wellbeing and role, but these are areas that may benefit from ongoing open discussion and reflection as the role of remote hearings evolves

¹⁵¹ The SCTS currently provides general information on its website for parties joining remote hearings and this approach could be adopted with specific instructions, particularly for those using the Sheriff Courts: see [Access to virtual hearings](#)

post-pandemic. This should include **reflecting on the impacts on the role (and training and support requirements) of clerks**, as well as the judiciary and legal representatives.

Formality, the rule of law and open justice

In addition to practical concerns about the impacts of remote hearings, in terms of IT, communication, participation and professional roles, participants raised a number of questions about the potential impact on the functioning and status of the courts as the place where justice is done and seen to be done – an important component of the ‘rule of law’. These questions often centred around what degree of formality and solemnity is appropriate in different contexts as well as on the need to ensure, as far as possible, public and press access to hearings. In the court setting, there was concern from professionals that remote hearings can be associated with an erosion of formality – overly informal dress, inappropriate language, and unsuitable joining locations – that has a detrimental impact on the ‘weight’ that proceedings carry for participants. This was echoed by some parties and advocacy organisations, who noted that parties may be more inclined to take the outcome of a hearing seriously when this is delivered in person, in a formal court setting.

Even in the deliberately more relaxed setting of a HEC hearing, a degree of formality was considered important by parties as well as professionals, in terms of reminding all those involved that it is a legal process and that it is being taken seriously. Relatedly, MHTS parties expressed concerns that telephone hearings might be experienced as less stressful but also ‘less real’, which was not necessarily appropriate given their liberty was at stake.

However, at the same time there was a perception from both family law parties and those involved in the tribunals that elements of informality enabled by joining a hearing remotely – such as being in familiar surroundings, with access to things that made you feel comfortable and safe – could be very helpful in enabling parties to participate more effectively.

The need to ensure open justice through public and press access to commercial hearings was felt to be easier for in-person compared to remote hearings by more professional respondents to the survey. All professional groups interviewed who had had experience of the commercial courts were concerned about the loss of public access in remote hearings. In terms of how best to remedy this, some expressed the view that remote hearings potentially offered wider access to more people through live-streaming and recordings made available online, with the proviso that this would only be appropriate for some hearing types such as appeal hearings or maybe debates, but not where members of the public were involved and/or where evidence was being given.

Suggestions for improvement: the rule of law and open justice

Suggestions around how to retain the status of the court within a remote hearing were predominantly from members of the judiciary working in the courts, rather than from parties or those involved in tribunals. Suggestions included:

- **Doing more to replicate the court room environment within a video hearing** – for example, there could be virtual rooms which would take parties, step by step from the court entrance through to their hearing. Participants noted that the set-up in other countries (Ireland and Australia were both mentioned) felt closer to an actual court room – for example, a background that makes it clear who the judge is, placed in a consistent central position on screen.
- **Standardised directions on conduct during remote hearings**, including guidance on appropriate dress and demeanour, and how to address the court, emphasising the seriousness of the court process.

Indicators that arrangements are working

As discussed at the start of this chapter, both the courts and the tribunals have already set out visions for the future which include remote hearings as an enduring feature of civil justice in Scotland. Developing a set of indicators that would be equally relevant across all case types and contexts and to all participants in the process is likely to be challenging. The themes outlined in this final chapter may help to provide a framework for considering these. However, as discussed in chapter 1, the limited scope of the current study in terms of types of civil cases needs to be born in mind – it is possible that different or additional issues and concerns may arise with respect to debt cases, for example, which account for a very large share of Sheriff Court civil business.

What is clear is that in assessing the future impact of remote hearings and other measures, it will be important to continue to gather data from across different participants – including parties. In considering this, SCTS and others may wish to consider what data is currently collected, both routinely and via ad hoc surveys and research, and whether these can be strengthened to provide a detailed and rounded picture of the impact of remote hearings across participants in future. As noted at several points in this report, the lack of data on mode of hearings and on party litigants did pose a challenge to robustly and fully assessing the impact of remote hearings.

At a basic level, **strengthening the collection and recording of data about the mode of individual hearings** would enable analysis of variations in their use across the court estate. Meanwhile, **recording whether one or both parties are party litigants** would enable more accurate analysis and support future discussion around the experiences of this group in particular. Beyond routinely recorded data, it may be worth considering a programme of **further survey research to monitor how well supported and trained clerks and members of the judiciary feel** with respect to remote hearings specifically, and what further training or support they feel they need. In addition, gathering **structured feedback from a sample of parties who participate by different modes** could help further assess whether the right balance has been struck between remote and in-person, and whether there are further improvements that could be made to support the effective participation of parties, whether remotely or in person.



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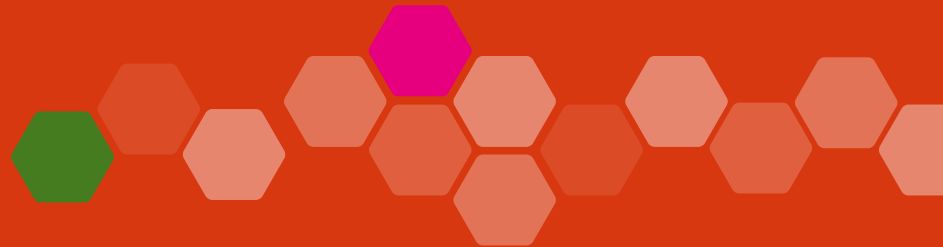
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