



Association of
Democratic Services
Officers

Guidance on Remote Meetings: What next for Local Authorities?

This guidance has been prepared by Lawyers in Local Government (LLG) and the Association of Democratic Services Officers (ADSO) in association with Bevan Brittan LLP for the benefit of its respective membership following the High Court judgment on remote meeting provision in respect of local authorities in England.

Many questions have been raised following the High Court judgment in relation to the application for a declaration that current legislation permits remote meetings, which was brought by Hertfordshire County Council, LLG and ADSO. In particular, members have been concerned about the scope of the judgment, and what steps can be taken now that the Flexibility Regulations have come to an end whilst adhering to the restrictions and guidance currently in place due to the pandemic, and moving forward, if the roadmap becomes interrupted.

This guidance is general in nature and must not be regarded as legal advice. Readers should take their own legal advice on the issues arising and any options being considered, taking into account risk and local circumstances.



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1 BACKGROUND

- 1.1 The long-established position in England prior to the pandemic was that council meetings took place in person at specified locations. Some councils were already webcasting their meetings (so that the public were able to observe remotely), but it was not until the pandemic forced the provision of remote meetings that councils in England really embraced both the technology and practical provisions for wholly remote meetings.

Scotland

- 1.2 In Scotland, meetings of councils are governed by the Local Government (Scotland) Act 1973, which made similar provision to that of the Local Government Act 1972 (LGA 1972), however in 2003 the Scotland Act was amended by the Scottish Parliament to expressly permit remote attendance, omitting reference to meetings being held at a 'place'.

Wales

- 1.3 In Wales, in 2011 the National Assembly for Wales made further legislation which expressly permitted remote attendance, however that was restricted to hybrid meetings with a base requirement for at least 30% of those in attendance being in attendance physically.
- 1.4 On 21 April 2020, the Welsh Government used their power under section 78 of the Coronavirus Act 2020 to enact the Local Authorities (Coronavirus) (Meetings) (Wales) Regulations 2020. These Regulations were developed by the Welsh Government Legal Department and assisted by a working group of Welsh local government Monitoring Officers. The Regulations (which were directly applicable and required no constitutional changes) made provisions relating to the publishing of documents electronically, the holding of legally mandated meetings (AGMs etc.), remote attendance, voting, substitution of Members, document access as well as a range of other provisions.
- 1.5 The benefit of the changes was quickly grasped. As such, the Welsh Government made amendments to the already progressing Local Government and Elections Bill in 2020 to incorporate key changes – principally to permit remote attendance on a more permanent basis. That Bill received Royal Assent in January 2021 and became the Local Government and Elections (Wales) Act 2021 (“the Wales Act 2021”).
- 1.6 Section 47 of the Wales Act 2021 places an obligation on local authorities to make arrangements for the remote attendance of Members and other persons at Meetings. It also states that *“the place at which a local authority meeting is held is not to be read as limited to a single physical location”*. This provision commenced on 1 May 2021, therefore overlapping the soon to expire Regulations. Section 47 of the Wales Act 2021 places an obligation on local authorities to make arrangements for the remote attendance of Members and other persons at Meetings. It also states

that *“the place at which a local authority meeting is held is not to be read as limited to a single physical location”*.

- 1.7 The arrangements under the above section must be such that a person may hear and be heard (previously remote access on Wales had required them to see and be seen, which could present technical challenges for those in areas with insufficient internet bandwidth, thus requiring them to join by telephone). The section also places broadcast duties with local authorities.

England

- 1.8 In 2016, the government opened a consultation in England “Connecting Town Halls; consultation on allowing joint committees and combined authorities to hold meetings by video conference”. As the title suggests, this was limited in scope to those circumstances mentioned. The response to that consultation was published in 2019. It acknowledged that there were benefits to holding remote meetings and stated that government would engage in discussions with the sector with a view to potentially extending the scope of remote meetings beyond that set out in the consultation.
- 1.9 Following the onset of the pandemic, Parliament enacted the Coronavirus Act 2020, section 78 of which permitted the making of secondary legislation relating to the holding of local authority meetings, however any such regulations were only able to make provision for meetings required to be held or held before 7 May 2021. The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority Police and Crime Panel Meetings) (England and Wales) Regulations 2020 (“the Flexibility Regulations”) were enacted and came into force on 4 April 2020, and which permitted entirely remote meetings to take place.
- 1.10 The Flexibility Regulations expired on 6 May 2021 and were not capable of being extended due to the sunset clause in section 78(3) of the Coronavirus Act 2020. Primary legislation was required to continue the express provision of remote meetings in England.

2 THE FIRST HIGH COURT JUDGMENT

- 2.1 Hertfordshire County Council, LLG and ADSO jointly made an application to the High Court for a declaration that the legislation in place in England relating to local authority meetings already permitted remote meetings to take place.
- 2.2 Judgment in that case was handed down on 28 April 2021, dismissing the claim on the basis that the LGA 1972 did not permit remote meetings, and that it was a matter for Parliament to legislate by way of primary legislation. In conclusion the court stated the following at paragraphs 89 and 90 of the judgment:

“...we conclude that the Secretary of State was correct in November 2016 and July 2019 to say that primary legislation would be required to allow local authority “meetings” under the 1972 Act to take place remotely. In our view, once the Flexibility Regulations cease to apply, such meetings must take place at a single,

specified geographical location; attending a meeting at such a location means physically going to it; and being "present" at such a meeting involves physical presence at that location.

We recognise that there are powerful arguments in favour of permitting remote meetings. But, as the consultation documents show, there are also arguments against doing so. The decision whether to permit some or all local authority meetings to be conducted remotely, and if so, how and subject to what safeguards, involves difficult policy choices on which there is likely to be a range of competing views. These choices have been made legislatively for Scotland by the Scottish Parliament and for Wales by the Senedd. In England, they are for Parliament, not the courts."

- 2.3 Following a draft of the judgment being sent to the parties, the court was made aware that their judgment did not determine the question as to whether a meeting which is required by the 1972 Act to take place in person, is "open to the public" or "held in public" if the only means by which the public are permitted to access it are remote. This is dealt with under section 3 below.
- 2.4 The judgment focuses almost entirely on whether the LGA 1972 permits remote meetings, and it has been suggested that it does not therefore apply to the Local Government Act 2000 (LGA 2000) and the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 ("the Exec Regulations").
- 2.5 It is worth noting that Part 1A of the LGA 2000 and the Executive Regulations do not refer to Members being present at meetings, however there are references to the public being present, as well as a proper officer being present who is required to (post meeting) produce a written statement of the decisions made.
- 2.6 Further, regulation 6 of the Executive Regulations refers to giving notice of the "*time and place of a public meeting*", and it is also worth highlighting the provisions inserted into the Executive Regulations (and the LGA 1972) by the Openness of Local Government Regulations 2014, which refer to persons "*attending*" at meetings being "*permitted to report the proceedings*". Those provisions also state that "*for the purpose of reporting on the meeting [the person] may use any communication method, including the internet, to publish, post or otherwise share the results of the person's reporting activities*". In addition, the definition of "*reporting*" includes "*using any other means for enabling persons not present to see or hear proceedings at a meeting as it takes place or later*".
- 2.7 It could be inferred from this language that being "*present*" means being physically present, indeed if being "*present*" included being able to take part or observe remotely, then the provisions about reporting might be considered to be irrelevant, or might have been phrased differently (i.e., focusing on permitting recording and onward broadcast, or stating that where the meeting was not already available remotely the provisions apply).

3 THE SECOND HIGH COURT JUDGMENT (POST-SCRIPT)

- 3.1 The second judgment of the High Court was handed down on 4 May 2021, and specifically covers the question as to whether a meeting which is required by the 1972 Act to take place in person, is "open to the public" or "held in public" if the only means by which the public are permitted to access it are remote.
- 3.2 Submissions were taken from the parties who in summary agreed that in order for a consistent interpretation, a meeting being open to the public or held in public should also be interpreted as requiring physical attendance.
- 3.3 The court stated that the meaning of being open to the public or held in public depended on the meaning of "meeting", and on the basis of the court having already found that under the LGA 1972 a meeting involved participants meeting face to face at a designated physical location, and that attending a meeting involved physically going to that location, this meant that members of the public must be admitted in person to the place where the meeting was being held.
- 3.4 As part of their discussion around the meaning of being "open to the public" or "held in public", the court stated that there were similar requirements for meetings being open to the public in other legislation that all dealt with the same subject matter and could therefore be described as "*in pari materia*". The Court stated that these other legislative provisions are therefore "*to be taken together as forming one system, interpreting and enforcing each other*".
- 3.5 Although the court did not expressly state that this principle of interpretation applied to the rest of the matters that they had given judgment upon (being attendance of Members etc.), and although there are of course arguments that the judgment does not expressly cover the LGA 2000 and the Executive Regulations, it is arguable that the same principle would apply so that the same requirements around physical attendance could be engaged.

4 OPEN TO THE PUBLIC / HELD IN PUBLIC

- 4.1 It should also be noted that the judgment of the court in no way prevents local authorities from broadcasting or live streaming meetings in addition to enabling physical access to the public. Paragraph 9 of the second judgment states as follows:
- 4.2 *"None of this, of course, prevents a local authority from broadcasting or live-streaming some or all of its meetings so as to allow wider public access. But such broadcasting or live-streaming does not, on its own, satisfy the requirement for the meeting to be "open to the public" or "held in public". We say nothing about the numbers of the members of the public who should be admitted in person, which will no doubt be subject to current public health or Government guidance. But subject to that practical consideration, or any other legislative intervention, where the requirement for the meeting to be "open to the public" or "held in public" applies, members of the public must be admitted in person as well."*

- 4.3 Local authorities can continue to broadcast and live stream meetings to widen public access. This does not fulfil the obligation for meetings to be physically accessible to the public, but it may however help regulate numbers and assist with compliance with current restrictions, enable social distancing, and reduce risk of transmission.
- 4.4 Members of the public who wish to actively participate in meetings, such as applicants, objectors, petitioners, or those asking questions for example, should be invited to attend in person.

5 CONSEQUENCE OF JUDGMENT

- 5.1 The High Court judgment means that the position in England reverts back to the pre-pandemic position – that physical meetings are required for committees to take decisions and that the public must have physical access to those meetings (unless those meetings are considering confidential or exempt information as defined in the LGA 1972).
- 5.2 Councils must have arrangements in place to hold physical meetings, and as part of those arrangements it is of course extremely important that risk assessments are completed in advance to ensure compliance with duties of care, as well as any restrictions and guidance in place at the time. There is various guidance issued by the government and the HSE which will need to be taken into account, and a template risk assessment provided by the HSE which could be used as a starting point.

6 OFFICER ATTENDANCE

- 6.1 An area which has raised many questions and which remains unclear is whether Officers (and indeed persons other than members and the public) are also required to attend physically, or whether they are able to attend remotely.
- 6.2 The LGA 1972 only addresses attendance at meetings of members and the public, and there is nothing explicit addressing the attendance of others, such as officers or even external advisors (that said the Executive Regulations do refer to a proper officer being present – see paragraph 2.5 above). It should also be noted that it was of course the accepted position prior to the pandemic that officers and others would attend meetings in person.
- 6.3 It is also worth referring to paragraphs 78 and 79 of the first judgment. As part of the court’s discussion around whether an ‘updating construction’ should apply to the LGA 1972, it stated as follows:

“There is, however, another feature of the statutory context which makes it unlikely that Parliament intended an updating construction to apply. The meetings provided for by Schedule 12 to the 1972 Act are an important part of the mechanism of government of the country. The decisions taken at these meetings may have significant legal consequences for third parties. It will often be necessary to decide whether a meeting is quorate or whether a majority of those present has voted in

favour of a particular resolution. Questions of this kind can give rise to acrimonious disputes. This makes it important to have certainty about what constitutes attendance or presence at a meeting. Without such certainty, it may be unclear whether a particular decision has been validly taken or not. The differences between the conditions for remote attendance in the 2011 Welsh Measure, reg. 5(3) of the 2020 Regulations and the 2021 Welsh Act provide a vivid illustration of the different ways of deciding what counts as remote attendance. These pieces of subsequent legislation were not, of course, available to Parliament in 1972, but the importance of certainty on these matters would have been obvious even then. It is legitimate to construe the 1972 Act in a way which promotes certainty in its application. A construction according to which meetings have to take place in person at a physical location better promotes certainty than one in which remote meetings are permissible in some but not other situations and the dividing line is not spelled out.

We have well in mind that, as Mr Moffett submitted, difficult or marginal cases of attendance or presence could arise even in the case of in-person meetings. But it is obvious that the scope for disagreement about whether someone has "attended" or is "present" at a meeting is much greater if remote attendance is permitted."

- 6.4 As will be noted, the above excerpt refers to the importance of having certainty about what constitutes attendance or presence at a meeting. Although this is stated in the context of having certainty around quorum and voting, and therefore concerns attendance of members (the decision makers), the same principle could be said to apply to the attendance or presence of officers or others. However, officers and others who might attend do not take decisions at those meetings – in the case of officers their role is to provide support and advice to enable members to take decisions. In the case of 'others', their attendance or presence is to make statements, ask questions, or make submissions in relation to the matter to be decided by members. There is therefore a difference, albeit how significant a court might find that difference to be is unclear.
- 6.5 Therefore, the starting point is to take a risk-based approach. The more contentious the business being determined at the meeting, the higher the risk of challenge. An obvious area where the risk is perhaps higher is in the context of planning. For example, a disgruntled developer or a campaign group may seek to challenge a decision not only on the basis of planning reasons or improper governance, but could also add in an argument that advice received from Officers attending remotely was not properly provided due to them not being physically present, and therefore the meeting was not procedurally compliant. Whether this would carry much weight with the courts, or the planning inspectorate, is unclear, however the very fact of a challenge, even if unsuccessful, could significantly delay implementation of decisions and impact upon resources.
- 6.6 As a minimum, it might be appropriate to have those officers directly supporting the meeting as a whole attend physically (albeit ensuring compliance with social distancing, risk assessments and guidance). This might include the Chief Executive, the Monitoring Officer/Legal Advisor, a Democratic Services Officer, plus key Chief Officers depending on the meeting in question.

- 6.7 Where councils have the technology, other officers could access the meeting remotely. Where such technology is not available, we are aware that some councils (where space is limited) will be controlling the number of officers in the meeting venue by having a physical waiting room, and inviting them in to the meeting room at the appropriate point on the agenda.

7 EXECUTIVE DECISION MAKING

- 7.1 Where a council is operating executive arrangements, all executive power vests in the Leader or Elected Mayor. Those powers can also be delegated to individual executive members and to officers (as well as to committees of the executive, the executive as a whole, and area committees where those powers relate to a specific area). There is therefore no requirement to hold executive meetings at all, so executive decisions, subject to being within the policy and budget framework, can be taken as individual decisions by the Leader or Elected Mayor, individual executive members, or by officers. In consequence, at least while the outcome of the government's call for action is awaited, this may be an option for executive decision making.
- 7.2 As readers will be aware, following changes brought about under the Local Government and Public Involvement in Health Act 2007, it is for the Leader to appoint the executive, and to determine the scheme of executive delegation. Even if a council's current scheme does not expressly state that individual executive member decisions can be taken, this can arguably be changed at will by the Leader. Full Council has no power to dictate how executive decisions are made, or what those decisions are to be, however it is responsible for setting out the policy and budget framework within which executive decisions are made.
- 7.3 Points to note are that even where executive decisions are taken individually, the requirements for notice of key decisions and publication of executive decisions still apply. Councils should also be mindful that moving purely to individual executive decision making without meetings arguably undermines transparency and effective scrutiny, as well as the public's involvement to a certain degree.
- 7.4 Further, if you are looking to make use of this solution, it might be worthwhile checking your key decision threshold. Certain authorities have particularly low thresholds that could reasonably be increased to allow for more streamlined decision making, and the avoidance of unnecessary red tape inhibiting decisions which are not, when considered in the round, significant. It may be useful to benchmark your threshold with other authorities of a similar size and structure.

8 VIRTUAL QUASI MEETINGS

- 8.1 By virtual quasi-meetings we mean completely virtual informal meetings, which are not actual meetings of an authority. They would not be meetings for the purposes of the LGA 1972. It may be worthwhile calling them something other than a meeting to assist with making the distinction clear, perhaps something along the lines of "Informal Pre-Decision Discussion/Consultation".

- 8.2 Attendance at these “meetings” would be entirely remote, with all members of the committee it relates to in attendance. The members could discuss the matters that are to be determined after the “meeting” and give an indicative view on those matters. After the meeting, an officer with appropriate delegated authority could then take the decisions, taking into account the indicative view of the “meeting”. It is important that when making that decision the officer does not simply “rubber stamp” it. There must be proper exercise of discretion when making that decision. The officer should use the indicative views of members as a means of consultation before exercising their own discretion within delegated powers.
- 8.3 A further means of making a decision post the virtual quasi “meeting” having taken place might be to set up formal politically balanced sub-committees, who could then meet physically in a covid safe manner to take the decision taking into account the indicative views of the virtual quasi meeting. Again, there would be a requirement not to simply rubber stamp – proper discretion must be exercised as explained above in relation to officer decisions.
- 8.4 Certain decisions cannot however be delegated and would require a meeting of the full council to take those decisions, such as deciding the annual budget, or dismissal of the Head of Paid Service for example.

9 REDUCED MEMBER ATTENDANCE

- 9.1 There are two potential options for reducing member attendance at physical meetings. The first option would be for the council to formally agree to reduce the size of the various committees (perhaps on a temporary basis) so as to more easily allow meetings to take place whilst managing risk and adhering to social distancing and relevant guidance.
- 9.2 The second option requires implementation through agreement between respective political groupings and members, to the effect that only certain members will attend in a representative capacity (perhaps members could pair off?). The informal arrangement would need to be politically proportionate and meet quorum rules, and there remains the possibility that some members or groups could go against the goodwill arrangement and turn up at meetings; in which case it may be appropriate to have other members on standby to ensure political proportionality.

10 HYBRID MEETINGS

- 10.1 Councils could seek to operate hybrid meetings, where some members are physically present, and others are in attendance remotely. Those joining remotely would not be lawfully present and could not make decisions. Those attending physically would make decisions, and attendance must be quorate. Reduced physical attendance could be on the basis of a goodwill agreement between groups, or it could be that the size of the committee is formally reduced by agreement of the council.
- 10.2 During hybrid meetings, the chair of the meeting could invite those attending remotely to speak and put their views, and indicate how they would vote, prior to the

actual vote of those physically present, who would take into account the views of those attending remotely.

- 10.3 As with the other options in which views are given, those taking the decisions must exercise their own judgment and discretion, so there may need to be safeguards built in to ensure that decision makers demonstrate that they are not predetermined.

11 OFFICER DELEGATION

- 11.1 Councils could increase their reliance on officer decision making through delegations. This is in fact referenced as an option in the government's safe use of council buildings guidance. If pursuing this option, councils should review their constitutions and schemes of delegation to ensure that appropriate provisions are in place. Whilst undertaking this exercise, councils might also want to check whether they have in place appropriate provisions that allow for the Head of Paid Service to take decisions in cases of emergency and where meetings cannot take place, which may become necessary should there be further lockdowns and restrictions.

- 11.2 Again, certain decisions cannot be delegated, and would have to be taken by the full council. We would also point out that an overuse of delegation may result in the disenfranchisement of members and the public in the longer term.

12 THE LICENSING REGIME

- 12.1 The Licensing Regime has been the focus of separate attention on the basis that hearings are conducted under the Licensing Act 2003 and regulations made thereunder. Commentators in this area have advocated that licensing sub-committees are not precluded from holding remote/virtual hearings as they are unaffected by the requirements relating to the LGA 1972. One of the bases for that argument is that section 101(15) of the LGA 1972 states that nothing within that section applies in relation to any function of a licensing authority under the Licensing Act 2003, and that this therefore means that the LGA 1972 is not relevant.

- 12.2 As with other such matters, there are opposing views. One such view is that section 101 of the LGA 1972 focuses on the delegation of functions only, whereas section 99 of the LGA 1972 deals with meetings and proceedings of local authorities, and states that Schedule 12 of the LGA 1972 has effect in that respect. The provision at section 101(15) of the LGA 1972 is expressly stated to only have effect in relation to that section, so it follows that section 99 and Schedule 12 of the LGA 1972 still apply.

- 12.3 The matter remains untested, and we would advocate a risk-based approach, determined by individual local authorities in light of their own circumstances.

13 RISK ASSESSMENTS

- 13.1 As mentioned earlier in this guidance note, councils should undertake appropriate risk assessments and adhere to relevant government and HSE guidance when planning physical meetings. Councils should also ensure that they comply with their

legal duties under health and safety legislation as a failure to do so could constitute a criminal offence.

- 13.2 Social distancing must be maintained for now, so it is appropriate to assess as part of any risk assessment whether the proposed meeting rooms can realistically accommodate those attending whilst complying with distancing requirements.

14 DISQUALIFICATION OF COUNCILLORS – 6 MONTH RULE

- 14.1 Section 85 of the Local Government Act 1972 states that a member of a local authority loses office if they do not attend a meeting at least once in any six-month period. This provision has not been amended and local authorities may wish to explicitly remind members of the six-month provision or give consideration to a blanket dispensation at full council. Democratic Services Officers can play an important role by tracking the attendance of members and making contact with those nearing the six-month period.

15 CALL FOR EVIDENCE

- 15.1 We recognise the value of in person meetings and the wish for them to return, but we also believe that the benefits of remote meetings, such as providing better access to democracy, increased transparency and engagement, reduced costs and environmental benefits, are significant. Some authorities have also reported that remote meetings have improved member behaviour, as well as greater involvement from some members who may not have had the confidence to speak at physical meetings.
- 15.2 We strongly urge everyone to submit their views and experiences of remote meetings as soon as possible as part of the government's call for evidence which remains open until 17 June 2021. Also, please make members and the public aware of the call for evidence and encourage them to submit their views. They might have very valid points to make as to how valuable (or not) it has been to them being able to attend or observe these meetings remotely.

16 ACKNOWLEDGMENTS

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Bevan Brittan 

The logo for Bevan Brittan, featuring a lowercase 'b' in a green circle.