

SCOTTISH CIVIL JUSTICE COUNCIL - CONSULTATION RESPONSE FORM
CITIZENS ADVICE SCOTLAND: Rules Covering the Mode of Attendance at Court Hearings

Introduction

Scotland's Citizens Advice Network is an essential community service that empowers people through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real-life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

Citizen's Advice Scotland (CAS) work on Access to Justice issues aims to ensure that consumers can access legal services and make effective and informed choices about legal issues. We support the development of new and simplified ways of accessing Court services; however, it is important that these developments improve the overall experience of people accessing justice.

This submission focusses on the questions where CAS can contribute an informed response. Our response draws on the experiences of colleagues throughout the Citizen's Advice network who are involved in advising and supporting clients who are engaged in disputes which have a legal dimension, including housing, neighbour disputes, consumer disputes, and debt actions. We acknowledge that individual advisers and advice services may have had differing experiences of interacting with the court system and the new Rules and procedures introduced during the pandemic period. As a result, differing views may exist on some of the matters raised within this consultation. As the consultation notes, this reflects the extensive debate currently surrounding the use of new technology to access the justice system.

CAS is not in a position to offer detailed comment on the categories of cases which are set out in the draft rules, as the majority of the legal work carried out by the Citizens Advice network relates mainly to Simple Procedure and First Tier Tribunal cases. For this reason, we have answered the questions as they relate to Court of Session rules and Ordinary Cause rules together where this is applicable. We would note that the draft rules, although listed as a supporting document in the consultation, had to be separately searched for in order to locate the full document. It would have been helpful if there had been a hyperlink to these from the main consultation to enable these to be easily found by those responding to the consultation.

Digital Exclusion and Access to Justice

CAS recognises that Scottish society is moving towards increasing digitisation of services. We note the SCJC's comment that: "As society in general moves increasingly online, there is a need for modernisation of the courts so that they can keep pace with user expectations and can take advantage of the potential benefits offered by digital technologies." While we understand that the move to online services will continue, CAS is concerned that those who are digitally excluded or have access issues may be excluded if services are fully digitised or a fully digital-by-default system is established. Any further move towards digitisation must include sufficient safeguards to ensure that no-one is excluded from accessing the justice

system and alternative communication and engagement methods must be easily accessible and available to users.

CAS has carried out research into digital access which identified that key barriers to getting online include skills and confidence; practical access; health issues, and literacy and language. While there have been positive changes in recent years, there remains a group of Citizens Advice Bureau (CAB) clients, often with vulnerabilities, who may lack the skills to go online and also may face other barriers in doing so. While we understand the inevitable and necessary move towards online services during the pandemic, we would note that this has led to further complications for some CAB clients. Many clients would previously have accessed devices and Wi-Fi through support services or community venues such as public libraries and the pandemic has prevented these clients from being able to access face-to-face advice and assistance. Opportunities for getting online, or receiving assistance in doing so, have been reduced.

We note that SCTS intends to draft an Assisted Digital Strategy which will ensure that digital services are straightforward and convenient so that all those who can use them will choose to do so, whilst those who can't are not excluded. This strategy will apply across all SCTS systems and websites. An assisted digital user is someone who cannot use a digital service independently. This includes people who are offline with no digital skills, and people who are online but only have limited digital skills. CAS would welcome further engagement with SCTS on this in due course.

CAS would welcome more detail on how SCTS is assessing whether people are being digitally excluded. It is not apparent or in the public domain whether SCTS has been able to collect full demographic data to assess whether there are groups or people who are simply not accessing court services because of these changes to the way services are delivered. We are aware that there is a decrease in numbers of cases submitted, which is in line with a general trend of decreasing civil cases but would be interested to know whether this change in numbers is due to changed demographics of court users, as this may indicate whether some groups or individuals are struggling to access justice.

CAS has had extensive discussions with SCTS colleagues regarding the preparation of equalities impacts assessments for these and other changes regarding the use of Civil Online and we understand SCTS have been engaging with a number of stakeholders on this matter. While these discussions have been useful, we consider that the approach taken by SCTS requires to be widened to incorporate considerations such as the Fairer Scotland duty, which takes into account socio-economic disadvantage, as well as ensuring that policies are "rural proofed" and take into account the needs of rural and island communities who may face specific travel and connectivity challenges in accessing justice either remotely or in person.

Finally, CAS notes that the Equalities Impact assessment refers to support providers like CAB and there is a presumption that CAB always have the capacity to assist in all cases. This is unlikely to be case for almost all service providers who are charities and do not have the physical capacity or resources to provide such resources to all service users. Further, we would note that our own In-Court advice services only operate in some areas of the country, leading to a potential post-code lottery for service users. Even where such services exist, they have different remits and are not funded to assist users in all actions. Therefore, while advice providers and charities such as CAB are there to assist people their capacity to do so can often be dependent upon funding requirements or volunteer or adviser capacity.

Simple Procedure, Summary Cause and Party Litigants

As explained above, much of the experience of the Citizens Advice network relates to Simple Procedure, Summary Cause or First Tier Tribunal work. According to the most recent Civil Justice statistics, more than 40% of civil cases initiated are under Simple Procedure¹. We would observe that the procedures and documentation that are required for Simple Procedure cases can be complex to navigate, with CAB advisers describing it as “anything but simple”.

This consultation does not refer to cases considered under other rules and which may be of vital importance to individuals. For example, Simple Procedure, Summary Cause Rules and Summary Applications do not appear to have been considered during this consultation. We would welcome clarity on what is proposed in relation to these cases.

Civil Legal Aid is not generally available for many such cases, meaning that Simple Procedure cases may have a greater proportion of non-represented litigants, or litigants who only seek representation at a very late stage in the process. We would also note that even where legal aid is available, clients seeking advice from the Citizens Advice network in Scotland have reported difficulties in finding a practitioner who will take on their case. These difficulties apply especially in relation to remote and rural areas and in certain specialisms, such as immigration or family law.

CAB advisers have raised concerns that some Summary Cause Cases can have considerable impacts on people’s lives. For example, a Decree for Eviction in both rental and mortgage cases can be granted on First Calling if the Pursuer makes the motion and there is no attendance by the Defenders. The consequences of this are sufficiently severe that consideration should be given to whether remote hearings are really appropriate where a home can be lost.

We consider that the move to virtual hearings has the potential to disproportionately disadvantage party litigants or clients who are assisted by CAB. Without attending physical court room locations, party litigants may not be signposted to advice and advocacy services (where these exist and are appropriate). The In-Court Advice services offered by Citizens Advice Bureaux are predominantly physically located within the court building and so many clients drop in on the morning of their hearing, having either been signposted by the Sheriff Clerks or having seen relevant signage. If the clients are not physically in the Court, they are far less likely to get advice or representation for their case, which in eviction or repossession hearings can be detrimental. The drop-in service is a vital resource to communities and a system of remote hearings by default could be detrimental to many of our clients, who may be unable to access resources or representation, or have difficulties in understanding proceedings.

We consider that unrepresented parties will need additional support to access virtual court services, to ensure that they understand them and that they can participate in them effectively. In our view it is unrealistic to expect vulnerable groups to engage with virtual services without providing some one-to-one support. We believe that further action in this regard will be necessary to ensure that the SCJC’s guiding principles of fairness, accessibility and efficiency are able to be met.

¹ <https://www.gov.scot/publications/civil-justice-statistics-scotland-2019-20/>

In relation to the specific questions, CAS would comment as follows:

Question 1 – For the categories of case listed as suitable for an in-person hearing (in relation to action in the Court of Session) and

Question 6 – For the categories of case listed as suitable for an in-person hearing (in relation to Ordinary cause proceedings):

o Do you think the general presumption given is appropriate? and

o Would you make any additions or deletions and if so why?

CAS believes that parties engaged in legal action should continue to have the option to attend proceedings in person if this best meets their needs and facilitates their involvement in proceedings. Equally, CAS is aware that some clients, especially those with access issues or disabilities may find virtual hearings more convenient. CAS is ultimately of the view that individuals should be supported to engage in legal proceedings in the ways that best facilitates their active understanding and involvement, through their preferred channel of choice, and that these changes should not limit their choices. It is CAS's view that the choice of forum or medium should be equally influenced by the needs and wishes of the parties as well as the nature of the hearing or action.

We note that the consultation suggests that in-person hearings may operate in relation to:

- proofs where there might be a significant issue of the credibility of parties or witnesses.
- legal debates and appeals where there is a point of general public importance or particular difficulty and the in-person appearance of advocates may help the resolution of cases.
- most hearings relating to family actions.

This would appear to leave open the possibility of virtual hearings in some proofs. We note continued concerns regarding the use of remote callings, especially in relation to proofs, with these concerns having been expressed by members of the profession and by CAB in-court advisers.

Feedback from our advisers indicated that where the hearing is a legal debate, with no leading of evidence from witnesses and conducted solely by solicitors, these would be more suitable for virtual hearing as principal agents can simply deal with the matter remotely without having to attend court.

Advisers also note that family actions, for example, can often be contentious with high emotions. In some cases, these sessions could be better suited to virtual hearings to take some of the intense emotions out of the proceedings.

Even where physical proceedings do take place, current distancing requirements still make it difficult for CAB in court advisers to effectively communicate with/advise clients. We would therefore welcome the provision of improved arrangements for client advice where hearings take place in-person as restrictions ease, to ensure all clients can be adequately supported going forward.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance) (in relation to cases at the Court of Session): and

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance) (in relation to Ordinary cause proceedings):

o Do you think the general presumption given is appropriate? and

o Would you make any additions or deletions and if so why?

As noted above, any actions raised or ongoing under the Summary Cause Rules, Summary Application and Simple Procedure processes do not appear to have been given consideration and CAS would welcome clarity on how these actions will be considered.

As set out above, CAS is of the view that ultimately there needs to be channel choice for people engaged in legal proceedings, enabling them to engage in proceedings in the manner that best suits their own needs, and facilitates their active engagement and understanding of proceedings, whether that be in person, via telephone or video link. It is CAS's view that the choice of forum or medium should be equally influenced by the needs and wishes of the parties as well as the nature of the hearing or action.

The consultation suggests that the virtual format could operate in relation to procedural business, commercial cases or business not involving the appearance of witnesses.

We note that some court and tribunal users have expressed the view that remote hearings have been welcome, especially where service users have physical access requirements or disabilities that make attending in person more difficult. However, we are also aware of continued concerns regarding the use of virtual hearings, especially in relation to proofs.

The main concern that advisers have in relation to any virtual proceedings is they are unable to give cues to clients or communicate real-time advice. This has led to a concern that individuals engaged in proceedings under the new rules may be at risk of prejudicing themselves without adequate support.

Advisers also note that general perceptions of the human presence can be lost, for example it is more likely that body language may be misread, or assumptions are made about a client's emotions or levels of contrition, due to the more impersonal approach of a remote hearing. These factors can often influence a Sheriff's decision.

CAS considers that it is vital that clients are able to understand what is happening in their case. Even decisions taken in procedural, or case management discussions can have a large impact on proceedings. For example, a North of Scotland CAB reported to us a case where their client had attended a virtual procedural hearing where the Sheriff had determined that he had no jurisdiction and had dismissed the case. The client was unrepresented, did not follow the legal arguments made around jurisdiction and had no understanding of the decision reached or the reasons for it. To compound things, no decision form was issued in the case, (until CAS later intervened to raise the matter with SCTS) leaving the client unaware of any arrangements or deadlines for appeal. It is unsatisfactory when clients do not have sufficient understanding or support to enable them to participate in major decisions regarding their case. We believe that the virtual nature of the proceedings

exacerbated this, making it harder for the client to actively engage and more difficult for the Sheriff to assess whether or not his decision was understood.

A West of Scotland CAB has also highlighted the difficulties for unrepresented parties. In this case, the client had no representation for her claim at an employment tribunal, despite several attempts to access a solicitor. The client had no experience of the court or tribunal system. The Judge explained that since she was a litigant in person, he would try 'as far as possible' to ensure that she was not disadvantaged, as the other side was legally represented. However, it was clear that, although the Judge tried to put her at ease and assist her through the proceedings, she was nevertheless at a disadvantage when legal terminology and case law was referred to. The client was visibly worried and stressed throughout the process.

Our advisers have also expressed specific concerns that the move to virtual hearings may make matters increasingly difficult for defenders in social housing eviction cases who may not have access to the necessary technology. These individuals will be the likely parties adversely affected by these cases being held remotely.

Telephone Hearings

It has also been highlighted to us that telephone hearings have presented particular challenges in advising clients when they are not physically in the same space as advisers or supporters. Sharing notes and providing real-time advice has proven difficult, and there can be a disconnect between the seriousness of court and a phone call which lacks the gravitas of court, meaning that clients may have less of an understanding of the consequences of proceedings. The move to video conferencing should be an improvement, but many of the same challenges remain.

Question 3 – The parties (to an action in the Court of Session) can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: and

Question 8 – The parties (to an action under Ordinary Cause rules) can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

o Do you think lodging a motion is the right way to do that?

o Is there any need for an application form to accompany the motion

Please explain your answer.

CAS is ultimately of the view that individuals should be supported to engage in legal proceedings in the way that best facilitates their understanding of them and supports their active participation. Our view is that these changes should not limit their choices.

Where both parties are represented, it may be sensible for the full motion process as set out in the Ordinary Cause Rules to be used and the Court should be able to assign a hearing if the sheriff considers it appropriate.

We have referred above to the needs of party litigants, and we consider that whatever methods are put in place to allow party litigants to request a change of mode must be as simple and as easily accessible as possible. In our view, it is unrealistic to expect party litigants to be able to enrol a formal court motion without support. Consideration should be

given to an explanatory note being required for parties who do not have legal representation. In our view, even the application form provided in the draft rules may prove challenging to fill out without support. We would recommend that specific thought be given to how such forms and applications will be made available to party litigants and especially to those with additional support needs. We would be in favour of information being provided to party litigants which will signpost them to advice and support in completing any such application or form. For the reasons given above, we do not believe it will be sufficient to rely on these forms being made available solely via digital means.

CAS would also question whether there will be a right to oppose any such motion and if so, how this would operate in practice. Clarity on this issue would be helpful.

Question 4 – In relation to Court of Session rules: The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

Question 9 – In relation to Ordinary Cause rules: The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

o Do you agree that the court should have the final say? Please explain your answer

We agree that there is a need to ensure that the chosen mode of attendance would not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice. We consider that “the interests of justice” include ensuring that the parties are able to understand proceedings and play an informed part in them. We would generally agree that the Court should make an assessment based on the positions of each party.

We agree that in making any decision, the court must be made aware of a) any specific requirements for specialist support services such as interpretation services, or supporters for vulnerable witnesses and b) how those particular needs may or may not be met within a system of electronic hearings. This should be made part of the pre-hearing organisation to ensure all litigants can understand and participate effectively in proceedings.

When considering which groups may be vulnerable, and who may have additional support needs, we consider that SCTS should use the widest definition of “vulnerability” possible. For example, the Financial Conduct Authority (FCA) has stated that a vulnerable customer is someone who, due to their personal circumstances, is especially susceptible to harm. Research conducted by the FCA during the pandemic demonstrated that 53% of the UK population had at least one characteristic of vulnerability². We would note that vulnerability can be either permanent or transient, and in some cases, this can be brought on by stressful life experiences. In many cases, people accessing the legal system will be doing so as a result of fundamentally stressful events such as job loss, bereavement, financial difficulties, or relationship breakdown. This vulnerability can be exacerbated by a lack of knowledge and experience of legal issues and processes, especially in the case of party litigants.

Given this, we believe it is important that people are able to exercise a degree of choice in how they engage in proceedings, as to do otherwise risks inadvertently excluding some participants and making it more difficult for them to access justice. As stated above we

² [Guidance for firms on the fair treatment of vulnerable customers | FCA](#)

believe the choices and needs of the individual should be as important a consideration as any general presumption regarding the type of case.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

Question 10 – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?

Accessing Advice

CAS recognises that the approach set out in this consultation provides more flexibility than the current arrangements set out in Schedule 4 of the Coronavirus Act. CAS welcomes this but considers that this flexibility could extend further to enable more choice for participants in legal action, especially party litigants and those with additional support needs.

We strongly believe that if these rules are implemented, the information provided to litigants should be made clearer and simpler. CAS notes that the current information page on virtual courts³ signposts to a page which simply contains around 40 documents and links to other pages, many of which are aimed at professional users and witnesses. If this page is designed or intended to assist party litigants, then the relevant information for them needs to be much more prominently highlighted. While there is information available for general parties to a civil action, it was not obvious to us that there is any information aimed directly at party litigants, and we believe that this is much needed.

Accessing Platforms

The proposed changes do not take in to account inequality and access to working telephones or internet access. The costs of defending an Ordinary Cause action are already so punitive that very few individuals can afford to do so. Putting an additional hurdle in the way in requiring a defender to interact digitally should be viewed with caution.

CAS would also note that the platforms used to facilitate virtual hearings must be accessible by as many people as possible. For example, the current guidance for parties in civil proceedings indicates that hard wired or Wi-Fi access with a speed of 10Mbps is recommended, that headset and microphone should be used and that users should not generally use a phone to access proceedings⁴.

We would question whether it is realistic to expect most non-professional users such as party litigants to have to access laptop or desktop devices and secure Wi-Fi with these functionalities. The expectation that all non-professionals will have access to adequate quality of photocopiers, headsets and microphones must also be questioned.

Even if many people can access the internet at a certain level there are far fewer who have the resources of a solicitor's firm in respect of items such as copiers and scanners.

For many, accessing the internet by mobile phone data may be their default, or only way of getting online. Ofcom data indicates that 5% of UK households (1.5 million consumers)

³ <https://www.scotcourts.gov.uk/coming-to-court/virtual-courts>

⁴ https://www.scotcourts.gov.uk/docs/default-source/elu-virtual-courts-training-documents/sheriff-court-professionals/civil-misc/civil-hearings-webex-events/general-party-guide.pdf?sfvrsn=ab69177a_2

access the internet at home via mobile phones only and not fixed broadband⁵. This can be an expensive way to access the internet, especially when recognised that video conferencing uses a vast quantity of data, to the point it will be unaffordable to many.

Polling by YouGov for CAS found that 32 per cent of people ran out of money before pay day in the last year. Of those people, 26 per cent had to go without internet access as a result. Based on Scotland's population estimates this works out to 369,200 people. A further 28 per cent went without mobile phone access, working out to 397,600.

In addition, in further polling conducted by YouGov for CAS⁶, 15% of respondents told us that the current costs of their internet or mobile phone contracts were unaffordable in relation to their personal income. For this reason, we would urge caution in assuming that accessing services virtually is affordable for all.

Further, the use of Webex requires downloading and installing programmes which may be beyond the proficiency of some users or may not be possible for those with devices issued, for example, by employers or support agencies who may restrict the installation of additional applications.

In general, feedback from our network is that our advisers and clients have experienced issues with accessing online systems. CAB advisers report, for example, being directed to the Helpdesk, but failing to get any response from this facility when experiencing issues with Civil Online. Advisers reported that Court staff were unable to provide any further support, simply directing them back towards online systems which were not operating or support functions which could not provide timely responses.

Advisers also indicated that there is a need for clients or party litigants to be able to access support when something goes wrong with technology in real-time. Where Courts are dealing with solicitors and similar bodies with whom they have regular contact due to past dealings, then the court can easily reach out to them if there has been a failure to join a remote hearing. The Court would have less opportunity to contact members of the public as this information is not easily accessible. CAB advisers have told us of clients who experienced technological issues which prevented them from joining virtual platforms at short notice. They were unable to find a way of alerting court staff to this, meaning that Sheriff assumed they had simply opted not to participate and proceeded to grant orders, such as those for eviction or custody, which had far reaching impacts. We are of the view that some safety net is required to deal with these situations.

Use of Written Submissions and Electronic Bundles

We note that Guidance such as Practice Notes can require the parties to provide written submissions to support the effective running of an electronic hearing. Some practitioners perceive this as creating an additional burden as they could otherwise make those submissions orally at an in-person hearing. Others consider that written submissions can assist the court by making information available in advance. We consider that where written submissions are sought, the timeframes for making submissions should be clearly set out,

⁵ [Affordability of communications services: Summary of findings](#)

⁶ Total sample size was 1032 adults. Fieldwork was undertaken between 20th - 25th May 2021. The survey was carried out online. The figures have been weighted and are representative of all Scotland adults (aged 18+).

consistent between jurisdictions and should not be subject to late changes, as these can cause detriment.

Our CAB advisers have highlighted ongoing issues with providing support for clients to engage with the wider process, from preparing papers to keeping up to date with case developments, and generally ensuring that clients understand proceedings, can play an informed role in them and can make appropriate decisions as to the conduct of their case.

For example, a CAB client in the West of Scotland was engaged in a First Tier Tribunal (Employment) case. She only received correspondence from the Tribunal, asking for further information in relation to her Statement of Loss, less than 24 hours before two deadlines for submission had to be met. She was fortunate that CAB staff were able to assist her that day as otherwise she would have had to respond without any support or advice, which she required to deal with such legal processes. This example shows the clear danger of not having a timeframe that gives adequate time for all to respond.

We must ensure that no one should be penalised for not having the means to make digital submissions to the court. Party litigants should also be signposted to sources of support to assist them in making written submissions. Feedback from CAB advisers indicates that there have been difficulties in supporting clients to submit written submissions or respond to requests from the Courts, which has been exacerbated by the differences in practice between courts and by clients having issues in accessing systems and uploading documents. In the past, CAB advisers have prepared the documentation on behalf of clients and supported them to lodge these papers. The move to Civil Online has created barriers in that the platform itself can be difficult for some users to navigate, particularly where they are not familiar with online platforms or IT systems more broadly. This in effect means that there are now barriers to accessing and navigating digital platforms as well as understanding the legal processes and forms. Anecdotally we are aware that party litigants have been relying on a trusted friends and family with good IT skills to help them navigate the platform, but that this can come at the expense of support to navigate the legal procedure.

If virtual hearings and hybrid hearings are to become a permanent feature, then a consistent approach must be taken on certain matters. For example, there must be a consistent and easy way for clients, and any advocacy bodies or people supporting them, to have the ability to access case documents, regardless of whether they have digital access.

Summary

In summary, CAS continues to have concerns around the barriers that individuals and vulnerable groups may face in accessing both Civil Online and virtual hearings. It is vital that any changes improve access to justice for all, rather than present more difficulties for those engaging with legal processes. We do not think that sufficient safeguards currently exist for party litigants, and we would urge the SCJC to consider further the experience of party litigants in accessing online systems and remote hearings. We are not aware of detailed research that has been carried out on the user experience or of any detailed feedback sought from users and we would urge that this be undertaken before final decisions are reached, to allow the user voice to contribute to this discussion. When considering what additional support is required, we would urge that a wide definition of vulnerability be utilised by SCTS, and that specific consideration be given to how supporters and advocacy bodies can help vulnerable people access justice.

CAS acknowledges that the varying options for attending a hearing may have potential positive and negative ramifications for clients. We note that during the last year and a half, some clients have preferred to participate by way of remote hearing, as it means they can be more relaxed and less stressed about their cases, or not been required to navigate physical access challenges. For others, a lack of digital access, or a forced move to digital services has been profoundly difficult. These difficulties may be caused by affordability issues, by a lack of connectivity in their area, lack of access to a device, or lack of skills. Even those who can access a device may not be entirely comfortable with virtual proceedings, especially if they have any vulnerable characteristics.

CAS is ultimately of the view that individuals should be supported to engage in legal proceedings in the way that best facilitates their understanding of them and supports their active participation. Our view is that these changes should not limit their choices and that their choices and wishes are equally important as the type of hearing under consideration.