Equality and Human Rights Commission

Scottish Civil Justice Council

scjc@scotcourts.gov.uk

9th November 2021

Dear Sir/ Madam,

Consultation on the rules covering modes of attendance at Court hearings

The Equality and Human Rights Commission is the national equality body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected characteristics set out in the Equality Act (EA) 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

We are an "A Status" National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC). We welcome the Scottish Civil Justice Council (SCJC) Access to Justice Committee's consultation on the rules covering modes of attendance at Court hearings. We previously responded to the Access to Justice Committee's consultation on mandatory use of civil online. This response builds on points we raised in our response to the civil online

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consultation and it may be of assistance to you to refer back to that response.

Public health concerns

We have approached this consultation from a post-pandemic perspective. We understand the purpose of this consultation to be to focus on what has worked well during the pandemic and what should be retained at some future point as we emerge from it. In preparing this response, we have not therefore weighed up the potential public health benefits of remote hearings or conversely, the public health risks of in-person hearings.

Public Sector Equality Duty

We welcome the fact that SCJC has carried out an Equality Impact Assessment which has been prepared in respect of the proposed new rules, as well as the commitment to refresh the EQIA following completion of the consultation and finalisation of the rules. This is a useful step as the SCJC is covered by the PSED general duty and the Scottish Courts and Tribunal Service is covered by the General and Scotland Specific duties as well as the Fairer Scotland duty, which places a legal responsibility on particular public bodies in Scotland to pay due regard to how they can reduce inequalities of outcome caused by socio-economic disadvantage, when making strategic decisions, such as in relation to the SCTS digital strategy**.**

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The Commission's response

The Commission has four main areas of interest in respect of this consultation.

1. The default mode of attendance for claims under the Equality Act 2010 and interventions by the Equality and Human Rights Commission (Questions 1, 2, 6 and 7 amalgamated)
2. The procedure by which a person with a protected characteristic (e.g. older or disabled people) can seek an alternative mode of attendance (Questions 3 and 8 amalgamated)
3. Whether the Court should have the final say (Questions 4 and 9 amalgamated)
4. The test to be applied by the Court in determining a motion to seek an alternative mode of attendance (Question 10- any other comments).

These will be addressed in turn.

The default mode of attendance for claims under the Equality Act 2010 and interventions by EHRC (Questions 1, 2, 6 and 7 amalgamated)

Questions 1, 2, 6 and 7 ask for views on the categorisation of electronic and in person hearings as the default in the Court of Session and the Sheriff Court. We appreciate that that there is a mechanism for seeking an alternative mode of attendance. However the EQIA identifies that a number of people with impairments may prefer not to disclose the nature of their impairment unnecessarily. It is therefore important that the default lists are appropriate and

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meet the needs of people with protected characteristics, in particular disability, at the outset. As discussed further below, all pursuers in an Equality Act claim will have protected characteristics and many will arguably have experienced discrimination related to their protected characteristics.

The EQIA identifies that there may be benefits and disadvantages of both electronic and in person hearings for disabled people with a range of disabilities. Further relevant information (albeit relating to the Criminal Justice System) is available within our Inclusive Justice report. The report recommends that *'all relevant public bodies ensure any new court processes are designed with disabled people in mind. This should include a process to assess whether defendants (in the case of criminal trials) with impairments can participate fully in video hearings and whether that affects their outcomes.'* Furthermore, rigorous and inclusive user testing will be required to ascertain whether some web-based platforms may be more suitable than others for people with protected characteristics.

Overall, we recommend that, in reviewing the Consultation responses, the SCJC will need to consider whether you have sufficient relevant evidence including the views of people with protected characteristics about the impact of the categorisation of different types of hearings. More information about the requirement to consider relevant evidence (in terms of the Scotland specific

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duties) is available in para 6.53 onwards of the Technical Guidance on the Public Sector Equality Duty: Scotland. The Guidance emphasises the importance of relying on objective evidence rather than stereotypes or assumptions about particular protected characteristics.

Chapter 44: Equality Act 2010

The proposed default is for attendance by electronic means for hearings fixed under Chapter 44 (the Equality Act 2010) in the Sheriff Court (draft OCR 28ZA.3 (2) (y)). We assume that only the procedural aspects under this chapter, for example a motion to appoint an assessor, would be heard by electronic means by default and not all hearings relating to a claim raised under the Equality Act 2010.

We would expect that any proofs, for example, would be dealt with in person by default to align with other ordinary cause proofs where there is an issue of credibility and demeanour (draft OCR 28ZA.2 (f)). Credibilty and demeanour will nearly always be an issue in discrimination claims where the conduct of individuals can be central to the evidence, for example around purpose or effect of behaviour. We would welcome confirmation on this point.

EHRC interventions

The proposed default is for attendance by electronic means for hearings relating

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to interventions in the Sheriff Court by the Commission (draft OCR 28ZA.3 (h)). We assume that this would only apply for procedural matters relating to permission to intervene under OCR 13A.3. Where an oral intervention is to be heard under OCR 13.4 (3) (b), we would expect this would take place in person as such interventions would ordinarily raise issues of wider public interest, akin to those held in person by default under draft OCR 28ZA.2 (e).

We also note that such interventions are not listed under either category in the corresponding draft Court of Session rules, which is where the vast majority of our interventions are lodged. We would expect these would be in person as a rule, to align with the 'general public importance' hearings in draft RCS 35B.2 (c).

The procedure by which a person with a protected characteristic (e.g. older or disabled people) can seek an alternative mode of attendance (Questions 3 and 8 amalgamated)

Questions 3 and 8 ask for views as to whether a motion is the correct way to apply for a change of mode of attendance in the Court of Session and Sheriff Court. We do not agree with this proposal.

We understand that the SCTS provides administrative support for the Scottish Courts and Judiciary in terms of s.61 of the Judiciary and Courts (Scotland) Act

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2008. In carrying out that function SCTS has a duty to take account of the needs of members of the public (s.61 (2)). As such, SCTS administration is exercising a public function in terms of Part 3 of the Equality Act 2010. The SCTS therefore has an anticipatory duty to make reasonable adjustments. This is acknowledged in the Equal Treatment Bench Book (p11/2/23).

The sheriff clerk plays a significant role in administration of civil justice. Under OCR Chapter 9 for example, it is the sheriff clerk who has responsibility for fixing an options hearing. A request for an alternative mode of attending that hearing could be a form of request for a reasonable adjustment for a disabled person, and should also be a step that the clerk could make as an anticipatory adjustment.

We are concerned that by placing the discretion for determining the mode that hearing takes within remit of the sheriff as opposed to the clerk, the SCTS is being prevented from fully exercising the reasonable adjustment duty. Under the draft rules, the only adjustment the sheriff clerk can lawfully make is to pass the request to a Sheriff for judicial determination. In our view, this adjustment is unduly burdensome for disabled people and unreasonable for four main reasons.

Firstly, it detracts from the anticipatory nature of the reasonable adjustment duty which means that service providers should not wait until a disabled person

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wants to use a service before considering the duty on a case by case basis. Instead they should anticipate the requirements of disabled people and the adjustments that may have to be made for them.[1] A disabled person should not have to meet further legal requirements, e.g. the test in draft OCR 28ZA.5 in order to access reasonable adjustments. A disabled person should not have to reveal private health information to a Court and other parties in order to access a reasonable adjustment. This is acknowledged in the EQIA.

Secondly, it may be unduly burdensome for a disabled person, particularly a party litigant, to have to go through these additional procedural steps and may deter disabled people from accessing justice.

Thirdly, it has potential to deny disabled people recourse to a remedy in the event that a request to lodge hard copy papers is declined. If the discretion remains with the clerk, and the request is refused, the court user may have a claim against SCTS under the Equality Act 2010. However this is not the case were a Sheriff to refuse the request. This is because paragraph 3 of schedule 3 to the Equality Act 2010 provides a broad exception to the prohibition on discrimination (including the requirement to make reasonable adjustments) that

[1] For more information on the anticipatory nature of the duty, please see our Statutory Code of Practice, Services, public functions and associations

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applies to judicial functions. This exception does not apply to administrative functions. So by moving the discretion from being an administrative function to a judicial one, this limits the rights of disabled people, and older people who may experience indirect discrimination, to seek redress including making a discrimination claim under the Equality Act.

Finally, the motions process means that disabled people will be disadvantaged by having to pay a motion fee in order to access a reasonable adjustment (currently £51). The Act prohibits service providers who are under a duty to make reasonable adjustments for a disabled customer from requiring those service users to pay to any extent the costs of making those adjustments (s.20 (7)).

The draft rules also raise concerns about access to justice. As you will be aware, Article 13 of the UN Convention on the Rights of Persons with Disabilities requires that state parties ensure effective access to justice for disabled people on an equal basis with others, including through the provision of procedural accommodations in order to facilitate effective participation. We note that the Civil Procedure Rules in England and Wales were amended in April 2021 to require that decision makers expressly and proactively take into account the rights of disabled people. Rule 1.1 sets the overriding objective which includes ensuring that the parties are on an equal footing and can

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participate fully in proceedings, and that parties and witnesses can give their best evidence. Practice Direction 1A gives further guidance on this. Paragraph 2 provides: "*vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case."* A non-exhaustive and broad list of factors which may cause vulnerability in a party or witness in paragraph 4 includes age, communication difficulties, disabilities, impairments and health conditions.

The right to a fair hearing in Article 6 (1) requires that litigants should have an effective remedy enabling them to assert their rights. We appreciate that this is not an absolute right, however a limitation, such as a procedural barrier, must pursue a legitimate aim and must be proportionate. In terms of Article 14 (taken with Article 6) where a general measure, such as the proposed rules, has a disproportionate prejudicial effect on a group, such as older or disabled people, this can be regarded as discriminatory even if there is no discriminatory intent, where there is no objective or reasonable justification. The justifications for, and benefits of, this process being judicial rather than administrative and of an additional procedural step involving a motion remain unclear.

Overall, in our view there should be a simple and free administrative, as

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opposed to judicial, process for seeking an alternative mode of attendance, in particular where the reason for the request is connected to a protected characteristic such as disability or age. In addition, the clerk should be alert to the possible need to change the mode of attendance as an anticipatory step where appropriate without having to wait for a formal request.

Whether the Court should have the final say (Questions 4 and 9 amalgamated)

We are unclear as to what, if any, appeal mechanism there would be if a Sheriff or Lord Ordinary were to refuse an application for an alternative mode of attendance. It is unclear whether or not this would have to be dealt with as an overall challenge to the procedural fairness of the hearing at the end of the case, by way of appeal to the Sheriff Principal or Reclaiming Motion, which would bring additional delay, stress and expense to the litigant.

We do not support the proposal to use motion procedure for the reasons set out above. However, if motion procedure is the final outcome, given that there would be no Equality Act remedy for a potentially discriminatory decision, a free, simple procedure for review of the refusal of a motion for alternative mode of attendance would be essential as a minimal safeguard.

The test to be applied by the Court in determining a motion to seek an

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alternative mode of attendance (Question 10- any other comments)

We are concerned that the test in both Courts for determining a motion for an alternative mode of attendance is that the sheriff is of the opinion that allowing a person to do so would not (a) prejudice the fairness of proceedings; or (b) otherwise be contrary to the interests of justice. We emphasise the importance of effective participation of elderly and disabled people, the reasonable adjustment duty and the potential for digital exclusion as a result of socio-economic disadvantage (including poverty). We are therefore of the view that the statutory test ought to create a clearer presumption in favour of granting the request. Creating such a clear presumption would avoid or at least minimise the need for unnecessarily intrusive supporting medical information.

In addition, there ought to be clear guidance for the decision maker on the importance of understanding, anticipating and taking into account the needs of people with protected characteristics, such as older and disabled people. It is essential that flexibility, choice and respect for the dignity and privacy of older and disabled people is ensured. The new processes should be kept under review to consider the impact on effective participation of people with protected characteristics. Processes for robust data collection disaggregated by protected characteristics would assist with this.

We hope this has been helpful and we would be happy to discuss this further if

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that would be of assistance. We would welcome a response and look forward to hearing from you in due course.

Yours sincerely,

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Scotland Legal Team |