Which? response to the consultation on rules of attendance at court hearings

Introduction

Which? welcomes the decision to consider rules on attendance at Court for civil proceedings including actions involving individual consumers, for example in relation to faulty goods or services or defending debt claims. In particular, whether in light of improvements to digital connectivity, the requirement for individual to attend court in person remains appropriate.

The past 18 months have demonstrated, it is possible to conduct much of the civil justice system without the need for in-person attendance at proceedings. Which? agrees with the SCJC that for some court users the attendance at hearings by electronic means has resulted in significant benefits in terms of reduced travel time and inconvenience.

We have first-hand experience of how remote access to court cases has made it easier for interested observers to follow proceedings without the need to attend in-person cases, for example for us to be able to be given access to observe cases with a strategic impact for groups of consumers in the higher courts. However it has also highlighted that not all proceedings are best conducted "remotely" and that even where it may be possible to satisfactorily conduct court business without "face-to-face" interactions, improvements to the "digital infrastructure" will be required.

For procedural hearings which last only 5 minutes, it may be easier for party litigants to attend remotely if they have access to the technology and would be easier for them to accommodate around other aspects of their lives. The ability to attend remotely may encourage more party litigants as it is just a simpler method of having their case heard as opposed to attending a court in person, which for some can be intimidating experience. The need to not attend at court building can also have benefits for people with childcare and caring responsibilities.

However, a lack of access to technology/digital connectivity should never be a barrier for justice and there are examples of party litigants relying on smart phones as they didn't have reliable broadband for hearings. Therefore, the system must protect the interests of those who do not have the finances or the skills to access the right technology.

As we are concerned with the principles behind the rules on attendance rather than the specific draft, we have not divided our response into Rules of the Court of Session or Ordinary Cause Rules. Instead, we have prepared our response on the basis that these issues should be applied equally to the two types.

Question 1 – For the categories of case listed as suitable for an in-person hearing: o Do you think the general presumption given is appropriate? and Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

The following principles should be adopted when determining whether the type of hearing should generally be considered for in-person or electronic means:

- The decision regarding whether both the type of hearing in principle, and where discretion is being applied, should always be based around the requirement of ensuring that non-professional court users are not disadvantaged. Many court users who have a consumer law claim, for example will not be eligible for legal aid but cannot afford legal representation and may still not be confident about conducting their case.
- Splitting the use of in-person or electronic along the lines of procedural or proof hearings is not satisfactory, as this is an arbitrary divide.

- Hearings relating to family actions should be conducted by an in-person hearing, unless there is clear evidence that it would better for the family members involved to conduct it by electronic means.

- We agree with Shelter Scotland that in housing cases where the tenant is unrepresented, these should also by default be in person. This is because in any procedural hearing in an eviction action, it is open to the Sheriff to grant decree, and thus the tenant's home is at risk.

- Proceedings involving the use of interpreters or other third-party assistance such as a lay representative or courtroom supporter should be conducted in-person, so as to minimise the disruption and to facilitate smoother exchanges.

- A robust Equalities Impact assessment – EQIA - must be produced by the Scottish Courts & Tribunal Service and agreed with the SCJC before any changes are made to the current rules. The EQIA produced for the Civil Online process is a good benchmark for this process, and the drafting of the EQIA should include dialogue with organisations representing consumers with protected characteristics, as well as more generally with the not-for-profit legal sector and consumer organisations.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: Do you think lodging a motion is the right way to do that?

The proposed rules suggest a motion procedure as the vehicle by which a party applies to change the mode of attendance. A court fee is normally charged when lodging a motion. We fully concur with SALC that any form of additional charge to access justice is greatly concerning and we would therefore oppose any such charges.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption. Do you agree that the court should have the final say?

Consistency in whether types of hearings are conducted in-person or electronically will be vital to not only the efficient running of the system, but ensure that participants understand the processes. Therefore, individual sheriffs should not be setting the rules on the types of hearings based on their personal preferences. We also believe that there should be a presumption in the granting of a motion made by a party litigant.

Question 5 – Do you have any other comments to make on the proposed changes?

- If party litigants and clients are expected to participate in proceedings remotely it is imperative that adequate provision is made for digital support. Participation should be based upon video conferencing systems, as opposed to telephone based systems – presumably Web-ex. The courts must ensure that adequate digital infrastructure is in place to enable this, either through the individuals' own facilities or via their representatives. This will mean that financial assistance will need to be provided to organisations such as law centres, CABs, other not-for-profit organisations, and possibly legal firms to install such infrastructure. We do not however have a view on whether this funding should be managed by SCTS, SLB or the Scottish Government itself.

- Drawing on our experience of "dialling-in" for the CAA/Ryanair case that was heard in the High Court (April 2021), we offer a few observations regarding the administration of the proceedings, that although conducted on Microsoft Teams, would apply across to other platforms including Web-ex. It is worth noting that in this case, there were no witnesses and it was a hearing with very experienced barristers mainly addressing the judge on points of law in the business / property section of the High Court. Learning points in this context include that Court clerks need to have a good level of IT competence and training, which will not always be the case with cases at lower levels of the court system. Also, from the perspective of observers, automatic access to court documents (if non-sensitive etc) would have been good as there is a lack of transparency. CPR in England and Wales does not provide enough open access for non-parties. And for parties, it is essential that they are provided with electronic access to all documents in an accessible form in good time before the hearing.