Scottish Civil Council Consultation

JUSTICE Response

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Introduction

1. JUSTICE Scotland is the Scottish branch of JUSTICE, an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This response addresses JUSTICE's views on the proposed new rules covering the most appropriate mode of attendance at civil court hearings in the Court of Session and in the sheriff courts, as put forth by the Scottish Civil Justice Council.

3. JUSTICE has previously undertaken extensive work on the issues of digital exclusion and court reform. Our Working Party report, *Preventing digital exclusion from online justice*, considered the impact that the modernisation of justice services may have on the vulnerable or digitally excluded in our society. The Working Party produced a set of practical recommendations to address the issues raised, which, although made in the context of England and Wales, are equally relevant to Scotland. We draw on this work in our consultation response, as well as our wider experience of promoting fair and effective reforms to the justice system.

Consultation Response

Rules of the Court of Session

Question 1 – For the categories of case listed as suitable for an in-person hearing: Do you think the general presumption given is appropriate? And would you make any additions or deletions and if so why?

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance): Do you think the general presumption given is appropriate? and would you make any additions or deletions and if so why?

4. JUSTICE does not make any comment on the specific categories of cases that are suitable or not suitable for electronic hearings. We welcome the use of technology where it facilitates access to justice, however we emphasise the need for safeguards to ensure effective participation, regardless of the type of hearing ascribed to categories of cases. While the subject matter of a case may be more appropriate for a particular mode of attendance, there may be reasons why this is not appropriate for the parties involved. There must be an awareness that all types of cases can involve vulnerable parties, or individuals with specific needs. Therefore, whilst there may be cases that are generally more suitable for either in-person or electronic hearings, we reiterate that:

    a) Where a hearing is presumed to be suitable for an electronic hearing, parties should be able to instead request an in-person hearing. Although rare, it is not completely unheard of for party litigants to appear at the Court of Session. Although some party litigants will be open to electronic hearings, and many will be able to effectively participate remotely, without a legal representative to guide them

through proceedings, it is important that their preferences are given primary consideration to ensure fair and effective participation.

b) Where a hearing is presumed to be in-person, parties should be able to request either that the full hearing is held electronically, or that they individually participate electronically. However, where the latter is requested, it must be checked well in advance of the hearing that the party has the appropriate technology in order to fully participate.

5. The proposed rules do make provision for parties to request a different mode of attendance. We wish to highlight the overriding principle that any such requests must be given primacy over any other considerations, and particularly so in the case of party litigants.

6. The use of motions to vary the mode of attendance is discussed below. In addition, we suggest that parties should be able to express their preferences at the earliest possible opportunity. We suggest that provision could be made for parties to indicate their preferred mode of attendance at the time of signeting. Those defending should have the same opportunity on receipt of service.

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? Please explain your answer.

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? Please explain your answer.

7. Lodging a motion seems the most appropriate considering that this is the standard procedure by which a party to the litigation makes an application or request to the court, outwith the 'standard' procedure. The concern is that the motion is to be placed before a Lord Ordinary or, where the cause is in the Inner House, a procedural judge for determination **without an oral hearing.** It is suggested that there should be the opportunity for an oral hearing, if the motion is opposed or the court needs to be further addressed. This is particularly relevant to party litigants, as the differences between represented and unrepresented parties are likely to be the most stark in written submissions. To make the process as simple and accessible as possible, a template motion for varying the mode of attendance should also be provided on the ScotsCourts website.

8. It is appropriate that the court makes the final decision, as it is in the position to balance all considerations and party preferences. Reaching an agreement between parties who request a different type of hearing may be time consuming and cause delays, and in certain cases may be an added source of contention. However, the court should give particular weight to the preferences of parties and their reasons for these preferences. Where a party litigant expresses a desire for an in-person hearing, this should be the primary factor in the court's decision, even where the party litigant has not provided reasons – it may be that the very reasons that they wish to have an in person hearing also make it difficult for them to express why they want an in-person hearing (or vice versa).

9. There needs to be greater clarity within the rules as to what issues the court will give consideration to when making this decision. There are many factors that may warrant a variation from the general presumption, and these should be set out in a non-exhaustive list within the rules. Parties, with or without legal representation, will have varying access to digital technology. Those with representation may be able to use their lawyer's premises to participate in a remote hearing, but this will not always be possible. Even where parties have access to digital technology, this does not always mean that they will be able to adequately follow or participate in a remote hearing, for example due to disabilities, learning difficulties or health conditions. Those that are requested to participate electronically may lack a sufficiently private and quiet place to do so.

10. Parties required to attend electronically may struggle to communicate with their representative during the hearing – although options like WhatsApp can work well, this requires individuals to be able to clearly articulate their concerns or queries while keeping up with proceedings, which can be much harder than verbally doing so in court. Lastly, parties may have a physical or mental health condition that renders either a physical or electronic hearing inappropriate, or means that reasonable adjustments are required. Provision should be made for parties to request reasonable adjustments. If they are required to attend electronically, this may take the form of live subtitling, increased screen breaks, or printed versions of court documents, rather than those available electronically. We also note that being able to attend electronically, rather than in person, may itself by a reasonable adjustment.

11. It is assumed that all of these considerations will be taken into account by the court, but assumption is not enough. The rules should set out a non-exhaustive list of factors that the court will consider when deciding whether to depart from the general presumption.

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

12. It is concerning that the proposed changes are being made without a comprehensive survey of users' experiences of remote and hybrid hearings so far. While important, practitioner and judicial opinion on which types of actions are best suited to being physical or remote may vary greatly from the views of lay people, especially those who have already interacted with the court system during the pandemic. Any opinions sought must focus on the principles of accessibility, user experience and access to justice. The Scottish court system has been forced to quickly adapt by the pandemic, and there is now a unique opportunity for any redesign to be shaped by the views and needs of its users. There needs to be an inclusive impact assessment – it may be that race, age, gender, income and/or disability significantly impacts an individual's experience of electronic or physical hearings.

13. An accessible set of rules must be made available, particularly to ensure that party litigants are fully aware of the processes and procedures in place. Accessing the relevant court rules through the ScotCourts website requires some navigation and prior knowledge, and is arguably not designed to suit the needs of lay people. At the least, a factsheet explaining where to find the rules, how they are categorised, and how to download them should be provided.

Ordinary Cause Rules

Question 6 – For the categories of case listed as suitable for an in-person hearing: Do you think the general presumption given is appropriate? And would you make any additions or deletions and if so why?

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance): Do you think the general presumption given is appropriate? and would you make any additions or deletions and if so why?

14. Please see answer to question 1 and 2 regarding the choice of parties.

Question 8 – 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? Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers.

15. Please see the answer to question 3 regarding the use of motions.

16. In addition, we suggest that parties should be able to indicate their preferred mode of attendance at the start of a claim, if pursuing. This could be done at the time of having the writ warranted. We would suggest the creation of a simple form for this purpose. Defenders should be given the same opportunity to express their preference, using the forms provided alongside a warranted writ. For example, this could be indicated in Form O4.

Question 9 – 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? Please explain your answer.

17. The answer to this does not vary particularly from the answer to question 4 above. However, it must be highlighted again that the preference of party litigants must be given primary consideration.

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

18. See answer to question 5.

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