

Citizens Advice Scotland: Response to the Scottish Civil Justice Council's Consultation on Simple Procedure

Scotland's Citizens Advice Network empowers people in every corner of Scotland 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.

Summary

This Consultation seeks views on the Simple Procedure Rules, to inform the Scottish Civil Justice Council's review of the Rule change which made use of Civil Online Mandatory for Simple Procedure cases.

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, we maintain that this must not come at the expense of channel choice. We have concerns that the Rule change may have had the effect of excluding party litigants and unrepresented people from the system. We would therefore support additional efforts to ensure inclusivity for those who are digitally excluded. We also have a number of wider suggestions to make in relation to potential reform of the Rules.

This response 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 support individuals with Simple Procedure cases. We acknowledge that individual advisers and advice services may have had differing experiences of interacting with the court system and the new Rules during lockdown and as a result differing views may exist on some of the matters raised within this consultation.

Answers to consultation questions

Question 1: Do you have any general comments about using Civil Online to submit claims?

CAS's work on Access to Justice issues aims to ensure that consumers can access legal services and make effective and informed choices about legal issues. CAS recognises that the ability to access Civil Online is of benefit for many individuals. CAS is aware that much of the Simple Procedure case load is generated by corporate actions for recovery of debt. Subject to there being an acceptable API or interface, we do not take issue with professional

users or solicitor's firms being required to use online methods of initiating claims. Further, CAS appreciates that the current public health situation has accelerated the move towards online services in an understandable effort to remove the need for unnecessary travel. We understand that the use of Civil Online in these circumstances has had benefits in enabling cases to be progressed during this time and in avoiding a situation where potential claims may otherwise have expired due to the passage of time.

However, we remain cautious about the mandatory use of Civil Online for party litigants and unrepresented individuals on an ongoing basis given that many of clients supported by the Citizen's Advice network may be digitally excluded. CAS has carried out research into digital access¹ 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 lack the skills to go online and face barriers in doing so. While we understand the inevitable move towards online services during the pandemic, we would note that this has led to further complications for 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. One adviser also commented to us that use of the "CAPTCHA" system of robotic exclusion, whereby users are asked to identify certain images to prove that they are not a robot, may present difficulties for those with certain disabilities.

We understand that the Scottish Courts and Tribunal Service (SCTS) is carrying out research into the use of Civil Online. We would welcome further information on what data is being collected, particularly with regards to communities which are digitally excluded, and we have written separately to SCTS in this regard.

CAS would welcome further information on the use of paper-based applications, and for this to be mapped against data on digital exclusion. For example, we know that digital exclusion is more prevalent in remote and rural communities and would therefore expect to see a higher proportion of paper-based applications coming from these communities. We would welcome sight of these figures and the ability to compare them against pre-pandemic levels of paper access.

Details on how SCTS is seeking to ascertain whether people are being digitally excluded would also be welcomed, alongside information on whether levels of incomplete or abandoned claims or drop offs are being monitored, as they might indicate that the system itself is proving to be a barrier. We would welcome further information on whether SCTS is able to assess whether there are groups or people who are simply not accessing the service.

We note that SCTS is to undertake specific monitoring of any instances where a Sheriff rejects a request for use of paper copies, and we welcome this. We are also of the view that any differences in implementation of the rules across different sheriffdoms should be monitored. Feedback we have received indicates that the exercise of shrieval discretion can have a significant impact on the use of online systems. In particular, concerns were raised by advisers about some instances of certain Sheriffdoms requiring written submissions to be

¹ See Offline and left behind, Citizens Advice Scotland (2013); Bridging the Digital Divide, Citizens Advice Scotland (2015); Internet access in Glasgow's deprived areas, Citizens Advice Scotland (2015); Disconnected, Citizens Advice Scotland (2018)

provided 48 hours in advance of a case calling, and irregularities in the application of this timeline being communicated to clients.

CAS is ultimately of the view that individuals should be supported to engage in legal proceedings in the ways that suit them best, and that changes to Simple Procedure should not limit their choices. Research into the barriers facing individuals and communities in engaging with proceedings is very much welcomed, alongside any plans to mitigate any unintended negative effects on communities.

Question 11- If you play a role in providing support to court users, do you have any comments on any practical issues arising from the rule change?

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". CAB clients have valued having support to facilitate their participation in legal processes. 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 relied on a trusted lay person 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.

Further, there are issues with CAB advisers lodging papers on behalf of clients where a fee is due to be paid, where clients are not able to be physically present. This has either meant that clients must electronically lodge papers unassisted or that they must give advisers access to their card details. This does not seem wholly satisfactory and it would seem preferable for advisers to be able to access the payment system in the same way that solicitors are able to do.

During the pandemic there have been practical issues with lodging documentation in hard copy, with many court offices being closed to the public. This has meant documents having to be posted, adding to the time needed for hard copies to be processed. Along with delays in postal services, this has at times disadvantaged clients who wished to lodge in hard copy but were unaware that they could not do so in person and encountered difficulties with deadlines as a result. We have also heard anecdotal evidence of paperwork being mislaid once lodged.

We are also aware of at least one instance of a client being advised incorrectly that all paperwork must be lodged online and that it was not possible to lodge paper submissions at all. Having liaised with SCTS regarding this, we understand that this was a training issue and that steps have subsequently been taken to ensure that all staff are fully aware of the new rules. It is however concerning that clients were being incorrectly advised that they had no alternative but to use online services.

The move to virtual proceedings has had a significant impact on the way in which party litigants can engage with supporters or representatives when they are not physically in the

same space. Sharing notes and providing real-time advice has proven difficult, and even where physical proceedings do take place, distancing requirements still make it difficult to effectively communicate with clients. There can also be a disconnect between the seriousness of court and a phone call which lacks the gravitas of court, meaning that there is less of an understanding of the consequences of proceedings for some party litigants. Feedback we have received indicated that the move to video conferencing should be an improvement when compared with telephone hearings, but many of the same challenges remain.

For this reason, CAS is of the view that whilst the virtual format may provide an effective solution in relation to procedural hearings or case management discussions where there is professional representation for both parties, the continued use of video calling for proofs where evidence is taken does not allow for sufficient support to safeguard the rights of party litigants.

CAS also wishes to raise concerns about the impact of digital exclusion on party litigants' ability to engage in the process of virtual hearings. This has been further compounded by the pandemic, which has made it more difficult to access IT equipment and support to use it, as set out above.

Question 12 - What effect, if any, has the rule change had for your service and service users?

We remain concerned, given the move to Civil Online, and the lack of or limited ability for advice agencies to provide face-to-face advice, that there is a risk that some clients are simply not initiating or responding to legal proceedings, even where this would be in their best interests. This may be because clients are unable to access devices, cannot afford data charges, or, in some areas, do not have adequate connectivity. Some clients may simply lack the skills, desire or confidence to interact with the system without considerable support, which for some people, may be best accessed face to face.

For this reason, we remain concerned that the Rule change has made it more difficult for the Citizen's Advice network to effectively support clients in dealing with legal issues. Part 2 of the Rules provide for a courtroom supporter, but currently this role is impacted by public health restrictions. In virtual proceedings, as noted above, advisers are unable to give cues to clients or communicate real-time advice, and even instant messaging significantly limits the advice that can be given. There are also issues with providing support for clients to engage with the wider process, from preparing papers to keeping up to date with case developments. We are concerned that individuals engaged in proceedings under the new rules may be at risk of prejudicing themselves without support because they do not understand the gravity of the proceedings, the process being followed, or the consequences that may follow.

We are aware that many cases have been sisted due to the pandemic, and we are aware of anecdotal evidence of cases being dismissed without parties knowing about it. This leaves parties having to lodge appeals against dismissal or lodge fresh proceedings where they have been informed of dismissals after the fact. Improved communication and the creation of an option allowing for correction of an interlocutor (see question 18) – as happens in other types of court procedure such as Ordinary Cause – would be helpful in these cases.

Question 17– Do you think the rules to make the use of Civil Online mandatory for Simple Procedure Cases should remain in place? If yes, why? If no, why?

As detailed in our previous answers, we have concerns around the barriers that individuals and vulnerable groups may face in accessing Civil Online. In our view there is currently insufficient evidence as to whether these barriers have been overcome for CAS to support the mandatory use of Civil Online by party litigants remaining in place. It is vital that any changes improve access to justice for all, rather than present more difficulties for those engaging with legal processes.

Given the restrictions and difficulties that currently exist in providing face-to-face support for clients we do not think that sufficient safeguards currently exist for party litigants. Without the ability to provide face-to-face advice and support to clients, we would not be minded to support the continued application of the Rule. As noted above, we have no difficulty in principle with the use of Civil Online being made the default for professional or solicitor users of the system. However, we feel that this can and has been detrimental for party litigants and in particular those who seek the support and advice of the Citizen's Advice network in Scotland.

Question 18 – If the rules continue to be in force past the 30th of September 2021, are there any changes to them that you think could usefully be made and if so, why?

We have received feedback from across the Citizens Advice network which has highlighted that there are opportunities to make the system more efficient and user friendly, which are detailed below.

Preventing duplication

Simple Procedure Rules 4.2(2) state that "the respondent must also send a copy of the completed Response Form to the claimant by the last date for a response." There is however no mention in the form itself of this obligation, which makes this requirement less clear for party litigants. It is the practice of the court to notify parties as soon as any document has been lodged in the court process, which suggests that this requirement on party litigants is unnecessary and could now be revisited.

Similarly, the requirement for sending the List of Evidence and List of Witnesses Forms to both the court and the opposing party at least two weeks before the hearing is set out in the Rule and the Forms. However, this appears to create unnecessary work for party litigants given that the court is going to notify the opposite party of its lodgement so that it can be viewed online.

Further, under SPR 4.4(3) and (4) the respondent is obliged to list any documents or witnesses that they think supports their response. Unless there are any other additional documents or witnesses not previously notified, this leads to duplication of efforts with respondents having to relist them in separate documents for the purpose of the hearing.

Given that Simple Procedure is intended to be more efficient and informal, one solution might be that the parties can indicate at the Case Management Discussion whether they intend to adduce any additional witnesses and/or documents in evidence or, alternatively,

they could be advised that they will only require to complete and submit these additional forms in the event that they propose to adduce such additional evidence.

Correction of interlocutor

There is no explicit provision in the Simple Procedure Rules enabling the Sheriff to correct an interlocutor where a mistake has been made such as exists under Summary Cause Rule 23.4 or Ordinary Cause Rule 12.2-(2).

We have heard anecdotal evidence from advisers of cases which have been wrongly dismissed due to errors within the Sheriff Clerk's office. In one such example, the litigants' agents enrolled for recall of the decrees but the applications were refused as incompetent as the basis for the recall applications did not fall within the six criteria provided in SPR 13.5(1). The only options left open to the litigants were to appeal the decision (such applications being out of time by the date of the refusal of the applications for recall) or to start afresh. Application to the Sheriff Clerk to waive the court fee for lodging a new action was refused. The financial burden of administrative error should not be placed on the litigants, particularly when considering that research has consistently shown that financial costs remain a concern for those seeking access to justice.² It is important that systems remove barriers to accessing justice, rather than compounding them. We would therefore recommend that the SCJC consider whether to include an additional power of the sheriff within SPR 1.8 enabling them to correct an administrative error of this type.

Question 19 – Please provide any further comments on the rules under review regarding the submission of claims through Civil Online or the API.

Finally, whilst this may be out with the scope of the current consultation, we wished to take the opportunity to highlight that there have been some concerns highlighted by the Citizens Advice network with regards to judicial expenses, and the difficulties which are present when advising clients of possible expenses given the differing thresholds of awards. There were differing views on the matter, however some felt that the Ordinary Cause Rules on expenses were clearer, and that a similar approach in the Simple Procedure rules would be helpful. Whilst there was not a unanimous view, there may be value in exploring the issue of expenses further in the future.

Some colleagues noted that there remains a remarked reluctance on the part of Sheriffs to make an award of expenses to successful party litigants and that the five criteria laid down in Rule 3.10 seem to be rarely, if ever, applied in practice.

CAS would also wish to highlight general concerns around the impact of delays in accessing justice on clients. We know that many people find legal issues stressful and difficult to deal with. We are aware of the strain being experienced by the Court system and we acknowledge the considerable efforts being made to allow for the continuation of business in these exceptional times. However, we would welcome anything further that can be done to assist people in resolving disputes promptly and effectively, whether by way of enhanced

² For example, see discussion in 'Rethinking Legal Aid: An Independent Strategic Review', Martyn Evans February 2018

case management procedures or access to alternative methods of resolving disputes in the interim before cases can be heard.