

Ms Emma Laurie
Policy Officer
Scottish Civil Justice Council
scjc@scotcourts.gov.uk

Your ref:
Our ref:

Monday 12 April 2021

Dear Ms Laurie,

Subject: Civil Online Questionnaire

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

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Human Rights Commission (SHRC).

We welcome the Scottish Civil Justice Council (SCJC) Access to Justice Committee's invitation to respond to the questionnaire on whether the Sheriff Court Rules, which make the use of Civil Online mandatory for Simple Procedure cases, should be extended, adjusted, or allowed to expire after the 30th of September 2021.

We do not regularly use Civil Online so have not responded to the Questionnaire, however we do have significant concerns about the potential impact of mandatory Civil Online on older and disabled people. We therefore wish to raise this issue with you by letter and we hope this approach is helpful. We have completed the Respondent Information Form in Annex B (attached).

Background

The Act of Sederunt (Simple Procedure Amendment) (Civil Online) 2020/293 introduced the rule change in December 2020. We understand that the rules currently require all parties, including party litigants, to submit Simple Procedure claims using a digital interface. There is one exception under Rule 3.7 whereby a user who is unable to submit a claim online may be able to submit a hard copy but this requires the permission of the Sheriff. This is reflected in the information available on the Scottish Courts and Tribunals Service (SCTS)

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website.

Administrative role of Scottish Courts and Tribunals Service

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 2008. In carrying out that function SCTS must take account of the needs of members of the public. Under Simple Procedure Rule 3.9 – 3.10, the sheriff clerk has responsibility for checking and registering a claim form and issuing a timetable for the case. As such, SCTS administration is exercising a public function in terms of Part 3 of the Equality Act 2010.

Equality Act 2010

Reasonable adjustments (s.20)

Service providers, and those exercising a public function, have an anticipatory duty to make reasonable adjustments for disabled people. There are three requirements under the duty, one of which is:

Where a provision, criterion or practice (PCP) puts disabled people at a substantial disadvantage compared with those who are not disabled, to take reasonable steps to avoid that disadvantage.

Requiring all service users to use Civil Online is a PCP which may put some disabled people at such a substantial disadvantage.

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We know from our research in [Is Scotland Fairer](#) that disabled and older people (and those living in deprived areas, in social housing or in remote areas) are less likely to use the internet and more likely to be excluded from accessing digital services.

There is a duty on the SCTS to make reasonable adjustments. One such adjustment might be to allow the sheriff clerk to accept a paper copy, as they have done for many years prior to December 2020.

However, under the 2020 amendments, 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 three 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 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 Rule 3.7 (1A), in order

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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to access reasonable adjustments.

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

Finally, it has potential to deny disabled people recourse in the event that a request to lodge hard copy papers is declined. 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 applies to judicial functions. This exception does not apply to administrative functions. So by moving the discretion to accept hard copies from being an administrative function to a judicial one, this limits the rights of disabled people to challenge potential discrimination.

Indirect discrimination (s.19)

Indirect discrimination occurs where:

- There is an apparently neutral policy, criterion or practice (PCP),
- Which puts or would put people sharing a protected characteristic at a particular disadvantage.

Given our findings, set out above, that disabled and older people are more likely to be excluded from accessing digital services, there is a risk that mandatory use of Civil Online will indirectly discriminate against service users sharing the

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protected characteristics of disability and age.

Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. This is known as objective justification. One way of considering objective justification is to consider the range of possible responses and ask whether the PCP is the least discriminatory alternative. It is submitted that a less discriminatory alternative would be for the sheriff clerk to accept hard copy submissions. However, as narrated above, the 2020 Rules do not afford the clerk discretion to do so. By moving this discretion from being an administrative to judicial function, older and disabled people's rights to challenge potentially discriminatory practices are restricted.

Public Sector Equality Duty

There is a general duty on public bodies to have due regard to three 'needs' when exercising their public functions. The three needs are to:

1. Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act,
2. Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and
3. Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The general duty applies to public authorities listed in Schedule 19 of the Act as

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well as to those exercising public functions.

Scottish Civil Justice Council

SCJC is not listed in Schedule 19, however we note that the Council has wide functions including: keeping the civil justice system under review, making recommendations to the Scottish Ministers, conducting consultations and commissioning research. In our view these are functions of a public nature in terms of s. 150 (5) of the 2010 Act and we are therefore of the view that SCJC is required to have due regard to the three needs in reviewing the mandatory use of Civil Online. More information is available within our [Technical Guidance on the Public Sector Equality Duty in Scotland](#).

Scottish Courts and Tribunals Service

The Scottish Courts and Tribunals Service is covered by the general duty as well as the [Scotland Specific Duties](#). The Specific Duties help listed authorities to meet the general duty. In addition, SCTS is subject to the [Fairer Scotland Duty](#). The Fairer Scotland Duty 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. It is also clear from our research in [Is Scotland Fairer](#) that those living in deprived areas are at risk from exclusion from digital services. We are concerned that by restricting the discretion to accept hard copy submissions,

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this will limit the options available to SCTS to enable them to meet the PSED and the Fairer Scotland Duty.

Conclusion

The Consultation asks whether the sheriff court rules which make the use of Civil Online mandatory for Simple Procedure cases should be extended, adjusted, or allowed to expire after the 30th of September 2021.

Whilst we take no position as to whether or not they should be allowed to expire, we are of the view that the rules require to be adjusted to avoid discriminatory practices and to ensure that SCTS has sufficient flexibility to meet their PSED and Fairer Scotland Duty. Doing so may also assist SCJC to demonstrate due regard to the three needs of the PSED general duty.

We would recommend that the rules be adjusted to allow the sheriff clerk to have the discretion to accept hard copies in order to meet the reasonable adjustment duties under the Equality Act 2010 and to avoid potential discrimination against older and disabled people. Such a rule change should be accompanied by clear and accessible guidance which makes reference to the reasonable adjustment duty and sets out how older and disabled service users can access this service.

We hope this has been helpful and we would be happy to discuss this further if that would be of assistance. We would welcome your view on the issues we

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raise and look forward to hearing from you in due course.

Yours sincerely,



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