

Scottish Civil Justice Council

Consultation Response: Mode of Attendance at Court Hearings

About SALC

The Scottish Association of Law Centres is a group of law centres and other charitable organisations who provide legal services. Between us, we provide essential legal services across Scotland and on a broad range of legal issues including but not limited to housing & homelessness, social security, immigration & asylum, employment, environment, child & family law. We exist to ensure there is some form of access to justice for those who are socially disadvantaged. In addition to providing legal advice and representation, we deliver training in the communities we serve and campaigns to bring about necessary change.

General observations

For many of SALC's members, the Court of Session rules are only of indirect relevance. The Ordinary Cause Rules are of greater relevance to us and so this consultation response focuses on them. Paragraph 48 of the Consultation Paper is noted for its reference to the Council's intention to amend other relevant procedural rules to mirror the agreed approach. To that end, SALC felt it important to make the following general observations in relation to the potential impact of making remote attendance a more permanent feature of our Court & Tribunal system.

- (1) The experience of legal professionals with access to the necessary devices and systems and an understanding of court processes cannot be compared to the experience of party litigants some of whom will have neither the technological devices or skills nor the knowledge and confidence in court processes to effectively participate. To this end the categorisation of cases appropriate for in-person or electronic hearings should be less about the type of hearing concerned, but whether or not the party is likely to be represented.
- (2) Access to Justice requires the full participation of all parties concerned. Court & Tribunal Rules ought to be drafted with the party litigant in mind and ensure that the SCTS can comply with both the **Public Sector Equality Duty** and **Fairer Scotland Duty** in the implementation of those rules¹. The Fairer Scotland Duty Guidance recommends that a Fairer Scotland Duty Assessment is carried out². There appears to be very little evidence available as to the impact of the proposed rule changes on those who are socio-economically disadvantaged. In a Law Society consultation response, '41% of respondents thought their clients struggled to

¹ Sections 149 and 1 of Equality Act 2010

² <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/03/fairer-scotland-duty-interim-guidance-public-bodies/documents/00533417-pdf/00533417-pdf/govscot%3Adocument/00533417.pdf>

understand or participate in remote hearings'.³ Said consultation was not limited to those respondents who work with the socio-economically disadvantaged. The clients SALC represent will be socio-economically disadvantaged. The court and tribunal cases we represent them in will concern matters such as their potential homelessness; loss of benefits; employment rights or immigration status which in turn will affect their entitlement to wider public services. Those service users we are unable to assist will be left to navigate the system by themselves, increasing the potential for an inequal outcome.

Case study: one of our clients was served with court papers, recalling his case to court in October 2020. He is dyslexic and has literacy problems. He understood that there was a court hearing and that he was at risk of eviction. He sought to attend court on the day of the hearing. He was advised on arrival that the court was closed and that it was a teleconference hearing. When he contacted his housing officer upon returning home he was told that decree had been granted against him.

- (3) Current guidance for lay persons attending remote hearings warns users that there may be **additional costs**, should they access the remote hearing via telephone and explains that if joining web-ex via telephone **the party will not be able to see proceedings** nor participate in a Breakout Session⁴. The proposed amended OCR rules suggest 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. Any form of additional charge to access justice is greatly concerning and potentially unlawful⁵
- ⊕ Court & Tribunal Rules should be designed with the disabled person in mind. Many of our clients may satisfy the definition of having a mental impairment under Section 6 Equality Act 2010 but not identify as being a disabled person. SALC endorses the response of Equality & Human Rights Commission to this consultation.
- (5) Where electronic hearings do take place, these should be by **video conferencing as opposed to telephone based**. Justice is impacted where the decision maker does not have sight of the parties before her. For many of our clients, the anxiety caused by being called to court over a matter of such importance as the potential loss of their home, or loss of benefits can be

³ <https://www.lawscot.org.uk/news-and-events/law-society-news/survey-finds-support-for-aspects-of-remote-civil-hearings/>

⁴ https://scotcourts.gov.uk/docs/default-source/elu-virtual-courts-training-documents/sheriff-court-professionals/civil-misc/civil-hearings-webex-events/general-part-v-guide.pdf?sfvrsn=ab69177a_2

⁵ *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51

debilitating. A party litigant representing themselves on the telephone may not know when to speak or indeed appreciate the importance of speaking, where they are unable to see the decision maker and their likely legally represented opponent. We have observed Web-ex hearings where the party litigant does not have access to video-conferencing but the Sheriff and opposing solicitor do. The contribution of the party-litigant who is one step further removed from the proceedings, is minimal.

- (6) Some of the additional requirements which might come with electronic hearings create additional barriers to accessing justice for party litigants. The requirement to lodge written submissions in advance of a hearing is disadvantageous to the party litigant.

Case Study: Party litigant attended electronic hearing. Their case was continued for them to lodge written submissions. They did not understand what was expected of them and received very little guidance. They attended at the continued hearing without having provided written submissions. The case was again continued for them to provide written submissions. Following this hearing they were able to instruct a solicitor.

- (7) Throughout the pandemic we have noticed discrepancies in practice across Sheriffdoms. In the case of heritable courts, whilst the majority transitioned to remote hearings, a small number insisted on in-person hearings. In certain Sheriffdoms, written submissions have been required in advance of a hearing whereas not in others and in at least one Sheriff Court the failure to timeously lodge written submissions has run the risk that an eviction case may be decided on the papers (or absence thereof) and without a hearing. Some Sheriff Courts have been unable to confirm the new court dates until a number of weeks have passed. Reviewing the rules to ensure consistency is welcome. Consideration should be given to issuing national guidance developed in consultation with stakeholders.
- (8) Consideration needs to be given to the impact on infrastructure and the associated costs for law centres and other third sector advice agencies who require to support their clients in accessing justice remotely.

Question 6: For the categories of case listed as suitable for an in-person hearing: do you think the general presumption given is appropriate?

Yes, for those categories of case listed. SALC would go further and suggest that **other general categories of cases** be considered as appropriate for in-person hearings by default, in relation to other types of procedure. For example, housing cases where the tenant is unrepresented should by default be in person. In any procedural hearing in an eviction action, it is open to the Sheriff to grant decree. The tenant's home is at risk. Prior to the pandemic several of SALC's members offered **in-court advice and representation** to tenants & homeowners who required it, through a series of grant funded projects. The transition to remote hearings has resulted in the loss of those vital legal services which

exist to protect some of society's most vulnerable people. Whilst Web-ex provides for Break Out rooms, not all service users will have access to the necessary devices to access this function. Furthermore, 45% of respondents to a Law Society Consultation found it challenging to obtain client's instructions during remote proceedings⁶. With remote attendance of procedural hearings in eviction & mortgage repossession cases, the opportunity for solicitors and party litigants to discuss the case and reach last minute agreement 'at the doors of court' is also lost. This was a regular feature of the heritable and ordinary courts in pre-pandemic times.

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?

Whilst remote attendance by video conferencing makes good sense for procedural matters where both parties are legally represented, this is not always the case for procedural hearings where there is a party litigant, for the reasons noted above.

Careful consideration should be given to what is at stake for the unrepresented party and whether changing the mode of attendance to remote by default reduces inequality of outcome or not.

Question 8: 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?

Prior to the introduction of the Homeowner & Debtor Protection (Scotland) Act 2010, home owners who wished to defend repossession actions required to timeously lodge a Notice of Intention to Defend with the court. The Home Owner & Debtor Protection (Scotland) Act 2010 made it a requirement for all such cases to call in court, following the recommendation of the Repossessions Group, which had been convened by the Scottish Government in response to the economic downturn and rise in repossessions. Several SALC members have also provided in-court advice and representation services to homeowners who attend court without representation. SALC has concerns with a proposal which requires parties to lodge a motion in order to have their case call in court.

Furthermore, the motion process requires a fee to be paid. This is unacceptable as a pre-condition to access justice.

A disabled person should not be disadvantaged by the need to make an application to the court in order to access justice.

If there were a requirement to lodge a motion or make such other formal request to vary the mode of attendance, there should be a presumption in the granting of a motion made by a party litigant.

⁶ <https://www.lawscot.org.uk/news-and-events/law-society-news/survey-finds-support-for-aspects-of-remote-civil-hearings/>

Question 9: Do you agree that the court should have the final say?

It is not clear whether there would be any appeal rights were a Sheriff to refuse a motion to change the mode of attendance.

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

See general observations above.