

Response by the Scottish Legal Action Group to the consultation by the Scottish Civil Justice Council: "Rules Covering the Mode of Attendance at Court Hearings"

Introduction

The Scottish Legal Action Group ("SCOLAG") exists to increase understanding of the law and legal services, and work to improve the legal system for the benefit of those people in Scotland who are economically, socially or otherwise disadvantaged.

SCOLAG is grateful for the opportunity to respond to this important consultation.

Access to justice

The civil justice system is used by many of the most vulnerable in our society, with significant decisions being taken about, amongst other things, their homes, family and rights. It goes without saying that changes to the rules relating to how parties, witnesses and others participate in the civil justice process raise significant access to justice considerations.

On the one hand, therefore, the consultation offers an excellent opportunity to consider how access to justice can be improved. There is, after all, plenty of room for improvement.

On the other, if hearings are reformed without sufficient regard to the impact of the reforms on vulnerable users and access to justice, there is a risk that existing processes will become even more difficult for court users to effectively participate in.

Engagement with court users

Given the potential implications of the reforms contained in the consultation is important that stakeholders, including court users, are able to engage fully in the consultation process. In our view, outreach efforts are needed to inform court users of the proposals contained within the consultation and of what they may mean.

Consulting with persons likely to be affected by proposed decision-making is fundamental to good and fair governance. Further, a widely promoted and well-responded to consultation helps to improve the quality of decision-making, because it means decision makers have the benefit of input from those with different perspectives.

Notwithstanding the importance of this consultation, there appears to be no attempt by the SCJC to engage in the kind of outreach with court users that might be expected. We are aware of no (virtual or in-person) "roadshows", no public meetings, no real attempt to engage with persons other than those likely to be familiar with the work of the SCJC. This is surely a matter of regret given the importance of the proposed reforms.

We worry that the effect of this is likely to have been a consultation process which, in reality, failed to obtain input from those who will feel the real-life effects of the changes proposed. Whatever route future reform takes, the vulnerable in our society who rely on courts need to remain at the very centre of projects of reform.

The SCJC's proposals

As to the substance of the SCJC's proposals, SCOLAG has two concerns. The first relates to the existence of a general presumption for remote hearings in civil proceedings. The second relates to the lack of explanation as to how the SCJC's proposals conform to the constitutional principle of open justice.

Effective participation

As to the first, SCOLAG does not accept that a presumption in favour either of in-person hearings, or remote hearings is the preferable way to proceed in terms of access to justice. SCOLAG believes that access to justice can be both facilitated and hindered by either approach and that there are factors which are likely to affect matters (such as e.g. the digital literacy of parties to the action and their own geographical location and access to means of travel) that arise on a case specific basis.

Instead, in SCOLAG's view, parties should be prompted at the earliest possible opportunity (e.g. in a Simple Procedure claim or response form, or when lodging an initial writ or defences) to make representations as to the appropriate means of participation to be followed.

Where parties agree as to the appropriate means, there should be a presumption in favour of the court acceding to that agreement.

Where parties do not agree, the matter of the appropriate means of participation should be determined by the court according to the individual facts and circumstances of each case, having regard to the need for effective participation.

Open justice

The Consultation notes that the "vision for truly open justice should be one in which the public and the media should be able to see and hear video hearings. In the longer term that should ideally be achieved without having to make an application." The principle of open justice is of constitutional importance. Justice must be **seen** to be done. SCOLAG therefore agrees with this vision.

However, the Consultation sets out that public access to electronic hearings is presently only provided "where practicable" and that video access is not available to the general public (as opposed to accredited journalists).

The Consultation explains that the "temporary restriction on the public being able to **view** hearings conducted by electronic means is expected to remain in place **until appropriate safeguards can be devised** (emphasis our own)."

SCOLAG does not have expertise in video technology. That said, it seems to us that society is some way off devising a system for live-streaming video that **cannot** be recorded. What is to stop, for example, a person recording a livestream by filming it on their mobile phone?

Unless the SCJC is aware of some technology which will prohibit unsophisticated recording of proceedings broadcast by video, it seems to SCOLAG that the "temporary restriction" on the general public being able to see civil justice unfold is likely to last very long indeed. That is not a satisfactory state of affairs. It represents an interference with open justice even after the pandemic has passed, and has serious implications for access to justice.

In SCOLAG's view, it would be inappropriate to proceed on the basis of the proposals contained in the SCJC's consultation without a better explanation of how open justice will be facilitated (including how members of the public will be able to see proceedings unfold).

It is for SCJC to devise a solution in that regard. If that means, for example, utilising the public benches in courtrooms to enable the general public to see and hear (even entirely virtual) hearings broadcast live, then so be it. For the avoidance of doubt, we do not advocate that solution as a perfect one. But if the SCJC's proposals are to be implemented, a solution in terms of open justice is needed.

Next steps

SCOLAG would welcome the opportunity to contribute further to this important discussion.