

## **Scottish Civil Justice Council- Consultation: Rules Covering the Mode of Attendance at Court Hearings- response from Scottish Women's Aid**

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to eradicate domestic abuse, playing a vital role in campaigning and lobbying for effective responses. We provide advice, information, training and publications to our 34 member groups and to a wide variety of stakeholders. Our local Women's Aid groups provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

We welcome the opportunity to comment on this important matter which has implications for women, children and young people experiencing domestic abuse and access to civil justice.

### **Introduction**

Before any moves to make permanent changes are considered, there is a need for an in-depth review of the efficiency and impact on court attendance by electronic means, both by video and by telephone, on civil court lay users, their experiences of engaging with both the court and their legal representative during remote hearings and in accessing support during this process. This vital piece of research must be carried out before moving to put any systems finally in place, particularly since these provisions were introduced rapidly in response to the global pandemic.

The consultation paper notes at page four, *“For some court users the attendance at hearings by electronic means has been perceived as delivering significant benefits in terms of reduced travel time and inconvenience, as well as more efficient hearings. For other court users it has raised concerns over how best to facilitate effective participation, maintain the gravitas of the court and respond to the availability of technology.”* Reference is again made in paragraph 23 to electronic attendance at hearings being *“transformational with significant perceived benefits”* but the evidence for this is not clear and indeed, paragraph 21 acknowledges that the changes were implemented *“...by SCGTS at pace..”* without the normal consultation period and without being *“subjected to significant piloting”* expected by the public before any national roll-out and such substantial changes to practice being made permanent.

Considerations around the pros and cons relating to the use of electronic attendance in civil proceedings currently seems to be on the technology, to the detriment of the practical issues facing, and impact on, lay users and party litigants. The evidence base must be clear before decisions are made on more permanent use of electronic attendance. In particular, there needs to be a thorough assessment of the benefits and the risks to civil court users, and input from lay users and party litigants as well as civil society organisations that provide specialist support to them.

The consistency and fairness of approach referred to in the consultation paper can only be achieved with the involvement of civil court users. While we are aware that the Judicial Institute held an event in May 2021 to discuss how civil business might

be conducted once the pandemic was over<sup>1</sup>, this was overwhelmingly attended by judiciary, legal professionals and other organisations, as opposed to lay court users and the public.

It is particularly important that consultation is held with women, children, and young people experiencing domestic abuse, and the specialist support organisations working with them during their engagement with the civil process to fully understand the extent to which the proposed changes would be beneficial or could increase their barriers to accessing justice. There is extensive research on how the civil court process, particularly proceedings in relation to child contact in the context of domestic abuse, impact negatively and disadvantage these parties; therefore, it is especially important to understand the impact of the proposed changes on this group of court users.

Paragraph 6, on page 8, states “*When exercising that choice, there is a need to ensure that the chosen mode of attendance would not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice.*” For women, children and young people experiencing domestic abuse, access to justice, the ability to participate fully in proceedings impacting on their safety, wellbeing and for children, essentially the rest of their young lives, is essential, not only in the interests of ensuring justice and fairness, but also as a human rights issue, in order to ensure their Article 6 and Article 8 rights are fully engaged and supported. This must be a consistent thread through any reform to civil procedure.

### **Issues facing women, children and young people**

The Equality and Human Rights Commission’s interim report<sup>2</sup> on video hearings and their impact on effective participation, although focussing on criminal proceedings and parties with disabilities, indicated barriers in accessing justice for those who were not familiar with the technology or did not have the required equipment and it is vital that the use of remote hearings is considered on a case-by-case basis.

Similar concerns were raised in the 2020 research carried out by the Nuffield Family Justice Observatory specifically in relation to family proceedings in England and Wales<sup>3</sup> in relation to parties in cases involving domestic abuse, parties with a disability or cognitive impairment or where an intermediary or interpreter is required. Indeed, their follow-up report, produced in July 2021<sup>4</sup> reiterated these points. Lady Wise also commented on virtual hearings and domestic abuse in her presentation to the Scottish Judicial Institutes’ Civil Justice Conference in May of this year<sup>5</sup> referring to the Nuffield research from England and Wales.

Examples of practices that were unsatisfactory in relation to maintaining and ensuring confidentiality and safety of women and children included:-

- Safety concerns around women and perpetrators being the only participants at any point in virtual proceedings and also that perpetrators may be recording phone or video the proceedings
- Trauma and distress to women through revisiting personal and sensitive issues of abuse when giving evidence alone in their own homes

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<sup>1</sup> Civil Justice Conference, May 2021 <https://www.scotcourts.gov.uk/about-the-scottish-court-service/civil-business-post-covid-19>

<sup>2</sup> Inclusive justice: a system designed for all; EHRC; 2020 [https://www.equalityhumanrights.com/sites/default/files/inclusive\\_justice\\_a\\_system\\_designed\\_for\\_all\\_interim\\_report\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf)

<sup>3</sup> Remote hearings in the family justice system: a rapid consultation; Nuffield Family Justice Observatory; 2 020 [https://www.judiciary.uk/wp-content/uploads/2020/05/nfjo\\_remote\\_hearings\\_final.pdf](https://www.judiciary.uk/wp-content/uploads/2020/05/nfjo_remote_hearings_final.pdf)

<sup>4</sup> Remote hearings in the family court post-pandemic Nuffield Family Justice Observatory; 2021 <https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/07/remote-hearings-in-the-family-court-post-pandemic-report-0721.pdf>

<sup>5</sup> Paper by Lady Wise on Procedural Hearings and Debates in the Scottish civil courts post-pandemic

- Physical and mental impact of remote hearings on participants, including isolation from both sources of specialist support and their legal representative,
- Virtual proceedings making it harder for women and children to engage with, and being unable to access, support
- impact on women and children's ability to give evidence and on legal representative's ability to fully advocate on their behalf
- inadequate space and privacy in the home environment and connectivity issues and capability of devices hindering or preventing full participation

However, there are undoubtedly benefits to women, children and young people experiencing domestic abuse from remote hearings

- from a logistical point of view in not having to make the, possibly lengthy, journey to the court, with the cost that involves not only in transport but potentially for childcare and loss of earnings.
- Similarly, the physical safety of women and children may be improved by avoiding the possibility of meeting the perpetrator, and potentially his family and friends, not only on public transport but also in the court building itself
- Not being faced with the perpetrator in court.
- Virtual proceedings should reduce waiting times in terms of parties not having to sit around court, may allow court backlogs to be progressed and the swift disposal of cases

Choice is therefore, a major consideration and as Women's Aid Federation of England noted in the 2021 Nuffield Research, "*We would like to stress the importance of offering vulnerable parties choice in any arrangements going forward. Survivors of domestic abuse need to be able to choose the safest option for their individual circumstances, and they are the best people to decide which option is best for them.*"

In relation to the position in Scotland, anecdotally, we are hearing reports of issues from professionals that replicate concerns noted above in research from England and Wales

- It is unclear how special measures are being used to help vulnerable and intimidated witnesses give their best evidence in court or to relieve some of the stress associated with giving evidence. Some are distressed by being alone at home during the hearings where they might hear or see the perpetrator.
- Issues arising when women have to phone into Child Welfare Hearings and were unable to engage with their legal representative or the sheriff and are being told not to address the sheriff.
- Impact on legal representative's ability to fully advocate on behalf of women as there is no way to tell via a phone whether the sheriff has grasped the significance and seriousness of the matter, the position advanced by the woman's lawyer or has understood the issues around domestic abuse.
- Cases have been dealt with where all the parties to the case apart from the client is in attendance, leading to poor decisions in relation to child contact.
- Fears around women's safety; solicitors have no idea where the perpetrator is or who is in the room with the woman if she is "attending" from home, and also issues of confidentiality.
- There are concerns that perpetrators may be recording the proceedings and we have heard of instances where their behaviour has not been conducive to a proper and fair conduct of the case; perpetrators may be able to protest that

they have not engaged with the process because of a bad connection where the sheriff makes a decision they do not like and similarly can “disengage” from the proceedings if it is not going to their liking. (The 2021 Nuffield research specifically mentions the fear of a woman experiencing domestic abuse that her partner will record and distribute information about the proceedings and again, this is a matter requiring urgent attention and further engagement.) This is an issue that must be discussed here with women, children and young people experiencing domestic abuse and specialised support services.

- In cases of domestic abuse, where coercive control or other high-risk abuse is a factor, as with the ongoing experiences of women, there is a risk that the virtual process itself may be used as a coercive control tactic and increase feelings of vulnerability

This underlines the importance of researching the impact on users before any further steps are taken to make permanent changes to the mode of attendance.

In the meantime, specific guidance and protocols are needed on the management of remote hearings and these must be put in place as a matter of urgency as an interim measure until the appropriate user research has been swiftly concluded and findings evaluated. The guidance must address the management of risk in domestic abuse cases generally, and how to protect, ensure, support and facilitate the best and safe participation of children, and women to give their evidence, during and after the hearing and how to end hearings.

Our final comment relates to the EQIA accompanying the consultation. In relation to the Protected Characteristic of “Sex”, it does not go far enough in addressing issues and barriers specifically arising for women, and the only reference is to the benefits of electronic hearings in relation to ameliorating child and other caring responsibilities. It does not refer to the systemic inequalities for women engaging with the justice system, and particularly the disproportionate negative effect of engaging with proceedings that can be experienced by women experiencing domestic abuse and how virtual proceedings may be to their benefit or detriment, setting out all the points we have raised above. We would also point out that women may be additionally vulnerable due to the nature of the proceedings themselves, and this issue was referred to by the Scottish Legal Complaints Commission in their guide around designing services to meet the needs of consumers at risk of vulnerability.<sup>6</sup>

Ample evidence points the disproportionate impact of COVID (and concomitant court delays) on women and their children. We suggest that the appropriate response would be to indicate how proposals address that disproportionate impact, as the obligation is not just to avoid discrimination but to improve outcomes. The EQIA is therefore not representative and effectively needs redrafting accordingly.

SWA would welcome further discussion and engagement with the SCJC on the matters discussed in this consultation and to support the SCJC engagement with both women, children and young people experiencing domestic abuse who are in touch with local Women’s Aid specialist services, and the workers in those services.

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<sup>6</sup> <https://www.scottishlegalcomplaints.org.uk/about-us/consumer-panel/vulnerable-consumers/>