

# **Consultation on Permanency of certain criminal justice measures from Coronavirus Recovery and Reform (Scotland) Act 2022 and modernising criminal justice procedures through digital processes**

## **Citizens Advice Scotland Response – 12<sup>th</sup> February 2024**

Citizens Advice Scotland (CAS), our 59 member citizens advice bureaux (CAB) and the Extra Help Unit form Scotland's largest independent advice network. The Citizens Advice network in Scotland is an essential community service that empowers people 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.

### **Background**

The Citizens Advice network in Scotland supports thousands of people across Scotland each year to understand their rights and responsibilities and seek access to justice, through holistic advice provision across a wide range of civil and administrative issues including benefits, debt, finance, utilities, housing, employment - and to a lesser extent (their interactions with) criminal justice issues -, as well as advice and support on legal proceedings and judicial and non-judicial remedies. This can take the form of generalist advice, specialist in-court advice such as court and tribunal support and lay representation, as well as advice to prisoners through prison-based projects in several CAB.

The significance and scale of this advice service is reflected in the following figures:

- In 2022/23, the Scottish CAB Service provided 665,500 pieces of advice and support to 183,800 individual clients across Scotland through multiple channels, including face-to-face, per phone or email.
- The network currently provides more than 3,200 pieces of advice on legal proceedings in an average month across the country. In 2022/23, citizens advice bureaux provided more than 40,000 pieces of advice on legal proceedings to more than 15,000 individual clients.
- In Q1-3 2023/24, 5% of all legal proceedings advice provided by bureaux related to criminal justice, slightly exceeding pre-pandemic levels.
- In 2022/23, the network supported 1,829 clients at courts and tribunals, with 1,600 of these cases (87%) won or upheld.
- The economic value of the advice we give on legal proceedings was estimated to be £11.58 million.<sup>1</sup>
- Our public-facing online information and advice site '[Advice for Scotland](#)' – which people can freely consult for self-help, registered more than 4,360,000 unique page views (UPVs) across all advice areas in 2022/23. As in previous years, among all our advice pages, 'The Law and Courts' pages have the highest number of UPVs (22-23% in Q1-Q3 2023/24).

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<sup>1</sup> [The economic value of advice report](#) (cas.org.uk) (March 2021), p. 20.

Based on our client experiences and data, as well as expertise from across the Citizens Advice network in Scotland, our policy work on Access to Justice at CAS aims to ensure that people's rights are protected and realised, that people in Scotland have equal access to the justice system and legal services regardless of who they are, where they live, their digital skill level, or the specialty of their legal issue; can navigate and engage appropriately in legal proceedings; and that processes are transparent and fair.

Following on from our previous engagement with the Coronavirus Act 2022<sup>2</sup>, CAS welcomes the opportunity to respond to this consultation. Below we focus on consultation questions where CAS can contribute an informed response.

## **Chapter 1 - Conduct of business by electronic means in criminal cases: Documents**

### **Q1. It is proposed that the provisions for Chapter 1 (Conduct of business by electronic means in criminal cases: documents) will be made permanent. Which of the following best describes your view?**

We think the provisions for Chapter 1 should be made permanent, with exceptions (please outline exceptions below).

#### **Comments:**

CAS supports making temporary provisions relating to the use of electronic signatures and digital transmission of documents in criminal cases permanent, as we understand these can improve access to and speed up court processes for some – however the implementation of these provisions must acknowledge the multiple barriers many people experience and additional support they will require to engage in digital communications and offer alternative methods and support where required. In the following example, a CAB client had significant literacy issues which could be further compounded if digital communications become the default.

A South of Scotland CAB reports the case of a client who says he cannot read or write and was assisted on the advice call by his wife. He had been to the Sheriff court for a hearing but was told the date had already passed. When the client explained his circumstances to the Sheriff Court and the Procurator Fiscals Office he was informed that a warrant for his arrest was out. Despite him telling them about his inability to read or write they did not assist him to write a letter explaining why he had missed a hearing and, instead, signposted him to Citizens Advice.

We would caution against simply relying on electronic transmission of documents to a person's solicitor instead of requiring these documents to be also sent to a party in a criminal case (s2(1) CRR (Scotland) Act 2022). Some individuals may for various reasons have difficulties engaging with or contacting their solicitor as exemplified in the following case – this would leave them at a significant risk of missing vital documents and messages if they are only sent electronically and/or only to their solicitor.

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<sup>2</sup> [Citizens Advice Scotland - Response to consultation on extension of temporary justice measures in the Coronavirus Recovery and Reform Act.pdf](#).

An East of Scotland CAB highlights the case of a client who is the accused in a criminal case. He has apparent mental health problems and finds it difficult to focus on the case. He reported he had sought help from a number of solicitors but felt they had not helped him and would no longer engage with him nor represent him. He faces difficulty and frustration trying to find and retain a solicitor to represent him in his criminal trial.

The current provisions stipulate that the Lord Justice General, as the head of the Scottish criminal courts, can direct that there should be exceptions to the rules regarding electronic signing and sending of documents, and that physical documents and signatures or sending to the person themselves should instead be used (s3(2)(b)). CAS would urge that such exceptions are not just based on document type and mainly aimed at efficiencies but that courts have a duty to holistically take into account, at the earliest opportunity possible, the situation and needs of the individuals involved to enable a person-centred implementation of these rules and everyone's equal access to justice.

Similarly, we acknowledge that the provision in s4 that any requirement to display a document on the walls of a court building or to make it publicly available within a court can also be fulfilled by publishing the document on the SCTS website reflects society's move towards digitisation and may assist in making the justice system more accessible for many. We continue to support the redaction of sensitive information to account for any issues arising from the potential online publication of sensitive data. However, we remain concerned about the possibility that some members of the public could be prevented from accessing this information due to digital exclusion and would thus urge that paragraph 4 is implemented in a way that retains the physical displaying of documents alongside their digital intimation.

## **Chapter 2 – Virtual attendance – criminal courts**

**Question 2: It is proposed that the provisions in Chapter 2 (Virtual attendance – criminal courts) will be made permanent. Which of the following best describes your view?**

Unsure.

### **Comments for Question 2 and Question 3:**

CAS, generally, notes that some court users supported by the Citizens Advice network have welcomed the use of remote and virtual hearings, especially where geography, health or physical access needs may make attending in person more difficult, or where individuals have found remote hearings less frightening, emotionally taxing or (re-)traumatising than an in-person hearing in court. We recognise that making the provisions regarding virtual attendance in criminal court permanent can support a more trauma-informed and person-centred administration of criminal justice by enabling courts to tailor the mode of attendance to individual's circumstances, while it can also contribute to clearing the backlog and enable more timely justice.

We are, therefore, supportive of provisions that allow criminal proceedings in which the only party is a public official to be held virtually - as long as exceptions can easily be made by courts and upon requests by the parties involved, in the interests of a person-centred and fair justice system.

We support the suggested provisions regarding virtual attendance in criminal cases as long as physical attendance at hearings remains the default for most criminal business, and courts can only overturn this on an individual case-by-case basis when it is satisfied that virtual attendance would not prejudice the fairness of proceedings or be otherwise contrary to the interests of justice. When making this decision, we would urge courts to follow the mode of attendance requests by the prosecution and/or defence as much as possible, in order to accommodate and balance individual needs of victims, witnesses and the accused.

It is crucial that restrictions continue to apply to the Lord Justice General's power to issue determinations to change physical attendance to virtual attendance, so that criminal trials cannot be made virtual by default. We are concerned about retaining the Lord Justice General's power to issue determinations to change the default to virtual attendance for certain other types of hearings or cases or in certain circumstances; we believe mode of attendance should always be decided by the individual needs and circumstances of the parties rather than by hearing type or case type.

**CAB advisers working in prison settings** and providing crucial advice and support to prisoners have, for example, highlighted that virtual hearings, while often welcome to speed up trial dates and proceedings, can lead to disengagement of the accused – the physical immediacy of the court room and other participants and the significance of the hearing for the accused can be lost in virtual hearings, where things 'seem to be happening on screen, and are somewhat detached and less real'. The right of the accused to meaningfully participate in criminal proceedings can be further affected where individuals face additional barriers such as language or disability.

CAS has also consistently highlighted that the way in which remote and virtual hearings are operated in practice gives rise to a number of other concerns; while most of the following paragraphs relate to the civil justice system, much of the issues are likely to exist in the criminal justice system as well:

➤ **Digital exclusion:** While CAS supports the use of digital technologies to enhance access to the justice system where appropriate, we would like to reiterate our firm belief in channel choice not channel shift, meaning individuals should be able to choose how to engage with the justice system. This approach is vital to ensure that no one is excluded from accessing justice or court services due to their lack of digital access, as in the example below:

A disabled client sought a West of Scotland CAB's support prior to proceedings at the local Sheriff Court in which he aimed to challenge a decree regarding the arrestment of his car for a debt he owed. The client faced being unrepresented in the ordinary cause proceedings as he was unable to find a local solicitor willing to take on his case but wary of having to travel and use a solicitor further afield due to his low immunity. The client stated he required assistance from the court to

lodge documents but was told by court staff that no assistance could be provided and if he made one more mistake on the forms, they would refuse to accept the documents altogether. He also stated that he had no facilities to attend the WebEx court hearing. CAB offered assistance in locating solicitors and use of CAB facilities to secure access.

It is important to underline that third sector organisations such as the Citizens Advice network in Scotland do not have the physical capacity or resources to provide digital technology support in all cases where it is required. As such appropriate support and funding is required to ensure users can adequately navigate the justice system when engaging with it digitally.

➤ **Technical issues and failures:** CAB advisers regularly report that even when clients physically have digital access limitations and failures of the technology both in virtual and telephone hearings can create significant problems and impact clients' experience and right to access of justice. For example:

An adviser in a North of Scotland CAB supported a disabled client in a tribunal hearing when the online hearing platform experienced technological problems which could not be resolved despite several attempts. This resulted in the adviser having to operate three different lines of communication – mobile phone in one hand, landline phone in the other, while he could see the court on-line, but the court could see neither the client nor him. These issues resulted in the hearing overrunning by 2 hours and a very distressing experience for the vulnerable client.

A West of Scotland CAB supported a client for whom English is an additional language in a virtual first-tier tribunal hearing contesting a DWP (Department for Work and Pensions) decision. The online hearing started late, then problems arose due to the interpreter not speaking the client's native language. The hearing had to be recessed to give the adviser a chance to separately take instruction from the client in which he made clear that he wanted the hearing adjourned so that an interpreter speaking the correct language could assist him in the proceedings. Several attempts to resume the video hearing afterwards failed, as the adviser and client could not be added to the virtual hearing room due to technical problems, so the hearing had to proceed by telephone instead. When the client started to become more and more agitated, the hearing was brought to a stop by ending the call. The adviser called the client to advise on what will happen next.

Technical problems can cause further detriment to clients and parties when something goes wrong with technology while parties are left without any real-time support to bring this to the court's attention. CAB advisers have told us of clients in civil proceedings who experienced technological issues which prevented them from joining virtual platforms at short notice. They were unable to find a way of alerting court staff to this, meaning the court assumed they had simply opted not to participate and proceeded to grant orders, such as those for eviction or custody, which had far-reaching impacts.

➤ **Vulnerable persons and people with protected characteristics:** CAS remains

concerned that the use of remote and virtual hearings can disproportionately disadvantage vulnerable individuals and those with additional support needs. We believe that it is unrealistic to expect vulnerable groups or those with additional support needs to engage with remote and virtual proceedings without providing some one-to-one support.

CAB advisers also report that in-person hearings can be vital for many participants when the honesty of their account and their veracity are crucial for the case – which may apply to criminal cases as well. Participants’ ability to fully engage may rely on physical co-presence and immediacy which can be significantly impaired in telephone or virtual hearings. Similarly, CAB advisers reported that in cases where interpreters are involved to assist a client in participating in and navigating proceedings, it may be crucial that interpreter and client are in the same (quiet) room so that they can communicate clearly and confidentially with each other during the hearing. The same is true for communication between representatives/advisers and clients where virtual/remote hearings can impede their confidential communication and real-time advice.

## **Chapter 8 – Impact Assessments**

### **Questions 15 and 16: Human Rights and Equalities impacts**

#### **Comments:**

#### **Digital Exclusion and Access to Justice**

As outlined throughout our engagement around the CRR Act, CAS remains concerned that the implementation of the provisions may be creating a ‘digital by default’ approach, which poses challenges for many of our clients in engaging with the court system and consequently poses barriers for their access to justice.

CAS understands that the use of digital technologies - such as virtual hearings, electronic submissions, email, and e-signatures – can enable greater efficiency in court services and operations, which can be beneficial for those involved in proceedings. However, for significant numbers of people in Scotland who face digital exclusion, these technologies can create additional barriers to navigating court processes and can impede their access to justice. We are concerned that the reliance on digital means of participation in criminal court proceedings risks people being unfairly disadvantaged and/or excluded from the justice system.

CAS is aware that a digital divide continues to disadvantage individuals and communities across Scotland. Research from CAS<sup>3</sup> has previously identified that key barriers for people getting online include a lack of devices or connectivity, particularly for Scotland’s rural and island communities, lack of skills and/or confidence; and barriers related to literacy, language, or health issues. Ofcom research in 2022 found around one third (32%) of UK households struggle to afford communications services<sup>4</sup>; while YouGov

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<sup>3</sup> 'Disconnected: Understanding Digital Inclusion and Improving Access' | Citizens Advice Scotland (cas.org.uk)

<sup>4</sup> 'Ofcom: Affordability of communications services', 2022. <https://www.ofcom.org.uk/research-anddata/multisector-research/affordability-of-communications>.

polling on behalf of CAS in 2022 found that of the 1 in 5 people who regularly run out of money before payday – one in 7 go without internet access as a result; while one in 5 go without mobile phone access.<sup>5</sup> The current cost of living crisis is leading to more people struggling to afford mobile/broadband data which would allow them to access legal and court services online.

Those who face digital exclusion are often dealing with interrelated barriers or vulnerability such as financial insecurity, disability, literacy, or language barriers – alongside the potential stress and impacts of facing criminal court proceedings as a victim, witness, or the accused. Certain ethnic minorities, migrants for whom English is an additional language, individuals with a disability or long-term health issues and those from areas of high socio-economic deprivation might be particularly impacted by moves to further digitise the criminal justice system. Moreover, prisoners, including those on pre-trial and pre-sentencing remand, constitute a group potentially severely impacted by these provisions, as *per se* they lack access to the internet and digital technologies.

The Citizens Advice network in Scotland recognises that the option to hold court proceedings digitally improves accessibility and allows for person-centred accommodations for some in certain circumstances, while efficiencies which allow the backlog to reduce are in everybody's interests. These benefits, however, must not come at the expense of access to justice for the most vulnerable in society. Any shift towards digital by default in court business and proceedings must therefore be matched with enhanced support for individuals who face barriers to navigating these processes digitally, to prevent any unfair disadvantage or their exclusion from the criminal justice system.

We believe more support is needed to enable vulnerable and digitally excluded groups' access to justice and that the best way to mitigate these potential detriments is through channel choice. This would allow the involved parties to choose the most appropriate method of participation in criminal court processes to suit their needs, rather than, as may happen in practice, the default channel being determined for administrative reasons such as the type of hearing or case.

Moreover, CAB advisers supporting those in prison-settings have highlighted to us that independent advice services such as the Citizens Advice network should be given internet access inside prisons to enable them to safely provide timely, accurate and efficient information and advice to prisoners, a group whose human rights are particularly at risk.

If the temporary measures consulted on here are being made permanent and further proposals to maximise remote and digital ways of working in the criminal justice system are brought into law, legislative measures and their implementation must be improved to mitigate the additional barriers that a digital first approach poses for certain groups' access to justice. Close monitoring is required of the impacts of these provisions on people's human rights as well as equality and inclusion in the criminal justice system, so

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<sup>5</sup> All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 1504 adults. Fieldwork was undertaken between 14th February - 4th March 2022. The survey was carried out online. The figures have been weighted and are representative of all Scottish adults (aged 16+).

that continuing and newly developing issues impeding people's access to justice can be better understood and addressed.

For questions please contact: Hyo Eun Shin, Policy officer – Access to Justice, Strong Communities Team. [Hyo-eun.shin@cas.org.uk](mailto:Hyo-eun.shin@cas.org.uk)