

Citizens Advice Scotland (CAS) response to the consultation on Coronavirus (Recovery and Reform) (Scotland) Bill

February 2022

Introduction

Scotland's Citizens Advice Network 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.

In the first eleven months of 2021, Citizens Advice Bureaux have collectively provided over 35,000 pieces of advice on legal proceedings.

Page views for the Law and Courts pages on our public advice site are increasing. Between April-December 2021, these pages had 655,076 unique page views. Our taking legal action page had 126,057 unique page views, and our helping with legal costs page had 12,717 page views. All page views are on course to be higher than those from 2020-21 and 2019-20. In 2020-21, the network helped clients in relation to more than 3,206 tribunal and court outcomes; and 92% of these cases were won/upheld.

Our response to this consultation will primarily focus on the provisions that would impact the operation of the justice system and the provisions relating to housing.

Will these provisions help deliver a recovery from the impacts of COVID for your sector and/or address backlogs in the delivery of public services?

The impact of the COVID pandemic on the justice system has been significant and there are now considerable case backlogs. Before the pandemic, there were approximately 17,930 trials outstanding. That number, as of January 2022, is 43,790 trials. This has resulted in the number of people remanded in custody increasing to historic levels and those on remand being held longer than the prior statutory provisions would permit. This has had an impact on the employment, health, and housing opportunities available to individuals and their families as they wait for their case to be heard. The case backlogs also impact on the finances, health, and stress levels of those who are waiting for civil cases to call.

The pandemic has resulted in significant changes to the operation of the court system. There has been a general move to electronic submission of court documentation and virtual court proceedings in a bid to address the backlog and to allow for the continuation of court business. While these reforms have allowed the court system to continue operating, Citizens Advice Scotland (CAS) have concerns that these measures can create difficulties or barriers for solicitors and advice providers in effectively communicating and advising clients.

CAS also has concerns that the digital provisions in the Bill, as they relate to court business, raise the risk of digital exclusion. A lack of access to digital services may be caused by affordability issues, by a lack of connectivity, lack of access to a device, or lack of skills. Even those who can access a device may not be entirely comfortable with virtual proceedings, especially if they have any vulnerable characteristics. CAS would be concerned if the provisions led to a digital by default approach. We believe that for individuals to be able to participate appropriately in the court system, they should be able to choose the method of participating – virtual, hybrid or in person – that best meets their needs.

In relation to legal aid, even where this is available, clients across the Citizens Advice network in Scotland have reported difficulties in finding a practitioner who will take on their case. This has repercussions for the backlog of cases and the impact of the backlog on court users. These difficulties apply especially in relation to remote and rural areas, ranging from the Highlands to the Borders, and in certain specialisms. We believe that urgent reforms are needed to ensure the legal aid system continues to meet user needs as we recover from the pandemic.

In summary, while CAS agrees that the use of electronic documents and virtual hearings may assist in clearing the backlog, we are concerned that the reliance on digital means of participation in court business risks people being excluded from the justice system. We believe more support is needed to enable vulnerable and digitally excluded groups access to justice.

As indicated later in this response, we believe that in addition to the measures in the Bill which tackle the backlog, there is a need for a bolder, more imaginative approach which would allow disputes and cases to be resolved at an earlier stage; before court action is contemplated. Such an approach would require a rebalancing of the Legal Aid budget to place a greater emphasis on prevention and early intervention.

In relation to housing issues, CAS welcomes the provisions of the Bill which will ensure that all grounds for eviction proceedings will be discretionary going forward, whilst retaining a pre-action protocol for landlords with tenants facing eviction for arrears. We consider that the application of these measures during the pandemic assisted in protecting the needs of vulnerable households and we welcome these measures being made permanent.

Do the provisions enabling the digital delivery of public services ensure that any potential negative impacts are overcome?

CAS recognises that Scottish society is moving towards the increasing digitisation of services. While we understand that the move to online services will continue, CAS is concerned that people may be excluded if services are fully digitised, or a digital-by-default system is established. Further moves towards digitisation must include sufficient safeguards to ensure that no-one is excluded from accessing the justice system and alternative communication and engagement methods must be easily accessible and available to users.

CAS has carried out research into digital access which identified that key barriers to getting online include skills and confidence; practical access; health issues, and literacy and language. While there have been positive changes in recent years, there remains a group of Citizens Advice Bureau (CAB) clients, often with vulnerabilities, who may lack the skills to go online and also may face other barriers, such as literacy and language, in doing so. While

we appreciate the need to move towards online services during the pandemic, this has led to further complications for some CAB clients. Many clients would previously have accessed devices and Wi-Fi through support services or community venues such as public libraries and the pandemic has prevented these clients from being able to access face-to-face advice and assistance. Opportunities for getting online, or receiving assistance in doing so, have been greatly reduced.

We are concerned that the move to virtual hearings has the potential to disproportionately disadvantage party litigants or clients who are assisted by CAB. Without attending physical court room locations, party litigants may not be signposted to advice and advocacy services (where these exist and are appropriate). The In-Court Advice services offered by some Citizens Advice Bureaux are predominantly physically located within the court building and so many clients drop in on the morning of their hearing, having either been signposted by the Sheriff Clerks or having seen relevant signage. If the clients are not physically in the Court, they may be less likely to get advice or representation for their case, which for instance in eviction or repossession hearings can be detrimental. The drop-in service is a vital resource to communities and a system of remote hearings by default could be detrimental to many CAB clients, who may be unable to access resources or representation, or have difficulties in understanding proceedings.

We consider that unrepresented parties will need additional support to access virtual court services, to ensure that they understand them and that they can participate in them effectively. In our view it is unrealistic to expect vulnerable groups to engage with virtual services without providing some one-to-one support. Further, we would note that In-Court advice services only operate in some areas of the country. Even where services exist, they have different remits and are not funded to assist users in all types of actions. For these reasons, we believe that further action is needed to ensure that people are able to access, understand and participate in proceedings that affect them.

The proposals in the Bill would mean that the nature of the proceedings would determine the way that a hearing is attended (virtually, audio, hybrid, or in-person). CAS disagrees with this and believes that parties engaged in legal action should continue to have the option to attend proceedings in the manner that best meets their needs and facilitates their active understanding and involvement in proceedings. It is CAS's view that the choice of forum or medium should be equally influenced by the needs and wishes of the parties rather than being automatically determined by the nature of the hearing or action.

We note that the Scottish Courts and Tribunal Service (SCTS) intends to draft an Assisted Digital Strategy which will aim to ensure that digital services are straightforward and convenient, so that all those who can use them will choose to do so, and those who can't are not excluded. We understand that this strategy will apply across all SCTS systems and websites. An assisted digital user is someone who cannot use a digital service independently. This includes people who are offline with no digital skills, and people who are online but only have limited digital skills.

We believe that any such strategy should draw on the learnings from a pilot study into assisted digital support conducted by the Good Things Foundation for the Ministry of Justice. The key conclusions of this pilot were that:

- Digital Support is highly valued by users and addresses a clear set of barriers to the use of digital services, including access to devices and data, low digital confidence and low or no digital skills.
- People needing Digital Support typically present with a range of other needs, which need to be addressed together – these include emotional, procedural, and legal needs.
- That community advice agencies and legal support centres are an effective way to provide Digital Support because they are known and trusted by users.
- That commissioning frameworks should be clear about outcomes but flexible enough to allow community and legal support centres to embed Digital Support in a way that makes sense for the offer they provide.

CAS would suggest that if the use of digital services is to continue, these learnings must be incorporated into any digital access system, such as that suggested by the COVID recovery Bill. Such measures would help to ensure that no-one is left behind by the increased use of digital technology.

Could the Bill’s intended policy outcomes be delivered through other means, such as using existing legislation or in another way?

CAS considers that early intervention and prevention is crucial, and that people should be able to access advice and support in order to resolve disputes at the earliest stage. The earlier people access advice and support and attempt to resolve disputes the less impact, cost, and distress it may cause - if the individual feels this is the right approach for them. This area, particularly the use of Alternative Dispute Resolution (ADR), would be a useful mechanism to achieve some of the Bill’s intended policy outcomes.

Greater use of ADR could have significant benefits, in preventing further pressure on limited court time and resources and by reducing the strain on individuals caused by the ongoing underlying dispute. Greater support for earlier intervention models may also reduce the call for support via the judicare element of legal aid. However, provision is currently fragmented, both by sectoral and by geographic coverage. Improving coverage, access to and take-up of ADR is not a “quick fix” but could have significant long-term benefits for individuals and the legal system.

Do these provisions disproportionately impact any individuals based on their protected characteristics, income, employment status, geographical region or in another way? If so, are these impacts mitigated by other provisions in the Bill?

It is against the law to discriminate against someone because of:

- **age**
- **disability**
- **gender reassignment**
- **marriage and civil partnership**
- **pregnancy and maternity**
- **race**
- **religion or belief**

- **sex**
- **sexual orientation**

CAS believes that to ensure everyone has access to justice, it is necessary to look beyond the protected characteristics above. CAS believes that more consideration needs to be given to the needs of vulnerable users of public services, including legal services. When considering which groups may be vulnerable, and who may have additional support needs, we consider that the widest possible definition of “vulnerability” should be used. For example, the Financial Conduct Authority (FCA) has stated that a vulnerable customer is someone who, due to their personal circumstances, is especially susceptible to harm. Research conducted by the FCA during the pandemic demonstrated that 53% of the UK population had at least one characteristic of vulnerability. We would note that vulnerability can be either permanent or transient, and in some cases, can be brought on by stressful life experiences. In many cases, people accessing the legal system will be doing so as a result of fundamentally stressful events such as job loss, bereavement, financial difficulties, or relationship breakdown. This vulnerability can be exacerbated by a lack of knowledge and experience of legal issues and processes, especially in the case of party litigants.

In relation to the protected characteristics, CAS notes that digital exclusion is more likely to impact those on low incomes, over-65s and people with a disability¹. CAS has previously urged (when COVID measures were last extended) that a Fairer Scotland and full Equalities Impact Assessment should be carried out, to allow us to understand the full range of measures which are in place to alleviate any adverse socio-economic impacts of virtual proceedings. We are pleased to see that these documents now accompany the Bill and would comment as follows.

While acknowledging the risk of digital exclusion, the Equalities Impact Assessment responds to this by stating that “... *it is important to note that the provisions will not remove the option of traditional means of communication*”. CAS welcomes this, but we note that reversing the presumption regarding the mode of hearing as set out in the Bill will likely require some kind of application or motion to the court. This is something that many digitally excluded users may struggle with if they are not provided with support to do so. As previously detailed, we do not believe that sufficient support currently exists to protect vulnerable users.

We note that the Fairer Scotland Duty Impact Assessment acknowledges the risk of digital exclusion and goes on to say “... *More generally, there is ongoing and wider analysis across different user groups to ensure a direct response to any emerging issues around equalities of outcome and access to Justice.*” CAS would welcome the provision of further details regarding this analysis being made available as we are not currently aware of the nature of this work.

The Fairer Scotland Duty Impact Assessment suggests that the only alternative to these proposals is to revert to an approach whereby physical attendance is the norm. CAS disagrees with this. Rather, we suggest that an alternative is that the needs and wishes of the parties should dictate the choice of the mode of hearing, rather than the type of hearing

¹ See for example, research by Ofcom [Digital divide narrowed by pandemic, but around 1.5m homes remain offline - Ofcom](#) and the ONS [Internet users, UK - Office for National Statistics \(ons.gov.uk\)](#)

doing so. We feel that this would promote a more person-centred approach and place the user at the centre of engaging with the justice system.

The Assessment also suggests that the Connecting Scotland scheme will help to reduce digital exclusion. CAS greatly welcomes this scheme but considers that the scope of the scheme is insufficient to meet the need of all those facing socio-economic disadvantage who need help to access digital justice.

CAS also considers that the current SCTS guidance on accessing virtual hearings is based on unrealistic expectations about the way in which people access the internet. For example, the current guidance for parties in civil proceedings indicates that hard wired or Wi-Fi access with a speed of 10Mbps is recommended, that headset and microphone should be used and that users should not generally use a phone to access proceedings.

We would question whether it is realistic to expect most non-professional users such as party litigants to have access to laptop or desktop devices and secure Wi-Fi with these functionalities. In many areas of Scotland, connectivity issues remain, especially in relation to mobile phone coverage. The expectation that all non-professionals will have access to adequate quality of photocopiers, headsets and microphones must also be questioned. Even if many people can access the internet at a certain level there are far fewer who have the resources of a solicitor's firm in respect of items such as copiers and scanners.

For many, accessing the internet by mobile phone data may be their default, or only way of getting online. Ofcom data indicates that 5% of UK households (1.5 million consumers) access the internet at home via mobile phones only and not fixed broadband. This can be an expensive way to access the internet, especially when video conferencing uses a vast quantity of data, to the point it will be unaffordable to many.

Polling by YouGov for CAS found that 32 per cent of people ran out of money before pay day in the last year. Of those people, 26 per cent had to go without internet access as a result. Based on Scotland's population estimates this works out to 369,200 people. A further 28 per cent went without mobile phone access, working out to 397,600².

In addition, in further polling conducted by YouGov for CAS, 15% of respondents told us that the current costs of their internet or mobile phone contracts were unaffordable in relation to their personal income³. For this reason, we would urge caution in assuming that accessing services virtually is affordable for all.

Comments on Specific parts of the proposed legislation

Legal aid and advice (Part 3, Section 26)

CAS would support the proposal to make permanent the existing temporary provisions which allow for increased availability of interim payments to solicitors, along with corresponding powers of recovery in the event of any overpayments.

² 1,028 Scottish adults were polled between 5 and 9 March 2020 as part of YouGov's Omnibus Survey. YouGov subsequently conducted two online focus groups.

³ 1,028 Scottish adults were polled between 5 and 9 March 2020 as part of YouGov's Omnibus Survey. YouGov subsequently conducted two online focus groups.

Legal aid is a key mechanism for ensuring that the Scottish legal system is accessible. At an individual level, services paid for by legal aid enable people to enforce or protect their rights, resolve disputes, defend themselves when the state and others take action against them, and use the remedies, processes and facilities the law provides to manage their personal affairs and relationships.

Increasing the availability of interim payments would be beneficial to the legal aid system as it will help to maintain, and potentially increase, the number of solicitors who will undertake legal aid work. Any increase in the number of legal aid solicitors would assist CAB clients in accessing justice, allowing them to progress their domestic affairs, and take forward consumer cases and rights enforcement. This is important as we hear evidence from across the Citizens Advice network in Scotland where clients have had difficulty accessing legal practitioners who will take on legal aid cases particularly in rural areas or in relation to certain legal issues.

Requirements of writing (Part 3, Section 30)

CAS supports the proposal which would disapply the requirement for the “physical presence” of parties when executing documents and administering certain procedures, oaths, or other declarations, to be extended beyond March 2022 and made permanent. CAS is pro-channel choice and allowing notaries public, solicitors and advocates the ability to execute documents and administer oaths by means such as live video connection on a permanent basis would be beneficial.

The extension of channels will allow for greater flexibility in accessing legal services. We believe that this will also be more convenient and create less stress for many clients, particularly those who have disabilities or are vulnerable.

We believe this increases the choice available to consumers, however we would be opposed to further measures that would enforce the use of services that are digital by default and did not offer individuals a choice of how to carry out these processes.

Housing: Removal of mandatory eviction grounds and application of pre-action protocols (Part 4)

The COVID-19 pandemic has made clear the importance of a safe and secure home, but also highlighted the fragility of the economy, leaving many without work and in precarious financial situations. This has had a direct impact on people’s ability to pay their rent, and this is evidenced by our advice code statistics, which show that the proportion of advice given about private sector arrears has more than doubled over the past year⁴. CAS believes that making all grounds for eviction discretionary is an important step towards making the private rented sector fairer. This means that all tenants at risk of eviction will have the opportunity to have their case heard by an independent tribunal, who can consider all facts of the case, rather than the outcome being a foregone conclusion. We therefore welcome these provisions in the Bill.

CAS also strongly supports retaining pre-action requirements for the private rented sector. We believe these measures have had a positive impact and provided opportunities to sustain tenancies through improved communications. The pre-action process requirements are a

⁴ https://www.cas.org.uk/system/files/publications/cas_annual_housing_data_briefing.pdf

valuable opportunity for people to be linked up with independent advice and support services, who can help to ensure that households are accessing all monies they are entitled to, which may help to address any arrears. Retaining pre-action requirements on a permanent basis also brings the private sector into line with the social rented sector, where these requirements have been in place for a number of years.

However, analysis of private rented sector queries dealt with by CABs shows that there are still landlords operating in Scotland who are unaware of (or wilfully ignore) pre-action requirements and other tenant protections, and still attempt to carry out illegal evictions. We would therefore welcome any strengthening of these provisions, for example, by imposing a presumption against evictions where the requirements of the protocol have not been complied with. It is important that the First Tier Tribunal (FTT) plays a strong role in actively interrogating and enforcing the fulfilment of pre-action requirements, otherwise they will become nothing more than a superficial tick-box exercise. We would welcome the FTT producing clear and accessible guidance on the application of the protocols which can be made freely available to both tenants and landlords. Further, where a landlord has not complied with the protocols and where the tenant has not been directed to sources of support, we would wish to see the FTT providing this signposting and assistance to ensure that no one is left behind and that all tenants are able to access support, regardless of their landlord's compliance.