OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 30 November 2021

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 30 November 2021

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE

10th Meeting 2021, Session 6

CONVENER

*Joe FitzPatrick (Dundee City West) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Karen Adam (Banffshire and Buchan Coast) (SNP)
Pam Duncan-Glancy (Glasgow) (Lab)
*Pam Gosal (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Alexander Stewart (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ruth Crawford QC (Faculty of Advocates)
Clare Haughey (Minister for Children and Young People)
Kay McCorquodale (Scottish Courts and Tribunals Service)
Iain Nicol (Law Society of Scotland)
Paul O’Kane (West Scotland) (Lab) (Committee Substitute)
Professor Richard Susskind OBE
Karen Wylie (Family Law Association of Scotland)

CLERK TO THE COMMITTEE

Katrina Venters

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 30 November 2021

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Joe FitzPatrick): Welcome to the 10th meeting in session 6 of the Equalities, Human Rights and Civil Justice Committee. Apologies have been received from Pam Duncan-Glancy, so I welcome Paul O'Kane, who is attending as a substitute member.

Agenda item 1 is a decision on whether to take in private item 5, which is consideration of today's evidence, and item 6, which is consideration of our approach to our stage 1 scrutiny of the Miners' Strike (Pardons) (Scotland) Bill. Do we agree to take those items in private?

Members *indicated agreement.*

Subordinate Legislation

Independent Reviewer (Modification of Functions) (Scotland) Regulations 2021 (Draft)

10:00

The Convener: Item 2 is consideration of an affirmative instrument: the draft Independent Reviewer (Modification of Functions) (Scotland) Regulations 2021. I welcome to the meeting Clare Haughey MSP, Minister for Children and Young People; Angela Leonard, policy officer at Disclosure Scotland; and Barry McCaffrey, solicitor in the Scottish Government's legal directorate. I refer members to paper 1.

I invite the minister to speak to the draft regulations.

The Minister for Children and Young People (Clare Haughey): Thank you for inviting me to say a few words on the draft regulations. The amendments are technical and are necessary to ensure that the Age of Criminal Responsibility (Scotland) Act 2019 can be applied as intended. The 2019 act raised the age of criminal responsibility in Scotland from eight to 12, and it established the role of the independent reviewer, who oversees the disclosure of convictions and other relevant information relating to when a person was under the age of 12. The purpose of the regulations is to amend the 2019 act.

The regulations are a consequence of the Age of Criminal Responsibility (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2021. That order, which is currently being considered by the Westminster Parliament, makes provisions in relation to the independent reviewer that will apply in England, Wales and Northern Ireland. In particular, the order places a requirement on specified persons in those jurisdictions, such as chief police officers, to refer and provide information relating to an individual's pre-12 behaviour to the independent reviewer.

The regulations therefore modify, in light of that order, the relevant functions of the independent reviewer in the 2019 act, in order to require the independent reviewer to review that information, invite representations, notify the outcome of the review and, where appropriate, advise on the right to appeal that decision.

The changes support the Scottish Government's decision to raise the age of criminal responsibility from eight to 12 by ensuring that the independent reviewer can review relevant information that is received from specified persons in other parts of the United Kingdom, as well as in Scotland. Committee members will wish to note that the regulations do not take forward any new policy. They are required to fully implement the 2019 act.

I would be happy to take questions on the regulations.

The Convener: Thank you. As members have no questions or comments on the regulations, we move to item 3, which is consideration of the motion for approval. I invite the minister to move the motion.

Motion moved,

That the Equalities, Human Rights and Civil Justice Committee recommends that the Independent Reviewer (Modification of Functions) (Scotland) Regulations 2021 be approved.—[*Clare Haughey*]

Motion agreed to.

The Convener: The clerks will write a note and report on our decision. That completes consideration of the affirmative instrument. I thank the minister and her officials for attending the meeting.

10:04

Meeting suspended.

10:06

On resuming—

Civil Justice

The Convener: The next item is to take evidence from our civil justice stakeholders on remote hearings and digital justice. I welcome to the meeting Kay McCorquodale, executive director of the Scottish Courts and Tribunals Service's judicial office; Ruth Crawford QC, treasurer of the Faculty of Advocates; Iain Nicol, convener of the Law Society of Scotland's civil justice committee; Karen Wylie, vice-chair of the Family Law Association of Scotland; and Professor Richard Susskind OBE, technology adviser to the Lord Chief Justice of England and Wales, who joins us remotely. I refer members to papers 2 and 3.

I invite each of our witnesses to make a short opening statement.

Kay McCorquodale (Scottish Courts and Tribunals Service): I thank the committee for asking me to participate in the round-table event. I will make a short opening statement on behalf of the Scottish Courts and Tribunals Service.

The Scottish Courts and Tribunals Service's digital strategy, which was published in 2018, set out a five-year ambition to move towards an increasingly digital service. Significant progress has been made on that front, largely out of necessity. It is fair to say that the pace of change has increased to an unprecedented level over the past year and a half. We could not have anticipated the speed with which we have needed to develop an increasingly digital service and conduct business remotely.

Throughout the pandemic, we have supported all essential civil business by focusing our efforts on managing as much business as possible remotely, whether by written submissions, teleconferences or virtual hearings. Throughout that period of rapid change, we have worked collaboratively with the legal profession, the judiciary and our staff. We shared a common goal of getting the business done.

Our use of the Webex platform as a solid foundation for remote operations has ensured that the SCTS has been able to support the conduct of civil business electronically. As a consequence, business across the civil courts has been able to proceed. There are no backlogs. Remote management of business and hearings remains the norm at this time.

As we move through the response to Covid-19 and into recovery, we will continue to review how civil business can best be conducted. We will work with our justice partners, including the Scottish Government, to ensure that the innovations that have been essential in enabling civil business to continue are retained. However, the Scottish Civil Justice Council is the body that is tasked with modernising the civil justice system in Scotland. It is ultimately for the council to decide how civil court proceedings should proceed.

Our ambition for the SCTS is for our services, in whichever way they are provided, to be accessible, transparent and, above all, fair, and for the lessons that we have learned over the past 20 months to be put to the best possible use in promoting more sustainable and efficient options as we seek to further improve access to justice.

Ruth Crawford QC (Faculty of Advocates): Good morning, convener and members of the committee. As Kay McCorquodale did, I thank you for inviting me to give evidence on behalf of the Faculty of Advocates. It seems to us that there are two principles in the consideration of the

"benefits and disadvantages of digital justice",

as the topic is described in your papers. Both, of course, centre on that word "justice". The two core principles underline the crucial importance of our justice system, which is itself an integral part of our democratic system.

The first core principle is open justice. The public and the media must be able to effectively access what goes on in our courts. At present, perhaps for understandable reasons due to concerns that those who access the courts remotely may abuse their access, access to video hearings is limited, and there are concerns about how to deal with access by the public to our courts, if we are going to continue with remote hearings.

That principle of open justice has been part of our law since it was enacted in the Court of Session Act 1693. The courts have been open to all since 1693, save in specific special cases. That principle of open justice has been consistently recognised throughout the courts, in England and Wales as well as in Scotland, and in every jurisdiction of which we are aware, save for those of autocratic states. That reflects the principle that not only must justice be done, it must be seen to be done.

The second core principle that I suggest should be at the root of your inquiries is the constitutional right of access to the courts. On that, I quote the words of Lord Reed, in the case of Unison v Lord Chancellor, in 2017, in the Supreme Court:

"The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the 'users' who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings."

It is important to bear in mind that it is a constitutional right of crucial importance and that justice is not simply a service, as opposed to all the other many important services that the Parliament has to address and deal with. If there are to be any inroads on the right of access to justice, it seems to me—respectfully—that primary legislation would be required.

That importance of the right of access to justice goes to the root of the rule of law in a democratic society, so discussion of the benefits and disadvantages of digital technology in the courts has to have those two core principles at its forefront, and they should not be sacrificed or diminished in any way. However, I look forward to discussing the other benefits and disadvantages during this morning's session.

Iain Nicol (Law Society of Scotland): Good morning to the committee. The Law Society of Scotland welcomes the opportunity to assist the committee with its consideration of the use of remote hearings in the civil justice sector.

10:15

As the committee will be aware, the society has a statutory duty under the Solicitors (Scotland) Act 1980 to promote the interests of the solicitors' profession and its 12,000-plus members as well as the interests of the public in relation to that profession, and everything that I will say this morning is intended to reflect that dual purpose. Over the period of the pandemic, we have endeavoured to understand what is working well and what is not working so well with regard to the necessary changes that were thrust upon all stakeholders in the civil courts, and I hope that the lessons that we have learned can be of assistance in the committee's deliberations.

Karen Wylie (Family Law Association of Scotland): Good morning and thank you for the invitation to give evidence on behalf of the Family Law Association of Scotland. The association's membership is made up of family lawyers across Scotland, and we are committed to the constructive resolution of family law disputes. Given that I am representing the association this morning, the focus of anything that I will say will be family law cases.

There is little doubt that the pandemic has given us many opportunities to modernise how we deal with family and civil cases in our courts. Family cases cover a wide range of issues of great importance to the lives of everyday people, including divorce, the separation of cohabiting couples, care arrangements for children, public law and child law cases such as permanence orders in which parental responsibilities and rights might be removed from a biological parent and authority given for the child in question to be adopted. There are also cases involving children's hearings. Some of the cases will involve parties who are some of society's most vulnerable individuals, who might not have the financial resources to obtain the best technology, software or broadband connection with which to participate, who require support to participate and who should not be at the receiving end of, say, a decision on children while sitting on their own either on the telephone or watching a screen in their home.

We have had many opportunities to look at how we do things, and the association does not want to go back to how things were done in the past. However, our members are concerned about rushing into a new system that has been brought in hastily—and understandably so, because of the pandemic. As Iain Nicol has said, we want to look at what is working well and what is not working so well. My understanding is that, for family cases, the proposed default in the draft rules is that, with certain exceptions, all family hearings will be in person, and our members welcome that.

Professor Richard Susskind OBE: I am sorry that I cannot be with you in person, but I very much appreciate the opportunity to say a few words. Although I am billed as the technology adviser to the Lord Chief Justice of England and Wales, I am not speaking on his behalf today. Instead, I am speaking as someone who has spent the past 40 years thinking about how we might use technology to improve access to justice.

Perhaps I can give the committee a couple of opening thoughts, the first of which is to highlight a fundamental distinction that I hope might help our discussion. There are two ways in which you can use technology: automation and innovation. The first 60 years of court and legal technology has been about automation, by which I mean using technology to streamline, optimise and render more efficient our current processes. That is what most people think of when they think of technology; in other words, it is about applying it to inefficient processes.

However, there is another use of technology that you see in other sectors—what I call innovation. You use technology to do things that previously were not possible. We have to be alive to that distinction and to the fact that this is not simply about computerising how we work today. Instead, I hope that we think about how we use the power of technology, for example, to extend the reach of our court system to people who might not otherwise have access.

Covid has changed the discussion about the future of courts. I helped found the Remote Courts Worldwide website—www.remotecourts.org—in which we track the progress of countries across the world in moving from physical courts to remote courts in one form or another, and 168 different jurisdictions are now represented on that service. It gives a strong sense of the extent to which, in a very short period of time, court systems have changed. I think that we have learned a number of lessons. Although lawyers and judges are often criticised for being quite conservative, the reality is that, when the platform was burning, they proved to be remarkably adaptable and flexible.

One thing that I found slightly unhelpful—I put this before the committee because I find that this unhelpful element often creeps into these discussions—is a slightly polarising effect. An example is the reaction to video hearings, which have been the dominant mechanism used during Covid. I am finding that lawyers and judges belong either to the camp who say, quite melodramatically, "We should never go back. Our future is transformed," or to the camp that is hankering and hunkering—hankering after our old ways of working, and hunkering down until the viral storm passes. I do not think that we need to take up one position or the other. As has already been hinted, we should be looking at the experience of Covid courts and thinking about what works well that we might industrialise, and what does not work well so that we will need to go back to using physical courts or other alternatives.

A bigger point, though, is that I do not believe that video hearings are the end game in the future of courts. Dropping a court hearing into Zoom is not a full transformation of the court model; it still has the same people, the same rules, the same—[*Inaudible*.]—and the same problems and difficulties that many people identify with the civil courts system.

I agree whole-heartedly that we have to look at video hearings as an important first step. However, a group on online dispute resolution that I chaired in the Civil Justice Council in England found different methods. I can talk about more of them shortly, but one is the asynchronous hearing, which is not actually a hearing at all. There are different methods open to us. We are at the foothills—that is my main message. Do not think that the only choice is between a physical hearing and a video hearing.

What Ruth Crawford said about justice is absolutely correct. However, people use the concept of justice both to support and to oppose these developments. Some say that justice will be better served by remote hearings because we can offer far greater access, while others say, "If you do not have a physical hearing, you are not having a fair process." I believe that the problem that we face is that civil process in most jurisdictions is too costly, too combative and unintelligible unless you are a lawyer, and it takes too long. Therefore, we should be open to new ways of working.

That is why I have been asking this question since the 1990s: to solve our legal differences, do we really need to physically assemble together on all occasions, or might it sometimes be more appropriate and proportionate to convene online in any of a variety of ways?

The Convener: Thank you, everyone. I propose that we now have a discussion. Committee members want to probe in some areas, but the benefit of a round-table session is that witnesses can bounce off each other and have a discussion. That means that, to some extent, committee members might find ourselves just sitting and listening to the discussion, but that will help us in our further deliberations on remote hearings.

I invite Karen Adam to come in with some initial comments on the witnesses' points.

Karen Adam (Banffshire and Buchan Coast) (SNP): Karen Wylie said that hearings will be held in person in most cases and that only under certain circumstances will they not be. My question has two parts. What circumstances would those be? In relation to family law, would remote hearings be preferable for some people when domestic abuse might be a factor? Have you had feedback on that?

Karen Wylie: In answer to your first question, my understanding of the draft rules is that, in the Court of Session, parties are not present for pre-proof hearings and case management hearings—in other words, procedural hearings. Similarly, in the sheriff courts, parties are not present for procedural hearings such as pre-proof hearings. Clients are supposed to attend options hearings. There is discussion among our members about whether that is necessary, but, at the moment, the court rules require that clients attend options hearings.

Those are all procedural hearings, at which our clients ordinarily would not be present. Such hearings do not deal with evidence or opposed motions, which involve debate about an issue, with a sheriff or, in the Court of Session, a judge being required to make a decision. That is the way forward—our members support that approach. At the moment, procedural hearings are working well; they tend to work well, ordinarily, except when there are difficulties with broadband connections.

Where domestic abuse is concerned, I can see that, for some clients, being online might be easier. A colleague gave me the example of a child welfare hearing, at which there is discussion about the care arrangements for children or an issue in a relationship that relates to children. In that case, there were allegations by the wife of domestic abuse, and she chose to turn her camera off, which was allowed, because she found it easier not to be observed while the matter was discussed. In certain circumstances, there can be benefits in having flexibility in whether the camera is on or off.

Many parents might want to be present when such matters are being discussed. When the parties can speak in a child welfare hearing, their behaviour, including how they address a sheriff and how they respond when asked a question, can often influence the decisions of the decision maker who is listening to the matters that are being discussed and debated. In evidential hearings and proofs, we talk about the decision maker weighing up the credibility and reliability of witnesses, and it is my belief that sheriffs and decision makers do that in child welfare hearings, too.

There can be benefits to being present—it can assist the decision maker for parties to be present—so it might be that parties should be able to ask for a particular hearing when it suits their circumstances. Many parents want to be present, which might be difficult for them; at the moment, for example, some courts conduct some child welfare hearings by telephone, but that is not appropriate for a child welfare hearing. At the very least, we should be using Webex for such hearings. There are all sorts of practical difficulties with telephone hearings. Many parents want to be present and to have greater involvement in matters of importance concerning their children.

The Convener: I remind folk to indicate if they want to come in.

Professor Susskind: I have a couple of observations. Around the world, one of the great unanswered questions is: what kind of cases are suitable for remote hearings, which I use as a generic term for non-physical hearings, and what kind of cases do we agree, in general, should be settled in the traditional way? We are feeling our way on that—it is early days. I want to plant this thought: what kind of evidence do we require to accept that one form or alternative is better than another?

I hope that the committee agrees that our thinking about the future of the court system should be evidence based. I have my own instincts and intuitions about the cases that are well suited to remote hearings and those that would be better dealt with in a physical court room. However, just as in medicine, where randomised control trials are undertaken and studies of developments are peer reviewed, we need rigour in law.

All of you in the committee room will have strong feelings and instincts and will be hearing anecdotes from judges and experienced lawyers about what does and does not work. That is all helpful, but is it not time that we took a step back and considered what kind of evidence we need—if we are going to be evidence based in the future of our court system—to allow us to move from the traditional system to new ways of working? We must remember that the current system is not the result of an evidence-based choice—it is just where we are today. We need to start thinking in a more evidence-based way, so I call for us to gather far more data about our current experience of using remote courts from judges, practitioners and, above all else, court users.

10:30

Maggie Chapman (North East Scotland) (Green): I will pick up on the points that Karen Adam and Karen Wylie made on the way in which we think about location. I am mindful of what Richard Susskind said about innovation and the need to think beyond what we have, rather than just replacing what we have with a digital or online system. I am also mindful of what Ruth Crawford said about the second principle: the constitutional right of access to the courts.

The system that we have now—or had pre-pandemic—is not the product of any strategic decision making based on evidence, as Richard Susskind outlined. We are thinking about what we have learned over the past 18 months about the use of digital, online and telephone services—alternative mechanisms of being in contact—and we also need to think about where something happens. We have the physical place of the courts and of people's homes or, if they are supported by organisations to allow people to give evidence, safe places. However, can we learn something from the codified bairns hoose or barnahus principle, in relation to child witnesses or young people who have been the victims of crime, that still allows for the clear principle that Ruth Crawford spoke about but which takes away some of the tensions and conflicts that are inevitable in a court setting, whether online or in a physical court room?

Kay McCorquodale: It might help if I put the matter in context. Karen Wylie talked about draft rules, and I mentioned the Scottish Civil Justice Council, which is tasked with modernising civil justice. It has just had a public consultation on the mode of attendance at court hearings. Attached to that consultation was a draft set of rules to which everybody was asked to respond. The consultation closed on 15 November and we are fortunate enough to have had 82 responses. All the non-confidential ones are already on the Scottish Civil Justice Council's website, if you want to look at them and have a chance to do so.

The point of that consultation was to air such issues. There are polarised views in the responses, but the council's role is now to go through them all and analyse them. It met yesterday and had a high-level summary of them. The secretariat is now tasked with analysing all the responses, and a full analysis will be provided at the next council meeting in January. The intention is that, as a result of that, court rules that take into account all those comments will be promulgated by the court and then laid before the Parliament.

We already have vulnerable witness suites where people who do not want to give evidence in court can give their evidence remotely. A perfect example is domestic abuse cases. We will continue to expand that facility.

I agree with Richard Susskind that we need an evidence base. There are polarised views in the responses to the consultation, and most of them are based on anecdotal evidence. Every solicitor and every judge has their own views and experiences. We need a firm evidence base if we are to make permanent changes.

The Scottish Government is to proceed with a remote hearing evaluation project. It is currently going out to tender. The Scottish Courts and Tribunals Service has fed into that process and is partly funding it, because we acknowledge that we need a firm evidence base to enable matters to be put on a firm footing for the future.

Maggie Chapman mentioned the barnahus principle, which the Scottish Courts and Tribunals Service is keen on implementing. One of the committees of the Parliament has heard evidence on that already, and Lady Dorrian's review of sexual offences touched on it. I understand that the Scottish Government will be taking that forward. The Scottish Courts and Tribunals Service is 100 per cent in favour of that principle being applied to children who are vulnerable and might be victims of sexual abuse. Taking them out of the court system and pre-recording their evidence as quickly as possible is definitely the way forward.

Alexander Stewart (Mid Scotland and Fife) (Con): The legal system is to be commended for how quickly it adapted its processes, because things changed virtually overnight. That was the case for all of us, but the organisations in the legal system seem to have co-ordinated extremely well. Professor Susskind's comments about evidence and data are important, and you have already identified that there are issues that you are looking at in that regard.

I want to touch on the issue of digitally excluded people, who have great difficulties in tapping into the system that has been created. Pioneering things such as Webex have been mentioned, and the committee has seen some of the good work that is being done in the structure, which is to be commended.

Resource and funding issues are important with regard to how the legal system supports all of that so that as many people as possible can be included. The reviews will identify some areas that you might be minded to capture, but there will be some barriers to your ability to communicate your role and responsibilities to the general public. How you square that circle needs to be examined in some way, because you will face problems as we progress.

Iain Nicol: I associate myself with Professor Susskind's comments about the need for data. The Law Society has been calling for the Scottish courts to introduce a pilot scheme in that area. As things stand, the civil courts are, by and large, not open. With a few exceptions, no live hearings are taking place in the civil courts.

We have been presented with a draft set of rules that, as I understand it, are being proposed on a medium to long-term basis to regulate the situation. Our position is that it is premature to introduce a permanent set of rules when there is no evidence base to justify them. We have suggested that a pilot scheme be introduced whereby proof hearings are held in the Court of Session and sheriff courts, basically to allow an analysis to take place of how the evidential hearings and proof hearings work and of the pros and cons of live hearings. Those hearings could then be compared with virtual hearings.

The pilot that we have proposed involves that analysis taking place over the course of a year before the issue is revisited. That would allow empirical data to be gathered from all court users and stakeholders in the court system about their experiences of live hearings. It is impossible to do that at the moment, as the default position is that there are no live hearings, and virtually nothing is taking place in court apart from in the inner house and in cases in which it is deemed that there is a justifiable cause for a live hearing, but they are very much in the minority.

One of the Law Society's major concerns is about digital exclusion. Whether the digital poverty or exclusion issues relate to an inability to afford the hardware, an inability to use the software, a lack of technological know-how or poor internet connection, it is fair to say that, although those issues affect a minority of court users, it is a significant minority, so the issue needs to be addressed.

Our view is that there is no quick fix. Any system that is introduced must be flexible enough to take account of the difficulties of those who are in digital poverty and are excluded from interacting with the court digitally, for whatever reason, and it must ensure that they can participate effectively.

Pam Gosal (West Scotland) (Con): It has been very helpful to hear about the advantages and disadvantages of going digital, but my question is more about the individual. Are individuals allowed to disagree to a default remote hearing? They might have many reasons for disagreeing. They might not understand what is happening, or they might need a translator. People might not have access to the technology, as Alexander Stewart and Iain Nicol said, or they could have any issue that impedes their ability and makes them feel uncomfortable about being heard remotely. What are the individual's rights?

Professor Susskind: Although I am a great enthusiast for technology and I have devoted my whole career to thinking about it, it might surprise people to know that I do not think that we should be thinking of these changes as short term. I have always advised that major change to a court system will take at least 10 years. People talk about court transformation projects taking a couple of years, but I find that entirely improbable. There are huge cultural, procedural and technical issues to be overcome. I stress again that we are in the foothills of that, and although we have had to put emergency processes in place for Covid, once we emerge from Covid, I am not of the view that we should immediately rush one way or another.

The observation about piloting is powerful. That is how most technological developments in most other industries proceed. You test, you experiment and you refine. If you do that too quickly, you come to a set of firm rules or processes without the evidence. That would be a mistake. I therefore urge the committee again to think that we are at the beginning of a process, so let us gather data, pilot and experiment, rather than diving in with dogmatic views of the next generation.

I want to say something about exclusion. Of course there is an issue about people who are not comfortable with technology, but there are other issues around exclusion that might be even more worrying. One is literacy. Even if someone has a hand-held machine and uses technology daily, that does not mean that they have the wherewithal to marshal evidence and present arguments if they are representing themselves, for example. There are also issues around confidence and cultural issues around which sectors of society feel comfortable in the kind of combat that is involved in litigation and disputes. We should also realise that, in the UK, about 19 per cent of working adults have limiting long-term illness, impairment or disability; for them, attendance in a physical court is often forbidding.

The Oxford Internet Institute's research into the level of internet usage shows that, in effect, only about 5 per cent of people in society do not have internet access. However, the problem is not about whether someone has connectivity or access; it is about whether, if they are self-representing, they have the confidence to use those systems. Again, we have to balance that against the other forms of exclusion.

That leads me to the observation that we should have a mixed bag of facilities. Depending on the particular court users and the nature of the case, some cases should be heard in person, some by video, some by audio and some even in pop-up courts. Some cases should even be handled through the paperwork alone. We want a flexible approach in which we can direct cases to appropriate forms of resolution in a way that is proportionate and just.

As I say, let us not just jump to video proceedings. We should not put the procedures in place then just dust our hands off and say, "That's digital technology in the courts done. Next project, please." We are at the beginning of a journey.

10:45

Paul O'Kane (West Scotland) (Lab): I thank everyone for their contributions this morning. What is coming across is a sense that the approach needs to be evidence led and that we need to take our time with it. Necessity may be the mother of invention, but we want to take time to learn from the experience of the past 18 months.

I will touch on two points. On digital exclusion, I agree with what has been said about ensuring that people have the right support. My concern is that we often end up with a two-tier system, even within a digital offering. People who do not have access to the internet sometimes cannot do audiovisual participation and end up participating via a phone, which is not always the best option, particularly—Karen Wylie alluded to this—in relation to children's hearings and family courts, in which the issues that are discussed are very emotive and can be very stressful and challenging for people. Participation on a phone can often mean that it is difficult to read people's tones or get a sense of what support someone might need. In addition, if someone is being supported by an advocate or legal counsel, it can often be hard in a digital setting for that relationship to be well established and for the person to get the right support. There are certainly things that need to be looked at to ensure that there is parity of access, even within digital offerings.

Ruth Crawford touched on the public's access to the courts and how, where appropriate, members of the public can ensure that they can be present, if they choose to be. Obviously, our public galleries at Holyrood have been empty for the duration of the pandemic, but we broadcast all the public meetings of the Parliament via the website through Scottish Parliament TV. The difference is that we have not quite reached all court proceedings being digitally available or available in live time. I am keen to understand how we can protect the right of the public to be present in court if there is a move to a digital setting.

I am currently a serving councillor. We have a strange process if a member of the public wants to join the meeting. They have to request to do so prior to the meeting and be let into the system that we use, otherwise they have to watch it after the live event on YouTube. We need to look at such issues so that we protect people's fundamental right to be present.

The Convener: I apologise to Ruth Crawford. I did not see her earlier.

Ruth Crawford: Not at all.

I want to make a number of points that pick up on some of the discussion. I ask the committee to forgive me, as I will probably resort to some anecdotes, which may give colour.

First, I whole-heartedly agree that the committee requires a proper evidence base before it starts to look at what innovations it wishes to consider for digital technology in our courts. Kay McCorquodale has already mentioned the consultation in relation to virtual hearings post-pandemic. I recommend that the committee take some time to read the responses. They contain a number of anecdotes, but there is an evidence base there, because the responses are from solicitors, advocates, judges and other people, representative bodies such as Citizens Advice Scotland and other voluntary organisations, and some local authorities.

Digital exclusion is, of course, incredibly important. I agree with Richard Susskind that it is not simply a question of having the ability to use the technology. This is where the anecdotes come in. I will also pick up on the point that Paul O'Kane made in relation to the support that an advocate or solicitor can give to the client.

We have been able to adapt to the courts using technology, but it is, frankly, very difficult to have two or three screens going at once. Forgive me for the anecdote, but you have one screen in front of you with the court and the boxes of the judge and your opponent, another screen with the documents, and another screen on which your client and solicitor are trying to give you instructions as things take place. I am too old for my brain to work in that way—I cannot keep my eye on three different screens at the same time. We have to think about those things. I realise that

that is simply a technical microelement, but it is important to consider.

It is not entirely satisfactory for a client to have to give instructions to his or her solicitor or counsel through tapping into a WhatsApp message. We also miss the opportunity to discuss the case with them inside or outside court beforehand, which is important.

In relation to digital exclusion, when clients and witnesses are giving evidence, documents are put up on screen. They have to master that technology themselves, and they often have just a smartphone rather than a big screen. That is very difficult. Those are very real technical problems that will have to be solved if the committee wishes to go down the digital route.

There is also the question that Alexander Stewart raised about who resources those things. He very kindly praised the legal profession for what it has done over the past 20 months or so. I am grateful for that, but I would not be quite so grateful for any notion that the legal profession should pay for making everything digitally inclusive. Solicitors' firms and the Faculty of Advocates have, not surprisingly, spent a considerable amount of money over the past 20 months on hardwiring our premises and making sure that there is decent connectivity. However, as treasurer of the faculty, I get daily reports of things breaking down. I have been in court when connections have broken down. Even after chucking a huge amount of money at that, it costs. Equally, that stands for our members.

We provide the legal service; we do not provide the technology, and nor do we provide for the courts. That goes back to my second fundamental point about access to the courts, which is a constitutional principle. Frankly, we, as lawyers, should not be providing for the courts. We assist the users and, of course, as Lord Reed remarked, we are remunerated for that.

I agree with Richard Susskind. The consultation responses make interesting, though lengthy, reading. The faculty's response is very much to accept that we should learn from the past 20 months in so far as digital technology is concerned. In general terms, to summarise the faculty's response, that is a bit of a mixed bag. We can see that there is a very real place for procedural business, for example, being held virtually, but the default position for contentious or substantive business should be that it should be taken in person and in a courtroom.

We recognise that there will be cases, either way, in which parties want to flip that. We propose a general test of the interests of justice, which the courts are well used to using. To go back to a point that Pam Gosal made, if the parties wanted an in-person hearing or a digital hearing, we would be firmly of the view that the courts should attach weight to that factor in considering whether to have a virtual hearing or an in-person hearing. We do not think that it should simply be down to matters of complexity or difficulty, as is presently proposed. The parties—the users of the court service—are clearly at the heart of that, and their views should be given weight. Whether they are given overriding weight would be a question for the individual judge, who is well used to weighing up such things.

It is acknowledged that views are polarised. The faculty has tried to be—and, I hope, will continue to be—constructive in its response. It recognises that there are clearly failings in our system, but there is a danger in going too quickly too soon. That is why I echo comments from around the table that a proper evidence base is required so that our court system in Scotland is fit for the 21st century—and, I hope, for the 22nd and 23rd centuries, as well.

Maggie Chapman: I like your optimism, Ruth.

I will pick up on what might be quite a broad issue in relation to our systems and processes. You mentioned that judges are well used to determining whether certain courses of action should be taken or alternatives should be found. I have an anecdotal point. I have spoken to somebody who supports survivors of domestic abuse. With the Covid emergency legislation, domestic abuse trials have been virtual by default, but I understand that only about 10 have actually been virtual, because the defence usually objects. In whose interests are such balances weighed?

That is a very small point in relation to the much broader questions of whether our justice system gets gender, racial and other diversity issues in a meaningful way and how we can not plug those into the system but be mindful of them. How can we work with the equalities unit and other organisations to make sure that we are not entrenching inequality?

Both pre-pandemic and during the pandemic, there have been certain entrenched impacts that might have disproportionately affected women, people of colour and some of the more marginalised people, whether they are victims, complainers or defendants. I am interested in how we navigate that space. I do not think that our justice system gets gender at the moment, for instance. We have an opportunity at least to try to address that.

Kay McCorquodale: I would like to touch on a few things, starting with what Maggie Chapman has said. The Judicial Institute for Scotland is a renowned organisation for training the judiciary, who certainly get training on diversity and racial issues. That is part and parcel of becoming a judge—they go through all that training.

If the Scottish Courts and Tribunals Service and the Scottish Civil Justice Council are going forward with any new initiatives, we compile equality impact statements. You will see that there is a full one, in particular, for the mode of attendance at hearings. The Scottish Civil Justice Council is going to update that in the light of the responses received. We take our equality duty very seriously.

On digital poverty, the key is flexibility. We do what we can, but we need to be better at it. We provide online resources, which is okay if a person can access them; we have written information; we are developing a suite of videos so that people can see what is required to attend an online hearing; and our court staff are always accessible to answer any questions—but, hands up, we all need to be better at it. At one stage, the Lord Justice Clerk mentioned the digital Zoom booths in Singapore: somebody can go into a booth in the court premises and use the court technology to access a hearing. Should we be considering that sort of initiative in local libraries?

That takes me on to resources. I heard what Ruth Crawford said about that. The Scottish Courts and Tribunals Service has been well supported by the Scottish Government during the pandemic. We have strong digital foundations, which we did not have before, and that means that we can continue with our hearings on the civil side. You will all be aware of the remote jury centres model for criminal business. That is how we are managing to get business done.

We need to keep up to date with that resourcing. Ruth Crawford said that it is not for the legal profession to pay for that, but I would challenge that. I would say that the legal profession does have a duty. For example, I remotely attended a judicial review hearing yesterday. There were two Queen's counsels who were participating remotely—it was a remote hearing. They were in the advocates consulting rooms on the High Street, and the internet connection was not good enough. We had to postpone the hearing, and they had to move into the advocates library, which had a much better internet connection. I know that advocates are aware of that, and work needs to be done on that. How that is funded is not for me to say, but resourcing is an issue for everybody.

Ruth Crawford: I was not suggesting that lawyers should not resource their own offices; what I would balk at is the idea that we should resource the courts. That is not our job. Of course there are issues, but the issues with connectivity apply not just to advocates or solicitors but to the individuals who use the courts. Who pays for them?

Kay McCorquodale: I absolutely agree with that.

The other question that we have come round to is: who makes the decision on whether a hearing should be in person or remote? That is a judicial decision, and all the circumstances are taken into account, including if a person cannot have access in some way to any digital connectivity. For example, the inner house of the Court of Session had an in-person hearing because a party litigant had no access—and that is our most senior court, where there are three judges.

The key for everything is flexibility. That is a good thing about having rules rather than primary legislation. Rules can be changed quite easily in the light of experience, or we might need new guidance or amendments to rules. That is one of the advantages of putting rules and procedures in place.

11:00

Fulton MacGregor (Coatbridge and Chryston) (SNP): I thank the panellists for the really helpful information that they have provided this morning.

I have quite a broad-brush question about an issue that has already been touched on. When I talk to constituents, and even in the discussion that we are having this morning, I get the feeling that the digital courts system is working well for some people but not for others. I am sure that other members will have felt that, too. Perhaps a really good example is the vulnerable witnesses whom others have referred to. Some of those witnesses benefit a great deal from digital technology—for example, there might be a case involving an abusive relationship, and the technology means that the witness does not need to meet their abuser. However, there are other situations in which vulnerable witnesses seem to be more excluded from the justice system as a result of online and remote ways of working.

How do we get better at identifying cases in which, or individuals for whom, remote hearings will be beneficial and will provide more access to justice, and how do we identify individuals for whom that will not be the case? I know that we have touched on that already, but is there any work that the committee can do to help to establish, say, a framework in that respect?

I am happy for any of the witnesses to answer that, convener. I will leave that up to you.

The Convener: I call Richard Susskind.

Professor Susskind: Perhaps I can make a couple of observations about technology. The technology that we are all using today is the worst that it is ever going to be. Technologies are getting better and better, and our machines are becoming increasingly capable. Scarcely a day passes in which we do not hear news of some kind of system, technology, app, breakthrough, or start-up, for example.

I know that people are often excluded from the debate about the future of technology, but the fact is that we are living in a time of greater technological advance than humanity has ever witnessed. As I forewarned at the beginning of the evidence session, what we are doing a little bit is falling into the trap of thinking that this is a discussion about video or physical hearings and not taking account of the reality that, during this decade, we will see the major emergence of artificial intelligence techniques in courts around the world, what I call asynchronous hearings, and greater use of blockchain for recording hearings.

I suspect that all of those notions will be rather foreign to you, but—I hope that it is not improper of me to suggest this; I do this a lot in England—I am more than happy to provide in my own time briefings to MSPs, judges and officials on the technologies that are coming over the horizon. You just have to be careful that you are not thinking about putting in place by 2025 technologies that would have been good in 2021. The technologies are advancing, and there are many more possibilities out there than video hearings.

I am looking at people's faces this morning. You all look very friendly, but you also look a bit grim. You should actually be excited by this. Goodness me—our justice systems around the world are facing huge problems, so surely we should be excited by the possibility that some of those problems might, with sufficient ingenuity, imagination, innovation and investment, be overcome by the same technologies that are overcoming problems in medicine, health, education and, indeed, all aspects of society. We should not be looking at this as a problem and saying, "Here are the various things that technology can't do."

I maintain that this is a long-term process. We have to take a long-term view of the developing technologies, and I would like you to have the confidence to look at the issue with energy, enthusiasm and excitement, instead of asking, "What are the limitations here?" and thinking that it is all doom and gloom. In my 40 years of working in legal technology, I have never been more excited, because technologies are now emerging that will help us solve some fairly significant justice problems that we have had for years.

In summary, the technology is not standing still, and we should embrace it rather than resist it.

The Convener: That was a wee jolt for us all, Richard. If our faces are looking a bit glum, it is maybe because the weather was a bit cold as we came in this morning.

Karen Adam: I will follow on from the subject that Maggie was discussing, but get a bit more specific. Effective communication underlies the entire legal process. How will you factor in opportunities to identify impairments and make adjustments for people with disabilities? I am thinking of the deaf community, for example. Kay McCorquodale mentioned equalities duties. Will that lens be used for the evidence and in any consultation analysis for any advancements?

Karen Wylie: My apologies—could you repeat the last part of your question?

Karen Adam: I asked whether the equalities lens will be used for the evidence that is being gathered and in any consultation analysis for any advancements.

Karen Wylie: In the consultation that is on-going at the moment, you would hope that matters of equality, people's disabilities and so on would be considered. On a personal level, my father is deaf, and I am aware of the many difficulties that he has dealt with during the Covid pandemic, not least due to mask wearing. When I think of what we are doing at the moment, I am conscious that he would struggle with many of the technologies that are available to us. That needs to be addressed, and I am sure that the consultation will have to consider all that.

As others have said, for some people with disabilities, physically going to court is a difficulty, and the online hearings perhaps work better for them. That is something that absolutely needs to be looked at when we consider how we take matters forward and how things will be in the future.

Pam Gosal: I share Richard Susskind's enthusiasm about technology evolving, and agree that, from now on, the technology that we have today is the worst that it will ever be. Today, we have talked about technology and the advantages and disadvantages of going remote. What about access? We know that when we take part in Zoom meetings, access can be an issue—for example, due to a lost wi-fi connection. In such cases, where would the onus lie? If somebody did not turn up to court, there would be penalties and they could be found to have wasted court time, although there might be a valid reason for their not turning up. What would happen if someone could not connect? What test would be applied in such cases?

My question is for Kay McCorquodale, with regard to the five-year digital strategy, as well as for Richard, given his enthusiasm when he talked about technology evolving.

The Convener: We will go to Iain Nicol first.

Iain Nicol: I have practical experience of running a proof hearing, which was scheduled to last for three days, with senior and junior counsel involved, and in which a witness was to give evidence from Morocco. It was a serious case in which credibility issues were very much at stake. The witness's internet connection simply did not work, and within 30 minutes of the start of the proof, the sheriff had to abandon the case and refix the proof hearing for much later in the year.

It is a practical issue, and there is no easy answer. The witness was giving evidence from abroad, and she could not travel back to Scotland to give her evidence in person. There was really no option but to adjourn. Without better internet connectivity, that is a practical issue that could arise at any stage in a case.

I have also had a situation in which a sheriff principal who was presiding over the court from home had a poor internet connection and had to adjourn the case. I think that such issues are being addressed, and I suspect that they will not be the norm going forward, but they do arise. The court just has to be flexible in taking those matters into account.

Fulton MacGregor made a point regarding those who have difficulty with interacting, of whom there are two categories. The first, which has been touched on already, is the category of vulnerable witnesses. Part 2 of the Vulnerable Witnesses (Scotland) Act 2004 deals with measures that can be put in place in civil proceedings; it is really a question of flagging up to the court whether someone is deemed to be a vulnerable witness. Measures such as the use of live television links or screens, the use of a supporter or, indeed, the taking of evidence by commission can then be put in place to assist that vulnerable witness to give their evidence in the most appropriate manner.

The other category is of witnesses who are not necessarily vulnerable, but who simply have a difficulty around interacting with the court system on a digital platform. Again, such issues really need to be flagged up. A formalised process needs to be put in place to flag up and highlight potential difficulties well in advance so that the court is aware of them and can take appropriate measures.

Such discussions would normally be held at procedural hearings and, if necessary, the court can take cognisance of any issues and say that it is not appropriate for someone to have to interact with the court digitally and that they should be allowed to appear in person, whether for procedural business or evidential hearings.

It is a question of making sure that the court is structured flexibly, so that it can take into account all those different possibilities.

Kay McCorquodale: I agree with what Iain has said. Normally, there would be a discussion at a procedural hearing or a hearing in advance of the substantive hearing. It is really for the judge to decide what is appropriate in the interests of justice. The judge will take into account the nature of the case, the public interest and the ability of the parties to participate effectively in the proceedings. That is how such issues are taken into account.

On the point about effective communication that Karen Adam mentioned and Karen Wylie addressed, I will just give a reassurance that we are looking at attendance at remote hearings. The Scottish Civil Justice Council has compiled an equalities impact statement; it is a very full document, and it will be updated before it comes back to the council. A business and regulatory impact assessment is also being prepared. Those two documents go hand in hand—they need to be compiled and the council needs to look at them when it is deciding on the appropriate rules to put in place.

Where does the onus lie in relation to how people can get access? Practice sessions are an inherent part of the system. Before any hearing takes place, the clerk of court will make sure that all the participants attend a practice session and hopefully at that point some of the connectivity issues will arise. That is certainly what happened in the judicial review that I observed yesterday. There were quite a few practice sessions and then the decision was taken that the court would have to do something differently. The hearing proceeded, as was necessary, but if it had not been for the practice sessions, the issues would not have been resolved.

Karen Wylie: Richard Susskind said that these are exciting times, and there is no doubt about that; it will be very interesting to see how the technology develops and how we will be working in the next five to 10 years.

To go back to the telephone hearings, it is somewhat discouraging that although we already have a slightly better forum—the Webex hearing—telephone hearings continue to be used. I feel very strongly—and certainly some of our members who have contacted me with their views feel very strongly—that telephone hearings simply do not work on a practical level. If you are involved in a court hearing that takes place by telephone, you cannot tell if you have lost a party during a call until, perhaps, someone addresses them. It can be very difficult to keep track of what is going on. You cannot see people, so you cannot read their emotions, how they are reacting and whether they are bored by or interested in what you have to say. There are all sorts of issues, and we need to be moving away from that and using the technology that is available to us.

11:15

I will make a quick point about open justice. I might be stretching it somewhat to consider myself a young lawyer—I am probably somewhat past that now—but my years of training are close enough in my mind. Open justice is very important for members of the public, but it is also important for people who are learning to be lawyers, solicitors or advocates. I learned a tremendous amount by being sent to court for the most basic hearing. I got to listen to and watch my more experienced peers addressing the sheriff or, when I was sitting in the Court of Session, a judge.

I raise that as a very minor point, but we should take account of it when considering how we will deal with matters. It is helpful for more junior members of the profession to see hearings being dealt with. That is a forum in which I have learned. Younger members of the bar and younger solicitors are not currently able to watch hearings in process, which is difficult for them. There are certainly learning opportunities in sitting in and attending court. A collegiate approach is taken in the bar and in local faculties. People have the opportunity to mix with other lawyers, to approach more experienced lawyers to discuss a case, and to get to know older members of the bar.

As the technology develops, there might be ways of addressing some of those issues. Those are minor points, but they should be considered when we look at what we will be doing.

Ruth Crawford: I will raise a couple of matters that we have not really touched on but which are nonetheless important in relation to the general category of access to justice, which I mentioned at the start of the session. The first relates to witnesses rather than parties to the proceedings. My experience is that taking evidence from witnesses virtually is sub-optimal at best. Witnesses are given all the whys and wherefores of the rules beforehand, but it is very difficult to know whether they are on the right page or whether they are alone and are not being tutored. We need to consider that.

There is also a lack of empirical evidence on whether taking evidence virtually is more effective and efficient in getting to the truth than taking evidence in person. I am aware that some research has been done, but that might produce evidence that is anecdotal in nature rather than empirical. Expert witnesses down south—this must be anecdotal evidence—have indicated that they felt that they had an easy time of it. Some people might think that witnesses having an easy time rather than a hard time is a good idea, but that goes back to the issue of the general solemnity of the proceedings. We have to consider the experience of witnesses.

As Karen Wylie said, training is incredibly important. We exercise collegiality in the bar; we consider that to be at the root of what we do. We learn by seeing and by doing. Earlier, I mentioned the consultation responses. Our junior junior members—those who have five years' experience or less—gave very powerful responses on their experiences and their views on virtual hearings.

As we go into the future, the committee might also wish to have regard to a point relating to technology evolving—which, of course, it will—and being able to innovate, which segues into the resources issue. It might well be that only well-resourced firms that deal with white collar-type work are able to afford the technology. I am concerned about ending up with only big city firms being able to provide legal services, because we know that Scotland is crying out for rural solicitors, who are under increasing pressures, to continue to practise. If we are to advance in that way, we need to consider the future of the solicitor side of the profession. Big law firms might see a business opportunity in that regard, and that might exclude smaller, more locally based law firms, so people who do not live in big cities might have to travel in, or dial in, to see their solicitor, which might not be satisfactory.

The Convener: Time is tight, so our final contribution will be from Richard Susskind. We hope to be able to influence what will happen, rather than just being spectators. What would having asynchronous hearings, for example, mean in practice?

Professor Susskind: I thank the committee again for involving me in the discussion. Connectivity has been a very practical issue. If there is not sufficient broadband and connections fall, the process is very difficult indeed. However, from now on, the connectivity that we have today is the worst that it will ever be. That is the case not only for law but for health and education. Across Scottish society, we will find that broadband connectivity will increase. By 2024, in light of 5G technologies and so on, I do not think that we will be having the discussions about poor connectivity that we are having today. In any event, we can sidestep the issue of connectivity, which takes me to my point.

The Civil Justice Council's futures group, which I chaired, came up with the idea of asynchronous hearings. Synchronous communication involves people needing to be available at the same time to communicate—a phone call, a meeting and so on. Asynchronous communication involves people not needing to be available at the same time—an email, a text message, a WhatsApp message and so on. People send and receive such messages at their convenience.

Court hearings are currently synchronous; everyone needs to be available, whether virtually or in a court room, at the same time. In asynchronous hearings, the use of which we advocated for low-value civil cases, evidence and arguments are submitted electronically by the parties, there is some kind of online discussion—almost like an exchange of emails—that is moderated by the judge, and the judge then comes to his or her conclusion and determination in like form. There is no oral evidence or physical or virtual hearings, so there is no question of connectivity difficulties or taking a day off work. We thought that that would be a proportionate way of resolving straightforward disputes.

Every year, there are 60 million disputes among traders on eBay. Almost none of those disputes is sorted out by lawyers in court; they are sorted out through an asynchronous process.

I am not saying that asynchronous hearings are the answer to all disputes—I really am not—but I want to put that option on the table as another possibility and as an illustration of something that avoids connectivity difficulties, for example. Our proposition was endorsed by the Lord Chief Justice and the Lord Chancellor, and it is now part of Government policy down south. I stress that this is not the last word; such hearings are another possibility in the buffet of options that we have for improving our system.

The Convener: Thank you very much. That is a good place for us to finish. The session has been really useful. Clearly, the committee wants to influence how we move forward, and the witnesses have certainly given us lots to think about.

We move into private session.

11:22

Meeting continued in private until 11:51.

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