

COVID-19 AND SOLEMN CRIMINAL TRIALS

SCOTTISH GOVERNMENT DISCUSSION DOCUMENT – APRIL 2020

Introduction

“The most important duty of any Government is to keep its citizens safe and maintain public order.”

Cabinet Secretary for Justice, Humza Yousaf MSP, Scottish Parliament, 1 April 2020

Scotland’s justice system underpins our basic rights and freedoms and protects communities and individuals from harm. Those vital rights and freedoms must continue during the COVID-19 outbreak. The Scottish Government and justice agencies are committed to ensuring continuing fair and effective justice. Moves have already been made to enhance digital systems and capability across the justice system and to scale back activity, where appropriate. However, our justice system relies heavily on physical attendance at court, and on physical evidence including for the most serious criminal cases that are heard in the High Court and Sheriff Court.

Purpose of this document

The purpose of this document is to provide a basis for upcoming discussions between the Cabinet Secretary for Justice and key stakeholders on the most effective approach to manage the impact that the COVID-19 outbreak will inevitably have on the operation of court business in Scotland. Ensuring all parts of our court system can operate effectively as soon as possible continues to be an important priority; including all civil, family and tribunal cases as well as those criminal cases currently heard at a summary level. We will continue to consider with our justice sector partners any necessary and appropriate steps we can take in regard to those matters. The focus for this paper and the subsequent discussions is, however, very much centred on the most serious cases (solemn cases). This is in order to be able to identify as quickly as possible some potential solutions to enable those cases to progress effectively if possible, during as well as in the aftermath, of the COVID-19 emergency.

Our approach

The Cabinet Secretary for Justice will have a number of focussed discussions on a range of potential options to manage the impact that the COVID-19 outbreak will have on solemn criminal business in Scotland. These options are set out in part 2 of this document. Part 1 of this document provides:

- An assessment of the current **operating context** – why might change be required just now and in the coming months and what **criteria** should we use to assess whether any change would be beneficial?
- An overview of solemn business – the current **arrangements and caseloads**; and a recap of steps taken to date – leading to the publication of this document.

PART 1 – CURRENT OPERATING CONTEXT

This paper is only necessary due to the impact that COVID-19 is having (and will have) on the operation of the solemn criminal justice system in both the short and medium term. All jury trials are currently suspended – this is the only responsible approach that could be taken in view of the social distancing guidance that is in place. When considering changes to the way in which the system operates it is important to bear in mind that we will, most likely, experience a phased return to normality and that, during each phase, the ability to conduct business as usual will depend on the public health requirements in place at that time.

Whilst it is not feasible to provide anything other than indicative timescales at this point it is possible to describe three distinct phases that we will most likely experience before the solemn criminal justice system can fully return to the position it was in ahead of the onset of COVID-19 outbreak. The impact on the operation of the system will vary in each – and there is the potential to cycle between these periods. This must be borne in mind when the options in this document are being considered.

- **“Lockdown” period** – this is the period that we currently find ourselves in. Precise timings cannot be confirmed, but it may continue for a period of weeks or up to a short number of months, based on public health advice. The assessment of the Scottish Courts and Tribunals Service (SCTS) is that, during this period, no jury trials can be commenced and only a limited number of summary custody trials may be possible.
- **Phased /Societal recovery period** – we anticipate that, for a period of months beyond the end of the current period, enhanced public health and social distancing requirements may remain in place. During this period jury citation will prove difficult and take longer, in a country recovering from high sickness rates, schools and public services re-commencing, businesses recovering after lengthy staff absences and people taking missed holidays after lengthy restrictions.
- **Business as usual recovery period** – once all public health restrictions are lifted it will be possible to fully recommence the operation of the normal solemn criminal justice system. However, pressures will be evident across all elements of the justice system; criminal, civil, tribunal and administrative. Care will be required to ensure that a recovery programme is established at a sustainable pace and matched to the resources available in justice organisations, the legal profession and voluntary sector. The precise length of that system recovery period will vary depending on the length of the preceding two periods, but it is already apparent that there will be a period of this nature.

Any options for change in the short to medium term should be appraised against those varying periods in which they would need to operate. They should also be appraised against clear **criteria** of what we are aiming to achieve by making changes to the system. Scottish Ministers are of the view that those criteria are:

- **To protect the life, health and safety of all those using the system;**
- **To maintain, so far as possible, an effective system of criminal justice;**
- **To maintain public confidence in the delivery of justice during this period;**

- **To facilitate the most effective long term system recovery.**

Solemn criminal business – Current arrangements and caseloads

Serious criminal cases are dealt with under solemn procedure in Scotland. The Crown will generally prosecute under solemn procedure where the sentence on conviction is expected to exceed 12 months of imprisonment or detention. It includes the most serious crimes which may only be prosecuted in the High Court, such as murder and rape. All solemn cases are heard in the High Court or the Sheriff Court by a judge sitting with a jury of 15 people. In the context of the COVID-19 outbreak, it is recognised that it is not appropriate to expect members of the public to undertake this civic duty in the normal way, as it would require them to travel to the court and to be in close contact with a number of other individuals, both in the context of empanelling the jury and during jury service.

Following Scottish Government and Public Health Scotland guidance, as of 17 March 2020 the SCTS confirmed that no new criminal jury trials would be commenced or new juries empanelled until further notice. The SCTS confirmed that the position would be regularly reviewed, but the effect is that until it is safe to convene a jury there will be no solemn trials in Scotland.

Further measures introduced by Scottish Government directed the public to stay at home to protect the NHS and save lives. While these measures are in place the SCTS cannot cite potential jurors, empanel new juries or commence jury trials. England & Wales, Northern Ireland and Republic of Ireland have similarly ceased all jury trials at this time. With an additional 551 new solemn cases being indicted each month (High Court and Sheriff Court), and many cases already awaiting trial when the restriction on jury trials was introduced, it is clear that the number of cases waiting for trial will very quickly increase.

Coronavirus (Scotland) Act 2020

The Coronavirus (Scotland) Act 2020, which was passed unanimously by the Scottish Parliament on 1 April 2020, included a range of emergency measures to ensure that justice can continue to take place and to provide flexibility during the current outbreak. The supporting documents for the Act acknowledged that during the COVID-19 outbreak, given the impact of significant staff absences and social isolation and distancing advice, it is inevitable that there will be large numbers of cases that are delayed for various reasons. The Act includes provisions that extend certain time limits applicable for criminal proceedings, including for solemn proceedings in the High Court and Sheriff Courts.

The provisions in the Act allow for time limits to be extended, but do not resolve the inability for the most serious cases to proceed without being able to empanel juries. In other words, the new extended time limits allow cases to be indicted and call for trial at a later stage than would normally be possible but do not allow cases to conclude while it is unsafe to bring a jury to court. Proposals within the Bill, as introduced, to allow Ministers - if they were satisfied that it was necessary and proportionate to do so - to provide by subordinate legislation for trials without juries on a temporary basis during the outbreak and its immediate aftermath were

withdrawn. Instead, Scottish Ministers confirmed that they would work with relevant stakeholders to consider any practical or legislative solutions to this issue, with a view to seeking to maintain an effective system of criminal justice whilst upholding the rights of accused persons, victims and witnesses, including the obligation to bring cases to a conclusion within a reasonable time. These discussions are being approached with an open mind by Ministers.

This paper describes the nature and scale of the challenge. It discusses various possible options for mitigating that challenge. Ministers are open to considering any other option which may be suggested to them. In addition to the substantive merits and demerits of the various options, Ministers will wish to discuss with stakeholders whether it is correct that any temporary solution should only be for the time period of the outbreak and the immediate aftermath. We are aware of concerns that, notwithstanding any measures which might be taken to enable cases to continue to be brought to trial during that period, there will still be a very significant backlog of cases to be addressed when it comes to an end. As well as the discussions focussing on each option we would also want to discuss what time period it would be appropriate for any changes to be in force for.

The Scottish Government also recognises that at least some of the options considered would require legislative change. Ultimately it would be a matter for the Scottish Parliament to scrutinise the proposals and to determine whether it supports them. Other proposals are matters that fall within the responsibility of the senior judiciary for the efficient conduct of business through the courts and of the SCTS who are responsible for the health and safety of court users. The purpose of this discussion paper and subsequent discussions is to establish not only which of the options would best prevent, mitigate or remedy the negative impacts outlined below but also the degree of consensus as to the merits or otherwise of any particular proposed measure. This will help to inform the Scottish Government decision on whether it is appropriate to propose further legislation and when this would best come into effect.

Scottish Ministers' continuing commitment to trial by jury

Scottish Ministers are committed to the principle of trial by jury. During 2017-2019 the Scottish Government commissioned ground-breaking research, using mock trials, into how juries reach decisions to help inform how the jury system could be strengthened¹. During early 2020, the Scottish Government hosted a series of engagement events across the country to seek views from the legal profession, third sector, and people with experience of the justice system, on the potential for criminal justice reforms, again with the aim of further strengthening Scotland's system of trial by jury. This included considering how the three unique elements of our jury system interact – the simple majority, size of jury and the three verdicts and whether all (or any) of those elements should be reformed. That work is paused during the period of the current outbreak and is therefore not directly linked to the work we are now considering on how our justice system can effectively react to the COVID-19 outbreak.

¹ <https://www.gov.scot/news/scottish-jury-research/>

The proposed change to the system of trial by jury envisaged in the Coronavirus (Scotland) Act 2020, in the context of the COVID-19 outbreak – namely, to allow solemn trials to take place before a judge sitting without a jury - was intended to be a temporary measure, for the immediate period following the outbreak and its aftermath until any excessive backlog was under control and the jury system was capable of fully functioning again. Any change would not have provided a precedent for removing jury trials in future. The change would have required subordinate legislation by Ministers, with the approval of Parliament. It would have required Ministers, following consultation with relevant stakeholders, to conclude that the change was necessary and proportionate in response to the negative effects that COVID-19 was having or was likely to have by preventing solemn cases from being heard and concluded. Ministers also recognise that, in response to this proposal, a number of other options have been suggested. Before bringing forward any further proposal, they wish to discuss a full range of potential options for addressing the problem. Whilst the proposal to temporarily change the trial by jury system is still included amongst these options, it is not the Scottish Government's favoured option to address this emergency situation.

This paper therefore sets out information about the potential scale and nature of those negative effects and seeks views on a range of options that have been suggested to mitigate these effects. Subject to the agreement of the Parliamentary Bureau, Scottish Ministers aim to report back to MSPs on next steps as soon as possible after recess.

Impact of pause on solemn jury trials – Scale of the potential backlog

“We will be facing a monumental backlog of solemn criminal trials once the current restrictions are lifted and trials can recommence. Unless action is taken to mitigate the impact of this, there will be substantial delays in bringing accused persons to trial. These are likely to stretch into years rather than months. The delays will be unprecedented in Scottish legal history.”

Lord Justice General, statement in response to the Coronavirus (Scotland) Bill, 31 March 2020

Over the past decade, levels of both violent and property crime in Scotland have fallen significantly. However, over recent years, there has been a very significant increase in the most serious crimes brought to court, in particular to the High Court. This reflects increases in particular in the prosecution of historical and new sexual crimes and measures to tackle serious and organised crime. The nature of these cases is also more complex, involving for example forensic or digital evidence, adding to the timescales for cases to be investigated and brought to court.

Table 1: Solemn crime – Indictments registered and trials led, 2017-2021²

	2017/18	2018/19	2019/20	2020/21 [Projected by SCTS]
High Court				
<i>Indictments Registered*</i>	718	911	1125	1275
<i>Trials Called**</i>	689	717	870	995
<i>Trials Evidence Led***</i>	461	507	521	620
Sheriff Court Solemn				
<i>Indictments Registered</i>	4,979	5,182	5508	5900
<i>Trials Called</i>	2,833	2,848	3030	3245
<i>Trials Evidence Led</i>	1,041	1,119	1230	1300

*'Indictments registered' is the formal decision point for criminal proceedings in serious cases. This can be seen as the point when the Crown Office decide a prosecution will be taken forward.

** 'Trial called' is the point at which after an indictment is registered that a trial is arranged.

*** 'Trial evidence led' is the point at which after an indictment is registered and a trial is arranged that a trial with evidence is progressed. If an accused pleads guilty, then there will be no trial with evidence led and instead the case will proceed to sentencing.

The Scottish Government has committed additional resources in recent years to both the SCTS and the Crown Office and Procurator Fiscal Service (COPFS) to help support measures to address the duration of these cases, notwithstanding the increase in volume and complexity. Prior to the current outbreak there were around 390 High Court solemn trials outstanding (with a scheduled trial date) and around 500 Sheriff Court solemn trials outstanding (i.e. registered with the SCTS but not yet disposed of).

As the Lord Justice General has made clear, the current pause in jury trials as a result of the restrictions in place to control the COVID-19 outbreak will inevitably lead to a substantial increase in the backlog of trials awaiting progress through the courts.

Based on the projections for 2020/21, for each five month period in which solemn jury trials cannot proceed, there would be an additional backlog of over 250 additional High Court trials and 540 Sheriff Court solemn trials that would otherwise have proceeded. In five months, the additional backlog could total around 790 serious cases. If the halt on the progress of cases were to continue over the summer the scale of the backlog, on top of those cases already awaiting trial prior to the outbreak, would be prodigious. The total number of outstanding trials could exceed 1600 cases.

Current justice capacity was only recently expanded to seek to cope with the growth in the number of the most complex and serious cases. There is no simple or quick way to expand further the capacity of the solemn courts to absorb and reduce a backlog. This would be the case in normal times, but is especially the case during the COVID-19 outbreak, which creates substantial difficulties for the normal operation of the courts. The impact of the backlog on the progress of, and timescales for, criminal cases could stretch over a number of years and impact on the justice

² <https://www.scotcourts.gov.uk/official-statistics>

system for years to come. That impact on the justice system translates, in turn, into impacts on and for individual accused persons (whether on remand or on bail) and for individual victims of crime, which we describe further below.

One way in which the High Court has met increasing demands in recent years has been to draw on resources from the Sheriff Courts, for example reallocating Sheriff Courts for High Court business and having experienced sheriffs act as temporary judges. This of course takes those sheriffs away from hearing solemn Sheriff and Jury cases. Furthermore, Sheriff and Justice of the Peace (JP) summary business is, at this time, only progressing on an exceptional basis. Therefore, although it is anticipated that some summary cases may still be brought to trial (particularly with the enhanced flexibility in the way that evidence can be made available to the court, provided for in the Coronavirus (Scotland) Act 2020), there will also be a substantial backlog of summary criminal business, which will require to be accommodated within the Sheriff Court, following the outbreak.

Implications of a significant backlog for victims, accused persons, etc.

“People who have experienced the most serious crimes, including families who have been bereaved, are already experiencing lengthy delays in their cases coming to trial. Many have expressed their concern that, while the restrictions to reduce the spread of coronavirus are necessary, these will result in further delays as well as a great deal of additional stress and anxiety.”

Victim Support Scotland, letter to MSPs, 31 March 2020

In her thematic review of the management of criminal justice time limits, the previous Chief Inspector of Prosecution in Scotland noted that serious consequences flow from delays in the progress of criminal prosecution. The implications include:

- For victims of the most serious crimes, and their families, there is the distress and uncertainty of waiting for an extended period for their case to be resolved.
- For vulnerable witnesses there is the ongoing trauma involved when there is a delay in giving evidence. The Inspectorate identified the adverse impact of delay, in particular, on the willingness of victims of crime to continue to engage with the criminal justice process.
- For people accused of serious crimes there is the uncertainty of awaiting justice. Accused persons on bail have a criminal charge hanging over them, and may be subject to conditions of bail, for an extended period.
- For those people accused of crime who are held on remand in prison the negative implications are especially acute. Without the ability for cases to progress to trial, an accused person could be held on remand for an extended period with no certainty about when their case will come to trial. Prior to the COVID-19 outbreak, there were 156 people in custody awaiting trial for solemn crimes in the High Court and 115 people in custody awaiting solemn trial in the Sheriff Court.

There may be opportunities to mitigate, to some extent, some impacts of the delay. For accused persons held on remand for solemn crimes, bail reviews can determine whether it is appropriate for them to remain in custody. However, there is already a presumption in favour of bail. Accused persons will therefore currently be remanded in custody for good reasons, including protection of the public. Therefore bail reviews are likely to be an option for and to be successful for only a limited number of individuals.

For vulnerable witnesses, there may be the opportunity to provide evidence by pre-recorded video. However, the capacity for pre-recording evidence well ahead of a trial taking place is still limited and, in the context of the current outbreak, there may be practical considerations in organising suitable arrangements for pre-recording, for example through evidence by commissioner hearings.

There are also wider consequences for the criminal justice system. Long delays may undermine public confidence in the operation and effectiveness of the justice system in tackling the most serious crimes, including murder, serious sexual offences and serious and organised crime.

Practical requirements for jury trials

“Without your essential contribution, it would not be possible for the Scottish legal system to maintain the high standards which have been achieved over the years.”
SCTS, Guide to Jury Service in the High Court and Sheriff Court, February 2019

There are a range of practical considerations that need to be addressed when exploring arrangements for, or alternatives to, trial by jury in the context of the COVID-19 outbreak and health advice:

- Prospective jurors are selected at random from information supplied from the electoral register. Whilst certain people are excluded, for example those employed in certain roles in the justice system, the aim is to ensure a representative and random sample of people to act as jurors.
- Prospective jurors are currently required to travel to and physically attend at the High Court or a named Sheriff Court. People who have not been excused who fail to attend can be fined.
- Prospective jurors will generally be brought together in a waiting room in the court before the jury is empanelled. Rules of Court require that a jury cannot be balloted where there are less than 30 people named on the list of jurors present in court, so the empanelling of a jury of 15 requires at least double that number to be present, and sufficient numbers of potential jurors to be cited to allow for excusals.
- Courts will generally set down several trials to be heard during the week, so the number of potential jurors cited to attend at court will allow for more than one jury to be chosen. Unless good reasons are given, or an objection to a balloted juror is allowed, the first 15 jurors balloted will make up the jury for each trial.

- Jurors are required to listen to all of the evidence as well as any instructions given by the judge. They must not make any investigations or enquiries of their own into the case or discuss the case with anyone except their fellow jurors, in the privacy of the jury room. A court clerk will carry any messages and ensure the security of the jury's deliberations. The role of the jury is to discuss the case together and to reach a verdict in the case. Throughout this time, the court has a responsibility for ensuring the privacy of the jury discussions and the protection of the jury; and it is essential that the integrity of the jury is maintained.

Jury service is an important civic duty. There are well established arrangements that allow people to be excused from jury service on medical grounds, provided they have a medical certificate. However, jurors are not expected to contradict health advice or to place themselves at personal risk in fulfilling their civic duty. The courts have a general responsibility to ensure the safety and wellbeing of those selected for jury service, whilst also ensuring that those accused of serious crimes can receive a fair trial.

PART 2 – OPTIONS FOR ADDRESSING DELAYS IN SOLEMN TRIALS IN THE CONTEXT OF COVID-19 HEALTH ADVICE

“The SCBA believes there are workable alternatives and welcomes the opportunity of working with the Scottish Government and the Justice Secretary in attempting to find a temporary solution to this temporary problem.”

Scottish Criminal Bar Association (SCBA), 2 April 2020

A wide range of options have been proposed by stakeholders, either to allow trial by jury to continue to take place during the current outbreak, or to assist in dealing with the inevitable backlog of cases during the recovery phase. Scottish Ministers are open to considering any feasible options that can help to address the difficulties to progress jury trials to deal with the most serious criminal cases. The potential benefits and limitations of the options which have been suggested are discussed below. In relation to some of the options we have indicated a provisional view; we are, though, open to reconsidering that view in the light of the discussions.

OPTION ONE: Having a smaller number of jurors

Scotland is unusual in requiring a jury to include 15 jurors (although this can reduce to 12 if, in the course of a trial, jurors become unwell or otherwise unable to continue their role). As noted by the SCBA in their response to the Coronavirus (Scotland) Bill, during World War II the number of jurors required to constitute a jury in Scotland was reduced. Section 3 of the Administration of Justice (Emergency Provisions) (Scotland) Act 1939 provided that all juries, whether civil or criminal, should consist of “seven persons of whom two shall be special jurors” (s3(1)). At the same time, the maximum age for jury service was raised from 60 to 65 (s3(4)). The reduction in the size of the jury did not apply to trials for treason or murder, or in any High Court case where the court, on the application of one of the parties, directed that the “gravity of the matters in issue” required a jury of 15.

Depending on the current and future health advice, smaller juries might also assist in securing sufficient jurors willing and able to serve and to assist with enforcing social

distancing in the court. Following the immediate period of the outbreak, smaller juries could also assist in securing more juries from the same number of prospective jurors currently brought to court – assuming there was sufficient court capacity - but would not on its own help to address the backlog of cases.

However, during the period of the current health advice, the use of smaller juries would not address the following issues: it would still involve sufficient numbers attending at court to empanel the jury (though likely smaller numbers than those required to empanel a jury of 15); it would require jurors to travel to court (or other venues); it would involve the jury members attending together during the trial; and it would run the risk that if any jury member were to become unwell, the jury would require to be discharged and the trial collapse (and restart, in due course, before another jury). Having a smaller number of jurors also raises some more fundamental issues. Lord Bonomy's independent review of safeguards within the criminal justice system (2015)³ emphasised that issues of jury size, the majority required to convict and the number of verdicts available to a jury are "inextricably linked", when considering the potential for miscarriages of justice.

If this proposal were to be considered as one which could be utilised beyond the immediate aftermath and therefore during the recovery period, the public health concerns may have reduced. There would, however, still remain decisions to be made regarding what would be the appropriate size for a smaller jury and the majority required for conviction as well as whether smaller juries are appropriate for the most serious cases.

OPTION TWO: Holding jury trials in larger non-court locations to facilitate social distancing

During the debate in Parliament on the Coronavirus (Scotland) Bill, the suggestion was raised that trials could be held in alternative, larger venues, such as cinemas or theatres.

It is not unprecedented for justice processes to be undertaken outwith courts. For example, the recent Clutha Fatal Accident Inquiry was held at Hampden Park Stadium in Glasgow, to facilitate attendance by families, etc. Larger venues, such as cinemas or theatres could more easily facilitate social distancing between jurors and others who have to be present in court.

There are, however, significant practical issues with using non-court venues for the most serious criminal cases. Most significantly, alternative venues do not have custody facilities for holding those accused of serious crimes safely and securely and for transferring them to and from the courtroom. Potential jurors would still need to be willing to fulfil their service and to travel to the proposed venue. There would be significant conversion required for criminal trial purposes in order to meet requirements for jurors, victims, witnesses and a wide range of professional court users. The need to introduce secure technology facilities for evidence presentation, pre-recorded evidence and productions would add to the challenges. There would

³ <https://www2.gov.scot/Resource/0047/00475400.pdf>

also still require to be staffing of security and court officials for these additional venues alongside the continued use of current court facilities.

Equipping an entirely new venue to accommodate all the requirements of the court process would take some time (particularly when those installing the facilities will need to observe social distancing). New facilities are unlikely to be up and running in less than a number of weeks at best and potentially longer.

Even if workable, the use of larger venues would not enable jury trials to commence during the lockdown period and would be of little value during the societal recovery period. At best if it was possible to create three larger venues, then the throughput of trials would potentially be nine per month across all three venues. This would have little impact on the estimated potential 1,600 outstanding cases. As soon as jury trials were recommenced the effort and cost involved in creating the three venues would be lost.

Our provisional view is that the practical difficulties with this proposal may make it unworkable.

OPTION THREE: Retain current court facilities but enable social distancing during jury trials

Section 92(3) of the Criminal Procedure (Scotland) Act 1995 provides that “from the commencement of the leading of evidence in a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the court-room”. This is to allow the public to be cleared from the court.

Potentially a similar power could allow the judge to clear the court in all cases in order to allow the jury to sit, appropriately distanced, in the public gallery. This option would not however address one of the concerns about the use of juries during the period of public health restrictions – namely the numbers of individuals who require to attend court to empanel the jury, and how this could be achieved whilst abiding with public health guidelines and the requirement for social distancing.

There are also a number of other issues that would need to be considered. Firstly the court is likely to require to allow certain other persons (in particular, members of the press) to remain in the court room. Secondly, there is the question of whether there are suitable facilities in the particular court room to allow jurors to be able to hear the evidence, especially if a higher number of witnesses are giving evidence by live TV link or pre-recorded evidence. We understand that, at the moment, there can be limited audibility from the public gallery. Finally, jurors would require to be brought together for their deliberations and it is more difficult to see how that could be done whilst abiding by social distancing requirements.

Our provisional view is that this option would not allow jury trials to commence during the lockdown period but that it may have advantages during the phased/societal recovery period, in terms of building confidence in juror safety. In itself this would not make any significant impact in reducing the backlog, but could be a useful approach to deploy, during that stage, in conjunction with option 9 (maintain the status quo).

OPTION FOUR: Having jurors in remote locations video-linked to court

It was also suggested during the debate in Parliament on the Coronavirus (Scotland) Bill, that juries could consider the case via remote television link from an alternative site, either individually or collectively.

Video links are used extensively within the criminal courts, for example for vulnerable witnesses giving evidence from remote sites or prisoners attending proceedings remotely by video link from prison or custody. Video links would avoid prospective jurors having to travel to court buildings.

However, there would be significant legal, technical and operational challenges in juries viewing court proceedings remotely. Once a jury is empanelled no communication with any person outwith the jury is permitted regarding the trial. Jurors must be secluded after the case has closed and they have been asked by the court to deliberate on their verdict. The jurors retire to a room by themselves and are not permitted to leave the room other than to receive or seek a direction from the sheriff/judge or to make certain requests. Nobody is permitted to enter the room or to communicate with the jurors unless authorised by the sheriff/judge. This includes the bar officer. If jurors require a direction or wish to make a request, this should be dealt with by a sheriff/judge in open court in the presence of the prosecutor and defence agent. The court officer may exercise minimum access only to ensure transmission of such requests to the court.

These rules are in place because of the need to secure the integrity of the jury system. If any unauthorised person contravenes the rules regarding the seclusion of the jury, the accused must be acquitted (section 99(5) Criminal Procedure (Scotland) Act 1995).

As a minimum such a system would require 15 secure video links to 15 secure locations, where each juror could be seen by the court and from which the juror would be able to view all court proceedings and evidence presentation. This assumes that the 15 jury members have been empanelled by some other, as yet unidentified, process from a much larger pool of remote potential jurors. Each juror would require a member of the SCTS staff to be present at the location and the 15 jurors would then need to be able to securely join together to take part in juror deliberations, without any risk of others accessing those deliberations.

To achieve these requirements and secure legislative provisions for a remote video solution would not be achievable within the time constraints available. For example, the courts would need time to:

- Select and procure an entirely new technology (cloud hosted secure videoconferencing) which has not been used to date;
- Design, build, test and implement entirely new equipment, processes and procedures; and
- Prepare and issue online guidance.

Even if achievable this would only facilitate a very small number of criminal trials which would have virtually no impact on the backlog. As soon as jury trials were

recommended the effort and cost involved in creating a remote video solution would be lost.

If jurors were to call from home there would be security and safety concerns as well as issues with the quality and reliability of internet links. It is also unlikely that it would be acceptable for a juror to be alone during any remote access as it would be important to ensure at all times that they are acting appropriately, in terms of attending to the evidence without distraction, and are not subject to any influence from others. Jurors would also need to be able to engage with each other securely during their deliberations.

OPTION FIVE: Test jurors / other court attendees for COVID-19

Testing for COVID-19 (or for those who have been shown to have had it and recovered) is clearly a matter of importance. But the focus must be on testing for our health and care providers and other key workers. It is therefore unlikely that we will be able to move quickly to a position where everybody who may be involved in a criminal court case (be that judiciary, lawyers, court staff, security, accused and witnesses) can be tested in advance. Even if that were possible it may be that a potential juror who has tested negative for COVID-19, in advance of the trial, could become exposed to the virus before the trial commences, including by travelling to any court venue, or, indeed, during the trial. If any single juror were to become unwell during the trial, that would have implications for the ability of the remaining jurors to continue to serve, and would be liable to result in the jury being discharged and the trial collapsing and having to restart before another jury.

In the event it becomes possible for individuals to show that they have some immunity to the virus then it is unknown whether that could potentially change the diversity of current jurors who hear cases. It also needs to be determined whether it should be the key focus for any individuals who may be immune to undertake this role. The priority will rightly continue to be on our health, care sector and emergency services, as well as other key workers. We are also aware of the financial hardship that many individuals may now be facing, and the impact on their willingness to undertake this civic duty, particularly immediately after the COVID-19 outbreak.

So whilst we do not rule out this option we do have a number of concerns as to whether it will be practicable.

OPTION SIX: Deal with the backlog with faster progress of jury trials at the end of the current health restrictions

In their response to the Coronavirus (Scotland) Bill, the SCBA suggested a range of measures that could be adopted to help address the backlog of cases at the end of the current pandemic and health restrictions. The suggestions included increased use of temporary or recently retired judges; the restoration of previously closed court venues or enhanced use of existing court venues; a return to the previous High Court “circuit” to locations across Scotland; etc.

Regardless of the mitigating actions that are taken during the current pandemic, the SCTS have made clear that whilst following the essential health advice, there will be

reduced capacity to conduct criminal trials. It is inevitable, therefore, that a significant backlog of cases will arise and that a wide range of actions will be required to seek to mitigate this. The Scottish Government will support the Courts and the Crown, as appropriate, in taking these necessary actions at that time.

While the exact timescale of the current outbreak and the associated health restrictions is not known, at this time a likely indication of the scale of the backlog may be in excess of 1,600 cases, double what would be classed business as usual.

While resources will be made available to put a robust recovery programme in place it has to be appreciated that pressures will be evident across all elements of the justice system; criminal, civil, tribunal and administrative. It will not be possible, therefore, to divert significant resource from one area of the system to accelerate progress in another. During the recovery period the civil courts, for example, will play a key role in supporting business to return to normality. The ability for people and businesses to assert rights and enforce remedies will be crucial. The role played by the courts in settling contract disputes and ensuring that debts can be recovered will be critical to the recovery of the economy.

The restoration of previously closed courts is not considered to be a viable option. The majority of these courts were closed as they were in more rural locations and the vast majority would not meet minimum modern jury standards. Equally, seeking to recreate a High Court circuit system across multiple Sheriff Court venues would reintroduce inefficiencies, which the current concentration of High Court work on particular courts removed, and would, by taking up space in Sheriff Court locations, add to the pressure on the Sheriff Courts. Increasing the number of judicial officers, on its own, would not enable additional courts to run – other staff, including clerks and macers, are also necessary. The best approach to maximise progress seems likely to be to consider how to make the greatest utilisation of existing jury accommodation, considering radical options such as seven day courts and longer sittings, including, possibly, early evening shifts.

Extreme care will be required to ensure that the recovery programme is set at a sustainable pace and is matched to the resources available in justice organisations, the legal profession and the voluntary sector.

OPTION SEVEN: Judge only solemn trials

Following dialogue between the Scottish Government, COPFS, the SCTS, victims groups and a number of other stakeholders, the Coronavirus (Scotland) Bill as introduced to the Scottish Parliament included provisions that would have allowed Scottish Ministers to make regulations (subject to the scrutiny of the Scottish Parliament) to enable trials on indictment to be conducted by the High Court and Sheriff Court by a judge without a jury.

If progressed, these provisions would have meant that judges would have considered and decided the verdict in the most serious solemn cases and provided reasons for their verdict. Professional judges (whether in the High Court or the Sheriff Court) act independently and impartially and possess the skills to deal objectively with evidence and to assess the credibility and reliability of witnesses. In

Scotland, sheriffs already undertake this role in summary criminal trials (which comprise the great majority of criminal trials in Scotland), which means they can determine whether an accused is guilty or not and sentence up to 12 months in custody upon conviction. Trial by a judge without a jury does not affect the right of the accused to a fair trial, or otherwise affect the trial process.

Most jurisdictions in mainland Europe which have inquisitorial or hybrid criminal justice systems do not use juries, but rather panels of judges, or of judges and lay assessors. Those jurisdictions with more comparable adversarial systems usually have provision allowing for the use of juries to be suspended – this tends to be on a case-by-case basis, i.e. where a jury trial could not be held in a particular individual case, where, for example, it is considered that pre-trial publicity has been so adverse that a fair trial before a jury could not be assured or where the nature of the case is such that the security and integrity of the jury cannot be assured.

The key advantage of this option was that (along with the measures in the Coronavirus (Scotland) Act 2020 allowing for greater flexibility in the ways in which evidence could be provided to the court), it would have allowed some solemn cases dealing with the most serious crimes to proceed during the current outbreak, including for at least some of those individuals held on remand in prison. In the immediate aftermath of the outbreak, judge only trials would allow for the faster progress of cases, with no need to empanel or instruct jurors. It is estimated by the SCTS that the use of judge-only trials could have shortened the length of each trial, and the programming gap between trials to empanel new juries, to such an extent that the throughput of trials could have been doubled. This would have been particularly valuable in the phased/societal recovery period, immediately following the lifting of restrictions, when it will be difficult to cite jurors at a time when businesses are trying to return to normal operation, many people will wish to take holidays, and there will still be some caution over behaviours that might reintroduce the risk of further widespread infection.

At the same time, the Scottish Government acknowledges and respects the strength of the concerns raised by some about this temporary measure. The primary objection to this option were set out by, amongst others, the SCBA and the Law Society of Scotland. In particular, they argued that any changes introduced in response to the current outbreak, however temporary, should not erode an important principle of the Scottish legal system or undermine the right of those charged with the most serious crimes to a trial in front of a jury of their peers.

In response to the proposal to make provision for judge-only solemn trials, a number of possible safeguards or adjustments have been explored and/or suggested:

Reasons

A key safeguard in any system of judge-only trial is the requirement on the judge to give reasons for the decision. This was provided for in the proposal which was contained in the Coronavirus (Scotland) Bill. The requirement on a judge to give reasons ensures transparency, is a protection against arbitrary decision-making, and, if the judge makes an error, provides a basis for an appeal.

Panel of judges

Consideration was given to whether a panel of judges rather than a single judge should sit in solemn cases, for example with three judges considering the case rather than one. In practice, the composition of judicial benches is a matter for the senior judiciary, not Scottish Ministers. There were also practical considerations against this option, for example about the number of judges who would have to sit to consider an appeal against a judgement or sentence by a three judge panel.

Appeal procedure

In their response to the Coronavirus (Scotland) Bill the SCBA noted that for judge in trials proceeding under the “Diplock” procedure, introduced in Northern Ireland in the 1970s, there was an added safeguard of an absolute right of appeal, and that right of appeal extended to both matters of fact and law. In Scotland, an appeal may be brought, with leave, on the grounds that there has been a miscarriage of justice. A “miscarriage of justice” is already capable of including a wide range of specific criticisms of the trial process. In the context of an appeal against a reasoned decision of a trial judge, it could include a variety of criticisms of the judge’s reasoning. Where an appeal is marked, leave is considered by a judge other than the trial judge, with a right of appeal against refusal of leave to a bench of three judges. This opportunity for an appeal against an initial refusal of leave makes it unlikely that any substantial ground of appeal against the decision of the trial judge would not be considered.

Jury trial waiver

In some jurisdictions, including the United States, it is possible for a jury trial waiver to be issued. This arises when a defendant chooses to forego a jury trial and have a judge hear and decide the case. The prosecution and court must also agree to the waiver. During the deliberations on the Bill, concern was raised about giving accused persons influence over how their case is progressed. Questions were also raised about how willing accused persons would be to take on this option, even if it was available.

The Scottish Government still considers it is worthy of discussing this option alongside these additional safeguards but as set out earlier in this paper given the concerns raised it is not considered to be the preferred option of the Scottish Government to address the problems created by the COVID-19 emergency.

OPTION EIGHT: Adjust the sentencing power of Sheriff Courts (summary and solemn)

As noted above, the High Court deals with the most serious criminal cases, including all cases involving accusations of murder or rape, and can sentence a convicted person up to life imprisonment. In solemn cases, the Sheriff Court can sentence an accused person to up to five years in prison or impose a fine of any amount. On some occasions the sheriff may, following conviction in solemn cases, remit the matter to the High Court for sentencing, if it considers that a five year sentence is insufficient to appropriately deal with the offence. In a summary case, heard by a sheriff without a jury, the Sheriff Court can sentence a convicted person to up to 12 months in prison or a maximum fine of £10,000 (though some offences can carry higher maximum summary fines as provided for in statute). These sentencing

powers are subject to the overall legal framework including the maximum sentence set for any individual offences.

Other than for cases that must be heard in the High Court as a matter of law, it is for the prosecutor to decide what level of court a case will be heard in, informed by the nature of the alleged offence, the impact of the offence on any victims and the wider community, the relevant potential sentence, the circumstances of the accused and the court's sentencing powers.

As can be seen, trials without jury are a common and long-established feature of the Scottish justice system with the vast majority of criminal cases proceeding to court having been heard in a summary court. For example, in 2018-19, 94% of people convicted in court were prosecuted in summary courts which includes the JP courts. These are of course less serious cases where a custodial sentence of up to and including 12 months is possible as noted above (60 days or less for the JP courts).

Given the current situation, it is appropriate to consider whether changes to these sentencing powers may aid an effective system of criminal justice during this period. This period covers both peak of the COVID-19 outbreak and the recovery that will be necessary in respect of the backlog of cases to be dealt with.

The sentencing powers of different levels of court have previously been subject to revision. For example, the sentencing powers of the Sheriff Courts in solemn cases were increased from three to five years through reforms implemented in the early 2000s which switched on provisions in the Crime and Punishment (Scotland) Act 1997. In 2007, changes were included in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 which increased the sentencing powers of the summary courts (excluding JPs) from three months to 12 months. At the time these changes were proposed, they were justified as reflecting the view that professional judges were capable of dealing with all aspects of cases for more serious types of offending (i.e. decisions about guilt or otherwise of an accused and decisions about sentencing) with such changes aiding the general effectiveness of how cases could be dealt with through the criminal courts.

From around the time of those reforms in the early to mid-2000s, it is worth noting that average sentence lengths overall and the profile of cases going through the criminal courts have changed significantly. Although the impetus for consideration of changes now is very clearly the need to respond to the impact of the COVID-19 outbreak, there may be wider and longer-term issues that could drive consideration of change forward in the longer-term (this is very briefly discussed further below).

For the purposes of the COVID-19 outbreak, consideration could be given to amending the sentencing powers of the Sheriff Court in summary cases. For example, this could look at considering a change in the maximum custodial sentence of 12 months and exploring higher levels such as two or three years. This would allow some cases that would otherwise require to be heard before a jury to be considered by a judge alone. Unlike the proposal for judge only courts, this change would limit the maximum sentence that a convicted person could receive from a judge sitting alone and would extend the long-established precedent for the summary courts to deal with both matters of guilt or otherwise of the accused and if

convicted, sentencing of the offender for cases at the less serious end of the spectrum.

A change to the sentencing powers could only allow a proportion of additional cases to proceed without the need for a jury. In 2018-19, around 1,500 people in Scotland received a custodial sentence of over a year up to and including two years (12% of all custodial sentences), although, clearly, it was not certain in advance what the final sentence would be in these cases. A change from 12 months to three years would have increased the potential for cases to 2,000 people who in 2018-19 received sentences of over a year up to and including three years (17% of all custodial sentences).

A change to the sentencing powers of the Sheriff Court in solemn cases from, for example, five to eight years, may not be seen as such a significant move as a jury would of course still be involved in determining guilt or otherwise of the accused. The Sheriff Court would continue to be able to remit convicted accused persons to the High Court for sentence where appropriate. This option would not address the immediate issue of the inability to hold jury trials. However, this option could provide useful additional flexibility during the recovery phase. The option may allow some cases currently heard in the High Court to be considered by the Sheriff Court before a jury.

It must be borne in mind that this flexibility may be limited as the Sheriff Courts face their own backlog of summary and solemn trials and will face significant continuing pressure to deliver both civil and criminal justice during the recovery period. With this in mind however, while a sheriff solemn court trial is of course a significant undertaking, there are administrative benefits in the use of such trials when compared with High Court trials e.g. there are more sheriffs than High Court judges so prioritisation of judicial resourcing in this way in the recovery period could allow High Court judges to focus only on the most serious criminal cases as backlogs of cases are dealt with.

If progressed, it must be emphasised that any such changes would be a temporary measure relevant only to the period and aftermath of the current pandemic. The exact timeframe for the application of the changes would depend on the estimated length of the recovery time for the criminal courts to deal with the impact of the COVID-19 outbreak, but these would not be longer-term changes.

OPTION NINE: Retain the status quo

If none of the above options is considered to be feasible or practicable, or indeed to have sufficient support, there continues to be the option that we do not adopt any of these temporary measures but instead retain the status quo through not only this outbreak and aftermath but also the recovery period.

We consider it to be important for everyone to be clear on the consequences of this approach. It would give rise to an extensive backlog that, even adopting some of the options above, would take a significant time to address. This would result in potentially very substantial delays for many who are awaiting their trial or who are due to give evidence. It would set back for a very long time the work which is being

done to seek to address the duration of the most serious cases within our criminal justice system, in the context of the very substantial increase which we have seen in the number of those cases in recent years. The size of the backlog and the additional delays which would ensue would depend, of course, on the length of time before the jury system was able to return to normal operation, but they are likely to be very significant.

CONCLUSIONS & QUESTIONS

“We want to continue to work positively with the Scottish Government around the changes which are necessary to our justice system to deal with the spread of Covid-19. The past few weeks have proved that we need to be flexible and responsive to emerging situations and creative in our solutions.”

John Mulholland, President of the Law Society of Scotland, statement on the Coronavirus (Scotland) Bill, 1 April 2020

Like all public services, Scotland’s justice system must comply with public health measures intended to reduce social interaction and the spread of COVID-19. However, the current circumstances also raise fundamental issues and questions for Scotland’s justice system in the context of the state’s responsibility to maintain an effective system for the investigation and prosecution of crime:

- What are the implications for justice and confidence in the rule of law if the most serious criminal cases are not able to progress?
- What are the implications for victims, witnesses and accused, in particular those held in prison on remand, when they have no certainty when their case might progress?
- Is it possible to ask members of the public to take on the civic duty of jury duty without exposing them, or their family members to some level of health risk?
- Are there technological or practical measures that could be introduced to mitigate these risks?
- Is it possible to maintain the random selection of jurors from across the eligible adult population?
- What is required to maintain compliance with ECHR and in particular the right to a fair trial?
- Are there additional safeguards that could be applied to help balance any move away from the current system of trial by jury?
- Is there a point at which the scale of backlog of serious criminal cases would justify a review of the balance between these issues? How would that point be assessed?

The Scottish Government will now engage with key stakeholders and representatives of other political parties on all the options set out in this paper. Subject to the agreement of the Parliamentary Bureau, the Scottish Government intends to update the Scottish Parliament on the progress of discussions as soon as possible after recess.

Scottish Government

April 2020