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HM Inspectorate of Constabulary in Scotland &  
HM Inspectorate of Prosecution in Scotland

## Joint inspection of emergency criminal justice provisions

September 2020

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*HM Inspectorate of Prosecution in Scotland*



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## About HM Inspectorate of Constabulary in Scotland

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HM Inspectorate of Constabulary in Scotland (HMICS) is established under the Police and Fire Reform (Scotland) Act 2012 and has wide ranging powers to look into the 'state, effectiveness and efficiency' of both the Police Service of Scotland (Police Scotland) and the Scottish Police Authority (SPA).

## About HM Inspectorate of Prosecution in Scotland

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HM Inspectorate of Prosecution in Scotland (IPS) is led by HM Chief Inspector of Prosecution who is appointed by the Lord Advocate to inspect the operation of the Crown Office and Procurator Fiscal Service. The functions of HM Chief Inspector are set out in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The 2007 Act makes clear that in the exercise of any of the functions conferred by the Act, HM Chief Inspector is independent of any other person.

This joint inspection was undertaken by HM Inspectorate of Prosecution in Scotland under section 79 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007; and by HMICS under section 74(2)(a) of the Police and Fire Reform (Scotland) Act 2012. This report was submitted to the Lord Advocate under section 79 of the 2007 Act and laid before the Scottish Parliament under section 79(3) of the 2012 Act.

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## Introduction

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The aim of this joint inspection was to assess the use and impact of key emergency criminal justice provisions introduced in response to the Covid-19 pandemic, and to consider whether any aspects of the emergency provisions could result in more efficient and effective ways of working in the longer term.

The inspection was carried out jointly, by HM Inspectorate of Constabulary in Scotland (HMICS) and HM Inspectorate of Prosecution in Scotland (IPS). We therefore considered the provisions primarily from a policing and prosecution perspective, however it was not possible to assess the provisions without also considering their implications for the wider criminal justice system. Had there existed a dedicated inspectorate with oversight of the Scottish Courts and Tribunals Service (SCTS), we would have sought to work with them to provide an even more rounded view of the emergency provisions. Nonetheless, we are grateful to SCTS for its open engagement and facilitation of our inspection.

The background to the joint inspection is set out in our Terms of Reference, published on 31 July 2020.<sup>1</sup>

A range of provisions were made to enable the criminal justice system to continue to operate during the initial response to the pandemic. Our inspection focused on four of these, three of which were legislative and one of which was a change in policy. The four provisions were:

- (1) Electronic signature and electronic transmission of documents<sup>2</sup>
- (2) Remote, electronic attendance of parties at court<sup>3</sup>
- (3) The ability to take a case beginning with an appearance from custody in any sheriff court ('national jurisdiction')<sup>4</sup>
- (4) The Lord Advocate's Guidelines on liberation by the police during Covid-19.<sup>5</sup>

The Covid-19 pandemic has had an extraordinary impact on the criminal justice system, as it has for other areas of public service delivery. Responding to the pandemic has required remarkable efforts from those working across the system to be adaptable, innovative and to work at pace to maintain the integrity of the system and to continue to protect the public. While much focus has rightly been on health care workers, we would like to pay tribute to those working in various criminal justice roles who have continued to deliver essential services.

The scale and pace of the changes required to maintain the operation of the criminal justice system have been a significant challenge. Criminal justice professionals have had to operationalise law and policy changes in quick time, and re-engineer processes to meet new requirements. Any suggestions for improvement or perceived criticisms in this report should be set against this context.

Working across criminal justice agencies has been essential, and we welcome the collaborative approach that has been taken. We note, in particular, the effective partnership working between Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS).

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<sup>1</sup> HMICS & IPS, *Joint inspection of emergency criminal justice provisions: Terms of Reference* (July 2020).

<sup>2</sup> Schedule 4, Part 1, Paragraphs 1 and 1A of the Coronavirus (Scotland) Act 2020 (the 2020 Act) and Schedule 4, Part 3, Paragraph 3 of the Coronavirus (Scotland) (No. 2) Act 2020.

<sup>3</sup> Schedule 4, Part 1, Paragraphs 2 to 4 of the 2020 Act.

<sup>4</sup> Schedule 4, Part 3 of the 2020 Act.

<sup>5</sup> COPFS, [Lord Advocate's Guidelines on liberation by the police during Covid-19](#) (2020).

To help coordinate the response to the pandemic, a Criminal Justice Board was established as a sub-group under the auspices of Scotland's Justice Board.<sup>6</sup> The Criminal Justice Board includes senior representatives from a range of criminal justice organisations including Police Scotland, COPFS, SCTS, the Scottish Prison Service and Community Justice Scotland. Focusing on the 'recovery, renewal and transformation' of the criminal justice system, the role of the Board is to drive forward a system level programme of work to deliver change. The Board has oversight of a number of workstreams, including those on virtual custody courts and virtual summary trials, and a number of enabling projects, such as those on a digital evidence sharing capability and a witness portal. Each of these workstreams or projects is led by one of the justice organisations.

These cross-agency governance arrangements are supported by internal governance arrangements within each organisation which have developed in response to the pandemic. For example, Police Scotland has refined the portfolio of one of its assistant chief constables so that he is solely focused on criminal justice policy issues, in support of the work of the Criminal Justice Board. This includes strategic responsibility for the digitally enabled policing programme which has strong links to ongoing criminal justice reforms. This demonstrates a commitment by Police Scotland to supporting the broader criminal justice agenda, which we welcome and which is evidenced further by the secondment of a chief superintendent to the Scottish Government to work on recovery and transformation of the criminal justice system. The COPFS response to the pandemic has been led by an internal Corporate Resilience Group, supported by what was initially known as the Operational Response Group and which has appropriately developed into an Operational Recovery and Transformation Group.

While the pandemic has brought uncertainty, risk and numerous challenges, it has also brought opportunity. Many of the innovations introduced in response to the pandemic are ones that have long been contemplated but had not yet come to fruition for various reasons. For some innovations, the pandemic has been a catalyst and for others, an accelerator. Some innovations are considered to be long overdue – until Covid-19, the justice system generally relied on face-to-face interactions and paper-based processes. As one respondent to our survey said, *'It shouldn't take a global pandemic to force the criminal justice system into the 21<sup>st</sup> century'*.

While many innovations have been vital to securing the continued operation of the criminal justice system and may continue to be of benefit in the longer term, their swift introduction without the usual consultation or equality and human rights impact assessments, risks them not gaining the support required to work as effectively as possible or, worse, risks the fairness of proceedings being called into question. It is now an appropriate time to take stock, assess their operation and ensure that the benefits are being fully realised without compromising the fair administration of justice. There should be a clear distinction between the response to the public health emergency and any future reform of the criminal justice system in Scotland, albeit that learning from the response may help shape its transformation. We understand that cross-agency work has recently begun on assessing the impact of changes made in response to the pandemic on equality and human rights, which we welcome.

Responding to the pandemic has been a challenge for all the criminal justice partners, but it is important to note the scale of the work still to be done. The criminal courts closed to all but essential business in March 2020. While some proceedings resumed as restrictions eased, by August 2020, the backlog of High Court and Sheriff and Jury solemn cases was 750 and 1,800 respectively, and the backlog of summary cases was 26,000.<sup>7</sup> The backlog continues

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<sup>6</sup> The role of the Justice Board is to lead justice system organisations to deliver the outcomes set out in the Scottish Government's justice strategy.

<sup>7</sup> SCTS, [Respond, recover, renew – Supporting justice through the pandemic and beyond](#) (August 2020).

to grow as, while police recorded crime and the number of cases reported to the procurator fiscal initially fell during the lockdown period, they were returning to almost pre-Covid levels from May 2020. Modelling has shown it may be several years before the backlogs are addressed. This will have significant consequences for the accused, victims and witnesses involved in cases awaiting trial and risks damaging confidence in the criminal justice system. Tackling the backlog will require investment and continued innovation by the criminal justice partners.

This report sets out our findings in relation to each of the four provisions. We describe how they have been used, what benefits they have had and what issues and challenges have been encountered. We also discuss the value of the provisions:

- during the initial response to the pandemic – broadly equivalent to the lockdown period between March and the end of May 2020
- during the recovery period – beginning at the end of May 2020 and continuing until restrictions relating to the pandemic are lifted and backlogs have been substantially reduced (while acknowledging that further periods of lockdown may occur, returning the criminal justice system to a state more akin to that during the initial response to the pandemic)
- post-pandemic – when the criminal justice system has returned to business as usual, albeit that some ways of working may have permanently changed.

Appendix 1 sets out the results of a survey of criminal justice professionals we carried out in support of our inspection in more detail. Throughout this report, and in Appendix 1, we have used quotes from the responses we received to our survey. These quotes reflect the themes raised in the responses but do not necessarily indicate our endorsement of what has been said.

We gathered information about the emergency criminal justice provisions from a range of sources. We reviewed documents and data relating to the provisions, and sought the views of those working in the criminal justice system via an online survey which received 479 responses. We also carried out more than 60 interviews of those working in the criminal justice system. The majority of those we interviewed worked for either Police Scotland or COPFS, but we also interviewed Sheriffs Principal and defence agents, and staff working for SCTS, the Scottish Prison Service, GeoAmey and other stakeholders. Every interview was carried out by two inspectors – one from IPS and one from HMCS. This ensured that all issues raised were viewed from both a prosecution and policing perspective.

We observed governance meetings relating to the use of the criminal justice provisions and two virtual summary trials. We carried out on-site visits to observe the operation of virtual custody courts at Saltcoats, Falkirk and Cathcart police custody centres. During these visits, we were able to speak to numerous staff about the emergency provisions as well as accused persons who had appeared at court virtually. We also observed the operation of a virtual custody court from the court's perspective, at Glasgow Sheriff Court.

Throughout our inspection, we sought to comply with public health guidance and minimise the risks to our own inspectors as well as those with whom we met. All but three of our interviews were carried out by video or telephone conference, and appropriate safety and hygiene precautions were taken during our on-site visits.

Our fieldwork was carried out in August and early September 2020. At that time, the criminal justice system was still responding to the pandemic and assessing how it could recover. We are mindful that our inspection was carried out in an evolving context and as decisions were being made about the use of the emergency criminal justice provisions, resulting in developments one day or week to the next. Many of the issues identified in our report will already be the subject of discussion and action among the criminal justice partners.

We would like to thank the personnel of Police Scotland and COPFS who facilitated our inspection, as well as all those who shared their experience and views of the emergency criminal justice provisions. We are particularly grateful for their input at a time when they were dealing with significant challenges brought about by the Covid-19 pandemic.

Laura Paton  
HM Chief Inspector of Prosecution  
September 2020

Gill Imery QPM  
HM Chief Inspector of Constabulary



## Key findings

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There has been effective collaboration between Police Scotland and COPFS as well as other criminal justice partners to maintain essential criminal justice processes in response to the Covid-19 pandemic.

Across Police Scotland and COPFS, staff have worked at pace and in challenging circumstances to operationalise legal and policy changes.

Emergency criminal justice provisions have generally been used to good effect to support the continued operation of criminal justice processes while also complying with public health guidelines and limiting the risk of transmission of Covid-19 among criminal justice professionals, witnesses and accused persons.

The emergency criminal justice provisions proved particularly beneficial during the initial lockdown period and will continue to have value during the recovery period. There is also merit in considering which of the provisions should be retained in the long term.

Some of the innovations prompted by the pandemic have been long overdue, and there is a desire to ensure that progress is not lost.

There is general support for retaining emergency provisions relating to the use of electronic signatures and electronic transmission of documents. Most believe that they result in more efficient and effective ways of working, save time and money and, by reducing an outdated reliance on moving hard copy papers between organisations, are more environmentally friendly.

Views as to whether the emergency provision relating to remote, electronic appearance of parties at court should be retained are mixed. Some thought virtual proceedings were only appropriate in an emergency situation, while others were in favour of retaining and extending the use of virtual justice. Others had more nuanced views, and there was some support for hybrid models.

The emergency provision creating the ability to take a case beginning with an appearance from police custody in any sheriff court has been little used. There are circumstances, however, in which it could be useful.

The revised Lord Advocate's guidelines on liberation by the police during Covid-19 have positively influenced custody decision making. Efforts are being made to sustain the required cultural change in decisions about whether to release from custody or hold for court, and to safeguard the presumption of liberty while managing risks to communities and individuals.

The pandemic has presented opportunities for transformational change as well as challenges. However, care must be taken not to prioritise efficiency over justice.

A common view among criminal justice professionals was that a strategic vision for the long term future of the pandemic-related innovations was lacking. We are aware that this was being developed at the time of our inspection, but there is a need to ensure it receives broad support.

Many criminal justice professionals felt existing IT infrastructure was not currently sufficiently adequate to fully support the technological innovations prompted by the pandemic. This requires to be addressed.

While the emergency provisions have understandably been devised and implemented rapidly, there remains a need to consult and engage with stakeholders. In particular, there is a need to secure the buy-in of all criminal justice partners to ensure the success of new approaches. Failure to do so risks losing momentum and growing resistance to change.

## Electronic signature and electronic transmission of documents

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1. Prior to the Coronavirus (Scotland) Act 2020 (the 2020 Act), the usual method of signing documents in Scottish criminal procedure was to affix a hardcopy document with a 'wet signature'. The usual method for the transmission of legal documents was to have the hardcopy document physically couriered between parties or organisations. Central to these processes was the physical attendance at offices and courts for the printing, signing, sending and receiving of documents, and physical interaction between criminal justice staff.
2. In response to the pandemic, the 2020 Act enabled the use of electronic signature and electronic transmission of documents associated with criminal proceedings.<sup>8</sup> Suspending existing requirements for the physical signature and transmission of documents was thought necessary as they would expose justice officials, legal practitioners and others unnecessarily to increased risk of infection.<sup>9</sup> The provisions were also an acknowledgement that access to secure printing facilities would be limited while many courts were closed and many staff from across the criminal justice system were working from home rather than offices. Enabling the electronic signature and transmission of documents would allow the essential administration of justice to continue in a manner that reduced the risk of transmitting Covid-19.
3. It is worth noting that there are some examples of electronic signature and transmission of documents that pre-date the 2020 Act. For example:
  - a procedural amendment in 2005 enabled the use of a typed electronic signature by the prosecutor on out of hours search warrants. It meant that a prosecutor could draft the search warrant, type their signature and email it to the police officer. The oath subsequently taken by the police officer was sufficient to authenticate that the application was an application by the named prosecutor.<sup>10</sup>
  - in 2011, the Crown moved to electronic transmission of documents to fulfil its duty to disclose information to the defence.<sup>11</sup> Since then, the majority of Crown disclosure has taken place via the COPFS Secure Disclosure System, a website onto which the Crown can securely upload the relevant documentation and from which it can be downloaded by the defence.
4. These earlier uses of electronic signature and transmission of documents are helpful to note as they demonstrate investment in and willingness to make better use of technology, and highlight some existing digital infrastructure which has facilitated the swift implementation of the emergency provisions in response to the pandemic.<sup>12</sup>
5. The introduction of the provisions was supported by effective governance arrangements and the rapid development of new guidance and processes. Within

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<sup>8</sup> Schedule 4, Part 1, paragraphs 1(1) and 1(2) enabled the use of electronic signature and electronic transmission of the prescribed documents set out in paragraph 1(4)

<sup>9</sup> SP Bill 66-PM [Coronavirus \(Scotland\) Bill \[policy memorandum\]](#) Session 5 (2020) at paragraphs 153-155.

<sup>10</sup> Act of Adjournal (Criminal Procedure Rules Amendment No.2) (Miscellaneous) 2005, s(3), amending Act of Adjournal (Criminal Procedure Rules) 1996, Rule 16.4A.

<sup>11</sup> Under Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010, the Crown have a legal obligation to disclose certain material information to the defence relating to their client's case, including any information that may be used as evidence in a criminal prosecution.

<sup>12</sup> The Crown use the Secure Disclosure System website to facilitate the electronic transmission of documents to defence agents, as well as the Criminal Justice Secure Mail, which enables the transmission of secure email between criminal justice partners, including SCTS, Police Scotland, COPFS and defence agents (who voluntarily sign up to the scheme).

COPFS, an Operational Sub-group of the Corporate Resilience Group was formed with a specific remit to lead the implementation of the provisions relating to electronic signature and electronic transmission of documents. Within Police Scotland, a chief inspector was tasked with overseeing and organising the implementation of the provisions. During our inspection, we also heard about effective partnership working across the two organisations to develop new processes to implement the provisions.

6. We noted that comprehensive written guidance on the use of electronic signatures and the electronic transmission of documents was produced for staff. Within COPFS, staff received guidance on how to create an electronic signature and apply it, general guidance on the use of electronic signatures and specific guidance on the use of electronic signatures relating to key processes. They also received general guidance on the electronic transmission of legal documents, specific guidance on each legal document capable of being electronically transmitted and guidance that was tailored to the prosecution level (Sheriff and Jury, High Court, etc).
7. While there was limited evidence of formal training on the use of the provisions, this is understandable given the circumstances in which they were introduced. In any case it may not have been necessary as the administrative and legal staff within COPFS whom we interviewed indicated that the step-by-step guidance and supporting operational instructions were comprehensive and easy to follow. We also found evidence of an open dialogue regarding the provisions between frontline staff and their line managers. We did, however, note that some training was provided to units which had to substantially change the manner in which they worked to facilitate the use of the electronic transmission provision. In the High Court Unit for example, we were informed that staff were trained via video conferencing in a new way of using their system.
8. Within Police Scotland, we also found comprehensive guidance on the use of electronic signatures for search warrants. The guidance had been well-received by officers who described it as succinct and easy to understand. Despite there being no formal training, they felt the guidance, with an accompanying process map, was sufficiently detailed and helpful. Officers we spoke to said they and their colleagues felt confident using the new approach.
9. During our inspection, we found extensive use of electronic signatures by COPFS across a range of processes and at all stages and levels of prosecution.<sup>13</sup> We found that electronic signatures had replaced wet signatures in a number of key processes including the signing of search warrants, vulnerable witness applications, petitions, indictments, section 67 applications and section 259 applications. While we also noted significant use of electronic transmission of documents, we noted that this varied by stage and level of prosecution, with the most common usage being at the investigation stage and the High Court solemn level of prosecution. For Police Scotland, the emergency provisions were mostly used in respect of applications for search warrants.

## Benefits

10. There was significant support for the emergency provisions regarding electronic signature and electronic transmission of documents amongst those we interviewed and those who responded to our survey. They cited several benefits, but the one most frequently mentioned was that the new way of working saved time. COPFS staff in particular noted that electronic signature and electronic transmission of documents was more efficient and more convenient. They said the author of a document was now able to sign it immediately, rather than the document being printed elsewhere and

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<sup>13</sup> Investigation stage, summary prosecutions and solemn prosecutions.

another member of staff having to review and sign it. We also heard about cost savings, not only those related to time savings, but also savings on the printing and transportation of documents. Linked to this, we heard that the new way of working was more environmentally friendly.

*'A huge benefit on time and resources...'* (COPFS staff)

*'It's an efficient way of serving documents. We're saving a fortune on postage.'* (COPFS staff)

11. We also heard that the use of electronic signatures could assist with resource management. For example, prior to the 2020 Act, advocate deputes who were on the rota to sign High Court indictments would have to attend the office in person and provide a wet signature. Since the 2020 Act, in-person attendance was no longer required and the work could be spread more evenly amongst advocate deputes. They said this resulted in a more efficient use of their time and described electronic signature as 'the way forward'.
12. More generally, we heard about a reduction in the need for police officers and COPFS legal and administrative staff to attend local offices. The use of the emergency provision enabled the work involved in reviewing and signing legal documents to be spread more evenly amongst staff working at home. Most crucially in the context of the pandemic, it also decreased instances of physical interaction between criminal justice professionals while ensuring that the administration of justice continued.
13. During our inspection, we heard that the provision enabling electronic transmission of documents was being well-used by COPFS at the solemn level of prosecution. The provision allowed High Court and Sheriff and Jury indictments, and other legal documents, to be served on the defence using the Secure Disclosure System. At the High Court level, these documents could also be lodged with the court, ensuring an entirely electronic process. This meant that police officers were not required to serve documents, freeing them up for other duties. Defence agents informed us that this provision enabled the rapid service of indictments. They also said they were able to access the documents outside their office, saving time and reducing costs.

*'Quick service of indictments, rather than waiting on police to deliver. Can get them on our phones at court rather than waiting on return to office.'* (Defence agent)

14. The benefits of the emergency provisions on electronic signature and electronic transmission of documents are well-illustrated by their application to search warrants (see case study). The new approach has advantages for Police Scotland and COPFS, as well as other criminal justice partners. During the lockdown and recovery phases of the pandemic when physical distancing restrictions were in place, the emergency provisions have removed the need for physical interaction but have also saved significant time and resources. Officers have not had to attend local procurator fiscal offices or sheriff courts, or the homes of prosecutors or sheriffs out of business hours.

*'Avoids police officers travelling to my home and avoids my getting dressed in the middle of the night to deal with them. Saves a considerable period of time.'* (Sheriff)

*'Saves time and travel and has probably had the biggest positive impact on policing during Covid and should be considered as becoming BAU [business as usual].'* (Police officer/staff)

### **Case study – electronic search warrants**

Prior to the pandemic, an application for a search warrant would be made by a police officer who would submit a typed email request to COPFS in a format that varied depending on the policing area in which they worked. A prosecutor would draft a search warrant if satisfied the intelligence met the required legal test. The prosecutor would then print and sign the hard copy warrant. A police officer would attend at the prosecutor's office (often a significant distance away, especially in remote areas) to collect the search warrant and take it to the local sheriff court for consideration and signing by a sheriff. Once signed, the police officer would then travel to the locus and execute the warrant. We heard from police officers that this process could take several hours in both journey and waiting time.

The emergency provisions in the 2020 Act allowed for the digitisation of the search warrant process. The requirement for police officers to physically attend both the prosecutor's office and the sheriff court have been removed and instead the application for and grant of a search warrant can occur via electronic means. Electronic signatures are used, and the warrant can be electronically transmitted between police, prosecutor and sheriff. If the sheriff has questions about the application or the officers require to be placed under oath, this can be carried out by telephone.

Several measures were taken by Police Scotland and COPFS in support of the new approach. For example, Police Scotland developed a national, standardised search warrant application form for use by all officers. Resources were invested to ensure this form could be accessed and transmitted from mobile devices, enabling officers to apply for search warrants from crime scenes if required. Police officers who had used the new form told us that they were easy to complete and therefore much quicker to process. Police Scotland and COPFS agreed upon a system of electronic mailboxes in each of the local procurator fiscal offices and national units to which the forms could be sent for processing. Police officers told us the mailboxes were regularly monitored and they felt applications for search warrants were being considered more quickly.

### **Issues and challenges**

15. While the use of electronic signature and electronic transmission of documents received widespread support, there were nonetheless issues or concerns raised which require to be resolved to maximise the potential of the provisions or which suggest that the emergency provisions are not suitable for use in all circumstances.
16. We heard about a few processes where it was felt that wet signatures on printed documents were more efficient than electronic signatures. For example, within COPFS, the National Initial Case Processing Unit (NICP) initially sought to use electronic signatures but abandoned them in favour of wet signatures. NICP is responsible for marking almost all summary level cases across Scotland. Cases reported in which the accused is not in police custody are printed at centralised hubs where an experienced prosecutor quality checks each summary complaint and signs them. Due to the significant volume of complaints and the process involved in applying an electronic signature to each, it was felt that signing hard copy complaints was quicker.
17. When it was felt that electronic signatures had not resulted in efficiencies, this was sometimes because they were not being used in tandem with electronic transmission. This was most often because the person to whom the document was being sent was not capable of receiving it electronically. To maximise the benefits of the emergency provisions regarding electronic signature and electronic transmission, they should generally be used together. For example, it is not currently possible to digitally lodge summary complaints and some other documents, which we heard has impacted the



system's ability to digitise the custody court process. Some COPFS staff questioned the point of using electronic signatures when the document is only going to be printed and transported to SCTS. We understand these issues are being reviewed by IT staff within SCTS and COPFS with a view to increasing the capability to electronically transmit documents between the organisations.

18. COPFS staff told us that the IT capability of defence agents can occasionally be a barrier to greater use of the emergency provision. However, in these circumstances, hard copy service is still available.
19. We also heard that the electronic service of summary complaints in cases reported while the accused is in police custody is not possible because at the stage of service, most accused persons either do not yet have legal representatives to accept service on their behalf or COPFS do not yet know who their legal representative is. Postal and personal service of these documents is still the only option for this process.
20. While we welcome efforts by Police Scotland to ensure applications for search warrants can be made from officers' mobile devices, officers told us that they do not all have access to a mobile device currently. Those without a device would still require to attend a police office to make an application, limiting to some extent the efficiencies offered by the new process.
21. When the emergency provisions were first introduced, there were some early procedural issues that limited their initial effectiveness. For example, in relation to electronic applications for search warrants, some officers were initially using incorrect email addresses while some of the COPFS mailboxes to which applications were sent failed to acknowledge receipt. We also heard that an issue with SCTS resources meant that lodging documents electronically at the High Court was not initially possible. These issues were quickly resolved due to the collaborative efforts of the organisations involved.
22. While many of our survey respondents highlighted increased security as a benefit of the provisions relating to electronic signature and electronic transmission of documents, security was also a key concern of other respondents. Some were concerned about the possibility of electronic signatures being forged, although we heard no evidence to suggest that a wet signature was any less secure than an electronic one. There were also concerns about the possibility of electronic documents being sent to the wrong email address.

### Potential for retention

23. The emergency provisions within the 2020 Act which enabled the use of electronic signature and electronic transmission of legal documents have been beneficial. In the early period of lockdown, the necessity of reducing physical contact and travel was essential for public safety. These provisions helped to significantly reduce physical attendance and contact within the criminal justice system, while also allowing essential criminal justice processes to continue. These benefits will continue during the recovery phase and as long as physical distancing is required.
24. It is notable however, that many of the benefits of electronic signature and electronic transmission of documents outlined above are not confined to a pandemic situation. Indeed, the benefits most frequently cited by our survey respondents relate to efficiencies and savings in the criminal justice system. One survey respondent succinctly described the benefits of electronic signature and electronic transmission of documents as being '*Immediate, efficient, resource saving, green and secure.*' Consideration should therefore be given to extending the provisions so that they apply

post-pandemic. Many of those we interviewed and who responded to our survey felt that the gains made as a result of the provisions should not be lost. Further consideration should be given to rolling out the use of electronic signature and electronic transmission of documents to additional processes within the criminal justice system and to ensuring the digital infrastructure is able to support this.

25. Of all the emergency provisions within the scope of our inspection, the electronic signature and electronic transmission of documents received the most widespread support. In our survey, when asked whether these provisions should be retained, 95% of respondents said yes. One respondent from COPFS said, *'of course – it is 2020'*. Only a small proportion suggested some caveats to their continued use, such as limiting the electronic application of search warrants to only those requested out of hours. Significantly, and unlike the other emergency provisions explored in our inspection, support for the use of electronic signature and electronic transmission of documents was high amongst all professional groups within the criminal justice system.

*'This has modernised the way we work and has brought the process into the 21<sup>st</sup> century.'*  
(COPFS staff)

*'It is a lot more efficient and something that should have been done years ago... it would be madness to go back'* (Advocate)

*'It would be a backward step to return to old, slow... hardcopy/wet signature, transfer of documents when all of the work has been done between partners to make the[se] changes.'*  
(Police officer/staff)



## Remote, electronic attendance at court

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26. In Scotland, criminal proceedings are usually held in person at court. Generally all parties are either physically present, or represented by an agent who is physically present.
27. The 2020 Act suspended any requirement that a person physically attend a court and instead required them to appear via electronic means.<sup>14</sup> As a result, all participants in criminal proceedings, including the judge or sheriff, the clerk, legal representatives, the accused or convicted person, and witnesses, are able to take part via live visual or audio link from any location. The 2020 Act did not suspend requirements for physical attendance at trial diets, but did allow the court to dis-apply any such requirements by directing the appearance of any person at a trial diet by electronic means.
28. The 2020 Act also provides that attendance by electronic means should only occur where it will not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice.
29. Allowing parties to attend via electronic means was thought necessary during the pandemic to allow the continued operation of criminal proceedings while also safeguarding the health of participants. It was thought that mandatory in-person attendance exposed parties to unnecessary increased risk of infection and ran contrary to public health guidance. Attendance via electronic means was also intended to save time for those involved in critical front line service delivery, such as police officers and medical professionals.
30. In our inspection, we considered various criminal proceedings at which the parties have appeared via electronic means. These are often referred to as ‘virtual’ proceedings:
  - virtual custody courts
  - virtual summary trials
  - virtual hearings (including procedural and appeal hearings).
31. We did not consider virtual jury trials in any detail. This was because considerable work was ongoing at the time of our inspection under the auspices of the Lord Justice Clerk’s Restarting Solemn Trials Working Group. In September 2020, it was confirmed that remote jury centres would be used to restart High Court solemn trials from 28 September with £5.5 million in support from the Scottish Government. Under this model, only the jury appears remotely, while all other parties are able to attend court.<sup>15</sup> Prior to this, a small number of High Court trials had taken place from July, using a two and three-court model to allow all participants in one trial to physically distance. The remote jury centre model was favoured over the multi-court approach because it frees up courtrooms for more trials to take place simultaneously, allowing High Court trials to resume at pre-pandemic levels. Work is ongoing to identify a similar solution for sheriff and jury cases.

### Virtual custody courts

32. Prior to the pandemic, all accused persons who appear at court from police custody did so in person. They were collected from the police custody centre on the morning of their scheduled court appearance and transported to the relevant court by GeoAmey, the company contracted to do so. Responsibility for the care and welfare of the

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<sup>14</sup> Schedule 4, Part 1, Paragraphs 2 to 4.

<sup>15</sup> SCTS, [SCTS Remote Jury Centres – Next Steps](#) (9 September 2020).

accused person transferred from Police Scotland to GeoAmey at the point the accused person was handed over. This well-established process resulted in the volume of people being held across Police Scotland's custody centres reducing to minimal levels each morning that courts were in operation. Officers and staff working in custody used this time to clean and maintain the centre and perform other duties.

33. In response to the pandemic, Police Scotland designated a small number of custody centres to hold all detainees displaying symptoms of Covid-19. These centres had additional personal protective equipment and access to health care provided by the NHS. Early discussions between Police Scotland, COPFS, SCTS and GeoAmey took place with a view to developing a process to deal with accused persons who were due to appear at court from police custody and who were suspected of suffering from Covid-19. Existing effective partnership working arrangements across these organisations assisted in their collective response to the public health emergency. Given this was a dynamic situation, criminal justice partners responded in accordance with their own local requirements, and this meant that the action taken and the extent to which the emergency provision was used varied across Scotland.
34. Police Scotland installed video conferencing facilities in some custody centres with a view to the accused appearing virtually at custody court. Given the urgent need to minimise the movement of detainees with Covid-19 symptoms, the equipment was installed in rooms not necessarily designed to be used as virtual courts, but with the capacity and basic infrastructure to allow virtual custody courts to operate. In most locations, the rooms used were those usually used for consultations between solicitors and their clients.
35. Designated courts were able to deal with virtual appearances from police custody. At the time of our inspection, the capability to deliver virtual custody appearances for people suspected of having Covid-19 had increased to 11 police stations providing links into courts in all six sheriffdoms.<sup>16</sup> For a number of years, the Scottish Prison Service has used a video link to facilitate appearances from prisons at courts. In some parts of the country, this prior experience has proved to be beneficial for SCTS staff involved with the rollout of virtual appearances from police stations.
36. GeoAmey committed staff to support virtual custody courts at six custody centres:
  - Cathcart (Glasgow)
  - Falkirk
  - Kittybrewster (Aberdeen)
  - St Leonards (Edinburgh)
  - Kilmarnock
  - Saltcoats.
37. The cooperation and flexibility demonstrated by GeoAmey has been helpful in establishing and supporting a process that minimises the risk to public health.
38. A memorandum of understanding (MOU) between Police Scotland and GeoAmey was drafted and local guidance was prepared for staff involved. There was no formal training for staff involved in the running of virtual custody courts, given the speed of the response to the public health emergency, however there was on the job training and guidance was given. The role of GeoAmey was to facilitate the virtual appearance of the accused person at court and to record the disposal. Careful consideration was

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<sup>16</sup> Video conferencing facilities had been installed in 19 police custody centres across Scotland, including at centres that were not used to hold people suspected of having Covid-19. At the time of our inspection, this was due to be extended to 22 centres in the coming months.

given by both agencies to who should have responsibility for the care and welfare of persons held in police custody to appear virtually at court. It was agreed that responsibility would remain with Police Scotland while they were detained in police premises, taking into account the legal responsibilities of the Chief Constable.

39. The revised process was put in place very quickly and as a result, there were teething issues associated with two organisations operating within the same premises which required to be resolved. In particular, the vetting of GeoAmey staff took time to complete, which placed an additional burden on Police Scotland staff who were required to accompany GeoAmey staff around the police building until vetting clearance had been given.
40. There was little evidence of engagement between the custody centres in operating as Covid-19 hubs. Custody centres appear to have established their own processes, resulting in some variance in practice across the virtual custody courts. Some of our interviewees believed this approach may have been appropriate given the different layouts of centres, staffing arrangements and local practices. However, it may be beneficial to share learning across custody centres in order to identify potential improvements.
41. We observed effective national governance through our observation of the multi-agency Custody Courts Standing Meeting. The purpose of this group is to work in partnership to deliver virtual court capacity, and associated processes, for all first custody hearings across Scotland which:
  - provides a safe and effective operating model for virtual custody hearings
  - delivers a national ICT virtual court platform for custody courts ensuring access to all partners
  - creates capacity and reduces demand upon the physical court estate during the pandemic
  - minimises the requirement to transport detainees between locations
  - supports the recovery, renewal and transformation of the justice system from the pandemic.
42. The group is chaired by a chief superintendent from Police Scotland. During our inspection, we heard that it has been effective in resolving operational issues. It is worth noting that ordinarily the police have a coordinating role during the emergency phase of critical incidents and are trained to chair multi-agency meetings in this regard. It may be therefore, that it was a logical choice for a senior police officer to chair this group. We heard from some stakeholders, however, that this may have led to a mistaken perception within some organisations that Police Scotland was leading on reform of the criminal justice system in relation to virtual custody courts.
43. At the time of our inspection, there had been approximately 1,000 accused persons who had appeared at court from custody via electronic means (usually video conference). Generally, it has only been the accused person who has appeared via electronic means, while other parties are present within the court (although there have been some examples of other parties such as the prosecutor appearing virtually).
44. Virtual custody courts have been used to varying extents in different areas. They have been used to the greatest extent at Saltcoats, where all accused persons have appeared virtually, regardless of whether or not they were suspected of having Covid-19. From late August, all those held at Cathcart who were suspected of having Covid-19 and those who were appearing on a charge relating to domestic abuse, appeared

virtually. At the remaining custody centres where GeoAmey have been deployed,<sup>17</sup> only those who are suspected of having Covid-19 appear virtually, while all others appear at court in person. However, if there are no suspected Covid-19 cases, Police Scotland selects two people to appear virtually. We heard that this was to test the virtual appearance concept and to ensure staff remain familiar with the operation of virtual custody courts.

45. It should be noted that, at the time of our inspection, virtual appearances from Kittybrewster and St Leonards had been paused, except for those suspected of having Covid-19, pending the resolution of issues relating to supporting technology and solicitor consultations, but it was anticipated that they would resume once the issues had been addressed.
46. All other police stations with the capacity to deliver virtual court appearances have only been used to enable accused persons who are suspected of having Covid-19 to appear at court by electronic means. On such occasions, this process is facilitated by Police Scotland personnel rather than GeoAmey.

### **Benefits**

47. Virtual custody courts have helped to maintain essential court business during the pandemic in a manner which has reduced the risk of transmitting Covid-19. Most importantly, their use has minimised the movement of those suspected of having Covid-19, thereby reducing the potential for the virus to spread to those working in and attending courts. The use of virtual appearances for those who are not suspected of having Covid-19 has reduced the number of accused persons appearing at court in person, allowing for easier physical distancing within court cells and within courts generally for those for whom attendance in person is necessary.

*'There are considerable benefits in remote attendance. It obviates the need for prisoners to be brought to court; dispenses with the requirements for solicitors to be physically present for cases; and permits the efficient running of business.'* (Sheriff)

48. Some of those we interviewed highlighted an additional benefit of virtual custody courts. They felt that being moved from a single occupancy police cell into a prisoner transport vehicle and then into a multi-occupancy court cell with other accused can be distressing, particularly for vulnerable people such as young people or those with mental health issues. They said that appearing in court by virtual means allowed the person to stay in their police cell, reducing risks associated with being transferred, and with continued access to the support that is available in some police custody centres (such as on-site health care). We heard that Kittybrewster custody centre offered superior facilities and services compared to those available at Aberdeen Sheriff Court, for example. The custody centre has 24/7 on-site health care, along with a range of other support from social services, housing and the third sector. While this is true of Kittybrewster and some other centres, the same level of provision is not available at police custody centres across Scotland. The provision of health care to those detained in police custody is an area of ongoing interest to HMICS.
49. While some support services are also available when an accused is held at court, if virtual custody courts were to continue in the future, there may be an opportunity to more effectively concentrate such services in police custody centres, rather than across two sites. It would also be helpful to better understand the views and experiences of accused persons about their time in police and court custody – we

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<sup>17</sup> This included St Leonards, Kittybrewster, Falkirk and, from September 2020, Kilmarnock.

heard that Police Scotland is planning work in this area, which we welcome and which may be best carried out in partnership with others.

50. During our inspection, we also heard about other potential benefits associated with virtual custody courts. These include:
  - a reduction in the cost and resources required to transport accused persons to court
  - the opportunity to use virtual custody courts in conjunction with other developments to improve the efficiency of the justice system. For example, appearing virtually could be used in tandem with the emergency provision relating to a national jurisdiction for first appearances from custody (see from paragraph 126) or the potential to operate weekend custody courts.

### ***Issues and challenges***

51. The use of virtual custody courts, as well as the need to transport accused persons to court in smaller groups to maintain physical distancing in court cells, has resulted in some people being held in police custody for longer. This has increased the demands on the police custody estate and on the officers and staff who work there (as well as any support services such as health care), particularly on Mondays as they are required to continue to manage the care and welfare of those held. This increase in demand also represents an increase in the level of risk being managed by Police Scotland. Officers and staff we spoke to could not highlight any specific benefits for policing in relation to the operation of virtual custody courts, but they acknowledged there were benefits to public health during the pandemic and potentially wider benefits to the criminal justice system. Another option suggested to us to help manage the volume of people detained at court on Mondays in particular (thereby allowing more people to be moved from police cells to court cells), is for SCTS to limit remand cases calling on Mondays to free up cell space, or to generally increase the virtual appearance at court of those held in prisons.
52. We heard about and observed several issues or challenges relating to virtual court appearances. Perhaps the most significant of these were the extent to which the accused was able to consult with a solicitor and the extent to which they were able to effectively participate in proceedings, as required by law.
53. Those detained in police custody should be able to consult with their solicitor prior to appearing in court. They should also be able to consult with their solicitor during and after proceedings as needed. During our inspection, we heard numerous concerns about the effectiveness of arrangements for solicitor consultation both from those we interviewed and those who responded to our survey. While Police Scotland and other agencies had taken account of early criticisms and sought to make improvements, some said the arrangements were not yet up the standard required. The majority of consultations have taken place by telephone with the solicitor making contact with the custody centre. Either police officers or staff or, in centres where they operate, GeoAmey staff, will pass a mobile phone to the accused person in their cell to speak with their solicitor.

*'Everything is capable of improvement, let's get started and accept this is an iterative process.'* (Police officer/staff)

54. In response to solicitors expressing a preference for speaking to their clients via video conference rather than telephone, increasingly such arrangements are being made. However they are not always satisfactory. They can also inhibit the running of the virtual custody court as the same video conferencing equipment is needed for court as for consultations (and there is only one or two sets of equipment in each custody

centre). There have also been concerns about the privacy of the arrangements – we heard that the court had dialled into what should have been a private consultation between solicitor and client on at least one occasion.

55. A survey carried out by the Law Society of Scotland found that 81% of solicitors were dissatisfied with the client consultation process for virtual custody courts.<sup>18</sup> While we heard that improvements had been made in response to that survey's findings, our own survey which was carried out later also prompted negative responses about arrangements for client consultation. While our survey was about a range of virtual appearances, not just those at custody court, 80% of defence agents who responded said that virtual appearance did not allow for effective client consultation prior to proceedings, 100% of defence agents said that effective client consultation was not possible during proceedings, and 93% said it was not possible after proceedings.

*'Consultation is more difficult remotely where the accused is vulnerable, new to the court process or has mental health difficulties.'* (Defence agent)

*'It can be difficult for [defence agents] to consult confidentially depending where the accused is held.'* (COPFS staff)

*'There is no capacity for quick, private conversations to deal with short but crucial issues.'* (Sheriff)

*'Police staff/custody staff had to be present within video rooms...not really very confidential.'* (Police officer/staff)

56. An issue that will require further work is ensuring that the accused is able to participate effectively in virtual proceedings based on their individual needs and circumstances. Defence agents said that by not seeing their client in person at court, they lost an opportunity to assess their demeanour and level of understanding of what was going on.
57. At the time of our inspection, there had been discussion about the selection criteria to be used to decide which accused persons were suitable to appear virtually and which required to appear in person at court. There was also some dubiety as to which agency should lead on setting the criteria, although there appeared to be some consensus that the police custody personnel should be able to make the assessment based on the information gathered about the accused when being booked into custody. A practice note published in August 2020 in support of the virtual custody court at Glasgow Sheriff Court helpfully set out some categories of accused person who could not appear virtually, including those needing an interpreter, those determined by Police Scotland to be unable to participate fully in virtual proceedings, and those representing themselves.<sup>19</sup> While this is welcome, more guidance is needed for those making the assessment of suitability.
58. Generally, we found a lack of awareness of the range of reasons why an individual might not be able to participate in proceedings. There is a welcome focus on assessing the vulnerability of people brought into custody, but vulnerability and the questions asked by police to establish vulnerability, are not necessarily those which will establish whether a person is able to follow and understand virtual proceedings, although there may be some overlap. There appeared to be no awareness, for

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<sup>18</sup> Law Society of Scotland, [Report on the feedback on the experiences of virtual custody courts by Scottish solicitors](#) (July 2020).

<sup>19</sup> SCTS, [Practice note – virtual custody court pilot](#) (August 2020).



example, of work recently published by the Equality and Human Rights Commission (EHRC) on ‘hidden disabilities’ such as cognitive impairment or neuro-diverse conditions which may impair effective participation and which require reasonable adjustments to be made.<sup>20</sup> There is a need for training in this area. There was, however, some acknowledgement that engagement with organisations such as the EHRC and the Scottish Human Rights Commission is needed. We hope this will now be addressed through work now being carried out on equality and human rights impact assessments.

59. The accused’s ability to participate effectively in proceedings is also affected by the quality of the video link from the police custody centre to court. While we saw this working well at Saltcoats in particular and in some instances at other centres, we also saw examples of the equipment failing. Some of our interviews described the equipment and the video conference platform used as adequate, while others said it was sub-optimal. In the initial stages, some parties appeared at custody court via telephone, rather than video link and we consistently heard this was unsatisfactory and inadequate. At the time of our inspection, virtual appearances were generally taking place with the accused appearing via video link and other parties (including sheriff, clerk, prosecutor and defence agent) appearing in person at court.
60. The audio quality of the video link was the issue most complained about. The positioning of the microphones in the court appeared to be a recurring problem. In one virtual appearance we observed from the accused’s perspective at the custody centre, the sheriff could be heard clearly but not the prosecutor or the defence agent. Despite being told this was a frequent problem and that GeoAmey staff would usually intervene, this did not happen on this occasion. Similarly, the accused person did not speak up to say they struggled to hear proceedings (which they told our inspectors afterwards was the case). We were told that SCTS had introduced a dedicated resource to assist in resolving IT issues in court which is a positive step. It is also possible that some of the issues we observed were teething problems which will be resolved with more frequent use of the technology (although this raises the question of fairness for those who were the first to experience it, before issues are resolved). We understand that efforts are being made to address problems with audio quality. A solution has been tested and there are plans to deploy it across the court estate.

*‘The sound quality is inconsistent and sometimes there is either muffled sound at both ends or delay in the sound being received.’ (COPFS staff)*

*‘Some accused persons are not following what is happening via video link and cannot easily get the attention of their agent.’ (COPFS staff)*

61. The video conferencing platform used for virtual custody courts is different from that used in other virtual court proceedings. We have heard differing views as to what platform should be used. We would expect that, regardless of the system used, the IT requires to be effective, reliable and compatible with other systems to provide confidence to all involved in the criminal justice process.
62. The poor quality of the link in the case mentioned above raises an issue about whether a court official should be present alongside the accused, or another professional (whether GeoAmey or police) who is clear that their role is to ensure proceedings run smoothly and to intervene on behalf of the accused if not. This would have resource implications but may be necessary to support the effective operation of virtual courts. It

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<sup>20</sup> EHRC, [Inclusive justice: a system designed for all – findings and recommendations](#) (2020) and EHRC, [Inclusive justice: a system designed for all – evidence base](#) (2020).

may also help to address another issue we noted, which is that there is scope to improve communication between the court and the custody centre in relation to the scheduling of appearances and resolving any IT issues as they arise.

63. We heard that some virtual custody courts did not proceed as efficiently as possible due to ineffective scheduling of cases (or ineffective communication of the scheduling). It was not clear whether this issue was unique to virtual appearances however, with some saying that this was a recurring problem in some custody courts that had simply been highlighted by the virtual model. Some scheduling difficulties may be the result of some courts not having a dedicated custody court, with appearances from custody being slotted in between other court business. This can result in inefficiencies with GeoAmey and accused persons waiting around in the custody centre for their slot.
64. In areas where only some accused are appearing virtually, the lack of consistency in approach has led to confusion. Defence agents have found themselves in situations where they do not know whether their client will be in court or appearing virtually.
65. We heard that delays in complaints and petitions arriving at court had resulted in virtual custody courts not starting promptly, although those who raised it acknowledged that this was also an issue for in-person hearings. We also heard about delays in bail orders being sent from court to the police custody centre for those accused who had appeared virtually which delayed their release.

*'I could only use a phone to take instructions. I did not have a summary complaint and it had to be read out to me...In court it is impossible to take instructions. The case had to be adjourned.'* (Defence agent)

66. Open and transparent justice is an important principle and one which requires further thought in respect of virtual custody appearances. We were told open access is being met by allowing the press into the physical court during virtual appearances, but there is no solution as yet to allow the public to observe custody court virtually as for other virtual hearings (see paragraph 101). The criminal justice partners are aware that this issue needs to be addressed.
67. There was a lack of IT and infrastructure available to GeoAmey staff to carry out their role in police custody centres as effectively as possible. For example, they lacked their own printers and computers and, in one custody centre we visited, were operating from the staff canteen. This meant GeoAmey staff were reliant on Police Scotland personnel to access systems on their behalf and print documents such as bail orders. This can pose challenges as those personnel must prioritise the care and welfare of those held in custody over other tasks. Addressing these issues would require investment from both Police Scotland and GeoAmey which may not be forthcoming until the long-term future of virtual custody courts is settled.

### **Potential for retention**

68. Virtual custody courts have served a useful purpose during the initial response to the pandemic. However, views were mixed on whether they should be retained in the longer term. While we observed the process working well at Saltcoats, we also observed significant challenges at Cathcart. Some of these challenges may be addressed through more routine use of the virtual model, however it is also clear that a number of issues require to be addressed before rolling it out further. This includes improving arrangements for solicitor consultation and assessing an accused's ability to participate effectively in virtual proceedings, as well as improving the video conferencing facilities. Custody centres have not been designed to host virtual appearances and the solution adopted, of re-purposing solicitor consultation rooms,



may have been appropriate in an emergency situation but may not be a long-term fix. Capital investment would be needed to adapt the police custody environment to one which best supports virtual appearances. The routine use of virtual appearances from police custody may also require a fundamental review of the roles of some criminal justice partners, including police custody staff and GeoAmey.

69. We are aware that there is support among some criminal justice partners at a senior level for the routine use of virtual custody courts. However, this enthusiasm is not yet shared by others and, amongst our survey respondents, there was some strong opposition. Extensive engagement and consultation will be required across the criminal justice system to ensure the virtual model has greater support before it can be rolled out further.

*'There is a deep rooted and well-founded suspicion that the measures introduced are an opportunistic means of implementing reforms that in other circumstances would be subjected to greater scrutiny and opposition. Simply because we have the technological ability does NOT mean it is 'better' – just because we can does not mean we must!' (Defence agent)*

### Virtual summary trials<sup>21</sup>

70. In response to the pandemic and the need to follow public health guidelines, the majority of criminal trials were suspended in March 2020. In the first quarter of 2020-21, only 38 evidence-led summary trials took place in the sheriff court, compared to 1,832 the previous year.<sup>22</sup> In March 2020, there were around 14,000 scheduled summary trials in the sheriff court. It has been estimated that should physical distancing remain in place, the number will rise to 31,710 by March 2021.<sup>23</sup>
71. The provisions of the 2020 Act regarding appearance at court by electronic means have enabled eight virtual summary trials to take place to date.<sup>24</sup> The first three of these formed an initial pilot of virtual summary trials in June 2020, with one trial at Inverness and two at Aberdeen. A report of this initial pilot was written by Sheriff Principal Pyle.<sup>25</sup> A second phase of pilot virtual summary trials was underway at the time of our inspection and we were able to observe two virtual trials at Hamilton and Inverness.
72. The conduct of the virtual summary trials is being overseen by a project board chaired by a senior representative of SCTS. The board has representation from across the criminal justice sector, including Police Scotland, COPFS, the judiciary, Community Justice Scotland, the Scottish Prison Service and the Scottish Legal Aid Board. The board also includes the Law Society of Scotland and Victim Support Scotland. The project is sponsored by the Criminal Justice Board.
73. The trials in the initial phase were selected on the basis that they were straightforward and suitable for a pilot. Two of the trials had only police witnesses while evidence from the complainer regarding a domestic argument was also led in the third. The intention was that as more trials take place, more complex elements would be introduced to test the capability of the virtual approach. These more complex elements have so far included, for example, the leading of digital evidence and the use of an interpreter for the accused. There has been an appropriate focus on identifying, sharing and acting upon learning from each trial to support continuous improvement.

<sup>21</sup> We have focused only on virtual trials in the sheriff court, as no virtual trials have taken place in the justice of the peace court.

<sup>22</sup> SCTS, [Quarterly Criminal Court Statistics – Report 9 – Quarter 1 2020/21](#).

<sup>23</sup> SCTS, [Covid-19 Recovery Model: Sheriff Court Summary Trials](#) (August 2020).

<sup>24</sup> As at 10 September 2020.

<sup>25</sup> Sheriff Principal D C W Pyle, [Summary Criminal Virtual Trial Pilot: The Way Ahead – A Strategic Plan](#) (2020).

74. Virtual summary trials are being piloted as a means of reducing the number of people required to attend court in support of physical distancing requirements for other court users. In his report, Sheriff Principal Pyle also noted that virtual summary trials may help free up the sheriff court estate for solemn trials. Virtual summary trials could also have a role to play in addressing the backlog of summary trials by increasing the number of trials that are able to run simultaneously.
75. In his report on the initial pilot, Sheriff Principal Pyle noted issues that require to be resolved if virtual trials are to be rolled out but also found feedback from trial participants to have been positive. He described the use of virtual summary trials as ‘*a necessity, not an option*’, while also acknowledging that some trials may not be suitable for the virtual model.
76. At the time of our inspection, consideration was being given by the project board to the extent to which the virtual summary trial model could be rolled out. In addition, consideration was being given to how best to identify trials that would be suitable for the virtual model. Experience to date had shown this to be a time consuming process. The latest thinking was that identifying a category of trials that would most likely be suitable for the virtual method might be easier than identifying individual trials. The category being considered was those relating to domestic abuse. These cases are around 20 to 30% of summary business, representing a sizeable proportion that could be moved online. Domestic abuse cases were thought appropriate for the virtual model for several reasons including that:
- identification of the accused is generally not an issue
  - there is often a small number of witnesses and productions
  - a complainer in a domestic abuse case may be more comfortable giving evidence from a different location than the accused
  - there may be an opportunity for complainers in domestic abuse cases to give evidence from the office of a third sector organisation where they can more easily access support prior to, during and after the trial.
77. During our interviews with those working in the criminal justice system and in our survey, we explored people’s experience of and views on virtual summary trials. We heard about the potential benefits of virtual trials and some of the issues and challenges that need to be resolved if they are to operate as well as in-person trials. We also sought views on whether virtual trials should be retained, whether as an emergency measure or during the recovery period, or in the future, when courts are able to return to business as usual.

### **Benefits**

78. Virtual summary trials have played a role in the resumption of summary business, albeit a minor one to date. Given that all parties are able to appear remotely from any location (including their office or home), the use of virtual trials has helped to reduce the number of people attending court which facilitates physical distancing for those whose attendance at court is essential. In practice, however, some participants in the trials held to date have not appeared from a remote location, but have appeared remotely from another room in the court, limiting the benefits somewhat.
79. While the volume of virtual trials has so far been limited, plans to extend the use of virtual proceedings increases the capacity of the court estate to be used for other essential business. This will be critical at least as long as physical distancing is required and possibly beyond that period, until the volume of cases awaiting trial returns to an acceptable level.

80. The participants in virtual trials have also been able to limit their physical contact with others, which promotes compliance with public health guidelines and reduces the risk of transmitting Covid-19. This is particularly beneficial for those trial participants who have been shielding. For shielding professionals in the criminal justice system, virtual proceedings have allowed them to continue to deliver their role when their activities may otherwise have been restricted.
81. Not all trial participants have had to gather together at court and instead some have appeared from home, or from a local office. This may save considerable time and money not only for witnesses and the accused, but also for professionals. For those living and working in more remote and island locations, or who live far from the area in which the alleged crime occurred, this benefit may be particularly important. For example, in one of the virtual trials at Inverness, the accused's home was in Cumbria. He was able to appear remotely from Dumfries Sheriff Court, only an hour's drive from home. In another trial, a police witness had switched roles since the crime had occurred. He was able to appear remotely from his new station, rather than travel to the court in the area where he had previously worked. The benefits of allowing police witnesses (or indeed, any other witness) who have moved to or from island locations to participate by electronic means are clear. Particularly for those who are not appearing in a professional capacity, including civilian witnesses and the accused, appearing remotely also has the potential to limit the general inconvenience of having to participate in a trial.

*'I work in a remote environment where witness and accused attendance for criminal proceedings is a significant logistical challenge, remote attendance removes potential barriers.'* (Police officer/staff)

82. We also heard that remote appearance may be especially beneficial for expert witnesses and professionals working in national units, who may be called to participate in trials across Scotland. This would include some prosecutors and police witnesses. For example, one of the virtual trials in Inverness related to wildlife crime, which is dealt with by a national unit within COPFS. The staff of that unit will not necessarily be local to the court where the trial takes place and being able to prosecute via remote appearance eliminates travel expenses and travelling time, allowing them to work more efficiently.
83. As well as reducing travel for participants, we also heard that virtual trials reduce the volume of case papers, and eliminate the need to transport papers and productions around the country. Many of our interviewees and survey respondents noted the resulting environmental benefits of virtual proceedings.
84. For those appearing virtually, including witnesses and legal representatives, the time spent waiting for the trial to commence, particularly if there are any delays, can be spent waiting in a more convenient location such as at home or the office, allowing them to occupy themselves more easily and productively than if they were at court.
85. Perhaps one of the most important benefits relates to the remote appearance of vulnerable witnesses. The trauma of attending court to give evidence experienced by some witnesses is well-documented. Virtual trials eliminate the risk that witnesses will meet the accused or their associates at court, and provide an opportunity for witnesses to avoid court altogether by giving evidence from a safe, supportive location. There is potential for a witness to, for example, give evidence from the office of support organisations such as Victim Support Scotland or Scottish Women's Aid. To avoid a

witness seeing the accused even on screen, SCTS has successfully tested removing the accused's video link from the witness's screen.

86. There are also benefits for the accused. In his report, Sheriff Principal Pyle quotes Sheriff Wallace as saying that the accused person appears on a more equal footing in virtual proceedings as opposed to being kept separate in the dock.<sup>26</sup> This benefit has also been highlighted in a recent evaluation of mock remote jury trials conducted in England and Wales, which found that the defendants were treated with more dignity than when appearing in a courtroom dock.<sup>27</sup>
87. For accused persons who are on remand or already serving a prison sentence, virtual trials may offer the opportunity to significantly reduce the need for prisoner movements to and from court. Such journeys can often be long and uncomfortable. Appearing remotely reduces the risks to which the prisoner may be exposed on a journey and there are cost savings.

### **Issues and challenges**

88. An issue that requires to be resolved relates to the location from which witnesses are able to give evidence. The virtual trials to date have mostly involved police witnesses giving evidence from an office in a police station that has been designated for that purpose. For other witnesses, consideration is being given to what constitutes a suitable venue from which to give evidence. The venue should afford privacy and there should be no interruptions. If witnesses are to appear from the offices of organisations which can offer them support as has been suggested, those organisations will need to be funded to provide the necessary facilities and staff.
89. Consideration is also being given to the venue from which the accused appears. In one trial we observed, the accused appeared from his solicitor's office, while in another he appeared from an office at the court. If there is a possibility that the accused will be taken into custody, he should appear from a venue where he can quickly be secured such as a police station or court.
90. As Sheriff Principal Pyle noted in his report, for the accused and some civilian witnesses, there is a need to ensure they are under the control and supervision of court officers (and perhaps of police officers where there is a risk of misbehaviour). This limits the locations from which they can appear, particularly in a trial with several witnesses as it would be resource-intensive to have court or police officers at multiple venues. In such cases, the least costly option may be an in-person trial, rather than a virtual one.
91. While it is possible that the sheriff, clerk, prosecutor, defence agent or police witnesses could participate in a virtual trial from home, we heard from some that they preferred to participate from their place of work. This had some advantages including more reliable IT and assistance at hand if required, and less likelihood that they would be interrupted by family, pets or deliveries.
92. The effective functioning of a virtual trial is of course dependent on reliable and secure IT. Only video conferencing is used for virtual trials, unlike other proceedings which may be conducted by telephone. The need for reliable IT may limit the locations from which parties are able to appear remotely. While the IT appears to have mostly worked

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<sup>26</sup> Sheriff Principal D C W Pyle, [Summary Criminal Virtual Trial Pilot: The Way Ahead – A Strategic Plan](#) (2020), paragraph 13.

<sup>27</sup> Mulcahy, Rowden & Teeder, [Exploring the case for virtual jury trials during the Covid-19 crisis: an evaluation of a pilot study conducted by Justice](#) (April 2020).

well for virtual summary trials, many of those we spoke to or who responded to our survey said it could be better. They noted the risks of a poor or unstable connection, even if this occurred for only a small portion of the proceedings. It is essential that the accused and his solicitor are able to follow and understand all that is being said and see all evidence that is being shown. It is also essential that all parties speak up if their connection is poor. Some witnesses and accused may be reluctant or feel unable to interrupt proceedings, or may not realise they should object to a connection which is good enough for a virtual chat with friends, but which is not of sufficient quality for legal proceedings. This emphasises the need for a court officer to be present who can monitor the connection and speak on their behalf if needed. Many of those who contributed to our inspection also noted the importance of having easily accessible IT support. This has resource implications for courts, COPFS, Police Scotland, solicitors and any other organisations whose offices are used to participate in virtual trials.

*'There needs to be a lot more investment in the technology in courts, police stations and prisons, and also in the manpower to handle this.'* (COPFS staff)

93. If the volume of virtual summary trials is to increase, there will generally need to be investment in supporting technology across the criminal justice system. This would include at prisons, where video conferencing facilities appear to be limited in number at present.
94. It is often assumed that digitalisation inevitably leads to efficiencies. However, we often heard that virtual proceedings are slower than in-person proceedings. As well as the proceedings themselves being slower, we heard that the time spent preparing for virtual trials was significantly longer for both prosecutors and defence agents. While it might be expected that preparation time will shorten as parties become more used to operating remotely, some doubted that it would shorten sufficiently to make a virtual trial more efficient than an in-person trial. Some felt the amount of preparation required for a virtual trial was simply not sustainable in the longer term. Thus, gains to be made from reduced travelling time to court, for example, require to be offset against the longer preparation time and trial itself. The implications for defence agents and legal aid of more time spent on individual cases will also have to be considered.
95. We also heard that considerable time is being spent identifying cases that are suitable for virtual trial. For that reason, if virtual trials are to be used more routinely, it may be helpful to identify categories of cases that are presumed to be suitable for virtual trial unless the parties object (as noted at paragraph 76). Alternatively, or in addition, a consistent screening process to identify cases suitable for virtual trial may need to be developed.
96. Currently, a barrier to identifying cases for virtual trial is achieving the consent of the defence to proceed virtually.<sup>28</sup> As is clear from our survey results, defence agents are generally less in favour of virtual proceedings and may not want to see their cases used to test a novel approach.
97. A consistent theme during our inspection was the need to secure the support of defence agents to changes in the criminal justice system. Many felt that too often decisions had been taken without their input or without due consideration of the impact of the change on them. While decisions were understandably taken in haste due to the emergency situation, it is nevertheless essential that all those within the criminal

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<sup>28</sup> Criminal Courts Practice Note No 1 of 2020, which related to the remote conduct of the summary trials pilot at Aberdeen and Inverness sheriff courts, required that both the prosecutor and the agent for the accused agreed that the case was suitable for trial.

justice system are fully engaged otherwise changes are likely to fail, or at least fail to realise their maximum potential.

98. Some of those we heard from felt something was 'lost' in a virtual trial. For some prosecutors, this was the opportunity to meet witnesses in person immediately prior to trial, to offer information and reassurance, and to identify any support that might be needed. If there was greater use of virtual summary trials, some prosecutors and defence agents felt they would lose a last minute opportunity to speak in person about the case and to bring it to an early resolution. What might be lost could also be something more intangible. For example, some prosecutors feared that the loss of eye contact, of non-verbal cues and of the ability to read the body language of witnesses and the accused would hamper their effectiveness at trial. Even those we spoke to who were positive about virtual trials and felt they had a place often said that they were not a perfect replacement for in-person trials.
99. Defence agents also felt that their ability to communicate with their client during virtual trials might be hampered. Agents are able to consult with their clients in a virtual 'side room', although they may feel that this is more disruptive to proceedings than having a quiet word in person at court.
100. There is a need to carry out a robust equality and human rights impact assessment of the policy of virtual summary trials at a strategic level, but also to assess the suitability of individual cases for virtual trials. In particular, consideration should be given to accused persons and witnesses for whom virtual trials are not appropriate. For the accused, their right to participate effectively in proceedings is guaranteed by the European Convention on Human Rights, regardless of whether the proceedings are in-person or virtual. The use of virtual trials may require that additional measures are needed to safeguard their rights (see also paragraph 58 above in respect of virtual custody courts). We understand that cross-agency work has begun on assessing the impact of remote appearances on equality and human rights, which we welcome.
101. Consideration is being given to the important principle of open justice although an appropriate solution has not yet been found for all types of virtual proceedings. SCTS has provided information on its website about how to access some types of hearing by telephone so that proceedings can be heard (but not seen). The website sets out rules for public access, similar to those that would apply at physical court. While virtual summary trials have been observed by several hundred interested parties across the justice system, including our inspectors, access is not yet freely available. While all those we spoke to in our inspection agreed that open and transparent justice is essential, there are concerns about security and the possibility of proceedings being recorded that require to be resolved. Once resolved, it is possible that virtual trials will increase transparency as it will be easier to access and observe proceedings when travelling to court is no longer required.
102. While observing two virtual summary trials, we noted that, in practice, it can be hard to follow proceedings given that key evidence was agreed in advance and was not read out at the start of the trial.
103. If virtual trials are to be retained in the longer term, we heard some concerns that this may lead to the closure of courts and local criminal defence practices in more rural and remote areas, thereby reducing local access to justice (as well as local employment opportunities).



### Potential for retention

104. The emergency provision in the 2020 Act which allowed virtual summary trials to take place has been, and will continue to be, beneficial. In the early stages of lockdown, the justice system was not sufficiently resilient that a reasonable volume of summary court business could continue. The introduction of virtual summary trials may address this to some degree. We consider there is a need to retain the provision in the event of a further lockdown, to bolster the resilience of system and limit as much as possible further increases in the backlog. The provision could be retained indefinitely, for use in other emergency circumstances which may arise in order that justice is achieved in a timely manner for both victims and the accused.
105. As outlined above, we also consider that virtual summary trials can serve a useful purpose during the recovery period, by freeing up courtrooms for solemn trials and minimising the number of people that have to attend at court. The issues and challenges we highlight above will require to be addressed. We are aware that many of the issues are being considered or addressed by the virtual summary trials project board. While the pilots have shown that virtual trials can work for fairly straightforward cases, scepticism has been expressed about the system's ability to roll virtual trials out on a more significant scale and to more complex cases. Consideration will also require to be given to how virtual trials fit with broader work within the criminal justice system, such as the Evidence and Procedure Review.
106. The outcomes of trials that are conducted virtually out of necessity during lockdown and recovery periods should be monitored and improvements made to the process as needed. In particular, the ability of the accused to participate effectively and the impact of virtual trials on victims and witnesses should be scrutinised. Consideration should also be given to the implications of virtual trials for defence agents, and their capacity and ability to continue to deliver an essential service.
107. There may also be a place for virtual summary trials in the longer term, although the extent to which they should be used in non-emergency and non-recovery circumstances ought to be the subject of extensive consultation and engagement. Some of the benefits highlighted above apply not only in an emergency or recovery situation, but also post-pandemic as business returns to normal. Each case will need to be assessed individually, to determine the most appropriate model for trial taking into account the needs of the parties and the circumstances of the case.
108. We believe serious consideration should be given to a hybrid model at the summary level. This would involve some of the trial taking place in person, with some witnesses appearing virtually. This could include some for whom the benefits of appearing in person are outweighed by the distance, duration and cost of travel, and some professional witnesses. There are two categories of professional witness who are most likely to act as witnesses and who might benefit most from the ability to appear virtually – police officers and staff, and health care workers.

*'[Virtual appearance] saves time, there is so much time wasted for police officers and staff travelling to court, days spent in witness waiting rooms, re-rostered rest days and annual leave etc.'* (Police officer/staff)

109. Arrangements could be made for both groups to give evidence from their place of work and without the need for court officers to be present. By appearing virtually, the costs of travelling to court would be reduced but, more importantly, their abstraction time from work would be significantly reduced. The time spent by police witnesses in particular waiting to be called to give evidence has long been a concern. If they were able to appear from their place of work, the time waiting to give evidence could usefully

be spent doing police work. This would ultimately benefit communities and the victims of crime and be a more efficient use of public sector resources. There may also be other benefits for some professions – HMICS has previously reported that giving evidence at court can be a barrier to some doctors becoming forensic medical examiners, which has contributed to insufficient numbers of forensic medical examiners in some areas. Reducing their abstraction time from their duties in order to give evidence at court may help remove this barrier.<sup>29</sup>

### Virtual hearings

110. The emergency provision relating to attendance by electronic means also applies to summary and solemn procedural diets and criminal appeals. We heard about electronic attendance being used across a range of hearings including, at the summary level, pleading diets where the accused has been cited, first appearance on an undertaking, intermediate diets and sentencing diets and, at the solemn level, full committals, first diets, preliminary hearings and sentencing diets.<sup>30</sup>
111. In June 2020, the Lord Justice General acknowledged that progress made in the use of technology to deal with as much court business as possible would continue so as to reduce the need for physical attendance in court buildings. He noted that remote appearance by some or all of the parties would be facilitated at cited diet and intermediate diet courts unless physical attendance was essential.<sup>31</sup>
112. While we heard that some procedural courts were carried out entirely via video or telephone conferencing, others had used a hybrid model where only some parties attended electronically.
113. We also heard of virtual appearances taking place at appellate diets, including bail appeals and appeal hearings. During lockdown, procedural appellate diets were dealt with by written submissions however, from June 2020, virtual substantive appeals against both conviction and sentence have been running successfully in the High Court and Sheriff Appeal Courts. In these cases, we heard that parties have been appearing remotely, with the exception of the court clerk. From 17 August 2020, the bail appeal court has also run in a virtual format.<sup>32</sup> Parties appearing remotely can join proceedings via video link from their laptop or mobile devices.

### Benefits

114. Many of the benefits of electronic attendance at procedural and appeal hearings mirrored those outlined in relation to virtual custody courts and virtual summary trials. The number of people attending courts has been minimised, providing a safer environment for those whose presence is essential. The use of virtual appearance has also minimised the need for travel, saving time and money. For COPFS, this has allowed appearances to be covered by a wider range of staff. These benefits are particularly relevant for those working in more remote and rural areas, such as Grampian, the Highlands and Islands.
115. Electronic attendance is of benefit to solicitors who have business calling in more than one court on the same day. A solicitor based in Glasgow told us that he was able to appear remotely to an intermediate diet in Inverness, avoiding significant travel time and expenses for a hearing that lasted only minutes.

<sup>29</sup> See, for example, HMICS, [Strategic overview of provision of forensic medical services to victims of sexual crime](#) (2017).

<sup>30</sup> This is not an exhaustive list of all the types of procedural diets that exist where electronic attendance can be facilitated. See [Direction 1 of 2020](#) for further specification.

<sup>31</sup> [Criminal Courts Practice Note No 2 of 2020](#).

<sup>32</sup> [Sheriff Appeal Court - Guidance for Practitioners appearing in the Bail Appeal Court](#).



116. Electronic attendance for appeals permitted the recommencement of appeal hearings and eased the backlog of appeals which may have otherwise amassed. One interviewee told us that electronic attendance will greatly assist in returning to business as usual for the Appeal Court, and some prosecutors said the written submissions required in advance resulted in more efficient hearings. Feedback around electronic attendance for appeals was positive and we heard that it is a viable model for most appeal hearings, although one interviewee felt that an exception to this may be cases where fresh oral evidence requires to be led.
117. Another advantage of electronic attendance to appeals hearings is that this would expand the resource availability and resilience of sheriffs and judges because they could hear appeals in locations other than Edinburgh, where the Appeal Court usually sits.

### ***Issues and challenges***

118. While we heard about some issues relating to the reliability and quality of technology in relation to virtual procedural hearings and appeal hearings, generally there appeared to have been fewer difficulties at these hearings than in, for example, virtual custody courts. We were told that proceedings generally run smoothly. Generally, participants favoured video over telephone conferencing.
119. A number of concerns were raised by COPFS staff regarding their ability to effectively participate in virtual procedural hearings:
- Some said not attending court in person reduced opportunities for plea negotiation and early resolution of cases. We note the introduction of a pilot at Hamilton Sheriff Court for face-to-face weekly trial surgeries to encourage early resolution of cases and reduction of the trial backlog.
  - Some deposes within the Appeals Unit raised concerns about not being able to communicate with the Advocate Depute to assist during the hearing in the way they normally would if they were physically present. However, we also heard that Deputes could still email Advocates Deputes during proceedings and in any event these consultations were rarely required.
  - A consistent approach to electronic attendance for procedural courts was lacking, both across the jurisdictions and nationally.
120. Prosecutors, as well as defence agents, also noted there was a lack of set criteria and procedure in relation to identifying cases where electronic attendance would not be appropriate for procedural courts.
121. We heard there is a need to better facilitate private consultation and interaction between defence agents and their clients prior to and during virtual procedural hearings. Defence agents said they needed to:
- be part of the decision-making process on whether it is appropriate for their client to attend a procedural hearing electronically
  - have a digital space to consult privately with clients during remote hearings when new and unforeseen issues arise, without disrupting the overall hearing
  - ensure there are enough 'slots' for pre and post-hearing consultations when their clients are appearing from prison
  - ensure that they can observe their client's demeanour to be confident that they can hear and understand proceedings and ensure their clients human rights are being protected.

122. We also heard that the availability of time slots for the accused to appear at court from prison was hampering the effective running of courts. We heard that there had been instances where courts had run over their allocated time and this had a knock on effect, causing other courts to miss their own slot and leading to delays in concluding their business for the day. If electronic attendance is to be rolled out further, the availability of slots and resources to support links from prison will require to be reviewed.
123. At the time of our inspection, given the ongoing health restrictions, there were only a limited number of accused persons physically attending procedural hearings. One sheriff who responded to our survey noted that they would be uncomfortable sentencing a person not physically before them to imprisonment and that they would not be willing to do so if the person was appearing by audio only.
124. While there are effective governance arrangements in place for virtual custody courts and virtual summary trials, there has been no equivalent for procedural courts or appeal hearings. This may be because of the wide range of hearings and personnel who might require to be involved. However, similar oversight arrangements for virtual procedural courts may be helpful to provide a clear strategic direction, identify learning and address issues.

#### ***Potential for retention***

125. The use of electronic attendance at virtual hearings has been beneficial during the lockdown and recovery phases of the response to the pandemic. Given the positive feedback we have heard, there may be some appetite for retaining electronic attendance post-pandemic. While feedback from the defence has been positive in relation to appeal hearings, this has sometimes been qualified by the assumption that electronic attendance would only be used in an emergency situation. Further evaluation of its use in different circumstances and further consultation should be carried out regarding the retention of electronic attendance at virtual hearings. It may be that electronic attendance is particularly effective for certain types of procedural court or in certain locations. It is worth noting though, that many of those we spoke to and who responded to our survey felt procedural courts were a more straightforward and 'natural fit' for electronic attendance given the accused may not need to attend.

## National jurisdiction for first appearance from police custody

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126. Criminal proceedings before a sheriff court usually take place in a court in the sheriff court district where the offence was committed. The 2020 Act provides that where an accused appears in court for the first time from police custody, that first calling of criminal proceedings can be taken in any sheriff court in Scotland and may be dealt with in that court by a sheriff of any sheriffdom.<sup>33</sup> This effectively created a national jurisdiction for sheriffs dealing with first appearances from custody.
127. The creation of a national jurisdiction offered flexibility in response to the Covid-19 pandemic and was thought necessary for two main reasons, as set out in the Policy Memorandum:
- (1) in response to the pandemic, Police Scotland intended to move to a smaller number of centralised custody centres. The first appearance of those held in police custody would therefore likely be at a court local to the custody centre rather than the location of the offence
  - (2) there was a concern that the availability of sheriffs may reduce as individuals became ill and self-isolated.<sup>34</sup>
128. In March 2020, SCTS consolidated its sheriff court business at 10 hub court locations. These hub courts dealt with all custody business from across Scotland. Because there was at least one hub court operating in each of the six sheriffdoms, it was not thought necessary to make use of the emergency provision creating a national jurisdiction. We were advised by SCTS, however, that had the situation deteriorated and the number of hub courts been reduced, then the emergency provision would have been employed so that custody business could continue to be heard. Instead, as the justice system's response to the pandemic progressed, the number of hub courts increased, reducing the need for emergency provision to be used as intended.
129. No data are available on the number of times the emergency provision regarding national jurisdiction has been used, but during our inspection, we consistently heard that it had been little used. While those appearing from police custody may not have appeared at their nearest sheriff court but instead at a hub court, they generally were not taken outwith the sheriffdom in which the crime was alleged to have been committed.
130. We heard that there may have been missed opportunities to use the provision to a greater extent during the initial response to the pandemic. Accused persons continued to appear in the usual sheriffdom, even when appearance at another sheriff court may have had benefits for them and others, such as their solicitor and GeoAmey. For example, a person from Girvan would have appeared at the sheriffdom's hub court at Hamilton, bypassing Kilmarnock Sheriff Court on the way (Girvan and Hamilton are within the sheriffdom of South Strathclyde, Dumfries and Galloway, while Kilmarnock is in the sheriffdom of North Strathclyde). If the accused was bailed from court, they may have had to make their own way home from Hamilton to Girvan on public transport at a time when the public were required to limit travel and contact with others. Appearing at Kilmarnock instead may not only have been more convenient from the accused person's perspective, but would have shortened the journey to court taken by both

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<sup>33</sup> Schedule 4, Part 3. The 2020 Act also provides for the continuation, up to a certain point, of criminal proceedings after the first calling to be heard in any sheriff court by a sheriff of any sheriffdom. For the purpose of our inspection, we have focused on the first calling of the case.

<sup>34</sup> SP Bill 66-PM [Coronavirus \(Scotland\) Bill \[policy memorandum\]](#) Session 5 (2020).

GeoAmev and the accused's local solicitor (as well as any additional support that would be required, such as an appropriate adult).

131. When asked why the provision had not been used, interviewees noted IT and practical difficulties in moving papers from one sheriffdom to another as factors. Some speculated that there was resistance to moving court business across sheriffdoms among sheriffs, court staff and defence agents.
132. Many of those we interviewed and who responded to our survey thought the provision would be useful in three main circumstances. The benefits they cited were not particular to an emergency situation such as the pandemic, albeit that the benefits might be more acutely felt during an emergency. The three main circumstances were:
  - (1) where a person detained in police custody has multiple outstanding warrants from more than one sheriffdom
  - (2) when local court holidays result in people being held in police custody for longer
  - (3) in the event of weekend custody courts.
133. Currently, where a detainee has multiple warrants from more than one sheriffdom, they generally appear in each sheriffdom on consecutive days, thereby extending their stay in police custody. Where a person has several warrants, they can spend several nights in custody. Remote appearance at a virtual custody court in each sheriffdom would offer the opportunity for the person to appear from one custody centre in all sheriffdoms in one day. This is an improvement on the current situation but would require effective scheduling and coordination across all courts. The national jurisdiction provision would allow one court to deal with all of the warrants at the same time. We welcome efforts by COPFS to establish a process for dealing with multiple warrants more effectively using the emergency provision, but note these stalled due to difficulties with transmitting papers electronically within the court service. However, it is intended that the Glasgow virtual custody court pilot will deal with multiple warrants at once, regardless of the sheriffdom which issued the warrant. We welcome this approach.
134. Dealing with multiple warrants at once offers various advantages. The time the accused spends in police custody will be shorter, which benefits the accused as well as reducing the demands on police resources. It was also suggested that where an individual is aware they have multiple outstanding warrants, they may be more likely to hand themselves in knowing they will be dealt with efficiently and will not have a prolonged stay in police custody. Even where our survey respondents were not supportive of a national jurisdiction, some did note that it would be useful in this limited circumstance. If the provision was going to be used in this way, defence agents were keen that consideration should be given to ensuring it is the accused person's 'home' court which is the one dealing with the multiple warrants.
135. During our inspection, we heard that the national jurisdiction provision could supplement existing efforts to minimise the impact of local court holidays on custody courts. It was suggested that the provision be used to ensure the custody cases of one area could be heard in the court of another sheriffdom, where that court was closest to the police custody centre at which the accused was being held. Again, this was with a view to minimising the time accused persons spend in custody.
136. The routine use of weekend custody courts has been suggested as a means of minimising the time accused persons spend in police custody and addressing to some extent the significant demands placed on COPFS and the courts on Mondays. While weekend custody courts are outwith the scope of our inspection, we note that a national jurisdiction for first appearances from custody could facilitate them. An

analysis of the demand for a Saturday custody court could help identify how many are needed across Scotland, enabling only a small number of custody courts to run to deal with all cases. This may work best in combination with the use of virtual custody courts. While such a proposal has some advantages, further detailed consideration would need to be given to the justice system's capacity to sustain weekend custody courts, not only in terms of the police, prosecution and courts service, but also defence, social work, prisons and health care. Engagement with stakeholders would be critical and a full assessment of the costs and benefits needed.

137. One of the key benefits in each of the three circumstances outlined above in which a national jurisdiction may prove useful relates to reducing the length of time people spend in custody. This has long been the subject of concern, particularly for those detained over weekends and public holidays. Lord Carloway noted his concern about the duration of detention in his review of criminal law and practice<sup>35</sup> and one of the policy objectives of the Criminal Justice (Scotland) Act 2016 was to ensure that a person is not unnecessarily or disproportionately held in police custody. More recently, following a visit to Scotland in 2018, the European Committee for the Prevention of Torture noted that the police custody centres they saw were unsuitable for detention for longer than 24 hours given the limited facilities. It recommended that, '*the Scottish authorities take steps to decrease the high number of persons held in police custody facilities for longer than 24 hours (i.e. between Friday and Monday mornings)*'.<sup>36</sup> Article 5 of the European Convention on Human Rights requires suspects to appear in court 'promptly'.

138. A concern that was highlighted by some was the potential loss of local justice should the use of a national jurisdiction be extended. They felt that justice should be seen to be administered locally. There were also some concerns about the broader implications for access to justice, with a fear that it might result in a concentration of defence agents in a smaller number of areas leaving some communities without local representation. Others were less concerned about local justice in the context of appearances from police custody, and felt it was more relevant to trial diets.

*'Maintain, as far as possible, the link between crime and local court.'* (Sheriff)

*'Locality is key, it is important that local courts deal with local offenders as they understand the broader issues not just crime but the impact criminals have on communities.'* (Police officer/staff)

### **Potential for retention**

139. The emergency provision in the 2020 Act which created a national jurisdiction for first appearances from police custody has generally not been used and, in practice, other approaches have been taken to manage custody cases during the pandemic. However, the provision may be of use in some limited circumstances as set out above.

140. While there is some support for retention post-pandemic, it is not unanimous and some issues require to be resolved including logistical difficulties at court; resistance to moving business between sheriffdoms; addressing any concerns about local justice; and fuller assessment of costs and benefits of weekend custody courts. Further consultation with stakeholders should be carried out to assess the extent to which it might prove useful in future.

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<sup>35</sup> Lord Carloway, [The Carloway Review – Report and Recommendations](#) (2011).

<sup>36</sup> Council of Europe, [Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) from 17 to 25 October 2018](#) (2019).

## Lord Advocate's Guidelines on liberation from police custody during Covid-19

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141. The Lord Advocate's guidelines on liberation from police custody were updated in April 2018 to reflect the terms of the Criminal Justice (Scotland) Act 2016 (the 2016 Act) and to provide clarity on the overall approach to be taken. In particular, the revised guidelines outlined that there is an overarching presumption of liberty and as such, police officers must have regard to a person's right to liberty under Article 5 of the European Convention on Human Rights and consider whether it is reasonable or necessary to keep that person in custody.
142. In response to the Covid-19 pandemic, and having considered the potential impact on police custody centres and courts, the Lord Advocate issued revised guidelines on 30 March 2020. These were introduced to guide Police Scotland on the approach to be taken regarding individuals who are in police custody having been arrested during the period of disruption caused by the pandemic. The principal aim of the revised guidelines was to assist custody officers to make well-informed, risk-based decisions on the suitability of liberation of an individual from police custody and the situations in which it may be suitable to detain a person for appearance at court. This was with a view to reducing the number of individuals held within police custody centres around the country and therefore to reduce the potential for spread of Covid-19.
143. The revised guidelines reiterated existing provisions based on the presumption of liberty and provided additional direction to police on the kind of situations where refusing to release an accused person may be justified. This included for example, where it is considered that there is a likelihood of the accused reoffending, or posing a substantial risk to the safety of a victim, witness or the public which cannot be mitigated by undertaking conditions.<sup>37</sup>
144. The guidelines also revised the procedures for the release of a person on an undertaking to appear at a specified court. They extended the date of the appearance at court to within 90 days of liberation, or otherwise in accordance with agreements between Police Scotland, COPFS and SCTS. The 90-day undertaking period also applied in respect of domestic abuse offences and the guidance highlighted that police officers must have regard to the terms of the Domestic Abuse Protocol<sup>38</sup> when considering liberation or undertaking for persons charged with domestic abuse offences. The extended period was introduced in recognition that there were significantly fewer courts in operation during the lockdown period.
145. In July 2020, the Lord Advocate updated the guidelines in respect of the timescales for a person released from custody on undertaking to appear at court. These reverted to the original timescales which were that the date of appearance at court should generally be within 28 days of liberation, and in respect of domestic abuse offences, the court appearance must be within 14 days of liberation.
146. Prior to the pandemic, it is evident that the Lord Advocate's guidelines introduced in April 2018 had not been implemented as intended. In January 2020, Criminal Justice

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<sup>37</sup> Under section 26 of the 2016 Act, an accused person can be released by the police on the undertaking that they will appear at court at a later date and that they will comply with certain conditions. These conditions are the same as those which can be applied to a bail order granted by a court and include, for example, a requirement not to commit further offences.

<sup>38</sup> COPFS & Police Scotland, [Joint protocol between Police Scotland and the Crown Office & Procurator Fiscal Service – In partnership challenging domestic abuse](#) (2019).



Services Division (CJSD) within Police Scotland had undertaken a review of the first year of implementation of the Criminal Justice (Scotland) Act 2016, including the impact of the legislation on throughput, detention in police custody, the use of investigative liberation and release on undertaking. The review recognised that there had been no discernible reduction in the number of individuals detained in custody for court appearance and only a 2% increase in the use of undertakings. While this does not suggest that decisions to detain individuals for court were not sound, CJSD recognised that the provisions had been under-used particularly in respect of undertakings.

147. As part of our inspection, we reviewed custody throughput data for a sample period between 15 March and 10 September 2019 and the same period in 2020. This enabled us to examine the impact of the revised Lord Advocate's guidelines on the levels of detention and liberation from police custody during the period of restrictions imposed as a result of the pandemic.
148. We found that the level of throughput in custody centres reduced by approximately 19% from 62,100 to 50,580. Almost 45% fewer people were held in custody for appearance at court during the sample period in 2020 compared to that in 2019, a reduction from 30,900 to 17,080. Our analysis identified that there was a considerable reduction in the use of custody to appear at court during the initial months of the pandemic. However, the number of people held for court gradually increased as the year progressed and on some dates during July and August, reached similar levels of detentions to those recorded in early March 2020, prior to restrictions being imposed.
149. In respect of release on undertaking, there was a 63% increase in the use of this procedure during the above noted period in 2020 compared with the same period in 2019. These increased from 7,350 to 11,990. The use of undertakings was highest during April and May 2020 with a gradual reduction during the following months. However, the daily rate of undertakings remained consistently higher during the sample period in 2020 as compared to 2019.
150. These figures suggest that while the revised guidelines had a considerable impact during the early stages of restrictions being imposed, there had been a gradual return to previous custody centre practices during the latter months of our sample period.
151. During our inspection, we recognised that the decisions made, predominantly by custody sergeants, on the detention or liberation of an individual from custody were often complex and required a balancing of the rights of the accused person with the potential risk posed to the community or specific individuals. This, coupled with a generally high level of custody centre throughput, creates a pressurised environment where difficult decisions are made on the release of an individual from custody. These decisions can at times be challenged by partners in the criminal justice system, by other police officers, and by victims of crime or members of the public which adds an additional layer of complexity.

### **Impact of revised guidelines**

152. It is evident from the data that the revised Lord Advocate's guidelines had a considerable impact on the number of people detained in police custody and those held for court. Whilst it is not possible to quantify the public health outcomes of this reduced custody throughput, it demonstrates that due consideration was given to limiting the potential spread of Covid-19 when custody decisions were made.
153. We heard consistently positive comments from interviewees on the benefits of the revised guidelines in respect of the reduced number of individuals detained in custody

and held for court. It was acknowledged by interviewees and many respondents to our survey, that this likely had a positive impact on public health. Some interviewees we spoke to highlighted that the reduced custody numbers eased pressure on frontline health services at a critical time.

154. The revised guidelines provided increased discretion and flexibility to custody sergeants to guide risk-based decisions on custody and liberation. Some survey respondents stated that reduced custody throughput helped free up custody resources and provided more time to undertake investigations and prepare cases. This was balanced however, with the recognised impact of virtual custody courts on custody officers in respect of additional care and welfare responsibilities as noted above at paragraph 51.
155. The revised Lord Advocate's guidelines allowed the release of individuals arrested on pre-conviction and witness warrants in certain circumstances during the pandemic to ease the number of individuals held in police custody, however we heard that these powers were not being used consistently across custody centres.
156. Between April and June 2020, COPFS received 5,365 undertaking reports, compared to 3,255 undertaking reports the previous year, an increase of 65%. The increase in the number of undertaking reports, and the reduction in cases reported to COPFS from custody, has implications for the management of resources within COPFS. The undertaking report cases with an anticipated forum of summary proceedings are usually marked by local court teams, whereas summary custody report cases are usually marked by the National Initial Case Processing (NICP) Unit. The effect of Police Scotland's application of the revised guidelines would have been to increase the workload of local court teams but to reduce the demands on NICP. While custody reports must be marked by NICP on the day of receipt, local teams have more time to mark undertaking reports, significantly relieving the time pressures on COPFS to make decisions on how cases should be managed. COPFS should continue to monitor the volume of custody and undertaking reports received to ensure that it is distributing its resources appropriately.
157. Whilst initially viewed as helpful in managing the marking of cases and keeping persons who had to be in court buildings to a minimum, a 90-day undertaking was seen by many to be too long for some individuals to manage and had the potential to be breached particularly by those with curfew conditions, thus creating additional cases. A subsequent increase in reviews to conditions imposed requested by defence agents<sup>39</sup> resulted in a requirement for cases to be considered and marked in advance of the scheduled undertaking date. As undertakings returned to the usual 28 and 14-day timescales, there was increased pressure to identify available court time for these as the 90-day cases were already fixed into slots that would usually be available. This should have been a temporary problem given that timescales have since reverted. However, we have also heard that there are challenges in meeting the timescales due to the need to minimise the number of people attending court at one time due to Covid-19. In light of the information gathered during our inspection, we believe that should there be a second strict lockdown period, consideration should be given to whether it is necessary for undertakings to be extended as long as 90 days and whether the usual timescales can be retained.
158. Some interviewees raised concerns about the potential for inconsistent application and interpretation of the guidelines and were of the view that the liberation of persistent and/or serious offenders could undermine public confidence. Whilst we were not able

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<sup>39</sup> Reviews of undertaking conditions imposed by police can be requested under section 30 of the 2016 Act.



to explore the potential impact on public opinion as this was outwith the scope of our inspection, we found no evidence of a problematic level of inconsistent application of the revised guidelines.

### Revised guidelines – key messages

159. The revised guidelines have reinforced the policy objective of the 2016 Act around the presumption of liberty and the need to ensure that a person is not unnecessarily or disproportionately held in police custody. As a result, this policy objective has had greater prominence in custody decisions.
160. Police Scotland provided swift and clear guidance to staff on the implementation of the revised Lord Advocate's guidelines and provided updates as these occurred. This view was supported by several survey respondents who stated that '*clear and helpful guidance was issued at an early stage of the pandemic*'.
161. When restrictions were introduced by the Scottish Government in March 2020 as a result of the pandemic, there was an initial decrease in the number of people detained, linked to a more general reduction in crime. Of those who were detained, fewer were held for court and more were liberated by way of undertaking. Whilst it is not possible to estimate the impact on public health of the reduced number of people detained in custody centres, it is considered that this situation helped to mitigate risks associated with the spread of Covid-19.
162. As restrictions eased, the rate of custody throughput returned to near pre-pandemic levels. The proportion of those held in custody for court also increased however did not return to the pre-pandemic levels of approximately 50%, but averaged 40% of throughput.
163. A significant number of individuals held in custody for court appearance were subsequently liberated from court. Following one weekend during the aforementioned sample period, 86% of people detained for court across Scotland were subsequently released from court. Many of these individuals would have been released on bail with conditions which could potentially have been imposed by way of undertaking. This raises issues regarding the basis for custody decisions in some cases, particularly those in which bail was not subsequently opposed by prosecutors, and highlights the need for increased partnership working between police and prosecutors with a view to achieving a greater understanding of which cases would be most likely to result in a period of remand to custody.
164. We found that there was willingness among police officers and prosecutors to develop a greater understanding of colleagues' roles and responsibilities in relation to custody and marking decisions. This could be achieved through developing joint training opportunities and collaboration on enhanced operational guidance.
165. As outlined above, we found a gradual return to custody centre practices which saw a return to pre-emergency provision levels of detention of individuals for appearance at court. It is evident therefore that in order to achieve continued effective implementation of the revised Lord Advocate's guidelines, a greater level of culture change will be required to challenge previous custody decision making practice.
166. Custody decisions can be complex and take place in a pressurised environment where issues regarding an individual's right to liberty are balanced with public protection and the safety of victims and witnesses. We found that in addition to this challenge, there was at times a tension between local policing perspectives on liberation of individuals

from custody and CJSD decisions to release an individual on the undertaking that they appear at court at a later date.

167. We found that decisions on the release of individuals accused of domestic abuse offences were particularly challenging and this prompted responses from several interviewees, particularly those with custody experience, that they would benefit from additional support and operational guidance to assist with custody decisions particularly where these were contentious. It was also noted that the introduction of a risk assessment template to guide custody decisions may encourage consistency across the country.
168. We noted from our review of key documents that a paper provided to the Scottish Government Victims Taskforce,<sup>40</sup> highlighted that releasing people from police custody who were accused of domestic abuse offences had raised anxiety for some victims. It was suggested within the report by domestic abuse support organisations that the use of undertakings did not give them time to contact victims and/or to assist them to put a safety plan in place.
169. We recognise this additional complexity for decision makers on considering the release of an individual from custody. We heard from several interviewees that there is a need for greater understanding amongst the public of the conditions that can be imposed on undertakings and the weight that these carry should they be breached. We suggest therefore that Police Scotland explore further opportunities to engage with victim support groups on this subject to promote a shared understanding of this aspect of criminal justice procedure and the protections that can be provided to victims by imposing an undertaking with conditions.
170. During our inspection, we noted that Police Scotland intended to pilot the introduction of five police inspectors into the role of quality assurance officers, to review cases marked for court as well as other quality assurance functions. This was with the intention of promoting greater consistency in custody decisions and the use of undertaking procedures and to enable those decisions to be taken at a more senior level where required. This approach had been in place for a short time during the lockdown period and likely assisted in making decisions which resulted in fewer people being held for court and more being released on undertakings. The proposed pilot therefore, would further embed practices that were shown to work during lockdown. We support this initiative and encourage strong partnership working between the inspectors and prosecutors in COPFS.
171. The proposed quality assurance inspector role has the potential to promote greater consistency in custody decisions and share learning across the country. This could promote greater compliance with the revised Lord Advocate's guidelines and human rights law. We suggest that Police Scotland also take this opportunity to provide comprehensive guidance to assist operational decision makers in custody disposal decisions. Effective working arrangements between quality assurance inspectors and custody review inspectors<sup>41</sup> would be essential in order to achieve enhanced monitoring and management of custody decisions.
172. We consider that the revised Lord Advocate's guidelines have had a positive impact on custody decision making. While it is not strictly the content of the guidelines

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<sup>40</sup> [Impact of Covid-19 pandemic on victims, witnesses and survivors – Evidence from support organisations](#) (Paper for Victims Taskforce, 10 June 2020).

<sup>41</sup> Custody review inspectors carry out reviews after a person who is not officially accused has been detained for six or 18 hours and authorises the extension of detention after 12 hours. They are also involved in other processes under the 2016 Act, and act as the key source of advice on any aspect of the legislation.

themselves that may merit retention, it is the cultural change they prompted within Police Scotland and the greater focus on the presumption of liberty that require to be sustained.

## Appendix 1 – Survey results

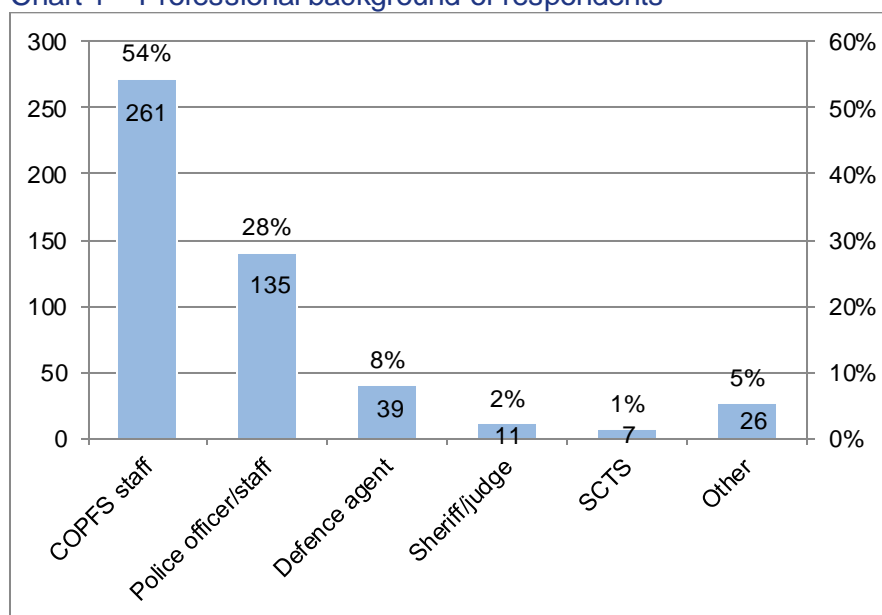
To inform our inspection of the emergency criminal justice provisions, and in light of the inspectorates' duty relating to user focus,<sup>42</sup> we invited those working across the criminal justice system to respond to an online survey regarding their experience of and views on the provisions. The survey was open between 6 and 21 August 2020. We received 626 surveys but 147 were excluded from our analysis because they contained no useable data – the respondents either did not answer any of the questions or they said none of the questions were relevant to their role.

Of the remaining 479 responses:

- 54% of respondents worked for COPFS
- 28% were police officers or staff
- 8% were defence agents
- 2% were sheriffs or judges
- 1% worked for SCTS.<sup>43</sup>

The remaining 5% of responses were received from a range of criminal justice professionals including advocates, social workers, those working for the Scottish Prison Service and third sector organisations, forensic scientists, and civil servants.

Chart 1 – Professional background of respondents



### Electronic signature and electronic transmission of documents

We asked respondents whether they had experience of the emergency provision relating to the electronic signature and electronic transmission of documents. Of the 479 respondents, 476 responded to this question:

- 74% (352) said they had experience of the provision
- 15% (70) said they did not or had not yet had experience of the provision
- 11% (54) said the provision was not relevant to their role.

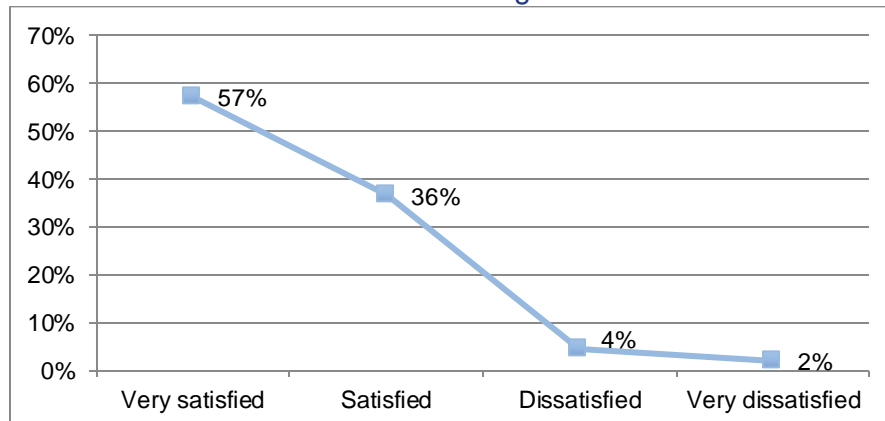
<sup>42</sup> Section 112 of the Public Services Reform (Scotland) Act 2010.

<sup>43</sup> Throughout Appendix 1, percentages have been rounded and therefore may not add up to 100%.

## Satisfaction

For those who had experience of the provision, we asked how satisfied they were with the new approach to electronic signature and electronic transmission of documents. Respondents indicated a high level of satisfaction, as shown at Chart 2.

Chart 2 – Satisfaction with electronic signature and electronic transmission of documents



The level of satisfaction with electronic signature and electronic transmission of documents was consistently high across professional groups. For example:

- 94% of COPFS staff were satisfied
- 93% of police officers and staff were satisfied
- 93% of defence agents were satisfied
- 91% of sheriffs and judges were satisfied.

## Benefits

We asked respondents what benefits electronic signature and electronic transmission of documents offer. 351 people responded to this question. Only 3% of respondents said there were no benefits. Of those who identified benefits, those most commonly cited are listed below. The benefits identified were generally consistent across the professional groups.

- **Efficiency**

The majority of respondents said the process of signing and sending documents was now faster, that time had been saved and that delays had been reduced. These benefits were particularly useful for out-of-hours work. Efficiency and time saving benefits were those most commonly mentioned across all the professional groups that responded to our survey.

*A huge benefit on time and resources. The process of serving an indictment could take up to 24 hours with numerous paper copies generated... now electronic signatures are applied the whole process takes less than 30 minutes. (COPFS staff)*

*Saves time trying to find relevant people to sign and lodge the document. (COPFS staff)*

*Easier and less time consuming. Leaves a trail of you lodging too. (Defence agent)*

*Electronic movement ensures the right parties have the information receipted within quick time. This supports a more efficient use of information and reduces risk of late or missing papers. (Police officer/staff)*

*I live and work on an island and taking physical documents to court takes time and is not always feasible operationally. (Police officer/staff)*

*Avoids police officers travelling to my home and avoids me getting dressed in the middle of the night to deal with them. Saves a considerable period of time. (Sheriff/judge)*

*Much more efficient way of dealing with out of hours warrants. (Sheriff/judge)*

- **Savings**

Linked to the theme of efficiency, respondents said savings could be made on unnecessary travel, paper, printing, transport and postage, as well as savings on staff time which could be reinvested in other work. Time and cost savings for those working in remote areas were highlighted.

*It's an efficient way of serving documents. We're saving a fortune on postage. (COPFS staff)*

*Allows colleagues to work from home and not be confined in the office, also easier process to serve on solicitors rather than arranging the police. (COPFS staff)*

*Incredibly quick, meant that a warrant could be granted without leaving the office to drive to a sheriff's home address, which usually contributes to a significant amount of time. (Police officer/staff)*

*Faster and more secure delivery, decreases need for officers to collect documents for service and enables them to focus on other duties. (Police officer/staff)*

*Saves time and travel and has probably had the biggest positive impact on policing during Covid and should be considered as becoming BAU [business as usual]. (Police officer/staff)*

*Allow for warrants to be granted without physical presence of deponent so minimises disruption to all involved. (Sheriff/judge)*

- **Security**

Respondents felt signing and sending documents electronically was more secure, and provided an audit trail.

*Speed of serving, reduced workload for Police Service of Scotland, better electronic audit trail for service of indictment. (COPFS staff)*

*More difficult to 'misplace' an electronic document. Speed of delivery, electronic trail which would be auditable and transparent. (Police officer/staff)*

*Speed, ease of service and it creates an electronic paper trail. (Defence agent)*

- **Ease**

Linked to efficiency, respondents felt the electronic signature and electronic transmission of documents was easier and more convenient.

*Quicker and more convenient. Means the author of the document can sign it, rather than someone else. (COPFS staff)*

*Easy access; remote working; universal access if required; lack of bulk; easy portage. (Sheriff/judge)*

*Quick service of indictments, rather than waiting on police to deliver. Can get them on our phones at court rather than waiting on return to office. (Defence agent)*

- **Safety during Covid-19**

Respondents said there was a reduced risk of transmitting infection by sending documents electronically, and more use of electronic processes generally had facilitated home working. The ability to work at home as a result of electronic processes was also mentioned by some respondents as a benefit without reference to Covid-19.

*Prevents need for face to face contact for provision of for example search warrants. (SCTS staff)*

*Less risk of transmitting/catching the virus if staff do not have to attend offices to sign the documents. (COPFS staff)*

- **Environmentally friendly**

Respondents felt they were working in a more environmentally friendly and sustainable way as a result of the reduced need to print and transport documents.

*I truly feel this is a far more expedient and environmentally friendly way of working. (COPFS staff)*

*Environment - saves on paper, use of printer ink / power, and transfer of documents by mail (carbon footprint). (Police officer/staff)*

## **Downsides**

We asked respondents whether there were any downsides to the electronic signature and electronic transmission of documents. The most prevalent themes were:

- **Security**

While security was highlighted as a benefit by some, it was also cited as a downside. Respondents noted risks relating to the forging of signatures, of electronic documents going awry, and of legal challenges. Some suggested the need for a system that confirmed receipt of documents.

*Lack of face to face interaction may lead to fraudulent obtaining of court orders, warrants, etc. (COPFS staff)*

*The concept of a principal hard copy. Are we confident in the security and authenticity of those signing? (COPFS staff)*

*Not all agents are on secure networks. (COPFS staff)*

*There are risks of documents going astray especially for unrepresented accused. (Defence agent)*

- **Technical/IT issues**

Respondents noted IT limitations or weaknesses which impeded the use of electronic signature and electronic transmission of documents. They also noted storage limitations, potential loss of files, and server failure.

*IT at all ends of the process has to be suitable. Potential for loss/corruption of files in the event of IT failure. (Police officer/staff)*

*Police systems are not modern/advanced enough to do this timeously and as easily as could be achieved. (Police officer/staff)*



*The only downside I have encountered is that the IT system to support electronic signatures is a bit clunky. (COPFS staff)*

*Broadband connectivity; lack of e-memory. (Sheriff/judge)*

- **Effectiveness**

Some respondents were concerned about the effectiveness of electronic document sharing. Some thought it was complicated, noting different rules for different documents.

*Require constant monitoring of emails so as not to miss service of an important document. (Defence agent)*

*Further difficulties if receipt not acknowledged or 'the wrong mailbox' is selected for the recipient where multiple email addresses are available. (Defence agent)*

*Different rules for different documents seems overly complicated. (COPFS staff)*

- **Time taken/delays**

Some respondents were concerned that the use of electronic signature and transmission of documents may take longer or cause delays – this was linked to concerns about effectiveness and IT difficulties.

*Very time consuming and not simple enough. (COPFS staff)*

*Delay in documents being sent from the court resulting in persons being held in custody longer. (Police officer/staff)*

- **Limited reach of electronic system**

To work effectively, an electronic process requires senders and recipients of documents to use it. There was some concern that some people or organisations do not have the capability for electronic processes (either through preference or logistics).

*SCTS remaining on a paper based system. (COPFS staff)*

*Lack of relevant e-mail addresses for solicitors firms or being unsure whether they access their [Criminal Justice Secure Mail] account. (COPFS staff)*

- **Decision making**

A small number of respondents noted concerns about the impact of electronic processes on decision making, including that it may lead to reduced scrutiny.

*The absence of discussion means the more controversial/borderline decisions are not so easily explained. (COPFS staff)*

The most commonly mentioned downsides across the professional groups were:

- for COPFS staff, it was security and delays
- for police officers and staff, it was technical/IT issues
- for defence agents, it was concerns about effectiveness
- for sheriffs and judges, it was security, technical/IT issues and decision making

## Changes

We asked respondents what changes, if any, they would make to the use of electronic signature and electronic transmission of documents. The following themes were identified in their responses:

- **Expand the electronic approach**

Respondents were keen to extend the use of electronic signature and electronic transmission to more types of document and processes and to have a more standardised approach across the criminal justice system. They also wanted to remove the need for services to state that they will accept an electronic mode of delivery before it can be sent. In particular, respondents wanted to be able to send all documents to the sheriff court electronically, and to have electronic forensic reports.

*Being allowed to send electronically to the sheriff clerk. (COPFS staff)*

*Extend the use of electronic signatures and documents for other processes and document between partners- electronic arrest warrants, bail orders, JP search warrants, civilian citations. (Police officer/staff)*

*Would like the process extended to other documents, in particular interview transcripts. (COPFS staff)*

*Clarify time when electronic service is deemed. Change the legislation to mandate all, Crown, defence, and in particular SCTS must accept documents electronically. (COPFS staff)*

- **Simplify and streamline the system**

Respondents were keen to simplify and streamline the electronic signing and document sharing process.

*I would legislate that anything which is uploaded to the National Disclosure Website should be treated as served on the agent for the accused (for whatever purpose). (COPFS staff)*

*I would bring it in permanently and phase out lodging and serving hard copy documents. (Advocate)*

- **IT improvements**

Respondents were keen to see IT improvements and made various suggestions. These related to how documents could be signed electronically, how to secure documents once signed, having a team or system in place to ensure receipt and secure storage of documents, having adequate online storage facilities, and ensuring that organisational IT systems were adequate and functional.

*I would make the documents locked for editing before they get sent out electronically as this may cause issues in the future. (COPFS staff).*

- **Clearer guidance needed**

Some respondents felt there was a need for clearer guidance on use of electronic processes if they are to be used effectively, as well as a need for training.

*Make the guidance clearer on where you find some of the documents that are used for electronic service and signature. (COPFS staff)*

*Ensure that everyone competent to sign documents is trained in the procedure for signing electronically. This will ensure the workload of signing documents is shared equally. (COPFS staff)*

- **Security**

Respondents suggested that changes were needed to improve security, including developing a process to acknowledge receipt of documents (such as adding a digital stamp to documents that had been received) and to authenticate signatures.

*Use of DocuSign or equivalent security measure. (Police officer/staff)*

*Use thumb print technology to remove the need for signature on documents like warrants, this would make it even more efficient. (Police officer/staff)*

- **Retain elements of other/previous systems**

Several respondents said there could be learning from the smartcard system used by the Law Society of Scotland which they felt was secure and easy to use. Some respondents were also keen to retain the option of face-to-face discussion and wet signatures, where discussion adds something to the decision making process.

Among both COPFS staff and police officers and staff, the change suggested most often was the need to expand the use of electronic signature and electronic transmission of documents. They also highlighted the need for IT improvements. COPFS staff also made several suggestions around simplifying and streamlining the process, as did defence agents and sheriffs and judges.

## **Retention**

We asked respondents whether the emergency provision allowing for the electronic signature and electronic transmission of documents should be retained once the emergency Covid-19 situation is over. Of the 344 respondents who answered this question, 95% (328) said that the provision should be retained. Many of the comments related to the provision being a timely step forward.

*This has modernised the way we work and has brought the process into the 21st century. It is far more efficient to have the documents served electronically. (COPFS staff)*

*This has been needed ... for a long time and is a significant step forward. (COPFS staff)*

*It would be a backward step to return to old, slow time hard copy/wet signature, transfer of documents when all of the work has been done between partners to make the changes albeit under the emergency legislation but surely this should be retained. (Police officer/staff)*

*It is a lot more efficient and something that should have been done years ago... It would be madness to go back. (Advocate)*

Support for retention was generally high across the professional groups:

- 97% of COPFS staff said that the provision should be retained (10% of whom said it should be retained with caveats, such as following review a process of review)
- 100% of police officers and staff said it should be retained (3% of whom said it should be retained with caveats)
- 78% of defence agents said it should be retained (24% of whom said it should be retained with caveats)
- 90% of sheriffs and judges said it should be retained
- 90% of 'other' respondents said it should be retained (one of whom noted a caveat).

### Remote, electronic attendance of parties at court

We asked respondents whether, since the introduction of the emergency criminal justice provisions, they had been involved in proceedings where they or other parties appeared remotely ('virtual' proceedings). Of the 417 people who answered this question:

- 37% (155) said they had been involved in virtual proceedings
- 28% (118) said they had not, or had not yet, been involved in virtual proceedings
- 35% (144) said this question was not relevant to their role.

We asked the 155 respondents who had been involved in virtual proceedings which type of proceedings they had been involved in – custody courts, summary trials, solemn trials, appeals or other proceedings:<sup>44</sup>

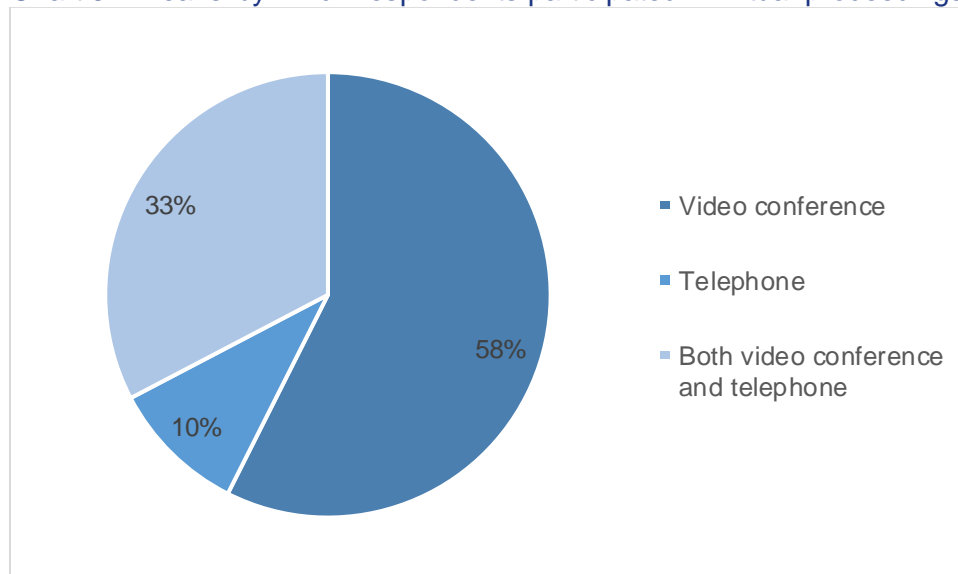
- 66% (103) of respondents had taken part in a virtual custody court
- 7% (11) had taken part in a virtual summary trial
- 5% (8) had taken part in a virtual solemn trial
- 15% (23) had taken part in a virtual appeal
- 39% (61) had taken part in other criminal proceedings including preliminary hearings, intermediate diets, bail appeals and pleading diets, amongst others.

Of the 155 respondents who said they had been involved in virtual proceedings:

- 53% (82) were from COPFS
- 21% (32) were defence agents
- 10% (15) were police officers or staff
- 7% (11) were sheriffs or judges
- 3% (5) were from SCTS
- 6% (10) were from other criminal justice organisations, such as the Scottish Prison Service.

Respondents were asked by what means they had participated in virtual proceedings. Of the 147 people who responded to this question, 85 had used video conferencing, 14 had used telephone conferencing, and 48 had used both.

Chart 3 – Means by which respondents participated in virtual proceedings



<sup>44</sup> Percentages do not add up to 100 because respondents were able to select all the types of proceedings in which they had been involved.

## Satisfaction

Respondents were asked how satisfied they were with the virtual proceedings in which they had participated. Overall, 65% of respondents were either satisfied or very satisfied and 35% were either dissatisfied or very dissatisfied. Those who had participated in virtual proceedings via video conferencing tended to be more satisfied than those who had participated via telephone. There was variation in satisfaction levels across professional groups with defence agents tending to be less satisfied than others.

## Effective participation

We asked respondents whether the accused person or witnesses are able to participate effectively in proceedings when they appear remotely.

In relation to the accused:

- 69% of respondents said the accused would be able to participate effectively when they appeared remotely, although this fell to 59% among those respondents who had actually participated in virtual proceedings
- 31% said the accused would not be able to participate effectively, and this rose to 41% among those respondents who had participated in virtual proceedings

Responses to this question varied by professional group:

- among COPFS staff, 82% said the accused would be able to participate effectively, and 18% said the accused would not be able to participate effectively
- among police officers and staff, 91% said the accused would be able to participate effectively, and 9% said the accused would not be able to participate effectively
- among defence agents, only 7% said the accused would be able to participate effectively, and 93% said the accused would not be able to participate effectively
- among sheriffs and judges, 50% said the accused would, and 50% said the accused would not, be able to participate effectively.

In relation to witnesses:

- 74% of respondents said witnesses would be able to participate effectively when they appear remotely, although this fell to 56% among those respondents who had participated in virtual proceedings
- 26% said witnesses would not be able to participate effectively, and this rose to 44% among those respondents who had participated in virtual proceedings.

Again, responses varied by professional group:

- among COPFS staff, 79% said witnesses would be able to participate effectively, and 21% said they would not
- among police officers and staff, 95% said witnesses would be able to participate effectively, and 5% said they would not
- among defence agents, only 19% said witnesses would be able to participate effectively, and 81% said they would not
- among sheriffs and judges, 57% said witnesses would be able to participate effectively, and 43% said they would not.

Comments regarding effective participation tended to focus on the accused's inability to hear and follow proceedings properly due to poor quality IT links. They noted that the accused may be reluctant to interrupt proceedings to say there is a problem, or where they try to do so, they may struggle to catch the attention of their agent or other participants. There were also some concerns about the ability of vulnerable accused persons to participate effectively in virtual proceedings.

*While it was strange and new, the court was able to function effectively and parties were keen to cooperate and ensure it did so with no prejudice to anyone involved. (COPFS staff)*

*The sound quality is inconsistent and sometimes there is either muffled sound at both ends or delay in the sound being received. (Sheriff/judge)*

*The accused cannot hear everything, and it is hard to tell if they understand. It is hard to judge if a client is vulnerable in this situation. (Defence agent)*

*Some accused persons are not following what is happening via video link and cannot easily get the attention of their agent. (COPFS staff)*

*Because the accused are not formally identified by the clerk, no one knew that the accused could not hear anything at all during the hearing. It only transpired afterwards at the full committal hearing. (Defence agent)*

### **Effective, confidential consultation**

We asked whether effective and confidential consultation between the accused and their legal representative is possible when either of them appear remotely. We asked whether this was possible before, during and after proceedings.

#### ***Before proceedings***

Of the 190 responses to this question, 72% said that the accused and their legal representative can have effective, confidential consultation before virtual proceedings. However, there were variations across professional groups. Significantly, 80% of defence agents said that effective, confidential consultation was not possible.

#### ***During proceedings***

Of the 182 responses to this question, 46% said that the accused and their legal representative can have effective, confidential consultation during virtual proceedings. Again, there was some variation across professional groups with 100% of defence agents saying that effective, confidential consultation with their clients was not possible during virtual proceedings.

#### ***After proceedings***

Of the 175 responses to this question, 65% said that the accused and their legal representative can have effective, confidential consultation after virtual proceedings. However, 93% of defence agents said that it was not possible to have effective, confidential consultation after virtual proceedings.

Overall, defence agents generally did not feel effective, confidential consultation with their clients was possible before, during or after virtual proceedings. Those not involved in such consultations, including COPFS staff, police officers and staff, sheriffs and judges, thought effective consultation between the accused and their legal representative was possible during virtual proceedings.

Many comments were made regarding effective, confidential consultation between the accused and their legal representative. There was concern about a lack of suitable facilities and a lack of time for such consultation to take place. Regarding facilities, there was concern among some respondents that the video link being used for consultations is the same as that used by the court, which can cause disruption and delay.

*Consultation is more difficult remotely where the accused is vulnerable, new to the court process or has mental health difficulties. (COPFS staff)*



*There is no capacity for quick, private conversations to deal with short but crucial issues. (Sheriff/judge)*

*Court facilities do not allow video conferencing between solicitor and accused or witness other than in court so if necessary, and it can be, court has to be disrupted to allow it to take place. (Sheriff/judge)*

*The provision for accused persons and their solicitors is wholly inadequate. (Defence agent)*

*I was not able to consult with the client via a video link prior to his hearing. (Defence agent)*

*It can be difficult for [the defence] to consult confidentially depending where the accused is held. (COPFS staff)*

*Emptying the court every time a case calls in order for the agent to speak to his client is both frustrating and time consuming. (COPFS staff)*

*Police staff/custody staff had to be present within video rooms...not really very confidential. (Police officer/staff)*

*Matters often arise shortly before, during or immediately following proceedings where consultation with the accused is necessary and desirable but not possible. (Defence agent)*

*There is not enough rooms in the courts to allow for effective communication before, during and after proceedings. There is often long queues before proceedings and often you cannot see your client in the allocated rooms. The accused cannot or does not feel he/she can speak during proceedings. After proceedings the prison has usually already taken the accused back to their room. (Defence agent)*

*It is impossible for an agent to see a client after proceedings as other business is being heard in the court. (COPFS staff)*

### **Support for vulnerable accused and witnesses**

We asked whether there are suitable arrangements in place to support the participation of the accused or witnesses when they are either vulnerable or have additional support needs (such as those with disabilities, learning difficulties or mental health issues, children and those whose first language is not English).

Of the 176 responses, 52% indicated there were suitable arrangements in place while 48% said there were not.

Views varied across professional groups, with 87% of police officers and staff saying suitable arrangements were in place, compared to 55% of COPFS staff. Only 20% of defence agents thought suitable arrangements were in place.

*Arrangements are well established to provide support as required including interpreters. (COPFS staff)*

*We have occasionally been unable to proceed due to the difficulty posed by the requirements to involve an interpreter. (COPFS staff)*

*The process for support hasn't changed, either with advocacy or solicitors, it's just as easy via VC or telephone. (Police officer/staff)*

*I am not aware of any assistance. (Sheriff/judge)*

*It is utterly hopeless for someone with language difficulties and is entirely inappropriate for the vulnerable. (Defence agent)*

*One cannot assess someone to see how vulnerable they are over a telephone line with a terrible reception. This has been happening with duty clients where agents haven't previously met the accused. (Defence agent)*

## **Benefits**

We asked respondents what benefits remote attendance at court offers. The main themes were:

- **Safety while maintaining court business**

Many respondents noted a benefit that was specific to the public health situation. They said remote appearance allowed essential court business to continue in a way which maximised the safety of participants.

*Minimises the number of personnel within the court room to allow for proper social distancing. (COPFS staff)*

*I suppose the benefit is a reduced risk of infection for all concerned. (Defence agent)*

*There are considerable benefits in remote attendance. It obviates the need for prisoners to be brought to court; dispenses with the requirements for solicitors to be physically present for cases; and permits the efficient running of business. (Sheriff/judge)*

*It allows the court to continue to deal with cases in a safe manner. (Sheriff/judge)*

- **Time, cost and resource savings**

Across the professional groups, respondents noted the potential for savings in terms of time, cost and resources. Some said this was only a potential benefit and said the current arrangements would need to improve before savings could be fully realised. Police officers and staff, in particular, noted the opportunity remote appearances afford to reduce the time they spend waiting at court to give evidence, and travelling to and from court.

*Transporting fewer prisoners reduces the risk of infection to others, it is also more efficient and presumably saves considerable costs. (COPFS staff)*

*There are savings in terms of travel time and reduction in risk associated with the presence of the accused and witnesses in the same building. (COPFS staff)*

*Saves time, there is so much time wasted for police officers and staff travelling to court, days spent in witness waiting rooms, re-rostered rest days and annual leave etc. (Police officer/staff)*

*Only called when court actually ready to hear evidence. More efficient process. (Police officer/staff)*

*Less abstraction from day job. (Police officer/staff)*

*You would think that time and money would be saved as there would be less travelling. (Defence agent)*

*If the system could ever be made to work then it could potentially save some time however, this is not currently the case and as a consequence the time it is taking to do remote cases, certainly in courts, is vastly longer than if they were physically present and it is costing a great deal more money as a result. (Defence agent)*

- **Efficiency and flexibility**

Some respondents suggested that remote proceedings are more efficient and more flexible, and said there could be a new approach to scheduling proceedings.

*Ability to deal with matters even when the parties are far apart e.g. cases affecting island and remote communities and to deal with them quickly and efficiently. (COPFS staff)*

*Provides an element of scheduling rather than all cases calling at 10am. (COPFS staff)*

- **Benefits for victims and witnesses**

Respondents suggested that remote proceedings offer benefits to victims and witnesses. For victims, these include not having to see the accused in person and potential protection from further victimisation. Attending remotely may also minimise disruption to witnesses, particularly expert witnesses.

*Negates the pressure already put on witnesses to attend court who are already scared of the process. (Police officer/staff)*

*I work in a remote environment where witnesses and accused attendance for criminal proceedings is a significant logistical challenge, remote attendance removes potential barriers to cases running through difficulties. (Police officer/staff)*

- **No benefits**

Some respondents, including a majority of defence agents, noted there were no benefits arising from remote appearance.

*[There is] none at all unless the person has COVID. (Defence agent)*

*None from a defence point of view. (Defence agent)*

## **Downsides**

We asked respondents whether there are any downsides to the remote attendance of parties at court. The main themes emerging from their responses were:

- **Contact between the accused and their legal representative**

Respondents were concerned that there was not sufficient opportunity for the accused to consult with their legal representatives, and some said a lack of face-to-face contact was problematic.

*Lack of facilities, unreliability of systems, unfairness in accused regarding taking proper instructions and being able to identify any additional needs properly. (Defence agent)*

*We do need to ensure that there is a robust solution for agents to be able to speak with their clients for consultation – this should not be rocket science and should not detract from us moving forwards. (COPFS staff)*

- **Increased length of proceedings**

Respondents suggested that remote proceedings were not more efficient and could actually take longer than in-person proceedings. This was sometimes linked to

proceedings being disrupted to allow for consultation between the accused and their legal representative. Scheduling issues also contributed to inefficiencies.

*The provision for accused persons and their solicitors is wholly inadequate. At the sheriff court where I mainly practice, there is one video link for pre and post case consultation that is required to be shared between all agents trying to deal with custodies, custody trials and full committals. (Defence agent)*

*There are multiple downsides. It slows the court down. There are not enough facilities for this system to work. It is not fair on the accused who should be able to see and speak to a solicitor. (Defence agent)*

- **IT and technical issues**

Respondents felt the current IT infrastructure within the criminal justice system is not capable of supporting remote attendance, and several noted IT equipment failing. The quality of the audio was mentioned frequently, with those who had participated in virtual proceedings saying they had found it difficult to hear what was being said or to be heard.

*Whilst remote attendance is great in theory, and I think it should be worked towards for procedural courts in future, at the moment the technological infrastructure and manpower by some agencies is not really there. (COPFS staff)*

*Technology invariably fails - remote attendance should be a backup solution only not the default position. (COPFS staff)*

*The available technology is unsatisfactory for this to become normal. Accused repeatedly claim they cannot hear. (Defence agent)*

*I doubt the accused follows the proceedings given the poor-quality system. I am often contacted afterwards to ask what went on. (Defence agent)*

*I can't hear, parties can't hear, the link breaks frequently, its shambolic and the dignity of the court is absent. (Sheriff/judge)*

*IT systems need upgraded in court to allow multi-point link and better audio links. Wi fi inadequate. Phone link poor on bench. (Sheriff/judge)*

- **Increased time spent in police custody**

A recurring theme, raised frequently by police officers and staff, was that accused persons spend longer in police custody than previously as a result of virtual custody courts. This is time they previously would have spent in court cells, and increases demand on police resources, including staff and the custody estate. They felt current custody provision was not suited to the new process.

*Custody are left with prisoners sometimes until mid-day...it can take a long time for their paperwork to come through delaying their release or transfer to prison. (Police officer/staff)*

*It has sometimes meant that offenders were in police custody for prolonged periods which they would have previously spent in court cells. (Police officer/staff)*

In addition to the themes raised above, there was some concern that communication between COPFS and defence agents was more challenging in relation to remote appearances. It was also suggested that the interests of justice were not always served by remote appearance. One respondent said:

*I am uncomfortable with the idea of sentencing someone to imprisonment when he is not physically before me. I will not do it if the link is audio only – I do not think any objective observer would regard that as justice being seen to be done. (Sheriff/judge)*

## **Improvements**

We asked respondents what, if anything, about remote appearances could be improved. The most frequent suggestions were:

- **Increase video conferencing facilities**

Respondents noted the need to increase the capacity of the system to allow for more video conferencing to take place. This included at police custody centres and at prisons.

*Prison link needs better organisation. (COPFS staff)*

*More links from prison. (COPFS staff)*

*Install remote technology in ALL custody suites, this is not new or expensive. (Police officer/staff)*

*More capacity within Police Scotland custody facilities to permit consultation between solicitors and accused persons. (Sheriff/judge)*

*[For] various prisons to have more than one link so that more than one court can dial into the prison at the same time. (Sheriff/judge)*

- **IT improvements**

Respondents across all professional groups noted the need for significant improvements in the current IT infrastructure. They said more investment is needed.

*The technical side needs improving, and all staff should be fully trained on how to use the equipment. (COPFS staff)*

*Better and more IT. E.g. for productions etc, CCTV productions, and more IT so it can be done in many more courts. (COPFS staff)*

*I would like to see multiple screens showing images of all participants. (Police officer/staff)*

*Most aspects have to be improved, the number of booths, the ability to consult, the camera angle for the accused – in some courts the camera is far too far away and the quality of connection. (Defence agent)*

*The quality of the IT equipment. Sheriffs were confronted with a situation where we had to accept procurator fiscals appearing by phone audio only link, despite the fact this was completely unsatisfactory... Had the defence solicitors also insisted on appearing remotely the system could not have handled it and the court would have been unable to function at all. (Sheriff/judge)*

- **Wider investment in criminal justice estate**

Some respondents said that the estate across the criminal justice system required investment to more fully support remote processes.

- **Improve communication**

Some respondents said that communication between criminal justice organisations had to improve so that remote appearances could run more smoothly.

*Communication from the court about times and bail papers etc. It is very difficult to get a response when phoning the court to find out information. (Police officer/staff)*

*I think the most beneficial improvement would be to ensure there is effective monitoring in place so any issues can be fed back and acted upon swiftly. (COPFS staff)*

## **Retention**

We asked respondents whether the emergency provision allowing remote appearance at court should be retained when the emergency Covid-19 situation is over.

Most COPFS staff said that the provision should be retained, although many said this should be subject to conditions. These conditions included that the provision should only be used in certain circumstances, should only be used if the improvements highlighted above are made, or should only be retained following further review.

*But only for procedural hearings at the moment pending further pilots for trials. (COPFS staff)*

*It should be withdrawn but with a view to its reintroduction once matters have been reviewed properly. (COPFS staff)*

Most police officers and staff thought remote appearance should be retained, although they too thought this should be subject to conditions. As well as those already highlighted by COPFS staff, police officers and staff thought there needed to be additional support and training on remote appearance. Police officers and staff were generally more positive about remote appearance than others in the criminal justice system.

*Everything is capable of improvement, let's get started and accept this is an iterative process. (Police officer/staff)*

Defence agents overwhelmingly rejected the idea that the emergency provision should be retained post-pandemic. A minority suggested that remote appearance could continue to be used in exceptional circumstances.

*Only in extreme circumstances otherwise definitely not. (Defence agent)*

Sheriffs and judges generally thought that the emergency provision could be retained, but should not become the default.

*Yes, but only for certain types of appearances with the court having a discretion to order that the hearing be in person. (Sheriff/judge)*

*Not as a matter of routine, although the formal hearings where the accused is in prison could be expanded. (Sheriff/judge)*



## National jurisdiction for first appearance from police custody

We asked respondents whether they had been involved in a case where the accused had appeared in a sheriff court outwith the sheriffdom where the offence was allegedly committed. Only 14% (66) of respondents reported such experience. Of the 66:

- 64% were satisfied or very satisfied with the experience
- 35% were dissatisfied or very dissatisfied with the experience.

Satisfaction was higher among COPFS staff (66%) and police officers or staff (81%). In the main, defence agents were dissatisfied (88%) with their clients appearing in other sheriffdoms.

## Benefits

We asked what benefits having a national jurisdiction for first appearances from custody offers. Of the 66 respondents who reported that they had experience of this provision, 77% (51) reported benefits. Of the 165 respondents who reported they had no experience of the provision, 68% (113) reported potential benefits. The most commonly cited benefits were:

- **Management of court business**  
A majority of COPFS, SCTS and Police Scotland respondents said the provision would help better manage criminal court business, due to the ability to move business across the country, enabling greater support for areas with fewer resources.

*The case can be heard anywhere thereby relieving pressure from busier courts. (Police officer/staff)*

*Any sheriff can hear it anywhere. (SCTS staff)*

*It allows all custody cases to be dealt with in a situation when only limited courts are sitting. It also allows cases to be split between the sitting courts to avoid one court being overwhelmed. (Sheriff/judge)*

- **Better allocation of resources**  
Linked to the better management of court business is the impact upon criminal justice resources. Many respondents said the provision enables flexibility in the allocation of resources within the criminal justice organisations, saving time and cutting costs.

*Allows for easier management of business and effective holiday cover to be arranged. (COPFS staff)*

*More flexible working of legal staff and easier management of rotas where there is a location neutral aspect. (COPFS staff)*

*Allows less custody courts to sit on a given day. (COPFS staff)*

*Efficiency of using best available resource without complex administration. (Sheriff/judge)*

*Better time management of court staff time. (Police officer/staff)*

*Save time transporting custody to other courts. (Police officer/staff)*

*Also in terms of time and money savings for GeoAmey, court and custody staff required to look after the person if one court could hear all of the business for that one individual. (Police officer/staff)*

- **Benefits for accused**

A significant number of respondents from across the criminal justice professions identified the benefits of a national jurisdiction when appearing from police custody for an accused person, including less delay in coming to court and less travel.

*It was safer... Prevented accused being held in cells for another night to appear in a different court the next day. (COPFS staff)*

*Would mean that accused people could appear in other courts when there are local holidays to avoid extra time in custody. (COPFS staff)*

*Quite often, persons in custody require to appear on various warrants issued from different courts, there are routinely 'holds' placed on that individual to attend various court in answer to the warrants. Surely in terms of ECHR for that individual that is not right? (Police officer/staff)*

*It prevents prisoners being held in custody to appear before more than one court and obviates the need for moving prisoners from one court to another to answer warrants. (Sheriff/judge)*

*[Saves] the transportation of many accused across the country. (Defence agent)*

### **Downsides**

We asked respondents whether there were any downsides to having a national jurisdiction for first appearances from custody. The most common themes were:

- **Local justice**

Respondents from across the professional groups were concerned that there would be a loss of local justice. This theme included the risk that local defence agents might not be able to represent their own clients, and the risk of losing a sheriff's knowledge of their local community and accused persons who appear before them regularly.

*It removes the 'local' element to proceedings. Even at a very early stage in proceedings there are occasions on which, for example, the prosecutor's and Sheriff's understanding of the local impact of a certain type of offending may influence attitudes towards the granting of bail or the imposition of special conditions. (COPFS staff)*

*Lack of local knowledge/interest on part of the prosecutor and judiciary. (Sheriff/judge)*

*Justice should inherently be local for the vast majority of matters...many issues are particularly local. (Defence agent)*

*How does the accused get home? How do their family or other interested parties such as victims attend if they want to? How does the local press report on it? court cases are of interest to local publications and local communities. Justice should be done locally. (Defence agent)*

*Appearance in local courts is a strong deterrent factor for those involved in criminality as local courts bring local accountability. (Defence agent)*

- **Less access to justice**

A number of COPFS staff and defence agents raised concerns about access to justice. Many of these respondents feared that the centralisation of custody appearances within a national jurisdiction would result in diminished access to

justice, whether in the form of choosing your own solicitor or the right to be prosecuted within your own community.

*Defence may struggle to meet clients/take instruction. (COPFS staff)*

*Disadvantage to accused persons and their relatives and friends who may have to travel a considerable distance to appear at court. (COPFS staff)*

*It could make it [in]feasible for the accused to have the solicitor of their choosing. It makes no sense to transport an accused to a different jurisdiction in normal times. The agent who ends up representing the accused may not have knowledge of the people and places pertinent to the case. (Defence agent)*

*Access to justice and choice of representation is a live issue. (Defence agent)*

- **Logistics and planning**

COPFS and defence agents raised logistics and planning as a downside of the use of a national jurisdiction. Respondents identified a lack of planning and failure to consider the practical realities of such a measure.

*May be difficult to manage logistically for both Crown and Defence – for example, how quickly will either know where and when and how the accused is appearing. (COPFS staff)*

*A great deal of coordination of partners and daily business will be required to organise the logistical planning of the custody court. (COPFS staff)*

*Papers for each case are held in the local sheriff clerk's office so it can be difficult for the court hearing the case to have all of the up to date info. (COPFS staff)*

*It would only lead to chaos and confusion. (Sheriff/judge)*

*More lawyers congregating in one court during a pandemic. (Defence agent)*

## **Improvements**

We asked respondents what improvements, if any, could be made to the use of a national jurisdiction for first appearances from custody. The main themes were:

- **IT**

Similar to the issues raised with the provisions on electronic signature and transmission of documents and remote appearances, respondents said IT has to be improved for this provision to be used to its fullest potential.

*Improve quality of video links and sound equipment. (COPFS staff)*

*Better technology; the sound is appalling. (SCTS staff)*

*The video and audio needs to be top notch with experts in support to assist. (Sheriff/judge)*

- **Communication**

Respondents said better communication between criminal justice organisations is needed for national jurisdiction to be used to a greater extent.

*Communication between all the services involved in the process needs greatly improved. (COPFS staff)*

*Better communication to inform officers and [procurator fiscals] there is still an attitude of keeping people in the dark. (Police officer/staff)*

*Early engagement with the agents of choice by SCTS and the Crown. (Defence agent)*

- **Improved infrastructure and resources**

Respondents from across the professional groups said there was a need for improvements in infrastructure and resources for this provision to be used effectively. This included more guidance and training, systematic reform of procedures, more staffing and better facilities.

*Courts must be better resourced with more available staff and better integration and cooperation from police and custody staff. (COPFS staff)*

*Having clear guidance about when to use the provisions would assist... and a commitment from Sheriff Principals to use it when it is required. (COPFS staff)*

*More frequent use. There should be a national collegiate approach to processing custodies. What I mean by this is that every court should remain processing custodies until all of the custodies nationwide have been processed. (COPFS staff)*

*Better facilities for the police and court. (Police office/staff)*

*Better communication links with lawyers. Written info to accused of what a video hearing involves. Better screening for neuro diverse and mentally disordered accused. (Queen's Counsel)*

*Investment and testing needs to be done, not forced through during a pandemic. (Defence agent)*

## **Retention**

We asked respondents whether the emergency provision regarding a national jurisdiction for first appearances from custody should be retained. The majority of COPFS staff said the provision should be retained, albeit some said further discussion and consultation should be carried out. Similarly, some sheriffs and judges were in favour of there being further consultation on the use of the provision. Police officers and staff were generally more certain in their view that a national jurisdiction should be retained post-pandemic. Defence agents were almost unanimously against retention of the provision.

Across the professional groups, there were respondents who were not sure about whether the provision should be retained, and some who felt the provision is useful, but only in emergency circumstances such as the pandemic.

*Flexibility is key for any modern criminal justice system. (COPFS staff)*

*Not as a blanket approach but for specific circumstances. (COPFS staff)*

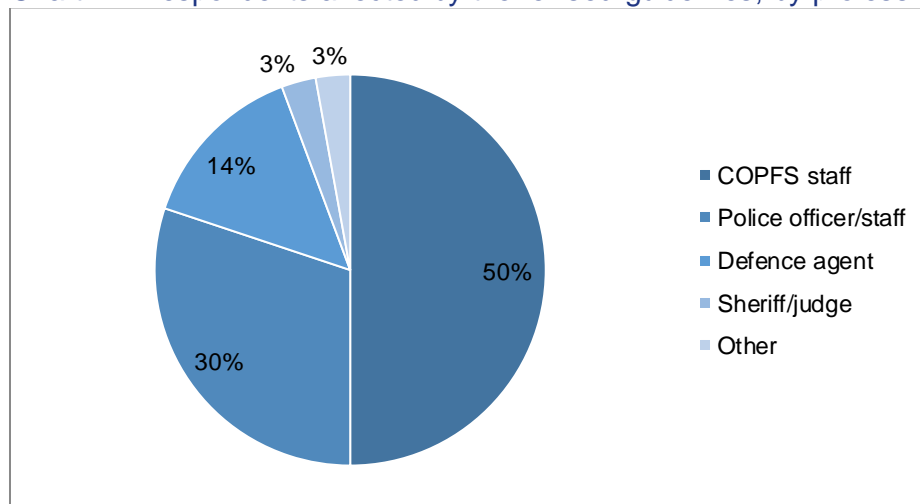
*Should be looked into further and put out for democratic discussion. (Sheriff/judge)*

*Only to be used in limited, crisis circumstances. (Sheriff/judge)*

## Lord Advocate's Guidelines on liberation by the police during Covid-19

We asked respondents whether their work had been affected by the revised Lord Advocate's Guidelines on liberation by the police during Covid-19. Of the 479 respondents, 176 said their work had been affected.

Chart 4 – Respondents affected by the revised guidelines, by professional group



### Benefits

We asked respondents about the benefits of the revised guidelines. We received 164 responses to this question, the majority of which highlighted benefits. One fifth of responses said there were no benefits or highlighted downsides. The main benefits were:

- **Reducing numbers in custody and custody to court**

The most frequently mentioned benefit across all professional groups was that the revised guidelines had contributed to a reduction in the number of people being held in custody, and a reduction in the number of people held in custody for court. This freed up staff resources within custody centres. It also kept the volume of people detained in custody at a manageable level, particularly during the response to the pandemic. This eased pressure both on custody provision and health care provision. Respondents also cited the importance of the presumption of liberty, and said the revised guidelines had resulted in practice that was more in line with the policy intention of the Criminal Justice (Scotland) Act 2016.

*There are fewer prisoners in custody and as such less risk for the police and courts. (Police officer/staff)*

*It ensured that custody courts were more manageable. (COPFS staff)*

*Only the most serious offenders/offences remain in custody and freeing up resources. (COPFS staff)*

*It offers more flexibility into the system - freeing up police/GeoAmey resources in detaining and transporting prisoners where appearance on undertaking would suffice. (COPFS staff)*

- **Decision making**

Another theme was that the revised guidelines facilitated increased discretion and flexibility in decisions about whether to hold people in custody or release them. For defence agents, this helped avoid people being held for court for what they viewed as minor offences.

*The guidelines provide a bit more flexibility for officers deciding on some disposals from custody as opposed to the blanket approach to keeping certain suspects/crimes in custody. (Police officer/staff)*

*The ability of the police to use their professional judgement to ensure that only people who need to be kept in custody for court appearances are. (COPFS staff)*

*Domestic matters and other custody matters are handled in a more effective and proportionate manner i.e. s38s released on [undertakings] fairer system for accused and other parties. (Defence agent)*

*Eliminates unnecessary custodies. (Sheriff/judge)*

- **Safety during Covid-19**

Reducing the number of people in custody, and the number of people having to attend court from custody was seen as beneficial in minimising the risk of transmitting Covid-19. This also helped essential court business to continue.

*It was sensible in not overloading the cells where cross contamination likely. (Defence agent)*

*Minimises health and safety risks. (Sheriff/judge)*

*Allowed processing of accused when courts were shut/limited. (Sheriff/judge)*

- **Time, cost and resource savings**

Some respondents highlighted the time, cost and resource savings of the revised guidelines, as a result of fewer people being held in custody. They said officers had more time to write reports and prepare cases. They also noted that fewer officers were abstracted from their usual duties to work in custody which was particularly important in rural areas.

## **Downsides**

We asked whether there were any downsides to the revised Lord Advocate's Guidelines. There were 161 responses to this question, the majority of whom identified downsides. Just over one fifth said there were no downsides. A greater proportion of police officers and staff identified downsides compared to the other professional groups (76% compared to 67% of COPFS staff and 64% of defence agents). The most common themes were:

- **Risk to the public**

The most commonly mentioned theme was the potential risk to the public of not holding suspects in custody. Many saw this as letting victims down, as well as removing a deterrent to offending. Some also felt that there was an increased risk to police officers and their job became more challenging.

*Too many undertakings! particularly with individuals who really should have their bail opposed. (COPFS staff)*

- **Concerns about undertakings**

Some respondents were concerned that the revised guidelines had led to an increased use of undertakings and the longer undertaking period.



*Undertaking dates are several months away which can result in an extended delay to the prosecution of the case. (COPFS staff)*

*Liberated accused sometimes 'forget' to answer undertakings or move address and miss citations etc. Very long liberation dates given and often could be on arbitrary police bail conditions for months. (Defence agent)*

*They prevent some accused from getting assistance when they require it through delaying or removing their interaction with the criminal justice system. (Defence agent)*

- **Inconsistent interpretation and lack of transparency**

Some respondents said the guidelines were being interpreted inconsistently and could be clearer, and that there was a lack of transparency around how they were being applied. Some commented that communication between criminal justice organisations on the application of the guidelines could be improved.

*For persons where bail is to be opposed it makes such a motion far less likely to be successful if the police have decided to release the person on undertaking – the police are essentially usurping the crown's ability to seek remands. (COPFS staff)*

For police officers and staff, the most commonly cited downside was the risk to the public, whereas for COPFS staff and defence agents, it was concerns about undertakings. Sheriffs and judges were more concerned by a lack of transparency and the need for clearer guidelines.

## **Improvements**

We asked respondents what, if anything, could be improved in relation to the revised guidelines. 72 people responded with suggestions. The most common themes were:

- **Clearer guidelines and guidance**

The most common suggestion was that the guidelines could be clearer, and that there could be more guidance on their use to address inconsistent interpretation across Scotland.

*Do not allow local interpretation. (Police officer/staff)*

*Stricter guidelines on who should be released on undertakings and who should be remanded in custody. (COPFS staff)*

*Clearer guidance for domestic cases. (Police offer/staff)*

- **Address undertaking issues**

Respondents suggested reducing the extended undertaking period or reducing the number of people released on undertakings. It was also suggested that the police should have more options at their disposal when considering undertaking conditions.

*Provision of more comprehensive information to the accused of the ability to challenge undertaking conditions. (Defence agent)*

*Limiting the passage of time between the issuing of the bail undertaking and the first appearance. (Defence agent)*

- **Decision making**

Linked to having clearer guidance, some respondents said the difficulties associated with making custody decisions should be addressed. One said that the background of the accused should be a stronger factor in decision making, while others said improved communication between departments or between criminal justice organisations would aid decision making.

*We received a lot of queries from complainers in domestic cases. They were typically distressed, as the police undertaking bail conditions usually required the accused not to have any contact with them, with an undertaking date scheduled sometimes a few months away. I think having a discussion with the complainer to understand their needs and having scope to adjust the police bail conditions for the circumstances would be sensible in future. (COPFS staff)*

- **Review guidelines**

Some respondents suggested a review of the revised guidelines should be carried out before deciding whether to continue using them.

*Should be re-written following proper and full discussion. (Sheriff/judge)*

- **Revert to previous guidelines**

A few respondents suggested that the revised guidelines should be revoked and the previous guidelines reinstated as they provided sufficient discretion to officers.

*They need to better recognise the risk to the public from those engaged in criminality still remains despite the pandemic. It is not appropriate to release everyone. (Police officer/staff)*

## **Retention**

We asked whether there were any aspects of the revised guidelines which should be retained once the emergency Covid-19 situation is over. This question received 134 responses, of whom:

- 41% said the revised guidelines should be retained (of whom, 51% suggested caveats to retention)
- 39% said the revised guidelines should not be retained
- 13% were not sure whether the revised guidelines should be retained
- 7% said the revised guidelines should be reviewed post-pandemic before a decision is made on retention.

Of those who said the guidelines should be retained, 51% suggested caveats to retention, including the need for more training and guidance and more scrutiny of decision making.

## **General comments**

Finally, we asked respondents whether they had any other comments about the implementation or impact of the emergency criminal justice provisions. Across the professional groups, there was recognition of the efforts that had been made to sustain the criminal justice system in the challenging circumstances brought about by the pandemic. Other themes were:

- **A modern criminal justice system**

The emergency provisions had been necessary and beneficial, and had brought the criminal justice system into the 21<sup>st</sup> century.

*It shouldn't take a global pandemic to force the criminal justice system into the 21<sup>st</sup> century. (COPFS staff)*

- **Savings**

There were savings to be made as a result of the provisions in relation to time, cost and resources.

*The huge reduction in use of paper and travel time as a result of the greater use of electronic means for hearings and signing/lodging documents is a benefit we should seek to preserve for the future. (COPFS staff)*

- **Fewer legal protections**

There was concern that the emergency provisions had eroded safeguards.

*Care must be taken not to favour efficiency over justice. (Defence counsel)*

*I remain concerned about the lack of potential checks and balances associated with hasty implementation. Are the facilities suitable? Have all human rights and GDPR issues been addressed? (Civil servant)*

- **Further review and consultation**

Respondents said there was a need for further review of the provisions and consultation before their use is extended.

*[The emergency] provisions should not be allowed to be used to implement significant changes to the criminal justice system without proper thought or consultation with all parties involved. They are not an excuse for change by the back door. (Defence agent)*

- **Clearer guidance and better communication**

Some respondents highlighted the need for clearer guidance around the emergency provisions and said communication about them could be improved.

- **IT investment**

Many respondents highlighted the need for investment in IT to support more modern ways of working.

*The technology is not fit for purpose. (COPFS staff)*



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