The Law Society of Scotland

House of Lords Constitution Committee Inquiry into the Constitutional Implications of Covid-19

July 2020

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

General Comments

1. What can Parliament do to maximise its scrutiny of the emergency regulations and to hold the Government to account effectively during lockdown? How are adjustments to procedures and processes working in the House of Lords?

Parliament should continue to scrutinise emergency regulations in much the same way as it did before the coronavirus crisis.

The work of the Secondary Legislation Scrutiny Committee is to be commended. Since 25th March, the committee has published 24 reports: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/reports/> . The majority of these reports engage with instruments relating to COVID-19. Some of these reports deal with significant matters such as i. the interpretation of regulations vis-a-vis guidance and the expiry provisions in regulations (in the 13th Report), ii. the visitation rights of prisoners and young offenders (in the 16th Report), and iii. the International Travel Regulations which were referred to the special attention of the House on the ground that they were politically or legally important or gave rise to issues of public policy likely to be of interest to the House (in the 18th report). Issues concerning the lack of an expiry provision in a number of Regulations indicate that close scrutiny has been carried out. In particular, the 19th report of the Committee contains an assessment of some of the “obstacles to Parliamentary scrutiny” which the Committee has encountered. These include the need to ensure that legislation follows on more closely from any announcement that is made by the Government and that the explanatory memorandum should contain specific information about how and where the outcome of the review of regulations is to be publicised and how Parliament is to be informed.

We draw attention to the use of made affirmative Regulations and short laying times later in this response.

With regard to adjustments to procedures following initial changes to attendance of Peers in March the House of Lords adopted a hybrid model in June. On 21 April the House agreed to ‘virtual proceedings’ for most business with the exception of government bills or formal procedural decisions.

Virtual proceedings allowed debate on delegated legislation but did not permit voting. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 Motion was considered “in a Virtual Proceeding via video call”.

The hybrid House

In person proceedings in the chamber and virtual proceedings continued until 4 June when the House agreed to the introduction of the ‘hybrid House’. This meant that peers could participate either in person in the chamber or by video call.

The motion provided for all voting to operate remotely, with members able to vote only ‘through the House of Lords remote voting system, in accordance with guidance to be issued from time to time by the Procedure and Privileges Committee’.

The [guidance on the hybrid House](https://committees.parliament.uk/committee/191/procedure-and-privileges-committee/news/146753/procedure-and-privileges-committee-publishes-guidance-on-proceedings-in-the-hybrid-house/) was issued on 5 June, but in relation to divisions it stated only (in paragraph 33): ‘A system to allow remote voting is being developed. The Order of the House of 4 June made provision for this. The first remote voting took place on 15 June.

An amendment to protect the integrity of voting was made to the Code of Conduct that peers “may not allow another member or other person to cast a vote on their behalf during any electronic division in proceedings of the House or its committees. Any member who does so commits a breach of this Code which the House would view with the utmost seriousness.’

The number of peers permitted to be in the chamber at any one time has been limited to 30, and short adjournments between items of business are used ‘to enable different groups of members to exit and enter the chamber while observing social distancing, as well as to onboard members remotely for the next item of business’.

Proceedings in the hybrid House ensure that peers may, subject minor exceptions, speak only by signing up to do so. This includes when speaking on amendments to bills and in doing so they are required to indicate whether they wish to participate physically or remotely.

The deadline for tabling amendments to bills has been increased to three working days before consideration – previously it was in practice one day, with the possibility of ‘manuscript’ amendments even later; it is not yet clear how that could operate in the event of a bill being ‘fast-tracked’.

The Procedures and Privileges Committee issued further Guidance (which includes guidance on voting) on 29 June: <https://committees.parliament.uk/publications/1664/documents/16226/default/>

Select committees do not operate the hybrid system. All future committee meetings are scheduled to take place as virtual meetings.

The continuing use of hybrid proceedings should enable those members of the Lords who are most vulnerable to continue to participate in the work of the House

1. What are the consequences for different ways of Parliament working on effectiveness, accessibility, fairness and transparency?

We have insufficient empirical evidence to respond to this question.

1. What emergency powers has the Government sought during the pandemic and what powers has it used and how?

**Primary Legislation**

The principal relevant UK primary legislation is the [Coronavirus Act 2020 (2020 c. 7)](http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted). This Act contains 102 sections and 29 schedules and was considered at pace in Parliament. It had all its stages – Second Reading, Committee, and Third Reading – in the House of Commons on 23 March, all its stages in the House of Lords over 24 and 25 March and became law on 25 March. In other circumstances the Law Society of Scotland would have highlighted the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of Covid-19 and the serious and imminent threat it poses to the community at large are potentially so devastating that it was right that Parliament’s response matched the level of threat.

The Act makes provision for Parliamentary scrutiny

Section 97 of the UK Coronavirus Act 2020 provides for a report to be made by the Secretary of State every two months on the status of non-devolved provisions of the Act. The first reporting period ended on 25 May: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889948/two-monthly-report-may-2020.pdf>. The report covers the status of certain non-devolved provisions continue to be appropriate relates to whether the provisions have been brought into force, have been suspended or revived or if an expiry date has been fixed. The second reporting period ended on 31 July: <https://www.gov.uk/government/publications/coronavirus-act-report-july-2020>

Section 99 applies where the Act substantively operates for more than a year from 25 March. Under this section, a Minister of the Crown must make arrangements for a motion in neutral terms to be moved in the House of Commons to the effect that the House has considered the one-year status report, to be moved in that House. A motion to take note of the report should also be moved in the House of Lords.

Scrutiny Proposals

We have suggested a Joint Coronavirus Committee to coordinate detailed scrutiny of Government through the pandemic in much the same way as the Joint Committee on Human Rights deals with human rights issues and the Covid-19 Committee in the Scottish Parliament deals with Coronavirus issues.

We also suggested a quadripartite parliamentary group, bringing together all the UK legislatures to share experience, best practice and knowledge about legislating in the pandemic, using as a model the Inter-Parliamentary Group formed to consider Brexit.

Scottish Legislation

The [Coronavirus (Scotland) Act 2020 (asp 7)](http://www.legislation.gov.uk/asp/2020/7/contents), which is the principal relevant Scottish legislation, contains many provisions of importance to life in Scotland, including law relating to children and vulnerable adults, justice matters, public bodies and a number of other areas. That Act contains provisions requiring Scottish Ministers to report on the necessity of such legislation rather than, as in England and Wales, the appropriateness of the status of the legislation.

The Scottish Parliament also passed the Coronavirus (Scotland) (No2) Act 2020 <https://www.legislation.gov.uk/asp/2020/10/contents/enacted>. The Act will help public services operate during the coronavirus pandemic and support businesses and individuals. The Act includes provisions to ensure business and public services can operate, change public service duties, provide protections for student tenants and support for carers and make changes to criminal procedure. It also allows Scottish notaries public to execute documents by video technology.

The Act contains a number of safeguards, including expiry of the legislation on 30 September 2020. The legislation can be extended until 30 September 2021. Scottish Ministers must review and report on the measures every 2 months: <https://www.gov.scot/publications/coronavirus-acts-two-monthly-report-scottish-parliament/>. Scottish Ministers must also review all coronavirus related Scottish Statutory Instruments under section 14 of the (No2) Act.

EU Coronavirus Legislation

The EU Institutions have also been active on the law-making front as a result of the Coronavirus.

There have been 32 Regulations originating from the EU which deal with Coronavirus issues. These include Regulations on [temporary support to mitigate employment risks (Council Regulation EU 2020/672)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590141163661&uri=CELEX:32020R0672), [addressing market disturbance in the fruit, vegetable and wine sectors (Commission Implementing regulation EU 2020/600)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.140.01.0040.01.ENG&toc=OJ:L:2020:140:TOC), on the [fishery and aquaculture sector (Regulation EU 2020/560)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R0560) and on [flexibility for the use of European Structure and Investment funds (Regulation EU 2020/558)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R0558).

There are also 14 Decisions including the [mobilisation of the Contingency Margin to provide emergency assistance to Member States (Decision EU 2020/547)](https://eur-lex.europa.eu/eli/dec/2020/547/oj) and to finance immediate budgetary measures ([Decision EU 2020/546](https://eur-lex.europa.eu/eli/dec/2020/546/oj) and [Decision EU 2020/545](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.125.01.0001.01.ENG&toc=OJ:L:2020:125:TOC)). An important Commission Decision relates to the [relief from import duties and VAT exemption on importation of goods needed to combat the effects of Covid-19 (Commission Decision EU 2020/491)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%2525253A32020D0491). There has also been one directive: Council Directive 2020/876 which deals with the need to defer time limits for the filing and exchange of information in relation to taxation: <http://www.legislation.gov.uk/eudr/2020/876/contents>

1. **What lessons are there for future uses of emergency powers, their safeguards and the processes for scrutinising them?**

We recommend a review of the law relating to health emergencies.

Legislation already exists to deal with circumstances related to pandemic disease.

The Civil Contingencies Act 2004 can apply to emergencies and creates a framework for civil protection in the UK. The Act provides for local arrangements for civil protection and the employment of emergency powers under Orders in Council.

The emergency powers in the Act allow for temporary regulations to deal with serious emergencies. Emergency powers under the Act are subject to rigorous safeguards and can only be used in exceptional circumstances.

The Public Health (Control of Disease) Act 1984 (amended by the Health and Social Care Act 2008) as respects England and Wales and the Public Health (Scotland) Act 2008 include quarantine, detention and medical examination, and other powers, for local authorities and Health Boards.

The preference of Government to employ either the Coronavirus specific legislation or Public Health Acts rather than Civil Contingencies legislation raises questions about the legislative framework which applies across the UK and its fitness to deal with future Public Health crises.

Once there is sufficient scope for a parliamentary inquiry into the fitness of the legislative (and policy) framework we can envisage this being a priority for all the UK Administrations and Legislatures.

In this connection we recommend that the Four Governments consider collaboration on the creation of a Standing Advisory Committee on Pandemics which, under an independent Chair would comprise medical, scientific, educational, research, and other experts drawn from the Four Nations and Ministerial Members from the Four Governments to keep under review developments in virology and epidemiology, oversee preparation for viral events including supply chains, stockpiling of medicines, vaccines, medical equipment and PPE, training of medical and nursing staff and preparation of educational tools to inform the public and general preparedness for future pandemics.

1. **How has the Government used both law and guidance to implement the lockdown and what have been the consequences of its approach? How has this varied across the constituent parts of the United Kingdom?**

In February the Secretary of State for Health and Social Care made the Health Protection (Coronavirus) Regulations 2020 <https://www.legislation.gov.uk/uksi/2020/129/made/data.pdf> which applied in England and Wales. The Regulations (now revoked) applied to two categories:

1. Cases involving people whom the Secretary of State or a registered public health consultant have reasonable grounds to believe are or may be contaminated with coronavirus provided they also consider that there is a risk that these people might infect or contaminate others (domestic cases);
2. Cases concerning people who have arrived in England on an aircraft, ship or train from outside the UK and who the Secretary of State or a registered public health consultant have reasonable grounds to believe left an infected area within 14 days immediately preceding their arrival in England (overseas cases). The Regulations provided for the detention by the Secretary of State or a consultant of members of the public “for screening, assessment and imposition of any restrictions” (on travel, activities and contact) for up to 48 hours or alternatively if screening has been undertaken, and restrictions are applied, the end of those restrictions.

Regulations were made in Scotland and Northern Ireland making COVID-19 a notifiable disease under the Public Health (Scotland) Act 2008 and the Public Health Act Northern Ireland) 1967 which provided detention and quarantine powers.

*The Coronavirus: Action Plan* (AP) was published on 3 March 2020 by the UK Department of Health and Social Care, the Scottish Government, the Department of Health for Northern Ireland and the Welsh Government. The AP recognised the respective roles and responsibilities of the UK Government and Devolved Administrations and set out:

1. what was known about the virus and the disease it causes
2. how the Administrations had planned for an infectious disease outbreak, such as the coronavirus outbreak
3. the actions the Administrations had taken so far in response to the current coronavirus outbreak
4. what the Administrations were planning to do, depending upon the course the outbreak took.
5. the role of the public in supporting the Administrations’ response.

The AP set out four phases to respond to COVID-19:

1. Contain: detect early cases, follow up close contacts, and prevent the disease taking hold in this country for as long as is reasonably possible
2. Delay: slow the spread in this country, if it does take hold, lowering the peak impact and pushing it away from the winter season
3. Research: better understand the virus and the actions that will lessen its effect on the UK population; innovate responses including diagnostics, drugs and vaccines; use the evidence to inform the development of the most effective models of care
4. Mitigate: provide the best care possible for people who become ill, support hospitals to maintain essential services and ensure ongoing support for people ill in the community to minimise the overall impact of the disease on society, public services and on the economy.

The AP was a document which indicated a high level of cooperation and coordination between the four nations in respect of the initial phase of the crisis. The Cabinet Office guidance on responding to emergencies assumed that this would be the approach to be followed: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192425/CONOPs_incl_revised_chapter_24_Apr-13.pdf>

Between 26 and 28 March, UK governments responded to medical evidence and advice that lockdowns must be imposed and enforced in order to save lives, prevent the National Health Service from being overwhelmed and constrain the spread of Coronavirus and began a legislative effort which continues to this day.

Acting under powers contained in the Public Health (Control of Disease) Act 1984, the UK Health Secretary made the [Health Protection (Coronavirus Restrictions) (England) Regulations 2020](https://www.legislation.gov.uk/uksi/2020/350/made).

This was followed by the Welsh Government, which enacted the [Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020](https://gov.wales/sites/default/files/publications/2020-04/the-health-protection-coronavirus-restrictions-wales-regulations-2020.pdf).

In Northern Ireland, the Executive Department of Health, using powers under the Public Health Act (Northern Ireland) 1967 as amended by the Coronavirus Act 2020 enacted the [Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland)](http://www.legislation.gov.uk/nisr/2020/55/contents/made).

In Scotland the position was similar, the Scottish Government, acting under powers in the Coronavirus Act 2020, enacted the [Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020](http://www.legislation.gov.uk/ssi/2020/103/introduction/made).

Divergence can however be seen in the way in which the regulations (which were similar but not identical) and Guidance published by all four Governments evolved: <https://www.gov.uk/coronavirus>; <https://www.gov.scot/coronavirus-covid-19/> ;<https://gov.wales/coronavirus> ; <https://www.nidirect.gov.uk/campaigns/coronavirus-covid-19>.

The Guidance contained information on how to protect one another from the virus (including vulnerable people and those who are shielded), maintain health and deal with employment, financial and work issues. The Guidance also covered topics such as business matters, education, schooling, housing, transport, travel and immigration, healthcare workers, volunteering and support when there is a death.

However, the Guidance evolved as the effect and understanding of the virus developed, and as Government priorities changed among the Four Nations and the Guidance each Government had issued diverged. The controversy between “staying alert” in England and “staying at home” in Scotland, Wales and Northern Ireland is an example of this divergence.

Consequently, we have reached the position where the Guidance and the law are not the same in each part of the UK (indeed divergences in guidance may not be reflected in amendments to regulations). This is understandable, given that the virus may have spread in each jurisdiction at different times and rates, with each nation having its own institutions and capacities to address the problems as they arise. Care must therefore be taken to ensure that the regulations applicable to whichever part of the UK are being followed, as a breach may result in legally enforceable penalties. To assist the public in following the relevant law and guidance it would seem particularly relevant, when broadcasting, for UK Government Ministers and officials to emphasise the jurisdiction to which their statements apply which could be the UK as a whole but often apply only to England.  Otherwise citizens in other parts of the UK might easily assume that the statements are being made in respect of the whole of the UK.

1. **What liberties has Parliament loaned the Government during lockdown? What are the processes for reviewing and returning them? Are the sunset provisions in the Acts and regulations sufficient?**

There is a considerable amount of Coronavirus subordinate legislation across the UK: 148 UK statutory instruments (regulations), 49 Scottish Statutory Instruments, 62 Northern Ireland Statutory Rules and 47 Wales Statutory Instruments at the time of writing. With so much subordinate legislation (and the potential for more) covering so many areas of the law, how can Parliament ensure a co-ordinated approach to scrutiny and, more importantly, that there are no gaps in legislation that may be needed to deal with the consequences of this illness?

In a significant number of those statutory instruments made affirmative procedure was being used. That is a form of fast-track procedure for subordinate legislation, which needs to be carefully scrutinised.

The House of Lords Constitution Committee, in its “Fast-track Legislation: Constitutional Implications and Safeguards” report, said:

“The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of ‘fast-track’ secondary legislation. In most cases the parent Act specifies which form of procedure should be applied to instruments made under it. In some cases however the Act may provide for either the draft affirmative or the made affirmative procedure to be used. If the made affirmative procedure is used then the instrument is effective immediately.”

The report went on to say:

“Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI’s 8th report of this session drew the special attention of both Houses to three statutory instruments which had been laid as made affirmatives ... ‘revisions were being made to the terms of the instruments down to the moment that they were made’”, and there had been “serious time pressure” in the making of the instruments”.

The parliamentary counsels’ offices and the solicitors in the Governments’ legal departments are clearly expert in drawing up instruments and rarely make mistakes but the policies and the challenging conditions which prevail require speed of scrutiny so those carrying out that scrutiny need to be additionally careful about the legislation they are considering.

Safeguards are built into the Coronavirus Acts applicable across the UK and in Scotland.

There is provision for a two-month review period in section 95 of the Coronavirus Act 2020. That is replicated in section 12 of the Coronavirus (Scotland) Act 2020 and sections 12 and 14 of the Coronavirus (Scotland) (No 2) Act 2020.

Automatic expiry is also a safeguard and is a significant factor in section 89 of the Coronavirus Act 2020, section 12 of the Coronavirus (Scotland) Act 2020 and section 9 of the Coronavirus (Scotland) (No 2) Act 2020.

One other feature which is relevant to the consideration of legislation at this time is the need for Government to resist conflating coronavirus legislation with that which is not necessarily coronavirus related.

In its Report on the Corporate Insolvency and Governance Bill (HL Paper 76), the Constitution Committee of the House of Lords stated in Paragraph 11, in recommending a sunset clause for permanent measures which had been included in this coronavirus fast-tracked bill:

“While temporary measures to respond to the COVID-19 pandemic may meet the threshold of urgency and exceptional circumstances to warrant fast-tracking, long-planned and permanent changes to the law do not. It is inappropriate for such permanent changes to be fast-tracked through Parliament and so subject to less debate and scrutiny.”

It is important that such an approach to legislation does not become a regular occurrence.

1. **How is the court system operating during the pandemic? What has been the impact of virtual proceedings on access to justice, participation in proceedings, transparency and media reporting?**

Criminal Justice

Maintaining public health and keeping people safe in the Scottish Justice system are core principles which have guided us to date through the coronavirus crisis. These need to be respected as we move into the lockdown phase which requires social distancing to remain in place and that continues to apply no matter if it is the accused or the witness, the court officials or the public that are involved.

Though there is a focus in the question on court, we would stress that all processes must be safe from the initial detention of the accused until any court or subsequent trial, which includes police station interviews. The interests of justice require that each procedural and evidential requirement from and including these preliminary processes must comply with the rule of law and human rights.

Initially with the pandemic, almost all court business ceased with the courts closing with the exception of the conduct of necessary business which included those appearing from custody being processed.

Court business restarted in July, with High Court trials recommencing following two different models adopted in Edinburgh and Glasgow respectively. These models use innovative processes, involving two/three court rooms respectively to ensure the necessary social distancing for all can be achieved. What has also been encouraging is that the jurors who have been cited have attended, demonstrating public confidence in the safety of the system. That is allowing the number of trials being undertaken to be increased in mid-August.

The result of these models will be studied through the Jury Trials Working Group[[1]](#footnote-2) led by the Lord Justice Clerk, Lady Dorrian and will help in taking future decisions on how High Court trials and consequently, how other court business can be progressed.[[2]](#footnote-3)

One approach which has recently been approved is the use of cinemas as additional court estate. A mock trial has been conducted at Fort Kinnaird, Edinburgh[[3]](#footnote-4) where a jury was able to watch on the big screen, this model also allows for social distancing between jurors.

No sheriff & jury trials have as yet been able to be conducted since the pandemic arose though this will be reassessed following the experience with the High Court. Technology has played a key role in a number of the changes that have been introduced, alongside an immense amount of hard work having been undertaken by the Scottish criminal justice organisations, including a collegiate approach in reforming how the Scottish justice system works. Five months ago, it would have been unimaginable that a custody appearance or trial would be conducted remotely by video link. These practices have now become a reality.

A small number of remote summary trials have been conducted in various parts of Scotland. There is a role for summary trials to be conducted remotely. There are trials that may be conducted successfully by this means but these require to be identified by the Crown and the defence and involve significant additional preparation work including the lodging of documentary and other evidence significantly in advance of the trial. There are evidential considerations too which would be means that remote trials may not work successfully where there is a need to identify the accused.

There has also been the introduction of virtual First Diet or ‘custody courts’. This was initially introduced to deal with the accused who had or was suspected of having COVID-19 avoiding the need to transfer them and the risk of transference of infection. This appears to have been extended to other accused appearing remotely. We published a Report on a survey[[4]](#footnote-5) conducted of solicitors’ experiences with virtual custody courts which highlighted a number of concerns.

We recognise the pandemic has created enormous challenges, with significant implications for the administration of justice. There are some potential advantages to virtual custody courts but there are considerable practical problems that have to be addressed.

The custody court is a crucial stage in the prosecution process, which may ultimately lead to a trial and a criminal conviction, so there is a need to understand how virtual custody courts impact on the way that criminal justice is administered. Solutions must provide assurance of effective secure, confidential communication between a solicitor and their client, and the utilisation of working audible and visual technology of quality. Facilities must exist to ensure face-to-face consultations and appearances of the accused in court where required. Otherwise there may be potential challenges in the future on the basis of compliance with Articles 5 and 6 of the European Convention on Human Rights.

Virtual custody courts will not work for all clients, particularly if they are vulnerable. The report on the survey does provide valuable insight for future decision-making on how court business can be run safely and effectively. There is a need to ensure that the rights of individuals are protected and that there is an effective court system maintained in Scotland.

As highlighted above, there are concerns over access to justice with regard to vulnerable clients since it is suggested that the effect of COVID-19 may have impacted on such groups disproportionately. For accused in court, they must be able to understand and participate in proceedings effectively as well as instructing their solicitors. For some, remote participation will not secure these rights.

Other court procedures have been introduced, such as written guilty pleas which reduces the need for the accused and the solicitor to appear in court.

Some changes may support the Lord President’s view that these should become permanent features of our justice system. For instance, we were grateful that the Coronavirus (Scotland) (No2) Act 2020 schedule 4 part 7 on Execution of Documents amends the law on the need for the personal presence of Notaries Public to enable documents to be executed by video link.

The need to hold court hearings in public is protected under Article 6 of the European Convention on Human Rights which includes a right to a fair and public hearing, conducted in a reasonable time, by an independent and impartial tribunal and requiring public judgment. The media reporting has tended to focus on the restarting of criminal business rather than the detail of any of the trials that had been held. Public access to the High Court trials has been secured by means of remote access using screens where the press and interested victims and the accused and their families can view proceedings safely.

Access to justice concerns continue to be relevant given the length of time which accused may be remanded pending trial owing to the backlog of trials at all levels. The effect on summary trials is significant given there is a presumption against custody for sentences of under 12 months and would spend only half of the sentence in custody. Those on summary charges are now requiring to spend more than 40 days on remand. The implications mean that more prisoners are being held on remand with the risks this brings in respect of COVID-19 in crowded prisons and potential restrictions on family visits.

Bail will only be opposed where there is a serious risk to public safety. Each case is judged on its own merits by the judge and as stated by the Lord President, “in the current crisis, the emphasis must be, albeit not exclusively, on whether bail should be refused on the grounds of public safety. The primary question is whether the accused, if at liberty, will pose a substantial risk of committing further offences; particularly violent (including sexual and domestic abuse) offences. If there is no such risk, the accused ought to be granted bail in the ordinary case.[[5]](#footnote-6)

In conclusion, there is much more work to be done, until we reach what may be the new norm. The implications not only for managing the justice system require the provision of adequate resources for all concerned including the Scottish criminal justice organisations. Consideration of legal aid too is required as solicitors require to invest in technology as well as recompense for their time as trials being held remotely at least at the start are predicated to take longer. Preparation for such trials may well be more onerous too.

How any remote trial system will cope with complexity in trials and where there are significant issues in dispute remains to be seen as this requires a level of preparation by the Crown and defence solicitor which would need to be sustained on a day-to-day basis, if this becomes the norm.

Training for all is also required not only in the use of technology but the effect of virtual courts on taking evidence/submissions etc.

We all have a role in finding ways to make the criminal justice system work effectively in undertaking trials, while respecting the basic rights and freedoms that underpin our system and the rule of law. Maintaining justice and safeguarding the health of participants in the justice system whilst ensuring that the public’s confidence is maintained in that system are paramount objectives.

Civil Justice

The Scottish Courts and Tribunal Service (SCTS) issued a statement on 18 March asking, “every member of the public, who is not directly involved in proceedings, not to enter our buildings”.

The rationale for this policy was to protect the court “environment and minimise the risk for those who are required to attend court or tribunal hearings”.

Guidance was issued for all Courts on 1 June 2020, setting out the civil business which can be processed. The Sheriff Court issued Guidance applying from 1 May 2020, setting out arrangements to enable proceedings to be progressed including parties being able to apply to restart cases where they consider the case suitable to be progressed remotely.

Court of Session Guidance published in May confirmed that electronic signatures can be accepted by the Court. Two Practice Notes were issued in June, the first concerned hearings by video conference, the second confirmed that hearings will be conducted remotely, and that the Inner House will sit as an online court to hear civil appeals. The second note provided that where documents have already been lodged with the Inner House, they must be submitted electronically for all hearings. The use of electronic documents continues, and practitioners are advised not to lodge documents or send papers by post. Inner House cases can proceed by Webex or written submissions. On the other hand, procedural hearings in the Outer House of the Court of Session can be conducted preferably by teleconference or written submissions with the agreement of the Court. This second note was updated in August which confirmed among other matters that substantive hearings, including proofs, in the Outer House may proceed by way of WebEx video conference or “in-person” where physical distancing can be accommodated and that from 5 August all new summonses will be signetted electronically: <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/coronavirus-docs/cos-guidance-for-practitioners-revd-07-08-20.pdf?sfvrsn=2> .

On 16 July the Scottish Courts and Tribunals Service published guidance which confirmed that all ‘court and tribunal buildings are open with access restricted to only those with a direct involvement with proceedings, and journalists’.

On 16 August SCTS published ‘COVID-19 Respond, Recover and Renew – Supporting Justice through the pandemic and beyond ’<https://www.scotcourts.gov.uk/docs/default-source/default-document-library/coronavirus-docs/covid-modelling-reports-and-other/covid-19---scts-respond-recover-renew.pdf?sfvrsn=2> The report sets out the steps taken by SCTS to manage COVID-19, the steps being taken to manage recovery and how SCTS ‘can draw on those experiences and lessons to build a more just, resilient and efficient system, working in collaboration with others across the justice system’.

1. **How will the justice system manage the increasing backlog of criminal cases? Is it appropriate to rethink the jury system during the pandemic, and beyond, and if so how?**

The response to question seven refers.

Though Article 6 of the European Convention on Human Rights includes a right to a fair and public hearing, conducted in a reasonable time, by an independent and impartial tribunal and requiring public judgment, it does not require a jury trial. These issues are governed by the Member State’s own procedural criminal justice framework. That approach was advocated as a means of addressing the backlog.

We continue to support a means of dealing with the backlog of cases arising from the early days of lockdown as outlined above. We do not believe that this is the time to make fundamental changes to the Scottish criminal justice system, such as instituting judge-only trials. There may be other means such as the reduction of the jury size as was undertaken in World War 2 that could continue to be considered.

Trial by jury in Scotland is one of our foremost safeguards afforded to the accused persons in the Scottish criminal justice system.The current system should be adapted and modified to meet the needs of health requirements.

 **For further information, please contact:**

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 0131 476 8138

michaelclancy@lawscot.org.uk

1. https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/05/12/jury-trials-working-group#:~:text=May%2012%2C%202020.%20The%20Lord%20Justice%20General%2C%20Lord,and%20travel%2C%20the%20requirements%20of%20public%20health%20 [↑](#footnote-ref-2)
2. https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/05/12/jury-trials-working-group [↑](#footnote-ref-3)
3. https://www.scotsman.com/news/crime/cinemas-scotland-may-be-used-jury-trials-following-successful-mock-trial-edinburgh-odeon-2933574 [↑](#footnote-ref-4)
4. https://www.lawscot.org.uk/media/369189/2020-07-28-crim-report-on-virtual-custody-courts.pdf [↑](#footnote-ref-5)
5. JD&BK v HMA 2020 HCJAC 15 [↑](#footnote-ref-6)