



Law Society
of Scotland

Consultation Response

COVID-19 AND SOLEMN CRIMINAL TRIALS

SCOTTISH GOVERNMENT DISCUSSION DOCUMENT – APRIL 2020

17 April 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Position

- We do not support the introduction of Judge only trials (Option Seven) during the period of the COVID-19 pandemic.
- Our position is that Option Three: Retain current court facilities but enable social distancing during jury trials provides the basis for a practical workable solution.

This would involve modifications to, and extension of the practices currently being utilised in court. That includes reduction of the size of the jury, greater use of technology for balloting of jurors and facilitating the hearing the evidence (including productions), the use of larger courtrooms as the jury room and securing public access for streaming trials. (These are described in more depth in our Response.)

- We endorse fully that in order to continue with any court business paramount consideration must be given to securing the safety of the public (including the court officials themselves).

That means respecting and implementing the public health law and advice/ guidance issued at any time by the Scottish Government during the continuing pandemic emergency. (Our Response is caveated by the need to ensure that position is achieved.)

- Before any jury trials can commence, since according to the law, the trial starts in the police station, each step in that process (police station and pre court hearings) leading up to the trial must be safe to all during the COVID-19 pandemic.

That cannot be assumed and must be fundamental to proceeding with any business in the solemn courts.

The Society's Engagement

Our President, John Mulholland indicated our wish to “work positively with the Scottish Government around the changes which are necessary to our justice system to deal with the spread of COVID-19.”

In that connection, we welcome the Scottish Government's commitment to engage with us in considering and responding to the Discussion Paper on “*COVID -19 and solemn criminal trials*” issued on 14 April 2020 (the Discussion Paper). The Discussion Paper outlines nine options for managing the impact of COVID-19.

The Working Group who have submitted this response comprised members of the profession representing Crown Office and Procurator Fiscal Service, defence solicitors, various local Bar Associations, and solicitor advocates together with academic, lay and judicial representation and support from the Faculty of Advocates. The membership and contribution of the Working Group is acknowledged in Annex 2.

We understand the focus of the Discussion Paper on solemn criminal trials although as is recognised, most of the options, if adopted, will inevitably have an impact on the operation of the remaining (summary) criminal court business. That relates to the availability and use of resources which are relevant when considering Option Six: Deal with the backlog with faster progress of jury trials at the end of the current health restrictions.

We have set out a Summary of the Society's Response. For reference we also have summarised our position regarding each of the Options in Appendix 1 of this Response.

We agree that continuing with the current total suspension of jury trials (Option Nine), while required initially in response to the immediate COVID-19 public health considerations which were paramount, is not viable or sustainable in the longer term. Turning attention on how to develop a way forward to dealing with solemn criminal trials now and in the immediate future is essential, recognising that developing workable practical solutions may take a little time, as we move through the three stages identified in the Discussion Paper that include:

- “Lockdown” Period
- Phased /Societal recovery period
- Business as usual recovery period

Synchronising these with the periods in the Coronavirus (Scotland) Act 2020 (2020 Act) section 12 and other public health legislation which determines the expiry of Part 1 of the 2020 Act as 30 September 2020, subject to extension to 31 March 2021 and 30 September 2021 is important.

Our view about finding practical solutions to proceeding with solemn trials is, as we understand, supported by Victim Support Scotland. They work closely with the families who are being significantly impacted by the current cessation of proceedings in the most serious of cases. There are deep concerns expressed about further delays which will have a catastrophic and deeply traumatising impact on such families. We recognise the need for victims' interests to be factored into identifying potential solutions, specifically regarding their interests in participating as witnesses, being supported during the process and for them and their families to be able to hear proceedings. There are other important considerations such as how

support for such victims pre- and at court is to be arranged and maintained during the COVID-19 pandemic crisis. There would need to ensure effective communication such as the use of secure video conferencing and dedicated mobile phone to address their concerns, such as how and when to attend court. This will be particularly relevant as all such services may have ceased during the immediate closure of the courts.¹

There is a need to recognise that measures to deal with solemn trials that may be put in place will require to be flexible to deal with potential changes in public health advice. What is crucial is the harnessing of the support and co-operation from all Scottish criminal justice partners and the profession in upholding the rule of law and maintaining the confidence of the public in the justice system. We are pleased to be a part of this process in lending our support in developing the way going forward.

Background

Schedule 4 Paragraph 11 of the Coronavirus (Scotland) Bill (introduced on 31 March 2020) proposed to remove juries as a response to the pandemic emergency. The relevant provision was withdrawn during the Emergency Parliamentary debate on 1 April to allow time for consultation on a range of options. The Government stated its intention was to introduce a further Emergency Bill on 21 April 2020. Some of the options outlined in the Discussion Paper may not require primary legislation so clarification about any Emergency Bill would be appreciated. It would be important to consider what would be required to be set out in primary legislation as compared to what might be left to the discretion of the Lord Justice General to be contained in an Act of Adjournal or regulations.

We stress that if Option Seven: Judge only trials are pursued, more time should be provided as the removal of juries is a fundamental constitutional step even if time- limited to the period of the pandemic.

There is a need to retain jury trials as they are an integral aspect of the Scottish criminal justice system. There are no safeguards that can be incorporated in legislation which would outweigh the loss of jury trials. Maintaining jury trials is the best way in which to maintain public confidence in the justice system. We stress that introducing legislation remains premature and the issue of the potential backlog does not rationalise that approach. There are other possible approaches to using the court buildings in an innovative way and by employing technology to help meet the requirements of public safety and social distancing. Our briefing on the Bill emphasised that:

“[in] ensur[ing] that the Courts continue their crucial and important work in this period of national emergency, but the interests of justice and the rule of law are not served by taking the proposed step [removing juries] at this time.”²

We respond to the questions posed in the Consultation Paper:

¹ Acknowledgement and thanks are due to Kate Wallace Chief Executive, Victim Support Scotland

² https://www.lawscot.org.uk/media/368600/200331-coronavirus-scotland-bill-briefing.pdf?_zs=38g3X1&_zl=G5Ge6

Question 1: What are the implications for justice and confidence in the rule of law if the most serious criminal cases are not able to proceed?

The Discussion Paper is silent on a key aspect that needs to be remembered. That relates to the precursor for the criminal court process and justice system. All trials, according to the ECHR jurisprudence, start in the police station. All aspects of the criminal justice system that underpin the start of any jury trial must be safe to all concerned which include all police station processes, the initial petition and First Diet/Preliminary hearings. Before considering how best to go forward with solemn trials, confirmation that all these steps can be undertaken safely is required and not just assumed before any serious criminal case may proceed to trial.

We have ruled out Option Nine: Maintaining the status quo. We understand the significant concerns outlined in the Discussion Paper about the current backlog and its potential development if no solemn trials are undertaken. These must be addressed.

Option Six: Deal with the backlog with faster progress of jury trials at the end of the current health restrictions is one option but may represent a partial or back-up solution to be considered in due course. It is not the optimum approach to adopt at present. There would be a need for significant additional resources which would include making increased court estate available along with necessary court officials judges, Fiscals and defence agents who would be required if there were no changes made now.

To address that inevitable backlog would require options to be explored such as the need to sit 7 days a week and late running courts. These affect not only those officials in the court but also the availability of witnesses and jurors. Resources across the criminal justice system are finite.

While the Scottish Government could provide resources to appoint additional judges, increase the number of court staff and Fiscals available by providing extra funding, this would not obviate the need for ensuring that there are relevant qualified and experienced persons available in the required numbers (e.g. trainee or inexperienced Fiscals would not normally undertake jury trials). That however does not address the resources required from the defence side as we do not yet know what the impact of the COVID-19 pandemic will be on the across Scotland and on the availability of solicitor members of the legal professions practising in the criminal courts to undertake increased solemn court business while continuing to undertake their normal day to day court practice.

There are likely to be changes to the types of crimes that are committed during the COVID-19 pandemic which may affect the number of jury trials required to be run. There may be a rise in offences such as domestic abuse which may not themselves give rise to jury trials though we recognise too that the offences arising now and being placed on petition include those involving COVID-19 as a background in threatening health workers and the police. These cases may require jury trials in due course. What the longer-term

implications across the criminal justice system are (including the utilisation of the increase in the monetary value of Fiscal Fines) remains uncertain for purposes of profiling and assessing the implications for justice and the need to hold solemn trials.

Considering other options such as Option Two- Holding jury trials in larger non-court locations to facilitate social distancing seems impractical to us as the same health issues arise as with using the courts. Added to that issue is the need to maintain deep- cleaning in estates that are not under direct SCTS control as well as adapting the venues safely for all concerned (including the public safety in relation to those who have been remanded for good reasons of public protection).

That approach seems to us to be potentially time-consuming and expensive. Any way forward which includes the use of jurors would require to use the existing, larger courts.

Question 2: What are the implications for victims, witnesses and accused, in particular those held in prison on remand when they have no certainty when their case might progress?

Inevitably there are significant implications for all concerned, in any role. Victims and witnesses want their case dealt with and an outcome. A system that can be devised to deal with jury trials during the pandemic emergency would help but only if the confidence of such persons can be ensured within the justice system as well as their safety in giving evidence.

For the accused, the impact of COVID-19 has been immediate. The extension of time-bars for all accused has been tested in a recent bail appeal. The extended remand in custody on account of COVID-19 as a result of the extension of the time-bars provided for in 2020 Act was upheld.³ In the longer term, there needs to be a workable solution to reduce the need to keep untried accused in prison for lengthy periods.

Realistically, with the current backlogs in court, a number of trials were already delayed beyond the 140-day time bar so it might be useful to remember the current problems with ongoing delays that were already significant.⁴ Trying to ensure that delay is managed for the future is important.

We understand that concerns have been raised by victims' groups at individuals currently on remand for serious crimes such as murder or rape potentially being released on bail due to the extended time-bars. In seeking to balance the interests of the accused on remand and the public must be a consideration when

3 <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020hcjac15.pdf?sfvrsn=0>

4 <https://www.scottishlegal.com/article/constant-breaches-of-140-day-rule-oppressive-and-unconstitutional>

seeking solutions to undertaking trials as soon as possible. These will no doubt be considered on a case by case basis with the safety of the public remaining paramount.

Question 3: Is it possible to ask members of the public to take on the civic duty of jury duty without exposing them or their family members to some level of health risk?

We have already addressed Option Eight: No jury option. Looking to our preferred option of maintaining jury trials, we have already highlighted the need for maintaining the safety of the public and of the jurors. We consider that members of the public could be asked to undertake their civic duties, but several factors would need to be addressed in ensuring their safety and promoting public confidence.

Firstly, we rule out Option Four: Having jurors in remote locations video-linked to court as that is not an option.

Views were sought from Professor Susskind⁵ who confirmed that he was “*not aware of any examples of the remote conduct of jury trials. Nor [was he] aware of any jurisdictions that have plans in this direction.*” There was no evidence of the extent of the practical and technical obstacles that might be present using a remote jury. Pioneering an approach at this time would require technical and complex obstacles to be overcome which Professor Susskind outlined as:

“A jury trial is a form of inter-personal communication that is much more complex than envisaged in the design of the current generation of videoconferencing systems (even advanced, ‘telepresence’ systems). There are, to my knowledge, no existing systems that were designed with jury hearings in mind (note that ‘crowdjustice’ and ‘mass collaboration’ jury systems bear almost no relation to the Scottish criminal jury system). However, technology to support complex cases (such as jury trials) would require bespoke development. This would take many months of development and many more months of testing (which should be as rigorous as clinical testing of new drugs).”

Though we acknowledge that new technologies exist, any development of a remote jury system should be developed and built “*incrementally, informed by experience.*” To develop a ground-breaking system from scratch and to pilot would be impractical and inadvisable as well as time consuming.

Protection of the interests of the accused should not be ignored so Professor Susskind identifies that:

“the art and method of communicating with juries has many different components - maintaining their attention, gauging and responding to their level of understanding, ensuring that they have clear sight of evidence and documents, persuading them memorably, and so forth. This form of rhetoric is well

⁵ “REMOTE JURY TRIALS” Professor Richard Susskind OBE Memorial 14 April 2020 We acknowledge the assistance from Professor Susskind.

understood when pursued in a shared physical space, but we have no experience at all of how to replicate this virtually. The danger here is that what might be lost is much more than, say, a good legal point for a judge. Rather, an inability to bring the art and method online might strike at the very heart of what a jury trial is all about, which is surely that juries of peers are fully engaged.”

We would consider too the public perception of any rapid change to the jury trial during the time of societal uncertainty. What do jury trials mean for the public? *“Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.”*⁶

This supports our view that where there is insecurity and instability that fundamental changes should not be made to our social and legal structures. That supports our view of making greater use of the system which currently exists with modifications.

Turning now to the safeguards and changes to be made in keeping our preferred option of maintaining jury trials, we suggest the following:

Streamline selection: In being selected initially for jury service, there would be a need to extend the range of automatic exemptions for essential health workers, those with caring responsibilities or ill/self-isolating as a result of COVID-19 and those being shielded who should not attend court.

Practical arrangements: Consideration may require to be given to dedicated transport between home and the court. There would be a possibility of their lodgings being paid for by the State and/or bringing in arrangements for jurors to continue to be in self-isolation.

Court rooms: It would be best to continue to use the current court buildings, focusing on the courts which were currently closed and/or the larger courtrooms where it may be possible to implement and maintain social distancing in a safe more easily cleaned environment. With the jury, there would then be the option of using the public benches of the courtroom as the jury room. The court officials would withdraw from the courtroom when points of law or jury decision-making were required. The jury (of whatever number) could be scattered around the court in allocated/numbered seats to maintain social distancing.

Size of the Jury: Consideration should be given to the possible reduction of jury size for some jury trials. Reducing the numbers of jurors would reduce the risks from COVID-19. However, there would be a need to retain 15 jurors in the High Court. The rationale and background for the 15-juror system has been set out previously by the Scottish Government.⁷ We support that need to retain 15 jurors in the High Court given the gravity of the offences tried there.

⁶ Lord Devlin

⁷ The Modern Scottish Jury in Criminal Trials <https://www2.gov.scot/Publications/2008/09/17121921/9>

We do not consider that Option Five testing jurors for COVID-19 is viable, again in the short term. We understand that priority must be given to health workers and there is a limited number of kits available and we doubt that the need to test jurors would be a priority. Time would also be needed to obtain the results and pool the available jurors. Jurors would have to be quarantined for 14 days prior to the trial and tested daily unless kept in complete isolation.

Question 4: Are there technological or practical measures that could be introduced to mitigate these risks?

We consider that there are a range of measures that can be explored to help with maintaining jury trials.

We are aware of recent work undertaken by JUSTICE⁸ in trialling an experimental virtual jury trial that was designed to test if it is possible for a fair trial to take place entirely online. Though we do not support the use of a remote jury, the trial presents interesting information and evidence as to the way in which a solemn trial could be run by using and extending existing technology as we highlight below.

There can be a much greater use made of pre-recorded evidence. For instance, we are aware of the successful use of body camera evidence for police officers in court. The right for the defence to challenge any such evidence robustly must be maintained.

The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 makes provision for use of pre-recorded evidence, such as evidence on commission, which could be used to assist in witnesses, including victims, giving evidence at any trials.

Other evidential considerations are required as, even once the venue and court officials have been secured, as there is a continuing need to secure the best evidence from witnesses in any trial, given the potential effect of COVID-19 on the availability of witnesses. These issues relate not only to being fit to attend a trial or to give evidence in any competent fashion but where some witnesses may have died.

Section 259 of the Criminal Procedure (Scotland) Act 1995 (hearsay) envisages a solution to such a situation and procedures for witnesses to give evidence. That section has now been modified by clause 12(2) Schedule 4 Part 6 of the Coronavirus (S) Act 2020 that provides flexibility for the current circumstances by extending its provisions so that:

“the reasons referred to in paragraph (a) of subsection (1) also include that it is not reasonably practicable, because of a reason relating to coronavirus, for the person who made the statement to attend the trial or to give evidence in any other competent manner.”

⁸ Preliminary Impressions of the Virtual Jury Trial Pilot conducted by JUSTICE 9 April 2020 Professor Linda Mulcahy Oxford University and Dr Emma Rowden, Oxford Brookes University

The effect on the administration of justice of essential witnesses dying could be significant. The recent experience in the trial in Australia of Cardinal George Pell who was found guilty of historic child assault is highlighted where his appeal was successful. Part of the problem for that prosecution was that there was only a single accuser as one of the witnesses and he had died prior to the trial. As a result, the case had been “wholly dependent upon the acceptance of the truthfulness and the reliability [of one man’s testimony].”⁹ The implications from that result for the Scottish criminal justice system and corroboration must be considered in proceeding with any solemn trial.

In seeking obviate these circumstances arising, if witnesses are unwell, there is a need to capture their evidence which can provide a safeguard though, if the witness survives, they would give evidence in person. Obtaining a dying deposition may be one approach but there are significant reservations regarding such evidence, given the absence of challenge through cross-examination and such evidence not being given on oath.

Taking evidence on commission is a preferred approach but it can be rather “clunky” in practical terms at the moment, although this may be because most commissions currently involve children. Seeking to streamline the process with a view to making it easier might be a way of going forward.

Expert witnesses- There may be issues regarding the attendance at court for certain witnesses such as doctors and other NHS staff who are on the front line and would not have the time to attend court. This could also have an impact on the availability of certain experts both for the Crown and the defence in providing reports for the court. Though much of their evidence might potentially be able to be agreed, there would be some cases where their evidence was essential. Could the criminal justice system use technology such as Microsoft TEAMS for this purpose? Otherwise could their evidence be video recorded – and this might extend to other types of experts?

Toxicology/Forensic Science Reports: Issues have arisen previously regarding toxicology reports. These will also be required for court so steps will be needed to ensure that such reports can be provided by the laboratories as universities have closed these facilities meantime in implementing social distancing and remote working.

Practical (evidential) implications: How would viewing labels and documentary productions/CCTV be undertaken?

⁹ <https://www.nytimes.com/2020/04/06/world/australia/cardinal-george-pell-conviction.html>

We understand that the V-Scene have confirmed in conjunction with MISO that they can provide a document system which would remove the current paper-based system. The solution can be developed for early delivery which would support the means to have the courts up and running as soon as possible.

This envisages the use of a central vault system where each item was located. As it was referred to, it could be released to allow the jury to refer/have sight. Any productions which were not used would not be available to the jury. Safeguards would be necessary to ensure that no items were, or could be, placed on social media or You-Tube during the trial or indeed post-trial.

Pre-trial instructions : Could these be pre-recorded ?

Question 5: Is it possible to maintain the random selection of jurors from across the eligible adult population?

We refer to our earlier answer regarding use of the court as the jury room. In maintaining a random selection of jurors, we would suggest, as under the current situation, normal balloting arrangements could be undertaken with most of the directions for balloting arrangements being usefully included in an Act of Adjournal. That could reflect the Lord Justice General's views and his discretion on the best way for such processes to be handled and for the purposes of maintaining consistency in each of the courts. These would need to include:

- **Time for the ballot:** The ballot could be conducted remotely (at 9.30am) intimated by text message and jurors asked to attend later (11am) to allow for travel. Could the ballot be carried out the day before? There would need to be a mechanism for ensuring that the juror could still be excluded from the jury such as having knowledge of the case/accused (with arrangements for substitution being necessary.)
- **Pooling:** Jurors would need to be pooled locally- as there was a need to observe the SG requirements over essential travel, though attending court would be exempt under the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. Considerations would need to be given to how to travel to and from Court given the availability of public transport and the health implications of travel.
- **Availability of jurors:** Consideration could be given to changing the basis of balloting jurors e.g. for a week rather than per case, notifying jurors of balloting by text message.
- **Size of the jury:** Over the period of the lock down, there would be issues in obtaining the required number of jurors:

- ✓ We recognise that fewer jurors may be able to attend the court owing to travel issues, exemptions due to being key workers (working for the NHS, supermarkets, etc) and personal factors such as child or caring responsibilities. They may also require to self-isolate or become ill themselves. Consideration also would need to be given to excusals on health grounds too such as vulnerability and how to make such an application for excusal. A streamlined approach would be needed. Is it practical for a jury size of 15 to be maintained? Would 7 or 9 jurors be more practical?
- ✓ If reduced to 7 or 9 jurors, that would still allow 2 jurors potentially to become ill, but the jury trial would not be lost. We recognise the concern of victims' groups about any trials being lost as a result of the jury number falling below any statutory minimum. For this to happen this would be devastating for such a victim who may already have given evidence, but then was required to have to go through the process again.
- ✓ Given the health implications and the need to continue to have a requisite number of jurors, would any arrangements be best utilised with cases that were not predicted to run more than 5 days?
- ✓ If the size of the jury were to be reduced, we would not seek to retain the current majority verdict. We would propose that the WW2 rule¹⁰ was adopted which required five of seven votes for conviction and anything less than that was an acquittal.

Question 6: What is required to maintain compliance with ECHR and the right to a fair trial?

The right to a fair trial is provided for in Article 6.1 ECHR that provides:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The basic provisions are:

- a. fair and public hearing,
- b. in a reasonable time
- c. independent and impartial tribunal established by law

¹⁰ Administration of Justice (Emergency Powers) (Scotland) Act 1939 s 3 and *Mackay v HM Advocate* 1944 JC 153

d. public judgment.

It is recognised that the right to a fair trial does not require the provision of trial by jury. It will be plain, however, that trial by jury in Scotland is one of the foremost safeguards afforded to accused persons in our system.

There are grounds on which the public can currently be excluded from the court. Judicial discretion is limited in this matter and exclusion on health grounds may be included in “protection of private life of the parties” but utmost clarity would require legislation which would engage the ECHR and raise competence issues for the Scottish Government and the Scottish Parliament.

A way to secure public access could include live streaming as one avenue. The Supreme Court is streamed (one court at a time). There could be several jury courts running at one time but live streaming from multiple locations is technically possible. There will be ways of utilising the relevant technology to allow the court proceedings to be streamed though it might not be available on public and uncontrolled systems. This could involve using another room in the same building. We are aware of existing links as in Glasgow at Atlantic Quay (which is used for evidence on commission) that might also present possibilities. We understand that this was used most recently during the terrorist trial of the Manchester Arena bomber proceedings where live streaming was available for families but in this case, social distancing would need to be deployed.

When considering the public, we would also highlight the public with specific interest in any trials such as the victim or indeed the accused’s family who must have the right to be part of the process. They too would wish to observe proceedings and that may present logistical safety problems in being streamed to one location as the accused family too may want to attend.

There is also the issue of interpreters to be considered. How can this be secured when respecting social distancing? This is needed for the accused but also for victims or their families. Any failure to ensure proceedings can be understood would be a breach of ECHR rights.

Question 7: Are there additional safeguards that could be applied to help balance any move away from the current system of trial by jury?

Option Eight: Adjust the sentencing power of Sheriff Courts (summary and solemn) is one option to explore. Were consideration to be given to changing the sheriff's sentencing powers, we understand that no definitive statistics are available as to the actual effect. Reference is made to the figures produced in *Criminal Proceedings in Scotland 2018-19* regarding all persons who had received a custodial sentence:

- 79% of those persons received a sentence of up to one year
- 12% received a sentence of over one year and up to two years
- 9% received a sentence of over two years

These figures are broadly similar to previous years so these may allow a projection to be made as to the likely shift in business.¹¹ There could be implications for other sentencing such as a knock-on effect on the business now being prosecuted in the JP courts to deal with the effect of sheriffs focusing on solemn cases.

Any change to sentencing needs to consider the options available for a sheriff as otherwise there may not be non-custodial sentences available at this time given the possible community restrictions on the use of community payback notwithstanding the extension of time provided in the Coronavirus (Scotland) Act 2020. The Cabinet Secretary's letter to the Justice Committee provides a view on sentencing that:

"..... the presumption against short sentences will still apply and no specific guidance is planned in relation to this. Indeed, it w[ould] not be appropriate for the Government to seek to offer guidance to the judiciary in that regard. The presumption is not a ban and custody may be used if a court has decided that alternatives are not appropriate. Reasons for using a custodial sentence would have to be recorded."¹²

There would also be legal aid implications arising from this option if business is prosecuted on using extended summary sentencing powers.

We do not consider that Option Seven: Judge only trials are a way to proceed. What seems to be proposed is the use of one judge which we do not consider is appropriate where there are no safeguards which could be incorporated. We recognise that there is a precedent for the use of three judges as in the Lockerbie trial. That approach in any event would require a consequential increase in the number of judges for any appeal. These would present an increased requirement for judges as would the use of Option Six to address the backlog later once the pandemic emergency resolves.

¹¹ Criminal Proceedings in Scotland, 2018-19 (2020) table 10(d).

¹² https://www.parliament.scot/S5_JusticeCommittee/20200407CSfJtoMM.pdf

We had considered if there could be an increase in the use of temporary and part time judges.¹³ The use of JABS¹⁴ might avoid this problem but their processes would need to be expedited to make quick appointments. Whether this is practical is not known.

Would any consideration would be given to the interests of the respective parties in deciding whether to proceed by way of a judge only trial?¹⁵

Question 8: Is there a point at which the scale of backlog of serious criminal cases would justify a review of the balance of these issues? How would that point be assessed?

We do not support the introduction of judge only trials now or in the future. We consider that there is a way now to proceed to explore how best to allow jury trials to proceed with modification of processes and system in place. Such measures could, if introduced, be subject to review in accordance with the timetable set out within the 2020 Act.

In conclusion, we stress that there is a need to make the Scottish criminal justice system work considering the current pandemic emergency but not at the expense of the basic rights and freedoms that are fundamental to our system of justice and the rule of law.

13 We would be relying on the current processes for appointment avoiding any of the issues which arose previously in *Starr v Ruxton* 2000 SLT 42

14 <https://www.judicialappointments.scot/>

15 We understand that in five Australian jurisdictions—New South Wales, South Australia, Western Australia, Queensland and the Australian Capital Territory—whether a trial for an indictable offence proceeds as a jury trial may also depend on whether there has been an application for the accused to be tried by judge alone without a jury. Criminal Procedure Act 1986 (NSW) s 132; Juries Act 1927 (SA) s 7; Criminal Code (WA) ss 651A–C; Criminal Code Act 1899 (Qld) ss 614–615E; Supreme Court Act 1933 (ACT) s 68B. <https://www.lawreform.vic.gov.au/content/2-jury-trials-victoria#footnote-1282-12>

Appendix 1: Our Position regarding the Options outlined in the Discussion Paper

Option One: Having a smaller number of jurors

The Society supports this option in conjunction with Option Three. There is a need to establish what the minimum number of jurors would be. Our preference would support a minimum of 7 jurors. This would allow for up to 2 jurors to become ill during a trial. We are aware that are concerns expressed from the victims' groups about trials failing to complete as the number of jurors falls below any statutory minimum. This would address that risk.

We do not support a reduction from 15 jurors for High Court trials.

Option Two: Holding jury trials in larger non-court locations to facilitate social distancing

The Society does not support this option as it seems impractical and difficult to uphold the deep cleaning and safety requirements which can be achieved using the existing court estate.

Option Three: Retain current court facilities but enable social distancing during jury trials

This is the Society's view. There are a few modifications which can be made to the existing system and utilising technology to assist in reducing the number of persons within the courtroom and respecting the need to maintain social distancing.

Option Four: Having jurors in remote locations video-linked to court

We do not support this approach as it would be innovative and take time as well as being extremely challenging to overcome all the obstacles it presents. There is importantly no precedent for this approach across the world and the COVID-19 pandemic does not justify its adoption currently.

Option Five: Test jurors/other court attendees for COVID-19

We understand the reason for including this option. We would not rule this out in the longer term when testing may be easier but relying on this option on its own is not a long- term solution but may be useful in conjunction with other options further on when returning to the business as usual recovery phase.

Option Six: Deal with the backlog with faster progress of jury trials at the end of the current health restrictions

We do not support this option at this stage. This option may be appropriate when we return to the business as usual recovery phase in addition to adopting Option Three now.

Option Seven: Judge only solemn trials

We do not support this option.

Option Eight: Adjust the sentencing power of Sheriff Courts (summary and solemn)

We are not generally in favour of any adjustment to the sentencing powers. If sentencing is increased for a Sheriff sitting alone, that in effect denies the accused the right of a jury trial.

Currently, sentencing powers for the sheriff on summary complaint are 12 months with the possibility of 18 months if there is a bail aggravation. If the sentencing was increased to 2 or 3 years, as we highlighted above (question 7), this would not make a huge difference to the number of the Sheriff and Jury cases as 12% of all custodial sentences fall within the 1 to 2-year imprisonment group.

The compromise might be that a sheriff could have increased sentencing powers for the core offence up to 18 months as a short-term (COVID-19) measure.

We have also raised the issue with custodial sentencing as community disposals may not be available at this time or limited as to their scope and provisions for supervision given the implications of social distancing. Sentencing offenders to prison for a longer time is not the solution and alternatives to custody will need to be available and especially, given the Presumption against Short Periods of Imprisonment (Scotland) Order 2019.

Option Nine: Retain the status quo

We do not consider that this is an option.

There are clear resource implications to be considered for all involved in the Scottish criminal justice system on which we have reflected in going forward in some practical and workable manner with solemn trial during the COVID-19 pandemic emergency. These will have an inevitable effect on the Scottish Government allocation for the Justice budget. For any future funding for such options to proceed, this should not be at the expense of the existing Justice budget.

We welcome the opportunity as the profession to discuss further how to develop Option Three to work together in continuing solemn court business, recognising that it may take some time to arrange for jurors



now to be cited, identifying how the courts can be adapted to accommodate social distancing and ensure public safety, utilising existing and remote technology to hear evidence and to accommodate the public hearing and respect and implement the rule of law.

Appendix 2: Members of the Working Group

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Rt Hon Lord Hope of Craighead KT House of Lords

Michael P Clancy OBE, Director Law Reform, The Law Society of Scotland

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