



Background

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

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 The relevant provision was withdrawn during the Emergency Parliamentary debate on 1 April to allow time for consultation on a range of options.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 Scottish Government then published a Discussion Paper on “*COVID -19 and Solemn Criminal Trials*” that included nine options (<https://www.gov.scot/news/criminal-trials-during-covid-19-outbreak/>.)

We understand that the Cabinet Secretary for Justice intends to make a Ministerial Statement on 21 April 2020 regarding the consultation. Our briefing is provided to assist in connection with that Statement.

We thank the Cabinet Secretary for Justice for the open and constructive way that he has approached engagement with the Society and its members on the Discussion Paper.

The Society’s Engagement

We set up a Working Group¹ under the chair of Debbie Wilson, Convenor of the Criminal Law Committee, to consider our Response which is available here (<https://www.lawscot.org.uk/media/368671/2020-04-17-crim-consultation-response-to-discussion-paper-on-covid-19-and-solemn-trialsrrcorr.pdf>)

We stress our commitment 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.” Measures need to be considered on how best to deal with all criminal business with the current consultation focusing on the most serious offences prosecuted under solemn procedure. Any measures to be put in place must be flexible to reflect the changes in public health advice which must be paramount through the different phases from the “Lockdown” Period, Phased /Societal recovery period and Business as usual recovery period.

What is essential 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 public confidence in the justice system. There is also a need to ensure that victims’ interests are factored into identifying potential solutions, specifically regarding their interests in participating as witnesses, being supported during the processes and for them and their families to be able to hear proceedings.

We consider by exploring ways to retain the current system of solemn jury trials with modifications addresses all interested parties and best supports the Scottish Government in developing the way going forward to produce a manageable and workable solution.

The Society’s Position

The Discussion Paper outlined nine options.

- We do not support the introduction of Judge only trials (Option Seven) during the period of the COVID-19 pandemic.

¹ The Working Group 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.



- 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.

- 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.

- 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.

These proceeding practices cannot be assumed. These must also form part of the solutions found in proceeding with any business in the solemn courts.

We summarise our position regarding each of the options set out by the Scottish Government as follows (Appendix 1):

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.



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