



Law Society
of Scotland

Scottish Parliament Justice Committee

Restarting Jury Trials

27 May 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.

Executive Summary

The impact of the COVID-19 pandemic emergency has been far reaching, affecting our personal and working lives, including that of the Scottish criminal justice system. Immediate national measures were required, and we supported the courts' closures in March 2020 to protect lives and to avoid the spread of the virus.

There is now a phased return to what will be the "new norm." The need to restart all criminal business is a priority. The focus lies with solemn business, involving a wide range of cases, large and small in scale and serious criminal offending. Solutions under consideration for restarting such trials have inevitable implications for other criminal business, including the availability of judges and other court (both civil and criminal) business.

In Scotland, the interests of justice require that:

- Each procedural and evidential requirement from the preliminary processes (including at police stations) to the trial must comply with the rule of law and human rights
- Everyone is included from the victim testifying to the remanded accused.

Safety for all involved in the court in accordance with ongoing and emerging health advice is paramount in ensuring the requirements for social distancing.

In adopting a flexible solution, the following are significant:

- Accommodation to undertake solemn trials is available.

The Scottish Courts and Tribunal Service (SCTS) has the court estate available to be used in a more creative and versatile manner. This utilises other rooms in the court buildings which may not have been conventionally deployed previously for jury trials. These can be supplemented, if required, by the use of

additional external Scottish Government buildings such as Atlantic Quay, other court estate such as the Judicial Institute's training facilities, university accommodation such as moot court rooms and/or the currently underused hotel and conference facilities. Accommodation does not require the use of three courts. Resources should not be an issue to adopting a solution.

- Technology exists.

This permits the use of remote balloting,¹ greater utilisation of obtaining evidence on commission,² the public being able to hear trials remotely, section 259 of the Criminal Procedure (Scotland) Act 1995³ (1995 Act), pre-recorded evidence⁴ and remote links at police stations for witnesses to give evidence. These should render the running of trials easier, the need for attendance and in ensuring the necessary social distancing.

- Motivation exists across the profession, both prosecution and defence, to be proactive.

In recognising the obvious challenges presented to solemn courts by COVID-19, there are opportunities to seize. These include the resolution of the practical issues where they arise in running trials. The legal profession is committed to playing their part in the system in ensuring the delivery of effective justice in a timely fashion.

- There is an urgency in restarting these trials. To do nothing and increase any backlog is unsustainable.

We urge that a solution is found and put into operation, by utilising some/all the aspects discussed fully below.

- Monitoring the solution is essential as is obtaining evaluation and feedback.

We recognise that we need to find a way forward as the effects of COVID-19 will be with us for some indefinite time to come.

- Now is not the time to fundamentally change the Scottish criminal justice system by instituting judge only solemn trials.

That is not a simple solution and will have significant consequences, requiring resourcing implications such as additional judges. It is possible that any change of this nature may give rise to legal challenges.

¹ By remote balloting in order to keep the risk down we have suggested that the jury ballot could be carried out with only those selected then attending.

² Consistent with Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019

³ Hearsay provisions

⁴ This could include medical professionals.

- Maintaining jury trials is our preference in seeking to make practical changes.

We accept that adjustments could be considered to reduce the numbers of jurors and to modify the respective summary/solemn sentencing powers. These would require legislative adjustment to the Criminal Procedure (Scotland) Act 1995 which would inevitably delay the restart of jury trials.

We welcome that announcement by the Working Group led by Lady Dorrian today that jury trials are to restart in July.

That swift approach endorses our preferred practical solution outlined above in response to the COVID-19 pandemic emergency and is echoed by Cabinet Secretary for Justice, Mr Yousaf in addressing the issue of delayed jury trials. He recognises that:

“victims, witnesses and accused, .. are all anxious to have their day in court and move on with their lives [with this] announcement bring[ing] us an important step closer to enabling this to happen in a manner which safeguards both the interests of justice and of public health.”

Background

All criminal business ceased in March in immediate response to the COVID-19 pandemic emergency. As part of the response to the emergency, a proposal was introduced to conduct judge -only trials by removing juries under the Coronavirus (Scotland) Bill.⁵ The relevant provision was withdrawn during the Emergency Parliamentary debate on 1 April to allow time for consultation on a range of options. A Discussion Paper⁶ was subsequently introduced by the Scottish Government with various options where we refer to our published response⁷ on 17 April 2020. The Cabinet Secretary for Justice, Humza Yousaf, then chaired a series of roundtable discussions with those involved in the justice sector on the options available to facilitate a restart, confirming subsequently that the Scottish Government would focus on four of these options.⁸ These options include

- solemn trials with smaller juries
- social distancing within existing court facilities
- measures to increase capacity to deal with a backlog of jury trials following the easing of restrictions

⁵ Now the Coronavirus (Scotland) Act 2020- Schedule 4 Paragraph 11 of the Coronavirus (Scotland) Bill

⁶ <https://www.gov.scot/publications/coronavirus-covid-19-options-for-progressing-the-most-serious-criminal-cases/>

⁷ <https://www.lawscot.org.uk/media/368671/2020-04-17-crim-consultation-response-to-discussion-paper-on-covid-19-and-solemn-trialsrrcorr.pdf>

⁸ <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/05/12/jury-trials-working-group>

- potentially adjusting the sentencing powers of sheriff courts.⁹

The Justice Committee of the Scottish Parliament has now commissioned a very short-term piece of work, following the impact of the COVID-19 pandemic emergency on the Scottish criminal justice system, to consider the issues involved in “Restarting jury trials” which the Committee recognises is not a simple process. It involves:

- policy decisions whether juries are to be retained and/or whether the size of a jury panel could be reduced and
- practical aspects such as how social distancing can be maintained in a courtroom and in a way that allows jury members, court staff, lawyers etc to travel to/from court in a safe manner.¹⁰

The Working Group on Restarting Solemn Trials¹¹ set up under Lady Dorrian is now running in tandem to the Committee’s work.¹² Its remit is focusing initially on High Court trials but includes, inevitably, the consequences on the scheduling of sheriff and jury trials so it seems wider than that of the Committee. It extends to consideration of:

- how the physical and other practical constraints on jury trials might be overcome
- alternative uses of space in the court setting
- innovative use of technology,
- how far a smaller jury size will make it easier to meet social distancing requirements
- any legislative changes needed to facilitate the necessary adjustments to trial practice and procedure
- the potential effect on the rate at which trials may be processed.

The Society’s Position

Since the COVID-19 pandemic emergency, our President, John Mulholland indicated that he would “work positively with the Scottish Government around the changes which are necessary to our justice system to deal with the spread of COVID-19.” As the lockdown eases, in a planned and measured manner, constructive discussions are taking place across the Scottish criminal justice system on how best to overcome the significant challenges in getting solemn trials restarted.

Though four options are under active consideration, holding judge only trials have not been ruled out.

⁹ <https://spice-spotlight.scot/2020/05/14/coronavirus-covid-19-trial-by-jury/>

¹⁰ Justice Committee 13th Meeting, 2019 (Session 5), Tuesday 19 May 2020 Restarting Jury Trials Note by the clerk Paragraph 9

¹¹ <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/05/12/jury-trials-working-group>

¹² Stuart Munro and Ronnie Renucci represent the Society and Faculty respectively on this Group. Two meetings have now been held.

We do not support the introduction of judge only trials during the period of the COVID-19 pandemic.¹³ Our position at the time of the Discussion Paper was to support the retention of the current court system. It needs configured to support the needs of social distancing with consideration given to the physical and technical modifications which will be required which we discuss below. In our view, that continues to provide the best basis for developing and operating a practical workable solution.

We are concerned that evidence may be put to the Committee to indicate that it is either not possible or is practically impossible to run jury trials in the current circumstances. We would resist any suggestion that judge only trials becomes the Scottish Government's preferred route and consequently, the default position.

We encourage adopting the approach taken in England and Wales¹⁴ where jury trials have now restarted, following the Working Group chaired by Mr Justice Edis.¹⁵ That work established ways in which a small number of jury trials could be commenced safely, in line with regulations allowing all participants in criminal trials to travel from home to court. As we continue to develop solutions, we suggest that the feedback from the monitoring and evaluating of the experiences of England and Wales in holding jury trials should be invaluable. This will allow those involved in assessing what are the best practices to adopt. That can be coupled to the practical experience to date in Scotland from those who have already appeared virtually by using technology such as in the commercial court¹⁶ and the Appeal Court.¹⁷

What we are focused on is a solution-based approach, given the public interest in having these solemn trials restarted. In this response to the Justice Committee, we focus on the policy, practical and operational challenges faced in restarting jury trials.

Policy Considerations

It is essential that solemn business can be restarted safely, given the public interest in justice and in maintaining confidence in the Scottish criminal justice system. There is a need to acknowledge the conflicting interests of the victims who are expressing deep-rooted concerns at further delays in trials

¹³ <https://www.lawscot.org.uk/media/368671/2020-04-17-crim-consultation-response-to-discussion-paper-on-covid-19-and-solemn-trialsrrcorr.pdf>

¹⁴ <https://www.judiciary.uk/announcements/jury-trials-to-resume-this-month/>

¹⁵ <https://www.judiciary.uk/announcements/jury-trials/>

¹⁶ 10 May 2020 <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/05/10/first-virtual-sheriff-court---inverness>

¹⁷ 21 April 2020 <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/04/17/first-online-hearings>

taking place which is having a catastrophic and deeply humiliating impact on them and their families¹⁸ and the accused, some of whom have now been facing lengthy periods on remand in custody.

There were already significant backlogs in the system acknowledged in September 2019¹⁹ and prior to the commencement of the COVID-19 pandemic emergency.

We recognise that this backlog will inevitably have increased appreciably since all solemn business stopped in March 2020 and without necessary steps being taken, will continue to impact. Factors such as the lockdown will have had an “as yet” unquantified effect on the incidence and investigation of crimes, both past and present, as well as the ability to commence proceedings by petition (the first procedural state) in initiating the hearing of new solemn or serious criminal cases.

We acknowledge that indicative figures of a backlog of 1700 cases if social distancing remained in place were quoted by Eric McQueen, Chief Executive of the Scottish and Courts Tribunal Service in his evidence session to the Committee on 19 May 2020.²⁰ Exact figures are of course difficult to obtain. However, to give an indicative scale of the volume of business being undertaken by the High/Sheriff and Jury Courts respectively, the number of indictments registered in the High/Sheriff and Jury Courts are set out below:

Table extracted from the Scottish Courts and Tribunal Service²¹²² Number of Indictments registered

Year	2019-2020	2018-2019	2017-2018	2016-2017
No of High Court Indictments registered	794	911	718	587
No of Sheriff and Jury Indictments registered	4150	5182	4979	5899

From the 2019-2020 figures, the quarterly breakdown shows registration of indictments as 248/272/274 (High Court) and 1385/1327/1438 (Sheriff and Jury) with no figures shown for the fourth quarter.

The decisions as to the volume of cases where prosecution is commenced and how that translates into the forum for hearing the court proceedings lies entirely in the discretion of the Lord Advocate and the Crown

18 Acknowledgement to Victim Support Scotland Kate Wallace Chief Executive <https://www.lawscot.org.uk/media/368671/2020-04-17-crim-consultation-response-to-discussion-paper-on-covid-19-and-solemn-trialsrrcorr.pdf>

19 <https://www.scottishlegal.com/article/prosecutors-face-unresolved-backlog-of-14-000-cases>

20 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12650&mode=pdf>

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

22 <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/03/07/criminal-courts-figures-published>

and Procurator Fiscal Service (COPFS). These figures emphasize the need to provide a way forward to deal with the volume of business and that is flexible enough to deal with our phased return through various stages as we return to business as usual.

That solution must first address the fundamental requirement of keeping everyone involved in solemn trials safe in accordance with the ongoing Scottish Government health advice and complying with the health and safety requirements in the courts. The solution must be flexible enough in order to accommodate the emerging and evolving medical advice²³ as more is ascertained about the contagious nature of the disease and the lockdown eases in the First Minister's description of "a phased resumption of aspects of the criminal justice system."²⁴

Restarting of jury trials cannot be considered in isolation as before any such trials may commence, according to the law, the trial starts with the initial stages in the police station. Each step in that process (including any police station detention and interview processes and the pre court hearings) must be safe for all during the COVID-19 pandemic. We are aware of work going on across the Scottish criminal justice system regarding the provision of the relevant safe systems and practices in the police stations and for the sheriff courts as they resume business. These initial procedural and evidential requirements cannot be ignored as the solution to be finally adopted must be examined to ensure that it complies fully with the rule of law, human rights and the interests of justice.

We consider these aspects in addressing the practical and operational challenges²⁵ being faced.

Practical and operational challenges

The model for a solemn trial should still look like a jury trial. 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, that does not require a jury trial. These issues are governed by the Member State's own procedural criminal justice framework.

Trial by jury in Scotland is one of our foremost safeguards afforded to the accused persons in the Scottish criminal justice system. We do not consider that the COVID-19 pandemic emergency is the time to alter this fundamental aspect of Scotland justice system.²⁶ The current system should be adapted/modified to meet the needs of health requirements.

²³ Dr Jim McMenamin Incident Director for COVID-19 and Interim Clinical Director, Public Health Scotland

²⁴ <https://www.gov.scot/publications/coronavirus-covid-19-update-first-ministers-speech-21-2020/>

²⁵ Justice Committee 13th Meeting, 2019 (Session 5), Tuesday 19 May 2020 Restarting Jury Trials Note by the clerk Paragraph 11

²⁶ http://www.parliament.scot/S5_JusticeCommittee/Meeting%20Papers/SHRC_20_04_COVID19_Criminal_Trials_BriefingvFinal.pdf

Timescales

For most aspects of the solution, we consider that primary legislative changes will be required though we recognise that there are details which can be left to the discretion of the Lord Justice General and could be contained in an Act of Adjournment or regulations to follow. Legislative changes would need to accommodate changing of the number and/or empanelling of jurors. As parliamentary time is needed to introduce legislation, we assume that that has an inevitable impact on the potential timing of any restart to solemn business. This does not seem likely in the immediate short term if legislative changes are required.

Delivery of key messages about the planning and timing needed to restart solemn business are essential now. That will provide the necessary certainty for all involved such as the SCTS in taking forward arrangements for the citing of jurors, COPFS to serve indictments and organise witnesses and the defence to prepare on behalf of the accused. It also provides victims and their families and the accused with a timeframe that is absent at present.

We had considered that September 2020 might prove to be the earliest practical timing for a restart allowing time for schools to reopen, and when public transport and businesses may be expected to restart and be operational.²⁷ That would allow for time to undertake any necessary legislative changes that were required (whether involving emergency or expedited parliamentary processes).

Importantly, that would allow time for the development of a plan for the citing of jurors, and utilising remote technology for balloting.²⁸ This would factor in the publication of juror information to take account of their needs, such as additionally, for excusals relating to COVID-19 for those with caring responsibilities (recognising that schools may not be fully operational and child care issues may continue to arise) and those falling within vulnerable categories (including “protected characteristics” and those with continuing shielding needs).

Valuable learning can be gleaned from England and Wales where their publication containing summons information for jurors²⁹ includes advice about excusals for self-isolating or other reasons why they cannot attend (which may of course be modified in due course) and about their need to provide their own food and water and sanitisers. That provides a practical basis from which to start here. Reference is also made to the publication of a Checklist on “*Our Commitment to running jury trials safely*” endorsed by Public Health England and Public Health Wales³⁰ which we understand is a good practice note being followed by SCTS in Scotland.

Since attending court is a legal and civic responsibility, subject to certain statutory exceptions, consideration needs to be given to the clear message to be sent to jurors when expecting them to turn up

²⁷ Phase 3 <https://www.gov.scot/publications/coronavirus-covid-19-framework-decision-making-scotlands-route-map-through-out-crisis/pages/4/>

²⁸ We referred previously to the ballot being conducted remotely at 9.30am using text messaging or the day before to limit the number of persons traveling <https://www.lawscot.org.uk/media/368671/2020-04-17-crim-consultation-response-to-discussion-paper-on-covid-19-and-solemn-trialsrrcorr.pdf>

²⁹ <https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation#jury-trials>

³⁰

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885672/HMCTS_Jury_trails_checklist_V1.0.pdf

at court as to ensuring their confidence and maintaining their safety is paramount for them, just as for anyone else involved in the solemn trials process. Safety in this context must include that of public transport to court which we recognise may also potentially restrict the available numbers of jurors and their ability to travel any distance to court. These are factors to consider if considering restricting the number of jurors attending which would ease the pressures in court of maintaining social distancing and the risk of aborted trials.

Adapting the Court Estate

The SCTS court estate where trials can be held is finite. That needs configured practically to meet the public health considerations to be in place for the future.

We understand that planning is being undertaken by the SCTS now to calculate how the courts (allowing for 2 metre distancing) can be utilised and appropriately adapted. There are implications as to which courts and where the business could be held, where, inevitably, the primary focus lies in using the existing larger courts to allow for social distancing to accommodate the jury, witnesses, public and court officials. More than one room is needed but not necessary more than one court is required.

We seek early publication of SCTS's risk and court assessments and thereafter public engagement with the relevant criminal justice organisations as to how the business will run as this may promote useful local dialogue as a one size approach will not fit all. These assessments are crucial in providing information on how feasibly the courts can be utilised and how much business can safely be carried out.

There is in our view a need to be creative and innovative in seeking out solutions to meet the challenges of social distancing. We are not responsible for the architecture of the Scottish court estate. SCTS are best placed to be aware of the accommodation and configuration of the courts. There are practical and flexible ways that can be used to respect the public health needs while addressing the important responsibilities of SCTS towards all court users during the pandemic emergency. These include:

Public hearings- Accommodation must be made for hearings to be in public unless the court is closed or judicial discretion permits for the "protection of private life of the parties" which raises ECHR issues and of compliance for the Scottish Government. There is no legal requirement for the public to be housed in another room within the same court. The trial may be streamed to another location as was undertaken during the Manchester Arena court proceedings or indeed smaller rooms within the court building such as conference or office accommodation could prove suitable. The respective interests of the victim's and the accused's respective families need to be respected since they along with the press have a right to hear.

Other courts and alternative properties- Though the solution is meanwhile prioritising the running of High Court trials, we consider that the use of other court buildings such as those used formerly for peripatetic High Court trials such as large courts in Ayr and Dumbarton may also be considered. These are in addition

to those mentioned as being capable of running in Glasgow and Edinburgh High and Sheriff Courts.³¹ It is important to recognise just how many trials can be run at any time but not every case that is indicted to any sitting will go to trial as inevitably, some resolve in pleas, are adjourned or deserted. Indicting cases to sittings will promote the efficient operation of court business as it focuses the Crown and defence on being ready to proceed to trial. Once these sittings are underway, that will allow for a few cases to be concluded without the need for further extensions of time and the resultant closure on both victims and the accused.

Early discussions centred around the use of alternative properties such as theatres, cinemas or indeed, we would suggest unused conference spaces. There seems every reason to explore this option further where appropriate given the importance of making court space available to reduce the backlog of solemn trials in the interests of justice.

We are aware too of the need to consider the effect of carrying out other business such as sheriff and juries and summary courts as there may be fewer courts available if the High Court takes over several court rooms. This supports the need to explore other appropriate venues- as indeed, Fatal Accident Inquiries³² are housed outside the main court estate. There would need to be arrangements made for cleaning and obtempering the public health advice.

Use of technology

There are certain limitations to the trials that can be held as we recognise multi-accused or complex fraud trials may be challenging to run. However, there are trials that can be identified now and, in the future (and where we would encourage early identification by COPFS and discussion with the defence) and these can be prioritised, potentially those involving fewer witnesses.

Our earlier response³³ highlighted a number of aspects where technology can be utilised to facilitate the holding of such trials, including the use of pre-recorded evidence such as taking evidence on commission, section 259 of the Criminal Procedure (Scotland) Act 1995 (hearsay), the recording of expert witnesses and the use of central vault system for documents to remove the need for any paper based system for documentary productions.

There was a further proposal that involved the pre-recording of all the evidence in the trial. Whether this may also provide a realistic solution is queried but it would adopt the approach undertaken in the recent jury research by Glasgow University.³⁴ There would be flexibility regarding the screening to the jury and the saving of time inevitably in marshalling (and consequential risk) witnesses in and out of court rooms.

³¹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12650&mode=pdf>

³² Dunblane and Lockerbie FAs are both examples.

³³ <https://www.lawscot.org.uk/media/368671/2020-04-17-crim-consultation-response-to-discussion-paper-on-covid-19-and-solemn-trialsrrcorr.pdf>

³⁴ <https://www.gov.scot/publications/impact-use-pre-recorded-evidence-juror-decision-making-evidence-review/> and a five-page summary is at <https://www.gov.scot/publications/impact-use-pre-recorded-evidence-juror-decision-making-evidence-review-9781788516679/>

We would also stress the need for education and training for all to be involved in solemn trials. We are aware that possible technical glitches can arise from time to time where the system breaks down. For the maintenance of public confidence in the running jury trials, there is a need for these sorts of issues to be ironed out before any such trials can take place. If jurors were watching evidence being given, it would not necessarily be a simple matter of merely repeating the evidence. There could be adverse implications for the judging capacity of jurors. This would require appropriate training and experience in using the various procedures and technology for all involved.

Number of jurors/jury size

Our view is that the use of 15 jurors should be maintained in High Court trials. We understand as we highlighted above that if fewer jurors are required, this may provide much needed flexibility in approach. This makes it easier to ensure that social distancing can be accommodated, in obtaining the number of jurors required, and reducing the risk for those attending. The recent Jury research³⁵ regarding the clarity of deliberations suggested that there may be little practical effect when using 12 jurors.

Our preference does support the retention of at least 7 jurors as a minimum to allow for up to 2 being lost through illness or other factors. However, before any jury size is agreed, we agree that there must be a contingency plan to deal with the risk as trials should not be aborted unless in extreme and unforeseen circumstances. This pre-planning is required to address the justified concerns expressed by victim groups regarding the risk of trials once started being abandoned as a result of juror illness. Where COVID-19 remains a risk, this would need to be factored into the approach adopted to jurors in solemn trials.

Judges

If the proposal for judge only trials to be adopted, we would echo our earlier comments as to the need to recruit additional judges, especially at sheriff and jury level. Appointments take time, though temporary appointments to the High Court, may present a possible solution, but this would affect the numbers of judges available to carry out business at the sheriff court level and the need to undertake all forms of civil court business.

³⁵ The Report by Vanessa Munro for the Scottish Government on the effect of evidence being delivered via video link rather than in person. The full report is at <https://www.gov.scot/publications/impact-use-pre-recorded-evidence-juror-decision-making-evidence-review/> and a five-page summary is at <https://www.gov.scot/publications/impact-use-pre-recorded-evidence-juror-decision-making-evidence-review-9781788516679/>

Sentencing/Use of sentencing discounts

Sentencing implications arise as sentencing of any accused to custody at this time may present challenges, when considering the effects of the Presumption against Short Periods of Imprisonment (Scotland) Order 2019 regarding sentences of 12 months or less and the ongoing early release of prisoners under the Coronavirus (S) Act 2020.³⁶ The recent English case ³⁷of *R v Manning* has also outlined some salient issues:

“The current conditions in prisons represent a factor which can properly be considered in deciding whether to suspend a sentence. In accordance with established principles, any court will consider the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.”³⁸ (the underlining is our emphasis)

We have questioned the introduction of increasing sentencing discounts if there were early pleas and thereby trials with witnesses were to be avoided. We cannot of course support any suggestion that the Scottish criminal justice system is allowing criminals to benefit during COVID-19. However equally, it cannot be excluded as a factor in ensuring a balance that is fair to the victims and to the accused as *Manning* suggests.

Conclusion

Restarting jury trials is a complex matter. There are significant challenges for everyone involved. During the COVID-19 pandemic emergency and its aftermath, we now know that its effects will be with us and our society for some unquantifiable time. We all have a role in seeking out ways to make the criminal justice system work effectively in undertaking solemn criminal trials, while respecting our basic rights and freedoms that underpin our system and the rule of law.

Reference was made to resourcing in the Evidence Session at the Justice Committee on 19 May 2020 which was felt not to pose a “particular problem.”³⁹ We agree that should not be the focus. A solution needs

³⁶ <http://www.legislation.gov.uk/sdsi/2019/9780111042175/contents>

³⁷ [2020] EWCA Crim 592

³⁸ Paragraph [41]

³⁹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12650&mode=pdf>

to be found that is not about money saving or in introducing radical changes to our system in response to an emergency.

Instead, it is about adopting a positive approach, by working collaboratively and by respecting public health advice.

We stress the willingness of the legal profession to continue to support the work that is underway with Lady Dorrian's group and in working with the Scottish criminal justice organisations in identifying a way forward and making themselves available for any pilots or projects that might be carried out⁴⁰ in modifying and extending the current practices being utilised in court.

⁴⁰ JUSTICE carried out remote jury project already which may have given much information as to how practically to achieve social distancing and carrying out of trials.



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