



Law Society  
of Scotland

# Law Society of Scotland

## Report on the Feedback on the Experiences of Virtual Custody Courts by Scottish Solicitors

– Analysis of the Survey Responses

July 2020



## Introduction

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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 ongoing coronavirus pandemic has and continues to substantially affect our daily lives. We are continuing to adapt both our working and personal lives in order to minimise its impact. Emergency legislation has been passed at both Westminster and Holyrood Parliaments along with a number of health protection regulations that have been made by Scottish Ministers, which have imposed stringent conditions on us all and which often run counter to the normal freedoms which we take for granted.

The Scottish criminal justice system has required to meet the challenges presented by COVID-19 to public safety and respect the need for social distancing. Initially, all criminal court work ceased, with what is now a phased return to what will become the "new normal." Though social distancing measures are easing, there is still a need to be vigilant while finding versatile solutions to the problems now facing the criminal justice system.

The need for our courts to handle all criminal business is a priority.

This report relates to that part of the business relating to appearances from custody or custodies. This refers to those persons who have been held in custody in a police station pending their appearance in court in terms of section 21 of the Criminal Justice (Scotland) Act 2016. The decision to hold such persons are made by Police Scotland at their discretion but factors governing those being held will tend to include the seriousness of the offence, potential risk to the public and previous record of offending.

Disposing with those appearing from custody is an important part of the criminal justice system and it is essential that they are dealt with in accordance with statutory timescales. The interests of justice require that these cases where the accused appears from custody, having been held in police custody, are handled fairly and with transparency.

At the Pleading Diet, usually referred to as the "custody court" as the court will be specifically sitting to deal with those that have been held in custody, the accused will be called upon to tender a plea in response to the complaint/petition that will have been served on them. The volume of those requiring to appear at the "custody court" varies from day to day, from place to place. Mondays and days following public holidays tend to be busier. The common factor is the need for each court to deal with the custodies effectively on a day to day basis.

Given the impact of COVID-19, the courts have required to find a way to deal with custodies on an ongoing basis, including those accused who had or were suspected to have COVID-19. This has resulted in the evolution of a piecemeal approach on how custodies were handled across the country affecting the different courts that were operating. As time has gone on, this has extended to certain courts arranging for some accused to appear remotely.

When the accused appears, they are asked to tender a plea. If proceedings are not then immediately disposed of by way of sentence or if the plea is one of not guilty, the case will be continued to sentence/trial in due course. The issue of the accused's liberation pending sentence/trial then arises which requires to be judicially considered.

That judicial decision focuses on the basic question of deciding whether to remand the accused in custody or to grant a warrant for the liberation of the accused, either by the accused being ordained to appear or to be admitted to bail on the standard conditions of bail and where appropriate, the application of special conditions of bail.<sup>1</sup> Admitting to bail effectively involves imposing restrictions on the personal freedom of the accused where justified, to ensure ongoing public protection and safety. Each procedural and evidential requirement that arises from such preliminary processes (following on the procedures and interviews previously undertaken at police stations) and which includes all appearances from custody to the trial, if appropriate and/or sentence must comply with the rule of law and human rights.

The Scottish Courts and Tribunals Service (SCTS) has ensured that the Scottish criminal justice system continues to operate during the restrictions that have been in place during the coronavirus pandemic. That has necessitated rearrangements of how the court business is conducted, including custody courts.

A pilot scheme operated by Police Scotland has seen the introduction of five virtual custody courts, which has involved the accused appearing remotely from a number of police stations. We understand the longer-term plan is to extend the use of virtual custody court appearances to 16 hub courts. No timescales have yet been set for such expansion.

There is a need to understand how the proposed use of virtual custody courts impacts on the way that criminal justice is administered. Assessing the early stage of these pilots allows all such views to be considered.

The Society recently undertook a short online survey as part of the ongoing monitoring of these pilot custody courts to gain a better understanding of our members' experience of the use of such virtual custody court appearances to date. This included views on their ability to work effectively in the interests of justice. This survey included those appearing on behalf of Crown Office and Procurator Fiscal Service (COPFS) and those appearing as defence agents on behalf of their clients. We undertook this online survey from 30 June to 9 July 2020 to ascertain experience to date to provide an evidence base to inform any extension.

<sup>1</sup> Section 24 of the Criminal Procedure (Scotland) Act 1995

Simultaneously, as a separate exercise, we also set up a focus group which has met twice<sup>2</sup> virtually and is continuing to obtain direct evidence of what is happening across Scotland. Membership includes members of various Law Society's committees, various Bar Associations and the Scottish Legal Aid Board. The conclusions of the focus group are included in Appendix 2 of the report.

It is intended that the report will be used to inform discussions with key stakeholders in connection with the virtual custody courts pilot. It will help to provide an evidence base about the impact of the proposed introduction of virtual custody courts. It will allow consideration of any subsequent measures which would be required to protect the rights of individuals appearing from custody and to facilitate solicitors' effective professional representation of their clients while upholding the rule of law in having an effective criminal court system in Scotland.

We would like to thank all the individuals who responded to the online survey and have taken and continue to take part in the focus group work.

## Summary of the Report

There were 144 responses from practitioners who had direct experience of virtual custody courts. This represents 10.4% of solicitors who are registered for criminal and/or criminal legal aid business.

- Key findings: 15% of respondents had participated only once at a virtual custody court, 45% between two and four times and 40% had participated 5 or more times. Most respondents indicated that communication was either by phone (92 consultations) or by videoconference (76 consultations). 81% of respondents were either dissatisfied or very dissatisfied with the client consultation process with only 10% indicating that they were either very satisfied or satisfied with the process.
- Most defence agents (78%) experienced problems in obtaining sight of the papers/arranging the client consultation.
- Most responses (58%) indicated a preference for video conferencing over telephone.

The safety of all involved in the criminal justice system and in arranging for appearances in the court is paramount; adopting measures to reduce the risk of disease transmission is required and is a benefit of this proposed pilot process. However, the interests of justice must balance these arrangements.

Virtual custody court pilots have been introduced in response to the COVID-19 pandemic although the concept of parties appearing remotely, such as witnesses, formed part of the context of the Evidence and Procedure Review<sup>3</sup> which took place from 2013-2016.

<sup>2</sup> 2 and 14 July 2020

<sup>3</sup> <https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>

Our survey's findings have shown that solicitors experienced a range of practical problems in undertaking pre-court consultations with their clients which stemmed from the lack of appropriate facilities, causing considerable delays and frustration for all concerned.

However, there are potential advantages of having virtual custody court appearances during the COVID-19 pandemic to respect the requirements of social distancing. These include:

- no personal presence from the accused which is helpful where the accused is suffering from or suspected to have COVID-19. The risk to all is minimised.
- having as few persons as possible in the court, probably just the sheriff and sheriff clerk with the procurator fiscal (PF) and the defence agent appearing remotely.
- Avoiding the need for the accused to travel to court along with other accused persons and the use of police and GEOAmey staff.
- Reduction in the need for the defence agent to travel to court.

There are different stages involved the process of custody courts, whether virtual or in person. These stages consist of

1. initial and pre-court client consultation (solicitor and client)
2. pre-court consultation with the PF Depute (solicitor and PF Depute regarding charges, pleas and bail position)
3. court hearing which may require further ongoing consultation with the client (as a result of the sheriff 's questions)
4. post-court consultation (if required to check understanding such as special conditions of bail)

Not all cases will require each step to be taken as there can be overlaps.

For example, on occasion, there may have been little opportunity to arrange any pre-court consultation with the client outside the actual courtroom which means that consultation would need to take place in court. This may be the case for instance where the complaint has not been available in advance to the defence. There may on occasion not need to be a post court consultation. Successful completion of Steps 1 and 2 facilitate the efficient running of the court hearings.

What has not been specifically addressed meantime, as far as the virtual court hearing is concerned, is the need for public access in summary cases.<sup>4</sup> Accommodation will need to 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 then raises potential ECHR issues and of compliance.<sup>5</sup>

<sup>4</sup> Petition proceedings are of course heard in private.

<sup>5</sup> We recognise that proceedings may be streamed to another location as was undertaken during the Manchester Arena court proceedings or indeed smaller rooms within the court. The interests of the accused's families need to be respected since they along with the press have a right to hear proceedings.

The COVID-19 pandemic has presented us with significant challenges. It is important to view the report against a background which has required the profession along with others to work in a completely different way.

Even as the survey was being undertaken, the technology used for virtual custody courts remained under consideration. Police Scotland has continued to trial other forms of technology<sup>6</sup> to underpin the effective use of virtual custody courts. Solicitors have been invited to provide feedback on demonstrations of alternative technology and will continue to do so during the pilot period.

Any adoption of virtual custody courts as a practical ongoing solution or practice requires effective technology to be in place, to ensure confidence from all who are involved in the system, from the accused to the judiciary, the defence and Crown, and the courts and police staff.

For virtual custody courts to operate, the technology underpinning the court hearing must support processes which will ensure effective consultation systems are in place so that all necessary consultations can be undertaken. If consultations cannot be undertaken face to face, the clear preference is for video to be in place rather than just a telephone consultation. The argument is that at least by video conferencing, there is an ability to see who the client is speaking with and for the client to feel more involved in the proceedings. The importance of verbal cues was also mentioned in measuring effective understanding.

The proposed introduction may have been required as an immediate response to the COVID-19 pandemic, ensuring that an accused person who has or is suspected to have COVID-19 could appear remotely. For virtual custody court pilots to continue, and potentially be adopted more widely, the difficulties which have been highlighted to date must be resolved by effective working technology. A commitment to ensure ongoing communication with local Bars and Faculties and to carrying out overall monitoring and evaluation is also vital to promote understanding and consistency of approach.

We are aware that there could be some potential advantages to the virtual courts, such as their use in rural areas which would cut down on travel and allow solicitors to appear in courts outside their immediate area on behalf of their clients. Time needs to be invested in allowing solicitors to become more familiar with the use and practice of the technology and experience involved to support any virtual custody appearances.

The report's findings demonstrate significant reservations among the respondents to the virtual custody court pilots. These include where the client is not a known client of the solicitor, where for instance they may be appearing as a duty solicitor, and in cases of vulnerability.

Respondents also raised issues on the ability to obtain clear instructions from the client to meet their professional duty in acting in the best interests of their client. Clear and effective instructions are also essential in ensuring solicitors meet their duty to the court.

This report must be viewed against the background of other significant changes affecting the Scottish criminal justice system which have been in the pipeline for some time. These changes may be expedited in

<sup>6</sup> Lifesize where three demonstrations have now been completed with invited members of the profession.

response to the COVID-19 pandemic emergency and include the development of digital evidence vault and virtual trials courts.

All virtual custody court hearings must comply with the European Convention on Human Rights (ECHR) - Article 5 – Liberty and Security of Person and Article 6 – Right to a fair trial. When the accused appears before court, there must be a genuine review on the merits of the complaint/petition and liberty to ensure ECHR compliance. When a judge decides on detention or bail, they must pay due regard to the presumption of innocence, examine all facts for and against a release, and set their decision out clearly. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of the case. It is not for the accused to prove they should be released. They also require access to legal representation.

The use of technology may allow for an increase in the efficiency and transparency of that judicial process and facilitate access to justice for individuals. The term now in use ‘e-justice’ covers a broad range of initiatives, including the provision of online information, the use of video-hearings and conferencing, the online tracking of registration and case progress, and the capacity of judges or other decision-makers to access information electronically. There are no specific requirements in relation to e-justice but implementing e-justice initiatives is subject to the rules on access to a court and the right to a fair trial under Article 6 of the ECHR as highlighted above<sup>7</sup>.

If the technology to be deployed does not allow these to be effectively engaged and secured, there may be potential challenges, not only immediately but in the future as the custody court provides the first stage in the Crown’s prosecution which may ultimately lead to trials and conviction. What underpins that process requires to ensure the rule of law.

## Methodology

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This online survey was issued to 1,383 criminal court and criminal legal aid members of the Law Society of Scotland by targeted email. In addition, a link to the survey was shared via social media channels to encourage responses from our members who had experience of virtual custody courts.

A total of 215 responses were received to the online survey. This report focuses on the responses of the 144 respondents who indicated that they have been involved in one or more virtual custody court hearings at the date of response to the survey.

The survey was open for responses between 30 June and 9 July 2020.

The full questionnaire can be found in Appendix 1.

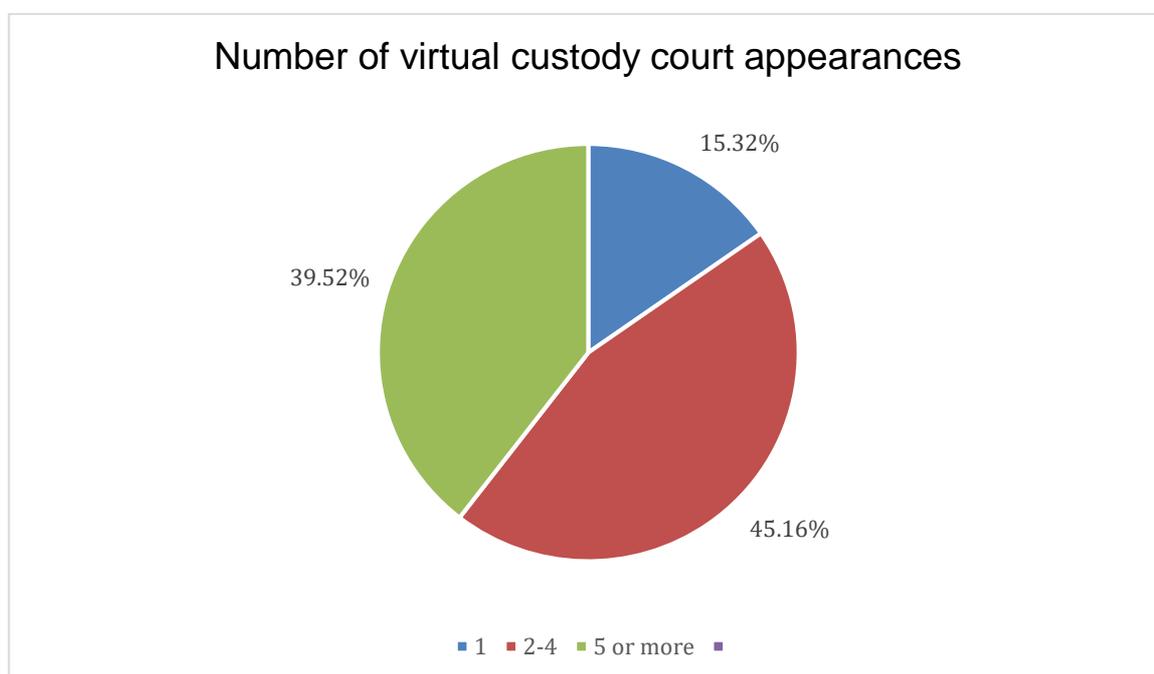
### **Question 1: Have you been involved in a custody court appearance by phone or**

<sup>7</sup> [https://www.echr.coe.int/Documents/Handbook\\_access\\_justice\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf)

## video conferencing?

Of the 215 responses in total, 144 respondents indicated they had direct involvement in custody court hearings by phone or video conferencing. 71 responses could not be considered for this survey as they did not have direct experience of virtual custody courts.

## Question 2: How many times have you participated in virtual custody court appearances?



**15% of respondents had participated only once at a virtual custody court, 45% between two and four times and 40% had participated five or more times.**

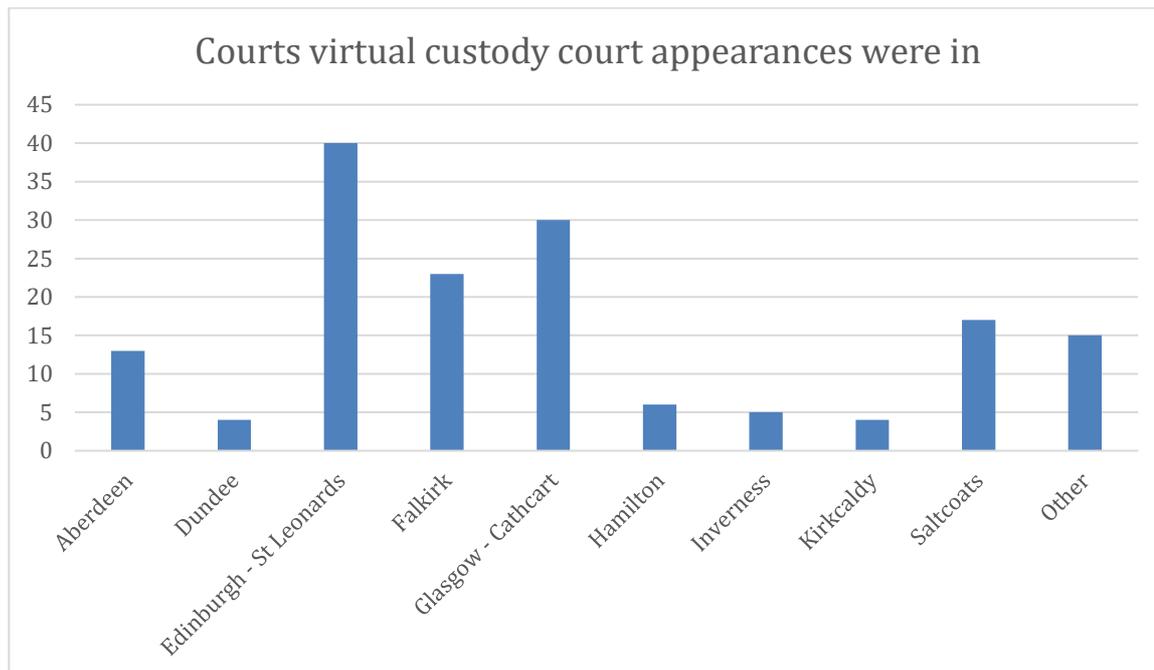
The responses indicate that most solicitors who responded to the survey have participated in undertaking more than one appearance at a virtual custody court for their clients.

The opportunities for the accused to appear remotely may have been limited to date. The pilot was operating over five courts out of forty sheriff courts though not all these courts would necessarily have held a custody court daily. It is understood too that initially, remote appearances were restricted for each of these courts to accused persons who may have or were suspected to have COVID-19. Thereafter other custodies are being selected to appear remotely.

The survey period was relatively short (31 June to 9 July 2020). This may explain why almost half the respondents' appearances were limited to between two and four appearances, however the responses are significant in providing valuable feedback on members experiences of the virtual custody court pilot to date.

Since undertaking the survey, more solicitors will have had the opportunity to participate in appearances for their clients in virtual custody courts.

**Question 3: Which court(s) hosted the virtual custody court appearance(s) you were involved in? Please select all which apply.**

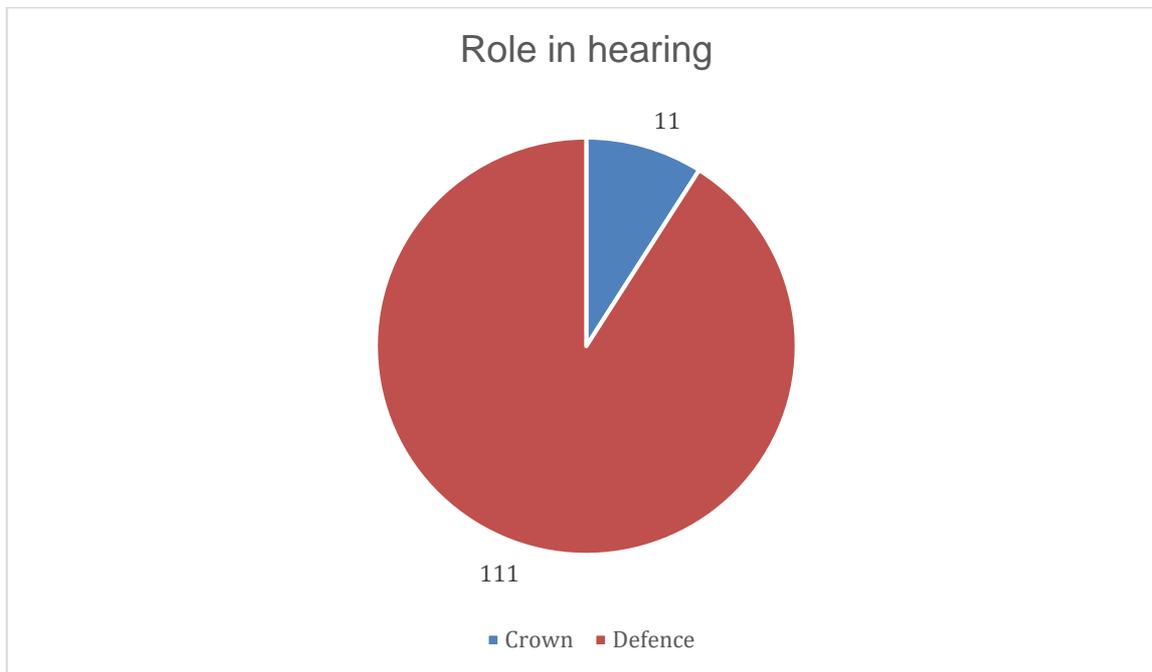


**This chart shows where the virtual custody court appearances took place. The majority were in Edinburgh St Leonards (40) and Glasgow Cathcart (30). It should be considered that those respondents who answered that they had made more than one appearance are basing their responses throughout the survey on custody courts in different locations.**

The virtual custody pilot included five core courts. These were Aberdeen- Kittybrewster, Edinburgh – St Leonards, Falkirk, Glasgow – Cathcart, and Saltcoats). There were several other courts that were identified and included in the “other” option.

Respondents have covered nine courts in which they identify that they have had experience of appearing in virtual custody courts which is helpful in providing a Scotland-wide perspective. The courts chosen include both rural and city based.

#### Question 4: In what capacity did you appear?

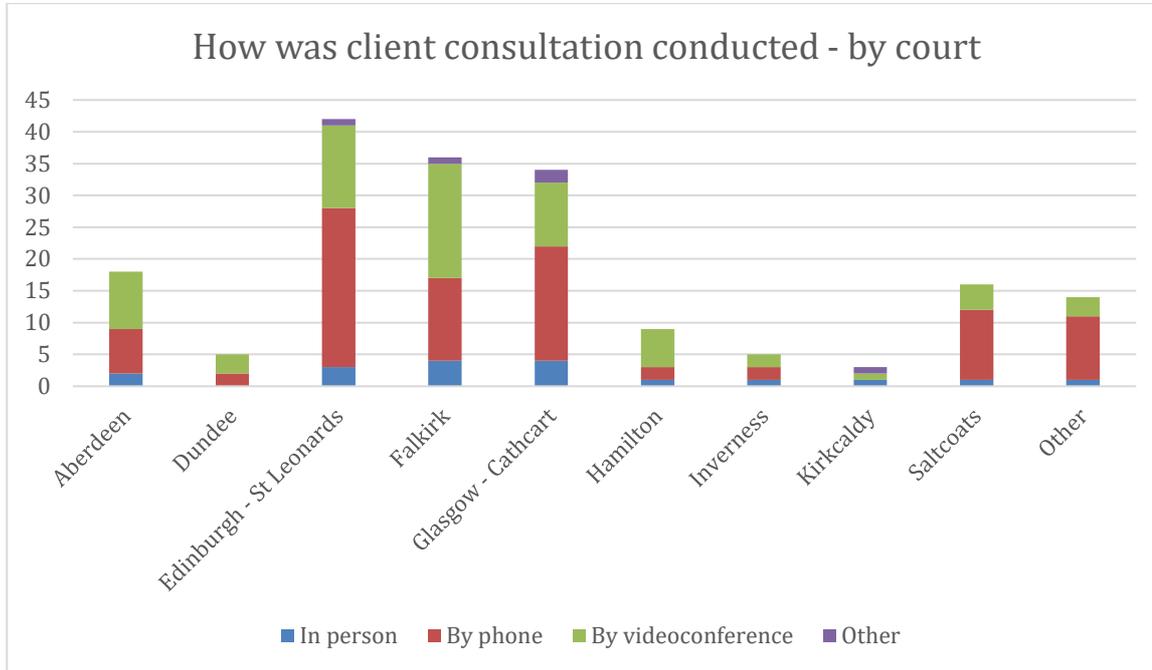


**There were 125 responses to this question. The vast majority (111) answered defence, (11) prosecution and (3) other.**

One "other" response referred to acting as an instructing agent and was included with the defence responses. Two "other" responses were discounted as being too low a response rate to be statistically relevant. Respondents who replied "Crown" or "Other" skipped the next set of questions (Questions 5 – 11) which were focused on solicitors' experiences who appeared as defence agents.

Views from both the COPFS and defence perspective are important when monitoring the impact of the virtual custody courts pilot. There is a need to recognise the different perspectives and what is involved from each of the COPFS and defence. For COPFS, there is a need to be able to communicate effectively with defence solicitors prior to and during the hearing. Additionally, for the defence, there is a need to secure effective and confidential communication with the accused before and after the hearing. There may also be an ongoing need to consult with the accused and between COPFS and the solicitor during the virtual custody court hearing.

## Question 5: How did you consult with your client prior to the virtual custody court?



**This chart provides a breakdown of means of communication between defence agent and the accused prior to the virtual custody court appearance. Most respondents indicated that communication was either by phone (92 consultations) or by videoconference (76 consultations).**

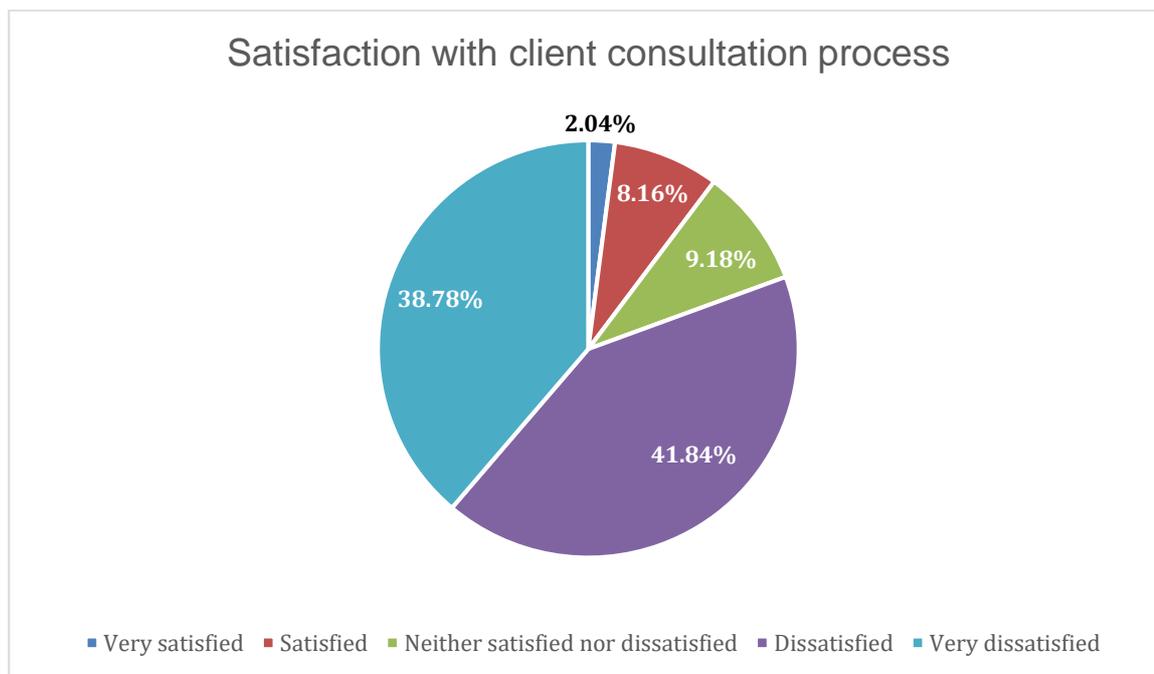
Some responses originally listed as “other” have been reallocated as videoconference or phone call where this was clear from the detail specified when “other” was chosen as a response.

There is a need to ensure with virtual custody courts that there can be effective consultation achieved with the client which fundamentally respects client confidentiality. For defence solicitors, they must be able to obtain instructions on the charges appearing on the complaint/petition as well as to advise on the bail position and/or special conditions of bail. There is also a need to be able to communicate with the Crown prior to any court hearing to ascertain the COPFS views to any preliminary plea to the competency or relevancy issues as well as tendering any pleas and/or the COPFS’s attitude to the bail position (including special conditions and address) to ensure that their client is represented effectively and any court hearing can be conducted efficiently and effectively.

That client consultation can be achieved in several ways: in person, by video conferencing or telephone. What is clear from the responses on virtual custody courts, is that representation should be better achieved by video conferencing given that important issues of liberty are under consideration. These require face-to-face contact so that solicitors can be aware of the body language and to reflect and gauge understanding of what is under discussion. Video conferencing rather than telephone contact helps to ensure that confidentiality is being respected.

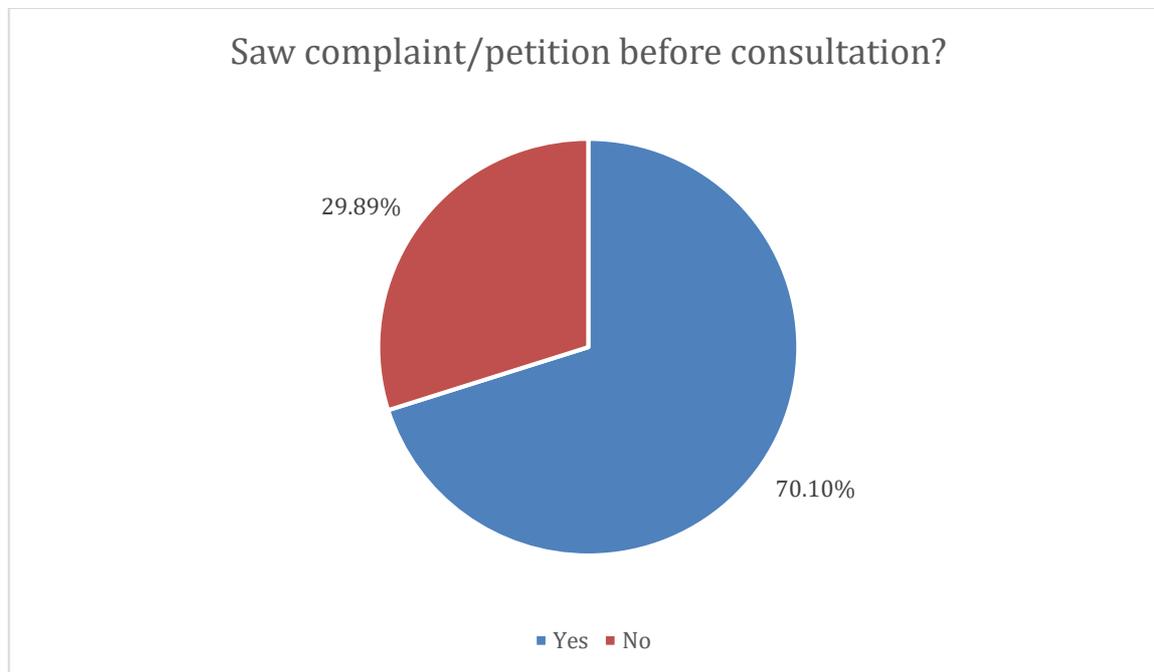
There must be consistent arrangements in place so that private consultation can be achieved successfully. The responses to the survey have demonstrated that absence of these arrangements has presented a major source of problems for solicitors and their clients. These were compounded by problems arising from the use of technology. These issues tended to be practical in nature in that there were insufficient monitors for the agents to use, resulting in substantial delays and frustration. This was compounded by issues with visibility and audibility regarding the provision of the mobile phone signal where the experience from one agent was described as “terrible.”

### Question 6: How satisfied were you with your experience of the client consultation process?



**81% of respondents were either dissatisfied or very dissatisfied with the client consultation process with only 10% indicating that they were either very satisfied or satisfied with the process.** The findings clearly highlight the difficulties solicitors have had in communicating effectively with their clients and which will need to be addressed if the virtual custody court pilot is to be successful.

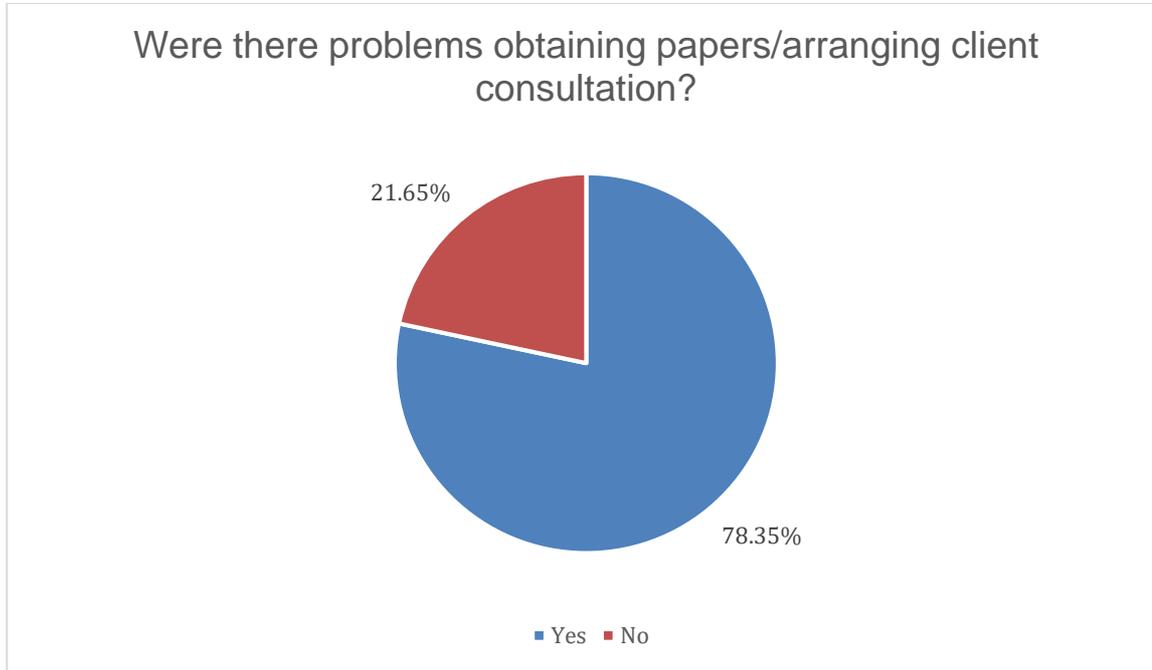
**Question 7: Did you have sight of the complaint/petition before or during your consultation with the client?**



Responses to this question indicated that 70% of respondents had seen the complaint/petition and 30% had not seen the complaint/petition prior to consultation. While most defence agents had sight of the complaint/petition prior to or for the purposes of conducting the client consultation, which is vital in securing instructions, some indicated they may not have had sight of this at the initial consultation, but obtained this later

“Not applicable” was available as an answer to this question. The only response to this stated that on some occasions it was not available at the initial consultation, but they had a further consultation with the client before the case was called. This response was therefore moved to the ‘yes’ response.

**Question 8: Did you experience any problems in obtaining the papers/arranging the consultation?**



**Most defence agents (78%) experienced problems in obtaining sight of the papers/arranging the client consultation.**

The responses included a variety of reasons from timing issues, practical issues with communication and to the availability of the procurator fiscal depute to discuss pleas and issues of bail and special conditions. These issues appeared to be widespread arising across all courts where the level of frustration and delay experienced was significant.

One response indicated that there was increased pressure placed on the defence solicitors as “the court will expect the defence to be ready when the crown and court is, that inevitably puts pressure on the defence to simply hang about awaiting developments.”

Examples highlighted timetabling and scheduling issues with custodies which included lack of understanding as to which court the client was appearing at and the means to organise the client consultation.

The results indicated a lack of information being transmitted successfully across all organisations from staff at the police station including GEOAmy<sup>8</sup> to the staff at the court. Communication issues affected all aspects of the process. Some of that lack of communication may have resulted from the need for a swift response to the COVID-19 pandemic, resulting in some of the new arrangements being, understandably, piecemeal

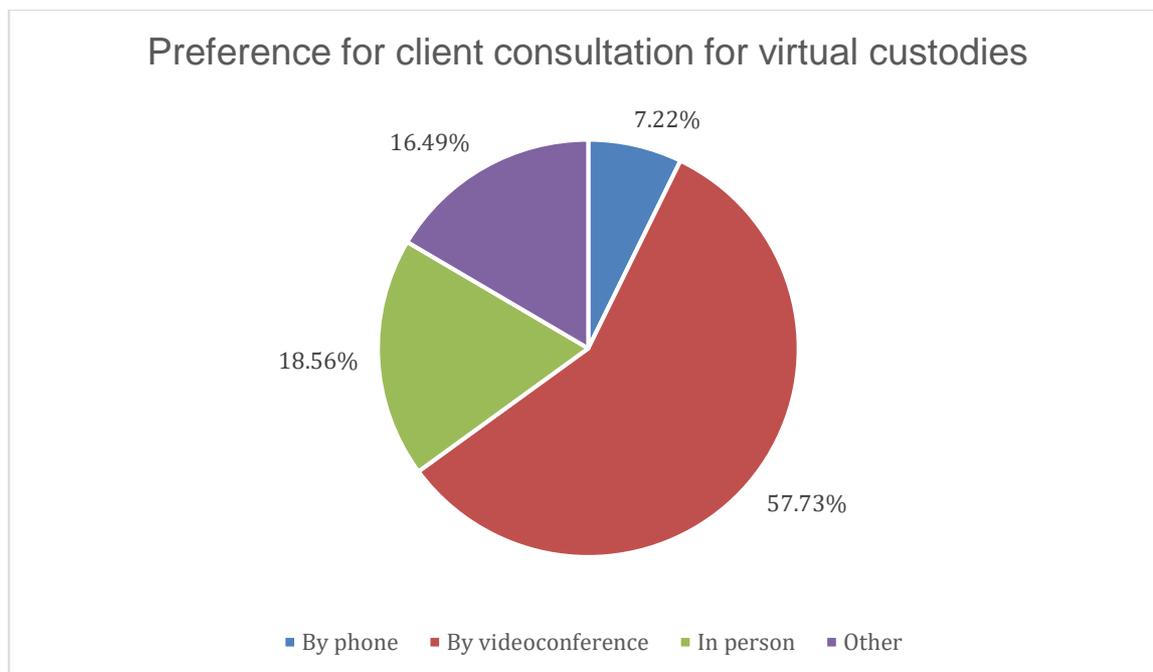
<sup>8</sup> Paragraph 2 of Schedule 2 of the Coronavirus (Scotland) (No.2) Act 2020 Arrangements for the custody of persons detained at police stations <https://www.legislation.gov.uk/asp/2020/10/schedule/2/enacted>

and evolving. In taking the pilot forward, this will need to be addressed so that there is a common understanding of the roles and responsibility for effective communication.

Delays, understandably caused by undertaking necessary sanitising requirements, will need to be factored into timing and scheduling custody arrangements.

Issues also arose where the communication required the use of interpreters.

**Question 9: It is proposed to move to holding remote only custodies in future. If this is to be the case, how would you prefer to conduct the consultation with your client?**



**Most respondents (58%) indicated a preference for videoconferencing if the virtual custody courts were to continue. A significant number at 18.6% indicated that they preferred personal client contact as there was a need to assess the client’s vulnerability and fitness to appear that was not possible to achieve otherwise.**

In the survey, only three options were given (by telephone, by videoconference and other). Respondents who gave “other” as their answer were asked to specify what this solution may be. On looking at the text provided it is clear that “in person” was the preferred option for 18 of the respondents who originally answered “other” so for the purposes of reporting, this has figure has been separated out. Seven of these respondents simply wrote “in person.”

Most responses left in the “other” category indicated a preference for “in person” over video or telephone conference but were left in the “other” category because the response given did not clearly state that preference. The responses have highlighted a preference for providing a means for personal client consultations, rather than video or telephone. One respondent summed up the generally held views that “a consultation in person is necessary to ensure that the accused's rights are being adequately protected. It is not possible to assess a person’s capabilities and level of understanding by remote consultation.”

From some responses, they considered that some viable alternative needs to be provided if the client is not able to give instructions via video link.

### **Question 10: Please use this space to explain why you would prefer telephone or videoconference for consultations with clients in custody?**

Most responses (58%) indicated a preference for video conferencing. There were several reasons provided for this as a preference, which included being more directly involved and engaged in the proceedings with an “ability to assess meaningfully a client’s participation.”

Concerns expressed that being held in custody should require the “courtesy of allowing them to be present in the court that determines whether they should be given their liberty.”

Utilising technology was recognised as being beneficial in other contexts (such as witnesses giving evidence remotely), but there were issues in rationalising when using it for virtual custody courts. This reflected the issues identified earlier with vulnerable accused persons who may feel “detached and disenfranchised from the court system.” A prevailing view was that the accused should be present in court for the sheriffs to explain why decisions are being taken regarding their liberty or otherwise.

A number of respondents suggested the introduction of virtual custody courts was being generated as means of cutting costs. One respondent said, “the motivation to implement this system is to cut costs and this is to the detriment of the accused person.” The cost of installation of the system attracted the observation that “it’s going to cost an absolute fortune to install and maintain the equipment, in the knowledge that IT often fails at the worst moment. Let’s keep people involved and forget trying to bring technology in where it doesn’t belong...”

### **Question 11: How can you best fulfil the needs of vulnerable clients in a videoconference or telephone consultation?**

From the responses, there was recognition that dealing with vulnerable clients by videoconference or telephone presented several challenges with the consensus that their needs could not be properly fulfilled in those circumstances.

The terms of “vulnerability” had been left deliberately undefined, but responses underlined how clients may be anxious, confused and angry and/or have mental health issues where client communication needed to be managed effectively.

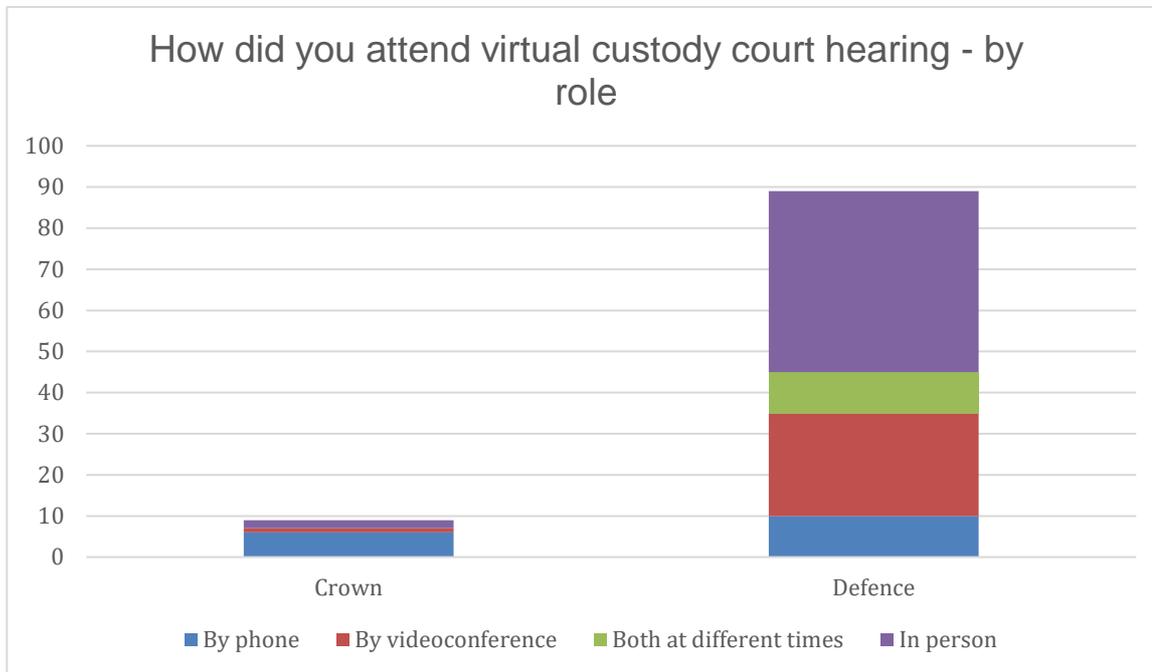
Respondents raised issues regarding the use of technology and it being a barrier to understanding and interpreting the relevant body language. There was a need to find a suitable space to speak to the client, which was compounded by difficulties where the papers (complaint/petition, previous convictions, summary of evidence) may not be available.

Timing was also an issue for respondents in that there required to be ample time for the client and defence agents to read these papers and go over the summary of evidence. Then there required to be sufficient opportunity to consult which was best achieved in person and not “at a remove which depersonalises the experience and diminishes the accused’s sense of participation and of being properly heard and represented.”

The survey results highlighted time as a factor regarding sheriffs’ understanding the ongoing need to consult clients within the hearing itself, to allow for potentially more consultations, allow time for a break or obtain information from the client’s family regarding health concerns or other issues. Some respondents indicated that the ability to identify potential mental health or suicidal concerns would also be restricted.

The requirement to secure arrangements for post-hearing consultations where it is incumbent upon defence agents to confirm that the client understands the outcome and any bail conditions that have imposed, was also identified by some respondents.

**Question 12: How did you attend the virtual custody court hearing(s) you have taken part in?<sup>9</sup>**



The original question 1 did not list “in person” as an option. It instead listed ‘other/not applicable’. This was an oversight as all the responses marked as “other” stated that they had attended court in person for the custody hearing. This response category has therefore been re-labelled as “in person” in the above chart as a more accurate descriptor for the responses submitted under that option. As the original “other/not applicable” option asked respondents to specify why, there is free text was available for responses.

The majority of those responding from the Crown were on the telephone (67%) whereas just under half of the defence (49%) appeared in person. However, the responses indicated a mixture of experience depending on the court.

**Question 13: How did you find your experience(s) of virtual custody court? Please include your thoughts on how the scheduling of the appearance went, the technology, the time the process took and how efficient the proceedings were.**

Significant concerns were expressed over the experience of virtual custody courts. These included:

<sup>9</sup> The following questions Question 12 onwards were available for answering by anyone who attended a virtual custody court, including those who had previously responded either defence or Crown.

- technical quality of the process which indicated visual and audibility problems with the court and issues where the technology did not work effectively. One response indicated that “the quality of the sound often results in the client been unable to hear what is being said...”
- judicial engagement is fundamental to making the system work to allow time if there are technical issues as one respondent noted that “Care needs to be taken to ensure that the client hears what is going on and has an opportunity to instruct a solicitor as the hearing goes on.”
- time consuming as the process took longer since contact with the solicitor/ client generally taking longer requiring a number of attempts being made, the courts running over their normal timeslots, physical arrangements for the accused appearing taking longer
- lack of organisation
- no systemic way of effecting communication throughout the process
- problems with papers
- lack of ensuring confidentiality

The views expressed by some respondents were that the current “infrastructure or manpower from outside agencies was not available” and there was “a transfer of risk from accused persons being together in cells to the PF staff, court staff and defence agents who now require to spend longer together at court.”

Some respondents stated that more consideration needed to be given to the vulnerable accused persons which makes video conferencing a difficult way for them to follow the court proceedings. Some noted that there were far more accused persons who are clearly struggling to follow the proceedings when using video links, as evidenced by the number of times they ask for things to be repeated etc. (sometimes because of the delay in the video system which “means that they sometimes end up talking over agents/sheriff which may be as they are not used to speaking to persons over video-link.”

#### **Question 14: What training or support would best allow you to undertake remote virtual custodies?**

The responses were mixed indicating that there was some familiarity in the use of technology but it was investment in appropriate and adequate technology which worked that was required, with training being required by those who were involved in working the technological systems such as the court staff, GEOAmev and Police Scotland staff. One response summed up as “better quality technology required, along with more interview facilities.”

Some responses recognised a need for support/training for the profession (COPFS and defence agents) but also in having the defence engaged in developing the system and undertaking dress rehearsals and understanding the logistics of the system with IT support. Training would be required in the use of both audio and video equipment. It would extend to training on how to get the best from the client and reassuring them regarding confidentiality and the solicitor/client relationship.

One respondent felt that it was not a training issue as it was not about “adapting to the use of such technology, but it should not be done when the infrastructure is clearly not in place” as there could be implications for the accused in being released many miles from their home without money or a telephone.

### **Question 15: How would you prefer to conduct the appearance in court?**

**50% of prosecutors stated that their preference for attendance at a virtual custody court would be by videoconference, this being the most preferred option among them, However, the preferred option among defence agents was for personal appearance (76%).**

The original question did not list “in person” as an option. It instead listed “other” and this was an oversight as all of the responses marked as “other” stated that they had attended court in person for the custody hearing. This response category has therefore been re-labelled as “in person” in the above chart as a more accurate descriptor for the responses submitted under that option. Only two responses were retained as “other”, one for each role, this is because either no preference or neither videoconference nor phone call without an alternative option was indicated in each response.

One reason for advanced by a respondent is the need for ongoing face to face confidential discussion between accused and defence agent as matters can quickly develop.

### **Question 16: Please give a reason for your preference for telephone or videoconference.**

Though the preference was expressed for personal contact, there was a recognition that “video is the lesser of two evils. Telephone is a disaster.”. The findings indicate that neither were viewed as an adequate substitute for face to face contact.

The overall view was that there should not be a “blanket” approach and if there should continue to be virtual custody courts, video conferencing is the only way that would allow instructions to be taken effectively, though the majority of responses felt that video conferencing was a less satisfactory way to proceed. Those surveyed agreed that telephone does not give the required contact with the client who is frustrated when they cannot be seen.

Respondents also highlighted that it would not be possible to ascertain from a telephone call if the client has visible injuries (which might be relevant to a defence of self-defence) and practically impossible to tell if the client was having difficulty comprehending their situation due to a mental disorder, learning disability or other vulnerability.

## Appendix 1 – Survey Questions

Question 1: Have you been involved in a custody court appearance by phone or video conferencing?

Question 2: How many times have you participated in virtual custody court appearances?

Question 3: Which court(s) hosted the virtual custody court appearance(s) you were involved in? Please select all which apply.

Question 4: In which capacity did you appear?

Question 5: How did you consult with your client prior to the virtual custody court? Please select all which apply.

Question 6: How satisfied were you with your experience of the client consultation process?

Question 7: Did you have sight of the complaint/petition before or during your consultation with the client?

Question 8: Did you experience any problems in obtaining the papers/arranging the consultation?

Question 9: It is proposed to move to holding remote only custodies in the future. If this is to be the case how would you prefer to conduct the consultation with your client?

Question 10: Please use this space to explain why you would prefer telephone or videoconference for consultations with clients in custody.

Question 11: How can you best fulfil the needs of vulnerable clients in a videoconference or telephone consultation?

Question 12: How did you attend the virtual custody court hearing(s) you have taken part in?

Question 14: How did you find your experience(s) of virtual custody court? Please include your thoughts on how the scheduling of the appearance went, the technology, the time the process took and how efficient the proceedings were.

Question 13: What training or support would best allow you to undertake remote virtual custodies?

Question 15: How would you prefer to conduct the appearance in court?

Question 16: Please give a reason for your preference for telephone or videoconference.

## Appendix 2 Outline of the key issues discussed in the focus group meetings held on 2 and 14 July 2020

### Meeting of 2 July

**Background and Remit:** The formation of the focus group originated from an invitation from Police Scotland to be involved with the Police Scotland's Virtual Custody Courts pilot. There had been little effective communication prior to setting up pilot. The pilot aimed to communicate effectively about their proposed roll out and to obtain views from the profession. There is a multi-agency group with representatives from health, SLAB, PDSO, COPFS, and SPS.

**Feedback on the pilots to date:** There are five courts operating at present. These include:

- Edinburgh- St Leonard's
- Glasgow - Cathcart
- Aberdeen - Kittybrewster
- Saltcoats
- Falkirk

Edinburgh –

- Experience had been obtained from a number of remote custodies.
- There were big challenges on consultation etc. when appearing as duty where there was no prior relationship. Where it was an existing client it may be easier.
- Considerable pressure of time
- Problems from who is to be present in court – is it only the Sheriff and Clerk?
- No protocols in place so for instance if it was a female or male sheriff that should be addressed.
- Struggled to hear as did the client
- Significant technical issues - loss of the mobile phone
- Lack of consultation being in private – police or GEOAmy being present
- Location of the camera
- Problems with interpreters and vulnerable clients
- Ability to go over court documents etc.
- Was the practice ECHR compliant under Articles 5 and 6?

Saltcoats –

- This was the first pilot and experience had been positive.
- There were two factors which included (i) the consultation and (ii) the court experience.
- Similar issues were reported regarding the court with regard to introductions and audibility.
- This included the video.
- One system does not fit all – but this was a rural area – which did save time in travel.

Glasgow-

- Delay in speaking to the client – and delay in running of the courts due to cleaning etc.

- Issue of ECHR compliance was discussed – European Courts have remote access and not necessarily a bar to the fair trial.
- There were a number of issues which needed addressed – such as consultation practices etc.
- Consider how it may allow better service for a client.

#### Aberdeen-

- Similar issues reported from Aberdeen
- Vulnerable accused is an issue and how to work out that there are mental health issues

#### General-

- Issues with the custody lists being shared.
- What was the view from the bench as to this system/need for feedback from judiciary?
- Need for training and effective communication
- Sharing of how the model is to work
- Suggestion of running a mock custody court to tease out issues
- Cost implications
- Additional equipment required by solicitors? Need to assess equipment required by solicitors.
- Questions were raised as to any projection of its use to extend to Saturdays and Sundays

## Meeting of 14 July 2020

**Update:** The police were to run further pilots using other technology, Lifesize, which they were trialing, and which would give a very different experience from that of the use of audio. The need to obtain both negative and positive feedback was emphasised. A number of those attending this meeting had or would be invited to attend the demo /pilot.

#### Feedback:

#### Edinburgh

- Concerns over the absence of face to face consultations which were needed to obtain the verbal cues. Could a solicitor carry out a face to face consultation notwithstanding the police decision that the accused could and should appear remotely?
- There would also be the possibility of utilising the right to an early consultation with the client in the morning.
- Concerns expressed especially where it was the duty solicitor appearance where there was no pre-existing relationship with the client.
- Question asked about how to obtain social work involvement. The social worker would normally see all custodies which was not possible at present under remote working.
- Strong feelings expressed with what appeared to have been a piecemeal approach to this introduction.
- Decisions as to who should appear remotely appeared to be taken by the police, irrespective of any view from the Crown.
- The custody courts were complex, requiring different levels of interaction for all involved.
- There was a need to establish consistency of approach across the country.

- The issue of ECHR compliance was raised again which needs to be tied to the question of ensuring that custodies do need to be held in public courts.

#### Glasgow

- The pilot at Glasgow had been postponed.
- The choice of type of cases to appear remotely was queried. It was understood that this was to have involved domestic abuse.

#### Aberdeen

- Problems were flagged of unreliable communication links.
- Pilot had been withdrawn from Aberdeen, and later reinstated. Two remote custodies per day being undertaken.

**For further information, please contact:**

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