



Adam Tomkins MSP
Convener, Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP

Sent via email: justicecommittee@parliament.scot

Our Ref: VMcE/AM/LB
Date: 2 September 2020

Dear Mr Tomkins

RESTORING THE COURTS POST COVID-19

Congratulations on your recent appointment as the new convener of the Scottish Parliament Justice Committee. Whilst I appreciate you have announced your decision to step down from the Parliament at the next election, I wish you every success in leading the work of the committee between now and next May.

Following the evidence session before the Committee on 18 August 2020, attended by the Cabinet Secretary for Justice, Humza Yousaf MSP and Eric McQueen, Chief Executive of the Scottish Courts and Tribunal Service (SCTS), I am writing to provide the Law Society's perspective on the current situation with our courts and the work to address the current substantial backlog of cases.

It is clear that creative solutions are needed to deal with the court business in as quick and efficient manner as possible and in our new, socially distanced environment. It is important that all those involved in the court system work together to deal with the current challenges.

There is an urgent need for the Scottish Government to provide a clear plan for the justice system post-pandemic and to specify the changes to the courts and the justice system being proposed.

Developing "creative and innovative solutions" for our courts relies on the support and co-operation of all of those involved in the justice sector. The solicitor profession has a central role in this alongside SCTS and other criminal justice organisations such as Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS).

As we emerge from lockdown, we need greater clarity on those changes which are being introduced to deal with the court backlog in the short and longer term. We also seek greater detail on more significant changes that are to be made to the justice system. While some changes are clearly necessary as a direct response to the pandemic, care is needed to avoid fundamental changes which could create a different crisis in the future.

There has been much progress in recent weeks in introducing new digital systems. However, the overall approach in dealing with court business has been piecemeal and inconsistent across the country. It has been hampered by a lack of communication about changes, many of which have been introduced at short notice. While perhaps inevitable in the initial response to the pandemic, the continued lack of transparency is impacting on our members' ability to meet their professional obligations on behalf of their clients. This is causing us and our members real concern.



We were pleased that the recent evidence session provided some clarity and reassurance, for example around the role of local courts. However, more information is still required. We are looking for greater communication among all of the parties involved in the justice system as we seek to restore the working of the courts as far as possible at this time.

We have set out our concerns in more detail below and hope you and other members of the committee find this helpful. I would be delighted to discuss any of the points we raise with you and the committee. Please do not hesitate to contact me should you have any queries or require further information.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Amanda Millar', written over a horizontal line.

Amanda Millar
President

Appendix – Responding to the Covid 19 pandemic

Background to the court backlog

Almost all court business, civil and criminal, ceased in the immediate response to the pandemic. That has had an inevitable effect in substantially increasing the backlog of cases in the courts that existed prior to the pandemic. We understand that it took time for the courts to reopen and to start to deal with the through-put of court business.

Post-lockdown, we fully appreciate that there cannot be any immediate return to the previous practices. Indeed, we would want to retain some of the newly developed ways of working.

Attention needs to focus on how court business should resume and continue to be dealt with. There are major public concerns over the backlog that has arisen and the effect on all involved. This includes the continued uncertainty and stress for victims of crime as well as the accused, who remain on remand for substantial periods of time. There is a need to deal with these issues in a transparent, consistent, practical and inclusive manner.

As we come out of lockdown, it remains paramount to ensure the safety of all persons within the courts, whether as the members of the public attending our courts or serving as jurors or witnesses, or appearing as the accused, along with all court officials and the judiciary. We appreciate the efforts made to date by the justice organisations, to reopen courts and to have business restart which have been fully supported by the profession. However, challenges do remain.

There is a need to ensure that all relevant interests, accused and the victims, are factored into identifying potential solutions and that there is effective support during the processes for the accused, victims, and their families being able to hear proceedings.



The legal profession's position

Throughout the pandemic solicitors' services have been vital in ensuring access to justice has continued, and in providing some of the most vulnerable in society with professional representation at such crucial times in their lives. Our members have continued to adapt and have worked very hard to support the justice system by appearing in court and representing their clients effectively. That has included clients appearing from custody, representing them at bail hearings and conducting the few trials that have been completed to date. It has also involved dealing with clients that had, or were suspected to have, COVID-19. Our members' professionalism and goodwill during this time must be recognised.

Last week's parliamentary session focused on the court system and its backlog. However, there is a need to consider the wider justice system. All processes must be fair and transparent and comply with the European Convention on Human Rights. This includes the time of detention at the police station and attendance at each court hearing thereafter. These processes must not be disregarded in upholding the rule of law and maintaining public confidence in the justice system.

We remain fully committed to working positively with the Scottish Government on the changes which are necessary to our justice system to deal with the spread of COVID-19.¹ We recognise that measures must be flexible to reflect the changes in public health advice through the different phases to the societal recovery period and business as usual recovery period.

The need for consultation and co-operation

The profession must be consulted and involved in exploring and developing any options, across both the civil and criminal courts, for dealing with the backlog. That requires positive advance engagement with the profession in seeking the adoption of innovative solutions which support a flexible, effective and fair court system for all now, and in the future.

We share the view² that Lady Dorrian's Working Group on "Restarting Court Business" provides an exemplar for how effective consultation on court changes can be achieved. It includes representation from the solicitor profession and the Faculty, as well as other relevant criminal justice organisations.

The search for innovative solutions, such as the adoption of cinema complexes as additional court estate, involved the use of mock courts, monitoring and evaluation, with feedback sought from all concerned. That has allowed the experience and practice, including the use of two pilot High Court trials, to be measured, and decisions reached which have provided a positive way forward for the conduct of High Court trials in the future.

We want to stress the significance of the work of Lady Dorrian's working group, in that it provided the means to ensure that the most serious of trials could restart, and freed up traditional courts to consider how the remainder of the court business can be conducted going forward.

The adoption of other estate outside the court was a solution we put forward in our response on "Restarting jury trials."³ However we remain strongly opposed to the introduction of judge-only trials in solemn business.

¹ <https://www.lawscot.org.uk/media/368923/2020-05-26-crim-scottish-parliament-response-to-justice-committee-restarting-jury-trials-002.pdf>

² "The work of Lady Dorrian's working group on solemn trials is an excellent example of what people can achieve when everyone comes together with a single focus."



Importance of communication

It is important that there are clear communication channels across both civil and criminal justice. In civil, there are inconsistencies across each Sheriffdom, with currently over 80 Practice Notes that have been issued since March 2020. Publications of changes to civil business are occurring at the last minute. That means each Sheriffdom is operating in a different way.

A more consistent approach could be adopted by use of better engagement with us at a national level and with the profession at a local level. We have on many occasions offered to support SCTS and provide feedback to assist in improving the way civil business is being conducted. It is vital that communication system is improved.

Similarly, for criminal justice, SCTS Practice Notes have been issued without consultation with the profession and we only become aware following their publication, which again leads to inconsistencies in approach across the country.

For solicitors to represent their clients, they must be aware of any changes and when Practice Notes are being issued, to ensure that they can provide effective representation and advice for their clients.

Our response to the SCTS plan for recovery

A number of issues arise from the SCTS plan **COVID-19 Respond, Recover and Renew – Supporting Justice through the pandemic and beyond**⁴ including the modeling where we are seeking an early opportunity for SCTS to explain the premise on which certain assumptions were made. Changes to future work practices need to be discussed and tested at Working Group level to ensure they will work in practice. In turn, we need to know much more about what SCTS is proposing and any suggested solutions. The work of the Civil and Criminal Working Groups has an added significance in light of this plan.

We welcome the commitment from the Scottish Government to support innovative solutions such as investing in cinema complexes for jury trials. However, the plan offers no insight into the impact on the backlog following resumption of High Court trials or for how sheriff and jury business will be conducted in the light of the acquisition of the cinema complexes. These changes should allow for the use of other rooms in court buildings, which may not have been deployed previously for jury trials. We appreciate that there may still be adjustments considered to reduce the numbers of jurors required, and to modify the respective summary/solemn sentencing powers.

One option in the plan was the introduction of weekend courts. I am sure you understand that the profession has been under considerable pressure throughout the cessation of court business and this proposal has not been discussed with the Society and is greatly opposed by the profession. We consider any reference to the introduction of weekend courts to be premature. We are not satisfied that any case has been made for its introduction and certainly not as a quick, unplanned and unconsulted upon change to the justice system.

Any such proposal will require full consultation with our members alongside clarity over any proposed timescales. The implications for court and COPFS staff must be considered in seeking to maintain a satisfactory work-life/ balance. The proposal is particularly significant for criminal defence agents, given the changes following the *Cadder* decision. That requires solicitors to represent their clients 24/7, 365 days a year in attending police station interviews to provide advice to their clients.

⁴ <https://scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/08/16/covid-19-scts-moving-forward>



We query too, if witnesses and victims would be prepared to attend to give evidence at the weekend, which has implications for those with caring responsibilities and families.

Technology - Criminal court business

We fully agree that the greater use of technology provides workable solutions.

We referred previously to the possible use of remote balloting, greater utilisation of obtaining evidence on commission, the public being able to hear trials remotely, use of section 259 of the Criminal Procedure (Scotland) Act 1995, pre-recorded evidence and remote links at police stations for witnesses to give evidence. These would all make running trials, both solemn and summary, easier, reducing the need for so many to attend and help to ensure the necessary social distancing.

Technology must work. Time and training resources will also be required by all concerned to successfully adapt to its use. There are however limits to using technology as remote solutions may not be appropriate for all.

We highlight the needs of the vulnerable accused. Many vulnerable witnesses will be able to adopt other measures to secure their evidence in court, but the accused has to be able to understand, instruct their solicitor and give evidence if they so elect. Remote access may not ensure that successful representation.

The introduction of a virtual custody court has highlighted issues which arise though lack of prior consultation. We recently published a report on the findings of our survey on the virtual custody courts pilot⁵ which recognised that there may be some potential advantages to virtual custody courts, beyond the immediate need for COVID-19 safety measures. However, there were significant practical problems arising from the pilot, as well as issues resulting from the different approaches adopted by the pilot courts. We are pleased that the Lord President has now recognised the need to address these by ceasing any Scotland-wide rollout before the Glasgow pilot which has now started and can be monitored and evaluated.

Technology - Civil court business

For civil business, particularly Simple Procedure, there are concerns over the proposed introduction of an interface to allow applications to be uploaded online, accompanied by a rule change to make civil process online compulsory. The lack of consultation has created a huge amount of uncertainty amongst the profession.

A timescale for introduction of the interface has been given as September 2020. No commencement date has been confirmed for a rule change to make civil online compulsory. We have asked for a three-month transition period to allow the profession time to implement the system once it is available. No assurances have been given on the adoption of that timescale, adding to the uncertainty.

The SCTS Digital Strategy team is currently working on an API (the technical interface) to enable solicitors to upload applications directly to the integrated case management system and allow volume users to use their Case Management Systems with the courts. The Digital Services team is only working with five big firms. Requests from our Civil Justice Committee to become involved with the SCTS Digital Strategy team to understand what is involved in the interface have been rejected. We have been advised that our requests to be involved are too premature. The lack of cooperation means that we are unable to give the wider profession any details of what technology or adaptations they might require for the interface being implemented.

⁵ <https://www.lawscot.org.uk/media/369189/2020-07-28-crim-report-on-virtual-custody-courts.pdf>



It is abundantly clear that the profession is very keen to engage to ensure that new protocols and procedures that are being contemplated bring about workable solutions, both now and in the future.

The profession has an important role to play in the process of ensuring that the changes being made to how our justice system operates are always for the benefit of those seeking access to justice, and not simply stakeholders within the justice system itself.

We hold a genuine concern that under the guise of COVID-19 sweeping changes to how our justice system operates are being made; changes and that these are reducing the openness and transparency that have been a fundamental tenet of its success.

We welcome appropriate, reasoned change and the use of technology is once it has been properly tested and shown to put the individual user, at a minimum, in no worse a position than they would have been in, should they have physically attended court. This is not the case at present under these proposals

The need for pilots, monitoring and access to justice

Eight virtual custody trials have now been successfully concluded across the country since the COVID-19 outbreak. We agree that there is a place for such remote trials, but there is a need to recognise the requirements on both the Crown and the defence to undertake additional work in advance, to identify these. We cannot agree that remote trials should be the default position as suggested in the interim report published by Sheriff Principal Pyle⁶.

There is a need for running mock courts to obtain much needed insight, providing an evidence base for future decision-making on how courts can be run safely and effectively, and how best to deal with the backlog. No remote hearing should take place unless there is agreement with all parties on how it will operate and what facilities might be available/required? We welcome working with SCTS, Police Scotland and COPFS to identify what more can be done to signpost and make clear what services are on offer and how they can be best adapted.

Any new practices will require review, as will the current legal aid system to ensure it keeps pace with any changes and that remuneration is appropriate for the work being done and is paid timeously. For example, conducting remote trials requires work to be done upfront to identify if a trial can progress remotely. This is in addition to the work involved in the substance of the case.

In conclusion, we will continue to work with all parties involved in the justice sector to ensure that the rights of individuals appearing from custody are protected and that there is an effective court system in Scotland. We welcome the honesty expressed during the evidence session that not everything has gone as well as it might have done, and aspects could have been done better.⁷

We believe there must be a collaborative approach to address the human cost of delays and uncertainty within the justice system. There is motivation across the profession to be proactive in adopting solutions. However, imposing changes without undertaking effective prior consultation and discussion,⁸ no matter how appropriate, is not the best way forward. Given all the challenges we currently face, now is not the time to fundamentally change the Scottish criminal justice system.

⁶ <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/summary-criminal-virtual-trial-pilot-report-to-ljg.pdf?sfvrsn=4>

⁷ Eric McQueen SCTS 18 August 2020

⁸ Introduction of holiday courts