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## Justice Committee Comataidh a' Cheartais

# Re-opening Scotland's courts and tribunals system



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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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# Background

1. At the start of the COVID-19 lockdown period, decisions were taken by the Lord President to close Scotland's courts and tribunals system. Subsequently, as the country partially re-opens, some court and tribunal business is now underway either in virtual, online form or through a limited number of cases where participants (judges, lawyers, witnesses, the accused, media and the public) attended in a socially distanced manner.
2. The result of the sustained closure of Scotland's courts and tribunals has been a substantial increase in the backlog of civil and criminal cases on top of what was already a significant number of trials that were pending. It has also meant delays in justice for the victims and survivors of crime and for the accused. For those accused held on remand, it has meant extended periods in prison and extra strains on an already stretched prison service.
3. Efforts have been made by various parties including the Scottish Government and the Scottish Courts and Tribunals Service (SCTS) to come forward with short- and longer-term options to re-open the courts and reduce the backlog.
4. Since March 2020 and lockdown, the Justice Committee has made scrutiny of the efforts to re-open the system one of its priorities. Several evidence sessions have been held in that respect.
5. **This short report brings together the evidence heard and sets out our findings on how to move forward. Further scrutiny and reports on this subject may be produced in due course.**

# Scale of the problem

6. Covid-19 and lockdown has not created the problem of a backlog in cases, rather it has deepened an already existing problem. According to David Harvie, Crown Agent, going into the current crisis, at the end of March 2020, there were 18,319 outstanding cases awaiting trial across summary and solemn business, of which about 460 were sheriff and jury and about 390 were High Court. These figures represent a 14 per cent increase on comparable figures for March 2019.<sup>1</sup>
7. Even prior to the pandemic and lockdown therefore, pending trials were significantly up from the previous year.
8. Table 1 below sets out some historic figures and trend data on court backlogs.

**Table 1: Solemn crime - Indictments registered and trials led, 2017-2021**

	2017/18	2018/19	2019/20	2020/21 (projected by the SCTS)
<b>High Court</b>				
Indictments Registered <sup>i</sup>	718	911	1125	1275
Trials Called <sup>ii</sup>	689	717	870	995
Trials Evidence Led <sup>iii</sup>	461	507	521	620
<b>Sheriff Court Solemn</b>				
Indictments Registered	4979	5182	5508	5900
Trials Called	2833	2848	3030	3245
Trials Evidence Led	1041	1119	1230	1300

9. In the early stages of the pandemic, Eric McQueen, chief executive of the SCTS, told the Committee in May 2020 that the sheriff court and High Court backlog for solemn cases would probably reach 1,800 by August 2020, and could potentially exceed 3,000 by March 2021.<sup>2</sup>
10. By August 2020, modelling produced by SCTS showed that, in a baseline scenario, the backlog for solemn criminal cases in sheriff and the High Court could over the next couple of years increase to twice the normal level.<sup>1</sup>
11. Mr McQueen added that, in terms of sheriff court cases, the backlog had grown to around 27,000 by the end of August 2020. Even with a fully-operational set of 33 sheriff courts, Mr McQueen said that it will take eight to 10 years to get back to pre-Covid levels.<sup>1</sup>
12. In the justice of the peace courts, the pre-Covid backlog was 3,500 cases and had now risen to 8,000 cases.<sup>1</sup>
13. In civil cases, Mr McQueen reported that there were no backlogs in the Court of Session and, in the sheriff courts for civil cases, any case backlog will be resolved

<sup>i</sup> Indictments registered is the formal decision point for criminal proceedings in serious cases. This is the point when the Crown Office decide a prosecution will be taken forward.

<sup>ii</sup> This is the point at which after an indictment is registered that a trial is arranged.

<sup>iii</sup> This is the point at which after an indictment is registered and a trial is arranged that a trial with evidence is progressed. If an accused pleads guilty, then there will be no trial with evidence led and instead the case will proceed to sentencing.

in the next 6 to 12 months.<sup>1</sup> The picture therefore in terms of civil cases was much better than for criminal cases.

14. Finally, for tribunals, SCTS said that the only tribunal with backlogs now is the housing and property chamber, which has a backlog of about 800 hearings, with the other tribunals “pretty much up to date.”<sup>1</sup>

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# What are the options to address the backlog and what has been the response?

15. Following lockdown, two main strands of work were undertaken to look at how the backlog, particularly for solemn cases could be addressed. The Scottish Government produced an [options paper](#) and consulted on this. Additionally, a [working group on jury trials](#), chaired by the Lord Justice Clerk, Lady Dorrian, was set up to look at the practical ways that courts could be reconfigured in order to meet social distancing requirements.
16. In addition to this work, some trials took place virtually. Civil cases and tribunals moved to an online format, thereby freeing space for criminal trials. SCTS introduced remote hearings and has piloted virtual criminal trials in a small number of sheriff courts. By mid-August, SCTS was reporting that it was able to restart a full programme of summary trials. Additionally, it was announced that, with the injection of an extra £5.5m from the Scottish Government, it was moving to what it described as a more radical approach for remote trials where the jury would not necessarily meet within the court estate but could participate remotely in other suitably-adapted venues such as cinemas.
17. In the sheriff courts, custody cases have been heard with the accused, if they have Covid-19 symptoms, appearing from the police custody suites. SCTS's plan is to roll that out for all custodies soon.
18. These efforts are making a difference but it is clear that some of the options being studied by the Scottish Government may still be needed. Its options paper of April 2020 set out nine possible options to reduce the backlog of solemn criminal trials. These were:
  1. Reduce the number of jurors required from the current 15.
  2. Hold jury trials in larger non-court locations to facilitate social distancing.
  3. Retain the current court facilities but enable social distancing during jury trials.
  4. Have jurors in remote locations video-linked to court.
  5. Set up a testing programme for jurors and other court attendees for Covid-19.
  6. Deal with the backlog with faster progress of jury trials at the end of the current health restrictions.
  7. Remove the right to jury trial and move to judge-only trial.
  8. Adjust the sentencing power of Sheriff Courts (summary and solemn) so that more trials were heard without juries.
  9. Retain the status quo.

19. Some of these options were ruled out by the Scottish Government at the time of publication of its options paper and have subsequently not been taken forward. Additionally, others, such as options 1, 7 and 8 would require primary legislative change. Others, such as option 2 were thought to be potentially unworkable by the Government at the time but have now been taken forward.

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# What difference will some of the options that are being looked at make?

20. On 16 August, SCTS published a report on [COVID-19 Respond, Recover and Renew – Supporting Justice through the pandemic and beyond](#). The report sets out the steps taken by SCTS to manage COVID-19, the steps being taken to manage recovery and how it can draw on those experiences and lessons to build a more just, resilient and efficient system, working in collaboration with others across the justice system.
21. The report was supplemented by [four analytical modelling reports](#) for High Courts, Sheriff Solemn, Sheriff Summary and Justice of the Peace Court trials have also been published.
22. The reports analyse the effect of physical distancing on the business as usual trial models and alternative operational models to deliver access to justice within an acceptable period.

## High Courts

23. SCTS modelled the possible impact on the backlog of cases of 6 different options relative to the baseline. These options were:
  1. *Multiple Courtrooms* - this model is based on the two- or three-room courtroom scenario, with the requirement to physically distance, and was the model used in the initial trials held in July 2020. This substantially reduces the High Court capacity. from 16 trial courts to between 5 and 7 and assumes there will be an easing of physical distance after March 2021.
  2. *Smaller Juries* - this model reduces the number of jurors from 15 to 7, maintaining physical distancing and reducing the accommodation requirements from three court rooms to two.
  3. *Increasing Solemn Sentencing Powers in Sheriff Courts* - by increasing the sentencing powers in the Sheriff court, some cases would potentially transfer away from the High Court.
  4. *Trial Without Jury* - this model is based on a judge sitting without a jury and with any combination of two sheriffs, two Justices of the Peace and two or more professional lay jurors on the bench. This enable a single court room per trial, returning capacity to 16 trial courts.
  5. *Introduce Remote Jury Centres* - in this model, the jury is located in an external non-court facility but linked and participating by live video and audio. A variation of this model was used in the July High Court trials when the jury were in a remote location but still within the court building. Located in a non-court facility, this enables a single court room per trial.

6. *Remote Jury Centres Plus* - In this model, the jury arrangements are external and non-court based. High court capacity is increased by using additional trial court rooms in other sheriff courts.
24. The detailed results of the potential impact of these models are set out in SCTS's papers. **At this stage, it is worth noting that only the options of trial without jury or remote jury centres plus reduced the backlog below the baseline.**

## Sheriff Court Solemn Jury Trials

25. In its modelling paper on Sheriff Court Solemn Jury Trials, the same six options were assessed. This time, only the options of trial without jury, remote jury centres or remote jury centres plus reduced the backlog below the baseline. The enhanced number of jury centres in the latter option unsurprisingly led to a quicker reduction in the backlog.

## Sheriff Court Summary Trials

26. In its paper on Sheriff Court Summary Trials, four options were looked at:
1. *Trial Courts with Physically Distancing* - this model is based on a single courtroom with Physical Distancing measures in place. 33 Trial courts are available.
  2. *Trial Court with an additional 10 Trial courts.*
  3. *Trial Courts plus courts meeting on a Saturday* - 33 Trial Courts operating with the addition of Saturday Trial courts.
  4. *Trial Courts with an additional 10 courts and Saturday Courts* – therefore 43 Trial Courts in operation with the addition of Saturday Trial courts.
27. Options 2, 3 and 4 all reduced the backlog to a baseline level with again, a higher number of courts meeting more frequently making the biggest impact in reducing the backlog and trial delays.

## JP courts

28. Finally, SCTS modelled two options for justice of the peace courts:
1. *Courts with Physical Distancing* - this model is based on eight trial courts with appropriate physical distancing. Prior to COVID-19 there would be eight courtrooms in use. Larger courtrooms are likely to be required.
  2. *Adding Trial Courts* - this model adds an additional 5 Trial Courts giving total capacity of 13.

29. The modelling showed that employing an additional five trial courts could return JP scheduled trials and the trial delay to pre COVID-19 levels by March 2022, two years faster than option 1.

## What has been the response of the Scottish Government to the various options and modelling?

30. As indicated above, the Scottish Government started its analysis in April 2020 with 9 options, some of which it ruled out at the outset. Others – such as remote trials and the establishment of more remote jury centres – have subsequently been taken forward.
31. The three arguably most radical options from a constitutional perspective – all requiring new primary legislation – have not to date been taken forward. These are: moving to a judge-only trial system for solemn criminal cases, reducing the number of jurors and, finally, altering the sentencing power of sheriff courts (summary and solemn) so that more trials were heard without juries.
32. The first of these – trial without jury – was to have been part of a Bill proposed to the Scottish Parliament at the outset of the pandemic, but this provision was withdrawn by the Scottish Government during consideration of the Bill.
33. In evidence to the Committee in August 2020, the Cabinet Secretary indicated that the option of smaller juries was also not being pursued. He said—
- ” I am reluctant, in the midst of a global pandemic, to be so firm as to say that we would never look at the option of smaller juries. However, given the solution that we now have, we do not need to pursue that option—certainly not at the moment. It is not an option that we are actively exploring, looking at or pursuing, because the solution that we now have in place will allow a 15-person jury to socially distance; there is plenty of room in the cinema complexes for that to happen. It would therefore not make sense for us at the moment to exert effort to explore the option of smaller juries. <sup>3</sup>
34. This led, in his words, to the only legislative option that the Scottish Government is current pursuing being adjusting the sentencing power of sheriffs. In his view, the key to that would be the extent to which the Scottish Government could extend the powers. In his opinion, it is clear that the further the Government extends sentencing powers, the more scope there would be to bring business into the sheriff courts. <sup>3</sup>

## Scottish Government modelling

35. In addition to the modelling cited above undertaken by the SCTS, the Scottish Government's Justice Analytical Services (JAS) also undertook modelling work. JAS illustrated a 'do nothing' scenario for dealing with the impacts of the Covid-19 crisis on the court system – and then estimated the backlogs and waiting times that the Government expected to see build up across the court system in the absence of significant and necessary changes.

36. In the high impact, 'do nothing' scenario, the Scottish Government estimated that the Covid-19 crisis could mean:
- Growth in the number of outstanding summary trials<sup>iv</sup> from approximately 23,000 to approximately 57,000 and growth in outstanding solemn trials from approximately 1,400 to 5,400, with implications for all of the people involved with these cases (victims, witnesses, accused).
  - Additional delays on top of baseline waiting times of around 11.5 months to conclude cases at summary trial and 15.5 months for solemn trials.
37. Furthermore, after 18 months of reduced capacity under the high impact scenario, if the system were then to utilise 120% of pre-Covid-19 levels of resources, without other actions, it would take an estimated further 7 years for summary trials and 9 years for solemn trials to fully clear the backlogs to pre-Covid-19 levels.
38. JAS highlights that while this "high impact scenario" analysis has painted a picture where outcomes deteriorate significantly, it is not a worst-case scenario. For example, changes in pleading behaviour of defendants would impact on court efficiency.
39. The JAS research also points out that while their model and paper have focussed on court backlogs, courts are not the only element of the justice system that is constrained, and therefore measures that may resolve the courts backlog would not eliminate the problems that the wider justice system faces. Instead they might move the backlog to other stages in the system. In the Scottish Government's view, a large increase in the ability of the system to bring more trials to court and deliver verdicts must be accompanied by parallel changes or expansion across the wider justice system so that problems are not created elsewhere.
40. Overall, the JAS modelling suggests that, under a 'do nothing' scenario, total trial backlogs could increase to 29,000 cases in the low impact scenario or to 56,000 cases in the high impact scenario, with additional average delays in concluding cases at summary trial of up to nearly a year and additional average delays in concluding cases at solemn trial of up to and over a year. This impact would be felt across the court system, with more individuals affected in summary courts and the largest increases in average waiting times seen for jury trials. Furthermore, modelling suggests that there will not be an easy way to overcome these challenges – with backlogs potentially taking several years to clear even if there was a relatively large increase in the capacity and resources available to the system.

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<sup>iv</sup> In the JAS research, cases are split into cases that will conclude at the pre-trial stage and cases that will conclude at trial. For this reason, the definition of outstanding trials used here is the number of cases registered at court that would be expected to conclude at trial, and not a description of only those cases that have already progressed beyond the pretrial stage / had a trial date fixed.

# How have other jurisdictions responded?

## England and Wales

41. In England and Wales, the courts and tribunals have continued to function throughout the Covid-19 pandemic. There has been, however, a significant rise in the number of outstanding cases in the magistrates' courts and the Crown Court.
42. As with Scotland, UK Government, the judiciary and HMCTS are working closely on a multi-pronged recovery plan that involves setting up temporary courts, extending court hours and number of sitting days, exploring options for changing arrangements for jury trials and maximising the use of technology.<sup>4</sup>
43. According to a report from the House of Commons Justice Committee—  

” The courts have rapidly adopted remote hearings in response to the COVID-19 pandemic. The Judiciary and lawyers have largely been positive about the move to using video and audio channels. However, there is emerging evidence that remote hearings are less satisfactory for some lay participants (that is the parties - whether legally represented or acting as litigants in person, and witnesses) and vulnerable court users. Remote jury trials have not taken place in England and Wales.”<sup>4</sup>
44. In the civil courts, the Lord Chief Justice told the House of Commons Justice Committee that “in the High Court and in the business and property courts around the country [England and Wales], in the region of 80% of the ordinary business is being transacted.”<sup>5</sup>
45. In evidence to the House of Commons, The Lord Chancellor explained that the option of trial consisting of a judge and two magistrates was only being contemplated for a limited range of cases, namely those cases that fit in “the either way category” which can be tried in either the magistrates' courts or the Crown Court, but which either through a defendant's choice or the magistrate's decision, end up in the Crown Court. Such trials would previously have been heard in the Crown Court before a jury.<sup>6</sup> The Lord Chancellor was also considering the option of reducing the minimum size of a jury from nine to seven.

## Northern Ireland

46. In Northern Ireland, jury trials were not held during the early stages of the lockdown for the same reasons as Scotland. When lockdown occurred, courts and tribunals business was consolidated into five hubs to deliver urgent business. Through the use of video technology, the majority of court business was dealt with either remotely or was reviewed by a judge administratively.
47. As of late August, jury trials have recommenced in Belfast, with plans to open five more Crown Court venues across Northern Ireland by the end of September 2020.

48. According to the Northern Ireland Executive's Justice Minister, Naomi Long, several physical alterations have been made to courtrooms to enable jury trials to proceed safely in line with the public health guidance on Covid-19, including a 2-court model, increased hygiene regimes, social distancing measures etc.<sup>7</sup>

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# What views have been expressed to the Committee?

## Options for tackling the backlog

### In general

49. As previous sections of this short report have highlighted, several options have been suggested to help reduce the backlog in our courts, especially in relation to solemn cases, but also in summary cases and civil business. Some of these options have been set aside as work to investigate them has been completed.
50. The principle behind, and the urgent need for, various options to address the backlog has been welcomed by many organisations. For example, the Scottish Criminal Bar Association has said that it is necessary to see “the solution to the present problem not as a single fix but as combination of measures that can be used both during and after the problem has diminished”.<sup>8</sup> This view is common of many that the Committee heard.
51. In a statement issued on 19 June.<sup>9</sup> Scotland’s most senior judge, Lord Carloway, called for new legislation to help address the growing backlog of court cases, stating that measures proposed so far had simply been “tinkering at the edges” of a major problem. He also said in his statement that “this is not the time for a defence of tradition,” and that: “... the cry of ‘it’s aye been’ cannot prevail. We have to seize the momentum and opportunity to respond to the particular challenge.”
52. In his view—
- ” None of the measures proposed by others have so far come close to offering practical answers to what are real difficulties
- They are simply tinkering at the margins of a major problem which, as long as social distancing and self-isolation are in place, requires a political solution.
53. The Law Society of Scotland wrote to the Committee on 2 September to express its view. Its President, Amanda Millar, said that “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.”<sup>10</sup> She added that—
- ” ...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.<sup>10</sup>
54. The submission also stated that—

” ...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.<sup>10</sup>

55. The remainder of this section explores the views we heard on some of the options that are still, in the view of some, worthy of further exploration.

## Trial by jury or judge-only trials

56. Trial by jury in Scotland is used in the courts of Scotland in solemn procedure for trial on indictment before a judge and jury for serious criminal cases, and in certain civil cases (mainly personal injury claims).
57. Criminal procedure in Scotland is generally regulated by the Criminal Procedure (Scotland) Act 1995 (as amended) and various Acts of Adjournal passed by the High Court of Justiciary. Juries in these cases consist of 15 people, if jurors drop out e.g. because of illness the trial can continue with a minimum of 12 jurors. In criminal trials conviction is on the basis of a majority verdict, with eight jurors required to decide that the accused is guilty.
58. The move to remove trials by jury in a solemn criminal case in the sheriff court or High Court would be a very significant step. As noted previously, this option was to have been part of a bill proposed to the Scottish Parliament at the outset of the pandemic, but this provision was withdrawn by the Scottish Government during consideration of the bill. Nevertheless, the measure still has its supporters as well as opponents.
59. For bodies such as Victim Support Scotland, Rape Crisis Scotland, Assist and Scottish Women’s Aid, this is an option that has been “prematurely dismissed” back in April 2020.<sup>11</sup>
60. In an open letter to MSPs, submitted to the Committee as evidence, these groups argue that jury-less trials are already used to prosecute domestic abuse cases in summary proceedings and this means that “thousands of serious cases [have already been] heard in Scotland without a jury present.”<sup>11</sup> They further argue that—
- ” Part of the rationale for retaining juries is the right to be judged by your peers, but this is unlikely to happen properly in the current circumstances with many people not being able to participate in jury services, particularly single parents and women with caring responsibilities and those who are ‘shielding’.<sup>11</sup>
61. In her evidence to the Committee. Kate Wallace, chief executive of Victim Support Scotland said—

- ” We would like the potential for juryless trials to be introduced into the mix along with the other options, so that we can keep an open mind about what the solutions to the crisis might be. It is not about replacing jury trials but simply about introducing another option. Our concerns about jury trials relate to the risk that the coronavirus situation poses, given the number of people who are involved in serving on juries and the length of time for which, as public health experts tell us, the coronavirus may be with us. We ask that the option of juryless trials be explored with other options.<sup>12</sup>
62. These organisations argue that human rights bodies have agreed that jury-less trials do not breach human rights providing that they are carefully considered.
63. Similarly, Engender has also indicated that it too would favour looking at this option. Stating—
- ” We continue to believe that judge-only trials respect the dignity and rights of women who have experienced gender-based violence, minimises additional trauma of delayed and protracted attempts to seek justice and balance the rights of women and the accused in a proportionate way while our society experiences the present disruption.<sup>13</sup>
64. In their submission to the Committee, the Scottish Human Rights Commission (SHRC) refers to this issue. The Commission notes in its submission that Article 6 ECHR “does not confer a right to a jury trial”.<sup>14</sup> The SHRC states that, “if proceeding without juries, the duty on the sitting judge to give detailed reasons would be a necessary Article 6 safeguard.”<sup>15</sup>
65. Nevertheless, the SHRC also states that “if the decision is made to proceed without juries in certain cases, a fundamental aspect of Scotland’s criminal justice system will have been altered.”<sup>15</sup>
66. Other organisations have come out strongly against this option. For example, the Law Society of Scotland stated that “Now is not the time to fundamentally change the Scottish criminal justice system by instituting judge only solemn trials”.<sup>16</sup>
67. Similarly, the Scottish Criminal Bar Association said that trial by jury is “at the very heart” of the criminal justice system and they “vehemently” opposed any change. The SCBA believed that the jury system delivers “balanced and well rounded decisions on behalf of society” in a way that a single judge would not, stating—
- ” Contrast the rounding and balancing effect of fifteen members of the public, drawn at random, with a jury of one drawn exclusively from the top one percent of earners; likely male; always university educated; and most likely aged between fifty and seventy. There is no moderating influence on that one privileged person’s views. He or she would take decisions about events in society far removed from their own life experiences.<sup>17</sup>
68. The Society of Solicitor Advocates also oppose this option, stating “we can think of no measures sufficient to compensate for the loss of one of the key safeguards in Scotland for guaranteeing a fair trial.”

69. In his evidence in May 2020, Eric McQueen, chief executive of the SCTS gave his view on the option of jury-less or judge-only trials. He said that, notwithstanding the opposition to this option, “we need to be clear that if delays are going to continue for a year, or for two or three years, trial by judge is an option that would address the issue—and would do so very quickly.”<sup>18</sup>
70. He added that “the view has been taken that trial by judge is not completely off the table, but we need to test a number of other options first.” He concluded that—
- ” I fully understand the opposition to trial by judge and I fully understand that its use would be a political decision—as it absolutely should be. That is not a decision that should be made by the courts or the Lord President. However, the option needs to stay on the table and to receive active consideration.”<sup>18</sup>
71. In his evidence to the Committee in June 2020, the Cabinet Secretary for Justice appeared to rule out the option of jury-less or judge-only trials. He said—
- ” We are not exploring the option of judge-only trials, no work is going into that option and I cannot feasibly see its being brought back for consideration at all. Even if there were a desire and a will to do so, which I do not think there is, Parliament has made its position on the matter clear, and I respect Parliament’s voice in that regard.”<sup>19</sup>

## Changing the number of jurors

72. With the introduction of social distancing measures in Scotland generally and within our courts, the option of reducing the size of a jury panel from the current 15 was put forward at the start of the lockdown period. The basic idea being that fewer jury members should mean it was easier to use some of the current court estate. There are, however, several challenges with this option as indicated by several organisations that gave evidence from the Committee.
73. The Scottish Criminal Bar Association stated that such an option would be workable and certainly preferred to jury-less trials. The organisation notes that the size of a jury could be allowed to fall to seven if jury members became ill during a trial before the case needed to be deserted.<sup>17</sup>
74. The Law Society of Scotland, unlike the above, takes a different view. Its evidence to the Committee states that “the use of 15 jurors should be maintained in High Court trials.” The Society accepts that some flexibility might be required and, if that was the case, some form of agreed contingency plan would be needed to deal with jurors being tested positive for COVID-19 during a trial.
75. The concern about the potential for increasing the risk of a mistrial or a case being abandoned is a key concern of victim’s groups who gave evidence to us. They note that the potential for a mistrial due to the absence of enough jurors will have a “devastating impact on the mental health and wellbeing of people affected by crime.”<sup>11</sup>
76. In its submission, SHRC raises no concerns about the option of smaller juries. It said that empanelling smaller juries “does not present human rights concerns,

providing that the jury is large enough to allow for sufficient deliberations and decision-making.”<sup>15</sup>

77. Despite the seeming initial enthusiasm for this option, the SCTS and Scottish Government appear now to have dropped the idea. With the introduction of remote trials (where the jury need not necessarily be in the same building as the other participants), the scope for socially distancing a jury of 15 members has increased as alternative venues can now be used.

78. In his evidence, the Cabinet Secretary told the Committee that—

” I am reluctant, in the midst of a global pandemic, to be so firm as to say that we would never look at the option of smaller juries. However, given the solution that we now have, we do not need to pursue that option—certainly not at the moment. It is not an option that we are actively exploring, looking at or pursuing, because the solution that we now have in place will allow a 15-person jury to socially distance; there is plenty of room in the cinema complexes for that to happen. It would therefore not make sense for us at the moment to exert effort to explore the option of smaller juries.”<sup>20</sup>

## **Altering the sentencing powers of the sheriff courts**

79. In its options paper of April 2020, the Scottish Government gave some background on the types of criminal cases heard in the different types of court in Scotland. It notes that the High Court deals with the most serious criminal cases, including all cases involving accusations of murder or rape, and can sentence a convicted person up to life imprisonment. Whereas, in solemn cases, the Sheriff Court can sentence an accused person to up to five years in prison or impose a fine of any amount.

80. In a summary case, heard by a sheriff without a jury, the Sheriff Court can sentence a convicted person to up to 12 months in prison or a maximum fine of £10,000 (though some offences can carry higher maximum summary fines as provided for in statute). These sentencing powers are subject to the overall legal framework including the maximum sentence set for any individual offences.

81. Other than for cases that must be heard in the High Court as a matter of law, it is for the prosecutor to decide what level of court a case will be heard in, informed by the nature of the alleged offence, the impact of the offence on any victims and the wider community, the relevant potential sentence, the circumstances of the accused and the court's sentencing powers.

82. The option proposed by the Scottish Government is to consider whether changes to these sentencing powers may aid an effective system of criminal justice during this period. Specifically, consideration could be given to amending the sentencing powers of the Sheriff Court in summary cases. For example, this could look at considering a change in the maximum custodial sentence of 12 months and exploring higher levels such as two or three years. This would allow some cases that would otherwise require to be heard before a jury to be considered by a judge alone.

83. The Scottish Government emphasised that any such changes would be a temporary measure relevant only to the period and aftermath of the current pandemic.
84. In his evidence to the Committee, the Lord Advocate set out some of the factors that would need to be addressed if this option were to be pursued. He said that decisions such as this (which court should be used) cannot be reduced to a simple formula (such as the type of crime) and that there may be reasons why a case that is likely to attract only a summary level sentence is nevertheless prosecuted on indictment. He noted that the impact of a change of this nature would be felt across all types of cases currently prosecuted on indictment in the sheriff court.<sup>21</sup>
85. The Scottish Criminal Bar Association's submission set out several concerns with this option. It warned that, for the cases this referred to, the option is the same as abolishing jury trials, but without the safeguards. They also point out that there is no audio recording of summary trials and this would make it more challenging to hear appeals.<sup>17</sup>

## Sentence discounts

86. One option suggested by some is to look at the scope for sentencing discounts as a means of enabling cases to be pursued more swiftly. Early pleas in return for a discount could mean a trial is not necessary. Sentencing discounts also have the potential benefit of reducing the number of people receiving a custodial sentence.
87. The Law Society of Scotland submission points out, however, that it cannot of support any suggestion that the Scottish criminal justice system is allowing criminals to benefit during COVID-19.<sup>16</sup>
88. In his oral evidence to the Committee, the Lord Advocate noted that—
- ” The Crown position is that the existing discounts already provide a substantial incentive to accused who wish to plead guilty to do so at as early a stage as possible. However, ultimately, the court will decide whether it is appropriate to allow an additional discount at this time.<sup>22</sup>
89. Kate Wallace of Victim Support Scotland said—
- ” Scotland already has one of the most generous systems in the world for early pleas—the definition of “early” can include a plea made on the day of the trial. The victims whom we support struggle already with the process of sentence discounting. Further discounts would be even less well understood and would cause more confusion and upset. In addition, [...] there have been concerns, from research across the world, about vulnerable accused, and about potential bias in early pleas for sentence discounts.<sup>23</sup>
90. In response, Ronnie Renucci of the Scottish Criminal Bar Association noted that—



” ...the point of discounted pleas is in recognising the utilitarian value of such a plea. It means that witnesses do not have to go to court and go through the anguish of waiting and then having to give evidence. It saves the court time and money.<sup>24</sup>

91. The Cabinet Secretary for Justice said that he was “wary of potentially increasing the discount further” because of the concerns of victim’s groups and for human rights reasons (whereby the possibility of a discount encourages a vulnerable accused person to plead guilty).<sup>19</sup>

## Remote courts and remote jury empanelling

92. One option that has now found favour by the Scottish Government, despite its initial reservations is one proposed by several Committee members in the early days of the lockdown period. That is to explore the use of suitable non-court premises which could be used for the jury to meet and dial in remotely to a trial and/or for the purposes of empanelling a jury before a trial started. This could help with meeting social distancing restrictions.

93. The submission from the Law Society of Scotland of May 2020 noted that—

” 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.<sup>16</sup>

94. Following work by the SCTS and an injection of an additional £5.5 million from the Scottish Government, this option is now being taken forward. In his evidence to the Committee, Eric McQueen noted that the £5.5 million provided gave SCTS the capacity to create the two remote jury centres for the High Court. However, he noted also that, to create the same model for the sheriff and jury court, will cost something in the region of £6.5 million, which was not yet forthcoming.<sup>23</sup>

95. The Cabinet Secretary told the Committee that the additional funds to use buildings such as cinemas would make a significant difference and “give us the capacity to run as many trials as we could pre-Covid.”<sup>25</sup> On 9 September, the Scottish Courts and Tribunals Service confirmed that the Odeon cinema at Ford Kinnaird in Edinburgh will host the first socially-distanced remote jury trial on 28 September. Additionally, the Odeon’s Glasgow branch will host trials from 12 October.

## Longer sitting hours/extended days of business

96. One other option that has emerged after the initial set of options proposed by the Scottish Government in April 2020 is that of longer sitting times and the use of hitherto non-sitting days (e.g. Saturday courts).
97. In its recent report <sup>26</sup>, the SCTS suggested that one of its priorities was “creating capacity, within physical distancing restrictions, to increase the number of trial courts, potentially introducing weekend trial courts.”
98. This has met, according to press reports, with some resistance from some quarters. For example, Mr Willie McIntyre of Russell and Aitken describing the suggestion as “a bluff”, noting that costs of overtime etc would be “exorbitant” and not without difficulties for the police, witnesses etc to attend. Ian Moir of Moir and Sweeney Litigation said he would be “astonished” if there was any appetite in his firm to work the additional hours. He said a six-day week as the norm was not realistic and would have significant impact on family life and stress. <sup>27</sup>
99. The Law Society also expressed concerns about this idea, stating—  

” ...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. <sup>10</sup>
100. In his evidence, the Lord Advocate also noted the resource challenge of additional sittings. He said—  

” If there were, at some point in the future, to be additional sittings in the sheriff court in order to seek to address the backlog there, that would likewise require additional procurators fiscal to prosecute those cases. More broadly, an increase in throughput across the system would also require an increase in the number of COPFS case preparation staff, victim information and advice staff and administrative staff, in order to support the ability of the Service to run a greater number of trials concurrently than its current resource levels allow. <sup>21</sup>

## Prioritisation of cases after lockdown

101. The scale of the backlog was only one aspect that the Committee has been looking into. One other issue is whether and how a prioritisation on the cases to be taken forward initially during the recovery phase can be put in place. Should some cases start before others and what criteria could be used to make such decisions?
102. In his evidence to the Committee, the David Hardie, Crown Agent, observed that certain factors will be used in this process, such as the age of the accused and whether the case is a custody trial or involves a particular vulnerability. <sup>28</sup>



103. He also noted that, due to the current pandemic, an additional element of importance is whether a trial can proceed—with regard to witness availability, arrangements for the physical or remote taking of evidence, and arrangements in relation to capacity depending on the number of accused in a given case.<sup>29</sup>
104. In summary cases, Mr Harvie said that custody trials and trials that involve vulnerable witnesses will be a priority.<sup>30</sup> The Lord Advocate added—
- ” Throughout this period, in all the adjustments that have been made, we have been acutely conscious of the particular features of domestic abuse cases and the need for them to be given appropriate priority. I envisage that those cases will continue to be a priority.<sup>30</sup>
105. The Scottish Criminal Bar Association’s evidence added to this debate, stating—
- ” There are many cases where the urgency is considerably less such as Misuse of Drugs Act offences or fraud cases. An exercise could be undertaken to evaluate and identify those cases that are a priority, that are ready to proceed to trial and could be easily accommodated within whichever option is finally chosen, thereby enabling the courts to proceed with cases that were most easily suited to that option.
- Consideration could also be given to the size of cases and it may be that larger cases would just have to wait until the aftermath of the crisis and be dealt with within the accumulated backlog.<sup>17</sup>
106. The Scottish Human Rights Commission also covered the aspect of prioritisation, noting—
- ” Appropriate prioritisation of cases, particularly where an accused is on remand, will be required. In general, the Commission believes it is likely that the current health crisis would be regarded as justifying time periods that are longer than under normal circumstances.<sup>15</sup>

## **Impact of delays on victims/survivors of crime, witnesses and the accused**

107. The importance of considering the rights of victims and survivors, witnesses and the accused was highlighted in several submissions to the Committee. For example, the Scottish Human Rights Commission stated—
- ” ...the rights of victims, witnesses and others involved in the justice system must also be protected through the conduct of trials. Articles 2 and 3 ECHR impose procedural obligations on the State to ensure the effective investigation and prosecution of crimes. Article 8 provides that States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.<sup>15</sup>

108. The Law Society of Scotland also commented on this, noting the balance that had to be struck between competing interests—

” There is a need to acknowledge the conflicting interests of the victims who are expressing deep-rooted concerns at further delays in trials taking place which is having a catastrophic and deeply humiliating impact on them and their families and the accused, some of whom have now been facing lengthy periods on remand in custody. <sup>16</sup>

109. Eric McQueen indicated in his evidence that the interests of victims of crime was a high priority for SCTS. He said SCTS was—

” ...very cognisant of the fact that behind the numbers are people—victims, witnesses and accused people—whose lives have, in essence, been put on hold. We need to find creative and innovative ways of re-establishing the justice system and reducing some of the time delays. <sup>31</sup>

110. Also, Engender's submission to the Committee raised several points in relation to gender issues and the current pandemic. It said—

” We do not believe that women's rights have been adequately balanced in the consideration of the options to date. Asking women to wait for justice adds serious injury to women whose lives have already been seriously affected by men's violence, but so too does instituting changes, however temporary or otherwise, which further undermine and exploit their own right to a fair trial and to justice itself. <sup>13</sup>

## Digital options, including the ability of the public to participate and scope for court closure

111. The introduction of remote juries (where members of the jury attend a trial remotely in an offsite location via video-link) is one of the options that has been put in place to help reduce the backlog and allow cases to be restarted in our courts. Other forms of court and tribunals have also embraced new technologies to meet virtually and carry on with business. In the justice system itself, digital technologies have been used to enable the accused to participate in a trial whilst remaining within a prison.

112. In Scotland, as part of the efforts to re-open the courts system, virtual trials were held in Aberdeen and Inverness as a pilot<sup>v</sup>. The results were analysed in a report from Sheriff Principal Derek Pyle to the Lord Justice General <sup>32</sup>. In his conclusion, Sheriff Principal Pyle stated—

” As a pillar in the effective administration of justice, it is recommended that the aim should be that virtual trials become the default method of judicial determination in summary crime.

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<sup>v</sup> The first summary trial was held in Inverness on 9 June 2020. Fiscal, defence agent and witnesses attended remotely. The Sheriff presided from chambers. The accused appeared from a video facility at court.

113. His report recommends that virtual trials should be rolled out across the country in the autumn of 2020, to allow time for engagement and training, and discussions are now underway with Sheriffs Principal, COPFS, The Law Society of Scotland and Victim Support Scotland.
114. The Committee understands that the pilot of virtual trails did not necessarily cover the full range of cases that can be heard in sheriff courts in Scotland. One the face of it, therefore, the use of such technologies might seem benign, but they are not without challenges.
115. In response to the report from Sheriff Principal Pyle, some local solicitors in Aberdeen spoke out against the pilots. For example, speaking to local media, Alex Burn, of Burn & McGregor, said—
- ” To me, it’s just a nonsense. If you want to assess someone’s credibility and reliability, seeing them on a screen is not the same as being personally present. You’ve got the technical difficulties, these things just don’t seem to work. I’m against it. It’s trying to do justice on the cheap. If there’s a backlog, maybe if they didn’t close Stonehaven Sheriff Court, maybe if Peterhead was able to do solemn cases. The powers that be think ‘no, we don’t need that’.<sup>33</sup>
116. In an inquiry report into the use of similar technologies in England and Wales, the Equality and Human Rights Commission highlighted several concerns. It said that “video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions.” The Commission noted that “people with these conditions are significantly over represented in the criminal justice system.”<sup>34</sup>
117. Furthermore, the Commission said that there were several other barriers, including the absence of processes to identify, record and share information about impairments. The body was also concerned about the availability of adjustments to ensure that disabled people accused of crime can understand and effectively participate in legal proceedings against them.
118. This view was echoed by the Law Society of Scotland who told the Committee that—
- ” 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.  
10
119. The Committee was also made aware of concerns, in some parts of Scotland, that a permanent move towards the use of such technology brought with it the potential for the closure of smaller, local courts in some remote or rural locations if it was perceived that everything could be done digitally.
120. Mr McQueen of the SCTS hoped that this would not be the case. He said that “it is very important that local justice is always delivered locally” and that “concerns over access to justice or closure of local courts are not even on our radar.”<sup>35</sup>

121. In his evidence before the Committee, Ronnie Renucci highlighted a problem with 3-way video links between the prison, counsel and the solicitor. He said—

” ...there is a problem with consultations with the accused. For some reason, the prisons cannot do three-way consultations: counsel and the solicitor have to be together if they are consulting by video link. They can do it with one person on the other end of a phone line but that is really not satisfactory. We do not know what the technical problem is, but we know that the Scottish Legal Aid Board looked into the issue with prisons and was told that the three-way consultation could not be done, at this stage. <sup>36</sup>

122. The Committee subsequently wrote to the Scottish Prison Service and was told this issue has been resolved and it is now possible to hold such conferences.

## Wider issues

### Remand, young prisoners and YOIs

123. As part of the evidence taken by the Committee, it is worth noting the lockdown has had an impact on several issues that the Members have previously expressed concern about. The initial cessation of criminal trials has meant that the length of time an accused is being held in remand has increased, thereby putting strain on the Scottish Prison Service.

124. Teresa Medhurst, acting chief executive of the Scottish Prison Service noted that since the beginning of May, remand numbers have increased by over 800. She indicated that SPS and other organisations, including the Scottish Government were looking at wider policy options such as the use of electronic monitoring as a bail condition as an alternative to remand. <sup>37</sup>

125. In supplementary written evidence, SPS provided further detail on remand figures. On 18 August 2020, there were 1,753 individuals on remand (1,994 if those individuals Convicted Awaiting Sentencing are included in the data), which accounts for approximately one quarter of our total population. Looking at young people (aged 20 and under) specifically, of the 232 currently in custody, 42.5% are on remand (52% if those Convicted Awaiting Sentencing are included).

126. The breakdown of those on remand is outlined in the table below.

#### Breakdown of people on remand

Population Type	Numbers
Untried adult male	1570
Untried young adult male	95
Untried adult female	82
Untried young adult female	6
<b>TOTAL</b>	<b>1753</b>
Convicted Awaiting Sentencing	241
<b>TOTAL</b>	<b>1994</b>

127. When speaking to the Committee, the Cabinet Secretary indicated that other options could be considered if necessary. He said: "As a last resort, and only as a last resort, there could be another early release scheme. I am not exploring that at the moment, but it is an option under the legislation. I cannot have a situation in which our prison population goes back to pre-pandemic levels." <sup>38</sup>
128. The specific issue of the number of young people held in Young Offenders Institutions (YOIs) and the impact of court closures was also raised. In its evidence, SPS noted that the number of young people in custody has dropped considerably over the past 10 years, from an average of 864 in 2010-11 to 232 today. SPS also noted that the remand population has not, however, fallen in line with this trend.
129. In a letter to the Committee, the Children and Young Peoples Commissioner Scotland noted that on 20 March 2020, there were 24 children and 270 young people (aged 18-21) detained in YOIs. On 15 May 2020, there were 7 children held on remand and 8 serving a sentence; with a further 58 young people being held on remand, 9 convicted and detained pending sentence and 149 serving sentences. In total therefore there were 231 children and young people deprived of their liberty, some for significant and uncertain periods of time. <sup>39</sup>
130. The Commissioner highlighted that this delay in justice, along with other issues such as conditions within YOIs during lockdown, exacerbated existing mental health vulnerabilities and placed all children detained at heightened risk of developing mental health problems.
131. The Commissioner encouraged the Justice Committee to seek specific disaggregated data on children detained in YOIs and in particular the length of detention, the reason for detention, the scheduled release date, parole/appeal or trial dates, whether they are care experienced or have a disability or additional support needs.

## The civil justice system and tribunals

132. Most of this report concerns itself with problems in the criminal justice system brought on by the pandemic and, in particular, with the challenges of restarting jury trials.
133. Although some of the evidence presented to the Committee by, for example, SCTS, has suggested that the problems are must less acute in the civil and tribunal system, there are still challenges nonetheless.
134. For example, the Society of Solicitor Advocates told the Committee that—
- ” It is worth pointing out that the continuing requirement for wet signatures is causing concern to our members who are still having to sign documents in civil and criminal cases and arrange to lodge the principal documents in hard copy. Given the strict time limits for lodging certain documents, this has been necessitating travel to court buildings during lockdown. We ask that this be reconsidered urgently for the safety, not only of our members but court staff. <sup>40</sup>

135. Although the case backlog may be much smaller or non-existent, other component parts of the civil justice system and ancillary services are still in the process of re-opening.
136. During its ongoing scrutiny of the impact of the pandemic, the Committee heard views of the challenges facing local authorities and their social work departments in supporting families on civil matters. Additionally, until very recently, family mediation and contact centres have operated with very limited service or have been closed for face-to-face child contacts. The pandemic has also led to very real challenges in terms of access issues for separated partners.
137. Other key components of the civil justice and tribunals system, such as solicitors, have all been subject to the same challenges facing all businesses in Scotland in terms of the ability to continue to trade during lockdown and provide services to clients.
138. In its most recent written submission to the Committee, the Law Society of Scotland was critical of some aspects of the efforts to re-opening the civil justice system. It said that there were inconsistencies across sheriffdoms, with “publications of changes to civil business are occurring at the last minute”, which meant each sheriffdom was acting in a different way.<sup>10</sup>
139. The Law Society also said that for both civil and criminal justice business—
- ” 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.<sup>10</sup>
140. Specifically, for civil business, the Law Society said that, 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. In its view, “the lack of consultation has created a huge amount of uncertainty amongst the profession.” It added—
- ” 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.<sup>10</sup>

## Use of simple procedure and mediation to clear the backlog in civil procedures

141. In his evidence to the Committee, Charlie Irvine, Director of University of Strathclyde Mediation Clinic, made the following suggestion that the Committee should—

” ...consider how the court system could take advantage of the opportunities presented by remote mediation to ensure more consistent access to justice across Scotland. If parties are willing to resolve their disputes in this way it will reduce waiting times and court costs. The current rules already allow and encourage this, but courts and sheriffs will need to take a more flexible approach. Resources may need to be applied differently to ensure sufficient mediator capacity. This may be a matter for the Scottish Courts and Tribunals Service and Scottish Government's Justice Directorate to address.<sup>41</sup>

DRAFT



# Initial conclusions and recommendations of the Committee

142. The COVID-19 pandemic has caused significant problems in the court and tribunal system in Scotland. Criminal trials - and especially jury trials - have been severely impacted.
143. The Committee welcomes the various initiatives underway to try to re-open Scotland's courts and tribunals. We are grateful to all involved for their efforts.
144. Furthermore, we welcome the collaborative approach followed, in the main, by the Scottish Government and the courts to explore and consult on a range of options that could be used to re-open the courts and tackle the backlog of cases.
145. However, we take note of the comments of the President of the Law Society of Scotland that "under the guise of COVID-19, sweeping changes to how our justice system operates are being made; [...] and that these are reducing the openness and transparency that have been a fundamental tenet of its success".
146. As we proceed, we must follow the model used by the Cabinet Secretary back in April 2020 and subsequently by Lady Dorrian's Working Group on Jury Trials. These initiatives followed a collaborative approach with all interested parties represented and with analysis undertaken in an open and transparent way.
147. The Committee has supported the steps taken to date. In our view however, no change that has been introduced in response to the pandemic should be regarded as irreversible if it can be shown to have impeded access to justice or resulted in substantial concerns for those whom the justice system exists to serve. The Scottish Government should take an iterative approach and take time to review each of the changes made.
148. The Committee welcomes the extra investment by the Scottish Government in remote jury centres for solemn criminal trials but notes that around double that sum will be needed to extend the option to summary cases in the sheriff courts. The Cabinet Secretary for Justice will need to reflect on that point in the forthcoming budget discussions for 2021-22.
149. Whilst some decisions on initial options have been taken by the Scottish Government and the SCTS, it is clear to the Committee that much more clarity is now needed if the trial backlog is to be addressed as a matter of urgency.
150. A failure to take the necessary decisions now will only result in ongoing delays in the justice system which, in our view, is not acceptable either for the victims/survivors of crime or for the accused. In this respect, we note the views expressed by the Lord President, Scotland's most senior judge, that we must "stop thinking about tinkering at the edges".<sup>9</sup>
151. The Committee further notes that there is a diminishing amount of parliamentary time remaining in this session of Parliament should there be a need for legislation or for the approval of additional budgets. Time is now of the essence for final decisions to be taken on how to re-open courts and tackle the backlog of cases.



152. In our view, there is no single solution to the problem and a basket of measures will be needed. Some of these will be unpalatable but are, in our view, necessary because of the current impact on the delay in justice on victims/survivors of crime, witnesses and the accused.
153. We are of the view that additional remote jury centres, remote jury empanelling, further use of digital technology, an exploration of additional alternative venues for virtual courts will all be necessary, providing that steps are taken to protect the rights of people with disabilities and the vulnerable accused to participate in the justice process.
154. Furthermore, the option of a further, limited, discounting of sentences should be explored, where appropriate, as a means of reducing the backlog of trials. Care will need to be used when considering how far this option can be used given the views of victims and others, such as those representing the vulnerable accused, on when it is appropriate for someone to receive a discount in return for a guilty plea
155. Although problematic, we believe that consideration should be given to the feasibility of extended court sittings as an essential element in the short-term to reduce the growing number of outstanding cases in the court and tribunal system. This may require extra investment in temporary sheriffs, additional court staff/prosecutors etc, as well as budgets for the legal profession, increased legal aid etc. Such measures should not be undertaken without full consultation of all the necessary parties likely to be affected.
156. As the re-opening of our courts begins, there needs to be rigorous assessment by the COPFS and the judiciary to prioritise cases using the types of factors identified in this report and to maximise pre-trial preparatory work than can be done now during lockdown. Particular types of case, length of time that a case has been delayed and whether the accused is on remand will all be important factors in prioritising which cases are taken forward first.
157. We also urge, for example, detailed consideration to be given as to how to use pre-recorded evidence to the fullest, especially by way of commission. Additionally, in appropriate circumstances, the evidence of essential medical witnesses or other key workers might be given by TV link to avoid removing them for too long from their work as key personnel.
158. Whilst some of the options we have identified above come with challenges, others must, in our view, remain beyond the pale. This includes the call for jury-less/judge-only trials. Such a step is, in our opinion, too significant a change to the fundamental principles of our criminal justice system to be made at short notice. Furthermore, there is insufficient time remaining in this parliamentary session to properly scrutinise any such proposal were one to be made.
159. In taking forward any new options, ministers and others must ensure that any initiative does not merely remove one barrier to access justice and replace it with another, or have unintended consequences in other parts of the justice system, policing and ancillary support services such as criminal justice social work, victims' support, legal aid etc.

160. We recommend that the Cabinet Secretary responds in full to our report and conclusions and, without undue delay, sets out his view on the merits of the ideas we have presented. We also ask him to comment on the option of altering the sentencing power of the sheriff courts. The latter is the only remaining change we believe he is still considering that would require new primary legislation.

161. In the spirit of our call for a collaborative approach, we recommend that the Cabinet Secretary organises a further roundtable of experts, lawyers, the Scottish Courts and Tribunals Service (SCTS), MSPs, victims' bodies etc and presents a final paper setting out his proposals for endorsement/agreement on the way forward. This paper should detail what options will be taken forward in the remainder of 2020 and before the Scottish elections in May 2021.

162. Furthermore, we recommend that the Cabinet Secretary or Minister for Community Safety convenes a similar roundtable for groups in the civil system, particularly in the family courts. This needs to bring forward options and investment to re-open this system and deal with the challenges faced by ancillary services such as family contact centres, family solicitors, domestic abuse support groups etc. There is a mismatch now between the courts, which are continuing with business, and these support services which are, at best, only partially re-open.

163. The Committee recommends that the Cabinet Secretary gives serious consideration to seeking extra investment as part of the forthcoming draft 2021-22 budget to match in summary cases that which has been provided for solemn trials in relation to remote jury centres.

164. We recommend that SCTS ensures that the increased use of digital and remote justice solutions does not impinge on the abilities of people (e.g. with disabilities or learning needs) to take part in trials. In our view, when new technologies are being considered, there must be a focus on the interests of more vulnerable court users, including children, disabled people and those with specific communication needs. Additionally, increased use of such technologies should not come at the expense of additional court closures, especially those in remote or rural areas.

165. In relation to the provision of data, we recommend that SCTS provides the Committee with monthly figures on the backlog in the criminal, civil and tribunal system, including trend data. Furthermore, we recommend that the Scottish Prison Service (SPS) provide the Committee with disaggregated data on the numbers of children detained in YOIs and, in particular, the length of detention, the reason for detention, the scheduled release date, parole/appeal or trial dates,

and whether they are care-experienced or have a disability or additional support needs. Similar information should be provided for women prisoners.

166. In relation to the tribunals system, we recommend that the SCTS or Cabinet Secretary set out what is being done to tackle the current backlog of around 800 cases in the housing and property chamber.

167. Furthermore, we ask both the SCTS and the Scottish Government to explore the concerns raised by the Society of Solicitor Advocates regarding the requirement for hard copy documents and signatures for certain civil court documents, given the challenges brought on the pandemic and the use elsewhere of electronic signatures.

168. Finally, we ask both the SCTS and the Scottish Government to explore what more can be done through simple procedure and remote mediation to reduce the backlog in civil cases and write back to the Committee on the feasibility of this suggestion.

# Annex A - Oral and Written Evidence

The Committee took oral evidence at the following committee meetings:

- [23 April 2020](#)
- [19 May 2020](#)
- [2 June 2020](#)
- [16 June 2020](#)
- [18 August 2020](#)

The Committee received [written submissions](#) from:

- Executive Committee of the Glasgow Bar Association (16 April 2020)
- Faculty of Advocates' Scottish Criminal Bar Association (15 April 2020)
- Law Society of Scotland (17 April 2020)
- ASSIST, Rape Crisis Scotland, Scottish Women's Aid and Victim Support Scotland (20 April 2020)
- Scottish Human Rights Commission (18 May 2020)
- Society of Solicitor Advocates (21 April 2020)
- Equality and Human Rights Commission (22 April 2020)
- Engender Submission (18 May 2020)
- Health and Safety Executive (18 May 2020)
- Rape Crisis Scotland (18 May 2020)
- Scottish Criminal Bar Association (15 May 2020)
- Scottish Human Rights Commission (18 May 2020)
- Victim Support Scotland (19 May 2020)
- Justice Scotland (25 May 2020)
- Public Health Scotland (25 May 2020)
- Law Society of Scotland (September 2020)

The Committee also received a number of [letters and other correspondence](#) about the proposals for solemn cases during the Covid-19 emergency.

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- [2] Justice Committee. (2020, May 19). Official Report.
- [3] Justice Committee. (2020, August 18). Official Report.
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- [19] Justice Committee. (2020, June 2). Official Report, col 26.
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- [29] Justice Committee. (2020, June 16). Official Report, col 14.
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- [31] Justice Committee. (2020, August 18). Official Report, col 2.
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