

T: 0300 244 4000  
E: scottish.ministers@gov.scot

Margaret Mitchell  
Convener, Justice Committee

By email

24 June 2020

Dear Margaret,

I was grateful for the opportunity to provide evidence at the Justice Committee earlier this month on the issue of jury trials. Thank you also for raising these additional queries which I am happy to provide further information on.

### **Potential legislation**

I can confirm that two of the four main options under consideration would require legislation if it was decided to take them forward:

- smaller numbers of jurors
- adjusting the sentencing powers of Sheriff Courts

### Smaller number of jurors

The Lord Justice Clerk's Working Group on Restarting Solemn Trials is looking at how the physical and other practical constraints on jury trials might be overcome, with alternative uses of space in the court setting and innovative use of technology, as well as how far a smaller jury size could make it easier to meet physical distancing requirements.

Despite the potential advantages of smaller juries in helping to secure sufficient jurors and meet physical distancing requirements, this is not a straightforward issue and careful consideration would need to be given to other matters such as what the number of jurors should be, how many jurors could drop out without the trial being aborted, and what the majority for conviction should be. The independent jury research published last year highlighted just how complex and inter-related these matters are, and I know that within the legal sector there are different views on whether this proposal should be considered, particularly at the High Court.

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Furthermore, as has been highlighted by third sector stakeholders in particular, it would be important to ensure that having fewer jurors did not lead to a significant chance of trials being aborted.

As the Committee is aware, the Lord Justice Clerk has now announced that planning is under way for an initial number of High Court jury trials to take place next month. In Glasgow they intend to use a 3-court solution in the High Court, with the jury using the public gallery in the trial courtroom. However, in Edinburgh, they hope to use a 2-court solution, allowing the jury to view the trial remotely from a separate room, although of course nothing will take place until they have finalised the planning and can provide the assurance that it will be safe for all of those participating in the trial and that proceedings may be recommenced without significant risk to the administration of justice.

If ultimately the preferred solution for jury trials is to locate juries remotely as is intended to take place in Edinburgh, then it may no longer be necessary to consider reducing the size of the jury. However, clearly such decisions cannot be made until after the trials have been carried out and evaluated. In the meantime, discussions will continue with stakeholders to ensure we are prepared for either eventuality.

### Adjusting the sentencing powers of Sheriff Courts

As part of an overall approach to dealing with the impact of coronavirus outbreak on the criminal courts, the Scottish Government continues to consider whether changes might be made to the maximum penalties that a summary court can impose.

As you are aware, the Scottish Government discussion paper included possible changes to summary sentencing limits and there was some interest in this proposal.

Scottish Government officials are continuing to explore the issues surrounding the impact a possible increase in the sentencing limit would have, for example what the level of the increase could be – e.g. from 1 year to 2 years, and which kind of cases would be brought within the summary courts that are currently prosecuted in the lower end of the solemn courts.

In deciding whether to take this proposal forward, views of stakeholders, including the third sector, will be important. Initial engagement as well as feedback to the discussion paper suggested that views were mixed even within sectors. In recent weeks we have been engaging further to help understand these positions and the views of organisations supporting victims.

It is important to understand the practical implications of a change in sentencing limits where the court estate is being used in quite a different manner as a result of Covid-19.

Clearly the work of Lady Dorrian's group is the key focus at present and how the work of that group evolves is crucial and will impact on consideration of the necessity, merits and practical impact of seeking to adjust summary sentencing limits.

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## Timescale

It may be that, after due consideration, neither of these proposals are taken forward, or there may be others outwith the four main options that could potentially require legislation, such as those related to jury selection that Eric McQueen highlighted in his evidence to the Justice Committee on 19<sup>th</sup> May.

Operational matters about the Scottish Courts and Tribunals are a matter for the Lord President, and the Restarting Solemn Trials Working Group is led by Lady Dorrian. Clearly the group are making swift progress so far, but there is a lot still to be considered, and new issues may emerge after the trials in July, so it would not be sensible to name an arbitrary date for any final decisions. However, the work being carried out by this group, as well as the trials being held in July should help clarify whether there will ultimately be a requirement for primary legislation. If it is decided that this is the most appropriate route forward, I will of course keep Parliament, and this Committee fully updated.

As I said during my oral evidence to the Committee, the ultimate aim is not to get a small number of trials started as quickly as possible, but to establish a sustainable approach that can allow as many trials as possible to progress in a way that is consistent with a fair justice system while protecting the health of all those involved.

## **Backlog**

As I also stated in my evidence session earlier this month, officials in the Scottish Government's Justice Analytical Services and the Scottish Courts and Tribunals Service (SCTS) are working towards a shared analytical product that sets out an analysis of the potential court backlog.

I can advise the Committee that in their work to date both SCTS and Justice Analytical Services have emphasised the size of the backlog we are likely to face, and that fact that the timing of the easing of restrictions is dependent on the scientific evidence base, will have a major impact on the Justice System, and so modelling will need to capture these complexities.

I expect a summary of this initial analysis to be finalised soon and I will ensure the Committee receives a copy directly. Officials within Justice Analytical Services have given an assurance that they will contact the Scottish Parliament Information Centre to share some of the underlying modelling with researchers.

Making this modelling publicly available will help ensure that our stakeholders have a shared understanding of the scale of the issues that our justice system faces, and thus the innovation, hard work and collaboration that will be necessary to tackle this.

## **Summary backlog**

As you are aware, the management of court business is a matter for the Lord President as the Head of Scotland's judiciary and Chairman of the SCTS board, but I am happy to provide you with the following information in relation to your query about plans to start addressing the summary backlog. In line with the Scottish Government's easing of restrictions all sheriff courts re-opened to SCTS staff from week commencing 2 June. From week commencing 15 June summary criminal business is restarting in local courts with physical distancing in place.

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SCTS has confirmed that custody trials will remain a priority, while non-custody trial courts will be programmed to allow the acceleration of cases administratively adjourned during lockdown.

Intermediate diets will be dealt with at all courts and will proceed administratively on the basis of written records, provided electronically by the Crown and defence. The accused will not be required to attend, unless the court directs otherwise. Trials following on from these diets will call on the previously assigned date and, where a trial cannot proceed on the original date, a new date will be fixed and intimated.

Video links are in place to manage custodies, together with remote representation of clients by solicitors, and bespoke courts have been established to deal with cases that can be resolved without the need for a trial. With regard to cases which cannot be resolved without a trial, planning is underway to expand the virtual trials which took place in Aberdeen and Inverness earlier this month. Such virtual proceedings, combined with summary trials continuing in physical courtrooms, could provide a mechanism to deal with some cases awaiting trial.

I commend the Court Service and the justice partners they have worked with in these very challenging times, for the range of collaboration and innovation that has been utilised to help overcome some incredibly challenging issues, However it is important that we do not forget that SCTS has assessed that, with physical distancing in place, court capacity will continue to be restricted to around 30% of normal levels. As I mentioned previously, modelling work is being finalised on the extent of the backlog and the projected trial delays, but I acknowledge that there will be a significant impact on the capacity to process summary business even when courts reopen and the Scottish Government will continue to work with SCTS and other partners to explore how best to address this issue.

## Victims

One of our key priorities during the pandemic is to ensure that victims continue to be supported, feel reassured and have confidence in the justice system. As the Committee is aware, I am committed to continuing engagement with organisations representing victims during the justice system's recovery process so that all voices are heard and all views taken into account. Indeed, the agenda of the Victims Taskforce earlier this month was focussed on the impact of Covid-19 on victims and how the Taskforce can help mitigate those impacts and ensure victims' interests are a central consideration in justice system recovery. In response to your request for a copy of a paper from the meeting, I enclose the following papers, all of which were prepared for the Taskforce meeting and consider the impact of Covid-19 on victims:

- Impact of Covid-19 pandemic on victims witnesses and survivors – Evidence from support organisations
- Summary of evidence relating to victims and the effect of Covid-19 – Justice Analytical Services
- Recorded Monthly Crime Statistics
- Overview of domestic abuse/VAWG trends and experiences during Covid-19 lockdown
- Victimisation during the coronavirus crisis – Information from victims' organisations

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- The experience of victims of crime – A rapid international review by Justice Analytical Services

The overview of domestic abuse/VAWG trends and experiences paper was originally submitted as an annex to the second paper - along with the crime statistics and the last two documents on the list - but this has since been published with very minor amendments and I enclose the final published version. The rest of the papers will shortly be made available on the Scottish Government's website.



**HUMZA YOUSAF**

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