JUSTICE COMMITTEE

AGENDA

14th Meeting, 2020 (Session 5)

Tuesday 2 June 2020

The Committee will meet at 10.00 am in a virtual meeting and be broadcast on www.scottishparliament.tv.

1. **Domestic Abuse Bill 2019-21 and the Private International Law (Implementation of Agreements) Bill [HL] 2019-21 (UK Parliament legislation):** The Committee will consider the legislative consent memorandums lodged by Humza Yousaf, LCM(S5)35 and LCM(S5)37.

2. **Work programme:** The Committee will ratify decisions made on its work programme at an informal meeting held on 12 May.

3. **The challenges in restarting jury trials in Scotland's courts:** The Committee will take evidence from—

   Ronnie Renucci QC, President, Scottish Criminal Bar Association;

   Kate Wallace, Chief Executive, Victim Support Scotland;

   and then from—

   Humza Yousaf, Cabinet Secretary for Justice, and Anna Donald, Acting Deputy Director, Criminal Justice, Scottish Government.

4. **The challenges in restarting jury trials in Scotland’s courts (in private):**
   The Committee will review the evidence heard earlier in the meeting.

Stephen Imrie
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5195
Email: justiceCommittee@parliament.scot
The papers for this meeting are as follows—

**Agenda item 1**

Paper by the Clerk  
J/S5/20/14/1

**Agenda item 2**

Paper by the Clerk  
J/S5/20/14/2

**Agenda item 3**

Paper by the Clerk  
J/S5/20/14/3

PRIVATE PAPER  
J/S5/20/14/4 (P)

[Click to watch Scottish Parliament TV](#)
Introduction

1. This paper invites the Committee to consider Legislative Consent Memorandums in relation to the following UK Government Bills:

- the Private International Law (Implementation of Agreements) Bill; and

- the Domestic Abuse Bill


3. The Domestic Abuse Bill is a UK Government Bill introduced to the House of Commons on 3 March 2020.

Legislative consent process

4. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of a Legislative Consent Memorandum (LCM). This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:

- change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or

- alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).

5. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass Bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the basis of a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note
that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

6. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in Chapter 9B of the Parliament’s Standing Orders.

**Private International Law (Implementation of Agreements) Bill**

7. **The principal legislative measures of the Bill are described as follows:**

- providing a clear approach to the domestic implementation of three international agreements drawn up under the auspices of the Hague Conference on Private International Law; and

- creating a delegated power which allows the Scottish Ministers, or the Secretary of State with the consent of the Scottish Ministers, to implement international agreements on Private International Law in domestic law in future via secondary legislation.

8. The Bill implements in domestic law the Hague Conventions of 1996, 2005 and 2007. A summary of each of the conventions can be found in paragraph 7 of the LCM (Annex A).

9. The second main provision of the Bill provides, in relation to Scotland, the Scottish Ministers (or the Secretary of State with the consent of the Scottish Ministers) with a subordinate legislation making power to domestically implement international conventions or agreements in private international law. This part of the Bill can be used for any future international conventions in the area of private international law (“PIL”) the UK enters and ratifies, both with the EU and other international partners.

10. For example, this power would be used to implement the Lugano Convention if the UK Government can successfully negotiate with the EU to re-join the convention. The Lugano Convention is the only substantial fall back for the EU regulation “Brussels Ia” (which provides rules for jurisdiction and recognition and enforcement of judgments in civil and commercial matters). The UK will cease to participate in Brussels Ia at the end of the implementation period. Lugano is an agreement between the EU and Norway, Switzerland and Iceland and the UK Government intends to accede to the Convention in 2020.

11. Provisions within the Bill which extend to Scotland relate to private international law which is within the legislative competence of the Scottish Parliament. The Bill also alters the executive competence of the Scottish Ministers. A summary of clauses in the Bill that require legislative consent can be found in paragraph 11 of the LCM (Annex A).

**Scottish Government Legislative Consent Memorandum**

12. A legislative consent memorandum was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 30 March 2020. The LCM can be found in Annex A.
13. The LCM states that the Bill is primarily being brought forward due to EU exit. The EU had taken competence to enter certain private international law agreements on behalf of Member States and the domestic implementation of the UK’s obligations under such conventions as an EU Member State was achieved by virtue of section 2(1) of and by Regulations made under the powers of section 2(2) of the European Communities Act 1972. EU Exit also means the loss of participation in the EU Regulations on civil judicial co-operation. This creates a need to enter into new international agreements with the EU and other states in this area.

14. Negotiating and joining international agreements on private international law is reserved, but implementing them in domestic law is devolved. The Bill provides that the Scottish Ministers may exercise the power to implement them in domestic law in relation to Scotland. However, the Secretary of State may also exercise the power in relation to Scotland, with the Scottish Ministers’ consent.

15. In considering whether to support the Bill the Scottish Government reached the following conclusions:

- The provisions within this Bill must be brought forward for Scotland or, as a separate jurisdiction, Scotland would be placed in a prejudicial position and Scottish citizens and businesses could be negatively impacted: in particular the Scottish Government would want to provide reassurance to those affected by the cross-border family support and custody mechanisms.

- Clause 1 and schedule 5 of the Bill relate to legislation already brought forward at a UK level (with the Scottish Ministers’ consent approved by the Scottish Parliament) to simplify the post Brexit implementation by means of primary legislation. The implementation approach in the Bill is simpler and clearer for users.

- The Bill is drafted to respect the devolution position: the Scottish Ministers make provision for implementation in Scotland with UK Ministers only being able to do so with the consent of the Scottish Ministers. Legislation in this area has in the past been taken forward on a UK basis and it may be convenient for it to be so in the future so the Scottish Government recommends this approach.

- It is the Scottish Government’s view that the most expeditious way to provide legal and financial certainty in Scotland is for the UK Government to put in place the necessary legislative cover across the UK.

16. The LCM (Annex A, paragraph 21) sets out the Scottish Government’s draft motion.

17. Members will also want to note that the Law Society of Scotland has sent some comments on this Bill to the Committee which have previously been circulated. The Law Society is in favour of the position taken by the Scottish Government.
Delegated Powers and Law Reform Committee Consideration

18. The Delegated Powers and Law Reform Committee considered the LCM at its meeting on 12 May 2020 and agreed to write to Scottish Government. The Committee considered the Scottish Government’s response at its meeting on 19 May 2020. The issues explored with the Scottish Government, and the Committee’s views on the response received, are set out in the letter attached in Annex B.

Domestic Abuse Bill

19. The majority of provisions contained in the Bill apply to England and Wales only. However, Part 6 of the Bill makes provision for the whole of the UK, including Scotland, to provide courts with what is called ‘extra-territorial jurisdiction’ over relevant offences as required by the Council of Europe Convention on preventing and combating violence against women and domestic violence (commonly known as the Istanbul Convention).

20. A summary of the clauses in the Bill that require legislative consent can be found in paragraph 9 of the LCM (Annex C)

Scottish Government Legislative Consent Memorandum

21. A legislative consent memorandum was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 16 March 2020. The LCM can also be found in Annex C.

22. The LCM sets out that, while the Bill largely applies to England and Wales, it makes provision for the whole of the UK, including Scotland, for extra-territorial jurisdiction over relevant offences, as required by the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). The UK become a signatory to the Convention on 8 June 2012, however, formal ratification remains pending. The measures in the UK Domestic Abuse Bill would allow for formal ratification by providing for extra-territorial jurisdiction over the offences covered by the Convention.

23. Giving effect to the extra-territorial jurisdiction requirements of the Convention will allow relevant offending behaviour to be prosecuted in Scottish courts when the behaviour occurs wholly or partly outside of the UK and when the offender is habitually resident in Scotland or is a UK national.

24. The Scottish Government considers that it is preferable to legislate for extra-territorial jurisdiction through the UK Bill to ensure that the UK is in a position to formally ratify the Istanbul Convention without undue delay.

25. The LCM (Annex C, paragraph 14) sets out the Scottish Government’s draft motion.

Action
26. **Members are invited to consider whether to agree with the recommendation of the Scottish Government that the legislative consent motions for the Private International Law (Implementation of Agreements) Bill and the Domestic Abuse Bill should be agreed by the Scottish Parliament.**

27. **Members are also asked to agree that the Convener should arrange for the publication of a short, factual report on the outcome of the Committee’s deliberations.**

Justice Committee Clerks  
28 May 2020
LEGISLATIVE CONSENT MEMORANDUM

PRIVATE INTERNATIONAL LAW (IMPLEMENTATION OF AGREEMENTS) BILL

Introduction

1. The Private International Law (Implementation of Agreements) Bill was introduced in the House of Lords on 27 February 2020. The Scottish Government considers that this is a relevant Bill under Rule 9B.1 of the Parliamentary Standing Orders. This memorandum has been lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, under Rule 9.B.3.1(a).

The Bill and supporting documents can be found at: [https://services.parliament.uk/Bills/201921/privateinternationallawimplementationofagreements/documents.html](https://services.parliament.uk/Bills/201921/privateinternationallawimplementationofagreements/documents.html)

2. This memorandum relates to the Private International Law (Implementation of Agreements) Bill as introduced.

3. The Bill is necessary as a result of the UK's withdrawal from the EU. The Scottish Government deeply regrets the withdrawal of Scotland, as part of the UK, from the EU on 31 January 2020. This action was taken with no democratic mandate for withdrawal in Scotland.

4. However, the Scottish Government accepts the need to make preparations for the circumstances which arise as a result of that withdrawal and to ensure that Scottish citizens, families and businesses are not adversely affected by the impact of EU Exit on the UK's private international law arrangements with other states including our nearest neighbours in the EU.

5. While the introduction of this Bill has been triggered by the UK leaving the EU, there are aspects of the Bill which go beyond EU exit. The Bill is also about the future strategy for international relations on private international law within the UK. That strategy is a continuation of the UK's longstanding commitment to international cooperation on private international law, and the agreements it implements are multinational agreements not limited to EU nations. These agreements also support the legal services sector by allowing the UK (including Scotland as a separate jurisdiction) to participate in private international law developments internationally.

Content of the Private International Law (Implementation of Agreements) Bill

6. The Explanatory Notes\(^1\) accompanying the Bill set out the UK Government's view of its purpose and main functions. The UK Government describes the principal legislative measures of the Bill as follows:

---

• providing a clear approach to the domestic implementation of three international agreements drawn up under the auspices of the Hague Conference on Private International Law; and

• creating a delegated power which allows the Scottish Ministers, or the Secretary of State with the consent of the Scottish Ministers, to implement international agreements on Private International Law in domestic law in future via secondary legislation.

7. The Bill implements in domestic law the following three key international agreements on private international law (or ‘Hague Conventions’):

**The 2005 Hague Convention on Choice of Court Agreements (“the 2005 Convention”):**

• A multilateral treaty aimed at ensuring the effectiveness of exclusive choice of court agreements between parties to international commercial transactions. Exclusive choice of court clauses are common in high value commercial contracts.
• The convention adds more legal certainty for parties to cross-border commercial contracts and maintains UK jurisdictions as an attractive choice for resolving disputes in commercial contracts.
• The convention provides legal certainty for resolving disputes relating to crossborder contracts.


• A multilateral treaty aimed at providing rules for the international recovery of child support and other forms of family maintenance, and for administrative cooperation between contracting States.
• The convention provides rules for recognition and enforcement of maintenance decisions across borders and for administrative cooperation between relevant countries on the processing of maintenance claims.
• The convention puts in place a framework for maintenance matters which can help reduce the financial hardship for the children of Scottish resident parents.


• A multilateral treaty aimed at improving the protection of children in crossborder disputes.
• The convention provides a framework for the resolution of issues such as residence of, and contact with, children where parents live in different countries, and establishes co-operation between national authorities involved in caring for children.
The convention provides legal certainty that decisions relating to children (e.g. access arrangements) made in one country will be respected in others, so that people do not have to incur the expense and trouble of taking fresh proceedings in another country.

8. All three conventions constituted EU Treaties under section 1 of the European Communities Act 1972. For the 2005 and 2007 Conventions the UK’s participation was through the EU as the contracting party. The UK has now taken steps to re-join these conventions in its own right. The UK is already the contracting party to the 1996 Convention. Domestic implementation of the three conventions was achieved primarily through reliance on EU law, mainly on section 2(1) of the European Communities Act 1972 and the principle of direct effect of EU law (together with accompanying regulations made under section 2(2) of the 1972 Act). During the transition or implementation period (IP), provisions in the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020 continue this means of implementation. It has however to be re-considered for the end of the IP. In 2018, the Scottish Ministers (with the approval of the Scottish Parliament) consented to two UK statutory instruments² (SIs) including devolved material relating to the 2005 and 2007 Hague Conventions. These SIs were made under powers in the EU (Withdrawal) Act 2018 and made legislative provision to adjust the existing domestic implementation of the conventions on UK ratification in its own right. No SI was made in relation to the 1996 Convention, relying instead on provisions in the EU (Withdrawal) Act 2018 which save directly effective treaty rights.

9. The Bill provides for a new, simpler approach to domestic implementation of the three Conventions to ensure that they continue to operate effectively at the end of the IP in a way that is more transparent and clearer for users. Clause 1(2) of the Bill inserts provisions into the Civil Jurisdiction and Judgments Act 1982 to give the force of law to the 1996, 2005 and 2007 Hague Conventions.

10. The second main provision of the Bill provides, in relation to Scotland, the Scottish Ministers (or the Secretary of State with the consent of the Scottish Ministers) with a subordinate legislation making power to domestically implement international conventions or agreements in private international law. This part of the Bill can be used for any future international conventions in the area of private international law (“PIL”) the UK enters and ratifies, both with the EU and other international partners. For example, this power would be used to implement the Lugano Convention if the UK Government can successfully negotiate with the EU to re-join the convention. The Lugano Convention is the only substantial fall back for the EU regulation “Brussels Ia” (which provides rules for jurisdiction and recognition and enforcement of judgments in civil and commercial matters). The UK will cease to participate in Brussels Ia at the end of the implementation period. Lugano is an agreement between the EU and Norway, Switzerland and Iceland and the UK Government intends to accede to the Convention in 2020.

Provisions which relate to Scotland

---
11. Provisions within the Bill which extend to Scotland relate to private international law which is within the legislative competence of the Scottish Parliament. The Bill also alters the executive competence of the Scottish Ministers. Legislative consent from the Scottish Parliament is therefore required. A summary of the clauses in the Bill that require legislative consent is as follows (clause numbers relate to the print of the Bill on introduction):

**Clause 1**

Clause 1 provides for the implementation of the three Hague conventions. This is achieved by amending the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act").

Clause 1(1) inserts a definition of the 1996 Hague Convention into section 1(1) of the 1982 Act, which is the section dealing with interpretation of references to Conventions in that Act. The 1982 Act already contains definitions of the 2005 and 2007 Hague Conventions.

Clause 1(2) inserts new sections 3C, 3D and 3E into the 1982 Act, providing for the 1996, 2005 and 2007 Hague Conventions respectively to have the force of law in the UK, subject to any reservations and declarations made by the UK. The UK made the declarations to the 1996 Hague Convention which are referred to in new section 3C(2) when it joined that Convention in 2012. The UK intends to accede to and ratify the 2005 and 2007 Hague Conventions during Autumn 2020 and will make declarations and a reservation to those Conventions in the form already approved by the UK Parliament when those Conventions were laid in the UK Parliament for scrutiny under the Constitutional Reform and Governance Act 2010 in 2018.

Clause 1(3) inserts into the 1982 Act the Schedules set out in Schedules 1 to 4 to this Bill, which comprise the text of the three Hague Conventions, and of the declarations which the UK made in 2012 in relation to the 1996 Hague Convention. The UK Government intends to use the power in clause 2 of the Bill to amend the 1982 Act to insert schedules containing the text of the reservation and declarations the UK will make for the 2005 and 2007 Hague Conventions, once it has submitted its instruments of accession and ratification to those Conventions, in Autumn 2020.

Clause 1(4) introduces Schedule 5 which contains provisions consequential on clause 1 of the Bill.

**Schedule 5**

Paragraph 1 adds the 1996 Hague Convention to the list of Conventions in relation to which the existing rule-making power in section 48 of the 1982 Act may be exercised, as a consequence of the 1982 Act being amended by the Bill to insert provisions implementing that Convention. This power already applies in relation to the 2005 and 2007 Hague Conventions.

Paragraph 2 provides for section 4 of the European Union (Withdrawal) Act 2018 to cease to apply to directly effective rights etc. derived from the 1996, 2005 and 2007 Hague Conventions. It will not be necessary to rely on these directly effective rights, saved by section 4 of the 2018 Act, once the provisions of clause 1(2) of the Bill
have provided for those Conventions to have the force of law. This is subject to the savings for “section 4 rights” in the EU Exit Regulations referred to in subparagraph (2). These are the UK SIs referenced in paragraph 4 of this Memorandum.

**Paragraphs 3 and 4** make consequential amendments to the EU Exit Regulations made in exercise of the powers in section 8 of the European Union (Withdrawal) Act 2018 in relation to the directly effective treaty rights derived from the 2005 and 2007 Hague Conventions. This reflects the new approach to implementation of the Conventions by the Bill rather than provision in the SIs operating on retained EU law. Only the provision in the SIs for transitional cases is retained.

**Paragraph 5** makes minor consequential amendments to provision made in respect of headings in the 1982 Act.

**Paragraph 6** revokes the Council Decision, adopted by the EU, authorising Member States to join the 1996 Hague Convention. This Council Decision will otherwise be saved in domestic law by section 3 of the European Union (Withdrawal) Act 2018, but is redundant.

**Clause 2**

**Clause 2** provides a power to Ministers to implement by way of subordinate legislation future international PIL agreements.

**Clause 2(1)** gives an “appropriate national authority” the power to make regulations (secondary legislation) to implement international agreements on PIL. The power can also be used to amend existing domestic provisions implementing a PIL agreement if any changes to its implementation are required.

**Clause 2(2)** provides that regulations may also be made to implement an international PIL agreement for application between England & Wales, Scotland and Northern Ireland, so the rules can be applied in cases raising cross-border issues between the three different legal jurisdictions in the UK, even if that is not a requirement of the international agreement itself.

**Clause 2(3)** provides that regulations may be made to give effect in UK domestic law for any arrangements for applying a relevant international agreement on PIL (with or without modifications), entered into between the UK and the government of a “relevant territory”, defined in clause 2(7) to mean the Crown Dependencies and Overseas Territories.

**Clause 2(4) and (5)** make further provisions about the sorts of provisions regulations made under clause 2(1) may include. Clause 2(5) makes clear that regulations may implement obligations in a PIL agreement which relate to the provision of legal aid or provisions which concern the sharing of information between courts or competent authorities dealing with cross border disputes. Clause 2(5) also makes clear that regulations may include enforcement provisions, but these will be subject to the restrictions in paragraph 1 of Schedule 6.
Clause 2(6) introduces Schedule 6 which sets out restrictions on the use of the power in clause 2 and the legislative procedure to be followed when making regulations under clause 2.

Clause 2(7) provides definitions of various terms used in clause 2. The effect of the definition of “appropriate national authority” is that the power in clause 2(1) could be exercised by the Scottish Ministers in relation to Scotland. The Secretary of State may also make regulations in relation to Scotland but only with the consent of the Scottish Ministers.

The definition of “international agreement” covers a convention, treaty or agreement to which the UK has already become a contracting party or to which it intends to become a contracting party (for example, it may have signed but not ratified the agreement). This ensures that it will be possible to exercise the power in clause 2(1) to make implementing regulations before an agreement is ratified. It is normal practice to ensure that domestic implementing legislation is in place before the UK formally becomes bound by an international obligation, so that it is able to comply with it immediately.

The definition of ‘private international law’ provides examples of the sorts of issues typically covered by international agreements in this field of law. The definition means that the power could be used, for example, to implement the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the 2019 Singapore Agreement on Enforcement of Mediated Settlement Agreements, and the 2019 Hague Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters should the UK join these in future.

Clause 2(8) provides for the implementation of model laws relating to PIL adopted by an international organisation of which the UK is a member. It provides that the regulation making power in clause 2(1) may be used to “give effect to” – rather than “implement” – a model law, because the text of a model law is not binding in the way that an international agreement is, and states may adapt a model law when giving effect to it.

Schedule 6

Paragraph 1(1)(a) provides that regulations made under clause 2 may not themselves confer a new power to legislate, other than a power to make procedural rules for courts or tribunals, but can modify or extend an existing power. Paragraph 1(1)(b) imposes limits on making regulations which create an offence subject to a term of imprisonment.

Paragraphs 2 to 6 (paragraph 5 does not relate to Scotland) deal with the procedure and Parliamentary scrutiny for making regulations under clause 2. Paragraph 3 deals with the procedure for regulations made by the Secretary of State. Paragraph 4 deals with the procedure for regulations made by the Scottish Ministers. In each case, the affirmative procedure will be triggered if the regulations:

- are implementing a new international agreement on PIL for the first time in domestic law, or a new arrangement entered into between different
jurisdictions in the UK, or between the UK and an Overseas Territory or Crown Dependency to apply an arrangement based on an international agreement (suitably modified) between them.

- create, extend or increase the penalty for a criminal offence.
- amend primary legislation (defined by paragraph 6 to include an Act of the Scottish Parliament). Reasons for seeking legislative consent

12. This Bill is primarily being brought forward due to EU exit. The EU had taken competence to enter certain private international law agreements on behalf of Member States and the domestic implementation of the UK’s obligations under such conventions as an EU Member State was achieved by virtue of section 2(1) of and by Regulations made under the powers of section 2(2) of the European Communities Act 1972. EU Exit also means the loss of participation in the EU Regulations on civil judicial co-operation. This creates a need to enter into new international agreements with the EU and other states in this area.

13. Negotiating and joining international agreements on private international law is reserved, but implementing them in domestic law is devolved. The Bill provides that the Scottish Ministers may exercise the power to implement them in domestic law in relation to Scotland. However, the Secretary of State may also exercise the power in relation to Scotland, with the Scottish Ministers’ consent.

Consultation

14. No formal consultation was carried out on the Bill. As indicated above, the Bill is primarily being brought forward due to EU exit. EU exit creates a need to enter into new international agreements with the EU and other states. Since the Bill’s introduction, the UK Government has engaged with stakeholders on the Bill’s provisions including the Law Society of Scotland.

Financial Implications

15. The UK Government provided the following analysis of financial implications, which the Scottish Government agrees with:

16. Clause 1 means that the provisions of three Hague Conventions, which were directly applicable in UK law during the transition period, continue to have legal effect in UK law after the end of the transition period. No substantive changes are being made to the Hague Convention provisions being implemented under the Bill and clause 1 is therefore not expected to have any financial implications.

17. Clause 2 creates the delegated power which will be used to implement a range of international agreements on private international law which could have financial implications for UK businesses, individuals and families. However, each use of this power will require separate financial analysis with the implications depending on the agreement being implemented. The creation of the power has no financial effect in and of itself.

18. Clause 3 and Clause 4 have no financial impact.

Scottish Government view
19. The Scottish Government has considered carefully the provisions of this Bill as it legislates for Scotland and whether to seek legislative consent from the Scottish Parliament. In considering whether supporting this Bill would be in Scotland’s best interests the following conclusions have been reached:

- The provisions within this Bill must be brought forward for Scotland or, as a separate jurisdiction, Scotland would be placed in a prejudicial position and Scottish citizens and businesses could be negatively impacted: in particular the Scottish Government would want to provide reassurance to those affected by the cross-border family support and custody mechanisms.

- Clause 1 and schedule 5 of the Bill relate to legislation already brought forward at a UK level (with the Scottish Ministers’ consent approved by the Scottish Parliament) to simplify the post Brexit implementation by means of primary legislation. The implementation approach in the Bill is simpler and clearer for users.

- The Bill is drafted to respect the devolution position: the Scottish Ministers make provision for implementation in Scotland with UK Ministers only being able to do so with the consent of the Scottish Ministers. Legislation in this area has in the past been taken forward on a UK basis and it may be convenient for it to be so in the future so the Scottish Government recommends this approach.

- It is the Scottish Government’s view that the most expeditious way to provide legal and financial certainty in Scotland is for the UK Government to put in place the necessary legislative cover across the UK.

**Conclusion**

20. It is the view of the Scottish Government that it is preferable in terms of good governance that the relevant provisions which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament to ensure effective domestic implementation of the three Hague Conventions is and that future private international law agreements can be implemented without delay.

**Draft Legislative Consent Motion**

21. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Scottish Parliament agrees that the Private International Law (Implementation of Agreements) Bill, introduced in the House of Lords on 27 February 2020, providing a clear approach to the domestic implementation of the 1996, 2005 and 2007 Hague Conventions at the end of the Implementation Period and providing a power for the Scottish Ministers or the Secretary of State with the consent of the Scottish Ministers to, on the UK entering any international agreement on Private International Law, implement that agreement in order for it to have legal effect in domestic law, in so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”
Dear Margaret

At its meeting on 12 May, the Delegated Powers and Law Reform Committee agreed to write to the Scottish Government with questions on the Private International Law (Implementation of Agreements) Bill. The Committee considered the response from the Scottish Government today. The issues explored with the Scottish Government, and the Committee’s views on the response received, are set out below for your information. The correspondence on this matter is also attached.

Given the remit of this Committee, the issues explored related to the delegated powers in devolved areas that are contained in this Bill.

Firstly, the Committee asked: “in what circumstances does the Scottish Government consider that it will be appropriate for the power to be exercised by UK Ministers as opposed to by the Scottish Ministers, and vice versa?” The Cabinet Secretary for Justice indicated in his response to the Committee that it may be beneficial for implementation to take place in one set of UK rules in some cases. It indicates that in the past, legislation in this area has been taken forward for the whole of the UK and that this might be appropriate in future. The response explains that circumstances in which the Scottish Government consider that it will be appropriate for the Scottish Ministers to exercise the power would include “where this is more expeditious, or where the different legal systems throughout the UK warrant it due to the procedure and process differences, or where a convention was only going to be implemented in Scotland”. The Committee is content with the response on this matter and the indication of the likely use of powers in this area.

The Committee also asked: “where the powers are exercised by UK Ministers with Scottish Ministers’ consent, how will the Scottish Government help facilitate scrutiny by the Scottish Parliament?”. In response, the Cabinet Secretary referred to the new protocol that is being developed for scrutiny of Scottish Ministers’ consent to UK SIs in devolved areas arising from EU withdrawal. The Cabinet Secretary stated: “It is the Scottish Government’s intention that the new protocol should cover all instruments proposed to be made by UK Ministers arising from EU exit and relating to devolved matters. This would include instruments under the UK’s Private International Law (Implementation of Agreements) Bill”.

The Committee welcomes this commitment and the confirmation that the protocol will extend to this Bill.

I hope this information assists your committee in its consideration of this LCM.

Yours sincerely,

Bill Bowman
Convener of the Delegated Powers and Law Reform Committee
LEGISLATIVE CONSENT MEMORANDUM

DOMESTIC ABUSE BILL

Background

1. This memorandum has been lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Domestic Abuse Bill was introduced in the House of Commons on 3 March 2020. The Bill can be found at:

   https://services.parliament.uk/Bills/2019-21/domesticabuse/documents.html

Content of the Domestic Abuse Bill

2. The majority of the provisions contained in the Bill apply to England and Wales only. The Explanatory Notes accompanying the Bill set out the UK Government’s view of its purpose and main functions. The UK Government describes the principal legislative measures of the Bill as follows:

   • **Part 1** provides for a statutory definition of domestic abuse which underpins other provisions in the Bill.

   • **Part 2** creates the office of Domestic Abuse Commissioner, sets out the functions and powers of the Commissioner and imposes a duty on specified public authorities to cooperate with the Commissioner.

   • **Part 3** provides for a new civil preventative order regime - the Domestic Abuse Protection Notice (“DAPN”) and Domestic Abuse Protection Order (“DAPO”).

---

Part 4 places new duties on tier one local authorities in England in respect of the provision of support to domestic abuse victims and their children in refuges and other safe accommodation.¹
Part 5 confers on victims of domestic abuse automatic eligibility for special measures in the criminal courts; and prohibits perpetrators of certain offences from cross-examining their victims in person in the family courts in England and Wales (and vice versa) and gives family courts the power, in certain circumstances, to appoint a legal representative to conduct the cross examination on behalf of the prohibited person.

Part 6 extends the extraterritorial jurisdiction of the criminal courts in England and Wales, Scotland and Northern Ireland to further violent and sexual offences.

Part 7 makes miscellaneous and general provision. In particular, this Part enables domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody; places the guidance supporting the Domestic Violence Disclosure Scheme on a statutory footing; ensures that persons with secure or assured lifetime tenancies are granted a secure lifetime tenancy where the new tenancy is being granted by a local authority for reasons connected to domestic abuse; and confers a power on the Secretary of State to issue statutory guidance to practitioners in England and Wales about tackling domestic abuse.

3. Part 6 of the Bill makes provision for the whole of the UK, including Scotland, to provide courts with what is called ‘extra-territorial jurisdiction’ over relevant offences as required by the Council of Europe Convention on preventing and combating violence against women and domestic violence (commonly known as the Istanbul Convention).

4. The Istanbul Convention is focussed on preventing violence against women, protecting victims and prosecuting accused offenders. The Convention opened for signature on 11 May 2011. The United Kingdom became a signatory to the Convention on 8 June 2012, however, formal ratification remains pending.

5. The Convention establishes a series of offences characterised as violence against women, which can be found at Articles 33 – 41. While the aim of the Convention is to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence, the offences within Articles 33 – 41 are gender neutral.

6. Article 44 of the Convention requires States which ratify the Convention to take ‘extra-territorial jurisdiction’ (“ETJ”) over these offences, to enable prosecution of its nationals and those habitually resident in the state when they commit one of these offences anywhere in the world. ETJ refers to the extension of a country’s criminal law to conduct which takes place outside that country and is the exception to the general principle the criminal law usually has effect with respect to the jurisdiction within which a crime is committed. The measures in the UK Domestic Abuse Bill allow for formal ratification of the Convention by providing for such ETJ in England, Wales, Scotland and Northern Ireland.
7. Giving effect to the ETJ requirements of the Convention will allow relevant offending behaviour to be prosecuted in our domestic courts when it occurs wholly or partly outside the United Kingdom when the offender is habitually resident in Scotland or a UK national.

8. The Scottish courts currently have ETJ with regards offences concerning forced marriage, female genital mutilation, murder, culpable homicide and the new domestic abuse offence. The Bill prescribes those further offences Scotland wishes to take ETJ over in order to comply with the Convention, contained in Part 2 of Schedule 2 to the Bill, namely: common law assault; stalking under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010; and the offences contained in sections 1 – 4 of the Sexual Offences (Scotland) Act 2009 (rape; sexual assault by penetration; sexual assault; and sexual coercion).

Relevant Provisions Which Relate to Scotland

9. A summary of the clauses in the Bill that require legislative consent is as follows (clause numbers relate to the print of the Bill on introduction):

Amendments relating to offences committed outside the UK

- **Clause 62(2) and Part 2 of Schedule 2**
  - This clause introduces Schedule 2, which legislates for devolved purposes, by making provision for the Scottish courts to take extraterritorial jurisdiction over certain offences under the law of Scotland and making relevant amendments to Scots law to facilitate this.

Commencement

- **Clause 72(3)**
  - This clause confers certain commencement-related powers on the Scottish Ministers so as to alter their executive competence.

Reasons for seeking legislative consent

10. The Bill applies largely to England and Wales. The Bill also provides Scottish courts with extra-territorial jurisdiction (ETJ) over offences covered by the Council of Europe Convention on preventing and combating violence against women and domestic violence, commonly known as the “Istanbul Convention”. The Bill is a “relevant Bill” for the purposes of Chapter 9B.3(3)(b)(i) and (ii) of the Standing Orders of the Scottish Parliament, in that it makes provision applying to Scotland for a purpose within the legislative competence of the Parliament as well as altering the executive competence of the Scottish Ministers. Although it would be possible to legislate for the devolved ETJ areas through a Bill in the Scottish Parliament, legislating through this UK Bill will ensure that the UK is in a position to formally ratify the Istanbul Convention quickly.

Consultation

**Financial Implications**

12. An estimate of the financial implications of the ETJ provisions of the Bill which extend to Scotland is contained in the accompanying Annex.

**Conclusion**

13. It is the view of the Scottish Government that it is preferable in terms of good governance that the relevant provisions which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament in order to ensure that the UK is in a position to ratify the Istanbul Convention without undue delay.

**Draft Legislative Consent Motion**

14. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Domestic Abuse Bill, introduced in the House of Commons on 3 March 2020, relating to amendments to the law of Scotland concerning extra-territorial jurisdiction over certain offences committed outside the UK by a UK national or habitual resident of Scotland in order to ratify the Council of Europe Convention on preventing violence against women and combating violence and domestic violence, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

**SCOTTISH GOVERNMENT**

March 2020
Likely impacts of extending ETJ – Scottish Impact Assessment

1. Due to a lack of relevant data, it is not possible to definitively estimate the impact on the Scottish justice system of providing the courts with ETJ in respect of the offences covered by the Convention.

2. The UK Government has used data from the Foreign and Commonwealth Office on arrests/detentions of UK nationals where consular assistance was requested and from the charity ‘Prisoners Abroad’ to estimate the number of additional cases where ETJ could be exercised. They estimate that there would be approximately 200 additional cases per year at a total cost of £6.8m. Proceeding on the assumption that approximately 10% of these cases would involve an offender who is resident in Scotland, the cost to the Scottish criminal justice system would be approximately £680,000 per annum resulting from 20 additional cases per year.

3. It should be noted these estimates do not take into account those offences which are not reported to foreign authorities but are instead reported to the home jurisdiction upon return e.g. when the complainer returns home from a holiday abroad. The numbers could therefore be greater than as estimated. However, while there may be up to 200 cases where ETJ could be exercised in the UK, and up to 20 cases where ETJ could be exercised in Scotland, only the most serious cases are likely to be prosecuted in the UK courts and therefore the actual number of cases and costs are likely to be lower.

4. Additional costs will fall on the Crown Office and Procurator Fiscal Service (COPFS), Scottish Courts and Tribunals Service (SCTS) and Scottish Legal Aid Board (SLAB) as a result of these additional cases. It is anticipated that the costs for the SCTS and SLAB will be in line with the cost of trials relating to offences committed in Scotland. However, for COPFS, there will also be additional costs as a result of: a) training (minimal); b) obtaining evidence from abroad; c) seeking concurrence from foreign authorities; d) transporting witnesses from abroad.

5. The average costs of a court case to COPFS, (excluding costs specifically associated with offences committed abroad), SCTS and SLAB are as follows:

- Sheriff Summary: £1,452
- Sheriff & Jury: £8,086
- High Court: £93,071

6. Fewer than 1% of all cases heard in the Scottish Courts in 2017/18 were tried in the High Court. However, the cost of any additional High Court cases arising from the extension of ETJ is disproportionately higher and some of the offences over which ETJ is being taken, including rape and sexual assault by penetration, either must be tried in the High Court or are more likely to be. For illustrative purposes, if the extension of ETJ were to result in an additional 5 High Court cases per annum,

---

5 Taken from [https://www2.gov.scot/Topics/Statistics/Browse/CrimeJustice/Publications/costcrimjustscot/costcrimjustdataset](https://www2.gov.scot/Topics/Statistics/Browse/CrimeJustice/Publications/costcrimjustscot/costcrimjustdataset)
the cost to the COPFS, SCTS and SLAB is estimated at £292,730 per year. If there were also to be an additional 5 cases heard in the Sheriff Court before a jury, the estimated cost to the COPFS, SCTS and SLAB is £40,430. If it then assumed that the remaining 10 additional cases capable of being prosecuted as a result of the extension of ETJ would, had they been committed in Scotland, been tried under summary procedure, then given that it is anticipated only the most serious cases committed outwith Scotland would be tried in Scotland’s courts, these would not be prosecuted. The total additional cost to COPFS, SCTS and SLAB is therefore estimated at £333,160 per annum.

7. There are also likely to be additional costs for the Scottish Prison Service (SPS) arising out of the extension of ETJ to those offences covered by the Convention. It is difficult to accurately estimate what these costs will be. The average notional ‘unit’ cost of a prison place in Scotland in 2017/18 was £38,903. The additional cost to the SPS will depend on the number of additional cases tried in the Scottish Courts, the proportion of those resulting in the conviction of the accused, and the proportion of those cases in which the courts impose a custodial sentence. The UK Government estimate that the average cost of additional prison places in England and Wales will be £4m per annum. In the absence of available data, we consider an estimate of £400,000 per annum in additional costs to the SPS is reasonable, though in the first years after the provisions are commenced, that cost is likely to be lower.

8. In view of the considerable uncertainty, monitoring the number of additional cases that arise after the extraterritorial provisions of the Bill come into effect will be prudent to accurately assess the financial impacts.

---

6 This does not take into account other costs which would be likely to arise as a result of an offence occurring in a foreign jurisdiction, e.g. obtaining evidence from abroad.
8 Making the reasonable assumption that a proportion of the custodial sentences imposed are of more than 12 months duration.
Justice Committee

14th Meeting, 2019 (Session 5), Tuesday 2 June 2020

Work Programme

Introduction

1. The Committee held an informal remote meeting via MS Teams on 12 May 2020, to discuss its forward work programme.

2. The Committee agreed the following actions —

- To request information on the timescale for the short-term working group, led by the Lord Justice Clerk, Lady Dorrian, to consider the practicalities of recommencing trials by jury as and when public health guidelines permit such a move.
- To write to the Scottish Police Authority to seek details of its oversight of a number of Covid-19 related policing issues. This includes police officer and staff absence levels, testing of officers and staff, enforcement of regulations, cross-border issues and quarantine measures.
- To write to the Cabinet Secretary for Justice, copied to Community Justice Scotland and Criminal Justice Social Work, to seek details of the challenges facing community justice providers during the pandemic, how these are being addressed, and the expected impact of the prisoner release scheme.
- To write to the Lord Advocate to request data on fiscal fines.
- To write to the Scottish Fire and Rescue Service to seek clarity on its decision to reduce time allocated to trade union officials during the pandemic.
- To write to the Scottish Prison Service to request data on the number of prisoners released and the number who have been refused release at the discretion of prison Governors.
- To write to the Parole Board for Scotland to request details of how it has prepared prisoners for release, and the arrangements that have been put in place.
- To write to the Scottish Parliament's Covid-19 Committee raising issues in relation to the justice provisions within the Coronavirus (Scotland) (No.2) Bill.
- To consider issues related to the Scottish Government Review of the Regulation of Legal Services, known as the Roberton Review, after the Parliament’s summer recess.
- To consider the Justice Committee’s annual report prior to the Parliament’s summer recess.
- Subject to the agreement of the Parliament, to schedule and conclude Stage 2 consideration of the Children (Scotland) Bill prior to the Parliament’s summer recess.
- Subject to the agreement of the Parliament, to postpone Stage 1 consideration of the Defamation and Malicious Publication (Scotland) Bill.
and the Hate Crime and Public Order (Scotland) Bill until after the Parliament's summer recess.

For decision

3. Justice Committee members will be invited to confirm these decisions, for the public record.

Justice Committee clerks
14 May 2020
Justice Committee

14th Meeting, 2019 (Session 5), Tuesday 2 June 2020

Restarting Jury Trials

Note by the clerk

Introduction

1. At present, all jury trials in Scotland are suspended, at least until July 2020. This decision was taken by the Scottish Government at the start of the lockdown period during this Covid-19 public health emergency.

2. Although some civil business is now underway in Scotland, solemn criminal cases involving juries have not yet recommenced. In England, the Lord Chief Justice of England and Wales, Lord Burnett of Maldon, following discussion with the Lord Chancellor, has now decided that new jury trials may be started in a few courts in the week commencing May 18 under special arrangements to maintain the safety of all participants and the jury in line with Public Health England and Public Health Wales guidelines. The Lord Chief Justice similarly continues to support the resumption of adjourned trials where this can be done safely.

3. In Scotland, work is underway to consider whether solemn criminal cases can also recommence and what changes would be required. In April, the Scottish Government published an options paper for progressing the most serious criminal cases. This set out 9 different options (not all mutually exclusive), ranging from a move to judge-only trials (i.e. no juries), smaller juries (reduced from the current 15), to virtual trials and trials with enhanced social distancing measures.

4. The Cabinet Secretary for Justice held a roundtable in late April to discuss these options, attending by senior figures from the legal system, a number of Committee members, Rape Crisis Scotland and Victims Support Scotland. Many of these bodies have subsequently published views on the options paper which can be found on the Committee’s Covid-19 webpage.

5. Subsequently, on 12 May, the Lord Justice General, announced the formation of a Jury Trials Working Group (see Annex A) to take forward work in this area. The Working Group 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, and how far a smaller jury size will make it easier to meet social distancing requirements.

6. On 26 May, Lady Dorrian – who chairs the Working Group – set out the first steps to restart jury trials in Scotland. She indicated that planning is under way for an initial number of High Court jury trials to take place in July.

7. It is anticipated that the Scottish Courts and Tribunals Service (SCTS) will use a 3-court solution in the High Court in Glasgow, with the jury using the public gallery in the trial courtroom. In Edinburgh, SCTS hopes to use a 2-court solution, allowing the jury to view the trial remotely from a separate courtroom.
8. The Coronavirus (Scotland) Act 2020, which was passed unanimously by the Scottish Parliament on 1 April 2020, included a range of emergency measures to ensure that justice can continue to take place and to provide flexibility during the current outbreak. Similarly, the Coronavirus (No2) (Scotland) Bill currently being considered seeks to make further changes to the justice system.

9. Proposals within the first Bill, as introduced, to allow Ministers - if they were satisfied that it was necessary and proportionate to do so - to provide by subordinate legislation for solemn criminal trials without juries on a temporary basis during the outbreak and its immediate aftermath were withdrawn. Instead, Scottish Ministers confirmed that they would work with relevant stakeholders to consider any practical or legislative solutions to this issue, with a view to seeking to maintain an effective system of criminal justice whilst upholding the rights of accused persons, victims and witnesses, including the obligation to bring cases to a conclusion within a reasonable time.

10. Even prior to the Covid-19 suspension of jury trials, there was a significant backlog of trials in Scotland. Additionally, according to the Scottish Government, based on the projections for 2020/21, for each five-month period in which solemn jury trials cannot proceed, there would be an additional backlog of over 250 additional High Court trials and 540 Sheriff Court solemn trials that would otherwise have proceeded. In five months, the additional backlog could total around 790 serious cases.

11. Restarting jury trials is not a simple process. Alongside policy decisions such as whether juries are to be retained and/or whether the size of a jury panel could be reduced, are the questions of how social distancing can be maintained in a court room and also in a way that allows jury members, court staff, lawyers etc to travel to/from court in a safe manner.

12. In addition to considering perhaps more suitable non-court locations for trials, some of the original options floated to tackle the more operational challenges have included, for example, removing the public from the court in order to allow the jury to sit, appropriately distanced, in the public gallery, or convening the jury remotely. There are, however, challenges.

Today's meeting

13. Members of the Committee will today hear from:

- Ronnie Renucci QC, who is a member of the Faculty of Advocates and also President of the Scottish Criminal Bar Association; and
- Kate Wallace, Chief Executive of Victims Support Scotland.

And then from:

- After these two witnesses, the Committee will hear from Humza Yousaf MSP, Cabinet Secretary for Justice and his officials.
14. Both the Scottish Criminal Bar Association and Victims Support Scotland have made a written submission to the Committee (see Annex B).

**Previous evidence**

15. In previous meetings on this subject, Members heard from

- Dr Jim McMenamin, Incident Director for COVID-19, Interim Clinical Director, Consultant Epidemiologist, Health Protection Scotland, Public Health Scotland
- Eric McQueen, Chief Executive, Scottish Courts and Tribunals Service

16. It is expected that the Committee will continue to take evidence from others on this subject.

Clerking Team
May 2020
Jury Trial Working Group

Lord Justice General, Lord Carloway, has established a short-term working group, led by the Lord Justice Clerk, Lady Dorrian, to consider the practicalities of recommencing trials by jury as and when public health guidelines permit such a move.

When the lockdown commenced, the Lord Justice General determined that, in accordance with Scottish Government guidelines on social distancing and travel, the requirements of public health protection meant that solemn trials could not take place in a suitably safe and secure manner. It was recognised that there was a need to explore ways that jury trials could restart when those guidelines and other protective measures were amended to allow greater activity. The Cabinet Secretary for Justice, Humza Yousaf, chaired a series of roundtable discussions with those involved in the justice sector on the options available to facilitate that restart. Those discussions revealed a number of possibilities and challenges which would need to be addressed and the Cabinet Secretary advised that the Scottish Government would focus on four of these options. The Lord Justice Clerk now wants to build on this work by examining the practical and operational implications of pursuing such options.

It is clear that, if the requirement for some form of social distancing persists in the period following the easing of lockdown restrictions, it will not be possible to reinstate 15-member jury trials just as they were prior to the lockdown. The Working Group on Restarting Solemn Trials will look 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, and how far a smaller jury size will make it easier to meet social distancing requirements. It will consider what legislative changes will be needed to facilitate the necessary adjustments to trial practice and procedure, and will assess the potential effect on the rate at which trials may be processed. Its initial focus will be on trials in the High Court of Justiciary, but there will clearly be lessons to be applied to solemn trials in the Sheriff Court.

The group will include representatives of the judiciary, Crown Office and Procurator Fiscal Service, Faculty of Advocates, Law Society of Scotland, Scottish Courts and Tribunals Service, Rape Crisis Scotland and the Scottish Government. It will also liaise closely with and seek the input of others with relevant expertise, such as Police Scotland, the Scottish Prison Service, Victim Support Scotland, and Scottish Women’s Aid. The group’s work will start this week, and will be progressed as quickly as possible.

Membership

Lady Dorrian, Lord Justice Clerk
Lord Mulholland
Lord Beckett
Lord Turnbull
Sheriff Principal Craig Turnbull
Sandy Brindley, Rape Crisis Scotland
Anna Donald, Scottish Government
Terms of Reference

To facilitate the recommencement of solemn trials, and in particular:

- to consider options and make recommendations on the feasibility of commencing jury trials in some form whilst maintaining social distancing during the Covid-19 pandemic, with initial focus on the High Court of Justiciary;
- to identify the conditions that need to be present to enable such trials to proceed, including the conditions necessary to enable all participants to engage with the process;
- to consider what technological support might assist the process;
- to consider the constraints and practicalities within the current legislative framework, and whether any further legislative change might be required to facilitate the restart;
- to assess the capacity of the court estate with appropriate measures in place, and the likely volume of cases that might be progressed.
SCOTTISH CRIMINAL BAR ASSOCIATION

1. **Introduction**
   a. The SCBA has taken care to set out their views at each stage of this process, in the confident hope of assisting the solution of the problems COVID-19 has caused and will cause to the administration of criminal justice in Scotland.
   b. We will attach to this response the submissions made to the original Bill in April. We maintain the commitment set out in that document to providing our assistance and expertise to the Scottish Government. At the same time we reiterate our steadfast opposition to the original proposal of the Scottish Government, supported by the Lord Advocate, to trying the most serious cases without juries.
   c. This document will not simply rehash what we have already said on the matter. Instead it will summarise what has gone before; what is happening now; and look to the future in the hope of improving what is already and is yet to happen in the process of restarting jury trials.

2. **Current operations to help the resumption of jury trials**
   a. The SCBA have strong ties with both Crown Office and the Scottish Courts and Tribunals Service. At the suggestion of the SCBA a working group has been established with senior members of Crown Office staff to achieve the best use of the time and resources in the period before any trials restart with the goal of reducing the number of outstanding trials through: plea resolution; agreement of evidence; and capture of the evidence of vulnerable witnesses by commission to avoid or minimise further delay.
   b. The aim of this group is to ensure that once trials can restart, the partnership of Crown, SCTS and the defence Bar work together to deliver the maximum efficiency and benefit from every hour of available court time.
   c. In addition, we will bring our strengths to the Lord Justice Clerk's Jury Trials Working Group
   d. We are in almost constant contact with our members updating them on developments and focussing their understanding of the challenges and the very real need for a spirit of cooperation with the other justice delivery partners in achieving the best outcome for Scottish criminal justice in unusual circumstances.

3. **Our proposals in outline:**
   a. In most ways, our proposals in response to the Bill back in April are indistinguishable from the model already adopted in English courts to commence the week beginning 18th May 2020 in both Cardiff and the Central Criminal Court in London. This confirms that the proposals now favoured and being considered by the Scottish Government are both
proportionate and workable. We take heart from that, but it is a matter of regret that the English courts are further ahead than ours in this regard.

b. We proposed:

1. the creative use of courtroom space to allow social distancing;
2. the use of unusual resources (like otherwise unused court space and larger rooms hitherto used for other purposes) to allow juries space to congregate and deliberate safely;
3. we proposed that remote juror balloting be carried out with only the selected jurors entering the court;
4. the adoption of PPE in line with expert advice;
5. the reduction of juror numbers to increase the safety margins in distancing and infection transmission;
6. the use of mothballed courts and unused circuit courtrooms to increase trial capacity when things return towards normal;
7. the engagement of the recently retired or soon to retire Senators, as well as part time High Court judges to increase trial capacity when things return towards normal;
8. during later discussions with government we also proposed consideration of enhanced plea discounts to commit guilty accused to resolving cases without trial, the justification for this would be the fact that the utilitarian value of an early plea during the current crisis is greater than would normally be the case; and
9. the greatest use of technology to limit physical contact between people, both in prisons and the wider community.

c. We understand that the Committee wishes better to understand the legal, practical and resource challenges for the options currently under consideration. However, it may also assist members to understand on a practical level how these challenges can be overcome by the proposals presently being considered. In relation to the combined options of a reduction in jury size and the practice of social distancing we refer to paragraphs b(i) and (ii) above. As a practical example of this we would refer to the High Court of Glasgow, at Saltmarket. This is large modern building which houses nine courts of varying sizes. The North and South Court and courts 3, 4, 5, and 6 are all large airy courts which could easily accommodate social distancing as has already occurred to allow trials that had already commenced to conclude during the early lockdown period. The well of each court is large enough to allow social distancing between the professionals taking part and any witnesses not giving evidence remotely, and the jurors can safely socially distance by using the public benches. The use of Perspex screens could also be deployed if necessary; for example, between the clerk and prosecuting and defence counsel.

d. The juries could then safely deliberate in any of the unused smaller courts and other large rooms throughout the building such as the cafeteria or jury muster room. These are practical solutions to practical problems making good use of the court estate and resources already available at minimal cost.
e. The above applies similarly to Court 3 in the High Court in Edinburgh at Lawnmarket.

4. **Problems encountered so far:**

a. The availability of multi-location video links with prisons appears to be the subject of confusion within the Scottish Courts and Tribunal Service and the Scottish Prison Service and we are aware of conflicting guidance from them. Clarity on the issue, and efficient problem solving would be welcomed.

b. Also, from SCTS we hear that from the point where some sort of jury trial is given the go-ahead normally a minimum period of six weeks would be required to accumulate a pool of jurors. Perhaps this problem can be overcome by any move to remote balloting and no doubt enquiry will be made about this. If the six week delay is inevitable then the SCBA one would hope that this time can be used constructively conducting hearings on commission and conducting procedural hearings such as debates or Preliminary Hearings where pleas can be recorded and trial diets can be assigned. None of these hearings would involve the participation of jurors or indeed witnesses.

c. Although discussions to date with the Crown have been constructive, we were disappointed that this morning the Crown confirmed that they will oppose any recognition by the courts of the increased utilitarian benefit that pleas of guilty would represent.

5. **The developments in England**

a. We note with some envy that English jury trials will resume in multiple locations next week. In addition to Cardiff and London we also understand that other courts likely to start in the course of next week are Bristol, Reading, Warwick, Winchester and Manchester Minshull Street, with Nottingham possibly following shortly thereafter. Counsel and others involved in the case to be listed from Monday have already been notified so that they can prepare for trial. We further understand that it is intended that the roll-out of jury trials across other sites in a similar manner will happen in the coming weeks and months to more court centres across England and Wales. From colleagues at the English Bar we are aware that most of the measures we suggested mirror the changes adopted there.

6. **Future**

a. The commitment of all the various justice delivery partners, including the SCBA, to the resumption of jury trials is best judged by their actions rather than their words.

b. It is easy to identify difficulties within any tough problem. Identifying the difficulties without proposing solutions bears the hallmark of a partner content to allow the genuine efforts of others to fail in the hope that they can get what they have wanted all along. We are heartfelt in our hope that there is no part of that at play in the present difficulties.
c. South of the Border tangible progress is being made towards the resumption of jury trials. The Cabinet Secretary to the Justice Committee impressed us with his ability to bring urgent focus to the jury trial options available with the clear intention of solving the crisis in Scotland. We hope that all justice partners stand behind him, as we do, in working towards resuming jury trials. If it can be done elsewhere then it can be done here.

d. Jury trials were made to run successfully through two World Wars. They can be run through this.

Ronaldo Renucci QC,
President,
Faculty of Advocates
Scottish Criminal Bar Association
VICTIMS SUPPORT SCOTLAND

Victim Support Scotland (VSS) welcome the moves that are being made to resume the business of the Scottish Courts, in particular those steps which are being taken to allow jury trials to resume in Scotland. We are also pleased about the formation of the Lord Justice Clerk’s Trial Working Group, which met for the first time on 14 May 2020 and are reassured that the Scottish Parliament Justice Committee will commence taking evidence on this matter on 19 May 2020.

As Chief Executive of Victim Support Scotland, Scotland’s leading victim focussed organisations, I wish to use this statement as an opportunity to highlight the devastating and lasting impact that delays to the operation of the criminal justice system has on victims of serious crime. Such delays, whether as a result of lockdown measures during the COVID-19 pandemic or as a result of mistrial, have the potential to cause further trauma and distress that we must all work to avoid.

VSS supports victims of serious crime and leads Scotland’s first national service for families bereaved by murder and culpable homicide, Support for Families Bereaved by Crime.

Awaiting criminal proceedings brought against the perpetrator of a serious crime, is profoundly challenging for every victim and their family, whether that be for rape and sexual assault or murder. Many families feel that they cannot grieve properly until the trail is over and that they cannot move on with their lives. Victims of serious sexual assault and rape are often traumatised by the experience of giving evidence, feeling they are re-living their abuse and that itself is re-traumatising.

In just one month, Victim Support Scotland has seen a 400% increase in the numbers of safeguarding reports through our support service of potential suicide relating to victims and witnesses. This is a deeply concerning situation and demonstrates the compounding effect of COVID-19 on a highly vulnerable group of people.

Ensuring that proceedings in these cases should be concluded as soon as the administration of justice allows is of utmost importance to the wellbeing of vulnerable victims and their families.

We would urge that all options are explored, including options where a trial could be conducted without a jury. Any move that increases the potential for a mistrial to occur will have a devastating impact on the mental health and wellbeing on people affected by crime. It is unacceptable to knowingly put victims in the position where they may possibly have to give evidence more than once due to a mistrial, which for many is worse than no trial taking place at all.

With this in mind, I wish to express my concerns about the proposal to resume jury trials with smaller juries in place. I am deeply concerned that this increases the risk of mistrial. I would press upon the members of the Committee to ensure that decisions on the resumption of jury trials are made on the basis that an effective jury system is in place, which avoids the risk of cases collapsing and complainers of sexual violence requiring to give evidence again.
Given the rapid spread of COVID-19 and the guidelines from the Scottish Government relating to self-isolation in the event of exposure and symptoms, like other organisations, we urge that due consideration is given to requirements for a body of evidence to be available that permits a conclusion to be reached on the level of risk of trial collapse. If one juror is tested positive or acquires symptoms it is likely that all who have been in contact with that juror will have to isolate. This may well mean that any time a juror tests positive the whole case is abandoned. The more people involved with the process the greater this risk becomes. It is in the best interests of victims that this risk of collapse be identified as minimal before a case may proceed.

I urge the work of the Justice Committee, and that of the Lord Justice Clerk’s working group, in relation to considering the practicalities of recommencing trials by jury when lockdown restrictions are relaxed. I would also urge that due consideration is given to the way in which the prosecution of serious sexual crime happens in a way that respects both the accused’s and victim’s rights during this global pandemic. To not consider these issues in full, runs the risk of further trauma to some of Scotland’s most vulnerable victims and witnesses.

Kate Wallace
Chief Executive