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Dear Convener

Criminal Justice Committee evidence session 10 January 2024 - additional information on capacity and projections

I thank you for the opportunity to attend and provide evidence to the Committee on Parts 5 and 6 of the Victims, Witnesses and Justice Reform (Scotland) Bill 2023 on 10 January 2024, alongside my colleague Danielle McLaughlin. During the evidence session I agreed to provide some additional information in so far as possible on physical court room capacity. Further correspondence from the Assistant Clerk to the Justice Committee has confirmed details of the areas of information sought. Our response, in so far as possible, using applicable subject headings, is detailed below.

Data on the level of spare capacity in the court infrastructure in Scotland

Court rooms and associated judicial, staff and legal professional resources are finite and great efforts are made to ensure they are utilised in a way that supports the efficient disposal of business across both the civil and criminal jurisdictions and the local administration of justice.

In response to the pandemic, and supported by funding provided by the Scottish Government in combination with legislative provisions supporting remote attendance (discussed further below) the SCTS was, and has been able to adapt court rooms and its physical estate to increase its physical trial court capacity to support an initial, and then extended court recovery programme. By way of example since April 2023 the criminal trial court capacity has been:

- High Court: 22 trial courts (a 38% increase compared to pre-pandemic)
- Sheriff Solemn: 26 trial courts (44% increase compared to pre-pandemic)
- Sheriff Summary: 33 trial courts (as per pre-pandemic).

In summary 207 physical court rooms are available in principle each day across the court estate for use for civil and criminal business (there is an additional 3 courts which are used for appeal business (Civil, Criminal, Sheriff Appeal Court) in Edinburgh which are not included in this analysis. Each court rooms varies in size, design, location and ability to support specific

cases types. For example not all court rooms have the associated facilities needed to support a jury trial e.g. a jury box and associated breakout rooms for jurors, nor could they easily be adapted to.

Our courtrooms and court locations are programmed for use in accordance with the Lord President and Sheriffs' Principal programmes of business, which take in to consideration a number of factors including case volumes and supporting access and the administration of justice at local level. Based on a 4 week average the 207 court rooms (excluding Appeal Court rooms) are programmed for use for criminal; some civil procedural hearings when virtual proceedings are not utilised; criminal trials; and civil evidential hearings 87.2% of the available time. 12.9% of our court rooms in principle remain unused on average over a 4 week period, suggesting the potential for 'spare capacity'. Such figures do not take in to account the flexibility un-programmed courts provide to support ad hoc and urgent business, which such rooms can be utilised for, and the specific local case needs. A breakdown of the in principle average court room capacity available at each court location is detailed in annex 1. As you would expect the High Court programmes each of its court rooms in Glasgow and Edinburgh and those it sits in across a number of sheriff courts to fully utilise 100% of available capacity every day to support the recovery programme. The court rooms located within sheriff court utilised by the High Court and their utilisation are included in the figures for the relevant sheriff court buildings. As you would expect, the data indicates that the majority of what would be seen as 'in principle capacity' which exists across our physical estate is mainly at the rural courts, which in response to needs and resources, do not need to sit full time Monday to Friday.

Subject to appropriate additional funding being provided, it may be possible for the SCTS to use un-programmed courts more and/or create via the further adaption and conversion of such court rooms and areas in the estate, in combination with the use of the current temporary provisions (discussed further below) additional trial court capacity, these additional courts would require additional judicial, SCTS staff, prosecutor, defence/legal professional resource. As the latest modelling paper (discussed in more detail) below states the Faculty of Advocates and the Law Society of Scotland have already shared concerns on the pressures faced by the legal profession and the challenges that the increased level of solemn trial capacity caused by the recovery programme creates for the profession.

The SCTS has considered its physical capacity alongside projections and other considerations associated with the implementation of the New national jurisdiction Sexual Offences Court, and we have sufficient physical court capacity to support it.

COVID Recovery programme and projections on the reduction of case backlogs

As mentioned in evidence, in addition to the publication on a monthly basis on our website of criminal case throughputs (accessible [here](#)), the SCTS, in collaboration with COPFS colleagues, produces an annual modelling report. Both allow measurement of the impact of the recovery programme on scheduled trials and waiting times to help illustrate the progress being made and potential challenges ahead.

The additional trial courts introduced as part of the recovery plan, combined with excellent levels of collaboration across justice organisations and legal profession have increased trial capacity and case conclusions to above pre-COVID levels generally. For example the number of scheduled trials peaked at 43,606 in January 2022. As at the end of November 2023 this had reduced by 16,344, with 27,262 scheduled trials remaining. It is important to note that the

overall aim of the criminal court recovery programme is to return the number of scheduled trials to a revised baseline of around 20,000.

The latest criminal back log modelling was published on 14 December 2023 and is accessible [here](#). It demonstrates that solemn trial baselines have continued to grow, following the trend that was evident before the pandemic. It suggests that the solemn case backlog is incrementally being replaced by a new higher baseline of scheduled trials and that a continued increase in court capacity will be required in the long term. Future transformation of the prosecution of sexual offences, including the impact of the recent Court of Appeal judgement on the law of corroboration, may further increase the level of petitions and subsequent solemn indictments.

In relation to the Committee's request for details on the latest projections:

- **High Court** scheduled trials are projected to reach the revised trial baseline by **March 2025**, in line with previous modelling. This is subject to COPFS's plan to register 95 indictments per month for the coming 2 years, before dropping back to 80 indictments per month.
- In relation to **solemn cases in our sheriff courts** scheduled trials are projected to reach the revised baseline during 2026-27, slightly later than the previous modelling indication of March 2026. This is subject to COPFS's plan to register 700 indictments per month for the next 2 years, before dropping back to 600 indictments per month. This is significantly higher than the 2019-20 monthly average of 454 indictments, demonstrating the continued increasing trend in solemn case levels.
- In relation to **summary cases within our sheriff courts**, scheduled trials are projected to reach the revised baseline during 2024-25, slightly later than the previous modelling indication of March 2024. This is a result of higher than expected levels of sheriff summary registrations as Police Scotland and COPFS have cleared backlogs. COPFS have registered an average of 5,400 complaints per month during 2023-24, which will now return to the previous forecast of 5,000 per month from January 2024. In addition COPFS are increasing the number of summary cases marked within 28 days. While this does not increase the overall number of cases registered it does increase the scheduled trials baseline as cases are now added to the baseline earlier.
- In relation to the **Justice of the Peace Court**, scheduled trials have now returned to the original baseline level as a result of a continued reduction in case registrations. Whilst case volumes will be kept under review further modelling is no longer required as these have returned to anticipated levels.

Use of temporary provisions introduced in response to support the justice system's response to the COVID-19 virus

The temporary provisions introduced and in place have been essential in ensuring that the SCTS and the criminal justice system have the ability to use different means of lodging documents and modes of hearings, in order to help maximise case and estate capacity and throughput on and off-site for criminal business; supporting all users. The continued existence of the provisions are essential to supporting the extensive recovery programme and associated increased solemn business; our ambition to become a more trauma informed justice system; alongside the challenges brought by increased weather disruption and the identification of RACC within parts of our estate at Airdrie sheriff court.

For example the current temporary provisions enabling the remote balloting of jurors across the solemn jurisdiction (whereby jurors can initially answer their citations by remote attendance until the ballot is completed) have played in an essential role in the day to day operation of our solemn courts. They have assisted in reducing repeated physical attendances at court, reducing footfall within our buildings to support a more trauma informed approach for our vulnerable users attending to give evidence; and have helped facilitate the temporary or permanent reallocation of rooms previously reserved for potential jurors to support the running of additional hearings.

Remote attendance of jurors- The existence and use of provisions which permit the remote attendance of jurors for trial via jury centres was essential to the recommencement of trials in Scotland in socially distanced environments. As restrictions eased they have allowed and supported us to provide additional trial capacity, allowing court rooms traditionally designed and sized to support civil matters (without a jury box, jury restroom/conferral room) to be used as trial courts. While further estate work has now been undertaken to change the physical design of courts rooms to support the judiciary, the provisions remain essential for the daily conduct of High Court trial business. One remote jury centre remains in daily use to support the High Court recovery programme in Edinburgh due to the physical restrictions with the estate.

Remote Preliminary Hearings- The ability to conduct Preliminary Hearings (PH) in the High Court remotely was essential to continuing criminal business and supporting Scotland's response to the pandemic. Traditionally these hearings would be conducted in person in Glasgow High Court impacting the ability for all parties involved to conduct criminal business in other parts of the geographical estate. Virtual PHs are now the default format for this type of hearing, following on from the positive response and reaction to their use. Such provision has allowed extensive flexibility, with legal professionals now having the ability to join PHs virtually before conducting substantive business/trials in locations across the country. For example advocate deputes and defence counsel can attend essential PHs remotely before joining and conducting in person trials in Inverness, Aberdeen, Dundee etc without the associated travel and time implications, all to support the extended recovery programme. The provision of virtual PHs has allowed greater flexibility in the use of the court room that would ordinarily have been reserved for in person PH hearings. This would not have been possible in the past.

Remote attendance of witnesses- The High Court of Justiciary has utilised the current provisions to enable the piloting of remote attendance of professional witnesses in trial proceedings. The pilot has allowed Police Officers, Medical Experts and Forensic Scientists to give their evidence remotely using the WebEx platform. Since January 2021 our manual records indicate that more than **947** professional witnesses have given evidence this way. The approach has provided immense benefits to the justice system generally, and particularly witnesses. Remote evidence allows these essential witnesses to remain within their workplace or other designated location, joining the video link to give evidence when required. It removes the requirement for them to travel to court and wait in our buildings to give their evidence and the associated time commitments that come with it. Allowing them to return to their essential front line roles earlier. The use of the remote provision of evidence also helps reduce footfall within our court buildings. Increased footfall can be traumatising for other vulnerable witnesses attending our locations to give evidence. The remote provision of evidence has also helped reduce capacity challenges associated with witness waiting rooms. By default the increase in trial courts has placed pressure on these facilities. The removal of the need for certain witnesses to attend and occupancy these rooms supports their use by other witnesses.

Our civil courts and Tribunals have also been importantly utilising the available provisions and innovating their own court rules, as applicable, to support procedural hearings and virtual attendance in particular, and support capacity and flexibility across our estate. For example the Court of Session has substantially adopted the use of remote proceedings for procedural matters which has resulted in the capacity suggested in Annex A.

The ability to conduct essential case management hearings virtually, and the provision of expert witness remotely are key features we anticipated will be incorporated in to the daily practice of the proposed national jurisdiction Sexual Offences Court, subject to such provisions remaining available in legislation.

Supporting capacity and efficiency- modelling system

Physical court capacity and legislative provisions that support the remote giving evidence or attendance at court are but two examples of the many factors that need to be considered and which can be utilised to support the court recovery programme and the administration of justice daily.

It is essential to support all our users, and ensure the efficient use of finite courts, judicial, staffing and legal professional capacity that a flexible trial scheduling system is available to the judiciary. It remains an essential feature as we support the justice system's recovery from the pandemic.

In the High Court a floating trial model is principally adopted. I am conscious of the discussion about floating trials and it might be useful to explain the concept further. The current process is effectively like a queuing system. In the High Court, the float is a 5 day court sitting- the intention is that the trial will be set down to commence that week with the specific day of that week unknown, but that it should start on one of those 5 days. Currently the High Court sits with 22 trials courts (pre-pandemic this was 16). The number of cases are allocated to the float period and specific trial court locations principally in discussion with COPFS. The allocation will include more than 22 cases- to take account of factors such as potential cases being settled by plea, being deserted and a number of other factors/occurrences. SCTS and COPFS colleagues are in daily dialogue regarding the trial progress, including case applications and effective running orders for the following week, and meet specifically on Fridays alongside other justice partners, including VIA, to discuss the proposed trial business and order for the upcoming week.

The latest available data for financial year 2023-24 for the High Court is that to end December 2023, **97%** of cases allocated to the floating trial system i.e. were confirmed ready to proceed to trial and had a jury balloted, did so within the 5 day window. **42% started on the assigned day (Monday), 21% on day 1 (Tuesday) and by day three (Thursday) of a float week 92% of trials had started.** The number of cases starting within the initial float has been generally on an upward trajectory with e.g. for financial year 2022/23 the percentage rate was 95%. Further details, based on manual collation, are noted below:

When Trials Started	2019/20	2020/21	2021/22	2022/23	2023/24 To end Dec
% of Trials on date assigned	30	40	29	35	42
% of Trials on Float Day 1	20	19	14	22	21
% of Trials on Float Day 2	16	16	17	16	18
% of Trials on Float Day 3	13	11	12	13	11
% of Trials on Float Day 4	10	7	13	9	5
Total- % of those calling within the initial float period	89	93	85	95	97
% of Trials in the next float period	11	7	15	5	3

This data is regularly shared with COPFS representatives.

The 97% is based on those cases which COPFS and applicable parties confirm are ready to proceed to trial, and have a jury balloted and evidence led. It correctly does not include those cases that are adjourned, a plea is accepted or parties otherwise confirm they are not ready to proceed to trial. Such instances apply irrespective of the scheduling model adopted and are not cases which require to be scheduled. By way of example for 2023-24 to end December only 515 of 687 cases that called for trial were confirmed ready to proceed. 175 cases did not proceed either due to the trial being adjourned or disposed of without a trial. Further details of the breakdown from 2019--20 to end December 2023, based on manual collation, is noted below.

High Court	2019/20	2020/21	2021/22	2022/23	2023/24 To end Dec
Trials Called	812	377	744	894	687
Trials Evidence Led/Balloted	498	278	577	611	512
Trial Disposed without a trial (Plea, Not Called Warrant etc)	109	22	56	99	71
Trials Adjourned	192	74	106	184	104

This data is again shared with COPFS.

The type of trial scheduling model adopted i.e. floating diet, should not impact on whether a case is ready to proceed for trial or not. Rather the reason(s) why a case may not proceed to trial is a different matter, which may benefit from further consideration and action by justice partners.

We acknowledged that when a trial might start and in turn when a witness may give evidence are particularly concerning and cause additional anxiety and the potential for further trauma. The float scheduling system helps support when a trial will commence. Neither it nor any fixed date trial scheduling model determine when a complainer and/or vulnerable witness may give evidence. When and at what time a witness gives evidence at trial is determined by a number of factors and considerations by a prosecutor (or the defence as applicable) and unpredictable aspects of trials generally, once a trial has started.

The use of pre-recorded evidence, as recommended by the Lord Justice Clerk's cross justice Review in to 'Improving the Management of Sexual Offence Cases', and the judicially led

Evidence and Procedure Review, removes many of the anxieties discussed. Allowing evidence to be captured significantly earlier in environments more conducive to 'best evidence' giving, and following discussion and judicial oversight at a Ground Rules Hearing of the questions and areas for exploration with a witness. Currently the average waiting time in the High Court for an evidence by commission hearing is 15 weeks, provided the application is made at the earliest procedural opportunity. In contrast the average waiting period from plea to the start of an evidence led trial in the High Court is 46 weeks per the latest published monthly workbook. A copy is accessible [here](#). Use of commissions have the potential to reduce the period of time a witness may wait to give evidence in the High Court by on average 31 weeks.

Court scheduling is exceptionally complex and involves balancing various interests and factors including those of the accused, complainers, witnesses and the period of time that has already elapsed. It also requires to take account of the time estimates for the trial which parties provide to the court. In financial year 2022-23 in the High Court only **23%** of trials actually concluded on the estimate. With 24% concluding within the estimate i.e. fewer days than estimated, and 53% of cases exceeding the estimate. Floating trial diets in the High Court give us flexibility to respond to, and move cases to different courts to address this in so far as possible. For example if a case exceeds its estimate and runs on, then the next case that was scheduled to start has the potential to be moved to another court room. If it finishes early there is a potential for another case in the float to start early.

The alternative model of a fixed trial date system would require in practice for each trial to be allocated to a specific court room and everyone would have that date assigned in their diaries. To give a practical example applying the aforementioned estimate data and its potential implications in practice, if you have 22 trials scheduled to start on Monday, as 53% of trials exceed their estimate 12 trials from the previous week would still be running. The greatest likelihood is that it would mean that for 12 trials fixed to start (and accordingly the complainers, vulnerable witnesses, expert witnesses and accused judiciary and legal professionals all associated with and prepared to start in that trial) would not start, and would effectively go to the end of the diary to be assigned a new trial date. Given 24% of trials end early, this would equate to almost 6 courts in a fixed model sitting empty.

Since submission of our response to the Committee's call for views on 9 September 2023, we have undertaken further analysis on the impact the introduction of a switch to fixed trials in the High Court, taking in to consideration accuracy of estimates, and its impact on the recovery programme abovementioned, would have. Our current analysis indicates that a minimum of **22 weeks** would be added to the average waiting period for complainers, vulnerable witnesses and accused. Based on the current average waiting times a switch to a fixed trial model could lead to waits of 68 weeks, in contrast to the current 46 weeks. In relation to the potential impact on the recovery programme, our initial analysis indicates that at best years would be added to current estimates, with a significant concern that recovery may not be possible at all without additional resource and action taken.

A move to a fixed trial system has the unintended potential to further aggravate the factors and challenges which are already present with the justice system. Impacting on journey times/scheduling of cases and aggravating the concerns raised by survivors and the third sector organisations who have made representations to the Committee. There are undeniable benefits in seeking to make improvements on the various challenges in the current system, through further concerted efforts on e.g. improved trial estimate accuracy, minimising late pleas and late adjournment of trials to ensure the model used is as efficient as possible.

If we can be of any further assistance on the issues above, or those that there was unfortunately insufficient time to cover in evidence, please do not hesitate to contact us.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'David Fraser', written in a cursive style.

David Fraser
Executive Director Court Operations
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Physical Court room capacity and usage

	Court	Total number of court rooms available each day	Number of sitting days available in an average 4 week period (Number of court rooms x 20)	Number of sitting days not programmed in an average 4 week period	Percentage used each day	Percentage not used each day
	Edinburgh High court	7	140	0	100.00%	0.00%
	Glasgow High courts	8	160	0	100.00%	0.00%
	Court of Session (excluding Glasgow)	7	140	20	85.71%	14.29%
G&S	Glasgow	27	540	3	99.44%	0.56%
GHI	Aberdeen	13	260	25	90.38%	9.62%
	Banff	1	20	11	45.00%	55.00%
	Elgin	2	40	14	65.00%	35.00%
	Fort William	1	20	11	45.00%	55.00%
	Inverness	6	120	11	90.83%	9.17%
	Kirkwall	1	20	13	35.00%	65.00%
	Lerwick	1	20	10	50.00%	50.00%
	Lochmaddy	1	20	18	10.00%	90.00%
	Peterhead	2	40	1	97.50%	2.50%
	Portree	1	20	17	15.00%	85.00%
	Stornoway	1	20	12	40.00%	60.00%
	Tain	1	20	8	60.00%	40.00%
	Wick	2	40	31	22.50%	77.50%
	L&B	Edinburgh	20	400	18	95.50%
Jedburgh		2	40	18	55.00%	45.00%
Livingston		6	120	17	85.83%	14.17%
Selkirk		2	40	18	55.00%	45.00%
NS	Campbeltown	1	20	15	25.00%	75.00%
	Dumbarton	6	120	1	99.17%	0.83%
	Dunoon	1	20	0	100.00%	0.00%
	Greenock	4	80	0	100.00%	0.00%
	Kilmarnock	6	120	4	96.67%	3.33%
	Lochgilphead	1	20	18	10.00%	90.00%
	Oban	2	40	18	55.00%	45.00%
	Paisley	9	180	16	91.11%	8.89%
SSDG	Airdrie	6	120	4	96.67%	3.33%
	Ayr	5	100	9	91.00%	9.00%
	Dumfries	4	80	27	66.25%	33.75%
	Hamilton	10	200	28	86.00%	14.00%
	Lanark	2	40	1	97.50%	2.50%
	Stranraer	2	40	16	60.00%	40.00%
TCF	Alloa	2	40	14	65.00%	35.00%
	Dundee	8	160	23	85.63%	14.38%
	Dunfermline	4	80	0	100.00%	0.00%
	Falkirk	5	100	15	85.00%	15.00%
	Forfar	3	60	9	85.00%	15.00%
	Kirkcaldy	6	120	20	83.33%	16.67%
	Perth	4	80	13	83.75%	16.25%
	Stirling	4	80	7	91.25%	8.75%
		207	4140	534	87.10%	12.90%