



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 16 June 2020**

**Session 5**



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**JUSTICE COMMITTEE**

**15<sup>th</sup> Meeting 2020, Session 5**

**CONVENER**

\*Margaret Mitchell (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

\*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

\*John Finnie (Highlands and Islands) (Green)

\*James Kelly (Glasgow) (Lab)

\*Liam Kerr (North East Scotland) (Con)

\*Fulton MacGregor (Coatbridge and Chryston) (SNP)

\*Liam McArthur (Orkney Islands) (LD)

Shona Robison (Dundee City East) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

David Harvie (Crown Agent and Scottish Courts and Tribunals Service)

Rt Hon James Wolffe QC (The Lord Advocate)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

Virtual Meeting



# Scottish Parliament

## Justice Committee

*Tuesday 16 June 2020*

*[The Convener opened the meeting at 09:30]*

### **Covid-19 (Reopening Courts and Prosecution of Crime)**

**The Convener (Margaret Mitchell):** Good morning and welcome to the 15th meeting in 2020 of the Justice Committee.

Agenda item 1 is the continuation of our evidence taking on the challenges of reopening the courts in Scotland and the prosecution of crime during the Covid-19 pandemic. I welcome our witnesses, the Rt Hon James Wolffe QC, Lord Advocate, and David Harvie, Crown Agent and chief executive of the Crown Office and Procurator Fiscal Service.

I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I invite the Lord Advocate to make a short opening statement.

*[Interruption.]*

09:31

*Meeting suspended.*

09:36

*On resuming—*

**The Convener:** I should also advise that we have apologies from Shona Robison.

I now ask the Lord Advocate to make a short opening statement for our evidence session on the challenges of reopening courts in Scotland and the prosecution of crime during the Covid-19 pandemic.

**The Lord Advocate (Rt Hon James Wolffe QC):** Thank you, convener. I apologise—I lost the connection for a moment.

I am grateful to you for inviting me and the Crown Agent to give evidence to the committee—in my case, as the head of the system for the prosecution of crime and investigation of deaths. The word “unprecedented” has been much used in this context, but it is a simple statement of the truth that the challenges that Covid-19 has presented and continues to present for the criminal justice system have no precedent.

At the outset, it is right that I should pay tribute to the staff of the Crown Office and Procurator Fiscal Service for the remarkable work that they have done in adjusting to new ways of working while complying with the restrictions that we must all observe to protect public health. Staff have continued to receive reports of crime, to mark new cases and to progress the existing case load. They are working with defence lawyers to resolve cases where that is possible; they have been keeping victims and witnesses informed about cases; and prosecutors have been attending court in person where that has been necessary to conduct the limited number of hearings that have taken place.

Using technology, advocate deutes have been appearing in entirely virtual appeal hearings and procurators fiscal have appeared remotely in custody courts. Two weeks ago, the Solicitor General argued a virtual appeal in the United Kingdom Supreme Court, and an advocate deute appeared at a virtual fatal accident inquiry preliminary hearing. Last week, three virtual summary trials took place.

The service has changed dramatically in a very short space of time. Some 1,500 modern laptops and more than 800 smart mobile phones have been issued to staff who previously had no capacity to work remotely. Those steps were taken in response to a situation of urgency, but they are consistent with the direction of travel of the service as it has moved in recent years to harness technology in the service of justice. They will provide a good foundation for the service’s work during the recovery period and beyond.

This week, we will see preliminary hearing business restarting in the High Court, including some hearings to take evidence by commission. Two models of jury trial will be tried out in the High Court next month. At the same time, pursuant to a practice direction that the Lord Justice General issued last week, the summary courts will begin to open up.

I very much welcome those developments, but I recognise that they are just the first steps to recovery, and that the pace at which the courts will be able to recommence substantive business will continue to be constrained by the public health guidance that we must all observe.

It would be hard to overstate the nature of the challenge faced by the criminal justice system. In the period since the courts effectively closed in March, a significant additional backlog of cases has built up at all levels of the court system. That backlog will go on increasing until the courts are able to return to at least something like their pre-Covid capacity. I am acutely conscious of the consequences of that for the system for the investigation and prosecution of crime, and of the

human impact on both accused persons and victims of crime at all levels of the criminal justice system.

Confidence in the rule of law has never been more vital than at present. The Crown is committed to the fair and effective administration of justice, to respecting the rights of the defence, and to fulfilling its obligations under the European convention on human rights. Those principles will continue to guide us as we work on the system-wide response to the challenge.

**The Convener:** I thank both witnesses for their recent letters, which have been most helpful to the committee in advance of the evidence session.

We move to questions. Please remember to allow broadcasting staff a few seconds to operate your microphone before you begin to ask a question or give an answer. I ask members to indicate whether their question is for the Lord Advocate or the Crown Agent.

**John Finnie (Highlands and Islands) (Green):** I will leave it to the panel to decide who should answer my questions, which are about the case backlog.

It would be helpful to know the latest figures on the backlog of criminal cases, both summary and solemn. How do those numbers compare with pre-lockdown figures? What are the current best estimates for how the situation might develop?

**The Lord Advocate:** I will make an initial comment and will then let the Crown Agent give the finer grain of the figures.

The justice analytical services division is doing a piece of work, using the best data gathered from Scottish Courts and Tribunals Service and the Crown, which I hope will help to inform us. The data that I have shows that, at close of business on 4 June, 703 High Court cases were indicted and awaiting trial. In the sheriff and jury court on that date, 1,564 cases were indicted. I do not have a figure for the summary court, but the Crown Agent may be able to provide that.

The key point is that the Crown is continuing to process its existing case load; to receive and deal with reports of crime; and to indict cases into the solemn courts and serve summary complaints.

It is inevitable that the backlog has increased during a period when there have been almost no trials in the system. It also follows that, during the period when the court is unable to process cases at its normal capacity, the backlog will continue to increase.

The Crown Agent will be able to give a more data-driven answer.

09:45

**David Harvie (Crown Agent and Scottish Courts and Tribunals Service):** I will try not to burden the committee with too much data. Mr Finnie's question is a good starting point, in terms of where we are.

Going into the current crisis, at the end of March, there were 18,319 outstanding cases awaiting trial across summary and solemn business, of which about 460 were sheriff and jury and about 390 were High Court. Those are the Scottish Courts and Tribunals Service figures. It is worth pausing to reflect that those figures represented a 14 per cent increase on the figures at the same time last year—we came into the crisis facing a 14 per cent rise.

From the Crown's perspective, I will give the current figure: as of 10 June, 717 cases have been indicted and are awaiting trial in the High Court, whereas 1,584 have been indicted and are awaiting trial in the sheriff and jury court—the figures are up by 11 per cent since the end of March.

Before I turn to the summary figures, it might help to provide a little more texture about what those High Court cases are. Forty-nine of them are homicides, 465 are serious sexual offence cases and 182 are major crimes. Perhaps importantly from the committee's perspective, in 238 of those cases, at least one person is on remand awaiting trial in the High Court. Twenty per cent of the solemn sheriff court cases that I referred to have at least one person in custody awaiting trial—the total is just over 300 people.

On summary casework, as the Lord Advocate has said, it is true that, regrettably, crime has continued throughout lockdown. We have had on-going reports from the police. There was a dip in April, and I will give some figures in relation to that. In March, we had 12,450 reports. In April, the figure dropped to 10,063. Perhaps importantly for the committee's consideration, by May, the figure was back up to 12,436. There was a dip in April, but we have been back up to pretty much normal levels throughout May. Our expectation is that we will have an extra 300 High Court and 1,500 sheriff and jury cases simply from those three months' worth of reports.

According to the SCTS figures, we started with about 17,900 outstanding cases in the summary courts at the end of March. Between then and the end of May, the Crown served an additional 21,000 summary complaints across the sheriff and justice of the peace courts. Obviously, not all of those will end up being trials, but that is an indication of the number of complaints that have been served during the lockdown.

**John Finnie:** Has the Covid pandemic had an impact on the Crown's ability to prepare cases for court? Is there a backlog in preparation, or is the only sticking point the limited access to the courts?

**The Lord Advocate:** Inevitably, there has been some impact, not least because those on whom the court relies—forensic services and the police—are also affected. There was a period during which the Crown was readjusting to remote working, which poses some constraints.

In general—I will ask the Crown Agent to add his own perspective on this as chief executive of COPFS—all Crown staff are able to work remotely. Because of the systems that we have in place, they are able to continue to prepare cases. The Crown Agent has given members the number of summary complaints that we have been able to serve during the lockdown period, which is perhaps indicative of a service that is able to continue to function.

At the policy level, the focus at this time is on seeking to resolve cases that can properly be resolved and on seeking to continue to prepare cases so that, when the court system is able to accommodate them, the Crown is as ready as it can be, in the circumstances, to move the case load forward.

The critical constraint is the limitation on the courts' ability to function. There are very good reasons for that, which we all understand at this time.

**The Convener:** Does Mr Harvie have something to add to that?

**David Harvie:** I will be brief, convener.

First, I take the opportunity to thank my colleagues for the extraordinary efforts that they have made throughout the lockdown period.

Pretty much 90 per cent of our staff have been operating from home throughout the period, using the laptops and other kit that the Lord Advocate has referred to. That has kept our absence rate very low. At the moment, our absence rate is 1.6 per cent, only 0.017 per cent of which is Covid related. We have been able to continue to mark cases and deal with every court appearance, whether that is a physical appearance at court, or an appearance at an administrative hearing or a virtual hearing. We have also been able to progress the preparation and investigation of cases that lead to indictment.

Beyond the court element, which has been, and continues to be, a significant constraint for understandable and intelligible reasons, the other constraint that we anticipate down the line is that, in due course, as we increasingly rely on reports from others—forensic reports, for example—we may need to make increasing use of the statutory

extensions that the Parliament passed in the emergency legislation. However, for the avoidance of doubt and the committee's reassurance, the presumption at the moment is that we will continue to indict to previous time bars where at all possible—and, largely, that has been possible.

**The Convener:** The increase in funding for the Crown Office and Procurator Fiscal Service for 2020-21 was used to recruit five additional advocate deposes, in response to an increase in the volume of serious and complex cases in the High Court. Why was that deemed to be the priority, rather than ad hoc advocate deposes being recruited as and when necessary, or more procurators fiscal being recruited, given that advocate deposes prosecute almost entirely in the High Court, and the solemn and summary case load of sheriff courts is, overwhelmingly, greater than the High Court case load? That question is directed at the Lord Advocate.

On spending, how much will the increase from 38 to 43 advocate deposes cost? How much did the 1,500 modern laptops cost? Which COPFS staff received them? How many smartphones were purchased, and at what cost? To which COPFS staff were the phones allocated?

The funding question is for the Crown Agent. Will the Lord Advocate start with the question about priorities, please?

**The Lord Advocate:** For the avoidance of doubt, the increase in funding has been spent on recruiting additional staff across the service. The five additional advocate deposes are a small part of an increase in professional and support staff across the service, which has principally been an increase in procurators fiscal.

It might be that some confusion has arisen. I was asked a specific question in correspondence about the number of advocate deposes, and I mentioned the increase in their number in my response. For the avoidance of doubt, the priority has been to increase the number of permanent staff in the Crown Office and Procurator Fiscal Service. The staff have been recruited and are in place; the Crown Agent can give greater detail. That was a response to the general change in the case load. The increase in the number of advocate deposes was a small part of the recognition of the increasing complexity and difficulty of the general case load.

On the question about laptops, the service was fortunate to receive additional capital funding at the end of the last financial year. The capital was to be spent on technology—laptops, smartphones and the like—so it was fortuitous that it was in place and available to spend for that very purpose when we were going into the pandemic. At the start of lockdown, the laptops arrived and were

delivered to staff. We were fortunate that we were able to do that. Had we not been able to do it, we would now be in a very different position.

That information is by way of background. I hope that it offers some reassurance on the question about priorities between parts of the service. I ask the Crown Agent to respond on the more detailed questions.

**David Harvie:** On distribution of laptops, 1,976 Windows 10 laptops were issued, so all staff are in a position to work remotely, if required to do so. In total, 814 phones have been issued, thus far. Would it be acceptable, convener, to write to you with the details of the individual costs?

**The Convener:** Absolutely. That would be very helpful.

**David Harvie:** Thank you.

**The Convener:** I will follow up on that. The Lord Advocate has highlighted that the pandemic is significantly affecting provision of diversion services, such as mediation, to which prosecutors can refer accused persons who would benefit from such interventions. However, is not it a benefit of mediation that it can be conducted remotely or outwith the court setting?

Finally, you have mentioned several times that the Crown Office and Procurator Fiscal Service works closely with the Scottish Courts and Tribunals Service. Given that the SCTS court estate where trials can be heard is finite, has that work included identification of appropriate alternative venues for trials, such as places where fatal accident inquiries are housed, which are outside the main court estate? If not, why not?

**The Lord Advocate:** On the first question, my only point is that there are constraints across the whole system, including in relation to availability of diversion. It is fair to say that prosecutors continue to mark appropriate cases for diversion, but I think that we all recognise the constraints under which the whole system is operating.

On your second question, the Crown is working very closely with the courts service across all aspects of the response to the pandemic, at national and sheriffdom levels, with the judiciary and at official level. You are absolutely right, convener, to recognise that a key constraint is the configuration and size of the court estate. One issue, particularly once the two models of solemn trials have been operated next month, will be the extent to which they might provide opportunities to use facilities elsewhere. Ultimately, that is a matter for the courts service although, obviously, the Crown will work with it.

10:00

We are also looking at use of digital virtual-trial technology, which provides opportunities in relation to summary business. The Crown is closely engaged with the courts service in that work. I am looking forward to receiving the evaluation of the virtual summary trials that were undertaken last week. That technology might provide opportunities for a proportion of the summary work.

In addition, we are engaged in considering the extent to which witnesses and others might be able to appear at trial remotely, and the extent to which premises other than court buildings could be used.

**The Convener:** It is encouraging to know that a list of alternative venues exists and is being actively considered.

**The Lord Advocate:** Well—

**The Convener:** Is that not the case, Lord Advocate?

**The Lord Advocate:** I do not want to give the committee the impression that I have in front of me a specific list of alternative venues. The key point on which the committee should be reassured is that the Crown is working very closely with the courts service on all the options. For my part, I am interested in exploring all the available options that are open to us, and in maximising our ability to process and deal with cases fairly and effectively under the constraints within which we are operating.

**James Kelly (Glasgow) (Lab):** Good morning. In your exchange with the convener, you said that there had been an increase in the number of laptops and phones, and you discussed the costs. During the crisis, it is important to remember that there are victims of crime who are looking for justice to be done, so it is important to try to keep the wheels of justice turning.

How has the additional digital capability that you described been used to allow the service to continue to operate, and to plan for the jury trials that will restart in July?

**The Lord Advocate:** I made the point that we would now be in a very different place, had we not had the laptops and other technology. The key point is that staff who are working remotely can log into the systems that the service already had in place, and can work on cases that they can access from home through digital technology. Prosecutors can contact and speak to defence agents from home, whether by email or by phone. In the same way that all of us are working remotely using email and technology, prosecutors can work from home as they continue to prepare and work on cases.

Mr Kelly is absolutely right to ask the question. We are all alive to the human impact of the circumstances that we find ourselves in, and the impact on victims of crime of the position of accused persons. Therefore, the key focuses for the service at this time are to continue to process cases, as the Crown Agent has observed; to indict cases according to existing time bars where possible; to continue to serve summary complaints; and to prepare cases—to the extent that that is possible—with a view to their being ready when we can bring them to trial.

So far as all that is concerned, I am very appreciative of the engagement by the defence bar and by all parts of the profession. The Crown has been working, particularly at High Court level, with representatives of the defence, with a view to ensuring that systems are in place, such that if an accused person wishes to defend or plea, that can be dealt with appropriately.

We are seeking to focus on the agreement of evidence, as far as that is possible and proper, and we are looking at use of evidence that is taken on commission, which might provide opportunities to take evidence before we are able to get trials up and running in the solemn courts.

Work has gone into identifying appropriate cases for the trials that are to run in July, with a view to minimising the risk of trials not being able to run, for whatever reason.

**James Kelly:** Thank you, Lord Advocate.

Mr Harvie, an interesting aspect of the pandemic is how organisations have adapted and worked, using technology. At the start of the year, the committee did not think that we would be conducting meetings virtually, as we are. Has the COPFS identified potential opportunities to take advantage of new technologies in order to keep the wheels of justice moving? Have you looked at how other organisations have adapted?

**David Harvie:** That is an important issue. Not only have we been learning from others but, as the Lord Advocate indicated, we made very good progress ourselves in the early weeks, which was significantly enabled by the fairly rapid availability of laptops for all staff. Within a matter of weeks, everyone was online and could not just engage with our systems but could, separately, prepare cases, as I said.

In responding to your question, may I fold in one or two points that arise from earlier questions? The convener asked about diversion. We continue to divert in the same way as we did before; what is different is that local authorities, for understandable reasons, have asked for a bit more time to conduct assessments of what is possible within the parameters of physical

distancing requirements and so on. Diversion continues.

In the context of our use of digital technology, I think that you asked about the importance of keeping victims and witnesses engaged and updated. Again, distribution of mobile phones and availability of other kit have enabled our victim information and advice staff to access our systems and to contact victims and witnesses to provide updates—albeit that, given conditions in the courts at the moment, a lot of those updates convey the current uncertainty and extended timescales. That information is being passed on.

On use of technology, after four weeks of lockdown I reflected on the extraordinary leaps that had been taken, not just in COPFS but throughout the justice system, in such a short time. We were able to secure developments that we had, frankly, been trying to get for some time. Aside from use of technology, there have been some really good changes made to systems and processes for legislation, in relation to electronic signatures and in transmission and service of complaints and electronic warrants. All that has meant that it has been possible to do a number of tasks remotely that, hitherto, would have required physical presence.

It is worth highlighting that our case management in court—CMiC—programme and use of tablets in summary cases, which the committee might recall from previous meetings, have been very significant throughout the crisis. All deputies, whether they have appeared in the physical courts, the virtual courts or the administrative courts, have had access to their documentation on tablets, either at the court or at home, to enable them to conduct the trial. We have been fortunate in being able to deliver the vast majority of our services remotely, but the difficulties relating to bringing cases to resolution via trial have continued to be an issue.

**Liam McArthur (Orkney Islands) (LD):** My questions follow on from my colleagues' line of questioning. It would be helpful if the witnesses could set out where the biggest impact on criminal court business has been in relation to the use of videoconferencing facilities. I hesitate to ask this question, given the glitches that we experienced earlier, but where have the problems in that process manifested?

**The Lord Advocate:** To date, technology has been used successfully in two parts of the system. In some custody appearances, procurators fiscal have appeared remotely and accused persons have appeared remotely from custody suites. The other part of the system in which technology has been applied is appeal hearings in the criminal appeal court and, for that matter, in the inner house and the United Kingdom Supreme Court.

The experience, in so far as I have had it reported back to me, shows that such appeal hearings work perfectly satisfactorily, although it is not the same as everyone being in the same room. Across all parts of the justice system in which technology has been used, both here and in England and Wales, there is a general recognition that certain adaptations are required and that operating an entirely virtual hearing is generally more tiring.

As far as the way forward with the use of virtual technology is concerned, we had three virtual summary trials last week in Grampian and the Highlands and Islands, and those are being evaluated. There is scope for the use of virtual hearings for a proportion of the summary business. That will be a critical part of the path forward, because of the constraints that running solemn trials will place on the physical estate. The ability to do at least a proportion of the summary business virtually will be an important feature, if we are able to achieve that.

It is fair to say that it will not be possible to hold every summary trial virtually, assuming that the evaluation is positive. There are summary trials for which it is important, for a variety of reasons, that witnesses and others are in the courtroom rather than appearing from a distance or remotely. It is also the case that, inevitably, the management of a virtual summary court is likely to result in a smaller number of summary trials being dealt with by an individual court on any given day, simply because of the challenges of managing the appearance of individuals virtually. However, future development of virtual technology is most likely to be productive in the summary court.

In relation to another part of the Crown's work, Sheriff Principal Pyle has decided that some of our fatal accident inquiries will be dealt with virtually later this year. That is another area in which that is possible.

10:15

So far as solemn cases are concerned, the organisation Justice Scotland has done some interesting work using virtual technology for solemn trials. Although it is fair to say that I am sceptical about the ability to manage a solemn trial entirely virtually, that is not to say that we will not seek to maximise the use of remote technology, where it is appropriate, for the taking of evidence and in other ways.

**Liam McArthur:** I thank the Lord Advocate for that detailed response. My follow-up question concerns what Mr Harvie said earlier in relation to the changes and the pace at which those changes have taken place.

We have talked about the number of laptops that have been issued. Although that may be seen

in some senses as a good thing, it also suggests that the way of working previously was perhaps behind the curve in relation to where it ought to have been. I have been involved in the digital roll-out programme in the Parliament, and the use of laptops pre-pandemic was certainly seen as a way of allowing more flexible working and so on.

Looking forward, is there now a mindset change across the Crown Office and Procurator Fiscal Service that will allow it, as technology develops, to incorporate that into business in the interests of the justice system as a whole?

**The Lord Advocate:** I have no doubt that that is the case. As I said in my opening remarks, the roll-out of the laptops goes very much with the grain of where the service was already going with the use of iPads and otherwise. It was fortuitous that that was part of the planning in any event and that we were able to accelerate it and bring it into play as we have done during the pandemic.

I have no doubt that it will continue to be a key part of how we operate through the recovery phase. We are acutely conscious of the fact that, while physical distancing constraints are in place, there will be limits on the number of staff who can attend physically at offices. Remote working will therefore continue to be a key part of the service's operations and also provides a sound platform for moving beyond the pandemic into, as Mr McArthur said, different ways of working and ways of working that are more flexible and efficient—all, ultimately, in the service of the more effective administration of justice.

**Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP):** I am not sure whether this is a question for you, Lord Advocate, or for the Crown Agent. You touched earlier on summary trials and the use of new technology in, I think, Inverness and Aberdeen, which would allow for more virtual or remote proceedings. Has there been time for any evaluation of those proceedings to have been done, and is there likely to be a roll-out of the same in other places?

**The Convener:** We will start with the Crown Agent—I invite Mr Harvie to comment.

**David Harvie:** Thank you, convener, and thank you, Mr Allan, for the question. The answer is that, yes, there is an evaluation—although I have not yet seen it—and that, yes, the intention is to roll out once that evaluation has been considered. That will happen over the next day or so, and we will then be in a position to give an indication via the courts service of our plans for next steps.

**The Convener:** Does that fully answer your question, Alasdair? Would you like to make any further comment, Lord Advocate?

**The Lord Advocate:** I do not think that I can add anything.

**The Convener:** I invite Alasdair Allan to ask his follow-up question.

**Dr Allan:** It is encouraging to hear that there will be a further roll-out. My other question is related to that and is about the legislative adjustments that have been made to allow for adjustments in how the courts operate. Do you feel that those are sufficient, that they are being used to the full and that they have a role to play in addressing the backlog that the Lord Advocate talked about earlier?

**The Lord Advocate:** The range of legislative change goes well beyond the expansion of the facility to take evidence remotely. The Crown Agent has referred to the important changes in relation to obtaining warrants, electronic signatures and the like, and the Crown Office has certainly embraced all those changes.

As we develop the solutions to the particular challenges with which trial courts present us, there might well be a need for further legislation. We have come to appreciate as an inevitable feature of the trial process the fact that it has historically involved everyone being together in the same room, but we have made great strides with regard to the pre-recording of evidence, and I anticipate that we will want to make use of that facility as we move through the recovery phase. However, the Parliament might well have to look again at features of the trial process that might help to facilitate virtual working in the summary courts or, potentially, at additional adjustments for solemn procedure.

**The Convener:** Mr Harvie, do you have anything to add?

**David Harvie:** I have nothing to add to that.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** I would like to ask about the prioritisation of trials. In relation to solemn cases, the Crown Office has advised that the decision on when a case should be scheduled for trial should be taken by the court. Does that apply equally to sheriff, solemn and High Court cases? Is it the Crown Office that decides on the prioritisation of summary trials? How does that operate in practice, and what advice do you give to inform decisions and so on?

**David Harvie:** As per the correspondence that was submitted, it is the courts service that sets the prioritisation of the solemn case work once a case has been indicted. We have elaborated that to the types of reasons that particular cases might have priority, depending on the age of the accused, for example, and whether the case is a custody trial or involves a particular vulnerability, and so on.

In the current climate, an additional element of particular importance is the fact that the courts will undoubtedly want to have a high degree of confidence that a trial can proceed—with regard to witness availability, arrangements for the physical or remote taking of evidence, and arrangements in relation to capacity depending on the number of accused in a given case—before they set the case down for one. There might be limitations on whether a trial can go ahead at present.

In summary trials, our position is again linked to the constraints that we talked about earlier. Most sheriff and summary courts might have eight trials on any given morning at the start of business. However, we anticipate that the vast majority of trial slots that traditionally existed prior to the outbreak will not be there and that there will be, at most, two or three virtual trial courts set down for a day. Custody trials and trials that involve vulnerable witnesses will then be a priority. The court will wish to be assured that arrangements are in place at the procedural stage, so that the trial can go ahead, and that the even more valuable court time is well used.

**The Convener:** Lord Advocate, do you have anything to add?

**The Lord Advocate:** I should perhaps add the observation that, obviously, we have had to consider which trials should be dealt with in July as the trials that will test out the two models of solemn procedure. At this stage, we are looking only at single-accused cases and we do not anticipate dealing with sexual offences in the early period, because of the concerns about cases being deserted for one reason or another. We are looking carefully at the witnesses who would be required for any given trial, with a view to ensuring, as far as possible—one can never be absolutely sure about this—that we have trials that should be able to run.

**Rona Mackay:** You have noted that the small number of summary trials that have proceeded during lockdown have involved accused who were in custody and that priority has been given to cases involving domestic abuse. How do you see the prioritisation of summary cases developing as more cases are brought to trial? Will domestic abuse cases still take priority?

**The Lord Advocate:** Indeed. Throughout this period, in all the adjustments that have been made, we have been acutely conscious of the particular features of domestic abuse cases and the need for them to be given appropriate priority. I envisage that those cases will continue to be a priority. You are right to make the point about custodies. It is clearly the case that, other things being equal, custody trials will have the first call on the limited resource.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** I want to follow on from Rona Mackay's line of questioning and ask about the resolution of cases without trial. Are you doing any work to identify cases that could be concluded without the need for a trial—for example, with acceptable pleas?

**The Lord Advocate:** The short answer is yes. The clear aim during this period is to identify cases that can appropriately resolve. I should be clear that the Crown will accept a plea only if it is in the public interest to do so, but it is absolutely right that we look hard at the case load and identify cases that can be resolved in the public interest by way of a plea, and that we seek to engage with representatives of the accused where there is an indication that an appropriate plea may be offered. That is part of the work that is being done.

The other part of the work that is being done in relation to the existing case load is that, where a case cannot resolve or does not resolve for perfectly proper reasons, we are seeking to maximise the opportunities to agree evidence, to limit the scope of trials and to focus such cases in a way that maximises our ability to move forward. The Crown will use the various procedural facilities that are available to it in seeking to do that.

The other part of the picture on resolving cases is the enhanced ability at the lower end of the system to use fiscal fines. One of the measures that the Parliament has given us is an increased fiscal fine scale, which provides an available option for prosecutors in a larger range of cases. Again, as a result of the change that the Parliament made in the Coronavirus (Scotland) Act 2020, procurators fiscal may offer a fiscal fine in a case that previously would have resulted in a summary prosecution, where it is in the public interest to do so.

10:30

**The Convener:** Mr Harvie, do you have anything to add?

**David Harvie:** Yes. A formal protocol has been agreed with the Law Society of Scotland and the Scottish Courts and Tribunals Service regarding a discrete process for pleas of guilty. The contacts have been shared across the profession so that the prosecutors can be contacted. Indeed, I wrote personally to all practitioners, indicating that, as the Lord Advocate has explained, we would seek to resolve cases appropriately where possible and that, where that was not possible, we would focus on agreeing evidence in order that cases were as narrow and well prepared as possible in advance of trial. It is still early days as far as that protocol is concerned, and, although we have had very good engagement from the leaders of the profession, I

would encourage the profession generally to engage in that process to ensure that, as we go into the recovery phase, the cases that would otherwise always have resolved still resolve, so that we are left with the recovery phase focused entirely on those matters that should be going to trial.

**Fulton MacGregor:** Thanks for that. Both those answers were really helpful. On the protocol that was mentioned, does the level of sentencing discount come into that? Could that be increased, where appropriate, to encourage early resolution of cases? Has that been taken into account as a possibility?

**The Lord Advocate:** It is important to recognise that the current law on sentencing discount offers a substantial discount of up to 30 per cent for an early plea. Of course, sentencing is a matter for the courts, and I anticipate that the court will determine whether an additional discount should be made available. Indeed, there was an appeal court hearing on Friday involving an unduly lenient sentencing appeal that I brought against the sentence of a man who was accused of coughing and spitting on a police officer. The sheriff had sentenced the man in that case to four months, but the appeal court increased the sentence to 10 months. I gather that the question whether additional discount should be made available was a matter of discussion before the court. The Crown position is that the existing discounts already provide a substantial incentive to accused who wish to plead guilty to do so at as early a stage as possible. However, ultimately, the court will decide whether it is appropriate to allow an additional discount at this time.

**Liam Kerr (North East Scotland) (Con):** Good morning, panel. I have a question on something slightly different. Lord Advocate, you just mentioned sentencing for coughing and spitting on police officers. In a submission to the Justice Sub-Committee on Policing, the Scottish Police Federation said that its members

“are exceptionally angry that neither the police service nor the Crown Office took a deliberate and unambiguous position that those who committed such assaults”

on police officers during this crisis

“should be kept in custody pending court appearance.”

How do you respond to that criticism?

**The Lord Advocate:** The first thing that I should say is that we all regard such offending as absolutely reprehensible. Police officers are on the front line keeping us safe during the pandemic and I greatly appreciate the work that they have been doing; they have been doing an extraordinary job on behalf of all of us. I have been very clear that prosecutors will deal with such offending robustly. We will take up such cases when they are

reported to us and we will prosecute them rigorously. Indeed, in the case that I mentioned, an appeal was brought on my behalf against an unduly lenient sentence, because it seemed to the Crown that the sentence that the sheriff had imposed was insufficient given the nature of the crime. There is no question but that prosecutors will deal with those offences rigorously.

In so far as custody is concerned, we operate within the statutory framework that the Parliament put in place in 2016. It is a modern framework for arrest, custody, bail, liberation and other matters and contains tests that are required to be met before an individual can be detained properly in custody by the police. That is a matter for the police service to apply, but it is correct that within the statutory framework that we operate—and it is a framework that recognises the presumption for liberty—it is not possible to have a blanket rule that all individuals in a certain category of case will be detained in custody.

**Liam Kerr:** I have a follow-up question. I understand that there is a statutory framework, and that the Crown Office issued guidelines pursuant to that framework on 30 March. However, throughout the crisis, there have been various frameworks and statutes that have been reviewed and their applicability during this period has been considered. Given the proposals by the Scottish Police Federation, has there been any discussion as to whether the position requires to be at least reviewed during this period?

**The Lord Advocate:** Any change in the legislative framework would ultimately be a matter for parliamentarians.

**Liam Kerr:** I will put the question to the cabinet secretary.

I have a slight change of topic for a quick follow-up question. The Inspectorate of Prosecution in Scotland is currently considering what work it should undertake on the COPFS's response to Covid-19. What discussions have you had with the inspectorate and are there any areas that you would like to see prioritised?

**The Lord Advocate:** I have the inspector's letter. In the ordinary course of events, I would discuss the proposed programme with her. My office is setting up that meeting and I have not yet had a chance to speak to her about the detail of her letter, but I welcome the suggestions that she has made. I think that it will be useful and helpful to look at the way in which the Crown Office has responded to the current situation.

In her letter, the inspector also identifies other pieces of work that she either has in train or anticipates undertaking. One of those pieces of work is to look at the way in which the Crown deals with criminal complaints against police

officers. I anticipate that she will want to take that piece of work forward. I welcome her initiative in suggesting particular aspects of how work is done during the current circumstances that she might usefully examine. That will help us to evaluate and consider how we take matters forward.

**The Convener:** I have a supplementary. The Scottish Criminal Bar Association highlights in its submission that

"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 that there seems to be

"conflicting guidance".

The Crown Agent has previously stated that he is very keen to keep moving. Are you aware of that issue, Mr Harvie? If so, can you tell us whether it has been resolved?

**David Harvie:** Real progress has been made in trying to deal with custody cases via remote link. A discrete group is currently dealing with that area, and it is expediting work that involves colleagues from our organisation, the Scottish Prison Service, the SCTS, Police Scotland and others. There is a shared aspiration to have all custody cases dealt with by remote link in the near future; the percentage of such cases is increasing, and that work is on-going.

**The Convener:** Thank you, Mr Harvie—that is particularly encouraging.

That completes our questions to the witnesses. The committee looks forward to receiving the additional information that you have undertaken to provide. I thank you both for taking part in what has been a very worthwhile session.

## Covid-19 (Prisons and Young Offenders)

10:41

**The Convener:** Item 2 is consideration of correspondence from the Scottish Human Rights Commission and the Children and Young People's Commissioner Scotland, in which they raise a number of issues regarding the impact of Covid-19 on those in prisons and young offenders institutions.

I refer members to paper 3 and ask whether they have any comments or views, and whether they would like the committee to take any specific action. I remind members that one possible action would be to write to the Cabinet Secretary for Justice and the chief executive of the Scottish Prison Service to ask them to respond to the issues that the correspondence raises.

**John Finnie:** I will comment briefly on each of the letters; I am grateful to all those who have taken the time to write to the committees.

In its submission, Social Work Scotland provides some interesting information in respect of rural areas, including its use of the Caledonian system to deal on a one-to-one basis with perpetrators of domestic violence against women and girls.

The letter from the criminal justice voluntary sector forum, which outlines the third sector response, mentions that there is

"a higher level of engagement"

as a result of remote activity. However, it notes that that is offset by some of the mental health challenges, and emphasises

"the importance of face to face contact".

I found that interesting.

I found the submission from the Scottish Human Rights Commission, and the submission from the Children and Young People's Commissioner Scotland, which starts by saying "We agree with" the SHRC, very troubling, and I am very keen that the committee follows up on the concerns that are raised.

When a body such as the SHRC says that

"some prisoners' fundamental rights are not being respected",

we must certainly pay attention. The SHRC submission details a number of factors—it is available online, so I will not go through all of them, but I will highlight a few. It states that prisoners have "limited" access to a lawyer and that

"the state's human rights obligations"

are not being met. It also highlights the steps that the state should take in the current crisis to ensure that impacts are "minimised, proportionate" and "in accordance with law."

Similarly, the Children and Young People's Commissioner Scotland highlights significant issues, not least limited access to education and social work support. It also states that

"There is no evidence that the ... rights of children"

were considered in respect of the early-release provisions, and it highlights the Howard League's support for that view.

I would want the committee, at the very least, to write to the cabinet secretary about those matters, because they are very important and raise fundamental human rights issues.

**Rona Mackay:** I largely agree with everything that John Finnie has said. A couple of pieces in the submission from the children's commissioner were also concerning: that children and young people

"are currently being confined in their cells for up to 23 hours a day and those who are showing symptoms of Coronavirus are isolated in their cells for 24 hours a day";

that family contact does not appear to be taking place; and that mobile phones do not seem to have been provided yet. I definitely think that writing to the cabinet secretary and the Scottish Prison Service would be in order.

10:45

**Liam McArthur:** I do not have much to add; Rona Mackay and John Finnie have covered it exceptionally well. Like them, I am grateful that the Scottish Human Rights Commission and the children's commissioner have written to us to shed light on what is happening. I do not think that they have spared us the alarming details. Writing to the cabinet secretary and the SPS would be entirely appropriate. It would be worth planting in particular some of the issues that John and Rona have mentioned, but there are other issues in the staff reports as well that we—*[Inaudible]*.

**The Convener:** I also note the Scottish Human Rights Commissioner's concerns about

"the lack of transparent and accessible data currently available to enable adequate monitoring of prison conditions and their impacts."

Given all the comments from members, are we agreed to write the Cabinet Secretary for Justice and the chief executive of the Scottish Prison Service to ask them to respond to the quite worrying issues that have been raised?

**Members indicated agreement.**

## **Covid-19 (Impact on Criminal Justice Social Work and Criminal Justice Voluntary Sector)**

10:47

**The Convener:** Item 3 is consideration of correspondence from Social Work Scotland and the criminal justice voluntary sector forum that raise a number of issues relating to the impact of Covid-19. I refer members to paper 4.

Is there any specific action that we would like to take? Once again, it is an option to write to the Cabinet Secretary for Justice to ask him to respond to the issues that are raised. I do not see any requests for members to comment or suggest specific actions. Are we agreed to write to the cabinet secretary?

**Members indicated agreement.**

**The Convener:** That concludes the public part of today's meeting. The next meeting, on 23 June, will be stage 2 consideration of amendments to the Children (Scotland) Bill. Any follow-up scrutiny issues from today's evidence session will be dealt with by correspondence, which will be published on the committee website. We now move into private session.

10:48

*Meeting continued in private until 11:02.*



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