OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 2 March 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 2 March 2022

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CRIMINAL JUSTICE COMMITTEE

8th Meeting 2022, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Vicki Bell (Law Society of Scotland)
Stuart Murray (Scottish Solicitors Bar Association)
Ash Regan (Minister for Community Safety)
Denise Swanson (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 2 March 2022

[The Deputy Convener opened the meeting at 10:00]

Subordinate Legislation

Legal Aid and Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2022 [Draft]

The Deputy Convener (Russell Findlay): Welcome to the eighth meeting in 2022 of the Criminal Justice Committee. We are joined remotely by Audrey Nicoll, Pauline McNeill and Fulton MacGregor. Jamie Greene is running late.

The first agenda item is consideration of an affirmative instrument. I welcome to the meeting the Minister for Community Safety, Ash Regan; Denise Swanson, who is the interim deputy director of the Scottish Government's civil law and legal system division; and Martin Brown, who is a solicitor in the Scottish Government's legal directorate.

I refer members to paper 1, and I invite the minister to speak to the draft instrument.

The Minister for Community Safety (Ash Regan): Thank you for the opportunity to speak about the draft Legal Aid and Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2022, which will support the coming into force of a negative instrument, the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022.

Legal aid legislation sets out prescribed limits of initial authorised expenditure, which is the amount of money that is available from the legal aid fund to cover the costs of fees and outlays before a solicitor must seek approval from the Scottish Legal Aid Board to incur any additional costs.

Due to increases in legal aid fees, including those that are to be delivered by way of the negative instrument that the committee will consider this morning, it is likely that, without our amending the current authorised expenditure limits that apply, they would frequently be exceeded by solicitors when providing advice and assistance to clients early in their instruction. The effect of that would be that solicitors would be required to seek the prior approval of SLAB to ensure the full payment that is available for the work that they undertake. Requiring solicitors to seek such approval for payments, which would otherwise be permitted in the table of fees, would result in additional time, resource and bureaucracy for legal aid providers and SLAB. To address that, the regulations will increase the limits for initial authorised expenditure.

Provision is made in the regulations to increase the maximum total fees per court session that are allowable to duty solicitors representing accused persons in the sheriff or district court. That means that session limits that apply to duty sessions will allow the same number of accused persons to be represented during a session, notwithstanding the fact that the fee per case has increased.

As I said, the affirmative regulations support the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022, which, primarily, will deliver the second part of the Scottish Government commitment to uplift legal aid fees by way of an increase of 5 per cent in 2021 and a further 5 per cent increase in 2022. The regulations also provide for a new, supplementary payment for a solicitor to claim when attending a holiday custody court sitting.

The regulations address an anomaly that resulted from a decision in a case that was reported in early 2021 on the interpretation of schedule 4 to the Civil Legal Aid (Scotland) (Fees) Regulations 1989 and, in particular, on how it should be applied to the fees of senior counsel.

I hope that that gives the committee a brief overview of the regulations and their context. My officials and I are happy to answer any questions that the committee might have.

The Deputy Convener: I will invite questions from members but, first, I will kick off with one of my own. We have received correspondence from the Law Society of Scotland, which you will have seen. It says that the regulations do "nothing to address" a legal aid system that is at "breaking point". What is your response to that?

Ash Regan: A 5 per cent uplift is included in one of the sets of regulations that are before the committee—that was a commitment that the Government made during Covid. I will run through what the Government has done in that regard over the past few years. We made a 3 per cent uplift in 2019 and the 5 per cent uplift in 2021 to which I have already referred. There is the 5 per cent uplift for 2022 that is in front of the committee today, and we have put £1 million into funding 40 trainees, which was in response to issues that the profession raised with us about capacity. The training was an attempt to go some way towards finding a solution to that issue. We also invested £9 million in Covid resilience grants.

In general, the Scottish Government considers the profession to be a partner with us in access to justice, in running the courts system and, because of the pandemic, in addressing the backlog, particularly in the criminal courts. The Government is attempting to demonstrate how much we value the profession by continuing to uplift the fees.

We are also working on packages of fee reforms, one of which we referenced in a letter to the committee—we are developing that at the moment. The full package of fee reforms has gone to representatives of the profession—I think that was last week, was it?

Denise Swanson (Scottish Government): It was on Monday this week.

Ash Regan: That was on Monday this week. They will be able to look at those reforms and decide what they think of them. That represents a significant investment, too. All those measures have been developed in concert with the profession. We have been listening to representatives of the profession and adapting and changing things in order to create packages of reforms that hopefully go some way to addressing the present situation.

Katy Clark (West Scotland) (Lab): Approximately £500 million was cut from the legal aid budgets up until 2019. Since 2019, there have been increases. The 5 per cent increase that has been proposed in the Scottish statutory instrument before us is obviously below current inflation rates. Do you accept that it is, in effect, a cut?

Ash Regan: No, I do not.

Katy Clark: But you must surely accept that, if inflation is in the region of 7 per cent and the increase is 5 per cent, the value of the money that lawyers will be receiving is going down. It does not keep pace with inflation.

Ash Regan: Over the past few years we have had the 3 per cent rise, the previous 5 per cent rise, the 5 per cent rise now and the additional money for Covid resilience funding, too. I accept that there are professionals—practitioners—working in the system who feel that rates should be raised. I totally accept that, and it is obviously for them to put that case forward. We spend much of our time working with the representatives of the profession: the Scottish Legal Aid Board, the Law Society of Scotland and the bar associations.

The fee rise that you are considering today is an across-the-board fee rise, but, as I have said right from the beginning, there are other ways of doing this, too. Some of the proposals that we have in the fee package that the profession is currently considering show that I am completely open to discussing these things with the profession and, if we can find ways to address individual fee reforms that can get more money into the pockets of the practitioners, I am completely willing to consider that. I have said that all along.

Katy Clark: But the rates that lawyers are receiving are broadly similar to those that they were receiving in 2007, although there have been increases since 2019. Do you think that explains why so many lawyers are now saying that they will no longer do legal aid work?

Ash Regan: Lots of lawyers are still doing legal aid work. This measure represents an attempt to listen to what the profession is saying, and it puts a significant amount of Government funding into legal aid. We take the matter very seriously.

Denise Swanson: Some of the reduction of expenditure on legal aid that you have referenced was in response to the economic downturn, and savings packages were made. Those mainly concerned subsidiary fees such as photocopying fees. Many of the fee arrangements that were put in place were in response to discussions, negotiations and agreement with the Law Society at the time. It was agreed, for example, that there would be a cut in one fee so that we reduced the number of people in the PDSO who would be operating in the legal aid system.

There is a range of reasons why the fees that we have in place have been agreed. They were agreed at the time. I can provide the committee with the read-out of the various fees and the negotiations on how we got to those fees. That is how we have got to where we are at the moment. I can have that information sent to the committee.

Katy Clark: That would be useful. Will you explain what the PDSO is?

Denise Swanson: Sorry; it is the Public Defence Solicitors Office. They are solicitors who are employed by the Scottish Legal Aid Board. They participate in the duty schemes. The percentage of duty scheme time that is allocated to the PDSO was agreed with the Law Society and the profession at the time that the PDSO was put in place. That was a historic agreement. However, there are other things that are relevant: for example, one fee was reinstated and another fee was cut. There were lots of agreements and discussions with the Law Society at the time that those fees were put into place. As I have said, I will have that set out for the committee and sent over.

Katy Clark: What you are saying conflicts strongly with the representations that lawyers and their representatives have made to us. If you can provide us with that information, we will put it to those organisations. They are saying clearly that there have been massive cuts, and we only have to look at the hourly rates et cetera to see that that is indeed the case. However, we would be very

grateful for any information that you are able to provide.

Denise Swanson: Yes, I will do that.

The Deputy Convener: Pauline McNeill, who joins us remotely, will ask the next question.

Pauline McNeill (Glasgow) (Lab): Good morning, minister. At the beginning of the meeting, the deputy convener spoke about concern in the profession about the increases—concern that, although they are very welcome, they might not meet all the needs of the service. The minister will be aware that, between 2010 and 2020, the number of firms providing civil legal aid decreased by 16 per cent. I have met firms that have expressed concern that we are losing lawyers from the profession. The number of criminal firms providing legal aid fell by 25 per cent. The committee has been hearing about that for some time.

I have put this question to virtually everyone—the Lord Advocate and many others in the criminal justice system—because we need to keep lawyers, so that those who are accused of crimes have some choice about who represents them, and we need to do what we can to make sure that we have a healthy legal profession. Does the minister have concerns about the number of lawyers we are losing from firms that do legal aid work?

Ash Regan: Thank you for that question. One of the instruments that is before the committee today includes, as well as the 5 per cent uplift, a new payment—a supplementary fee for holiday custody courts. That is a direct attempt by the Government to address the matter, having listened to solicitors who told us that they wanted that. Solicitors who work in holiday custody courts have not been getting an additional payment, so if the committee agrees to recommend the instrument, they will get additional money. We listen constantly to the profession. As I have said, we will adjust fees where we think that doing so will have an impact.

You mentioned civil legal aid. I know that this is quite confusing, because we are talking about lots of different things. In the reforms package that we have developed and put in front of the profession on Monday, and on which the committee will have seen correspondence, there are proposals on solemn and summary courts. The proposals on solemn courts represent significant additional funding, which is a response to requests from the profession to change fee rates and so on. We have done that. In a minute, I will ask Denise Swanson to explain a little more about that.

In discussion, it was—I note for the committee's information—agreed that the civil side would be left to a later date. That is not to say that we think that everything is fine on that front; we have made a commitment to go back to look at fee reforms for the civil side.

I would, therefore, like the committee to think of this more as a starting point; we are starting here and will continue to consult the profession about changes. We are putting money in: the reform package that we have put on the table this week represents several million pounds of additional funding. I ask Denise Swanson to add a little more on that.

10:15

Denise Swanson: We are looking at improvements that can be made in the short term, while the longer-term issues with the substantial and significant fee uplifts that the profession has requested are dealt with. We discussed that approach with the profession in December and January. Both the proposals that are now with the profession reflect the discussions that we had in January.

There is a longer-term issue with the significant uplifts that have been requested by the Law Society of Scotland. Those must be dealt with as part of our spending review process, because they represent a package of about £57 million per annum. We need to work through how that budget might be allocated to the legal aid fund.

The minister discussed solicitors leaving the profession in a meeting with the president of the Law Society yesterday. We are not clear from the figures that were presented how much legal aid work was done by those who have left the profession. We have a projectory of those who provide legal aid; a small number of firms do a lot of legal aid and a lot of firms do a little bit. We are not sure whether it is the firms that do a little bit of legal aid work or those that are doing a bigger proportion of the legal aid work that are leaving the profession. The minister discussed that with the president of the Law Society yesterday to see whether we could get into some of the figures and unpick a little more detail.

The Deputy Convener: We have a question from Audrey Nicoll, who is joining us remotely.

Audrey Nicoll (Aberdeen South and North Kincardine) (SNP): Minister, you may have answered my question in your response to Pauline McNeill. You have shared some helpful correspondence, in which you outline some of the short-term and long-term measures that you are looking at and the legal assistance measures that will be considered. The legal aid reform bill is also coming.

Given your previous response, it sounds as though there will be opportunities to reconsider

legal fees. Why is the 5 per cent increase being introduced now? Could it have been rolled up in work that will come later?

Ash Regan: Around Christmas 2020 and early 2021, after discussion with the profession, the Government made a commitment to increase legal aid fees across the board. At that point we committed to 5 per cent increases in two years—one last year and the increase for this year that is in front of you today. We are making good on a previous commitment.

Jamie Greene (West Scotland) (Con): Minister, I apologise for missing your opening comments. The car park is still quite busy in the mornings.

I have some questions. You will have seen the correspondence that was sent by the Law Society of Scotland on 23 February. The society acknowledges the 5 per cent uplift, but says that that is

"significantly below even the rate of inflation".

That is a particular issue for small businesses. The last paragraph of the Law Society's letter says that the legal aid system is "at breaking point". I do not know how much of that is crying wolf and how much of it is true. What do you ascertain about that summary of the legal aid system?

Ash Regan: I do not know whether you caught our earlier in-depth discussion about those points. I regularly meet representatives of the profession; I met the chief executive of the Law Society yesterday. Those are full and frank discussions; there are no holds barred. The profession talks to the Government and tells us what it perceives to be the issues. We then have to assess the evidence and make policy decisions based on that.

We have listened to the profession, which is why we have given the uplifts that we have given over the past few years. We know that the legal profession, among other businesses and industries, has been impacted by the pandemic, so we sought to give it additional resilience funding.

I accept that the profession feels very strongly about the matter. The Law Society is right to strongly represent its profession and to try to get the best deal. That is completely legitimate. We have talked about the spending review as one way for the Government to decide on priorities and on how to allocate spending across the board. My job is to try to find a way through the matter and to make fee reforms where they will be of benefit.

The instruments that are in front of the committee represent a significant investment. Before Jamie Greene arrived, we had a discussion about the funding package, of which I hope he has been able to see some details. That funding is additional to what is in the instruments.

I am listening to the profession and I am doing my utmost to respond to the concerns that it raises. My officials work with the profession weekly to develop fee packages to respond to concerns that it has raised. I have been trying to work on that over the past year. For instance, holiday custody courts were raised with us; I wanted to resolve that issue so that practitioners who work in those courts get a supplementary payment. That is one of the measures that is in front of the committee.

I have said before and am happy to say again that my door is open. I am willing to talk with the profession and to work with it on fee reforms. That is what we will continue to do.

Jamie Greene: Thank you for that comprehensive answer. I guess that the difference is that the inability of solicitor firms to undertake their duties or even to survive as going concerns affects members of the public very differently from how the impact of Covid on other types of commercial business affects them.

In the correspondence from the Law Society that we received yesterday—we have just had time to digest it—there was a paragraph with key questions. They are posed to us for us to pose to you. I request that you review those key questions and respond to the committee so that we can forward that response to the Law Society or make it public.

I get the impression that the Law Society is not confident that there is sufficient capacity in the defence bar to address the backlog of cases. That is a key point, irrespective of the argy-bargy over fees. Are there physically enough people in the system or, even if you increased capacity in the Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service was able to increase capacity, would the inability to increase defence capacity at the same rate mean that you would not get through the backlog at the rate that we all want? Is that a concern for the Government?

Ash Regan: Capacity issues have been raised with us and we take them very seriously, for the reasons that you have just suggested. We put £1 million into the traineeship fund, which you will no doubt have heard about. That was an attempt to go at least some way towards addressing the capacity issues that have been raised with us. We are monitoring the matter extremely carefully. I guess that, in the medium term, it could be addressed in the legal aid bill that should be forthcoming during this session of Parliament.

Jamie Greene: I have a final question on an issue that has cropped up a few times and on

which we took evidence in the early part of the committee's existence. It relates to salaries.

When we posed the question to the Lord Advocate, her response was that people take a pay cut when they go into public service from the private sector. However, I get the impression that the Law Society thinks otherwise. There is a sense that good-quality solicitors are being poached from the private sector into the Government—the civil service—or public bodies that require legal assistance.

Do you have any indication as to where the truth lies? Is it somewhere in the middle? Are average salaries much higher in Government agencies than they are in the private sector, for all the reasons that we have talked about and because of the financial issues that private sector firms have faced?

Ash Regan: That is a bit like apples and oranges: we are perhaps not able to compare the two directly. I will ask Denise Swanson to provide a bit of detail on that in a moment.

Crown salaries are published online. On the other side, private companies are obviously free to set the rates that they want to set.

Could you give a little bit more context, Denise?

Denise Swanson: The short answer to the question is that we do not know. We have had discussions with the Law Society and the Scottish Solicitors Bar Association about collecting the evidence and data that will demonstrate what is happening in those situations. In private firms, it is for partners to decide how much salary is paid to employees. That is often commercially sensitive information that some firms might not wish to share.

Those are some of the things that we have been trying to unpick with the Law Society and the SSBA in order to ascertain what kind of evidence we could develop on where there are disparities and why. That came up in the payment panel; a recommendation was made in the payment panel's report around building an evidence base and a database. That research is on-going. It will be crucial to get the support of the profession on sharing information on salaries, terms and conditions, work-life balance and so on, so that we can properly ascertain what the disparity might be.

Jamie Greene: I guess the answer is to improve retention and to stop people leaving the profession.

Denise Swanson: Yes. Retention and recruitment have been problems.

Jamie Greene: It is a matter of getting new entrants in, too.

Denise Swanson: Yes.

Katy Clark: I want to raise a point about the level of income, which has been put to us by the Law Society of Scotland, and I would like to hear your reaction. The Law Society is saying that, even taking into account the recent uplifts and the increase that will be introduced by the regulations, legal aid rates will be about 60 per cent lower in real terms than they were when the Scottish Parliament was created. It is quite obvious that hourly rates have not gone up by much. The Law Society of Scotland is saying that that is in the context of a long-term decline in overall legal aid expenditure, with the 2021-22 budget being £138 million, in comparison with £160 million in 2010-11. Do you accept all that?

Denise Swanson: We need to consider the levels of legal aid that have been provided. Most of the expenditure goes on solicitors' fees, but that expenditure depends on how many applications for legal aid are submitted and how many are offered or given. We have seen a decline over the period in legal aid applications; those are charted in the Scottish Legal Aid Board annual reports. We are starting to see an increase—it started just before Covid—particularly in sexual offences cases.

There is not necessarily a straightforward correlation between legal aid expenditure and fees; expenditure depends on the number of cases. Case loads have reduced for the profession over the period. I can take the question away and try to provide the committee with a more structured response to the point that was made by the Law Society.

Katy Clark: Thank you.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. Minister, you said that the measures before us represent "a starting point", which is quite reassuring. Can you confirm that negotiations and discussions with legal professionals will continue on the issue?

Ash Regan: Yes, absolutely. In relation to the reform package—not what is in front of you now, which is an additional reform—we have already discussed our solemn proposals in quite a lot of detail with the profession, and those are pretty much ready to go. I will be able to bring them to the Parliament quite soon.

The summary proposals need a bit more development, so we will take a bit more time to develop them—again, that could absolutely be progressed this year. Those proposals are already in development, which is certainly a starting point. The fees need a lot of reform, and, as I said, it is an on-going process, but we are happy to consider any suggestions from representatives of the profession on how fees could be changed or altered in the future.

The Deputy Convener: No members have indicated that they have any further questions or comments, so we move straight to item 2, which is formal consideration of the motion on approval of the affirmative instrument.

Motion moved,

That the Criminal Justice Committee recommends that the Legal Aid and Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2022 be approved.—[*Ash Regan*]

Motion agreed to.

The Deputy Convener: I invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on the affirmative SSI that we have considered today. Are we agreed?

Members *indicated agreement.*

The Deputy Convener: That completes consideration of the affirmative instrument. I thank the minister and her officials for attending. We will suspend briefly to give the witnesses time to depart.

10:31

Meeting suspended.

10:32

On resuming—

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/30)

Parole Board (Scotland) Amendment Rules 2022 (SSI 2022/10)

The Deputy Convener: Item 3 is consideration of two Scottish statutory instruments that are subject to the negative procedure. I refer members to paper 2.

No members have indicated that they have any comments or questions on either of the instruments. That being the case, are members formally content not to make any comments to the Parliament on the instruments?

Members *indicated agreement.*

Coronavirus (Recovery and Reform) (Scotland) Bill: Stage 1

10:34

The Deputy Convener: Item 4 is the continuation of our scrutiny of the provisions in the Coronavirus (Recovery and Reform) (Scotland) Bill at stage 1. I refer members to papers 3 and 4.

I am pleased to welcome to the meeting, albeit virtually, Vicki Bell, who is a member of the Law Society of Scotland's criminal law committee, and Stuart Murray, who is vice president of the Scottish Solicitors Bar Association. We very much appreciate your taking the time to join us this morning.

I intend to allow up to an hour and 15 minutes for questions and answers. I remind members and witnesses to try to keep questions and answers pretty succinct so that we can fit in as much as possible. I ask members to indicate the witness to whom they are directing their question. If either of our witnesses would like to speak, they can let us know by typing R in the chat box.

We move directly to questions. I open with a fairly general question for you both on what are known as virtual trials or proceedings. After two years of the Covid experience, which has become a bit of a reality, what do you regard as the general pros and cons of the virtual approach? I do not know which of you would like to come in first—I will leave it up to you. Perhaps Vicki Bell would like to go first.

Vicki Bell (Law Society of Scotland): Good morning, convener, and thank you for the opportunity to participate. I will try to go first.

On the pros and cons of virtual proceedings, I start by saying that the criminal justice system and the partners who are involved in managing virtual proceedings as a result of the pandemic have been impressive, and best efforts are always the intention. As always, however, especially with things that involve technology, the approach has not always worked. There have been delays caused by technical difficulties. For example, in remote jury trials, the link has been known not to work, and various technical difficulties have been encountered with witnesses who are giving evidence from abroad, which have resulted in delays. The system is used to dealing with delays, even when witnesses are appearing in person; we respond as and when difficulties occur. Nonetheless, technical faults can create delay.

With regard to virtual trials, I have not personally participated in a virtual summary trial. My peer, Stuart Murray, has more experience in that regard. The only observation that I offer is the need to be

consistent across courts. There is a baseline for virtual trials and then a variation in practice, depending on the court. It is vital that offenders—sorry, I mean those who are accused; I beg your pardon—are appropriately supported and have access to justice. The same goes for complainers and witnesses. They would usually receive pastoral care from volunteers at the court who are from Victim Support Scotland, and that aspect would need to be considered if virtual proceedings were to become a long-term practice.

Stuart Murray (Scottish Solicitors Bar Association): Thank you for inviting me to give evidence. I am wholly disappointed by the resulting systems that we are now working with in relation to virtual courts and virtual trials. I will not name names, but I have read commentary by sheriffs, sheriffs principal and some politicians who say that the approach has been a resounding success. However, I can say—on behalf of the vast majority of the profession, I think—that the experience has, unfortunately, been nothing but a resounding failure.

I say that with the caveat that there are those among us—by "us", I mean solicitors acting as defence agents—who were opposed from the beginning to the introduction of virtual courts for any process or procedure, and admittedly some would never accept the introduction of such a system. Nevertheless, others whom I know well have tried hard to accommodate the new systems. Of course, those systems have changed during the pandemic, in terms of their structure and the software that is used. Ultimately, however, even those who were pro virtual courts have now taken the view that, for the majority of the time, they are entirely inappropriate.

I think that the main reason for that involves the one thing on which all courts should focus, which is access to justice. Ministers who are involved in the justice portfolio, solicitors who appear as defence agents and fiscals who appear on behalf of the Crown should all be focused on the phrase "access to justice", and the virtual system simply does not allow for such access in a realistic and practical manner.

It is interesting that the new system is referred to as a virtual court because, ultimately, something that is virtually a thing is not the real thing. The current approach is significantly detrimental to the majority of our clients, certainly in the criminal arena. There is perhaps more room for it in the civil arena, and there is perhaps room in both civil and criminal proceedings to utilise virtual courts, or elements of the virtual court, where that might assist witnesses who would otherwise have to travel a long distance to give evidence. Essentially, however, in the criminal realm, an accused person should be entitled to have their accuser in the same room as them. My view—and, I think, the view of the profession—is that a virtual approach takes away some of the solemnity of the court process.

The Deputy Convener: Thank you. We appear to have lost Vicki Bell's connection, so I ask members to focus their questions on you until she returns. You are in full flow, so that is perhaps a good thing.

We move to questions from Pauline McNeill, who also joins us remotely.

Pauline McNeill: I have a question for Stuart Murray. You said that we should consider the issue of access to justice in relation to the virtual system, and the need to have accusers and the accused person in the same room. Are there any elements of the process for which virtual proceedings would be appropriate? Would you take the same view with regard to witnesses giving evidence virtually? Would a virtual approach work for any part of the process? The Government has indicated that it wishes to go down that road, so I would welcome your comments on that.

Stuart Murray: As I said briefly, the virtual system could be used for bringing certain witnesses into the courtroom virtually. However, because there are many different types of witnesses, both in criminal trials and in civil proofs, it is not possible to talk about witnesses per se.

As I have stated, I think that, with the removal of witnesses from the room, there is in general—not always, and perhaps not in the case of expert witnesses—a move away from the solemnity of proceedings. When I talk about the solemnity of proceedings, I am speaking about summary and solemn trials—principally summary, of course. Physically being in a court, even if it is not in the same room as the accused and perhaps giving evidence by way of a video link from another part of the building, adds a degree of importance. It reinforces the solemnity of the proceedings. We are dealing with people's lives and, on occasion, their liberty. It is important that the witnesses who come to court actually come to court to give evidence because, for most of them, although not all, it is only then entrenched in them that it is a serious matter and not something to be taken lightly.

I hope that that answers your question.

10:45

Pauline McNeill: Yes, it does.

I wanted to ask about the extension of time limits. Is that okay?

The Deputy Convener: We will come on to that later.

Rona Mackay: Stuart Murray, you talked about the solemnity of the proceedings. We heard from Scottish Women's Aid and Victim Support Scotland that it is intimidating for victims and witnesses. It might seem like solemnity to legal professionals, but it does not to the people who are in court. Do you take on board the fact that certain victims are looking not for solemnity but for a fair court hearing where they can express what has happened to them without being intimidated?

Stuart Murray: With respect, that is an interesting take on the process of coming to court. Of course, victims appear in court and, of course, there are individuals who are accused and who have committed offences—sometimes minor ones and sometimes, to be frank, quite horrific ones—but the starting point that you have given me is that of victims not wishing solemnity, so it appears that you are discussing every complainer who comes to court as being a victim. They are not, because, often, accused persons are found not guilty or the verdict is not proven—they are acquitted in one of those ways. We have to get away from the culture of discussing complainers as being victims.

In making your point, which was well made, you spoke about the stress—I do not want to paraphrase you—of coming to court, but I remind you that it is stressful for the accused person to come to court as well. You must bear in mind the fact that a cornerstone of Scottish justice is that a person is innocent until proven guilty. Therefore, to speak about victims prior to a trial being concluded is, in my opinion, wholly inappropriate and forgets about the solemnity that is required for the complainer and the accused, as well as for witnesses, who have given up their spare time to give evidence. The serious nature of court cases means that they can be dealt with only through a level of solemnity, which impacts on everybody in the courtroom.

Rona Mackay: Thank you. I simply add that witnesses are always witnesses.

The Deputy Convener: I am told that Vicki Bell's connection has been repaired and she is back with us.

Katy Clark: We have written to the Scottish Courts and Tribunals Service, asking for information about the extent to which virtual trials and other forms of criminal procedure have taken place during the pandemic. As you know, the bill proposes that, in summary cases—many thousands of cases every year—the default should be virtual. I appreciate that you will not have numbers, but, so that we can take an evidence-based approach in our decision making, will you indicate how many virtual cases you think have taken place or, anecdotally, what percentage of defence agents' casework would have been virtual during the pandemic; whether you are aware of any evidence as to what happened during those cases, including outcomes—whether the verdict was guilty, not guilty or not proven; and what kind of charges and sentences were involved in those cases? I appreciate that you will not have researched those issues, but can you give us a feel for the level to which virtual trials have been taking place in summary cases—perhaps in different sheriffdoms—or in relation to specific types of charge?

I do not know whether Vicki Bell has anything to say on that. She said that she had not dealt with any such cases—which, in itself, is of great interest.

Vicki Bell: I apologise for demonstrating the cons of remote participation. That was not deliberate.

I do not have any sense of the information that you requested. If it would be helpful, I could invite our criminal law committee to consider the question and respond in writing. I suspect that it would be willing to do that but would draw on data from other justice organisations to inform its response. The Scottish Courts and Tribunals Service will have oversight of how many virtual proceedings have occurred across criminal and civil proceedings—they have been used in civil proceedings and have been welcomed as something that could become a more permanent feature of those. The Crown Office and Procurator Fiscal Service would also have an overview, potentially.

From my knowledge, I can share that all solemn proceedings have been remote in part. Jurors have been remote, but the courtroom has accommodated the judge, the prosecutor, the defence and the person accused. There has been a combination of witness attendance in person and remote participation. Solemn proceedings take place in the sheriff court and in the High Court, so there is a broad range of solemn offences. In the sheriff court, the maximum sentence for a solemn offence is five years; in the High Court, there is no maximum.

From discussions in the criminal law committee, which is made up of a combination of academics and practitioners who work in both prosecution and defence, I understand that the overall view—certainly in relation to solemn proceedings—is that there has been no obvious impact on the journey of a case in relation to the verdict or the resulting sentence.

Katy Clark: I ask Stuart Murray to come in on those issues.

Stuart Murray: Vicki Bell has made an important distinction between summary procedure and solemn procedure. It is fair to say that the

High Court practice of facilitating juries from cinemas seems to have worked relatively well. Certainly, it is as good a system as we could have hoped for to get the High Court and sheriff-and-jury courts up and running again, because those deal with the more serious offences in the criminal justice system and it was vital that they took priority. However, although most criminal defence lawyers and most criminal defence advocates would accept that it works to a degree, it is far from ideal.

I have yet to see a jury trial in which at least one juror does not start to nod off during proceedings. That is because they are no longer in the court and it does not feel like a tangible experience for them. There are difficulties with the remote system, even in the High Court and the sheriff-and-jury court.

More broadly, there has been a very low percentage of summary virtual trials. That is partly to do with a change in the technology and, as I mentioned earlier, partly to do with witnesses not taking the matter particularly seriously. It is hard to gauge what the figures are because, for some considerable time, both in my time with the Scottish Solicitors Bar Association and, previously, when I was the president of the Aberdeen bar association—I should say that I know that my colleague who took over from me as president is having the same difficulties—the issue has been in getting the data from the Scottish Courts and Tribunals Service, to allow us to see what the figures are. We just do not know, because that data has never been provided. It is important that it is provided if the use of virtual trials is to be realistically assessed. However, the perception on the ground, among my colleagues at the coalface, is that it should not be pushed through as a default—unless, of course, the accused person wishes to comply with the new procedure.

I realise that I am going on a bit.

I also appreciate that the focus of the Scottish Government has been on prioritising matters of a domestic nature. However, other procedures, such as those involving minor road traffic matters, could benefit equally—and perhaps more—from virtual courts, perhaps because such cases are easier to deal with witnesswise and very rarely lead to a loss of liberty or of some right other than a driving licence. Even matters of a domestic nature can be very serious, so, in general, people wish to be able to have them dealt with within the confines of the court building.

Katy Clark: It has been suggested by some defence agents that the balance between prosecution and defence has been impacted by virtual courts, with fewer people being acquitted. Are you aware of that having been said, or have you seen it in any way?

Stuart Murray: It would be misleading to say that I have personally witnessed that, but I am aware of the anecdotal evidence of others, who take that view. There is no possible way of knowing, because, when a case is prepared for prosecution, we are, in effect, given evidence on paper—other than by way of closed-circuit television and so on. For a long time, CCTV could not be utilised in a virtual trial. That was part of the reason why the content of virtual trials had to be limited so much. We have therefore not been able to properly assess how a virtual trial runs in a sheriff court without a jury. It is impossible to comment fully without the data from the SCTS.

As I keep saying, the question is why an accused person should be forced to deal with something virtually, given that the virtual nature of the experience is indicative of its being something less than the real thing. It is an experiment. Why should those people be subjected to an experiment in what can only be an attempt to save money and move matters on?

Although it is not fully connected to that matter, it is interesting and important that, to date, the Crown has yet to draw a line under anything, because it has prioritised everything. When it comes to actually fixing a date for a trial, it can prioritise only a few cases. Therefore, despite the huge backlog that continues to build, the Crown takes no view even on minor JP court matters, which will not impact hugely on society but will continue to increase the backlog.

11:00

The Deputy Convener: Thank you. We will move on to questions from Collette Stevenson.

Collette Stevenson (East Kilbride) (SNP): Good morning. I will touch on the strong comment that Stuart Murray made at the beginning of the session. You said that virtual hearings have been a resounding failure. I would like you to expand on that, particularly in relation to hearings in which there has been remote appearance of the accused from police custody. The Law Society of Scotland has highlighted concerns and has argued that more detailed work is required in that area. Can you touch on that and say what has gone wrong and what could work better?

Stuart Murray: I think that you are talking about virtual custody hearings, whereby accused persons appear from a police station somewhere in the country—not always in the same city or town in which their court appearance is being held.

At the very outset of virtual custody hearings, I spent a significant amount of time with Police Scotland and the chief inspectors, who were heavily involved in setting up that process. We found a number of things, such as the fact that the

technology was woefully inadequate. The initial idea was that virtual custody hearings would take place from a police station, principally for those who were diagnosed with Covid or who were—or had suspicions of being—Covid positive. On one level, that was an appropriate thing to do, because it prevented a Covid-positive person from being brought into court and it dealt with social distancing and contact. Unfortunately, it very rarely worked. First, the technology very rarely worked, although each court is different and I can speak only about Aberdeen. We would try to speak to somebody in the cells, perhaps in Kittybrewster police station, but we would not be able to connect to them. When we could connect to them, we could not hear them properly because the camera was in a different room, through a glass panel from our client.

Secondly, the police and the SCTS decided that they would carry out a trial system whereby they would randomly choose people to go through the virtual custody system. However, that led to huge concerns because, very often, it is only when the accused person sits in a cell block at a court with an experienced lawyer who has been dealing with people with multiple issues for many years that it comes to light that the accused person has mental health issues or drug problems that were not entirely obvious at first sight, or that they have difficulties because they are a younger person with a lack of experience of being in a court.

Rightly or wrongly, the perception of many of our clients of speaking to us from the police station cell block was that they were being dealt with by people who were hostile to their requirements. Only when those individuals were brought to the court and allowed to speak to us face to face were we able to put their minds at rest—albeit not wholly all the time. That allowed them to see that the person they were speaking to was interested only in their needs and in looking after their concerns, with the multiple issues that they faced in what were sometimes chaotic lives. The practice of that being dealt with in one place, without their having face-to-face contact with a lawyer, was significantly worrying for a number of clients.

I say this again: there is a perception that all criminal accused are guilty, and that is just not the case. People deserve to be able to have face-to-face contact with their lawyer, especially if it is a duty lawyer and the accused person has never been in custody before. It is really important that their mind is put at rest and that they know that the person they are face to face with is looking after their best interests.

Collette Stevenson: I ask Vicki Bell the same question. What are your views, Vicki?

Vicki Bell: My understanding of accused persons appearing virtually from a police station when in custody is that it was brought about as a measure to prevent the spread of Covid by not moving people around from police stations to court cells, up to courtrooms and so on. The reason for it was proportionate.

However, I agree with Stuart Murray. Following their arrest, engagement with a solicitor is the first supportive experience for the person who has been accused and is in police custody. It is an anxious time. They are often anxious to understand what is coming next, and lots of reassurance is required from the solicitor in that context. When the solicitor engages with their client in order to understand what they are in police custody for and, therefore, what might come next, there is an element of pastoral care to that. Creating that relationship in a remote way is challenging for the solicitor and for the person in police custody.

Collette Stevenson: Thank you, Vicki. I have no further questions.

The Deputy Convener: We will now move on to Fulton Mackay, who has some questions on that topic; we will then move on to another area of questioning.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Thanks, convener. Just for the record, it is Fulton MacGregor. I get “Fulton Mackay” all the time.

The Deputy Convener: Oops.

Fulton MacGregor: I think that you have called me Fulton Mackay once or twice as well, Rona.

I hope that the witnesses—and the deputy convener—do not mind my going back a wee bit, like Collette Stevenson did. I want to return to an earlier line of questioning by my colleague Rona Mackay to Stuart Murray.

Stuart, I am sure that you will be used to the points that you have made being picked up on—I apologise for doing so, too. I should say that I really like your tenacity in your work for people who are accused—it seems that you would be a really good lawyer to have.

On that note, however, I disagree with your comment that the accused should have the right to see their accuser. I can understand that from a general, theoretical point of view, but we have heard evidence in committee on a number of occasions and in various evidence-gathering sessions indicating that that can be a really traumatic experience for the accuser in some of the most heinous crimes that have been reported. I appreciate that they are only alleged crimes at that stage, and I understand the complexities around that.

However, it has become clear to me that there is also an issue of access to justice. We have talked a wee bit about access to justice for the accused and whether they are not getting a fair hearing or to have a trial in the old-fashioned, pre-Covid way—although that can include virtual elements, too. If a victim—an alleged victim, rather—is so scared or traumatised that he or she cannot give evidence to the best of their ability, that is another aspect to consider. I get that there is a balance to be struck on that. I wanted to come back to you on that point.

Do you not see any merit at all in continuing virtual hearings, for example for domestic abuse offences, sexual offences or serious assault offences? If you do not, do you see any way to bring in some sort of hybrid format? That might be like the one that we use in the Parliament, for example. Could such a format be brought in to capture—almost—both elements: ensuring that the accused gets a fair hearing and ensuring that the witnesses, who have perhaps experienced really traumatic things, get to give their evidence in the best way possible?

Stuart Murray: You make a very good point. To be clear, I recall saying—I stand to be corrected—that access to justice should be spoken about in relation to everybody: by the defence, the Crown Office, the Scottish Government and the Scottish Legal Aid Board, but also in respect of accused persons, complainers and witnesses. Essentially, access to justice should cover everybody who comes into court other than the court professionals.

To answer your question specifically, yes, I absolutely think that there must be in place a virtual process that, effectively, allows complainers—that is the word that we should be using—many of whom have gone through very traumatic experiences in the lead-up to the court process, to give evidence in a way that negates all the concerns about coming to court as far as possible. I say "as far as possible" because it is not always possible to negate them all. Of course, such a process has always been in place.

I say this with all due respect to you, but, frankly, your question highlights the lack of understanding of what takes place in a courtroom. Procedures were in place prior to the pandemic to allow a witness to come to court, and they were still in place during the pandemic. Those procedures allow a complainer to give evidence by way of videolink from another part of the court. I briefly touched on that earlier in my evidence.

Please do not make the mistake of thinking that the pandemic has brought in new procedures. It has brought in procedures that do not work particularly well. There have always been procedures in place in courts—perhaps not always, but for some significant years now—in summary proceedings, as well as solemn proceedings, whether at sheriff-and-jury or High Court levels. Under those procedures, a witness can give evidence either by the use of screens in court or by videolink from another place, either in the court or in a building near the court. That applies to all vulnerable witnesses, from complainers in serious sexual assaults to children giving evidence in more minor—I would not say "not serious"—summary-level trials. That has always been the case.

11:15

Of course, we as a profession are in favour of that. It would be wholly inappropriate to put an extremely vulnerable witness through the process of literally coming face to face with the accused person. However, that is not what we are talking about. That aspect can proceed as it always did. It was impacted by the introduction of virtual trials, but it worked perfectly well before virtual trials were introduced. No accused person—[*Inaudible*.]

The Deputy Convener: Thank you, Stuart.

Fulton MacGregor: Thank you for that, Stuart—

Stuart Murray: I am sorry to keep on about it, but it feels as though there is a fundamental lack of understanding of what happens in a court building during the trial process.

Fulton MacGregor: I hear what you are saying. Nevertheless, in the committee's defence, some of us were members of the Justice Committee in the previous session of Parliament, and we are well aware of what was available pre-pandemic for remote contributions. Some of us were involved in the consideration of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, for example.

I accept what you say, but we are now hearing in evidence that, because of the pandemic, completely virtual trials are now possible. We have heard from witnesses that, in some of the most extreme cases, it can be hard for someone even to go into the same building as the accused person, even if they are in a different room and there are safeguards in place. Some of those crimes involve emotional abuse, and even being in the same building can have an impact.

I do not want to go back over the issue—I can feel the convener's eyes burning into me, and I know that we are short on time. I was simply making the point—perhaps you can come back to this in a later answer—that, for some individuals in some cases, fully virtual trials, which mean that witnesses are nowhere near the building at all, may be appropriate.

Rather than going back to Stuart Murray at this point, I will pass back to the convener so that he can decide what he wants to do next.

Stuart Murray: Can I quickly respond to that point? It has been put to me, so I think that it is appropriate that I am able to respond.

I accept the point, but I say again that there are many accused persons who find it extremely stressful to come to court. That is why I said earlier that some accused persons may feel that it is more appropriate for them to be able to deal with the matter by way of a virtual procedure. As I see it, that applies equally to both complainers and the accused. It is appropriate, in any fair justice system, that the same rules should apply to both accused persons and complainers.

Fulton MacGregor: I take that point.

The Deputy Convener: I put on record my apologies to Mr Fulton—[*Laughter.*] Sorry, I mean Mr MacGregor; I did not get his name wrong deliberately.

Before we move to the next line of questioning, Rona Mackay has a brief question. I would appreciate it if we could keep questions and answers as succinct as possible, given the time that we have left.

Rona Mackay: My question is for Vicki Bell. At last week's committee meeting, Scottish Women's Aid and Victim Support Scotland agreed that virtual courts should be the default for domestic abuse cases. What is your opinion on that? Do you agree that domestic abuse is, by its very nature, not a one-off alleged offence, which is why it is so urgent that those cases are dealt with? As we know, there is a huge backlog.

Vicki Bell: I agree with that observation. The experience can be distressing for complainers and for witnesses, who are often friends or relatives. Coercive control is damaging, both physically and emotionally. On the day of the trial, the focus for the witness is to talk about the things that have happened, which is in itself a retraumatising experience.

On a practical level, for a witness who is coming to court—using the same entrance door to the building, checking in at reception, going to the bathroom, using public corridors and going for a coffee—the chance of passing the accused person, or any of their relatives who may be there to support them, can add to their retraumatisation and distress, and can have an impact overall on how well they feel by the time they get into the witness box. There is a period when they have to wait and experience that additional human contact, which adds to the pressure on them. So, I agree with what—[*Inaudible*.]

The Deputy Convener: We move to the next area of discussion, which is time limits in criminal cases. Jamie Greene will ask questions first, followed by Audrey Nicoll, who joins us remotely.

Jamie Greene: I would like to discuss the parts of the bill relating to the issue of criminal procedure time limits, which has arisen as a result of the pandemic. You will be aware of the temporary extension to those time limits, in particular relating to pre-trial in solemn cases, in which there was a quite substantial extension to the normal time limits. The limit for time on remand until service of indictment, which was previously 60 days, was extended to 80 days; the limit for time on remand until pre-trial hearing was more than doubled; and the limit for time on remand until trial went from a maximum of 140 days to 320 days. There were similar extensions—although they were not the same—for summary cases.

I think that we all appreciate that that was done to ensure that cases did not time out in any way. It gave the Crown Office sufficient opportunity to proceed as appropriate, given the context of the pandemic. However, the bill seeks to make many of those extended limits a feature of our justice system for the longer term or, indeed, for the long term.

What are your views on those time limits and the extension thereof? Should we look favourably on them or not? Do you have a view on whether, although the extensions have served a purpose, we should now, where possible, try to revert to the pre-pandemic status quo?

Perhaps Vicki Bell can start.

Vicki Bell: The Law Society's criminal law committee has discussed that particular part of the bill at length and, collectively, we do not support the provisions, for a number of reasons. We agree that swift action to extend time limits was necessary and proportionate when Covid legislation was first imposed. As a result of lockdown and social distancing, there was a period when no trials could proceed and time limits had to be protected so that cases did not fall.

It is necessary to continue consideration of the issue, given the backlog. Perhaps extensions could be applied in a more tailored manner. There will be some cases that do not require additional time and others that do. As an example, a case could require additional time where forensic evidence is awaited. The pandemic has affected forensic laboratories and there is a backlog. If forensic science analysis is required to inform evidence in a case, the case needs to wait for that evidence before it can proceed to court. The criminal law committee's view is that extensions should be considered case by case.

The additional matter that we discussed in that context was the need, if a case is ready for court—ready to be indicted or for proceedings to commence—to consider trauma-informed practice in relation to witnesses, complainers and the accused. It can be challenging for people to have to wait indefinitely for a process to commence.

The justice system often sees the end as being when evidence is finished, yet, from a trauma-informed perspective, that tends to be the start of recovery for a complainer. For a complainer, having a trial date to work towards can be more manageable and less challenging than having a narrative that says, "There is a backlog and it might be a year or it might be two. We really don't know, but the case is waiting in the queue".

The criminal law committee is firmly of the view that the issue should be consulted on to enable all those factors to be considered and reflected in whatever extension is made to the existing time limit provisions.

Jamie Greene: Thank you for outlining why you disagree with those elements of the bill.

Stuart Murray, we have heard that the backdrop or context for this is the backlog of cases. I hope that I am incorrect in assuming that, because of the backlog, there is an inevitability about extending the time limits, because so many cases will simply not reach the first, second or third stages of proceedings without some form of extension. No one wants cases to fall off the edge of a cliff because they have reached technical time limits—that is not good for the accused or the complainer. What is the bar association's view?

Stuart Murray: As you say, it feels very much that there is an inevitability to it. Going back in time, there was an acceptance that there required to be an increase in the time limits because of the pandemic, and anybody who suggested otherwise would have been fairly churlish about it.

Throughout the course of the pandemic, the defence bars have felt that every measure that has been taken by the Scottish Government, the Scottish Legal Aid Board and, in particular, the Scottish Courts and Tribunals Service has been two or three steps too late in the process. It has now reached a stage at which we have clients on remand who are getting so annoyed at us because their cases are not proceeding to trial—of course, that is entirely beyond our control—that they are transferring to other firms in the vain hope that they will be able to fast-track things for them. That is clearly not possible. It is for the Crown to decide who gets brought to court for trial.

In a roundabout way, it is costing SLAB more money because, generally, these matters involve time online. The new firm has to be paid for going through disclosure of evidence that has already been disclosed to another firm. People are sitting on remand with no real access to jobs or courses because they are not serving prisoners. They get very little time out of their cells each day and, understandably, they become increasingly frustrated.

At the very outset, we were told that the Crown would prioritise certain matters, such as one-accused trials rather than multiple-accused trials and cases that included a level of domestic abuse. To be clear, I am talking about sheriff-and-jury trial level, not High Court level. I have clients who have been sitting in the cells for nigh on two years now. They qualify as belonging to that group of people that the Crown said that it would prioritise, but they have simply not been prioritised. There is no rhyme or reason to who gets taken for trial and who does not. There are people in the cells with very few convictions—convictions that are not always analogous with the matter for which they are on remand—and they are becoming increasingly frustrated. The situation is bordering on giving rise to issues under article 5—the right to liberty. Something has to be done about it.

An added difficulty for many of those cases is that the result of an application for bail by the accused is really dependent on which judge or sheriff is on the bench on the day. Some people are remanded for lengthy periods, yet a different judge might have admitted them to their liberty on bail. There is no continuity or consistency—it is judge led. That must be addressed quickly.

11:30

Jamie Greene: Remand is a much wider issue, which the committee is looking at. Everyone is acutely aware of the sad inevitability that some people spend more time in prison on remand than they would have done in serving their sentence, if they had been proven guilty, but we can talk about that another day.

Stuart Murray: That is exactly right.

Jamie Greene: I know that Audrey Nicoll has questions on this subject. My other question is on the next topic that we will discuss, so I will save it.

Audrey Nicoll: I want to follow on from Jamie Greene's line of questioning. I am very concerned about the provisions in the bill on the proposed extension of time limits, particularly in the current context of remand, which Jamie has just highlighted.

I want to pick up on Stuart Murray's previous points about virtual court proceedings. I think that we agree that there is benefit from a virtual option to expedite court proceedings, without it being at the expense of their quality. Perhaps virtual proceedings have their place in helping to reduce

the backlog by allowing cases to be processed in a more timely manner.

On one hand, you expressed some concern about virtual court proceedings as an option. On the other hand, in the circumstances that we face post-Covid, are they a legitimate option in the court process, particularly in the context of avoiding extended timescales for court proceedings to be undertaken and completed, thereby potentially avoiding the necessity for time limits to be extended permanently?

Stuart Murray: Hi, Audrey. Thank you for the question. My view is that they are not a legitimate alternative to what I refer to as a traditional court process.

It is interesting that very often—more often than not, probably—in most courts up and down the country, there are in-built, inherent delays. For example, in a trial, it might appear that you call one witness, they go away and you bring another witness in, but we are talking about the real world and it is not always like that. Usually, there are delays of one type or another, which might be to do with a witness having difficulty with childcare, not feeling well, running late or using public transport. It could be about any of those issues or more.

When we introduce a virtual system, we increase the propensity and potential for something going wrong. That is generally what we have found. By introducing a virtual system, we introduce another layer and level of things that can go wrong on the day. Although it might appear that it can help to expedite the backlog, it is our view as a bar that that is not the case.

At the risk of repeating myself, a virtual system could be a useful tool to have in the box. Bringing witnesses from furth of the border can be costly and time-consuming and can cause witnesses not to be able to be present because of issues with public transport, other delays or weather. Therefore, there is the possibility of using a virtual trial system for witnesses who are furth of Scotland, from abroad or something of that ilk, but not in the day-to-day running of the court. It is not working, and I think that I can say on behalf of all the bars in Scotland that it will not work. We have no faith in it. It is costing time and money, especially when we hope that we are coming to the end of the pandemic, certainly to the extent that we can open cinemas and nightclubs again and allow people to travel. In those circumstances, as a profession, we do not understand why we cannot bring witnesses back into court, because it worked before.

Audrey Nicoll: Thank you for that. Does Vicki Bell want to add anything to that response? I am aware that colleagues also want to ask questions around time limits.

Vicki Bell: I suspect that I have nothing of value to add, but I will make an observation. I hear what Stuart Murray said about respecting the traditional way in which trials proceeded, but I also accept that, in order to have any measurable impact on the backlog, additional short-term and longer-term measures are required.

Audrey Nicoll: Thank you. I will leave it there and hand back to the convener.

The Deputy Convener: We have a couple more questions on that subject, the first of which comes from Pauline McNeill.

Pauline McNeill: As Jamie Greene indicated earlier, the Coronavirus (Recovery and Reform) (Scotland) Bill would extend time limits quite extraordinarily from 140 days to 320 days, which gives me cause for concern.

Stuart, in your evidence, you said that, with regard to the cases that are being called, there is no rhyme or reason as to which cases are being given priority. That also gives me cause for concern. Can you give any guidance to me—and other committee members who are concerned—on an alternative way of going about that? At the moment, if we were to agree to the proposed timescale extensions, they would automatically apply to every case, so we can see how that would go. Might it be your view that, if we did not extend those time limits, there would be some discretion? Is there an alternative way? One view is that, in coming out of the pandemic, the court system is going to be such a mess from the point of view of the availability of courts; another view is that, if we simply allow the current situation to go on for almost a year, we might be—I agree with you on this—verging on breaching article 5 in some way. I would welcome a response on that.

Stuart Murray: I think that we have now reached the point where there is a bottleneck in the system and that, if we continue to extend the time limits, it will simply cause that bottleneck to fill up further. That seems like common sense to me. The time limits were extended because of the pandemic. I come from a family of doctors. Although I do not know anything about the pandemic with regard to how it should be dealt with or how people should be treated, I undoubtedly see common sense in things, and it seems to me that the extension of the time limits does not comply with common sense at all.

I want to be able to say that the pandemic is over, but I cannot say that. I am repeating myself, but I can go only on what the Government is doing. It is allowing people back into nightclubs, allowing them to travel and allowing them to meet and congregate in large groups. For me, as a

layman, it seems that the pandemic as we know it is—touch wood—coming to a more manageable point. Therefore, why can we not manage the Scottish court system more appropriately and pragmatically?

I am sorry if that response is not filled with technical detail, but it is a commonsense issue. Ultimately, we have people languishing in custody and some of those people should not be there. As one of your colleagues pointed out, many of those people, even if they are convicted, will have been on remand for significantly longer than their sentence might have been.

That is all that I can say on the matter.

Katy Clark: It is clear that we have a crisis. The word "bottleneck" has already been used. When we heard from the Scottish Prison Service last week, it put the proportion of prisoners on remand at 30 per cent, which is higher than the previous figure that we were given—the most recent official figure—of 27 per cent. It is clear that we must address the problem. What are the alternatives? In what ways could we change the system to address the crisis? Does Vicki Bell have any suggestions, based on her experience?

Vicki Bell: The criminal law committee has had a discussion about what could assist in alleviating the remand population. Its understanding is that while the number of persons arriving on remand has decreased, the length of remand has increased. That makes it look as though the remand population is larger than we are used to, but that is due to the length of time that people are spending on remand, not the number who are on remand.

In that context, we have spoken about measures that would reduce the remand population. The first is electronic monitoring as a condition of bail. That might address offenders who might not otherwise be suitable for bail but who would be if they agreed to electronic monitoring as a condition.

We also spoke about the recent sentencing guidelines for young offenders—those under 25—and felt that they would have a positive impact on future remand decisions for that age group. The drive behind those sentencing guidelines is to take a more trauma-informed response to dealing with young offenders.

We spoke about the need not to have a blanket approach to extending time limits for people who are on remand, but to have a more tailored consideration. We should approach a case by asking whether there is a reason why it needs to wait and what that reason is. If it does not need to wait, it should be put into court. It is likely—this is subject to the views of victims groups—that that would be welcomed by complainers and witnesses. As I explained before, waiting for a date can be emotionally challenging or more challenging than waiting when a date for trial has been set. Having a date allows for coping strategies. For example, if someone has eight months until the trial, they can determine what strategies they can deploy in that time to cope with the pressure of waiting. However, if they have no idea how long they need to wait, it is much more challenging to manage from a therapeutic and wellbeing point of view.

11:45

Katy Clark: I take it from what you have said that you think that we need to review whether individuals who are currently on remand need to be where they are, or whether there are alternatives for them.

Vicki Bell: Yes. If there were suitable alternatives available for members of the remand population, depending on their circumstances, because every decision is facts specific, that would alleviate issues with those on prolonged remand and would protect the public from risk.

Katy Clark: If you think that there is a need for continued use of automatic time extensions, how long would it be legitimate for those to continue?

Vicki Bell: When we discussed the time limits, the criminal law committee observed that it is proposed that bail time limits increase by about 50 per cent, which we do not take issue with, but the increase in remand time limits would be much greater than that. We could not see any reason why that should be the case. Normally, a bail trial commences within 12 months, and it is proposed that it commence within 18 months. We have absolutely no difficulty with that. However, it is proposed that there be a substantially greater increase in relation to the 140-day limit.

Katy Clark: There should be a focus on people in custody prior to trial.

Vicki Bell: Yes.

Katy Clark: I understand.

Will Stuart Murray pick up on that issue? What alternatives can you suggest as to what we do in the here and now, given the crisis that we face?

Stuart Murray: I know that this does not answer the question, but Vicki Bell made a very appropriate, valid and important point about complainers also having to wait during the process. My role is as a defence agent, but I am also an officer of the court, as are all my colleagues in defence and prosecution teams. Believe it or not, we also think about the complainers and witnesses in such matters.

To move things forward, the courts have to be directed to view secondary or further applications for bail in a different manner. At the moment, when an application for bail is made, it is not really a matter for the court to consider the length of time for which the person will be on remand. The court might be able to consider other matters such as a family's lack of income or something of that ilk. Ultimately, however, the court does not consider the length of time on remand, and I suggest that it perhaps should.

Second or third applications for bail could be considered in a different manner. As Vicki Bell said, such applications could be dealt with by way of curfew orders or restriction of liberty devices, whereby people are kept within the confines of their home or in suitable accommodation. That would allow some members of the remand population to be given their liberty. I come back to the point that such individuals are innocent until proven guilty; that is a fact.

The Deputy Convener: We are just about out of our scheduled time, but we can continue for five or 10 more minutes, if the witnesses are happy to stay with us.

The next area of questioning relates to the power to release prisoners early. Rona Mackay and Jamie Greene have indicated that they would like to ask questions on that subject.

Rona Mackay: The bill seeks to give the Government powers similar to those that were provided in 2020 to release groups of prisoners earlier than under the normal rules. Certain types of prisoners would be excluded from release. I wonder whether I could have your opinion on that policy. There are some concerns about that happening, particularly from Victim Support Scotland and Scottish Women's Aid.

Stuart Murray: Yes, I think that certain groups of prisoners should be given early liberty. In saying that, I understand that there are certain groups of complainers—victims by the time that the accused has been convicted—who will undoubtedly have significant concerns about their attacker, if I can use that word, being given an early date for liberation.

I do not quite know how one gets away from those legitimate concerns of victims. There are of course civil procedures that can be employed and put in place to offer some protection to people who have those concerns, but the procedure that is involved is new, and it is another procedure that the victim has to follow to ensure his or her protection. I am not quite sure what the answer is.

There are currently too many people in our jails. There have been no young offenders in HMP Grampian in Peterhead for years now. That has been an underfunded and understaffed facility, and that itself causes issues that impact on prisoners and on how they serve their time. It is a complex question, and I do not have all the answers to it, but I can see an argument from both sides.

Vicki Bell: The first observation that the Law Society's criminal law committee would offer relates to section 24(4), where there is a list of categories of prisoners who would be considered not appropriate for early release, for example "a life prisoner". We would have thought that prisoners who have been assessed as posing a serious risk of harm should perhaps fall into that category. Section 24(3) refers to

"the governor of the prison"

deciding that

"the person would, if released, pose an immediate risk of harm to an identified person."

However, risk of serious harm is not as specific as that, in that it is not

"harm to an identified person."

That is our first observation.

The criminal law committee is supportive of the notion of continuing the provisions that would allow for early release, albeit not on a permanent basis and on the condition that proper throughcare plans are created prior to release so that prisoners have the support that they need to reintegrate.

Jamie Greene: I will keep this question brief, and I would request brief answers.

I guess my fundamental question is about the power to release being granted to ministers by Parliament on the grounds of the public health emergency—in other words, for the safety and security of those within the prison environment. Is that a power that ministers should have—I am not talking about governors of individual institutions—against the backdrop of what is already a debatable presumption of automatic early release of short-term prisoners?

Secondly, even if you agree that ministers should hold this power within the confines of a health emergency, do you think that they should keep it after such an emergency only to deal with any other pandemics that might arise and for that reason alone?

I will start with Stuart Murray. Could you be brief, Stuart?

Stuart Murray: I can be very brief, if you want.

On the second part of your question, it is a power that ministers could have kept slightly further away from them than arm's length, but it is important in situations such as the pandemic that we have been going through. As for whether ministers should have it, I suppose that they have

to have it in order to do these things, but I would just point out that it did not take very long to get the coronavirus legislation passed. I am therefore not quite sure that it should be a permanent fixture. The issue could be revisited as and when required.

Jamie Greene: Thank you for that helpful suggestion. If ministers need the power, they can come back to Parliament and ask for it. As I recall, we passed that particular legislation in a matter of days.

Do you have a view on that, Vicki?

Vicki Bell: I agree with Stuart Murray. Such an approach would allow for parliamentary scrutiny of the proportionality of early release provisions.

Jamie Greene: That response was helpfully brief, too.

Finally, are you concerned that the power might be used as a blunt tool to reduce prison population numbers, as Stuart Murray has alluded to, and that it might be used inadvertently not for public health reasons but simply to get the numbers down? There are, of course, other ways to get the numbers down—and I am sure that we will have a discussion about that, too, some time—but given the high rate of reoffending among the last cohort of prisoners who were released for public health reasons under this emergency power, when a substantial number of them reoffended in a short space of time after release, that sort of suggestion has struck alarm bells among many from whom we have taken evidence.

Do you have any view on that, Vicki?

Vicki Bell: I am sorry—could you repeat the question?

Jamie Greene: Sure. This power was used first under the premise of a public health emergency. Are you concerned or worried that it could be used as a blunter tool to reduce our burgeoning prison population?

Vicki Bell: If ministers could demonstrate a commitment to proper throughcare planning with regard to access to accommodation, benefits, medical services and so on, the criminal law committee would support the power being held in the short term, but not on any permanent footing, for reasons to do with a lack of scrutiny that I have already set out.

Jamie Greene: Thank you.

The Deputy Convener: There might be one or two areas of questioning that we were not able to cover this morning due to time constraints, which we might follow up in writing with you. If you have any other points that you would like to make, you can put them in writing to us. Thank you for taking the time to join us and for giving such frank and interesting evidence.

We will now move into private session.

11:58

Meeting continued in private until 12:17.

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