

Criminal Justice Committee

9th Meeting, 2022 (Session 6), Wednesday 9 March 2022

Coronavirus (Recovery and Reform) (Scotland) Bill

Note by the clerk

Introduction

1. The Scottish Government's [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill](#) was introduced on 25 January 2022.
2. The COVID-19 Recovery Committee is the lead committee on the Bill.
3. The Criminal Justice Committee is a secondary committee on the Bill and is scrutinising the justice proposals in the Bill at Stage 1 of the Parliament's legislative process.
4. Although the remit of the Committee refers to criminal justice, the Committee is also considering court measures that apply to both criminal and civil courts, and legal aid which is also a criminal and civil matter.
5. A [SPICe briefing has been published](#) on the justice provisions of the Bill.

Participants

6. The Committee will be holding two panels of evidence at the meeting on 9 March 2022, bringing to a close its oral evidence taking:

Panel 1

Kenny Donnelly, Procurator, Fiscal Policy and Engagement, Crown Office and Procurator Fiscal Service, and David Fraser, Executive Director, Court Operations, Scottish Courts and Tribunals Service

Panel 2

Keith Brown, Cabinet Secretary for Justice and Veterans, and Scottish Government officials (details to be provided).

7. The Committee has heard previously from the following at its meetings of 23 February and 2 March:
 - Dr Marsha Scott, Chief Executive Officer, Scottish Women's Aid
 - Kate Wallace, Chief Executive Officer, Victim Support Scotland
 - Emma Jardine, Policy and Public Affairs Adviser, Howard League Scotland
 - Teresa Medhurst, Interim Chief Executive and Allister Purdie, Interim Director of Operations, Scottish Prison Service
 - Vicki Bell, Member of the Criminal Law Committee, Law Society of Scotland, and
 - Stuart Murray, Vice-President, Scottish Solicitors Bar Association

Format

8. Members of the Committee will be attending the meeting in person. Some of the witnesses will be appearing in person and others will appear remotely.

Written evidence

9. Written submissions of evidence have been received from some of today's witnesses. These are set out in **Annex A**.

Clerks to the Committee
March 2022

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Overview

The Coronavirus pandemic has had a significant negative impact on the functioning of the justice system. Public health restrictions, combined with increased demand in specific areas, have significantly extended the time required by:

- Police Scotland and other reporting agencies to investigate alleged criminality, including scientific analysis
- the Procurator Fiscal to prepare cases for court
- the courts to resolve cases.

Backlogs have developed at every stage of the system. However, the system's ability to deliver justice in the most serious cases, those prosecuted on indictment, has been most significantly impacted. For many months the system was not able to conduct any jury trials.

Emergency Coronavirus legislation, complemented by policy and guidance produced for staff by the Crown Office and Procurator Fiscal Service (COPFS) and other justice partners has ensured that aspects of the system of criminal prosecution, including applications for search warrants, the first appearance of an accused person before a court, whether in custody or otherwise, service of documents connected with a prosecution, and disclosure of evidence, continued, and the criminal justice system is best placed to recover as the public health situation continues to improve.

It remains the case, however, that without the provisions of the emergency Coronavirus legislation, discussed further below, continuing to be available to provide support for, and flexibility within, the system of criminal justice, the system would not currently be able to deliver justice to both victims and accused persons.

In particular, without extended time limits prosecutors would not be able to raise criminal proceedings in many cases and would currently require to make an application to the court in almost every solemn case to keep those cases live. Making such applications to the court in almost every solemn case would use up limited prosecutor, defence and court resource, delaying further, and risking, the delivery of justice.

In response to these challenges COPFS, and other criminal justice partners, will require to use finite resource, to best expedite cases. It is forecast that it will take several years for the criminal justice system to return to pre-pandemic levels of business.

The Coronavirus (Recovery and Reform) (Scotland) Bill

It is recognised that the criminal justice system (police, prosecutors, defence solicitors, criminal justice social work and the courts) operate within a framework of finite resource to respond to these challenges. It is also recognised that any delay in the criminal justice system impacts both on accused persons and on victims and witnesses.

It is essential that there is a legislative framework within which the criminal justice system can best allocate resource to the criminal justice response and expedite the progress of cases through the system.

This submission focusses on the aspects of the Coronavirus (Recovery and Reform) Bill which relate to the criminal justice system and, in particular, the work of COPFS. This submission focusses on the Schedule to the Bill, specifically Parts 1 – 6, Clause 31 and Clause 43 of the Bill. Clause 31 which introduces amendments to the Criminal Justice and Public Order Act 1994, the Police and Fire Reform (Scotland) Act 2012, the Criminal Justice (Scotland) Act 2016 and the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 to temporarily allow accused persons to appear by virtual means for certain court proceedings and Clause 43, which introduces amendments to the Criminal Procedure (Scotland) Act 1995, temporarily amending relevant time limits on criminal procedure.

The provision in the Bill is welcomed by COPFS. Further consideration is given to specific aspects below.

Schedule

Part 1 Chapter 1: Documents

COPFS has used electronic signature and transmission of documents, provided for by the emergency Coronavirus legislation, to continue to efficiently process cases during the pandemic, facilitating improved and more efficient ways of working. Electronic signature and transmission of documentation continues to be used in conjunction with the traditional “wet signature” and paper documents.

COPFS has used electronic signature and transmission of documentation in a variety of situations, including, but not limited to, the signing and transmission of search warrants and the service of complaints and indictments and case related documents, including vulnerable witness notices and notices to add relevant evidence to indictments. It is estimated that around 98% of indictments, applications and notices relating to High Court casework are now signed and served electronically.

Between 1 May 2020 and 31 December 2021, there were at least 12,779 search warrants sought, signed, transmitted and granted using electronic means.

Whilst traditional “wet signature” and hard copy documentation continues to be used, in appropriate circumstances, the availability of electronic signature and electronic transmission of documents allows COPFS resources, and that of criminal justice partners, including Police Scotland, to be used more efficiently.

Prior to the pandemic, an indictment was, in most circumstances, served by two police officers. Liaison with Police Scotland confirms that reversion to this system would impact on operational policing resource.

It is noted that Part 1 Chapter 1 paragraph 3 of the Bill clarifies the types of documents to which electronic signature applies. This is welcomed by COPFS and will enhance current provision in this regard.

Part 1 Chapter 2: Attending a Court or Tribunal

The suspension of the requirement for accused persons, and in some cases witnesses, to attend physically within court buildings has facilitated the system of criminal justice to continue during the pandemic whilst minimising the number of people who require to be present in the court estate. With ongoing self-isolation and social distancing policies and guidance from the Scottish Government in place, the continued suspension of these requirements will allow cases to progress in this context, providing a welcome flexibility within the system.

Part 2: Fiscal Fines

Under the Coronavirus legislation, the scale of fines issued by Procurators Fiscal was extended to increase the maximum fine from £300 to £500. These fines include fiscal fines and fiscal combined offers, a combination of a fiscal fine and a compensation offer.

Fiscal Fines:

Between 1 April 2020 and 31 December 2021, 294,898 individuals were reported to COPFS. Of those people, 93,652 individuals received a first marking action for a Direct Measure. 23,207 or approximately 25% of those individuals were offered a fiscal fine.

- 178 individuals were issued with a fine under the old scale; and
- 23,029 individuals were issued with a fine under the new scale (which had effect from 7 April 2020).

Approximately 3% of the fines issued were above the previous scale maximum of £300.

Fiscal Combined Offers

Between 1 April 2020 and 31 December 2021, of the 93,652 individuals who received a first action marking for a Direct Measure, 4,370 (approximately 5%) of those individuals were issued with a combined offer.

- 18 individuals were issued with a combined offer under the old scale and
- 4,352 individuals were issued with a combined offer under the new scale (which had effect from 7 April 2020).

Approximately 1% of the combined offers issued were above the previous scale maximum of £300.

Impact of the Revised Fiscal Fine Scale on Court business

The revised fiscal fine scale continues to enable a wider range of cases to be dealt with by fiscal fine. Whilst a relatively small proportion of the fines issued have been above the previous scale maximum the change has been a useful modification, which has allowed the Crown to respond proportionately, efficiently and in a timely manner to offending for which such a measure is appropriate, particularly at a time when summary criminal court capacity is not anticipated to return to pre-pandemic levels for a significant period.

Since implementation of the revised scale on 7 April 2020, on average, 3% of individuals offered a fiscal fine and 1% of individuals offered a combined offer have been issued with a fine amount between £300 and £500. COPFS analysis of Justice of the Peace court disposal data is that approximately 4% of relevant cases in the Justice of the Peace Court were formerly disposed of with a fine amount between £300 and £500.

These statistics demonstrate that prosecutors are continuing to appropriately utilise the revised scale of fiscal fines, by (i) not increasing the fine amount in individual cases which would previously have been dealt with by way of fiscal fine, and (ii) offering a direct measure, in particular a fiscal fine, in relation to appropriate cases which would otherwise have proceeded in the Justice of the Peace court.

The increase to the maximum fine from £300 to £500 has enabled appropriate action, alternative to prosecution, to be taken in a wider range of cases and allowed COPFS to develop prosecution policy that, in cases where it is appropriate to do so, should not be marked for prosecution in the Justice of the Peace Court without prosecutors first offering a Direct Measure.

Part 3: Failure to appear before a court after police liberation

Part 3 of the Schedule continues to provide flexibility to the judiciary to continue cases, as appropriate, where an accused person is not able to attend an undertaking diet for a reason related to coronavirus. Whilst it may be anticipated that, as the public health situation improves, this provision may be used less often, it remains an important flexibility to allow a court to deal most appropriately with non-appearance where the issuing of a warrant is not considered to be the most appropriate course of action. Importantly, the provision allows for protective conditions imposed in connection with the undertaking, often relating to victims and witnesses, to continue to have effect.

Part 4: National Jurisdictions for calling from custody etc.

COPFS welcomes the proposed continuation of national jurisdiction. Whilst the pandemic continues to impact on the justice system and during the period of recovery, national jurisdiction will continue to provide maximum flexibility for the system to process cases involving persons who have been detained in custody in the most appropriate manner.

The use of national jurisdiction, alongside electronically signed and transmitted documentation, will allow COPFS and criminal justice partners to continue to

effectively process custody cases without the requirement to transport individuals from one location to another.

Part 5 Chapter 1: Criminal procedure time limits

COPFS welcomes the proposed extension of time limits relating to criminal proceedings, which are essential to both the processing of business during the ongoing pandemic and system recovery.

It is essential that finite resource in the criminal justice system, including COPFS resource, is deployed in the most efficient manner to facilitate system recovery, in the context of increased demand within the prosecution and court system. Removal of provision for increased time limits in criminal proceedings, at this early stage of system recovery risks overwhelming the court system and diverting finite prosecution, defence and court resource from progressing cases appropriately to simply keeping cases live, against set time limits.

Returning to pre-pandemic time limits, at this stage, would not reflect the reality of the ability of the criminal justice system to process criminal business.

The impact of the pandemic and value of the extended time limits can be shown by looking at specific points in the life of cases. There are two key areas which require to be highlighted, (1) initial case marking of summary cases and (2) solemn proceedings, given the different manner in which time limits impact in these contexts.

(1) Initial Case Marking of summary cases:

The extension of time limits in the emergency Coronavirus legislation has provided necessary flexibility to police to report cases to the Procurator Fiscal and to COPFS to prioritise the marking of cases.

Section 136 of the Criminal Procedure (Scotland) Act 1995 requires proceedings for qualifying offences to be started within 6 months of the offence. If this time limit is not met, no criminal case can be raised against the accused. Qualifying offences include drink and drug driving and assault and obstruction of police officers and emergency workers. Under the emergency Coronavirus legislation this time limit is currently increased to 12 months.

The COPFS National Initial Case Processing (NICP) unit deals with the majority of cases received from Police Scotland. Cases are reported with the accused either being in custody, released on an undertaking, sought on warrant, or at liberty without an undertaking (custody cases, undertakings, warrants and report cases). COPFS requires to appropriately prioritise the marking of these cases. Given relevant timescales, custody and undertaking cases are allocated the highest priority, however, report cases often involve other factors which require a degree of priority, for example, cases involving accused persons who are children or otherwise vulnerable, cases involving child witnesses and cases involving more serious offending, including sexual offending.

At any one time, COPFS has a number of cases awaiting marking. This is sometimes referred to as a “backlog”, however it is more correct to refer to this as cases in hand

awaiting marking. At present the figure is just over 14,000 cases. At least 25% of these cases would rely upon the current extended summary time limit to start proceedings.

By way of illustration, there are currently 1,562 cases which would become time barred on 1 April 2022 were the increased time periods to raise summary criminal proceedings not extended beyond 31 March 2022. If the time limits are not extended beyond March 2022 (there is currently provision in the Coronavirus (Extension and Expiry) (Scotland) Act 2021 to extend the expiry of the provisions to September 2022 by statutory instrument which remains under consideration by the Scottish Parliament), COPFS would require to mark and bring those cases to court no later than 31 March 2022. If not, proceedings could not be raised. Crucially, this would require capacity within the court system to accommodate a first court appearance in relation to the majority of those cases, unless proceedings were raised by initiating warrant which would have a further and substantial impact on justice partners and accused persons. At present, due to the system backlogs, the first available court dates to start routine proceedings in some Sheriff Courts is July 2022.

From discussions with Police Scotland, it is understood that they currently have a higher number of cases awaiting report to COPFS than would have been the case pre-pandemic. This is indicative of the fact that there are delays at each stage of the criminal justice system.

It is not anticipated that the system will have recovered sufficiently by September 2022 to make a time limit of 6 months feasible once again in the context of continued challenges and delays at all stages of the justice system.

COPFS will continue to prioritise these cases, including cases yet to be reported by Police Scotland which are impacted by this time limit. However, the proposed continued increase to the relevant time limit provided for in the Bill will allow COPFS resource, as well as that of other justice partners, including Police Scotland and the Scottish Court and Tribunal Service, to continue to be targeted at cases based on factors including, but not limited to, the date of offence.

There is a risk that, without the flexibility in time limits provided for by the Bill, some cases, including serious road traffic offending, would not be able to be progressed due to expiry of relevant time limits.

(2) Solemn Procedure:

Solemn (serious) cases are tried before a Sheriff and Jury or a High Court Judge and Jury. Section 65 of the Criminal Procedure (Scotland) Act 1995 sets procedural time limits in solemn cases. Different time limits apply depending on whether the accused is on bail or in custody, pending further investigation and trial.

The time limits apply to the time given to the prosecutor to prepare the case against the accused (and serve an indictment, if appropriate) and the time then given to the court to hold a trial. If certain time limits are not met the accused can be released from custody or the case brought to an end. The time limits can be extended by the court on an application by the prosecutor. Under the emergency Coronavirus legislation, the time limits are currently extended by set periods.

The emergency Coronavirus provisions were introduced in recognition of the fact that the criminal justice system would be unable to progress cases in the timeframe required pre-pandemic. Without the provision for extension of time limits it would have been necessary for courts to consider applications in relevant cases to extend the relevant time limits on a case-by-case basis. This would have diverted finite prosecution, defence and court resource to the consideration of such applications rather than being used to progress the underlying casework.

The justification for the continued extension of time limits persists on that basis. At present the criminal justice system, including the court system, is not in a position to progress cases, both in relation to custody cases and bail cases, under pre-pandemic time limits.

The Lord Advocate is responsible for ensuring that, where proceedings on indictment are in the public interest, every solemn case is indicted into a first diet (for sheriff & jury proceedings) or preliminary hearing (for High Court proceedings) within the relevant statutory time limit. Under the current emergency provisions, the first diet or preliminary hearing must take place no later than (a) 110 days + 6 months (pre-pandemic this was no later than 110 days) after the date of full committal, where a person is remanded in custody, or (b) 17 months (pre-pandemic this was no later than 11 months) after committal for further examination where a person is on bail.

Once a first diet or preliminary hearing has called before the relevant court, it is for the court to schedule future court diets and prioritise the case within the context of the overall caseload of that particular court. COPFS have, throughout the duration of the pandemic, assisted the Scottish Courts and Tribunal Service in this task by providing appropriate information, as required.

Solemn cases can be sub-divided into Sheriff and Jury cases and High Court cases.

Sheriff and Jury cases

The criminal cases which are prepared and prosecuted as sheriff and jury cases are predominantly those which are assessed by COPFS to be likely to attract a sentence of between 12 months and 5 years imprisonment, reflecting the range of sentences available in relation to cases prosecuted in that forum. These cases include offending involving serious violence, sexual offending, including possession and distribution of indecent images, dishonesty, misuse of drugs, possession of knives and weapons in public places and other cases involving public disorder. Some cases involving serious and organised crime are also prosecuted on indictment in the Sheriff Court.

The number of Sheriff and Jury level cases reported to COPFS has increased. The current level in 2021-22 is an increase of 37% from 2017-18 levels.

Due to the increased amount of business and extended time taken to investigate and prepare cases, the numbers of cases being prepared to bring before the court ("work in progress") has risen by 84% since March 2020 (from 3,442 cases in March 2020 to 6,345 in January 2022). 742 of these cases are already older than the pre-pandemic time limit for service of an indictment on the accused (approximately 10 months after first appearance on Petition). A further 661 of these cases are approaching the pre-

pandemic time limit (cases between 8 and 10 months after first appearance on Petition).

854 of these cases have at least one accused in custody. 248 of these cases are older than the pre-pandemic time limit for service of an indictment on an accused (80 days after Full Committal) and are reliant upon the extended time-bar. The remaining 606 cases will, in very short time, become older than the pre-pandemic time limit.

By way of illustration, if the time limit extension were to cease imminently, COPFS would have to make at least 990 applications (742 for bail cases and 248 for custody cases) to the court to extend the time bar with many further applications anticipated over the following months.

These 990 applications would use limited prosecutor, defence and court resource to keep the cases live or confirm the court's existing decision that the accused should be kept in custody pending trial. As cases progress through the system, it could be reasonably anticipated that such an application would be required in the majority of these cases. These applications would add to the system backlog, furthering delaying justice for victims and accused persons.

High Court:

The High Court function of COPFS deals with the most serious criminality, including, but not limited to, homicide, rape, serious sexual offending including offending towards children, offending under the Misuse of Drugs Act and offending connected to serious and organised crime.

As of 1 January 2022, there were 1,934 live cases in all High Court units which have yet to reach the stage of conviction. This figure does not include any case where the Crown are undertaking pre-petition investigation and therefore no-one has appeared on petition.

This figure represents a 55% increase in live cases compared to pre-pandemic caseloads (1,251 cases in April 2020 compared to 1,934 cases in January 2022). Whilst there are increased case numbers in all disciplines, sexual crime is both the largest part of the High Court business (67% of the High Court caseload) and has had the largest increase since the beginning of the pandemic (27%).

Due to the extended time taken to investigate and prepare cases, the numbers of High Court cases being actively prepared to bring before the court (precognition work in progress – PWIP) has risen by 51% since March 2020 (526 in March 2020 compared to 796 in January 2022).

In 164 of the 796 cases the accused is/are on bail and the case is older than the pre-pandemic time bar of 10 months for indicting (accounting for 25% of all bail cases in PWIP).

In 144 of the 796 cases at least one of the accused is/are in custody, of which 83 (accounting for 58% of all custody PWIP) are older than the pre-pandemic time limit for an indictment to be served of 80 days. To add further context to this there are also 85 custody cases which have been prepared and are currently awaiting indictment, all

of which are older than the pre-pandemic time limit for an indictment to be served of 80 days following full committal on petition.

The general trend remains one of an increased age profile of precognition work in progress. By way of illustration, there are currently 339 cases, including both custody and bail cases, which are over 7 months from the date of first appearance on petition. The current figure represents an increase of 23 cases (7%) since 30 September 2021.

If the time limit extension were to cease imminently, COPFS would require to make at least 339 applications to the court to extend the relevant time limit with many further applications anticipated over the following months.

These 339 applications would use limited prosecutor, defence and court resource to keep the cases live or confirm the court's existing decision that the accused should be kept in custody pending trial. These applications would add to the system backlog, furthering delaying justice for victims and accused persons.

Trial Delays

There are 850 High Court cases which have been indicted but are awaiting a trial date, including all cases in which a High Court indictment has been served but in which a trial has not started or a plea of guilty has not been tendered.

Prior to the enactment of the Coronavirus (Scotland) Act 2020, the legal time-bar for a High Court trial commencing in a custody case was 140 days from Full Committal (FC) and in a bail case 12 months from Committal for Further Examination (CFE). The Coronavirus (Scotland) Act 2020 suspended relevant time limits for a period of 6 months. For illustrative purposes, the current time limits are accordingly estimated for a custody case to be 320 days from FC and in a bail case to be 545 days from CFE.

Notably, none of the cases, custody or bail, scheduled for trial to commence in the High Court between 10 January 2022 and 30 April 2022 are within the pre-pandemic legal time limit for a trial to commence.

The overall average time for a High Court trial to commence during this period is 557 days between FC and trial in custody cases and 817 days between CFE and trial in bail cases.

Comparing data from 22 July 2019 with data from 10 January 2022, in custody cases the average number of days between FC and trial increased by 90% and in bail cases the average number of days between CFE and trial increased by 28%.

Remand Population:

It is recognised that there are legitimate concerns regarding the increased prison remand population in Scotland. In March 2020, remand prisoners made up around 16% of the Scottish prison population compared to 29.9% in January 2022.

There has been a decrease in the number of people who enter the remand population since the beginning of the pandemic, partly a reflection of the more stringent approach of the courts. In the case *JD and BK v HMA 2020 HCJAC 15*, the Appeal Court stated that, in relation to bail "...the primary question is whether the accused, if at liberty, will

pose a substantial risk of committing further offences; particularly violent (including sexual and domestic abuse) offences. If there is no such risk, the accused ought to be granted bail in the ordinary case”.

Whilst public safety is not the only consideration, the courts have thus placed greater emphasis on considerations related to public safety when making decisions on bail.

However, given the impact of the pandemic, the length of journey time of cases including custody cases, has increased leading to an overall increase in the remand population.

Notably, section 30 of the Criminal Procedure (Scotland) Act 1995 makes provision for a person, including a person who is remanded in custody, to apply to a Sheriff/Judge to review any previous decision on bail where (a) the circumstances of the person have changed materially; or (b) the person puts before the court material information which was not available to it when its decision was made. There is therefore a mechanism to allow a person to request that the court reviews the initial, and any subsequent, decision to remand that person in custody.

Conclusions relating to solemn caseload

It should be noted that, due to the pandemic, the criminal justice system has a more limited capacity to deal with solemn level cases. Some of the main factors include:

- (1) Juries are currently unable to be convened in courtrooms. Trials within remote jury centres take longer due to the more complicated procedure for balloting juries, and
- (2) The courts have had limited ability to deal with multiple accused cases due to the need for physical distancing between accused, their legal representatives and other court users. As a result, the proportion of cases awaiting indictment and awaiting trial which involve multiple accused persons has increased. This includes cases involving offending linked to serious and organised crime which often involve multiple accused persons. Whilst the capacity of courts to deal with multiple accused cases improved towards the end of 2021, with the requirement for physical distancing being reduced, the reversion to enhanced social distancing and the volume of these cases in the system adds to the significant backlog of solemn cases awaiting indictment and trial.

COPFS have grave concerns as to the impact on the justice system were the extension to the solemn time limits to be removed or significantly modified, at this stage.

The pandemic has had a significant impact on all areas of COPFS work and on the wider justice system and the work of justice partners. The recovery programme recognises that it will take a number of years to return to pre-pandemic levels of business. It is assessed that reverting to pre-pandemic time limits at this stage would significantly hinder the ability of justice partners to recover towards pre-pandemic levels of business.

By way of illustration, if the justice system reverted imminently to pre-pandemic solemn time limits, around 1,024 sheriff and jury cases and around 504 High Court cases would be vulnerable to time bar, in absence of an immediate application to extend

relevant time limits. This would require system resource to be diverted to keeping these cases live within a justice system framework which cannot process business more quickly than is currently the case. Substantial improvement in this situation is forecast to take several years.

Were the extended time limits not to be maintained, the result could be to deprive victims and witnesses in these cases from access to justice. It could also mean that those accused of serious crimes would avoid trial and sentencing, with a potential risk to public safety. Such cases include serious allegations of violence, including sexual violence, domestic abuse, and serious and organised crime.

Further relevant considerations

COPFS welcome the provision in the Bill for the extended time limit to continue during the period of system recovery.

It is worth emphasising that were the Bill not to extend the provisions in relation to new cases coming into the system after a specified date, COPFS would require to allocate resource to newer cases (not benefiting from the longer time limit) at the same time as older cases (which do benefit from the longer time limit), including making any necessary applications to the court to extend time periods, as required. This would lead to resource being allocated on the basis of keeping cases live rather than prioritising and progressing business appropriately.

Without the current extended time periods, including provision within this Bill for new cases coming into the system from September 2022 onwards, COPFS would be in the invidious position of operating a parallel time-bar process, with newer and older cases operating under different regimes of time limits. This must all be viewed in the context of wider pressures in the system.

Other justice partners have been adversely impacted by the pandemic and, similarly to COPFS, have their own additional backlogs of business and increased timelines. For example, one area which currently impacts on the ability of COPFS to indict cases is the current delay period in obtaining cybercrime reports and forensic reports in cases involving forensic examination of electronic devices within timescales which would comply with the pre-pandemic time limits.

Finally, it is worthy of note that there is a risk that substantial resource is allocated to initiating proceedings (summary cases) or indicting cases (solemn cases) into a criminal justice system, in particular a court system, which is not, at present, in a position to efficiently progress those cases. This is likely to have a negative impact on the efficiency of the system as a whole at a time when efficiency is key to recovery.

Part 6: Confiscation Orders

The pandemic has impacted on proceeds of crime cases in that the ability of the accused and/or any agent to gain access to the necessary information/productions/vouching in order to form a view of, and where appropriate challenge, the Crown statement of information, was limited during at least part of the pandemic. The effect of this is applications for postponement of proceedings in order to ingather relevant information and, in many cases, instruct a defence report in relation to the findings in the relevant Crown statement of information. In turn, the

CJ/S6/22/9/1

Crown often requires increased time to examine any further relevant evidence produced by the defence and instruct further police enquiry, as appropriate.

As with extensions made under section 65 of the Criminal Procedure (Scotland) Act 1995, it would fall to the Crown to seek to keep the case alive by making application to extend the relevant 2-year period in appropriate cases. The existence of the Coronavirus extension on covid grounds placed the success of any application beyond peradventure.

Since March 2020 there have been twenty-six cases that have had their permitted period extended under the Coronavirus legislation. It is expected that within the next six months applications will be made to extend the period in a further three cases. If the current provisions are removed, it is likely that the Crown would revert to making any necessary applications under exceptional circumstances and each case would require to be considered on its own facts and circumstances.

SCOTTISH COURTS AND TRIBUNALS SERVICE

Background

The Scottish Courts and Tribunals Service (SCTS) is an independent body corporate established by the Judiciary and Courts (Scotland) Act 2008.

Its function is to provide administrative support to Scottish courts and tribunals and to the judiciary of courts, including the High Court of Justiciary, Court of Session, sheriff courts and justice of the peace courts, and to the Office of the Public Guardian and Accountant of Court.

This response is submitted by the SCTS acting in its role to provide efficient and effective administration to the courts and tribunals and does not include the views of the Judiciary.

Custody at police stations (Part 3, Clause 31)

As noted in our response to the Scottish Government's Covid recovery consultation the ability to deal with custody courts virtually removes the need to move large numbers of individuals to and from court buildings on a daily basis, for what are very often very short custody hearings. The ability to appear virtually helps reduce the justice sector's carbon footprint and enhances resilience within the justice sector should there be any type of disruption which would make transport to or physical attendance at court impractical.

Virtual custody courts have been piloted in Falkirk and the initial findings of that pilot indicate that it allows the business to be processed more efficiently, which benefits the system as a whole and impacts positively on the wellbeing of the economy. Initial feedback has indicated that there has been a positive impact on the wellbeing of the accused as they move through the custody process. Ken Dalling, Law Society of Scotland, echoed the latter point in his evidence to the Criminal Justice Committee meeting of 8 September 2021.

These provisions are integral to ensuring that virtual custody courts can be facilitated. They enable prisoner custody officers, police custody and security officers to hold a person who is appearing before a court virtually from a police station. Without these provisions, they would only be able to hold them within a court building. The benefits go beyond supporting the response and recovery to public health incidents that require physical distancing, such as COVID. Virtual custody hearings can ensure that, for example, those held in police custody are able to appear before a court on the next lawful day in circumstances where transport to court may be impractical – such as during severe weather.

The Impact of COVID on the Justice system

Temporary provisions (Part 5, Clauses 38-42)

The provisions in this part provide Scottish Ministers with a power to suspend the operation or any provision in the schedule or revive any that are suspended. They also provide that the provisions expire 30 November 2023, with the ability for

Ministers to bring forward that date or extend by periods of a year up to 30 November 2025.

These clauses make clear that the provisions in the schedule are temporary in nature and therefore that their aim is to help address the backlog of cases in the justice system. The power given Ministers to bring forward the expiry of provisions provides a safeguard mechanism should any of the provisions no longer be required.

Given they are temporary however, they will only improve the resilience of public services to future public health threats or other events during the period this Bill is in force. The SCTS is of the view that a number of these provisions have the potential to support recovery and build resilience and efficiency in the longer term. We are of the view that a number of the provisions contained in the schedule should, in time, be made permanent.

Schedule: Temporary Justice Measures

As we noted in our response to the Scottish Government consultation, the provisions in the schedule to the Bill are vital for ensuring that the backlog of court cases can be addressed. For example the extension of criminal procedure time limits is necessary to help the SCTS and justice partners work to deal with the backlog of cases as quickly as possible. In solemn cases, without this extension the only option would be for an application to be made to the court in each case seeking to extend the time periods. If the court does not grant the application, or no application is made, then the accused would be released on bail or the case would fall, when the relevant time limit expires. Given the number of cases involved the application process would consume significant court, judicial and other justice partner resource which could be better utilised dealing with the backlog of cases.

In addition to helping address backlogs in the court system there are a number of these provisions that we think should, in time, be made permanent. In particular those relating to conduct of business and appearance in proceedings by way of electronic means and those which provide national jurisdiction for callings from custody. The response to the pandemic has proven that there are a number of different ways that we can conduct business in the courts. For those that have proven to be successful it would be a backward step to remove the options available – as these allow the most suitable approach to be taken in managing the proceedings, based on the facts and circumstances of each case.

Returning to an in-person only model would remove the capability to make use of new approaches and technologies which, whilst developed during the pandemic, have already proven their ability to build resilience and flexibility into the operations of Scotland's courts – with the potential to provide real benefits to victims, witnesses, professionals using the system and the accused. In addition, these measures provide greater resilience for the justice system by enabling courts to continue to operate should there be a future, similar pandemic or incident which restricts access to court buildings, such as severe weather leading to travel restrictions. It would be unfortunate if, when faced with a similar future challenge, significant case backlogs had to once again accrue due to the inability to make use of approaches that have now been proven to work and have the potential to be further developed and improved.

Some of these provisions provide sensible modern day equivalents, for example the provisions relating to intimation on the Scottish Courts and Tribunals Service to replace 'walls of court'. Many people will be unaware of the existence of the 'walls of court' and that service/intimation of documents can be affected in this way. Website publication means that it is more likely that the individuals concerned will be made aware of the documents and is therefore a better solution to that which was in place before, improving access to justice. Safeguards are however in place through the Direction making power given to the Lord President and Lord Justice General to restrict the information that is published enabling data protection concerns to be addressed.

The ability to electronically sign and transmit documents is crucial in enabling us to work with justice partners more efficiently and to continue to modernise our justice system. Whilst provisions of this nature were introduced to allow business to continue in the face of public health measures they have also resulted in cost savings and improvements in sustainability across the justice system e.g. in terms of a reduction in the use of paper, printing costs and postage. In civil proceedings electronic submission is currently the main method of sending documents to courts and we have and continue to make investments in the development of our Civil Online system. We would contend that the vast majority of parties in civil cases have no desire to return to a system that requires them to generate large bundles of paper documents and deliver these, often at significant cost, to the court.

The ability to electronically sign and transmit documents has also enabled applications for search warrants to be applied for out of hours without the need for a police officer to attend at a sheriff's home. This is a much more efficient process for all concerned – it can also reduce the time period between requests for documents such as warrants being made and being issued – which, depending on the circumstances, may assist with more effective enforcement. There appears to be widespread support for these provisions across the justice system.

The experience of virtual hearings throughout the pandemic has proved the concept that these can be made to work efficiently and effectively, whilst preserving the three fundamental elements of the system: access to justice; fairness; and transparency. Having the means to deal with court and tribunal proceedings virtually alongside the option of in-person hearings greatly enhances resilience, something that has been invaluable during the pandemic and will continue to be so. For example should one or more of the participants be physically unable to be present in the court/tribunal building but able to participate effectively in proceedings via remote means this can avoid the need for business to be adjourned – at significant inconvenience (and, in the case of victims or witnesses, potential trauma) to all those who did attend. There are also practical and security benefits in holding certain types of trial virtually e.g. in the case of serious organised crime or terror related offences this can remove the need for transportation of those on remand between prison and court and remove the need for armed police officers to deploy within the court building.

The ability for police and expert witnesses, for example medical practitioners, to appear remotely is also hugely beneficial. There have been both time and resource savings for those witnesses, who no longer have to travel to court and wait in the building to give their evidence. By making full use of these initiatives we can ensure

that high quality evidence continues to be provided by such witnesses whilst freeing up considerable amounts of time so that front line police and medical staff can continue with their essential duties as opposed to travelling to, and waiting in, court.

Developing an approach that allows those affected by domestic abuse to be able to avoid the court environment entirely has considerable potential benefits and we believe that the scope for such work should remain open in order that it can be fully assessed and developed. A pilot of such an approach has taken place in the Sheriffdom of Grampian, Highland and Islands and has issued a report which recommends that specialist online courts be set up to tackle domestic abuse cases. During the pilot all other parties to the proceedings participated via video conference too, meaning that a physical courtroom was not required. Having such an option frees up court accommodation which could be utilised to help further clear the backlog of cases, should resources permit.

Similar points can be made in relation to the national jurisdiction for custody callings provisions. They provide flexibility in the management of such cases that can be used to maintain the smooth operation of the justice system in the face of unexpected or emergency situations, for example transport disruption, severe weather or other public health emergencies.

These provisions will also enable the SCTS and justice partners to look at the custody court model to ascertain how best the system can operate making use of the digital innovations available to it, such as consideration of a sheriffdom wide custody court model. Such a model is likely to create efficiency savings across the justice sector and a reduction in costs to transport individuals from custody to court. Similarly they would enable a more efficient process to be put in place for dealing with those who appear in court for a new offence but have an outstanding warrant in another court, potentially in another sheriffdom. At present accused persons in this situation have to be held overnight and transported to appear in the other court the next day, creating additional costs and inconvenience. The maintenance of national jurisdiction provisions will allow the SCTS to explore an approach whereby the accused appears in a single court for both cases.