



glasgow bar association
established 1959

Room 1.29
Glasgow Sheriff Court
1 Carlton Place,
Glasgow
G5 9DA

16th April 2020

To whom it may concern,

**The Executive Committee of the Glasgow Bar Association
Written Submissions in relation to Jury Provision
Scottish Government Discussion Document - Covid-19 and solemn
criminal trials (April 2020)**

Introduction:-

The Executive Committee of the Glasgow Bar Association (GBA) welcomes this opportunity to respond to this proposed legislation on behalf of its members. The GBA is the largest association of Solicitors in Scotland, representing Solicitors in the West of Scotland and acting on behalf of our clients throughout Scotland. Glasgow Sheriff Court is the busiest Court in Scotland. It has also been billed as the busiest Court in Europe.

The Aims and Objectives of the Glasgow Bar Association are: -

1. To promote, represent and protect the rights and interests of its Members in the practice of law; and by extension those of its members' clients and therefore the wider public including the most vulnerable members of society.
2. To promote access to legal services and to justice.
3. To consider and, if necessary, formulate proposals and initiate action for law reform.

4. To consider and monitor proposals made by other bodies for law reform and draft legislation and to make comments, recommendations and representations thereanent to the appropriate quarters.
5. To arrange conferences and lectures and otherwise to provide opportunities for its Members and others to study and keep up to date with current and proposed law practice and procedures.

We have already make public our concerns about the proposed legislation as set out in the Coronavirus (Scotland) Bill 2020 and we welcomed the Scottish Government's decision to withdraw that part of their Bill in so far as it related to the suspension of Juries in Solemn matters. Furthermore, we welcome the opportunity presented by the Discussion Document to engage in meaningful deliberations with Stakeholders to achieve a constructive outcome to the problems faced in the operation of Solemn Court business in the aftermath of the Covid-19 pandemic.

As always, we would welcome any expression of interest from the Members of the Scottish Parliament to discuss with us the work undertaken by our Members at the High Court of Justiciary in Glasgow, at Glasgow Sheriff Court and jurisdictions throughout Scotland to illustrate the commendable work done by our members in representing our clients.

Our submissions:-

- I. Prior to the production of the Discussion Document, our Executive Committee had summarised the following as our proposals:-

These fall into three categories, viz –

1. **Current situation.** This proposal for legislation is premature. The Government has measures in place to ensure maximum public safety and unless and until these regulations are relaxed, we consider that no Jury trial should be sitting. The current Government regulations promote stay at home and social distancing provisions and irrespective of any issues with potential jurors attending at court it would be inappropriate and reckless to seek to have witnesses (both professional and non-

professional), Solicitors, Solicitor Advocates and Counsel (both Crown and Defence), the Judiciary, Clerks, Court Officers and other court staff attend at courts and require them to be in contact in close proximity to numerous persons on a daily basis. This accords with the Practice Notes from the High Court of Justiciary and local Sherifffdoms. The suspension of all jury cases was the first measure implemented by the Scottish Courts and Tribunals Service. In any event the Crown are presently not seeking to have any Jury trials fixed until August with all cases currently being adjourned to First Diets in July. The suggestion of implementing the suspension of trial by jury attempts to provide for a situation that in the short term will not arise, as no dates for trial have been set during the current lockdown. We also make reference to the fact this is presently the position in England as detailed by the Lord Chief Justice.

(<https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>)

If no other country in the world is contemplating such measures at this time of crisis, this in itself demonstrates that the proposal is premature.

The GBA is fundamentally opposed to any variation in the Jury process at this time.

2. **Future situation.** Once the pandemic regulations are relaxed and in anticipation of the Courts assigning new diets and dealing with a backlog of work, we still support the use of a 15 person jury system and can suggest the following methods of quickly clearing a backlog of cases :–
 - (i) Postponement of judicial retirement plans and reappointment of those already retired to create additional members of the Judiciary to process the backlog created. Further appointment of Temporary Judges and Ad Hoc Advocate Deputes would allow more courts to sit. The temporary promotion of summary sheriffs to Sheriffs and the appointment of additional summary sheriffs to backfill the gaps left by any promotion to Temporary Judge would also ensure the anticipated backlog of both solemn and summary caseloads could be appropriately managed.

- (ii) Use of current facilities and reopening of closed court buildings. For instance, the schedule of Glasgow Sheriff Court was adjusted to allow for overspill court sittings from the High Court and this could be further accommodated. Separately, the Glasgow Sheriff Court diary was adjusted to make provision for the Climate Change Conference scheduled in Glasgow for later in the year which has now been cancelled. This will create availability of facilities in our Sheriff Court. Civil practitioners had their case load in part transferred to the Tribunals Centre and so there is precedent for this. In a rationalising of SCTS facilities, Sheriff Court buildings were closed and their reuse could be explored. Separately, greater use of sittings in local courts could be made. The High Court has previously sat in such local Courts as Paisley Sheriff Court and Dumbarton Sheriff Court and such facilities could be used again. It is the understanding of the Executive Committee of the GBA that in general terms the Sheriff and Jury business in Glasgow is dealt with relatively efficiently and with the Climate Change Conference being cancelled, we anticipate that our local court will be able to absorb the backlog. Other courts generally do not have Sheriff and Jury ‘sittings’ that continue on a day to day basis and accordingly they could also absorb a backlog along with providing capacity for High Court sittings.

3. Esto position.

Notwithstanding these preferred courses of action, it is incumbent upon us to comment on proposals to facilitate arrangements meantime, which we would categorise as follows:-

(i) Use of technology –

- (a) Remote site use for witness evidence and juries.
- (b) Online balloting of jury.

We welcome the decision of the Scottish Courts and Tribunals Service (SCTS) to use technology to resume sittings of Court of session Inner House Appeals.

(ii) Jury composition –

(a) 15 jurors - social distancing can be observed in large court rooms, or use of separate courts or other buildings, e.g. conference suites in Government Buildings, University/College lecture rooms and Church Halls.

(b) Less than 15 jurors – The Scottish Government has of course commissioned a report relative thereto which is referred to in the Discussion Document, given our unique practice of 15 jurors and the not proven verdict. The Scottish Government is undertaking a consultation process relative thereto (currently impacted by the pandemic). We would have grave concerns about any decision made to convene a jury of less than 15 members.

(iii) Lastly, we would want measures of regular review of any legislation relative hereto, for this provision to be set out clearly in any legislation and that there should be an end date incorporated into the legislation (a sunset clause).

II. A. In light of the Discussion Document being produced, we welcome the opportunity to have a meaningful debate before one of the cornerstones of justice is prematurely and disproportionately set aside.

To allow for a meaningful debate to take place, we would call upon the Scottish Government to liaise with the SCTS to provide more detailed analysis of the numbers being affected by the current lockdown provisions.

We reproduce the Discussion Documents own table to illustrate matters:-

“Table 1: Solemn crime – Indictments registered and trials led, 2017-2021

	2017/18	2018/19	2019/20	2020/21 [Projected by SCTS]
High Court				
Indictments Registered*	718	911	1125	1275
Trials Called**	689	717	870	995
Trials Evidence Led ***	461	507	521	620
Sheriff Court Solemn				
Indictments Registered	4,979	5,182	5,508	5,900
Trials Called	2,833	2,848	3,030	3,245
Trials Evidence Led	1,041	1,119	1,230	1,300

* Indictments registered is the formal decision point for criminal proceedings in serious cases. This can be seen as the point when the Crown Office decide a prosecution will be taken forward.

** Trial called is the point at which after an indictment is registered that a trial is arranged.

*** Trial evidence led is the point at which after an indictment is registered and a trial is arranged that a trial with evidence is progressed. If an accused pleads guilty, then there will be no trial with evidence led and instead the case will proceed to sentencing.”

We would submit that this table is not sufficiently detailed to allow an informed decision to be made about how many cases will be impacted by the current lockdown provisions. It does not detail how many cases are resolved by section 76 letters, by pleas at First Diets or continued First Diets, or arranged in advance of the Jury sitting or on the First day of trial or during a trial. In essence, these statistics do not give an accurate breakdown of how many trials have proceeded to a conclusion with a verdict to help to illustrate a projection of how many trials may be affected by the current lockdown.

As the Scottish Criminal Bar Association (SCBA) have referenced in their response, the number of new cases during lockdown is much smaller than would be normally expected and there will be an associated drop in new business to be progressed throughout the year ahead.

We illustrate here a sample of the Court notes from Glasgow Sheriff Court for Solemn matters immediately after the Easter holiday weekend, to indicate the extensive data being collated by SCTS:-

COURT 3 - 14.04.20

Sheriff:

Cubie

Breakdown of Cases	Number of cases
NEW PETITIONS	9
PETITION WARRANTS	
FULL COMMITTAL	6
BAIL APPLICATIONS	
UNDERTAKINGS	1
TOTAL CASES	16

Breakdown of Accused	Number of accused	Related cases
PETITION	9	9
PETITION WARRANT		
PETITION & PET WARRANT		
FULL COMMITTAL	6	6
BAIL APPLICATION		
UNDERTAKINGS	1	1
TOTAL	16	16

DOWNTIMES

TIME	14:00	16:30				Start Time	14:25
TIME	14:25	17:20				Finish Time	17:30
REASON	D	A					
DELAY (Mins)	00:25	00:50	##	00:00	00:00		
COMMENTS	13 sets of papers (agents speaking to clients via tv link to Cathcart PS)	waiting on last case					

DELAY KEY
A - PAPERS
B - AGENTS
C - RUNNING ORDER
D - OTHER
E - CELL ACCESS

B. Mirroring the points made in the Discussion Document, we would summarise our responses as follows:-

Option one – Having a smaller number of jury members

As above we would have grave concerns about any decision made by a jury of less than 15 members.

Option two – Holding jury trials in larger non court locations to facilitate social distancing

We take the view that issues of security, cleanliness and suitability of such facilities would make this an impracticable suggestion.

Option three – Retain current court facilities but enable social distancing during jury trials

We agree that this option should be the preferred approach. As stated above other Sheriff Courts can be used to accommodate the High Court. We support the approach taken in this regard by the Law Society of Scotland and the SCBA.

Option four- having jurors in remote locations video linked to court

Subject to appropriate security and facilities being made available to jurors then this option may be supported by the GBA. Further expansion of the use of video link evidence being given by witnesses should also be explored.

Option five – Test jurors / other court attendees for Covid-19

Concerns about the practicability about such an option would make this a restrictive option and not suitable until Government policy on testing changes.

Option six – Deal with the backlog with faster progress of jury trials at the end of the current health restrictions

The GBA would support this option subject to appropriate consideration of jurors’ rights and expectations to a family life. We would also refer to our earlier comments about use of other Sheriff Courts and the appointment of Temporary Judges and part time Sheriffs. Further resources should be provided by the Government to all interested parties to allow for the faster progress of case resolution to be achieved.

Option seven – Judge only solemn trials

The GBA takes the view that this option could not reflect the Scottish Government’s approach that Scotland’s justice system underpins our basic rights and freedoms and protects communities and individuals from harm.

Option eight – Adjust the sentencing powers of Sheriff Courts (Solemn and Summary)

The current sentencing powers of the Sheriff Court are regarded by the GBA as more than sufficient. We would not support this option.

Option nine – Retain the status quo

A return to the status quo should be achieved as quickly and safely as possible after the current crisis is resolved.

C. There are questions at the conclusion of the Discussion Document and we also respond to them as follows:-

- 1. What are the implications for justice and confidence in the rule of law if the most serious criminal cases are not able to progress?**

The current crisis is affecting everyone's daily lives at present. The most serious criminal cases will be able to proceed with suitable safeguards being put in place.

As the introduction of the Discussion document narrates –

“Scotland’s justice system underpins our basic rights and freedoms and protects communities and individuals from harm. Those vital rights and freedoms must continue during the COVID-19 outbreak. The Scottish Government and justice agencies are committed to ensuring continuing fair and effective justice. Moves have already been made to enhance digital systems and capability across the justice system and to scale back activity, where appropriate.”

2. What are the implications for victims, witnesses and accused, in particular those held in prison on remand, when they have no certainty when their case might progress?

The proposals detailed above will assist in clearing a backlog and provide a degree of certainty in the progress of cases. All the legal professional bodies from the Defence perspective who have responded to date have put forward proposals to deal with cases as speedily as possible. The courts are assigning diets to progress cases.

3. Is it possible to ask members of the public to take on the civic duty of jury duty without exposing them, or their family members to some level of health risk?

Nobody involved in the jury and court process should be exposed to unnecessary levels of risk. This includes all witnesses, court staff, solicitors, solicitor advocates and counsel, police officers and the judiciary.

4. Are there technological or practical measures that could be introduced to mitigate these risks?

As above, we consider that greater use could be made of technology, existing Court facilities to promote social distancing as well as the appropriate use of PPE.

5. Is it possible to maintain the random selection of jurors from across the eligible adult population?

Yes, as with the existing system, upon production of an appropriate medical certificate, potential jurors can be excused.

6. What is required to maintain compliance with ECHR and in particular the right to a fair trial?

Scots Law maintains compliance with ECHR regulations with the current system and as the law is currently stated. Any interference with the current system would not be a proportionate or necessary response to the right in Scots Law to a Jury trial for the most serious of offences.

7. Are there additional safeguards that could be applied to help balance any move away from the current system of trial by jury?

The GBA maintains that such a move is disproportionate and counter to the interests of justice. The essential safeguard to a miscarriage of justice in serious crime is trial by jury.

8. Is there a point at which the scale of backlog of serious criminal cases would justify a review of the balance between these issues? How would that point be assessed?

Until more detailed information is available as referred to above, given that the courts are continuing to fix diets to progress these cases and until the level of the backlog known, it is difficult to assess such a question.

In conclusion, Lord Devlin has often been quoted on the issues raised, and we echo his sentiments:-

“Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.”

We commend these proposals to the Scottish Government and urge the Scottish Government in the strongest terms possible to consider the impact of this proposed legislation to suspend or vary trial by jury which is a cornerstone of Scots Law.

Most sincerely,

The Executive Committee of the Glasgow Bar Association