

FACULTY OF ADVOCATES
SCOTTISH CRIMINAL BAR ASSOCIATION
Response to
COVID-19 AND SOLEMN CRIMINAL TRIALS
SCOTTISH GOVERNMENT DISCUSSION DOCUMENT

1. **Introduction**

- a. The Faculty of Advocates' Scottish Criminal Bar Association (SCBA) has recognised the need to make temporary changes to certain parts of our criminal justice system during this time of crisis but has already made its opposition clear to any proposal that involves the abolition of trial by jury no matter how temporary that proposal is. That position remains.
- b. *“Representative government and trial by jury are the heart and lungs of liberty”* – John Adams 1774. (2nd President of the United States)
- c. The SCBA accepts that changes may require to be made to the way in which we conduct our solemn criminal trials in the short term. This is so in order to address the real problems brought on by COVID-19, but those changes should not result in the dismantling and abandoning of the very thing that is at the heart of that system, trial by jury.
- d. Without that you are left with a form of summary justice in all but name and that should not be overlooked or easily ignored. We realise that certain changes will require to be made to the practical way in which we conduct solemn trials and we also accept that a number of options will require to be considered.
- e. In doing so the SCBA very much welcomes the opportunity of engaging in those discussions and is committed to working with government and all other stakeholders in order to ensure that justice can continue to be dispensed within this difficult period. However, at the heart of those discussions should be solutions that seek to preserve trial by jury in some form, not remove it. It is fundamental to our criminal justice system, our democracy and our unique Scottish Legal Tradition.

- f. Most if not all democratic countries with an adversarial system have trial by jury as indeed do some with an inquisitorial system, but nowhere has the unique features of our trial by jury. A jury composed of fifteen members, with three available verdicts and a verdict based on a simple majority including for the most serious crimes.
- g. Trial by jury represents decision-making on the important facts being made by the society in which they arose. Those fifteen jurors provide an accumulation of life experience which marginalises extreme or unrepresentative views and, through the majority, delivers balanced and rounded decisions on behalf of the society from which its members were drawn. Contrast the rounding and balancing effect of fifteen members of the public, drawn at random, with a jury of one drawn exclusively from the top one percent of earners; likely male; always university educated; and most likely aged between fifty and seventy. There is no moderating influence on that one privileged person's views. He or she would take decisions about events in society far removed from their own life experiences.
- h. The SCBA strongly believe that trial by jury is not something that we should abandon lightly, if at all, and should be the last thing to fall in our criminal justice system in times of crisis. Not the first.
- i. The basis for any starting point should be to find a solution that preserves trial by jury as a matter of principle.
- j. Any proposal that seeks to do otherwise cannot be said to be proportionate if other jurisdictions are not doing likewise.
- k. Such a drastic move should only be considered if all else fails.
Nothing else has been tried.
- l. Although the SCBA commends the Cabinet Justice Secretary for his decision to withdraw the controversial proposal last week, we are nonetheless disappointed that the proposal remains in the discussion paper. That being said we seek to respond to the Scottish Government's Discussion Document in a constructive and proportionate way.
- m. The document starts off with a quote from the Cabinet Secretary

- i. *“The most important duty of any government is to keep its citizens safe and maintain public order”*
- n. No-one can argue with that but the way in which a government goes about doing that is equally important, especially in a progressive, forward thinking, liberal country like Scotland. It is therefore the duty of that democratic government to do so in a way which does not jeopardise the integrity of the democratic process.
- o. In finding a solution to the ongoing problem one should not lose sight of just how important our jury system is to our country’s identity and that democratic process.

2. Purpose of The Discussion Document

- a. It sets out the purpose of the discussions and states that it is to be able to identify as quickly as possible potential solutions to enable those cases to progress effectively if possible, during as well as after the aftermath.
- b. The SCBA see the solution to the present problem not as a single fix but as combination of measures that can be used both during and after the problem has diminished.
- c. It is therefore a two-stage process with solutions available at each of the stages. The first in order to allow the solemn case to run during the crisis and the second to effectively tackle any a backlog arising during it, and this response sets out to highlight some of these potential solutions. The SCBA also sees the solution to the problems as one that involves multiple agencies and not just the court and the trial process itself.

3. Part 1 of the discussion paper

- a. Part 1 of the discussion document sets out the Current Operating context.
- b. Without addressing all aspects of this Part of the document it is perhaps important to highlight some points. The document identifies 3 periods, the Lockdown period when no trials will commence and the recovery period where it is suggested that jury citation will prove difficult and take longer. That of itself is not a barrier to the operation of a jury system and this can be addressed

in a number of ways which will be referred to in the course of this response.

- c. This part of the document also sets out the criteria of what it is sought to achieve and the first of those is to protect the life, health and safety of all those using the system. Again, no issue can be taken with that. But that statement must include those working within the system, including clerks, macers, court staff, as well as judges and lawyers.
- d. Accordingly, if it is the case that it is deemed safe to have a judge only trial presumably that is because steps can be put in place to ensure this, although it is noted that Option 7 does not specifically refer to them. It follows if it is deemed safe for those individuals and if the same safeguards can be put in place for the jurors then the first criterion is met without the need to resort to Option 7 trial without a jury.
- e. If it is unsafe then all that Option 8 does is remove some people from the risk equation. The situation has to be safe for everyone and if it is unsafe for jurors employing the same safety measures as those other users then how can it be safe for anyone?
- f. It would appear therefore that the issue is about managing the situation and managing the situation for all involved in the trial process. If it can be managed for part of the trial participants then there should be no reason why it cannot be managed for all even if that means reduction jury numbers or some use of remote technology.
- g. The document states that until it is safe to convene a jury there will be no solemn trials in Scotland and that is as it should be.
- h. It also states that ministers will wish to discuss with stakeholders whether it is correct that any temporary solution should only be for the time period of the outbreak and the immediate aftermath. If as is stated, the purpose in the solution is to deal with the problem of protecting the public safety during this crisis why should the temporary solemn measures in relation to the form of a trial continue once that danger is passed? Surely at that stage there would be no barrier for example in getting back to a full complement of jurors or to empanelling and taking evidence in the “normal” way within a courtroom setting with all participants present.

- i. It is heartening to note that Scottish Ministers are committed to the principle of trial by jury and that it is stated at page 5 that Option 7 it is not their “favoured” option. That is as it should be and having identified numerous options within the discussion document it is submitted that option 7 should be excluded.
- j. The document makes reference to the scale of the potential backlog and concludes at page 6 that for each five-month period in which solemn jury trials cannot proceed there would be an additional backlog of approximately 790 cases. This is worst case scenario should no solemn trial be able to proceed in the next 5 months. However, should trials be able to proceed within that time albeit in an amended form that figure will obviously drop.
- k. In addition to that the paper does not take account of the fact that there has been a significant decrease in offending during the lockdown period and if that pattern continues the build-up of cases will not be increasing in line with the previous year’s figures or even the projected figures for this year. These are factors that also have to be borne in mind when talking about the scale of the backlog being “*prodigious*” or “*monumental*”.
- l. As an example anecdotal information from Sheriff Courts across Scotland suggests custody cases are down by 80% and in Glasgow Sheriff Court today, after a holiday weekend, when in the past custodies have been as high as 250 it is understood the figure appearing from custody was 15. It is understood the figure at Edinburgh may have been as low as 3.
- m. In addition, the figures spoken of in relation of backlog should be considered in context, and whilst the backlog figure may be unprecedented, it would be so no matter what system is put in place. However, the system in recent years has coped with figures well in excess of the figures quoted in Table 1 at page 5.
- n. This is highlighted by consideration of capacity five years ago. According to SCTS published figures (<https://www.scotcourts.gov.uk/official-statistics>)
 - i. In 2014/15 there were 5,642 jury trials calling in either the High Court or Sheriff Court each year and 1,873 had evidence led.
 - ii. In 2018/19 there were 3,565 jury trials calling in either the High Court or Sheriff Court each year and 1,474 had

evidence led. (these figures do not match those quoted in Table 1)

- iii. In addition, delays due to lack of court time have dropped from 8.1% of trials to 2.0% of trials.
- o. On these figures adding another 400 additional trials a year would take the system back to where it was in 2014/15, and that is excluding any trials that were able to proceed within the 5 month period and the fact that offending, including serious offending, is likely to be reduced substantially within that 5 month period particularly when one considers that public houses etc., remain closed.
- p. It is important therefore that the figures referred to are considered in context and although they are significant they are not insurmountable for the reasons stated.
- q. The Discussion Document at page 8 sets out the practical requirements for jury trials, and the range of practical considerations that need to be addressed when exploring arrangements for alternatives. It is accepted that during the present crisis these considerations will require to be altered and even relaxed in order to adapt to the situation and in order to preserve the right to jury trial in some form.
- r. These changes could include checking on the availability of prospective jurors before putting them forward for balloting and although this would involve some filtering of availability at an earlier stage it would still ensure the diversity in age, occupation and life experience of the potential jurors.
- s. Once this has been achieved juries could be balloted remotely and jurors could then be advised that they have been chosen and that they should then attend court. This would avoid the problem at present of jurors having to travel to court unnecessarily and waiting together before a jury is empanelled.
- t. The point being that none of the practical requirements highlighted in the document are obstacles that cannot be addressed and overcome.

4. PART 2 – OPTIONS FOR ADDRESSING DELAYS IN SOLEMN TRIALS IN THE CONTEXT OF COVID-19 HEALTH ADVICE

- a. Before addressing the options in turn, the SCBA recognise that there are implications for delay not only for an accused but also for witnesses, bereaved relatives, complainers, and particularly complainers in cases where sexual offences are alleged.
- b. One way of addressing these issues with a view to alleviating unnecessary distress would be to make use of the time the courts are unable to sit by identifying those cases that it would be both desirable and appropriate to prioritise either because they were custody cases or because of the nature of them.
- c. It is recognised that whatever option is chosen the solemn courts will not be operating at full capacity and therefore use could also be made of capturing the evidence of witnesses in cases by way of commission for example.
- d. There are many cases where the urgency is considerably less such as Misuse of Drugs Act offences or fraud cases. An exercise could be undertaken to evaluate and identify those cases that are a priority, that are ready to proceed to trial and could be easily accommodated within whichever option is finally chosen, thereby enabling the courts to proceed with cases that were most easily suited to that option.
- e. Consideration could also be given to the size of cases and it may be that larger cases would just have to wait until the aftermath of the crisis and be dealt with within the accumulated backlog.
- f. Prioritisation would not only allow the most urgent cases to proceed sooner but would help alleviate the pressure of a large backlog of urgent cases.
- g. This is why we stated at the start of this response, that we see a multi discipline approach to addressing the problem.

5. OPTION ONE: Having a smaller number of jurors

- a. Although this would be undesirable in a perfect world and in normal times, we are not living in either. The SCBA therefore recognise that this is a workable alternative and certainly a preferable option to Option 7. There are also a number of factors

present in this option which also apply to Option 3 an option that the SCBA also see as viable and preferable to Option 7.

- b. The positive points raised in the Discussion Document are endorsed. However, it also raises a number of issues that it says this solution does not address. The first is the fact that it would still involve sufficient numbers attending court for empanelling.
- c. We would refer to our earlier comments about the possibility of remote empanelling which would address this problem.
- d. Nor has consideration been given to the of selecting of jurors remotely before the day of the hearing and thus only requiring the number required plus perhaps a handful of first substitutes to attend the building where the jury will sit.
- e. We also note the comment about jurors travelling to court and if any became unwell the jury requiring to be discharged. These issues also arise to some degree with Option 7 as the other participants require to travel to court and if they became unwell then the trial would also be required to be discharged.
- f. However, although a reduced jury of seven sat during the war that does not mean that it would have to be seven now. The jury could start from any size and provision could be made to allow it to drop as low as seven before the trial required to be deserted. In addition, because of the fact that the courts will for all intents and purposes be closed to the public during this period, social distancing and PPE could be employed thereby reducing the risk.
- g. The practicalities of this will be addressed fully in Option 3 but applies equally to Option 1.
- h. We note the comments re Lord Bonython's observations and appropriate size etc , but Option 7 seeks in effect to reduce the jury size to one. Even a reduced traditional jury must be preferable to that.

6. OPTION TWO: Holding jury trials in larger non-court locations to facilitate social distancing

- a. The view of the SCBA is that this Option is not only impractical and expensive, but it is also unnecessary.
- b. We refer to our answer at Option 3 below but in short this is unnecessary because there are courts that are already large enough to accommodate social distancing and therefore it would be totally unnecessary to utilise alternative premises with all the problems that entails,

7. OPTION THREE: Retain current court facilities but enable social distancing during jury trials

- a. The SCBA regard this Option as workable. Furthermore, we disagree with the provisional view stated that this option would not allow jury trials to commence during the lockdown period.
- b. The other advantage to this Option is that it is the one Option that has already been tried out in the High Court during the lockdown period albeit in limited form, enabling at least one trial to conclude.
- c. Turning to the perceived problems outlined in the document – the first is in relation to the matter already addressed that of empanelling the jury. Once again, we see no difficulty with empanelling being undertaken remotely, it has already been done in Glasgow on a number of occasions albeit when the jurors were in the building, but the principle is the same.
- d. We hesitate to suggest that deliberate obstacles are being put in the way of this option but even if there were members of the press wishing to attend a trial, the courts we have in mind for the running of these trials could easily accommodate members of the press. They could even watch proceedings remotely from another room in the building if necessary. The infrastructure to allow that we understand already exists.

- e. We do not suggest that this option would be available in every solemn courtroom but it could easily be utilised in a sufficient number of courts to be effective. At present there are 8 trial courts in Saltmarket they do not all necessarily run at the same time.
- f. Six of these courts are large and could easily accommodate social distancing for the jury. This could be done by the jury sitting in the public benches safely applying social distancing. PPE such as masks, gloves and sanitising products would help.
- g. Some at least of this already occurred in the High Court at Glasgow in the trial referred to where it was completed with the jury sitting in the public benches.
- h. The issue of jury deliberations mentioned in the document is also easily addressed as it was with that trial. Given the court building will not be fully utilised the jury deliberations could be accommodated, as it was, in the unempanelled jurors waiting room which accommodates a large number of people. Other unused courts could also be used.
- i. This Option is even more practical if worked in conjunction with Option 1 reduced jury size.
- j. The SCBA do not see the audibility issues as being an unsurmountable problem and are somewhat surprised that this is a problem given that the whole idea of the public gallery is for everyone to be able to follow proceedings.

8. OPTION FOUR: Having jurors in remote locations video-linked to court

- a. The SCBA note all the challenges to this Option and although it would not be the SCBA's favoured option we are aware that this is an option that is being considered in England and that trials are being conducted in order to establish its feasibility. The SCBA further understands that initial tests have been promising.

9. OPTION FIVE: Test jurors / other court attendees for COVID-19

- a. The SCBA recognise the impracticability of this option at present but note it has not been entirely ruled out.

10. OPTION SIX: Deal with the backlog with faster progress of jury trials at the end of the current health restrictions

- a. The SCBA regards option 6 as part of the second phase of dealing with the problem. We would submit that Option 6 utilised after and /or along with Options 1 or 3 could effectively mitigate the length of the backlog.
- b. We note that the projected figure of 1600 backlog cases is repeated in this section, but again for the reasons stated earlier, this is a worst case scenario which requires to be seen in context.
- c. In addition, and with all due respect to the writer of the document the perceived reintroduction of short term “*inefficiencies*” would seem but a small price to pay in order to address the far bigger problem of the 1600 case backlog referred to.
- d. We also note the comments about taking up space in Sheriff Courts, however this was done regularly up until a few years ago and although undesirable, it may be that it is nonetheless a short-term solution to the potential backlog. If the back log is really going to be 1600 will there be any other option?
- e. At present there are four courts in Lawnmarket, eight in Glasgow plus Livingston and Aberdeen and the High Court also has the use of additional courts in Edinburgh and Glasgow Sheriff Court. Surely it would be possible to utilise a few others from Inverness, Paisley, Stirling, Perth Kilmarnock Dundee, Forfar, Dumfries, Dumbarton, and Greenock all courts which until recently the High Court visited. The radical options of longer court hours and sitting more days per week are also worth considering as part of an overall temporary recovery package.

- f. The extra judicial officers required could come from retired judges or sheriffs, and the appointment of temporary High Court Judges not necessarily from the shrieval bench in order to avoid pressure there. To assist in the sheriff court part time sheriffs could be more widely utilised.

11.OPTION SEVEN: Judge only solemn trials

- a. The SCBA continue to oppose this proposal vehemently for the reasons set out in their response to the Coronavirus Bill. The proposal was flawed then, and apart from a more widely rooted opposition nothing has changed.
- b. All the comments in relation to our judges are true. This response is not an attack on their integrity, rather it is a defence to an attack on the integrity of our criminal justice system and the most important component of it, trial by jury. The SCBA do not regard the comparison with summary trials as relevant; it is one thing being placed on a Community Pay Back Order as a result of summary justice it is quite another being convicted of murder and receiving a life sentence. The SCBA would reiterate its comments in its original response regarding the diverse make up of a jury of one's peers in comparison to the contrasting position of a High Court Judge. All the comments about faster progress of cases is noted, however convenience and speed should not trump justice.
- c. The government reiterate the objection by the SCBA and the Law Society that any changes, however temporary, should not erode an important principle of our legal system or undermine the right to trial by a jury of their peers for the most serious charges. It is to their credit that they have stated at the start of this paper that this is not their preferred option. Nor should it be for any democratic government, if there is one thing that history has taught us it is that it does not easily forget bad decisions.
- d. With regards to the safeguards that are discussed and in particular the fact that a judge sitting alone would have to give reasons. That may well be a safeguard but that of itself is no justification

for the abolition of a jury and is no substitute for the decision of a jury of one's peers.

- e. Reference is also made to Appeal Procedure, but not wholly accurately. In Northern Ireland not only do judge only trials require the giving of reasons they also involve an automatic right of appeal not only on points of law but on the factual conclusions reached and inferences drawn by the trial judge. These remain features of trials without a jury in section 5(6) and (7) of the Justice and Security (Northern Ireland) Act 2007 and would appear to be part of the reason that the Diplock System (as it remains) is compatible with the Convention. In continental systems the appeal amounts in many jurisdictions to an effective retrial.
- f. The only ground of appeal in Scotland is that there has been a miscarriage of justice. The High Court of Justiciary Appeal Court in Scotland focuses almost entirely on question so of law and will almost always avoid issues of the facts. The appellant in Scotland must overcome the hurdles of the sifting process before even getting to the doors of the Appeal Court and that is entirely different to the appeal process from a "Diplock" Court. It follows that if we are to follow the Diplock or continental system then we must have that wider right of appeal without the need for the permission of the appeal court.
- g. If there is an abandonment of jury trials, however temporary, it will be to Scotland's international criminal shame.

12.OPTION EIGHT: Adjust the sentencing power of Sheriff Courts (summary and solemn)

- a. For the cases this applied to, it would be the same as abolishing jury trials, but without the safeguards. In summary trials there is no audio recording of the evidence. The whole trial relies on the Sheriff's handwritten notes and this is a particularly big burden for Sheriffs when an appeal is marked. This would also increase

the sentences imposed in cases that would otherwise have been summary and would increase prisoner numbers.

13. OPTION NINE: Retain the status quo

- a. The SCBA does not regard this as desirable given the options and combination of measures which it considers workable. This is particularly so given the fact that there are others which haven't yet been discussed such as increasing the level of discount available on a plea on a temporary basis. Any increase could be justified given that the utilitarian value of a plea in the present crisis would undoubtedly be increased.
- b. In addition, consideration could be given to reinstating the release of long term prisoners after two thirds of their sentence has been served. This would reduce prison numbers and pressure.

CONCLUSIONS & QUESTIONS

Taking each in turn

- What are the implications for justice and confidence in the rule of law if the most serious criminal cases are not able to progress?
This applies to everything in our lives at present. Why should the criminal justice system remain unaffected? That being said the SCBA do not see this as a problem as we are of the view that there are Options available that would and should allow criminal cases to progress.
- 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?
We need to have a clear plan to catch up with a backlog by taking the capacity of the system back to what it had pre 2014. That is how people will know the backlog can be cleared.
- 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?
The same could be said of many essential workers. Furthermore, this

question is predicated on the basis that the level of risk cannot be managed as it would be for other court users. Both options 1 and 3 have the capacity to deal with the risk for the reasons stated.

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

Yes – greater use could be made of technology, as well as the sensible use of PPE

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

At present selection is limited to people who are on the electoral register and live in the Sheriff Court districts where jury trials take place.

Would the exclusion of those at high or higher risk from Coronavirus from the jury pool be a significant failing? Ultimately compromises may have to be made in order to ensure the continuation of the jury system.

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

Experience in Northern Ireland suggests that an unrestricted and automatic right of appeal on issues of law and facts is an essential part of ensuring that judge only solemn trials are Convention compliant. This may have the effect of opening a Pandora's Box of appeals.

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

No safeguard could be applied to counter Option 7 – there are other safeguards referred to in this response in relation to other options which could be applied.

- 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?

Not until SCTS and COPFS have provided real figures that accurately reflect the reality today and not just possibilities worst case scenario figure, and all the alternative options have been considered.

Ronaldo Renucci QC

As president of the Scottish Criminal Bar Association

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