



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

15th Meeting, 2020 (Session 5)

Tuesday 16 June 2020

The Committee will meet at 9.30 am in a virtual meeting and be broadcast on [www.scottishparliament.tv](http://www.scottishparliament.tv).

1. **Re-opening the courts in Scotland and the prosecution of crime during the Covid-19 pandemic:** The Committee will take evidence from—  
  
Rt Hon James Wolffe QC, Lord Advocate, and David Harvie, Crown Agent and Chief Executive, Crown Office and Procurator Fiscal Service.
2. **Prisons, Young Offenders Institutions and Covid-19:** The Committee will consider correspondence from the Scottish Human Rights Commission and the Children and Young People's Commissioner Scotland.
3. **Covid-19 and the impact on criminal justice social work and the criminal justice voluntary sector:** The Committee will consider correspondence from Social Work Scotland and the Criminal Justice Voluntary Sector Forum.
4. **Re-opening the courts in Scotland and the prosecution of crime during the Covid-19 pandemic (in private):** The Committee will review the evidence heard earlier in the meeting.

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The papers for this meeting are as follows—

**Agenda item 1**

Paper by the Clerk

J/S5/20/15/1

PRIVATE PAPER

J/S5/20/15/2 (P)

**Agenda item 2**

Paper by the Clerk

J/S5/20/15/3

**Agenda item 3**

Paper by the Clerk

J/S5/20/15/4

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**Justice Committee**

**15th Meeting, 2019 (Session 5), Tuesday 16 June 2020**

**Re-opening the courts in Scotland and the prosecution of crime during the Covid-19 pandemic**

**Note by the clerk**

**Introduction**

*Solemn cases*

1. At present, all jury trials in Scotland are suspended, at least until July 2020. This decision was taken by the Lord President at the start of the lockdown period during this Covid-19 public health emergency.
2. Although some civil business is now underway in Scotland, solemn criminal cases involving juries have not yet recommenced. In England, the Lord Chief Justice of England and Wales, Lord Burnett of Maldon, following discussion with the Lord Chancellor, has now decided that new jury trials may be started in a few courts in the week commencing May 18 under special arrangements to maintain the safety of all participants and the jury in line with Public Health England and Public Health Wales guidelines. The Lord Chief Justice similarly continues to support the resumption of adjourned trials where this can be done safely.
3. In Scotland, work is underway to consider whether solemn criminal cases can also recommence and what changes would be required. In April, the Scottish Government published an [options paper](#) for progressing the most serious criminal cases. This set out 9 different options (not all mutually exclusive), ranging from a move to judge-only trials (i.e. no juries), smaller juries (reduced from the current 15), to virtual trials and trials with enhanced social distancing measures.
4. The Cabinet Secretary for Justice held a roundtable in late April to discuss these options, attending by senior figures from the legal system, a number of Committee members, Rape Crisis Scotland and Victims Support Scotland. Many of these bodies have subsequently published views on the options paper which can be found on the Committee's [Covid-19 webpage](#).
5. Subsequently, on 12 May, the Lord Justice General, announced the formation of a **Jury Trials Working Group** to take forward work in this area. The Working Group is looking at how the physical and other practical constraints on jury trials might be overcome, with alternative uses of space in the court setting and innovative use of technology, and how far a smaller jury size will make it easier to meet social distancing requirements.
6. On 26 May, Lady Dorrian – who chairs the Working Group – set out the [first steps](#) to restart jury trials in Scotland. She indicated that planning is under way for an initial number of High Court jury trials to take place in July.

7. It is anticipated that the Scottish Courts and Tribunals Service (SCTS) will use a 3-court solution in the High Court in Glasgow, with the jury using the public gallery in the trial courtroom. In Edinburgh, SCTS hopes to use a 2-court solution, allowing the jury to view the trial remotely from a separate courtroom.
8. Even prior to the Covid-19 suspension of jury trials, there was a significant backlog of trials in Scotland. Additionally, according to the Scottish Government, based on the projections for 2020/21, for each five-month period in which solemn jury trials cannot proceed, there would be an additional backlog of over 250 additional High Court trials and 540 Sheriff Court solemn trials that would otherwise have proceeded. In five months, the additional backlog could total around 790 serious cases.
9. Restarting jury trials is not a simple process. Alongside policy decisions such as whether juries are to be retained and/or whether the size of a jury panel could be reduced, are the questions of how social distancing can be maintained in a court room and also in a way that allows jury members, court staff, lawyers etc to travel to/from court in a safe manner.
10. In addition to considering perhaps more suitable non-court locations for trials, some of the original options floated to tackle the more operational challenges have included, for example, removing the public from the court in order to allow the jury to sit, appropriately distanced, in the public gallery, or convening the jury remotely. There are, however, challenges.
11. The Committee has received a number of [written submissions](#) from different bodies in this subject. These include:
  - Executive Committee of the Glasgow Bar Association
  - Faculty of Advocates' Scottish Criminal Bar Association
  - Law Society of Scotland
  - ASSIST
  - Rape Crisis Scotland
  - Scottish Women's Aid
  - Victim Support Scotland
  - Scottish Human Rights Commission
  - Society of Solicitor Advocates
  - Equality and Human Rights Commission
  - Engender Submission
  - Health and Safety Executive
  - Justice Scotland
  - Public Health Scotland
  - Scottish Courts and Tribunal Service
  - Edinburgh Bar Association
  - The Lord President
  - The Lord Advocate

### *Summary cases*

12. Solemn criminal cases are only a small fraction of the business conducted in Scotland's courts. Summary cases, heard in Sheriff courts, account for a far greater proportion of trials.
13. According to figures from the Lord Advocate, the volume of reports to the Procurator Fiscal over the three months of March, April and May 2020 may be expected to convert over the next year into approximately 300 High Court indictments and just over 1,500 Sheriff Court indictments, whilst during that three-month period, 21,064 new summary complaints were served.
14. Unlike solemn criminal cases where no jury trials have been taking place, there has been some summary business underway. The Cabinet Secretary told the Committee in his evidence that "plenty of essential summary business has taken place in the 10 hub courts". He said that the current plan is to begin to open further courts—five hub courts, which were due to open on 3 June. The SCTS has said that it will gradually reintroduce certain core staff first, and then, when the safety and wellbeing of that core staff have been established, the service will begin to work its way through the backlog.

### *Prosecution of cases during the Covid-19 pandemic*

15. On 20 May, Lord Advocate wrote to the Committee providing the following material:
  - A [letter](#) on the impact which Covid-19 is having for his responsibilities as regards the prosecution of crime and the investigation of deaths, and on the work of the Crown Office and Procurator Fiscal Service (COPFS)
  - [Guidelines on the Operation of the Fixed Penalty Notice Scheme Under The Health Protection \(Restrictions\) Coronavirus\(Scotland\) Regulations 2020](#)
  - [Guidelines: Liberation by the Police, Covid-19 or Coronavirus](#)
16. On 8 June, the Lord Advocate [wrote](#) to the Committee. His letter covered:
  - Prioritisation of cases
  - Recruitment of additional Advocate Deputes
  - The merits of adjusting the sentencing limits for summary cases
  - COPFS' use of digital technology.
17. He also [wrote](#) to the Committee on the issue of fiscal fines. His letter set out the decision-making process in relation to use of such fines and the process for issuing a fiscal fine. The letter noted that the Lord Advocate had issued revised prosecutorial [guidance](#) about the use of fines during the Covid-19 pandemic.
18. The Lord Advocate said that the use of fiscal fines under the 2020 Act will be monitored by COPFS. The monitoring will include the numbers of fiscal fines and their levels. He also said that because of the statutory framework, and the timescales involved in administering and processing fiscal fines, the impact of the changed fiscal fine scale cannot be confirmed at this early stage. He noted that the

COPFS had produced an indicative analysis of relevant marking decisions for cases reported in April and May 2020.

19. Additionally, the COPFS's Chief Inspector of Prosecution wrote to the Committee on her activities during the Covid-19 pandemic (see Annex). She also provide a copy of her letter to the Lord Advocate on the review of the IPS inspection programme 2020-21 (see Annex).

20. Separately, on 9 June, the Justice Sub-Committee on Policing took [evidence](#) from the Chief Constable of Police Scotland where the issue of Fixed Penalty Notices (FPNs) issued during the current pandemic was raised. The Sub-Committee has subsequently [written](#) to the Chief Constable to ask for data on the number of FPNs issue and a [breakdown](#) by the type of crime and the number of FPNs issued in error as no such data has been published to date.

### **Today's meeting**

21. Members of the Committee will today hear from:

- Rt Hon James Wolffe QC, The Lord Advocate, and from David Harvie, Crown Agent

### **Previous evidence**

22. In previous meetings on this subject, Members heard from

- Dr Jim McMenamin, Incident Director for COVID-19, Interim Clinical Director, Consultant Epidemiologist, Health Protection Scotland, Public Health Scotland
- Eric McQueen, Chief Executive, Scottish Courts and Tribunals Service
- Ronnie Renucci QC, who is a member of the Faculty of Advocates and also President of the Scottish Criminal Bar Association; and
- Kate Wallace, Chief Executive of Victims Support Scotland.
- Humza Yousaf MSP, Cabinet Secretary for Justice and his officials.

Clerking Team  
June 2020

**ANNEX A**

**LETTER FROM THE LORD ADVOCATE AND NEW GUIDELINES (20 MAY)**

[https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20200520\\_LordAdvocatetoMMCovid19.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20200520_LordAdvocatetoMMCovid19.pdf)

[https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/Lord\\_Advocates\\_Guidelines\\_on\\_Liberation\\_Coronavirus\\_Publication\\_Version\\_02\\_30\\_March.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/Lord_Advocates_Guidelines_on_Liberation_Coronavirus_Publication_Version_02_30_March.pdf)

[https://www.parliament.scot/S5\\_JusticeSubCommitteeOnPolicing/Inquiries/Lord\\_Advocates\\_Guidelines\\_on\\_FPN\\_Coronavirus\\_2020\\_03\\_30.pdf](https://www.parliament.scot/S5_JusticeSubCommitteeOnPolicing/Inquiries/Lord_Advocates_Guidelines_on_FPN_Coronavirus_2020_03_30.pdf)

**LETTER FROM THE LORD ADVOCATE (8 JUNE)**

[https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20200608LordAdvocatetoMM\\_reopeningcourts.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20200608LordAdvocatetoMM_reopeningcourts.pdf)

**LETTER FROM THE LORD ADVOCATE ON FISCAL FINES (8 JUNE)**

[https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20200608Lord\\_AdvocatetoMMFiscal\\_Fines.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20200608Lord_AdvocatetoMMFiscal_Fines.pdf)

**LETTER FROM COPFS'S CHIEF INSPECTOR OF PROSECUTION**

Dear Convener

**HM Inspectorate of Prosecution in Scotland – Inspection programme**

In March 2020, HM Inspectorate of Prosecution in Scotland paused face-to-face inspection fieldwork in response to the Covid-19 pandemic and in accordance with government guidelines. However, we continued to work remotely on assessing the implementation by COPFS of the recommendations made in our 2017 inspection of the investigation and prosecution of sexual crime. As this inspection comes to an end (the report of which will be shared with you in due course), I am looking ahead and considering what scrutiny activity will be most helpful and relevant. In particular, I am considering how the inspectorate can best fulfil our statutory role in the present circumstances in a way that is meaningful and that also takes account of the considerable pressures on COPFS and its staff.

For your information, I enclose a letter that was sent to the Lord Advocate, inviting views on potential areas of scrutiny. I would welcome the views of Committee members too. Given the small capacity of the inspectorate, it will likely not be possible to deliver all suggested areas of work and a decision will be made as to which is most

pressing, will add most value and that is achievable given the current restrictions which require adaptations to usual inspection methods.

I wish you and your fellow Committee members well during the current circumstances.

Yours sincerely

Laura Paton

**LETTER FROM THE CHIEF INSPECTOR TO THE LORD ADVOCATE**

Dear Lord Advocate

**Review of IPS inspection programme 2020-21**

I previously wrote to you on 19 March 2020, setting out our work programme for the year ahead. Since then, we have continued to review progress made by COPFS in implementing the recommendations made in our 2017 thematic review of the investigation and prosecution of sexual crime. Currently, we are awaiting further information on this from COPFS and are drafting our report which we will share with you in due course. As this inspection comes to an end, I am looking ahead and considering what scrutiny activity will be most helpful and relevant. In particular, I am considering how the inspectorate can best fulfil our statutory role in the present circumstances in a way that is meaningful and that also takes account of the considerable pressures on COPFS and its staff.

In my previous letter, I indicated that our next inspection would assess how COPFS handles criminal allegations against the police. There are advantages in continuing with this inspection, not least that it is what was already agreed and preparatory work has begun. In addition, the findings will be of particular interest at a time when confidence in policing and the criminal justice system as a whole is key. Further, the inspection will require liaison and engagement with a comparatively small number of personnel at COPFS which will help minimise our scrutiny footprint when staff are seeking to maintain delivery of essential services. It may also be useful to conduct the inspection shortly so that the publication of its findings are proximate to those of Dame Elish Angiolini's review of police complaints handling, in the expectation that all relevant agencies can take account of recommendations arising from the two pieces of work when developing action plans in response.

While continuing with our inspection of criminal complaints against the police seems worthwhile, I am also conscious of the need to carry out work that is relevant to the public health situation and to provide reassurance to you, the public and stakeholders about how COPFS is managing its response.

I have considered several issues that may benefit from scrutiny and would welcome your views as to which may be most useful, or indeed whether there are other issues about which you would seek our help in providing assurance. The purpose of this pandemic-related scrutiny activity would be to:

- a) inform the public and stakeholders about how COPFS is managing its response to the pandemic by focusing on areas of risk and/or public interest, with a view to maintaining confidence in the integrity of the criminal justice process
- b) highlight any issues or areas of concern to COPFS for action in quick-time
- c) consider any emergency measures, adaptations or innovations which have proven effective and efficient and which may be retained during the recovery period and as COPFS returns to business as usual
- d) gather contemporaneous information in anticipation of the possibility that IPS may be asked in the future to conduct a retrospective review of the

preparedness for and response to the pandemic by COPFS (or of the criminal justice system more broadly in conjunction with other justice scrutiny bodies).

It is anticipated that the output from our scrutiny activity may take the form of short, published papers, rather than large thematic reports. This work would be delivered alongside the planned review of criminal allegations against the police, or that review could be delayed for a short period. Consideration will be given to which of the potential activities should be prioritised, taking into account the availability of inspectorate resources. Potential areas for scrutiny include:

(1) Communication with victims and witnesses - Timely and effective communication with victims and witnesses is essential, but particularly at this time of uncertainty and when cases are being postponed due to the pandemic. COPFS plays a key role in maintaining the confidence and engagement of victims and witnesses in the criminal justice process despite the inevitable delays they will experience. IPS could carry out a spot-check of communication with victims and witnesses since the period of lockdown began, providing assurance as to whether this is being carried out effectively and, where appropriate, highlighting any areas for development or improvement during the recovery period.

(2) Early assessment of the use of emergency measures - Various emergency measures have been employed in response to the pandemic, such as allowing documents to be signed and transmitted electronically, provision for attendance by electronic means, and the ability to take custody cases in any sheriff court. There may be value in the inspectorate gathering information at this early stage that may assist in a future assessment of which measures could be retained and what, if any, safeguards or amendments may be required for their continued use in non-emergency situations.

(3) Digital capability - COPFS has rapidly increased its digital capability in response to the pandemic, with almost all staff being supported to work from home and some court business being conducted remotely. This represents a significant shift in working practice and one which has been achieved in a short period of time. The inspectorate may be able to assist in capturing information about this shift, including views on what elements could be maintained during and post-recovery.

The inspectorate had previously considered that assurance work around the prioritisation of cases during the recovery period may also be useful and would be of public interest, although I note your letter to the Justice Committee of 8 June 2020, stating that this is for SCTS. Nonetheless, I would be happy to consider if any scrutiny activity by the inspectorate could be of assistance in this regard.

#### *Longer term pandemic-related scrutiny activity*

The inspectorate will continue to consider the impact of the Covid-19 pandemic and the Crown's response in our work for the foreseeable future. For example, as part of the joint inspection of the management of cases reported from custody currently planned for later this year, there will be an opportunity consider how custody cases were managed during the lockdown period, including the application of revised Lord

Advocate's Guidelines on liberation and the appearance of suspects at court via video link (if not already address as part of work under (2) above).

There is significant public interest in the Crown's role in the investigation of deaths linked to Covid19 and I note your statement to the Scottish Parliament on 13 May 2020 regarding the categories of deaths which are to be reported to the Procurator Fiscal. Further ahead, there may be scope for the inspectorate to provide assurance about the Crown's role in this regard and IPS would welcome discussion as to what that might entail.

I have discussed the above with the Crown Agent earlier this week. I welcome your views on the potential areas for scrutiny outlined above, including views on which may be the most pressing or add greatest value. I also welcome suggestions of other areas which may benefit from the inspectorate's focus in the coming months.

Yours sincerely

Laura Paton

**Justice Committee**

**15th Meeting, 2019 (Session 5), Tuesday 16 June 2020**

**Prisons, Young Offenders Institutions and Covid-19 - Correspondence from the Scottish Human Rights Commission and the Children and Young People's Commissioner Scotland.**

**Note by the clerk**

**Introduction**

1. The Committee has recently received correspondence from the Scottish Human Rights Commission and the Children and Young People's Commissioner Scotland (see Annex).
2. The letters raise a number of issues and concerns in relation to prisons, Young Offenders Institutions and Covid-19.

**Action**

3. The Committee is invited to consider what, if any, action they wish to take. One option would be to invite the Cabinet Secretary for Justice and the Chief Executive of the Scottish Prison Service to respond to the issues raised.

Clerking Team  
June 2020

## LETTER FROM THE SCOTTISH HUMAN RIGHTS COMMISSION

Dear Convenor,

### Human rights and prison conditions during COVID-19

I am writing to you today to set out the Scottish Human Rights Commission's continuing concerns about measures being taken in prisons during the COVID-19 pandemic, and the associated risks to people's human rights.

We are particularly concerned at the ongoing lack of action taken to address these human rights issues by both the Scottish Prison Service and the Scottish Government. We ask you to consider this letter as part of your scrutiny of the Scottish Government and the wider justice system's response to COVID-19.

### Background

People in prison are likely to be more vulnerable to the risks and impacts of COVID-19. Closed conditions of detention make social distancing virtually impossible; many prisoners are currently living together in cells designed for one person; and prisoners are spending more time in their cells with no possibility of receiving a visit from their family.

On 20th March 2020, the Council of Europe's Committee for the Prevention of Torture (CPT) issued a Statement of Principles on the treatment of people in prisons and other places of detention during the COVID-19 pandemic<sup>1</sup>. This set out the steps required to ensure respect for people's fundamental rights in the context of emergency public health measures. These fundamental rights include:

- The right to at least one hour of time in the open air each day
- The right to maintain adequate personal hygiene including access to soap and hot water
- The right of access to a lawyer
- The right to alternative means of contact with the outside world in the absence of face-to-face visits

The United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also produced advice on COVID-19 for State parties and National Preventive Mechanisms<sup>2</sup>.

On 2nd April 2020, the Commission and other members of the Scottish Sub-Group of the National Preventive Mechanism (NPM) wrote to the Cabinet Secretary for Justice, setting out a number of recommendations to ensure that people's rights would be respected in Scotland's prisons and other places of detention<sup>3</sup>. Subsequently, the Commission and other key stakeholders have met with the Cabinet Secretary on a number of occasions to raise and discuss our various concerns.

The Commission welcomes and supports a number of the steps taken by the Scottish Government in response to some of these concerns. In particular, we recognise the dedication of staff working in detention settings and we commend efforts made by government to reduce the prison population.

However, we remain deeply concerned about the current conditions being experienced by some people within Scotland's prisons.

### **Current measures and conditions**

As the Committee is aware, the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 introduced significant changes to the prison regime at the discretion of the Scottish Prison Service. The amended rules relax requirements to meet some basic needs including nutritious food, clean socks and underwear, access to bathing or showers, family contact, reading material, and purposeful activity.

We are concerned that some of these changes, and associated Scottish Prison Service requirements of governors, are creating conditions where some prisoners' fundamental rights are not being respected. We are particularly concerned that current conditions being experienced by some people could amount to inhuman and degrading treatment, in breach of Article 3 of the European Convention on Human Rights.

These concerns are based on our review of the amended rules and the action required of governors. We are aware, for example, of people being confined to their cell for 24 hours a day, for extended periods of time, with no access to shower facilities or time out of cell, including access to outdoor exercise. We are also aware that prisoners who are confined in their cells for COVID-19 related reasons are afforded limited telephone contact with their lawyer, and that some prisoners have been unable to maintain any form of telephone contact with their families.

While it may be legitimate and reasonable to suspend non-essential prison activities in the current public health emergency, any restrictions must be minimised, proportionate to the nature of the health emergency, and made in accordance with law.

Measures amounting to solitary confinement for healthcare reasons should only be adopted on the basis of a comprehensive medical assessment. Solitary confinement, which carries significant mental and physical health impacts, should only ever be adopted where it is proportionate, limited in time and subject to procedural safeguards.

The Commission is also concerned about the lack of transparent and accessible data currently available to enable adequate monitoring of prison conditions and their impacts.

Given the serious nature of our concerns, we have urged the Scottish Government to take action to ensure that all prisoners are being held in conditions which are fully in accordance with the state's human rights obligations. To date, we have not received the assurances we would wish to see in this regard.

We remain committed to working with the Scottish Government, Scottish Prison Service and all other relevant stakeholders to ensure that people's rights are respected and protected through the current public health emergency. We welcome the Justice Committee's consideration of the issues and concerns we have set out here.

Judith Robertson  
Chair

**LETTER FROM CHILDREN AND YOUNG PEOPLE'S COMMISSIONER SCOTLAND**

Dear Convener

We note the Scottish Human Rights Commission's letter of 18 May 2020 in which the Commission sets out its concerns around human rights and prison conditions during the Covid-19 pandemic. We agree with all of the points made in the letter, in particular that in some cases conditions experienced by prisoners may amount to inhuman and degrading treatment in terms of Article 3 of the European Convention on Human Rights (ECHR).

In addition, we would ask the Committee to give specific consideration to the rights of children and young people who are deprived of their liberty. These children are recognised in international law as being particularly vulnerable to human rights breaches in normal times, and are additionally so during the current pandemic. We refer the Committee to the UN Committee on the Rights of the Child's General comment No.24 (2019) on children's rights in the child justice system, which specifically requires that children are deprived of their liberty only as a measure of last resort, by absolute necessity and for the shortest appropriate period of time in accordance with the law.

In Scotland, children may be deprived of their liberty and detained in various settings including Young Offenders Institutions (YOIs) Secure Care provision, mental health facilities, and an immigration detention centre. Each of these types of establishments are governed by different procedural legal frameworks but all children detained are entitled to the full protection of human rights in international law.

We note that on 20 March 2020, there were 24 children and 270 young people (aged 18-21) detained in YOIs. On 15 May 2020, there were 7 children held on remand and 8 serving a sentence; with a further 58 young people being held on remand, 9 convicted and detained pending sentence and 149 serving sentences. In total therefore there were 231 children and young people deprived of their liberty, some for significant and uncertain periods of time.

We would refer the Committee to a number of recent and significant reports which set out the human rights situation at an international and domestic level. In particular, "The Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty" and "Rights Respecting? Scotland's Approach to Children in Conflict with the Law". It is worthy of note that shortly before the Coronavirus crisis began the findings and recommendations of the Scottish Independent Care Review were published with 'The Promise' echoing the HMIPS concerns for children deprived of their liberty. The "Report on an Expert Review of the Provision of Mental Health Services, For Young People Entering and in Custody at HMP YOI Polmont" ( HMIPS Mental Health Report) sets out serious concerns about mental health in Scotland's YOIs and as we note below, the situation has only become worse as a result of the pandemic. The Report "Children in Prison During the Coronavirus Pandemic" sets out concerns about detention of children in England and Wales and includes commentary on many issues that are equally relevant to Scotland.

## **Solitary confinement**

International human rights frameworks clearly prohibit the use of solitary confinement for children, recognising the damaging effects it can have on physical and mental health. Solitary confinement is defined by the United Nations in the Nelson Mandela Rules as confinement “for 22 or more hours a day without meaningful human contact”. It is important to note that the negative impacts of isolation can begin long before the 22-hour threshold is reached. We understand that some children and young people in YOIs are currently being confined in their cells for up to 23 hours a day and those who are showing symptoms of Coronavirus are isolated in their cells for 24 hours a day.

## **Access to education and other activity**

We have been told that access to education, activity and exercise are very limited at present. This has a negative impact on children’s rights to education and health. We note that the HMIPS inspection of Polmont YOI found that children on remand in particular experienced limited access to meaningful activity and support prior to the pandemic, and that access to services was also restricted prior to sentencing.

## **Social work support**

We have been told that social work visits have largely ceased. This will affect the level of support provided to children, the level of additional scrutiny over protection of their rights, and their ability to be assessed for and prepare for release.

## **Family contact**

We have been told that family contact is not taking place despite it being recognised as playing a huge role in mitigating vulnerability and mental illness. We understand that no measures have been put in place to facilitate additional virtual contact and to support rights to respect for family life (such as socially distanced visits, significantly increased telephone or video contact.)

## **In-cell telephony and technology**

One of the recommendations of the HMIPS Mental Health Report which the Scottish Government agreed to (in June 2019) was to install in-cell telephony in HMP YOI Polmont. On 17 April 2020, the Cabinet Secretary for Justice announced the Scottish Government’s intention to provide mobile phones to those in custody. To date this has not been done.

## **Hygiene**

Amendments to the prison rules have relaxed duties to meet basic needs including those related to hygiene. We are not aware of any Children’s Rights Impact Assessment having been conducted on these amendments. Notwithstanding the impact on human dignity of having access to showers restricted, when the strong messaging from public health professionals is about the critical and life-saving important of washing hands to prevent the spread of the virus, we question how hygiene and infection control in prisons is being managed.

## **Mental health**

The consequence of all the above will be to seriously exacerbate existing mental health vulnerabilities and to place all children detained at heightened risk of developing mental health problems. There were pre-existing concerns in YOIs about the level and quality of mental health support for children and young people. The HMIPS Report highlighted significant concerns for the mental health of those on remand, awaiting sentence, or in the early stages of their sentence. These groups are identified as being the most vulnerable to episodes of self-harm or suicide. A key reason outlined in the Report for why the remand population was considered to be particularly vulnerable related to their experience of 'social isolation'. As noted above similar concerns were raised by the Centre for Youth and Criminal Justice (CYCJ) and the Independent Care Review. The situation is only likely to have worsened as a result of the pandemic.

## **Early Release**

In March, 2020, the United Nations High Commissioner for Human Rights, Michelle Bachelet, appealed for urgent action to prevent Covid-19 from "rampaging" through places of detention and on 8th April 2020, the United Nations Committee on the Rights of the Child (the CRC) called on all States to:

"Release children in all forms of detention, whenever possible, and provide children who cannot be released with the means to maintain regular contact with their families."

"Prevent the arrest or detention of children for violating State guidance and directives relating to COVID-19, and ensure that any child who was arrested or detained is immediately returned to his or her family."

We welcome therefore the fact that some children and young people are covered by the early release regulations, but note that the 16 and 17 year olds detained in Young Offenders' Institutions (YOIs) are subject to the same eligibility criteria as adults. As the Howard League noted in its submission to the Committee, the criteria are not human rights based, and make no provision for assessment of children's rights, needs and wellbeing to inform a decision on release. There is no evidence that the Government gave any consideration to the specific needs and rights of children when drafting the regulations.

In line with the overwhelming weight of international expert opinion, including the United Nations Committee on the Rights of the Child (UN CRC), the Office of the UN High Commissioner for Human Rights (OHCHR), the World Health Organisation (WHO), the UN Office on Drugs and Crime (UNODC), the UN Joint Programme on HIV/AIDS (UNAIDS), and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, we are calling on the Scottish Government to ensure that all children detained in YOIs are individually assessed for release using a human rights based approach. This approach would be consistent with the Government's obligations in international law to grant children additional legal protection and consideration.

We are especially concerned that failure to include children and young people on remand in the early release regulations disproportionately impacts on this group, who

are likely now to be facing detention and deprivation of their liberty for significant and uncertain periods of time, without having been convicted of any offence.

We welcome the Committee seeking data on the Scottish Government's early release programme. We would also encourage the Committee to seek specific disaggregated data on children detained in YOIs and in particular the length of detention, the reason for detention, the scheduled release date, parole/appeal or trial dates, whether they are care experienced or have a disability or additional support needs. This would greatly assist the Committee in assessing the impact of the programme on those whose rights are most at risk.

In addition, we consider that children in secure care centres should also have their situation reviewed, allowing a rights-based assessment of whether detention continues to be in their best interests. This does not require legislation, but it is not clear that the Government has set an expectation that this will happen.

We intend to raise the issues around early release with the Covid-19 Committee as many of them require legal change in order to resolve, however we consider that the Justice Committee will wish to be aware of these matters to provide context in relation to the concerns we set out above.

We hope members find this information useful, and we encourage and support the Committee in its scrutiny of the Scottish Government and Scottish Prison Service approach to ensuring the human rights of children deprived of their liberty are respected, protected and fulfilled.

Bruce Adamson  
Children and Young People's Commissioner Scotland

**Justice Committee**

**15th Meeting, 2019 (Session 5), Tuesday 16 June 2020**

**Covid-19 and the impact on criminal justice social work and the criminal justice voluntary sector - Correspondence from Social Work Scotland and the CJVSF**

**Note by the clerk**

**Introduction**

1. The Committee has recently received correspondence from Social Work Scotland and the Criminal Justice Voluntary Sector Forum (see Annex).
2. The letters raise a number of issues and concerns in relation to the impact of Covid-19 on these sectors.

**Action**

3. The Committee is invited to consider what, if any, action they wish to take. One option would be to invite the Cabinet Secretary for Justice to respond to the issues raised.

Clerking Team  
June 2020

**LETTER FROM SOCIAL WORK SCOTLAND**

RE: Justice Social Work and Covid-19

Dear Stephen

Thank you for your email of 27 May regarding the impact of Covid-19 on justice social work (JSW). As the Cabinet Secretary outlined in his letter of 11 May to the Justice Committee, whilst there were some initial problems in accessing PPE, these have been resolved and JSW now has access to appropriate PPE and home visits and direct contact with individuals are risk assessed and planned in advance.

I would like to take this opportunity to provide further information to the committee of the impact of the pandemic on JSW business and outline some of the challenges that will be faced as future planning is undertaken in line with publication of the Scottish government's Coronavirus (COVID-19): framework for decision making - Scotland's route map through and out of the crisis on 21 May.

Following the Coronavirus (Scotland) Act 2020 coming into being on 7 April, the time limit for the completion of all existing unpaid work and other activity requirements in community payback orders were extended by 12 months and a restriction placed on courts for the period during which the legislation is in force. This was to ensure that any new unpaid work or other activity requirements have a time limit of at least 12 months from the point of imposition. These measures allowed JSW to suspend all programmes relating to unpaid work or other activity requirements for the duration of the pandemic without affecting the ability of individuals to complete their hours within court-directed timescales. During April and May, therefore, unpaid work has effectively been on hold.

Whilst each local authority continues to respond to their own local circumstances, the current position is of note:

□ JSW identified the management of higher risk of harm and vulnerable individuals subject to community payback orders (CPO), drug testing and treatment orders (DTTO) and prison licences as the key priority at the onset of the pandemic and this remains the case. However, notwithstanding the restrictions outlined below, JSW has continued to provide as a comprehensive service as possible during this time to help and support individuals and keep communities and victims safe.

□ Providing criminal justice social work reports (CJSWR) to courts continues to be a priority.

□ All group work, including the Moving Forward: Making Changes sex offender programme and the Caledonian System domestic abuse programme has been suspended. Further detailed guidance for Caledonian workers has been issued and plans to introduce an alternative 1:1 version of the programme are at an advanced stage. Similarly, discussions about how best to proceed with MF:MC are being held.

- The Multi Agency Public Protection Arrangements (MAPPA) continue to operate effectively through phone or virtual meetings.
- Prison-based social work continues to operate, prioritising statutory work, with some teams able to operate within prisons and some remotely. Remote access to SPS information systems is now possible and it is hoped all workers will be able to access in the near future.
- SPS have worked hard to facilitate meetings either physically or remotely wherever possible and identifying clear lines of communication for community-based social work.
- Court services remain largely withdrawn but continue to be available for the provision of bail supervision assessments.
- JSW continue to work mostly from home with some offices remaining open and staffed on a very limited rota basis. Individuals on supervision are being seen in offices and on home visits where this is assessed as necessary and proportionate based on risk. For example, where there is non-compliance and an increase in risk of harm and potential breach proceedings. But this is limited with most contact by telephone with some video platforms being used such as Skype and WhatsApp. Authorities are reporting better IT provision and connectivity.
- In agreement with Scottish Government, the delivery of National Outcomes & Standards for social work services in the criminal justice system and associated practice guidance continue to be relaxed with resources being allocated in accordance with risk and need. Social workers are working creatively and flexibly to deliver interventions at this time using written material/work books or tailoring interventions to suit remote delivery.
- The numbers of CJSWRs and new CPOs has significantly reduced, as court business has been interrupted. During April and May a total of 32 CPOS were made; in 2018-19 approximately 1300 CPOs were issued each month.

### **Future planning & challenges**

Focus now is on future planning in line with the 4 Phases outlined in the Route map. For social work, the Route map sets out in Phase 1 for “Greater direct contact for social work and support services with at risk groups and families with physical distancing and hygiene measures” with a further scaling up of public services and resumption of justice system processes and services in Phase 2 and 3 in advance of “Public services operating fully, in line with public health advice, with modifications and changes to service design, including increasing use of digital services where appropriate” in Phase 4.

In respect of the increasing use of digital services, JSW is committed to innovating and incorporating technology where appropriate (as it has done during lock-down), but it is important to note that opportunities to do so are restricted by the ability of JSW clients to access and use technology themselves. ‘Digital poverty’ is a reality for many, and

JSW practitioners are mindful of not further disadvantaging individuals by adopting practices which inadvertently create barriers to engagement.

The impact on the absence rate of JSW social workers across Scotland during the pandemic has been monitored on a regular basis and encouragingly has consistently been between 5 – 7%, significantly less than predicted. This will significantly help as the SWS Justice Standing Committee develops guidance relating to the interpretation of the Route map that will offer support and advice concerning the respective phases post-lockdown which will be issued imminently and as there is a limited increase in direct contact with individuals. It will also help to ensure a degree of consistency across the justice social work landscape.

The restarting of unpaid work and other activity requirements will be particularly complex and challenging – how will individuals travel safely to offices and projects when work vans do not accommodate physical distancing rules? How will workshops operate safely? How will individuals be safely instructed in using tools and equipment? Which projects will be most suitable during the pandemic? In the absence of public toilets, how will individuals be able to take comfort breaks without significantly interrupting the work day? Additional cost may be incurred as a result of hiring minibuses or portaloos as services explore the best and most effective way to reconfigure services.

The biggest impact will be capacity. Ongoing work to model the accumulating number of unpaid work hours shows approximately 700,000 hours outstanding with an estimate of the ratio of supervisor to individual likely dropping from 1:5 to 1:1 or 1:2 initially at best – in normal times a community payback supervisor will manage a group of up to 5 individuals – and capacity is likely to remain reduced for as long as physical distancing is required. As new unpaid work requirements are made as courts get back to work, this will provide an additional challenge. It is understood no decision has been taken by Scottish government regarding the further use of the Coronavirus (Scotland) Act in respect of the potential, for example to enact the regulations for the postponement of CPOs or varying the requirements of community orders but that it remains under consideration.

There will be a similar impact on the supervision of individuals on CPOs and prison licences. The reduction in the capacity of social workers to meet face-to-face with individuals will similarly reduce to around 20 – 30% as office space will not accommodate the same numbers of people. This space will need to be reconfigured and adapted to ensure safe interviewing areas. The impact on delivering interventions will continue to be marked with group work largely continuing to be curtailed, which will have a further impact on resources and how individuals address the issues relating to their offending. Social workers will require to offer clear information in CJSWRs and Home Background Reports to Parole Board Scotland in respect of how risk will be managed in the community and the delivery case management plans, and in CPO reviews. For example, the mix of direct and phone contact that can be realistically offered, how a programme will or has been delivered, which is likely to be a greater mix of written work and fewer physical meetings to ensure the decision making of courts and PBS is fully informed.

The challenge across the justice sector is common to all. Social Work Scotland will continue to work openly and collaboratively with key stakeholders. Regular conference

calls are scheduled with Scottish Prison Service, Scottish Courts & Tribunal Service, Crown Office & Procurator Fiscal Service and Community Justice Scotland. We support a joined up and whole system approach to the restarting of the justice system given its inter-connectedness and SWS are also represented on the Justice Board's Covid-19 sub-group.

Social Work Scotland would welcome any further invitation to inform the Justice Committee of any matters relating to the provision of justice social work during the pandemic.

Yours sincerely,

James Maybee  
Chair of Social Work Scotland's Justice Standing Committee

## LETTER FROM THE CJVSF

Thank you for this opportunity to provide the Justice Committee with an update from the third sector as part of their ongoing scrutiny of the Scottish Government's response to the COVID-19 outbreak in justice. This briefing has been prepared in response to the Committee's request for more information on risk assessment processes and access to personal protective equipment (PPE) and has been prepared following consultation with our members.

This briefing will include:

- A short summary of the third sector response to COVID-19 to date
- Information on:
  - CJVSF member experiences in relation risk assessment in face to face delivery
  - Access to PPE supplies for third sector organisations
- Other issues raised by CJVSF members

If you require any further information or clarification in relation to any of the points raised below then please do not hesitate to contact us.

### The Third Sector Response to COVID-19

COVID-19 has caused widespread change to how third sector organisations are working. Social distancing requirements and emergency measures have resulted in significant alteration to services and in some cases to the suspension of all service delivery.

In light of the risk to staff and the people they support, many organisations have moved to remote service delivery and are providing support over the phone and internet. In some instances, these organisations working digitally are registering a higher level of engagement than would normally be the case. Others are reporting a higher degree of flexibility in how they are able to support people as funders relax some of the restrictions placed on how their funding can be used in response to the crisis. Many are also engaging with and creating new digital resources to help them support people at this time.

Given the importance of face to face contact in supporting the most vulnerable, a number of CJVSF members have continued to deliver services in person. This has particularly been the case for services working with those with addictions, residential or tenancy support services, intensive support services, and those working to support young people at risk of offending. Where it has been necessary to continue face to face delivery of services, organisations have continued to do so where possible whilst following public health guidance. Many of these services have also adapted their face to face work in light of social distancing restrictions and are working in new ways, such as through delivering food or welfare packages, to ensure that the people they are working with feel supported.

For many voluntary sector organisations, the disruption to normal justice processes means that it is increasingly difficult for them to engage with people who need their support. Changes to the prison regime and the suspension of prison visiting and access for non-agents has meant that in-prison service delivery and many of the normal referral routes to third sector services are not available. This also means that engagement with people before release is limited. Similarly, disruption to court processes and the closure of local hubs or key referral partners (e.g. Jobcentres) has made access to services more difficult in a community setting.

Third sector partners are able to engage with local community justice processes where these have established links with the voluntary sector but for many areas this was not in place before the outbreak.

This lack of access to services in prison and the community will have a significant and lasting impact on people in the justice system and on third sector organisations. Likewise any sudden increase in the number of people going through the justice system as normal justice processes resume could have a significant impact on the voluntary sector as it begins to return to face to face delivery.

In the longer term, the funding implications of the outbreak are also likely to have a significant impact on the voluntary sector. While most funders are responding flexibly at present and significant extra resources have been made available, the economic impact of the crisis on government spending and the significant commitment of resources by discretionary and trust funders in the short term could lead to a difficult funding climate for the sector, with increased competition for scant resources.

## **Risk Assessment in Face to Face Delivery**

The Committee has asked CJVSF members to share their experience of risk assessment in delivering services during the COVID-19 outbreak.

CJVSF members report that where they are continuing to deliver face to face services, they have adapted their risk assessment processes to include a consideration of the risks posed by COVID-19. Given the vulnerability of many of the people they support and the potential risks to their staff, CJVSF members are accustomed to carrying out thorough risk assessment procedures in the course of normal service delivery and have found that adapting their processes to COVID-19 has not proved challenging in most cases.

Members have drawn on a range of national and local public health guidance and processes relating to COVID-19 to inform their risk assessment procedures and consider current national guidance sufficient to allow them to do this effectively. In establishing updated procedures, some CJVSF members reported close engagement with local authorities and with Health and Social Care Partnerships but this was not the case for all members, suggesting varying practice across Scotland. As such, CJVSF members would welcome greater clarity on how local partnerships are supporting voluntary sector organisations to work safely in the current outbreak.

In implementing these new risk assessment processes, organisations have adapted their practices to take account of the needs of different groups, such as those who are shielding, and to take actions to mitigate risks to service users and staff, such as using appropriate PPE or social distancing measures. CJVSF members noted, however, that the dynamic situation with COVID-19 and the needs of the people they are supporting, particularly where a person's addiction or mental health necessitates an urgent welfare check, means that conducting risk assessments in individual cases can prove extremely challenging.

Despite the relative ease with which CJVSF members have adapted their risk assessment processes to take account of COVID-19 to date, members did suggest that this might prove more challenging as lockdown begins to end and the Phases of the Scottish Government's Route Map Through and Out of the Crisis progress. As face to face delivery resumes, more organisations will need to put in place appropriate risk assessment procedures. For those organisations without dedicated resources or health and safety staff, this may prove a considerable challenge. CJVSF members who have yet to resume face to face delivery have

suggested that additional guidance and clarity around when and how face to face delivery of services could resume would be necessary as the phased approach progresses.

More generally, members called for clarity on what constitutes a “community justice front line worker” and therefore a “keyworker” in a community justice context, as no justice specific guidance had been issued.

## Access to PPE for Third Sector Workers

The Committee has asked CJVSF members to share their experience of accessing PPE supplies during the outbreak.

CJVSF members have not reported any ongoing difficulties in accessing PPE.

For some organisations access to PPE in the initial stages of the COVID-19 outbreak was a serious problem and, as a result of the delay in implementing national PPE supply processes, some members had to dedicate considerable staff time and large amounts money to source adequate supplies (in one instance around £20,000). This represents a considerable expenditure for third sector organisations working in what is already a challenging funding environment. Members have also reported similar difficulties to other sectors in relation to PPE supply chain disruption and in some instances existing supply arrangements were interrupted so that suppliers could prioritise NHS provision.

All CJVSF members who responded, however, report that access to PPE is not a concern at present and that they are able to access supplies either through local hubs, HSCPs, local authorities or through their own supply arrangements, including as part of buying consortiums.

Members did, however, suggest that this could be an issue in future as we progress through the Phases of the Scottish Government’s Route Map Through and Out of the Crisis. As more services return to face to face delivery, demand for PPE will increase, which will potentially increase strain on distribution hubs and supply chains. Similarly, in light of the cost concerns raised above, it may prove difficult for some third sector organisations to afford PPE supplies. Third sector organisations working across multiple local authorities may also face challenges engaging with multiple processes to source appropriate equipment, given that their staff and resources will already be stretched by COVID-19.

CJVSF members would therefore welcome clarification wherever possible on:

- The PPE requirements for justice service delivery as the phased approach progresses.
- The national PPE distribution programmes available to voluntary sector organisations working in community justice.
- Any arrangements for funding/reimbursing voluntary sector PPE costs in justice.
- Any arrangements in place to coordinate PPE requirements and distributions for services that operate in multiple local authority areas.

## Additional Issues Raised by CJVSF Members

In the course of gathering information to respond to the Committee’s questions, CJVSF members also raised a number of issues relating to the COVID-19 outbreak that they believe the Committee should be made aware of.

**Digital Delivery of Services** – As identified above, many services have responded to the COVID-19 outbreak by shifting towards remote delivery where possible to that ensure public health guidance is followed and that staff and service users are kept safe.

While some CJVSF members are reporting an increased engagement and new opportunities to support people in the justice system as a result of this, other CJVSF members have reported that people can be reluctant to engage support online or over the phone for a variety of reasons, often related to their mental health. Moreover, many people face considerable challenges when engaging with services digitally as they lack smart phones or internet access. Others may be prevented from accessing the internet as a result of their licence conditions. There is therefore a risk that prioritising online delivery over a prolonged period may exacerbate the “digital divide” and increase digital inequality unless steps are taken to support digital inclusion for people in the justice system and their families. CJVSF members would therefore welcome information from the Scottish Government on what it is doing to support the digital inclusion of people in the justice system.

In light of all of the above, CJVSF members also stressed the importance of continuing face to face delivery of services alongside digital delivery as we move beyond the initial response to the COVID-19 outbreak. Digital support should not be seen as an economical option for replacing normal service delivery but rather as part of the range of options open to organisations to provide person-centred support for people in the justice system.

**Unsuitable Accommodation** – CJVSF members were concerned about people, and young people in particular, being placed in unsuitable accommodation as part of the crisis response to house people sleeping rough during the outbreak. While steps have been taken nationally to ensure that time spent in temporary accommodation is minimised, members reported that young people in particular had been placed in inappropriate accommodation without proper risk assessments having taken place, potentially increasing their risk of harm through drug use, victimisation, and poor mental health. For some young people, this also means that they are at increased risk of being recruited into criminal gangs.

**Unemployment** – Given current disruption to the job market and the difficulties in delivering employability work at this time, CJVSF members expressed concerns around the potential long term impact of unemployment on the justice system. Young people were identified as being particularly affected and one member observed that many young people they are working with are making claims for Universal Credit for the first time, suggesting challenges for the future.

**Family contact for people in prison** – CJVSF members suggested that further information from the Scottish Government and the Scottish Prison Service on the introduction of virtual visits and mobile phones for people across the prison estate, including clear timescales for their introduction, would be welcome.

Once these schemes are in place, CJVSF members suggest that the Help With Prison Visit Scheme could be amended to allow funding to be re-directed at this time. Members expressed concerns that many families would not be in a position to engage with digital visits, due to costs or connectivity issues, so supporting them will be essential in ensuring that they can contact a family member in prison.

**Remand** – CJVSF members are increasingly concerned about people being held for long periods of time on remand following the passing of the Coronavirus (Scotland) (No 2) Act. Figures from the Scottish Prison Service indicate that the proportion of people in custody being held on remand has been increasing since mid-April and that this may be having a

disproportionate impact on young people. This and the severe restrictions to the prison regime introduced in response to COVID-19 will have clear human rights implications. CJVSF members also report a growing number of family members expressing concerns about the length of time people are spending on remand.

CJVSF members would therefore welcome further information on what is being done to support the use of alternatives to remand at this time and what support is available to those on remand in light of restrictions to normal prison activity.

Chris McCully  
Development Coordinator  
Criminal Justice Voluntary Sector Forum (CJVSF)