



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 19 May 2020**

**Session 5**



The Scottish Parliament  
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - [www.parliament.scot](http://www.parliament.scot) or by contacting Public Information on 0131 348 5000

---

**Tuesday 19 May 2020**

**CONTENTS**

	<b>Col.</b>
<b>DECISIONS ON TAKING BUSINESS IN PRIVATE .....</b>	<b>1</b>
<b>JURY TRIALS .....</b>	<b>2</b>

---

**JUSTICE COMMITTEE**  
**13<sup>th</sup> Meeting 2020, Session 5**

**CONVENER**

\*Margaret Mitchell (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

\*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

\*John Finnie (Highlands and Islands) (Green)

\*James Kelly (Glasgow) (Lab)

\*Liam Kerr (North East Scotland) (Con)

\*Fulton MacGregor (Coatbridge and Chryston) (SNP)

\*Liam McArthur (Orkney Islands) (LD)

Shona Robison (Dundee City East) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Dr Jim McMenamin (Public Health Scotland)

Eric McQueen (Scottish Courts and Tribunals Service)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

Virtual Meeting



# Scottish Parliament

## Justice Committee

Tuesday 19 May 2020

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

### Decisions on Taking Business in Private

**The Convener (Margaret Mitchell):** Good morning and welcome to the 13th meeting in 2020 of the Justice Committee. We have received apologies from Shona Robison, who is attending the COVID-19 Committee.

Before we begin, I place on record the committee's thanks to the witnesses for agreeing to provide oral evidence at short notice and during such an exceptionally busy time for them. It is very much appreciated; hearing from key witnesses is invaluable in assisting the committee to conduct necessary scrutiny at this time.

I also thank the stakeholders who provided written submissions in advance of today's meeting.

Our first agenda item is consideration of whether to take item 5 in private, to allow the committee to consider the evidence that we receive from witnesses today. Given the complexities of a group discussion over videoconference, I will assume that all members agree to do that unless someone says otherwise.

No member has objected, so the committee agrees to take item 5 in private.

Do members also agree that all future approaches or amendments to the work programme, approaches to calls for evidence, consideration of evidence taken and draft reports should be taken in private during the Covid-19 public health emergency?

No one has objected, so we are all in agreement on that. Thank you.

# Jury Trials

10:02

**The Convener:** Our main item of business this morning is evidence on the challenges of restarting jury trials in Scotland's courts. The committee will take evidence from two witnesses. I welcome our first witness: Dr Jim McMenamin, incident director for Covid-19 and interim clinical director, Public Health Scotland.

I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper. I invite Dr McMenamin to make a short opening statement.

**Dr Jim McMenamin (Public Health Scotland):** Thank you, convener. On behalf of my colleagues in health protection in Public Health Scotland, I can say that we have a great interest in getting our society back towards its normal functioning, as best we can, guided by the principle of ensuring public health—at all times, that is the backdrop to anything that we are offering.

In much of the documentation that has been made available in advance of this meeting, I can see that, not just in this committee but across the whole of the United Kingdom, there is a shared understanding that at this point it is really important that we all ensure the safety of the public.

That is the case for everyone who would be involved in the jury trial process, whether we are talking about defendants, jurors, witnesses or staff. Processes must be in place to ensure that there is reasoned consideration of all information, in thinking about how best to implement things in the new world that we enter in the immediate period that follows the release of the current lockdown of society.

If there are any key questions, I will do my very best to address them. If you have any technical questions that it is not possible for me to deal with in the meeting, I would be happy to take those back to colleagues and make a submission at a later date.

**The Convener:** Thank you, Dr McMenamin. That was helpful. We will move to questions—I ask everyone please to allow our broadcasting staff a few seconds to operate the microphones before asking a question or providing an answer.

Has Public Health Scotland been asked by the Scottish Government and/or the Scottish Courts and Tribunals Service to give any advice on how best to facilitate the resumption of jury trials in Scotland? If so, when was that advice sought? In general terms, did—or, if it was not sought,

would—such advice anticipate any insurmountable problems to jury trials being held?

**Dr McMenamin:** Thus far, we have not received any direct request for input from colleagues in the Scottish Government. That is not to say that we have not been involved in some of the decisions or been able to offer advice through the normal channels that are often, of necessity, considered by all the groups that are answering key questions. That is because we have a core set of infection prevention and control guidance that can be translated into every setting and, through our colleagues in the Scottish Government health protection team and the offices of the chief medical officer, we make that general information available to those groups. We also make it available publicly and publish updated guidance periodically to inform the response of every organisation. That core information is deemed to be important for all organisations to consider.

We are also aware that we are not the only providers of guidance. The Health and Safety Executive across Scotland and the United Kingdom provides important information on what should be considered for the workplace and is making a useful contribution to assisting all organisations to set the scene for what should be considered.

That consideration is undertaken by the two different organisations. Public Health Scotland looks strictly at the infection prevention and control guidance, and its general application. The HSE considers guidance specifically for the workplace.

**The Convener:** It is somewhat disappointing that Public Health Scotland has not been contacted specifically, especially as Public Health England and Public Health Wales have been actively involved in and key to the work that is leading to the resumption of jury trials in England and Wales.

What contact, liaison or discussion has Public Health Scotland had with either or both of its counterparts in England and Wales about their experience of working with justice partners to help jury trials to recommence? If there has been any contact, when did it take place? If there has not, are there any plans to contact Public Health England and Public Health Wales to find out about their experience and the issues that have been raised?

**Dr McMenamin:** Our colleagues in Public Health England and Public Health Wales have endorsed information that has been prepared by the court system for use in England and Wales. Over the week of 15 May, important documents were produced and are now more broadly available. Our colleagues endorsed, rather than actively prepared, the information. The core

information to which I have alluded has been considered and applied within the documentation for use in England and Wales. After that information has been prepared, our colleagues in Public Health England or Public Health Wales offer an endorsement.

The same consideration would be given by our organisation to any such information that was prepared by our colleagues here in Scotland. We would look at the information as it was prepared, consider it in relation to the core guidance that I have already mentioned and then offer any commentary on it.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** I will follow on from the convener's questions. Is there an optimum number of times that court participants should be tested in order to remove the risk of their being contagious? We know that the incubation period is between one and 14 days. Given that timescale, how could testing work in practice? Would you advise testing for all participants—court staff, the accused and witnesses?

**Dr McMenamin:** In direct response to your question, in the main, we are asking for the main features that we have considered in our core guidance to be used as a backdrop to anything that happens within the court system. Usually, we ask that individuals who are symptomatic should not be presenting and should self-isolate, so that they do not infect others.

Rona Mackay asked me a specific question about testing. In the main, and right up to yesterday, testing has been almost exclusively reserved for individuals who have symptoms. We are trying to identify individuals and confirm their illness in order to allow appropriate management for them. You asked about the testing of anyone who is involved in the court process. That has certainly not been advocated and, given that that is not the current recommendation, we cannot offer any commentary on it.

However, we recognise that, as of yesterday, the potential offer of citizen testing has been the subject of some discussion. That would mean that anyone who has symptoms could be offered testing in the community and, by using lighthouse laboratories, results could go back to individuals. We recognise that that is an emerging area in the offer of tests to the general community at large. We recognise that the position might change over time, but there is currently no recommendation for individuals to be offered testing in general, unless they are symptomatic.

**Rona Mackay:** Should we be assessing the level of risk in courts more generally, even when social distancing measures are used? While the threat of Covid-19 lessens, it will still be present.

I have been told that a sheriff court near my constituency is so busy right now that social distancing is impossible. How can the risk to all court participants be eased under such circumstances?

10:15

**Dr McMenamain:** My direct response is that, no matter what the setting, risk assessment is important. A dynamic risk assessment should take place in any organisation. Various measures can be considered in advance, which allows us to draw up a checklist of measures that would need to be in place for the resumption of court business in any setting. When any new consideration arises, or if practical difficulties are encountered, a risk assessment for all those involved should be possible in any locality to enable us to adjust and amend measures dynamically as part of our response.

Rona Mackay cited issues in a local court. I am sure that colleagues there will be actively looking at how they can best implement and revise the risk assessment process accordingly and, if it is deemed appropriate, make any changes to the action that they are undertaking locally.

**James Kelly (Glasgow) (Lab):** Good morning, Dr McMenamain. Leaving aside the very important issue of testing, which Rona Mackay raised, what key steps can be taken in courts to guard against the spread of the virus? I am thinking about the use of personal protective equipment, hand sanitiser and the cleaning of courts.

**Dr McMenamain:** The key steps are laid out in our core guidance for use in every aspect of life. Although social distancing—or physical distancing, as it might now be better described—is one of the most important measures that many of us are looking at, it is just one of many features in a suite of measures that it is important we consider.

As James Kelly indicated, action starts with simple measures such as encouraging hand washing and, where it is not possible for people to wash their hands, making available hand hygiene and decontamination measures such as alcohol gel. It also involves all the measures that are associated with hand hygiene and respiratory etiquette as part of the general public response, such as telling people to cover their mouth with a disposable tissue when they cough and to dispose of the tissue immediately or, if they do not have a tissue, to cough into their sleeve.

However, action needs to go much further than that—it also has to involve ensuring that people who have respiratory symptoms do not go to court in the first place. Just yesterday, a new Covid-19 symptom—anosmia, which is an altered sense of taste or smell—was added to the list of symptoms,

so it is not only a fever and a cough that we should be looking for in patients with Covid-19. If individuals are symptomatic, they should not present to the court. If they develop the symptoms while they are in court, they should, in line with an appropriate arrangement, be returned to the place from which they came. That should apply to everyone: defendants, jurors, witnesses and staff.

It would also be important to have a checklist—of the kind that I have seen in documentation for court arrangements that might potentially apply across the UK—of things that can allow us to say, in each circumstance, whether a risk assessment has been undertaken in which we have looked for all those things. Of course, physical distancing is important, too; it is a matter of how that can be made to work in practice throughout the court, using a checklist that would allow people to walk through what they anticipate being the normal discharge of court arrangements. It would also allow consideration of what should happen if someone, regrettably, became unwell and how to deal with each of those challenges. Such a checklist approach—which would consider the core infection prevention and control aspects that I have just outlined—would be very important.

I have not yet covered the protection of those members of society who are more at risk. All of us have become familiar with the concept of shielding, and some individuals need special consideration. Because of their underlying medical condition, it may not be wise to take them into the court process. That might make things immensely complicated, and the matter could perhaps only be approached on an individual basis, given the information that might be available on each individual. Nonetheless, it is an important consideration.

**James Kelly:** You said that individuals should not go to court if they have symptoms. As we know, people can have the virus without displaying symptoms. Do you not think that testing needs to be extended to cover everyone who goes into court?

**Dr McMenamain:** Testing is certainly a complex area. You are right: we are identifying, particularly among the elderly, some individuals who may be pre-symptomatic or who have so few symptoms that they are deemed to have none—they are asymptomatic. The science on that is emerging, and there is no recommendation that testing of them be a requirement.

There is no requirement for anyone to be serially tested—that is to say, tested once and then, perhaps a week later, tested again. That is in recognition of the fact that we must have a very good public health reason, in any setting, for testing. As the technology changes and as we move to antibody testing, potentially, in the future,

I am sure that that position will be kept dynamically under review.

There has been speculation about whether lateral array devices—which in simpler parlance might be thought of as being like pregnancy testing sticks—might be used to test a blood drop, to see whether someone is immune. We are looking to the future for those important developments, but we are not currently able to employ that technology locally.

At the moment, all that we have are the swab tests, which we routinely use. We know that, when we test a person, we get a positive or negative result of whether they are infected at that time. However, as you have outlined, a person might go on to develop symptoms, or they might have been infected in the past. All that swab testing tells us is whether a person is infected at that point. As the new tests are developed over time, perhaps we can use that technology to its best advantage. However, currently, there is no recommendation about the testing of individuals to allow them to participate in the court process.

**John Finnie (Highlands and Islands) (Green):** I am a great fan of the use of simple parlance. What is the current thinking on how contagious people who are not displaying any symptoms may be?

**Dr McMenamin:** It is difficult to be concise about the science in such a difficult area. The majority of risk in the population appears to be related to individuals who are symptomatic. A person who is symptomatic and who is coughing can easily spread the infection to others. That is reflected in the increasing headlines that we see in day-to-day life about the R number, which is the reproducibility of the infection and how easily it is able to pass from person to person.

In general, for an individual who is infected with a virus to pass it on, the more efficient they are at that transmission, the higher the R value will be. Most people are able to pass on the infection and can demonstrably do that whenever they are coughing respiratory droplets. They contaminate their loved ones and those they are closest to. The infectious droplets can also contaminate work surfaces and so on.

People who are asymptomatic appear to be less likely to pass on the infection, in terms of biological plausibility. If a person is not coughing, they have a limited opportunity to pass on the infection to other people. It is not that they have no potential to do that, but they might have reduced potential to do that.

Unless a person is in very closed environments, such as care homes, we do not, thus far, have good evidence on the contribution to the overall numbers and the spread of the infection. We have

seen recent examples of the infection being very difficult to manage in a care home setting. It seems likely that, in such closed settings, where people are together day and night for long periods, there might well be some opportunity for transmission. However, within the general population, most of the risk is associated with people who have respiratory symptoms and are coughing.

**John Finnie:** What is the science behind the 2m rule? To what extent does it reduce the risk of transmission where people are gathered indoors for a prolonged period, such as in a courtroom? How long does the virus remain on surfaces in a room, for example?

10:30

**Dr McMenamin:** On the science around social or physical distancing, in the UK we recommend that a distance of 2m should be maintained between individuals, on the basis of what we have observed not just with this virus but with a range of respiratory viruses over the years. If someone who is infected coughs or sneezes, respiratory droplets are produced, which fall from the air quickly—because they are relatively heavy—and land on exposed work surfaces. We have known about the aerobiology for a long time; there are respiratory viruses that transmit through coughing, with droplets falling rapidly and contaminating the area immediately adjacent to where the person was coughing or sneezing.

It is therefore important, first, that someone who is symptomatic should not be in court, and, secondly, that the people who attend are protected, with hand washing facilities and alcohol gel available and suitable, regular cleaning and decontamination of work surfaces following risk assessments in the local environment.

I think that you asked a second question, Mr Finnie, which I failed to write down. Will you ask it again?

**John Finnie:** You touched on it. I asked how long the virus remains on surfaces in a room.

**Dr McMenamin:** The maximum survival period of the virus appears to be 72 hours, but that is on non-wood surfaces—for reasons that we do not quite understand, some surfaces are more conducive to its survival than others.

We know that, as well as the decontamination that we can undertake, a universal disinfectant is available, which we can see out of the window: sunlight degrades the virus, whether it is in the air or on work surfaces. Natural sunlight, by itself, is incredibly good at rendering this virus inert and unable to be communicated to others. A science is emerging behind all that, which perhaps begins to



explain why such infections are more difficult to transmit in the summer than they are in the winter. Sunlight is a natural disinfectant and is reducing the survival of the virus in the environment. In particular, where natural sunlight can get into rooms and on to work surfaces, it has a sterilising effect not just in the air but on work surfaces.

**The Convener:** I will bring in Liam McArthur.

*[Temporary loss of sound.]*

**The Convener:** We have some difficulty in hearing you, Liam. Would you like to start again?

I am going to leave Liam McArthur just now and go to the next question, which is from Alasdair Allan. I will bring Liam McArthur back in after Alasdair Allan.

**Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP):** My question touches on the point that Dr McMenamain made about people with underlying health conditions. You mentioned that we should have a case-by-case approach when it comes to those people attending court. Should people with underlying health conditions have an automatic right to be excused from jury duty?

**Dr McMenamain:** That is something that we give general guidance on, rather than the definitive answer that you are seeking. For instance, we could say that everyone with asthma should not attend court, but that medical condition has a range of severity. Someone who has exercise-induced asthma and only infrequently has to use one of the blue inhalers that you often see people using is at one end of a clinical spectrum of severity. Having a single, blanket exemption is not endorsable from a public health perspective. Consideration should be given by those who know the individual's history best—their general practitioner or a hospital clinician involved in their care would usually be best able to make that determination.

However, there is a general guide. In line with Government policy, a number of individuals have received letters about shielding, which means that they have been identified as having a medical condition that potentially warrants their being given special consideration in ensuring that their safety is treated as being of paramount importance. Inevitably, some of those individuals will have had something that is now completely resolved, so they are now hale and hearty and no longer at risk. There are important exceptions to the general shielding advice—there could well be medical or non-medical reasons why shielding is not applicable to someone at a particular moment in time.

**Dr Allan:** I appreciate your point about the need to be sensitive to individual circumstances. However, if we restart jury trials at this time, what

advice needs to be given to people when they get a letter saying that they have been selected for jury duty? How much of what you have just said needs to be explained to them, given the context of the new situation with Covid-19, so that they understand what the sensible thing to do would be?

**Dr McMenamain:** It is important that those individuals have that detailed discussion on receipt of that information. For those who are involved in the juror invitation process, that may well be something that is reflected in the communication that goes out to jurors. There should at least be consideration of whether it could or should be included in the covering information.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** What is your advice for court users who need to use public transport to get to court? Do you have any specific advice on that?

**Dr McMenamain:** The general advice that is already in place across the community covers the use of public transport. We are encouraging the safe use of our public transport system by the general public. Our core Covid advice offers some commentary on that. Specific advice might also be available from Government sources or from the transport provider.

In overview, we are encouraging people to maintain the best physical distancing that they can achieve and to consider their underlying health issues when they use any transport.

We understand that the Scottish Government appears to endorse the use of facial coverings in some settings—you will notice that I am careful to use the term “facial covering” rather than “mask”. Members of the public can decide whether they wish to consider using facial coverings when they are on public transport. Advice about how best to make facial coverings has been widely disseminated and members of the public can decide whether to avail themselves of it.

**Fulton MacGregor:** Thank you for that response. I appreciate that it will probably cover the majority of people who come into that category.

The courts are unlikely to have come across this next situation so far. What will happen when a witness or a juror, for example, needs to get to court and their only means of getting there is public transport, but they feel uncomfortable and do not wish to use it? I do not expect a full answer to that question now, because it would need to be seen as an issue in the first place, but will specific provisions be put in place to cover situations in which someone says, “I can't get there because I can't use public transport”?

**Dr McMenamin:** I do not think that that is question for me. I can only offer public health advice about the general core issues that should be considered. That is a societal question that is more difficult to address. The personal opinion of an individual is being considered, rather than any hard-and-fast science, and I am talking to the science, rather than to what an individual might feel about things.

However, I sympathise with every individual who is faced with making those important decisions. We will all have to take a balanced or reasoned view in any decision that we have to make about travel at the moment—we do that when we make decisions about whether we want to get food from whichever local grocery provider and when we have to make any other decisions about essential travel. That is part and parcel of how we are looking at a gradual return to a new normal, whatever that might be for our society.

**The Convener:** We will now go back to Liam McArthur.

10:45

**Liam McArthur (Orkney Islands) (LD):** Thank you, convener, and apologies for my earlier error.

Thank you for your evidence, Dr McMenamin. In response to our questions, you have sketched out the sorts of issues that the Scottish Courts and Tribunals Service is having to take on board in facilitating the restarting of jury trials.

To go back to the question that the convener asked at the outset, I am somewhat staggered that, with jury trials now getting under way in England and Wales, there has been no attempt to consider the precautions, safeguards and measures that have been put in place there to provide reassurance around public safety and the safety of all those involved in trials. That might be a matter for the Scottish Courts and Tribunals Service and we are to take evidence from its representative later. However, I cannot understand why Public Health Scotland would not wish to take a look—even if just out of curiosity—at the measures that have been put in place in England and Wales and establish whether they might be appropriate for Scotland's circumstances.

**Dr McMenamin:** The important distinction that you have offered me the opportunity to comment on lies in whether we think that the issue is important from Public Health Scotland's perspective. Of course we think that it is important.

As I have outlined, it is important that those of our Scottish Government colleagues who are making preparations in the background with particular emphasis on the court system are considering the issue. Information was shared with

me and my team at the end of last week—from Friday onwards—so we are aware of a lot of preparatory work being done in the background. I expect that, as that work gets more polished, Public Health Scotland will inevitably be invited to consider it. I expect Public Health Scotland to consider it carefully, in the same way that our colleagues in Public Health England and Public Health Wales have done, and to answer the question, "Do you endorse this?" We in Public Health Scotland would ask whether all the issues for due consideration had been incorporated.

Inevitably, as colleagues across England and Wales have already gone through that process, some exemplary work will have been undertaken. We can see from the checklists and the general supporting information that has already been developed in other parts of the UK that much of that work looks to be of excellent quality. I have no doubt that, when we are asked to consider that information, we will be able to provide commentary rapidly on whether it is potentially endorsable in Scotland. We will turn around the information rapidly once we have considered it.

However, I cannot say that we have duly considered the information until we have seen that final product. We need to see what the output is and then offer that rapid commentary so as to provide reassurance.

**Liam McArthur:** I do not doubt for a second that Public Health Scotland sees the importance of the matter, but I am somewhat surprised that further steps have not been taken to assess what is in place in England and Wales to see what, if anything, is transferable to the Scottish situation.

Is it your opinion that risk assessment is the same for juries as it is for other participants in a jury trial, including the judge, defence counsel and witnesses, or would you envisage there being different, separate risk assessments?

**Dr McMenamin:** Many of the key component steps in any pathway are similar, whether for a defendant, a juror, a witness or a staff member. However, given the unique nature of their position in the court arrangement, I am sure that there are some specific issues for jurors, and it is important that those are addressed. Although there are common features—for example, it will be clear that people should bring their own bottle of water—jurors may have different pathways from the moment that they arrive at court or as they prepare in the background.

A juror arrives at court having considered the issues that are specific to them, as outlined by the court. Where applicable, and depending on local arrangements, they may arrive through a different door or take a different route to get into the court. However, that all depends on the specific

circumstances of each unique court environment. Each setting should be considered, and as long as all the generalities are covered and the unique features of each court are considered, I am sure that the guidance will be well received by all.

**The Convener:** That concludes this evidence session. Thank you for a very worthwhile session, Dr McMenamain.

This is an important issue, in which the safety of everyone who participates in the court process, whether they are a witness, a defence agent, an accused or a victim, is paramount. Like other committee members, I am somewhat surprised and disappointed that you have not been contacted directly for your advice.

Although I think that you have more or less provided the information that we have sought, I am grateful for your undertaking to provide additional information. If we have further questions, once we have considered the evidence, we can come back to you.

I am thinking in particular of whether Public Health Scotland might consider being a little more proactive. I totally take on board the fact that checklists on the important things to consider and the scenarios that might come up are available from Public Health England and Public Health Wales. You will be able to consider all eventualities, such as a juror or someone else becoming ill. I take on board the fact that you have looked at that advice and that it is a developing situation. I also take on board what you say about shielding. However, instead of reacting to a checklist, would you think about liaising with the Scottish Government and having a more formal—or informal—discussion with it, because that is often the best way to develop policy?

Thank you for taking part in the meeting. We now suspend briefly. When we resume, we will hear from our next witness.

10:54

*Meeting suspended.*

10:58

*On resuming—*

**The Convener:** I welcome everyone to our second evidence session. We are joined by Eric McQueen, who is chief executive of the Scottish Courts and Tribunals Service. I invite Mr McQueen to make a short opening statement.

**Eric McQueen (Scottish Courts and Tribunals Service):** Thank you, convener, and good morning, members.

I will be brief, as you have asked, but I wanted to say that that was a fascinating session with Jim McMenamain from Public Health Scotland. I assure the committee from the outset that Public Health Scotland guidance is our authoritative bible on every part of the work that we are doing around this issue. All our internal and external guidance, the policies that we are putting in place, and decisions on who appears in court and how our courts operate are based on Public Health Scotland guidance. That is our checklist for every single step and decision that we make.

11:00

Public Health Scotland is no doubt under enormous pressure and its resources are vastly stretched. Sometimes communication is not great, but one of its members—Colin Ramsay, who is a colleague of Jim McMenamain—will be working with us. He has been invited to be on Lady Dorrian's working group on jury trials, and has accepted. He would have been at the first meeting on Friday, but a crisis emerged in Public Health Scotland. He will be on the working group and assessing all the work that we go through to develop the framework of the arrangements that we put in place to return to jury trials. I want to reassure you that there may have been a communication issue but we are working very closely with Public Health Scotland, which will be a formal part of the working group, assisting us and ensuring that what we put in place adheres to its guidance.

This may be an obvious statement, but coronavirus has had the biggest impact that we have ever seen in the court system in living memory, not just in the speed and impact of the lockdown but in the specific on-going issues—in particular, social distancing—that could be with us for a significant time. We recognise that we are looking at a new and different court service that will have to be much more digitally enabled, with a big reliance on digital hearings and virtual courts being important to that. We are already seeing significant developments in those areas.

Between 400 and 1,800 people have been in our court buildings each day, which will no longer be acceptable. How to deliver business in a different way in the coming months and years is part of our work. This is a wicked problem, which we might define as one to which there are no easy or simple answers. We will have to test and try things, and we will have to be prepared to adapt and base our decisions on the latest scientific advice from Public Health Scotland. That is exactly what we will do in the coming months.

There needs to be real openness. The cabinet secretary kicked that off with his round-table discussion, which members of the Justice

Committee took part in. Absolute transparency and an open say in discussions with justice organisations, MSPs and the legal profession is the only way to get to a proper solution, and that is very much the direction that the Lord Justice Clerk wants the working group to take. Everyone has a commitment to try to get the best solution, to test out different approaches and to accept that there may well have to be changes as we learn and adapt over the coming months.

That is all that I will say at this stage; I am happy to take questions.

**The Convener:** Thank you, Mr McQueen. We now move to questions, with a reminder to allow broadcasting staff a few seconds to operate microphones before beginning to ask a question or provide an answer.

I will ask the first question. On 20 April, the Justice Committee received a response from the Scottish Courts and Tribunals Service to its letter asking, among other things, what steps the SCTS was taking to tackle the Covid-19 emergency. Following the round-table discussion on jury trials, on 21 April the cabinet secretary made a statement to the Scottish Parliament outlining options that the Scottish Government was focusing on for jury trials that included social distancing. That was more than three weeks ago. Other than the establishment of the Lord Justice Clerk's working group, to which you have referred at length, there appears to have been little progress. To give reassurance that the SCTS has not been dragging its feet on resuming jury trials, can you outline what action and, perhaps, practical measures the SCTS has taken since way back on 21 April?

**Eric McQueen:** There has certainly not been any dragging of heels whatsoever. It is worth rewinding a little bit. Back at the very start, there was universal agreement that, in the current lockdown period, it was completely unrealistic for trials to proceed, which I think was widely accepted across all organisations.

Over past weeks, there has been quite intensive work—as you have said, perhaps behind the scenes and not in the public arena—to identify the major challenges for getting jury trials back up and running. Significantly, that will be about how we redesign our accommodation and buildings to manage what will be a growing volume of work over the coming years. We have been working closely with our academics and space planners and looking at Public Health Scotland guidance to redesign a court system that will allow jury trials to run. With social distancing, we reckon that our capacity will be reduced to about 30 per cent of what it normally is.

The traditional design of our courtrooms will not allow a traditional jury trial to take place with social distancing, so we are looking at how we can use them in a different way. There is no way that we can hold a jury trial in one jury room, so we are looking to see whether we can use two or three rooms in a court to do that. Perhaps there are different ways of involving a jury and perhaps we can spread the jury members around the court building so that they use spaces that are currently allocated for the public to participate in the jury system.

A lot of work has been done on social distancing and the measures that we would have to have in place to allow jurors to come back into the buildings and make trials operate. Our work tells us that the capacity that we will have for jury trials will be significantly less than we have at the present time. However, please be assured that we are not dragging our heels, as intense work is going on in the background to ensure that we have the right plans in place to allow jury trials to return in a safe way, particularly for jurors, who will be coming into a different and uncomfortable environment.

**The Convener:** I suppose that there is some frustration that, during that three-week period, the working group in England and Wales has got trials up and running in different parts of England and Wales, whereas we are just looking at the establishment of a working group.

Once the working group has reached its conclusions, what are the next steps? In other words, who will approve its recommendations or proposals: the SCTS or the Scottish Government? The SCTS has independent operational responsibility for courts but, ultimately, who will make the decision as to when jury trials can resume?

**Eric McQueen:** The decision on when jury trials resume will be made by the Lord President. It was the Lord President who ceased jury trials when we moved into the lockdown period, he will bring them back again and, primarily, the working group will report to him.

I expect that we will get consensus from the working group participants on the approach and design for moving back to holding trials, and I imagine that issues will come out of the working group that require legislative change. For example, there might be issues about how we ballot jurors, and there might be further discussions in the Government about the size of juries. Some issues will come up that will be matters for ministers and the Scottish Parliament, if they involve legislative change.

The key priority of the working group is to work out how we bring back jury trials in a safe manner in the current environment for all participants.

**Rona Mackay:** Good morning, Mr McQueen. I want to know a bit more about the jury trial working group. I appreciate that it might be difficult for you to say at this stage, but when do you expect it to report back, even if it is just an approximation?

Following consideration of the discussion paper, the group indicated that it would be looking at four options. You spoke a bit about operating from existing premises, which was one of the options. The other options were smaller juries; measures to increase capacity to deal with the backlog when the lockdown restrictions are lifted; and increasing the sentencing powers of sheriff courts for summary and solemn cases. Is the working group looking at any of those options in particular? What progress been made?

**Eric McQueen:** I will start with your kick-off point about the working group. Lady Dorrian has described it as a short-term working group, which is about injecting pace and energy to get to a new position as soon as we can. When the Government document came out, our estimation was that jury trials would be unlikely to start in significant numbers until August or September. Our aim is to get a small number of at least pilot jury trials up and running in the early part of the summer.

The working group will meet weekly—the first meeting was held last Friday and the next one will take place this Thursday. Its aim is to come up, in a few short weeks, with proposals and recommendations on how we can at least start to introduce the first jury trials in a relatively short space of time.

The scope of the working group is look at how we get trials up and running in the current circumstances, given the constraints. The major issue is what Rona Mackay described as court facilities and social distancing. The group has already looked extensively at architect-designed plans and what they would mean for social distancing. It is looking at a range of issues around how we look after and cater for the jury; access routes through the building; and alternative accommodation for the jury retiring room.

The group is also looking at the potential for juries to video in from a different location rather than necessarily being based in the courtroom. It is looking extensively at everything to do with court facilities and social distancing.

The issue of trials with very small juries will come back to Parliament in legislation; there will be different views from participants, which may depend on what basis smaller juries might be

used. Lady Dorrian's working group is considering whether, at a practical level, smaller juries may mean that we could run more jury trials. For example, if there are only seven jurors, a wider range of courts may be available for use, as some courts can accommodate seven people where they could not accommodate 15. That might allow us to work through the backlog, which is clearly an issue, at a quicker pace.

The measures that are taken to increase court capacity will be critical for jurors. In normal circumstances, where there was a backlog we would simply introduce more courts or staff or bring back retired judges, and we would do things more quickly. In the current environment, that approach is not feasible. The working group is looking at other things that we could do to accelerate the process. For example, could there be much wider use of pre-recorded evidence? When evidence is taken from vulnerable witnesses, it is recorded in advance. Could that approach help to shorten or reduce the length of trials? The working group is looking at that.

Sheriff sentencing powers are another political issue that will come back in legislation. The working group may have differing views on that, but it will be looking at the operational impact if there is any change. For example, would we be able to move a proportion of cases from jury trials to summary sheriff trials, or from the High Court or sheriff and jury trials? The group is looking not at policy or the legislative implications but at the operational implications and what any such changes would mean for getting jury trials up and running again.

**Rona Mackay:** Over a month ago, you took part in the committee's round-table session, and you will therefore be aware of the concerns that organisations such as Victim Support Scotland, Rape Crisis Scotland and others have expressed about the effect of delays in trials on victims and the trauma that may be caused. Have those issues been actively considered in the jury trial working group's discussions?

**Eric McQueen:** Yes—Rape Crisis Scotland is part of the working group, and it has expressed that view clearly. As with all these things, it is a bit of a two-edged sword. There is genuine concern about delays, which could be quite lengthy if the backlog is not addressed. At the same time, there are significant concerns around the need to ensure that jury trials do not end up being aborted. There is a real risk that a jury trial may start and then, for whatever reason, not continue; the trial would be deserted and the witness would have to come back and give their evidence for a second time. That is certainly a major concern of victims groups and Rape Crisis Scotland in particular.

An interesting issue that was touched on in the round-table session is the jury pool. That will be another big challenge for us. Jurors will come out of lockdown into a very unfamiliar environment, and they will have been socially distancing for a significant period of time, so it will be quite a big step. They may be apprehensive about taking part in the jury system. There will also be major concerns about people who still have childcare responsibilities, people who have underlying health issues—as was discussed earlier with Jim McMenamin—people who are self-employed and keen to get their businesses restarted, and people who are returning to work after having not been working for four or five months.

11:15

There is a range of issues that we will need to think about very sensitively when we start to recommence the process. We need to consider what types of exemptions we will allow to be made, because the last thing that we want to do is bring in jurors who do not want to be there or who are very nervous and uncomfortable. We have to strike a balance, very much on an individual basis, in relation to how we communicate with jurors. We have to understand their personal circumstances and try to ensure that jurors are as relaxed as they can be in what will be very unusual and potentially nervous and apprehensive situations for them.

It is key that we focus on the impact on victims and witnesses. The length of the delay will have an impact, and we must also ensure that, when we start jury trials, we provide a high level of assurance that it is likely that they will run to a conclusion.

**Liam Kerr (North East Scotland) (Con):** It appears to be the case that faster progress has been made south of the border in getting jury trials up and running again. Why is that? What discussions are you having with your counterparts south of the border in order to understand what lessons we can learn?

**Eric McQueen:** When we talk about “faster progress”, we should note that different jurisdictions always do things at different times. The issue is not so much about faster progress or whether measures are right or wrong; people are in different positions. Across the global community, there is a vast variety of positions on jury trials.

England and Wales have got a couple of trials up and running—I think that one started yesterday in the Old Bailey and one started in Cardiff. The aim is possibly to get up to four or nine trials, and those will be in major centres across the whole of England and Wales. At that stage, people will want to pause and think about how they will ramp that

up to what might approach something like business as normal. In a normal month, 1,400 trials are progressed, so having a few trials starting is a good step, but it is certainly not a full restart of the jury process. That is fully accepted.

We have had close discussions with colleagues in England and Wales, and the Lord President has been in regular contact with the Lord Chief Justice of England and Wales. We have had video calls with their operational and health and safety staff, and we will have a video call with them this afternoon to review progress in the first couple of days. We have been sharing with them a vast amount of information, including risk assessments and checklists; the checklists that Jim McMenamin referred to earlier have been passed on from Her Majesty’s Courts and Tribunals Service. There is no doubt at all that closeness and collaboration exist: we will continue to work closely with colleagues in England and Wales as we develop our own ideas and learn from their experience over this week and next week.

**Liam Kerr:** I am grateful for that answer. I have only one more question to put to you. I believe that judges and court staff in England and Wales get a summer break of some description, and that there is a suggestion that that might be forgone. Is there a similar break in Scotland and, if so, are you considering the option to forgo it?

**Eric McQueen:** You will be glad to hear that we are ahead of England and Wales on that issue. In Scotland, as in other jurisdictions, there used to be, in essence, recess periods when the courts would shut over the summer for a significant time. When Lord Carloway became Lord President a number of years ago, he removed those altogether, so there are no recess periods in Scotland. The courts run all year long.

**James Kelly:** Earlier, you said that there is a hope that pilot trials might be able to restart in early summer. What is your assessment of what the backlog of cases might be at that stage? How effective would each of the options that the working group is looking at be in starting to get some traction and getting the backlog of cases down?

**Eric McQueen:** We have been looking at the backlog in some detail. When the Government put out the initial discussion paper, the thinking was that the backlog would be about 1,600 trials by August. Concerns were raised about whether that was an accurate figure and what it was based on.

Once we went into the lockdown period, there was initially a drop in police reports coming through, sometimes by as much as 25 per cent. Over the past weeks, we have seen the level returning to what might be classed as business as normal, before Covid.

Custodies have also dropped to a remarkably low level—about 25 per cent of normal levels—but yesterday we had 296 custodies, compared with 349 on the same day last year, so business levels are now pretty much back to where we would expect them to be. We have had pretty high business levels over the past few years, particularly in solemn cases, which have been slowly increasing.

The predicted backlog of 1,600 cases was certainly realistic three or four weeks ago. If anything, we predict now that the number will be higher. We reckon that the sheriff court and High Court backlog will probably be just over 1,800 by August, and we expect that it will potentially exceed 3,000 by March 2021.

Our basic issue, which is really difficult to get a handle on, is the extent to which we expect social distancing to be in place, and its timeframe. With social distancing in place, our court capacity will be cut to a third of what it currently is. For example, we would routinely have 16 High Court trials running nearly every day of the week. In a socially distanced environment, we will, at best, get five High Court trials running. Our capacity to put trials through is already significantly reduced. If we have challenges with jurors' nervousness, and we are working between three courts rather than in one, that could impede progress and could make things worse.

Realistically, we think that the backlog is what we expected, and that it will increase significantly as we go through this year. We reckon that, by August, the High Court will have 750 cases awaiting trial. Because we are having to reduce the number of courts from 16 to five, we anticipate that the number of cases might increase to about 1,200 by the end of March. If social distancing stays in place in some form over the next year, the number could increase to around 1,700 cases. Even assuming that social distancing ends at that stage, we could still have, in two years, a backlog of approaching 2,000 outstanding High Court trials.

Those figures are incredibly high, but they are indicative of the world that we are living in. Currently, the Crown is indicting about 90 cases per month in the High Court, and about 400 a month in the sheriff and jury courts. The number of cases that are coming into the pipeline is not reducing by any extent. If we are saying that that pipeline will get narrower because we can have only five High Court trial cases rather than 16, the delays will become quite significant.

Options are currently being discussed. It is fair to say that they will, at best, marginally slow the increase in the backlog. They will not reduce it or have any real impact on it. The major thing that will allow the backlog to be addressed will be a

reduction in social distancing. At that stage, there will be more staff and judges in order to deal with cases faster. The things that are currently being discussed are not solutions, and they will certainly not impact on the backlog in the short term, the medium term or the long term. They might marginally slow accumulation of cases.

The figures are not scaremongering. [*Temporary loss of sound.*] Over the next number of years, things have to be based on reality. It is not about rushing into it; it is about accepting that, where we are—[*Temporary loss of sound.*]

**The Convener:** We are having some difficulty with your microphone, Mr McQueen.

I remind everyone to be as concise as possible and still cover everything. That would be very much appreciated.

We will move to James Kelly to see whether he can ask a follow-up question. I hope that Mr McQueen's microphone is still on.

**James Kelly:** You mentioned the importance of the jury pool and the understandable anxiety of potential jurors. Would a robust and extensive testing programme in the court system give potential jurors more confidence about coming forward, in that they could be assured that, as far as possible, the people whom they would encounter would be virus free?

**Eric McQueen:** I hope that you can hear me now.

**The Convener:** Yes. There is no problem, now.

**Eric McQueen:** Good.

I think that testing was well covered by Jim McMenamin. Clearly, we will need to take Public Health Scotland's advice on whether such an approach would have merits and advantages. As Jim explained, the current testing is relatively blunt—a test might tell an individual whether they had the virus on a given day, but I have absolutely no idea what that would mean for days 2, 3 or 4 of a jury trial. Testing might be helpful, but I cannot see how the current test type would offer a material advantage or significant benefit to jurors. However, I have no expertise at all in the area: we will absolutely be guided by Public Health Scotland on whether testing was sensible.

I want to jump back to the conversation about the options that are being considered for clearing the backlog. It is clear that, at best, those options might scratch the surface of the backlog; they might slow its accumulation but they will not address it.

I have to come back to trial by judge. There was enormous opposition to that, particularly from the legal profession, and I understand the points that were made. However, we need to be clear that if

delays are going to continue for a year, or for two or three years, trial by judge is an option that would address the issue—and would do so very quickly. The view has been taken that trial by judge is not completely off the table, but we need to test a number of other options first.

The options will be tested, but our view from the modelling that we are doing at the moment is that they will not have a material impact on the backlog or its accumulation. Unless some radical options are implemented, the backlog will be with us for a long time.

I fully understand the opposition to trial by judge and I fully understand that its use would be a political decision—as it absolutely should be. That is not a decision that should be made by the courts or the Lord President. However, the option needs to stay on the table and to receive active consideration.

**The Convener:** I think that it is fair to say that the committee would be deeply concerned if the assurances that the cabinet secretary gave us were being discounted and jury trials were to be replaced with judge-only trials, in any circumstances.

**John Finnie:** An option that has been discounted is the remote involvement of jurors in trials, by videolink. Will the working group consider whether empanelling of juries—the selection of jurors—could be done remotely?

**Eric McQueen:** Yes, absolutely. That is a good point. I will come to your first question, because there might be more that we can do in that regard.

We certainly want to be able to empanel juries digitally, in advance. At the moment, we write out to about 100 potential jurors, and we anticipate that about 60 will turn up at court to be balloted, with 15 taking part in the trial. Clearly, there is a high risk attached to bringing 60 people into court; we have very little in the way of enabling all those people to maintain social distancing. Therefore, we are looking at how we can change that—and we are looking at the legislative implications—so that the process is more digital, with pre-balloting of maybe 20 jurors, to ensure that we bring in a smaller group before a trial starts. The suggestion is excellent and we are pursuing it.

11:30

To go back to the question on jurors, I note that we are thinking seriously about opportunities for jurors to join the court by videoconference. The initial model was based on pilots in England in Wales whereby, in essence, the jurors were separate from each other, but were coming together through a VC link. We have not ruled out, and have discussed with Lady Dorrian's working

group, a model in which the 15 jurors, as a group, could be in a different location and join the court by videolink. We are keen to develop that, and have been working on it over the past week.

That would, potentially, allow more trial courts to be used as jury courts. At the moment, we reckon that we can only use about a third of them—that is, five. If we had a means of having jurors in a different location, it might be possible to increase the number of courts that could hold jury trials to seven, eight or whatever. We think that there is scope to develop and test that option further, to see whether it would address the backlog more quickly than is happening at the moment.

I want to assure the convener that what I have said about remote-jury trials is my view as chief executive of the SCTS. I am not expressing the views of the Cabinet Secretary for Justice: I am simply pointing out that that is an option that we have put forward. Having remote-jury trials would make a material impact on the backlog. The SCTS does not think that that option should be taken off the table. We might need to come back and consider it, if we find out that the delays in the trials carry on. Ultimately, that is a decision for ministers and, beyond that, it is a decision for Parliament. We fully accept that; it is Parliament's right. I am flagging up only that we still see it as a potential option for if the backlog accrues at the rate that we currently anticipate.

**The Convener:** Liam McArthur is next.

**John Finnie:** May I have another question, please, convener?

**The Convener:** I am sorry, John. I thought that you had had a second question. Please ask your follow-up question.

**John Finnie:** Thank you, convener, and thank you for that very reassuring response, Mr McQueen. I am sure that the committee and the convener will want to be kept up to date on any progress.

I will stay on videoconferencing. The committee has talked in the past about videolinks with prisons, particularly in relation to very short appearances by people who are on remand, and the like. Have you engaged with the Scottish Prison Service about the prison estate's capacity for such technology, or on the potential for an accused person to participate from prison in a trial?

**Eric McQueen:** Absolutely. Those discussions are live and on-going. Through the emergency legislation that came through last month, there is now an option for the accused to be excused from the physical trial, and for the trial to take place electronically.



We are looking at bringing forward pilot projects for criminal business, whereby we would hold the whole trial virtually, with the accused being based in prison. We have had discussions on that with the Scottish Prison Service over the past week.

High Court appeals, for example, started last week in a virtual court. The accused, in prison, comes directly by video connection into the virtual hearing. Opportunities exist: not moving individuals around reduces risk.

In relation to High Court cases, the only challenge is that they can take significant time: a virtual trial in a summary court might last for a few hours and an appeal hearing might last for a few hours. The question that we have discussed with the legal profession is what the implications would be if a trial by videolink lasted for six or seven days, and six hours a day. How would that change the ability to interact? Technically, that is perfectly feasible and would, from an operational viewpoint, make perfect sense. However, there are discussions that we will need to have, which we will have partly through the working group, about the implications. If we could do it, that would be a good practical solution.

**John Finnie:** Thank you very much.

**Liam McArthur:** I am intrigued by the idea that England and Wales are not ahead of us in restarting jury trials but we are somehow ahead of them in terms of cancelling the summer recess.

There is a shared concern about the time that it has taken to make progress on what we all understand to be—in your words, Mr McQueen—a “wicked problem”. Nevertheless, Parliament made its position on judge-only trials absolutely clear during the debate on the first emergency legislation, and that was restated during the round-table meeting that was hosted by the Cabinet Secretary for Justice, so I share the convener’s concern that there are attempts to put judge-only trials back on the table.

You have said that six courtrooms are available for carrying out jury trials. I am intrigued to know which courts have been identified, because I understand that the potential exists for as many as 10 courts to be used. Can you set out which six courts you think would be usable for jury trials?

**Eric McQueen:** Do you want me to set out the six courts?

**Liam McArthur:** Yes.

**Eric McQueen:** Two of them are in the Saltmarket in Glasgow and one is in the Lawnmarket in Edinburgh. There are also the courts in Glasgow and Edinburgh sheriff courts that are currently being used for High Court trials.

I believe that a view was taken in a paper from the Criminal Bar Association that there are other courts in Glasgow that could be used for jury trials. Arguably, that is the case, but we are saying that, for each jury trial, we would need three courtrooms—[*Temporary loss of sound.*]—which are larger and could host a jury trial.

To run a jury trial, we would use three courtrooms, not just one. We would have one courtroom where the trial would take place, where the jury would be spread around the public seating to achieve social distancing. Another courtroom would be designated as the jury’s retiring room, because the jury needs its own legally sequestered room to retire to and make decisions. Another courtroom would be used for the media, victims’ families or any other relatives who were involved in the case. Interestingly, that is the model that is being used in England and Wales—the trials that started yesterday in Cardiff and the Old Bailey are based on the three-court model, which has been through an extensive risk assessment.

The issue that has been raised in relation to Glasgow is that there are some slightly bigger courtrooms, but they would need to be used as part of a three-court pool to deliver one trial.

Please do not think that we are trying to make this difficult or to restrict things. Nothing would give me greater satisfaction than having jury trials up and running tomorrow or having as high a throughput of trials as possible. We are not putting barriers in place by any stretch of the imagination. We want to make sure that we can bring back and deliver jury trials that meet the Public Health Scotland guidance and are absolutely safe for all participants. That will be essential to building the confidence of jurors. If we tried to cram in too much business and failed to observe social distancing measures in our courtrooms, I am sure that my letterbox would be full of letters from MSPs about constituents who were very unhappy with the situation.

Please do not think that we are putting barriers in the way of a return to jury trials. Our aim is to provide the safest and quickest return to jury trials in Scotland that we can.

**Liam McArthur:** Thank you—it is helpful to get that detail. I think that there might be a question as to whether the second and third rooms need to be courtrooms, and there have been questions about the figures that the SCTS has provided on the projected backlog.

I turn to a case under Lord Fairley that, as I understand it, went through the Saltmarket court shortly before the lockdown restrictions were put in place. A juror had to step down, as they had been advised that they had to shield; an expert witness

developed symptoms and had to give evidence by videolink; and jurors were required to socially distance. Therefore, we already have an example of a jury trial that was run in a Scottish court that could provide evidence on the testing of the safeguards that you are talking about. Given that that is the case, why are we not seeing greater progress towards restarting jury trials in Scotland, even if the capacity for that was only limited at the outset?

**Eric McQueen:** There are two points to make in response to that. The example of the case that was heard in the early days of Covid-19 is not a particularly good one, because our understanding of social distancing and Covid-19 are light years on from where we were at that stage. That was in the early days, when there was no real public or social awareness of the issues and no guidance from Public Health Scotland. The trials that we got through then were got through on the basis of our best endeavours, but I do not think that they would meet any of our current risk assessments, given the knowledge and expertise that we now have and the guidance from Public Health Scotland.

In relation to the on-going discussion about why we are not starting trials, it is worth reminding members that we are still in lockdown and that none of the Government restrictions has eased. Everyone involved, including the legal profession, takes the view that we should not contemplate starting trials in the current period. I think that the Glasgow Bar Association said that that would be “reckless”, and that view is universally accepted.

We are doing everything that we can to carry out proper assessments and analysis of space to ensure that we comply with Public Health Scotland guidelines so that we can be in a position to start trials. England and Wales might be a few weeks ahead of us in getting there—all credit to them for that—but this is not a sprint; it is a marathon and the situation will be with us for a long time. If it takes us a few weeks longer to get agreement on safe resumption of jury trials in Scotland, that is a good place to be. Trying to race just for the sake of it will not be an advantage for anyone.

**The Convener:** The next question is from Alasdair Allan.

**Dr Allan:** Convener, please do not take this as a criticism, because I realise that conveners have a difficult task in steering committees while taking the opportunity to put their point of view but, at the end of the previous evidence session, you expressed either disappointment or concern about the fact that the Government had not sought the advice of Dr McMenamin. I want to put it on the record that Dr McMenamin in fact went on to say that advice and information had been provided through what he called the usual channels. As someone who has been a minister, I know that

ministers have to ask questions and seek advice, but they also rely on the advice that is provided as a matter of course. I wonder whether you could clarify that your disappointment was expressed from a personal point of view rather than a committee one.

**The Convener:** I am happy to do that.

**Dr Allan:** Thank you.

I have taken up enough time, so I will ask just one question. Obviously, there is a working group that is looking at four options. Mr McQueen said that there is the potential for a backlog of 2,000 trials. I ask him to elaborate a bit more on his perception of the four options and the impact that they might have on that backlog.

**Eric McQueen:** Yes—four options are being considered. The first is the option of having trials with smaller juries. As I said, a range of views will no doubt come to bear if legislation is introduced on that, and I do not want to get caught up in that today. From my perspective, the advantage of smaller juries would be the potential ability to run more trial courts. If we had to socially distance seven people—if that was the size of the jury—rather than 15, that might enable a wider range of courts to be used.

Equally, smaller juries present the risk of one juror dropping out and trials having to be aborted. At the moment, with 15 jurors, a trial can continue if the jury goes down to 12, so there is that contingency. From an operational perspective, there is a risk with a smaller jury that, if one juror drops out, the trial cannot continue. That goes back to the concerns that have been raised by victims organisations. However, smaller juries might have the advantage of allowing a wider range of trials to take place at any one time, so the option is certainly worthy of significant consideration.

Another option is to change sentencing powers, although, to be honest, that is more marginal and at the edges. It might move a small number of future cases out of the sheriff and jury system and into the sheriff summary system, where cases could be dealt with through trial by judge. That would reduce some of the flow that is coming in, but it would not have a material impact on the current backlog.

Increasing sentencing powers at the top end, possibly to eight or 10 years, would have the practical advantage of moving some cases from the High Court to the sheriff and jury system. Again, the effect of that would be felt more at the edges rather than being substantial. Sheriff and jury cases tend to be proceeded through more quickly, so that might help with efficiency, but it is doubtful whether it would have a material impact on a rising number of cases in the backlog.

11:45

One of the main issues for the working group, and one of the main constraints, is that of social distancing, which we have spoken about extensively. We are in a bit of a dilemma when it comes to the measures to increase court capacity. While social distancing is in place, the courts' capacity to go at a quicker rate is severely limited. In a traditional world, if we had a problem and suddenly had to move out of the court building, we would requisition further courts, deploy additional staff and sheriffs at High Court trials and look at how we could run at a faster pace to reduce the backlog. However, social distancing limits us.

We are keen to pursue the option of having the jury in a different location, with proceedings being videoed into the jury court. That idea has real merit, and we want to develop our thinking on it over the next week to identify whether it could have a significant practical benefit and significantly reduce the existing backlog.

When one puts forward figures, there are always doubts, concerns and sceptics. Our aim is to get some work done on the modelling, which we are finalising at the moment. We want the Scottish Government's analytical service to go through that in some detail. We want that modelling to be publicly available, because we want to be transparent.

When I come to the Justice Committee, I often tend to have a more optimistic outlook on what we can achieve and how we are performing, which is sometimes treated with scepticism. This time, I am trying to be entirely realistic with the committee about the potential impact of the current situation.

We cannot forget that the coronavirus issue affects all the business of the courts. In the coming months, we need to make sure that we still prioritise summary criminal business, which makes up 90 per cent of the business that goes through our sheriff courts. We must do everything that we can to move civil business into a more digital world to allow more virtual hearings to take place. Over the coming year, the capacity of our courts will be incredibly compressed, because only a third of it will be available to us, so we have to find different ways of working.

**Fulton MacGregor:** Good morning, Mr McQueen. You have talked about this already, but could you elaborate on any discussions that you have had with the Scottish Government on the level of additional resources that the Scottish Courts and Tribunals Service might need to reopen courts? What assurances have you had that those resources will be available?

**Eric McQueen:** We have had significant discussions with the Government and colleagues on that issue. It is fair to say that we have not

been offered a blank chequebook, but that the severity of the situation has been recognised. At this stage, we do not see funding or resources being a particular problem.

There is a realisation that the matter needs to be resolved; if that requires an injection of extra resources, I expect that those will be made available. No promises have been made, but it has been accepted that investment will be needed and that resources will need to be made available, depending on what final solutions are put in place.

**Fulton MacGregor:** On a somewhat related matter, what consideration has been given to the other agencies that link in to court business—the medical profession, social work and other agencies—and the pressures that might be on them as a result of the coronavirus implications? Have you given any consideration to how that interplay with the courts might be affected?

**Eric McQueen:** We have given that quite a bit of consideration. A lot of that comes together through the justice board, which brings together representatives from social work, community justice and health to look at the overall impact.

In relation to health, for example, we are thinking carefully about the impact on witnesses and jurors. We want to make sure that, in future, any expert witnesses who are required to give evidence in court are not drawn away from their place of work too much, and that their evidence can be given remotely through videoconferencing with the court. Equally, we will look hard at the levels of exceptions that will be applied to jurors, particularly when they come from a health background. It seems unrealistic for us to take key workers away from their work to be jurors, even for a short period of time.

A lot of discussions are going on in different forums involving people from the key worker sectors, particularly in relation to health and social work and the implications for community justice services.

**The Convener:** That completes our questions and concludes our evidence session with you, Mr McQueen. There will be issues that we will want to follow up on, not least of which is the fact that there does not seem to be a date for the working group concluding. It has had one meeting and several others are planned, and there has been a vague reference to trials starting in August or September, which is many months away in relative terms. It would be useful to get more information on what you referred to as a six-week lead-in time and how the videoconferencing and virtual meetings that you talked about could help with that.

We have covered the fact that in Scotland, happily, the recess issue has been taken care of,

but has consideration been given to holding evening or weekend courts? Given the time constraints, those are issues that the committee might well follow up on, as well as the use of facilities other than courts to spread the jury trial burden.

In conclusion, Mr McQueen, given that you are still not ruling out the use of judge-only trials, I want to leave you with this thought that was in the Scottish Criminal Bar Association's submission:

"a. The commitment of all the various justice delivery partners, including the SCBA, to the resumption of jury trials is best judged by their actions rather than their words.

b. It is easy to identify difficulties within any tough problem. Identifying the difficulties without proposing solutions bears the hallmark of a partner content to allow the genuine efforts of others to fail in the hope that they can get what they have wanted all along. We are heartfelt in our hope that there is no part of that at play in the present difficulties."

I think that that is worth saying, given the committee's frustration at the length of time that has passed, the apparent lack of progress, and the fact that August and September are the only dates that have been mentioned for a possible return to jury trials.

With that, I thank you very much for appearing before the committee. That concludes the public part of the meeting.

11:53

*Meeting continued in private until 12:19.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

---

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

---

All documents are available on  
the Scottish Parliament website at:

[www.parliament.scot](http://www.parliament.scot)

Information on non-endorsed print suppliers  
is available here:

[www.parliament.scot/documents](http://www.parliament.scot/documents)

For information on the Scottish Parliament contact  
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

---



The Scottish Parliament  
Pàrlamaid na h-Alba