FACULTY OF ADVOCATES

SCOTTISH CRIMINAL BAR ASSOCIATION

Response to

CORONAVIRUS (SCOTLAND) BILL

The Faculty of Advocates' Scottish Criminal Bar Association (SCBA) recognises that some emergency measures in certain areas of law, such as child welfare, may be required in the current COVID-19 crisis; and recognises that some short term practical changes in respect of the administration of criminal cases (such as those already instigated by the Lord President) are necessary to meet the temporary challenges created by the effect of the virus.

It will become clear to the reader that we oppose the proposals in Schedule 4 Part 4 (the extension of time-limits by 6 months) and Part 5 (the power of the legislature to allow trials in serious matters, even in the High Court, without juries) and we urge caution in respect of Part 6 (the relaxation of the rule about hearsay evidence).

We respectfully see the sense in the proposals in Part 1 of schedule 4 which relate to relaxation (with safeguards) of the need for personal appearances in court and physical contact with documents, together with the increased use of electronic resources. Parts 2 and 3 do not call for comment from us. No doubt the bodies which represent solicitors can make any suggestions known. Nor do we provide comment in relation to Parts 7 and onwards. Our focus is on Parts 4,5 and 6.

Any changes, however temporary, should not precipitously erode important principles of our legal system which would have the effect of undermining or ignoring the citizens' right to justice.

Such changes should not, at a stroke, remove the fundamental principle of the right of those citizens charged with a serious criminal offence to a trial by a jury of their peers, within a reasonable time.

What is proposed includes attacks on principles that have been built over more than six hundred years and are the very cornerstone of not just Scotland's Criminal Justice System, but those of almost every advanced liberal democracy in the developed world. As such the Scottish Criminal Bar vehemently opposes the main changes proposed by the Scottish Parliament Emergency Bill.

These are, the blanket six month extension of time limits (Part 4), introduction of solemn trials being conducted by a judge or sheriff alone without a jury (Part 5), and the dilution of rules against hearsay in the use of prior statements (Part 6).

The Scottish Criminal Bar Association believes that these measures are premature, disproportionate and ill-advised. They are at best a knee jerk reaction to an as yet unquantified problem instigated by panic, and at worst something far more sinister.

The blanket six month extension of statutory time-limits is not only undesirable but is wholly unnecessary at the present time. We are given to understand that the emergency measures affecting public contact are likely to last between one month and three months. Extensions of time-limits, given that they will include extending the period citizens presumed to be innocent will be held in custody, should be kept to the bare minimum and require justification. What is proposed takes Lord Bonomy's 'Jewel in the Crown' of Scottish justice, the 110 day custody time-limit, and increases it to 293 days, an increase closer to trebling it than doubling it (166%). That would mean an automatic period on remand equivalent to a sentence of just short of twenty months imprisonment, regardless of the eventual verdict.

The present procedures governing time-bars and time-bar extensions provided for by s. 65 of the Criminal Procedure (Scotland) Act 1995 are more than adequate to address the situation. Section 65 allows for the extension of *all* solemn time-bars by the Court on 'cause shown'. It would be inconceivable that any court properly exercising its discretion would not find 'cause shown' for the necessary extension of time-bars in appropriate cases during the current crisis. As a matter of course in recent weeks the Crown and the defence have agreed

time-limit extensions administratively, most often for about three months. That practice, in which each case is considered individually, should stand. It has been shown to work in practice and it safeguards the rights of each citizen affected.

It follows that time-limits are sufficiently flexible as things stand.

For the Scottish Government to attempt to pass the measures contained at Parts 4, 5 and 6 of the Bill (particularly those relating to trial without a jury) within one week of a 'lockdown' being introduced is extremely concerning; and is all the more concerning when no such similar measures are to our knowledge being suggested or proposed in any other part of the United Kingdom.

If, within such a short period of time following the Scottish Government's introduction of the "lockdown" provisions, such measures are deemed truly necessary in order to navigate a route through this temporary crisis, that would indicate far more fundamental problems within the criminal justice system. This would be particularly so given that these measures, in effect, dismantle in one fell swoop more than 600 years of legal principle that sits at the very heart of our modern democracy.

We turn to the removal of the important protection that trial by jury represents. It is somewhat ironic that a modern and forward thinking democratic country which values its traditions and its citizens' fundamental Human Rights (as Scotland properly presents itself to the outside world as being) is considering departing from the jury system, however temporarily, just as other countries not so historically associated with modern democratic tradition and institutions (such as Argentina and Bulgaria) have turned towards a jury system.

We are being asked to believe that these changes to the most serious category of criminal cases are somehow 'necessary' in order for our criminal justice system to function properly. If that is so, then why has no other Western Democracy, including our nearest neighbours, felt compelled to go down the same route?

Even in our nearest neighbour England; a country that, like many others, conducts substantially more criminal jury trials than Scotland; a country where, unlike Scotland, an accused person can elect for trial by jury in relatively minor matters; there is no whisper of a need for such fundamental changes to the right to trial by jury, such is the unassailable importance of trial by jury there. Trial by jury should continue to enjoy the same unassailable importance within the Scottish system of law.

This radical proposal not only affects the rights of any accused person charged with serious offences; but equally affects the rights of every citizen in Scotland.

The selection and use of a jury of fifteen citizens drawn at random from a wider pool brings certain irreplaceable advantages to the administration of justice.

The first is that it represents decision-making on the important facts being made by the society in which they arose. Those fifteen jurors provide an accumulation of life experience which marginalises extreme or unrepresentative views and, through the majority, delivers balanced and rounded decisions on behalf of the society from which its members were drawn. Contrast the rounding and balancing effect of fifteen members of the public, drawn at random, with a jury of one drawn exclusively from the top one percent of earners; likely male; always university educated; and most likely aged between fifty and seventy. There is no moderating influence on that one privileged person's views. He or she would take decisions about events in society far removed from their own life experiences.

There is a reason why all countries with adversarial systems value trial by jury in serious cases.

Although the average citizen may initially think little of the removal of trial by jury; and think that such a measure has little, if any, consequence for them because they are unlikely to find themselves accused of a serious offence, they are mistaken.

They are mistaken because this proposed legislation would deny ordinary citizens the opportunity to be involved in the criminal justice process, whereby they represent the public interest of the People of Scotland, as they have done for centuries.

Juries are often informed by trial judges that they (the members of the jury) are brought together randomly from all walks of life to act as the *judges of the facts* of the case; and that they are brought together to do so because the decision as to the guilt or innocence of a fellow citizen in relation to an allegation of serious criminal wrongdoing is too serious a matter to be left to the judgement of a judge alone.

They are told that for a sound reason. If such matters were deemed too important to be left to the judgement of one person prior to the onset of the COVID-19 pandemic, why are they now no longer too serious to be left to the judgement of a single person?

These proposals will mean that we would descend in one fell swoop from a jury of fifteen to a jury of one, and that jury of one would also decide matters of law and sentence.

That, for all intents and purposes, amounts to a form of summary justice. Whilst there is undoubtedly a place for that in dealing with relatively minor matters there should be no such place for it in relation to solemn procedure.

To allow these proposals would result in summary trials being conducted in the High Court of Justiciary in all but name; and would amount to no more than Justice on the cheap.

Furthermore, these proposals, covering the most serious offences such as murder and rape, do not allow for the accused to have any say in whether he is to be tried by jury or not.

These proposals are yet more difficult to comprehend and accept when one considers that not even during two World Wars did the then UK government see fit to interfere with the principle or tradition of trial by jury, the most drastic change being that during World War II the jury size was reduced to seven.

These wars lasted 4 and 6 years respectively, not for a matter of weeks or months as COVID-19 is predicted to last.

Indeed, the situation at the end of World War 1 was compounded by the Spanish Flu Pandemic of 1918. This is the global health emergency that is most comparable (and most commonly compared) to the current crisis presented by COVID-19; but it is noteworthy that no attempts were made to abolish or even suspend trial by jury as a result of that pandemic in 1918.

The only instance of the abolition or suspension of trial by jury in United Kingdom history was the introduction of 'Diplock Courts' in Northern Ireland in the 1970s. However, SCBA also notes and submits that the situation or problem that those measures were instituted to address bear no comparison to the present emergency; as the rationale behind 'Diplock Courts' was to avoid the perceived danger of (i) perverse, politically motivated jury verdicts; and (ii) jury intimidation and physical threat to jurors in cases where alleged members of armed paramilitary groups faced trial for alleged terrorist or 'political' offences. No other forms of alleged criminality were subject to the Diplock procedure. Notwithstanding the undoubted issues caused by the current COVID-19 pandemic the current situation cannot be equiparated with the discrete political situation in Northern Ireland in the 1970's that gave rise to the Diplock procedure.

In trials proceeding under the "Diplock" procedure there was at least the added safeguard of an absolute right of appeal, and that right of appeal extended to both matters of fact and law. That safeguard was referred to by Lord Kerr in the recent case of Hutchings [2019] UKSC 26 when he highlighted the fact that in the cases conducted under the "Diplock" procedure:-

"a defendant upon conviction, was entitled to an automatic right of appeal, not only on points of law but on the factual conclusions reached and inferences drawn by the trial judge"

It is concerning to note that section 11 at Part 5 of the Bill is silent on the matter of appeal. This being so an accused in Scotland tried under the proposed procedure has no such safeguard, and if he wishes to appeal a conviction the only ground he can do it on is that of a miscarriage of justice, based on a matter of law and for which he will have to seek leave to appeal. In attempting to do so, an accused will have to overcome the not inconsiderable hurdles of the sifting process.

If this is an error in drafting it should be corrected and if it is not an error in drafting the position remains the same; it should be corrected.

The Scottish Criminal Bar Association are also concerned at the terms of s11(4)(b) of Part 5 which states

> 11.(4) For the purposes of any trial conducted by virtue of sub-paragraph (1)-
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> (a) the court has all the powers, authorities and jurisdiction which it would have had if it had been sitting with a jury, including power to determine any question and to make any finding which would, apart from this paragraph, be required to be determined or made by a jury, and references in any enactment or other rule of law to a jury or the verdict or finding of a jury are to be construed accordingly,
>
> (b) the judge conducting the trial may make such orders as the judge considers necessary for the fair and efficient disposal of the case.

What "such orders" does Parliament have in mind? It is entirely unclear from the terms of the drafting and has the potential for wide reaching interpretation, including the bestowing of unfettered and unintended powers upon the trial judge.

Lastly, we consider the proposed dilution of the rules against hearsay evidence.

What is proposed is an explicit extension of the exceptions to the rule that hearsay evidence (evidence of what a witness said to someone else, rather than in court on oath) is not admissible in criminal trials. We need not go into the reasons why our courts value the sworn testimony of a witness ahead of second hand recitals of what that witness said previously. Currently Section 259 of the Criminal Procedure (Scotland) Act 1995 provides at S. 259(2)(a) that the court will admit as evidence the statement of a person who is unfit or unable by reason of bodily or mental condition to give evidence in any competent manner.

Such a state of unfitness or inability is ordinarily vouched by a suitably qualified professional. That vouching is exhibited and either accepted or debated before the judge decides the matter. Our concern over the proposed extension of the classes of exception to the rule against hearsay relates to the rigour with which the proposed extension will be enforceable.

The proposed extension would involve any witness for whom *"it is not reasonably practicable, because of a reason relating to coronavirus, for the person who made the statement to attend the trial or to give evidence in any other competent manner"*.

Our issue is not one of blanket opposition. Rather it is one of doubting practicability. What are the limits on 'a reason'? How would one vouch such a condition? Of the established exceptions, if a witness is dead then a death certificate is expected. If they are ill or incapable then a doctor will certify that. If it is disputed then further expertise is brought in to aid the decision. If they are furth of the land and beyond persuasion to return then official witnesses will attest to the efforts made. Abandoning the hope of sworn oral testimony is only done as a last resort, knowing that it is at the expense of the quality of that evidence. It is not a step taken lightly. It requires a secure foothold, in the form of objective proof.

If a witness simply refuses to attend court or engage in video linked communication out of hysterical fear of infection, or self-certified isolation, would that refusal be sufficient to allow the immediate descent to the poorer form of evidence that hearsay represents? As it stands this proposed amendment could be advanced by central witnesses in murder or rape trials without any obvious form of objective assessment, and justice would be the poorer for it.

We urge that care is taken if the rule against hearsay evidence is to be varied as proposed, in that thought is given to how such an important step is taken securely and robustly. It cannot rely on the whim of the witness. Experience suggests that if it does, advantage will be taken of it.

POSSIBLE ALTERNATIVE SOLUTIONS TO JURYLESS TRIALS

Had more thought gone into it, then other solutions to any potential problem caused by the number of trials requiring to be adjourned presently could be found without the need for such seismic change to our system.

It is recognised that given the present crisis an accused person may require to be locked up for longer than otherwise would be the case; that is an understandable consequence of these unforeseen and exceptional times. However, it is one thing extending or modifying current practices; - it is quite another abolishing, however temporarily, principles at the very heart of our criminal justice system.

This is akin to rewriting our criminal justice system without any opportunity for proper debate and consideration.

Furthermore, if the proposal is intended to allow trials to proceed during this crisis then although potential jurors would not be at risk of infection the same cannot be said about those, including witnesses, court practitioners and court staff etc who would still necessarily be involved in the trial process.

There are other ways of combatting the problem which at present appears to be a potential backlog of approximately 3 months' worth of trial business in the solemn courts. For example, more temporary High Court judges could be appointed and in addition to this we could do as they have done in the National Health Service and bring out recently retired judges and/or extend the tenure of those who are due to retire.

Where are these additional trials to be accommodated in relation to High Court trials?

The answer to that is relatively simple, we could temporarily recommission many of the sheriff court previously decommissioned by the government. It would be most unfortunate if a consequence of shutting these court was the erosion of one of our most fundamental legal principles, that of trial by jury.

Recommissioning these courts is one option, but that may not be necessary because we already have the traditional and ancient facility of sending the High Court out "on circuit" and the High Court could return to courts that were until fairly recently used for this purpose. Sheriff Courts such as Paisley, Kilmarnock, Forfar, Dumfries, Perth, Dundee, and Inverness. The re-introduction of the High Court to these towns and cities, would once more allow their citizens, denied when these courts were taken off the circuit, the opportunity to participate in the criminal justice system.

As well as that we could simply make better use of courts still on circuit, but no longer fully utilised such as Stirling.

Trial by jury for the most serious charges is not simply a fundamental right of an accused person to be tried by his peers, it is also a fundamental right of the citizens of Scotland to try their own.

It is appreciated and recognised that once the crisis subsides people will be anxious to get back to work and full-time employment. However there is nothing to prevent, in the short term, juries being made up of retired people, many of whom are still relatively young and able, or by those, who for whatever reason are unable to work but still have something to contribute to society.

These proposals do not simply discriminate against and strip away the rights of the accused they strip away the rights of every member of society to participate in the criminal justice system, thereby participating in the democratic process of which trial by jury forms an integral part.

Perhaps more importantly these proposals attack and erode the very principle which sits at the very cornerstone of what, for the moment at least, sits and remains at the very heart of our very proud and unique legal traditions.

Our considered opposition to the measures, especially trials without juries, will come at personal cost to each of our members. The loss of work that a substantial period without trials will represent has an acute impact on every member of the Criminal Bar, each of whom is self employed. It would no doubt be selfishly convenient for our membership to welcome the early resumption of trials in the manner proposed. Yet we do not, and that should underscore the importance of the matters of principle set out in the preceding paragraphs.

Accordingly, the Scottish Government are urged to reconsider the terms of the Bill.

Faculty of Advocates

SCBA

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