

OPENING OF THE LEGAL YEAR 2020/21

Welcome

This is the opening of the legal year, here, in court 1 of the Court of Session in Parliament House, Edinburgh. The ceremony is taking place in a much less densely populated court, for reasons of which we are all too aware. We do have representatives present from each of the constituent parts of the legal profession; the Faculty of Advocates, the Law Society, the Society of Solicitors in the Supreme Courts and the Writers to the Signet. This important event in our legal calendar is being live streamed for the first time. I welcome all those present including the Lord Lyon, Lord Advocate and Sheriff Principal Mhairi Stephen and those watching from elsewhere to our proceedings.

On the bench, we do not have the usual hail of 15. We do have to my right, Lady Dorrian, the Lord Justice Clerk. On my left is Lord Menzies and the Reverend Calum Macleod, the Minister of St Giles. The Kirking of the Court will not be taking place in St Giles this year, but the Minister kindly accepted the court's invitation to attend and preside over the closing part of the ceremony.

Since becoming Lord President, I have used this occasion to review the year and to preview future important developments. This has, in the past, involved describing the steps being taken along the slow path of modernisation. This would still be an apt description of the first six months of the legal year. It truly has been a legal year of two halves.

September to March

It will come as no surprise that what I was going to say will be different in character. It is worth, however, setting out some of the pre-planned, pre Covid changes.

The first has been the continuing rollout of the Integrated Case Management System in the Court of Session. It is already used to aid the management of civil business in the Sheriff Courts, the All Scotland

Personal Injury Court and the Sheriff Appeal Court. The capability of Civil Online, used in simple procedure cases, has been improved. Firms should now be able, subject to initial limits on numbers, to transfer simple procedure applications from their internal systems directly into Civil Online.

As of last week, new personal injury actions in the Court of Session will be processed from end to end through ICMS.

The Vulnerable Witnesses Act, the substance of which was largely generated by the Scottish Courts and Tribunals Service's (SCTS) Evidence and Procedure Review, is now in force. The benefits, in terms of the experiences of children and other vulnerable witnesses, as well as the reliability of their evidence, are now well known.

In terms of the SCTS estate, unfortunately the official opening of the Inverness Justice Centre, which was scheduled for March, was postponed. The court nevertheless did open. It served as one of the 10 hub courts that were part of the early response to the virus. This is the first purpose built Justice Centre in Scotland, with six digitally equipped courtrooms, including two jury courts, a child and vulnerable witness evidence suite and tribunal hearing facilities. In addition, Kirkcaldy now has long overdue new criminal courts and a custody suite near the sheriff court building but above the police station.

March onwards

In last year's address I said that there was a long way to go in achieving online processing across all courts and tribunals. Online could not be viewed as an option or alternative to the courts system; it was the future of the court system.

As the seriousness of COVID-19 began to be understood, SCTS started to consider the potential impact of an outbreak in Scotland. There had been no comprehensive contingency plan designed to cope with restrictions imposed by the Government in the wake of a pandemic. One would have to be developed; and quickly. It was clear that

digitisation, both of hearings and documentation, would be of the essence.

The immediate task, broadly put, was simply to stop all in-person business. On 17 March the decision was taken to halt all new jury trials. Six days later the country was put into lockdown. Only essential business could proceed. All but 10 hub sheriff courts were closed. That, then, was that.

Criminal

In criminal proceedings, the pre-existing 5 year digital Strategy had planned the development of a Digital Evidence Sharing Capability (an evidence vault) and high-quality video links, with a view to achieving full digital case management and online hearings in summary criminal trials and custody courts.¹ In response to COVID-19, the first virtual criminal trial across the British Isles took place, as part of a pilot, on 9 June, in Inverness. Its success led to Sheriff Principal Pyle's recommendation² that virtual trials should become the default in summary crime where appropriate. Initial steps were taken to ensure that accused with suspected COVID-19 were not being brought to court. Virtual courts, which involved accused appearing from custody, were operated. A pilot is now taking place in Glasgow under the auspices of Sheriff Principal Craig Turnbull. Sheriff Principal Aisha Anwar is supervising innovative procedures in South Strathclyde. There have been some issues in relation to communication between accused and their agents. Improvements are needed, but these hearings can and do work.

As physical distancing emerged as one of the key protectors against the virus, the practical operation of jury trials presented itself as the least tractable issue. When the Government was telling the public not to leave the house other than for a daily hour of exercise, and as of now prohibits people from having visitors, it is unrealistic to expect jurors to

¹ *Ibid*, pp 7-10.

² [Interim Report to the Lord Justice General by Sheriff Principal D C W Pyle on the Summary Criminal Virtual Trial Pilot: The Way Ahead – A Strategic Plan](#), 25 June 2020.

attend courts in the numbers required. A Working Group led by Lady Dorrian, and representing all relevant perspectives, was called upon to consider possible solutions. They have found one. After initial trials of remote juries in different courtrooms in Glasgow and Edinburgh, juries will now be able to sit and deliberate in a multiplex cinemas. The first trials will get underway from today in Edinburgh and from 12 October in Glasgow.

This is a model that will be replicated at various sites around the country for both the High and sheriff courts. This has required a considerable amount of technical work, not inconsiderable expense, and most of all dedication from the Working Group and the SCTS staff members tasked with its implementation.

Civil

In civil cases, online or telephone hearings have been rapidly accelerated across all courts. Three weeks after lockdown, the Divisions of the Inner House and, shortly thereafter, the High Court's criminal appeal benches, were back up and running at normal capacity using the Cisco WebEx platform. Proofs in the Court of Session have recommenced. Some have been conducted remotely, others in person and yet more using a blended approach. Remote hearings have taken place in Sheriff Principal Mhairi Stephens' All-Scotland Sheriff Personal Injury Court³ and in some sheriff courts,⁴ including proofs in family cases. Fatal Accident Inquiries are taking place remotely. As illustrated by Sheriff Principal Pyle's tragic Puma case.

In normal circumstances, these developments would have entailed detailed consultation, tenders, trial runs, pilots, user-surveys and staff training. What previously would have taken years was done in weeks.

Tribunals

³ [Business in the All Scotland Sheriff Personal Injury Court](#), 15 May 2020.

⁴ [First Virtual Sheriff Court – Inverness](#), 10 May 2020.

Much of the business in the Tribunals was able to continue through the use of the relatively simple technology of telephone hearings. A major priority was to ensure that those cases in the Mental Health Tribunal that are subject to statutory time limits could be conducted, and this was achieved with SCTS staff based in Hamilton managing hearings remotely. Not all Tribunals business could take place during the lockdown period and work is well under way to bring the cases that had to be paused back on stream.

The Coming Year

Those seeking an indication of when and to what extent things may return to normal, will be disappointed. It seems likely, in light of statements by both the Prime Minister and First Minister that all of the current remote systems will subsist for the coming legal year. Even after a vaccine is developed, when sports stadia are full and the pubs are open after 10.00pm, courts and tribunals will not return to the way things were.

Trial and error has been imposed upon us, and through it we have learned valuable lessons about what works and what does not. We have, in an extraordinarily short period, made huge advances in the modernisation of our practices and procedures. We have moved at great pace, meeting the challenges imposed by the pandemic to adjust, adapt, learn, respond and innovate. We have not always got everything exactly right first time. This is not easy. It is an inevitable consequence of such rapid change that the new ways of working will require to be improved, expanded and amended.

We have been presented with an opportunity as well as a challenge. It has been demonstrated that, with the right level of proactive collaboration and consultation, we can very quickly effect a significant improvement in the range and quality of the services provided by the courts and tribunals. As the virus abates and eventually disappears, we will need to consider how best to take advantage of the advances that have been made, and how to build – constructively and in collaboration with the professions and other interests – a digitally-

enabled courts and tribunals service that provides justice in a manner responsive to the needs of modern society.

At a time of impositions on our basic liberties, it is vital that access to, and trust in, the courts is preserved. Open justice has scarcely been more important, but has never been more difficult to achieve. It is not possible to grant to the general public physical access to courts and tribunals. SCTS is working hard to ensure that journalists, as observers and reporters to the public, continue to have access and to assist the public at large to identify and join remote hearings. The presiding judge will always determine whether proceedings can safely be broadcast in the interests of justice, but the number of remotely accessible hearings will increase.

Thanks

For their help and support, I thank all of my judicial colleagues, whom I have not already mentioned, including Sheriff Principals Duncan Murray and Marysia Lewis.

Lady Smith would ordinarily be here on the bench, but to her I wish to extend a special thanks and appreciation for her six years of distinguished service as the first President of Scottish Tribunals. Her legacy is a well-functioning unified system of devolved tribunals, now operating under the auspices of SCTS. Lord Woolman, who was welcomed into the Inner House earlier this year, is the new President.

I thank the SCTS chief executive, Eric McQueen, the Director of the Judicial Office for Scotland, Tim Barraclough, and all the other staff working here in Parliament House, in the High Court Centres, sheriff and justice of the peace courts, the Office of the Public Guardian and Accountant of Court and the Tribunals Centres throughout the country for their ingenuity in developing new ways of processing business, and for their unstinting commitment and professionalism in supporting the judiciary and continuing to serve the people of Scotland in these difficult

times I also welcome our new Principal Clerk, Pam McFarlane who takes over from Gillian Prentice, who, after a long and distinguished career, is about to enjoy a well deserved retirement.

This has been a legal year like no other, but everyone's determination to maintain access to justice in the most challenging of circumstances has been remarkable.

I wish also to thank all of you in the legal profession at large for your forbearance as the modes of Scottish justice have adapted. In particular, I would like thank those representatives of the Faculty and the Law Society and all those members of the professions whose wisdom and practical knowledge have been indispensable in developing achievable solutions to the complex problems presented by Covid-19.

QCs

It is now my pleasure to introduce those who have gained the rank and dignity of Her Majesty's Counsel. All of you will be major assets to the senior bar.

Mr McCallum, you have substantial experience in criminal law, both from your practice as an advocate and at different times a defence solicitor and procurator fiscal depute. You served first as Advocate Depute and then a Senior Advocate Depute for the Crown, before returning to defence practice to work on a variety of complex matters.

Ms Charteris, after serving as legal assistant to Lord President Rodger, you developed a varied civil practice in private and public law at the Bar. Your expertise in the public law field led to your appointment as a standing junior to the Scottish Ministers. You have served as an ad hoc Advocate Depute, and carry out important work as chair of the Scottish Social Services Council's Fitness to Practice Panel.

Mr O'Brien, in your broad commercial and intellectual property practice, you have appeared at all levels of the courts system, including

on a number of occasions as lead counsel in the Inner House. Your advocacy in the Commercial Court in particular has been complimented.

Mr Dawson, you have developed a broad civil practice in which you have demonstrated your advocacy skills at all levels of the court system. Your prior involvement in Lord Penrose's contaminated blood inquiry will stand you in good stead for your important work as lead Counsel for core Scottish participants in the Infected Blood Inquiry.

Mr Smith, you achieved distinction in the complex areas of corporate and regulatory crime, an area in which many dabble but few excel. You regularly appear in complex Fatal Accident Inquiries, including recently as lead counsel for the regulator in the Clutha inquiry.

Ms Gillespie, prior to your service as an Advocate Depute, you served as Law Clerk to the Lord Justice Clerk, Lord Gill, in that capacity assisting with the Civil Courts Review and the Review of Expenses and Funding in Civil Litigation. You have served on two important public inquiries, namely Billy Wright and Vale of Leven Hospital.

Ms Galbraith, after working as a prosecutor in the Crown Office, you have developed expertise in personal injury matters, acting for both pursuers and defenders, particularly in large-scale litigation, as well as experience in other areas of civil law. Your knowledge and expertise has been valuable to the work Scottish Civil Justice Council's Personal Injury Committee.

Mr Burnet, within your civil practice, you have developed significant expertise in planning matters. This has been put to frequent use in your 8 years as a standing junior to the Scottish Ministers and in your involvement with the Edinburgh Trams Inquiry.

Mr MacGregor, in addition to your practice in commercial and public law, you have sat as a legal member of the Mental Health Tribunal and served as a standing junior to the Office of the Advocate General.

Ms O'Neill, as a solicitor advocate, you have been involved in significant constitutional and public law cases, including in your role as first standing junior to the Scottish Ministers, at the same time as leading one of Scotland's largest law firms. I hope that you will find time to continue to describe the constitutional law and practice of Scotland alongside Professor Himsworth.

The rank and dignity of Queen's Counsel is well-deserved honour for each of you. I offer you all my sincere congratulations and best wishes for the coming years as Senior Counsel.

The skills and talents of many of those who applied for silk was once again outstanding. I repeat that unsuccessful candidates should not be too discouraged from applying again. Some narrowly missed out on silk this year.

For those who are considering applying, I reiterate that, although never decisive, demonstration of commitment to public service, in particular as an Advocate Depute, experience of both civil and criminal law, and regular appearances in substantive matters heard in Scotland's highest appellate courts, especially in criminal appeals when they have already represented the appellant at first instance, are regarded as favourable attributes.

Lord Carloway
Lord President
28 September 2020