



# **Human Rights Principles and Options for Solemn Trials During Coronavirus Pandemic**

## **Response to Scottish Government**

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## **Introduction**

JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. In Scotland we work under our title JUSTICE Scotland and through the assistance of our expert volunteers.

## **European Convention on Human Rights**

It is correct to say that under the ECHR, there are positive obligations on member states to maintain an effective system of criminal justice. It was clear from Wednesday's roundtable discussion (15/4/20), and in particular from the contribution of the Crown Agent, that the proper and necessary investigation and prosecution of crime continues.

What is being considered is a delay in the final disposal of those solemn cases which require to proceed to trial in order to be resolved.

In the view of JUSTICE Scotland, a period of delay in the final disposal of solemn trials beyond what would normally be expected, where that delay is occasioned by the COVID-19 pandemic, is unlikely to give rise to a breach of any of the positive obligations as a generality.

Before commenting on the specific options, we will briefly address 3 key Convention rights: Article 5 (right to liberty); Article 6 (right to a fair trial); Article 8 (right to private life).

### Article 5

It is clearly the minority of accused who are remanded in custody awaiting trial. There is Strasbourg jurisprudence to the effect that the state ought to afford a measure of priority to the trial of those in custody.

The Options paper notes that there is a presumption in favour of bail. This is correct. However it does not necessarily follow that the continued remand of every person who was in custody prior to the present pandemic restrictions will continue to be justified. That is why, in our response to the Bill, we advocated for a review of remand on a case by case basis.

The Scottish system provides mechanisms for review of remand/bail. A prisoner can make an application for a review of the refusal of bail, or lodge a bail appeal if he did not do so initially. The prosecutor can also make an application for a bail review. In addition, the Lord Advocate, *ex proprio motu*, can grant bail (see section 24 of the Criminal Procedure (Scotland) Act 1995).

Article 5 requires the opportunity for review of detention. The Scottish system provides this.

It is important to bear certain principles about A5 in mind:

- There is no maximum period beyond which a breach will occur provided the person is detained for one of the lawful purposes;
- What is required is that the proceedings are conducted with appropriate expedition – this includes an entitlement to have the case given priority (for example, priority over those involving persons at liberty);
- In complex cases, Strasbourg does not impose a particularly exacting standard in assessing whether pre-trial detention has been unreasonably long;
- The court can consider the eventual sentence with a view to determining whether the overall time spent on remand was reasonable (at solemn level, particularly in the High Court, it would seem highly unlikely that a remand period would exceed the eventual sentence).

#### Article 6

Reasonable time requirement: Article 6 includes the right to be tried within a reasonable time. A comment was made at Wednesday's meeting that, if, as a

result of delays caused by COVID-19 backlog, a solemn case were to take 18 months or so, there could be a potential A6 challenge.

It is important to bear certain principles about A6 in mind:

- There is no maximum time limit for disposal of a case prescribed by ECHR or the Strasbourg jurisprudence;
- Determination of what constitutes a reasonable time requires regard to be had to the particular circumstances of each case, including:
  - complexity of factual or legal issues - the more complex the issues, the longer the period which may be considered reasonable;
  - the conduct of the accused (including waiver of any time limits);
  - the conduct of the competent authorities (includes police, prosecution and courts).
- In relation to the conduct of the competent administrative and judicial authorities, regard will be had to such matters as whether cases were appropriately prioritized, whether any delays resulted from inactivity or oversight by the authorities, etc;
- The remedy for breach of the reasonable time requirement (should a successful claim be made) is ordinarily a reduction in sentence (or compensation). Absent demonstrable prejudice such that a fair trial is no longer possible, discontinuation of the proceedings is not the remedy.

While it may be that lack of sufficient institutional resources cannot in and of itself justify the passage of an unreasonable time, one could reasonably anticipate that a delay caused by the fact that the authorities have been complying with national and international law and guidance in relation to the pandemic would be treated as justifying a longer period for disposal of a case than in normal circumstances.

It is important to bear in mind that it is only the accused who has a right to trial within a reasonable time. Article 6 is not engaged in respect of witnesses

(including complainers), albeit other rights may be engaged. Article 8 is the most obvious example (see below).

Effective participation: Article 6 also provides the right to an effective defence. The method by which this is provided must be practical and realistic, not theoretical and illusory. Effective participation is at the heart of ensuring a fair trial takes place. This means that whatever option or options are deployed in the current crisis, the accused's ability to follow and understand proceedings and engage with their defence team during the trial is paramount.

Likewise, the EU Victims Directive provides a right for complainers to understand and be understood (Article 3) and a right to be heard (Article 10). It also requires support and accommodations to be made as appropriate. These rights are, to some extent, reflected in the Victims Code for Scotland. This is of relevance in considering some of the options in the paper.

### Article 8

Article 8 is engaged in respect of both accused and complainers/witnesses by a criminal process. It is important to remember that Article 8 is a qualified right (unlike Articles 5 and 6 which are absolute rights). As a qualified right, interference with it (such as a requirement to participate in criminal proceedings over a longer period of time) will be lawful provided it pursues a legitimate aim (here, the protection of public health and prevention of crime), and is necessary and proportionate. Again measures such as the reasonable prioritization of cases, efforts to minimize distress through special measures including pre-trial recording of evidence where appropriate, etc will all contribute to ensuring the interference with A8 is justified.

It is against that background that JUSTICE Scotland has considered the options in the discussion paper.

## **OPTIONS**

In JUSTICE Scotland's view, during the strict lockdown period, it is not realistic to conduct any solemn trials requiring the physical presence of persons in the court room, whether with a jury or with a judge alone. Trials necessarily involve individuals travelling to court and remaining there for some time interacting with others. These features increase the length of time and opportunities during which people are potentially exposed. In our view, it would only be appropriate to hold trials during lockdown if this can be done remotely (see Option 4).

As set out above, the absence of solemn trials during the strict lockdown phase is, in our view, unlikely to result in breach of A5, 6 and 8 per se. However, subsequent delay caused by the backlog may pose a difficulty should the authorities fail to take any action to prioritise and progress cases. Thus we consider that the risk of a rights challenge principally exists where the authorities choose to adopt Option 9 (Retain the status quo) during all the stages including phased recovery and business as usual recovery.

Given our view in relation to the lockdown stage, our comments on other options are directed towards the phased/societal recovery period and the business as usual recovery period. We do not intend to comment on every option but rather focus on those that appear to have been the subject of an emerging consensus or are the most contentious.

### **OPTION 1: Having a smaller number of jurors**

We can see no immediate adverse human rights consequences of reducing jury numbers provided the jury (as finally constituted) retains sufficient numbers to permit adequate deliberations and decision-making.

We are not aware of any research about the minimum number of jurors below which the process of proper deliberation is compromised.

The recent research commissioned by SG demonstrated that reducing jury size (from 15 to 12) may lead to jurors participating more fully in deliberations and

is unlikely to impact the range of issues considered and discussed. That provides reassurance about the quality of deliberations for both the accused and complainers/witnesses at least with a reduction of 3.

Having said that, the research also suggested that reducing the size of the jury might, in some trials, lead to more individual jurors switching to the majority view (whatever that was) in order to facilitate a verdict. It is possible that may be exacerbated by further reducing jury numbers.

As well as thinking about numbers, consideration would need to be given to whether a reduced jury size ought still to reach a decision by requiring a minimum number for a guilty verdict (often erroneously called “by majority”) or whether unanimity ought to be the aim.

Where juries were asked to reach a majority verdict they were more likely to favour a guilty verdict. Combined with the increased “switching” resulting from reduced numbers, it may be that the appropriate balance for a reduction in numbers would be a requirement to reach a unanimous verdict (or near equivalent) in order to try to achieve with what appears to happen with a jury of 15. In the alternative, we note that during WWII, when juror numbers were reduced to 7, the majority required for guilty was 5-2. That provides a safeguard which is not present with the simple majority approach we currently adopt for a jury of 15.

Avoiding the collapse of a trial:

Assuming the jury will observe social distancing (as from time to time advised by Government), the fact that one juror may require to isolate during the trial should not cause its collapse provided the legislation allows for reduction of numbers with the jury remaining quorate (as at present from 15 to 12).

Should a trial collapse as a result of a significant number of jurors (or their household members) becoming unwell with COVID-19, there are attendant risks to Article 5 and 6 and there are implications for the Article 8 rights of both accused and complainers. That risk could be mitigated by consideration of a

system of substitute jurors. In the Lockerbie trial, a substitute judge was present during proceedings to cover the possibility that one of the judges hearing the case became unwell. We would note that in the ordinary course of events, there can be occasions where illness spreads through the jury such that a trial has to be discontinued and neither Article 5 nor Article 6 is breached provided the trial can be recommenced relatively quickly (we do recognise that the high level of transmissibility of COVID-19 increases the risk of more jurors being affected than by, say, the flu).

We would observe, in relation to Option 7, that a judge alone trial does not remove the risk of trial collapse as a result of illness. Proceedings would require to be ended should the judge, either lawyer or the accused become unwell or otherwise require to isolate in compliance with government guidance.

### **OPTION 3: Retain current court facilities but enable social distancing during jury trials**

Article 6 provides a right to a public hearing (with certain specified exceptions). It is important in order to maintain confidence in the justice system and for reasons of accountability that proceedings should remain public where possible.

Should the public benches require to be utilized by jurors in order to achieve social distancing, we would urge that the opportunity for public scrutiny be maintained for example by streaming the case online (for those parts of a trial not in a closed court) or by allowing the press access to a stream or recording. That this is technically achievable was established in the Salmond trial where proceedings were streamed to a separate media room. It may also be achieved by putting members of the press in the jury box. (There are ordinarily very few members of the public present observing a trial).

### **OPTION 4: Having jurors in remote locations video-linked to court**

As noted above, JUSTICE Scotland's view is that during strict lockdown, this is the only potentially feasible option for safely conducting a jury trial. In the subsequent phases, should the model prove successful, there is the potential



to increase the capacity of the system to hear cases (provided personnel are available, even if fewer courtrooms are available as a result of the need for social distancing).

The issue of maintaining a public hearing arises in this context as with Option 3. There are, we understand, technological solutions to that.

In terms of the integrity of the trial process and jury deliberations, we would point out that the court places a great deal of trust on jurors' honesty and integrity, and that of those in the public gallery, in physical courtrooms. There is no mechanism for checking whether a juror spoke to their family over dinner about the evidence. There is no guarantee that a member of the public is not surreptitiously recording proceedings from the gallery. It is the experience of many of those in the justice system that, when proper warnings are given and the consequences explained, juries can be trusted to observe the rules. There is no evidence to suggest that would not similarly apply in a remote hearing (albeit the checks and instructions may need to be adapted).

If the model is successful, this is a potentially very flexible resource. It could be combined with reduced juror numbers to enable it to be more manageable; it could be used for summary trials (removing any concerns about the integrity of the "virtual" jury) and thus reduce the build up of backlogged summary cases (potentially facilitating the availability of more sheriffs for solemn business in due course).

It is also far more palatable that members of the public take part from the safety of their homes than travelling to court with the attendant risk of infection during the journey and throughout the court building particularly during lockdown.

Witness evidence can already be pre-recorded in certain circumstances. The expansion of recording witness evidence outwith the jury should be considered to preserve evidence for trial at a later date. This will alleviate distress for complainers.

JUSTICE is conducting a further test of a virtual jury trial on Friday (17/4) and will be happy to share its results.

**OPTION 6: Deal with the backlog with faster progress of jury trials at the end of the current health restrictions**

We recognise that the courts will have to deal with a backlog across the range of work – civil, criminal, administrative, tribunal.

From a human rights perspective, it is important to remember the need to prioritise those cases where an accused is remanded in custody and to have regard to the factors at play in meeting the reasonable time requirement for Article 6. Cases involving vulnerable witnesses, complainers and accused should also be prioritised where Equality Act duties require this.

Pre-recording the taking of witness evidence may help to alleviate backlog by prompting guilty pleas in some circumstances.

**OPTION 7: Judge only solemn trials**

Our general view is that while of course a judge only trial is capable of being compatible with A6, that is not the only (or necessarily the primary) consideration in our system. We would observe that in a jurisdiction with a long-established common law system of trial by jury, the emphasis should be on providing sufficient justification for departing from that norm, rather than on justifying continuation of the norm (with or without adaptations).

We note that judge-only proceedings still require the travel and continued presence of numerous individuals with the attendant risk (see above).

The discussion paper proposed that these trials could be used for the most serious crimes, including for some of those held on remand. It is unclear from the discussion paper if the proposal is that the accused could observe the trial through video link (thus avoiding the need for transport to the court and the presence of court escorts). If that is the intention, we would draw attention to evidence that the use of video links for any participant (such as the accused)

when other participants are occupying the same physical space can present an obstacle to full and effective participation. That may (in certain circumstances) risk a breach of A6. We would be particularly concerned about that possibility in the context of a trial (as opposed to a procedural hearing where requirements for the accused's participation are of a different nature).

In relation to appeal procedures, we disagree with the discussion paper in so far it suggests that the Scottish procedure is comparable to that applying to "Diplock" courts. The critical differences are: the requirement to obtain leave as opposed to having an appeal as of right; and the ability of appeal on the basis of an error of fact (as opposed to the far higher test of a miscarriage of justice resulting from an unreasonable verdict). The possibility of appeal as of right, and the ability to appeal an error of fact as well as an error of law, are reasons why "Diplock" courts are compatible with Article 6. We note that the Cabinet Secretary for Justice has repeatedly stated that Option 7 is not the Government's preferred option. We welcome that. We would note that, should the option be proposed in any future legislation, the original draft provision should be amended to extend the right of appeal.

It is our view that such a dramatic departure from our common law tradition is not currently justified and that efforts to find solutions that retain trial by jury ought to be properly trialled in the first instance. Only in the event that the other proposed measures prove ineffective resulting in a real and present danger of a systemic violation of Articles 5 and 6, should this option could be considered.

#### **OPTION 8: Adjust the sentencing power of Sheriff Courts (summary and solemn)**

In our view increasing summary sentencing powers will contribute to alleviating the strain on solemn court capacity. It would be important to ensure that where cases previously on sheriff court indictment which were assessed as being sufficiently complex to justify the employment of counsel are reduced to summary, that the legal aid regulations permit that sanction for counsel to continue. That will assist in meeting the A6 requirements for equality of arms and for the instruction of counsel of choice.

However, we would see no purpose in increasing the solemn sentencing powers for sheriffs given the burden of work already in the sheriff courts. Moreover, this would not alleviate the problem of individuals attending physical court buildings at the risk of infection. Option 8 would have to contemplate sheriff courts sitting virtually during any lockdown and otherwise respecting guidance on social distancing and other necessary measures.

**OPTION 9: Retain the status quo**

As noted at the start of this paper, we consider that observing the Government's rules during the current pandemic will inevitably cause delay in the system and that will be a relevant factor in defending any alleged breach of A5, A6 or A8.

JUSTICE Scotland

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