



Coronavirus (Scotland) Bill

All Stages

April 2020

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Introduction

1. 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.

2. This briefing addresses the emergency Coronavirus (Scotland) Bill, ahead of Stage 1, and all stages, in the Scottish Parliament, due to take place on 1st April 2020. We fully appreciate the pressure Scottish Government is under in responding to the outbreak of the coronavirus and understand that the measures proposed in this Bill are for the carefully considered extension of State power in a time of public health emergency. Nevertheless, it is important that due scrutiny is given to any expansion of power. JUSTICE is solely concerned with the operation of the justice system and the proposals in Schedule 4. We set out four narrowly confined concerns to ensure that the proposals enable fair trials to continue to take place, even during this emergency period:
 - **Every effort should be made to ensure that legal cases can proceed through the courts and tribunals. The preference should be for fully video trials to ensure equality of arms and effective participation for those who cannot attend in person. The Bill must make provision for open justice;**
 - **Extension of custody time limits – these provisions violate Article 5 ECHR and should not form part of the Bill;**
 - **Trial by judge alone is a significant erosion of the right to a fair trial in Scotland. It must be used only as a measure of last resort, in the interests of justice, where trial by electronic means has been considered and is not practicable. A right of appeal must lie from a decision for judge-only trial;**
 - **Cross examination of witness evidence at trial is critical to the rights of the defence. The admittance of witness statements alone must be due to guidance issued by Scottish Government preventing the person attending court and only where all competent means, including live or pre-recorded electronic means have been explored.**

Schedule 4

Part 1 – Conduct of business by electronic means

3. Part 1 enables a person to be excused from attending court in person, and the court may allow them to instead attend by electronic means. Under paragraph 3, they must appear by electronic means in accordance with a direction issued by a court or tribunal. The direction must set out how the person is to appear by electronic means. It must provide for the party to use means that enable the party to see and hear all other parties, the judge and (where applicable) the jury and witnesses who give evidence.
4. Scottish Courts and Tribunals Service (SCTS) is already involved in a large scale technical programme to extend and refresh courtroom technology to support evidence presentation, evidence on commission, recording and video links.¹ The clauses of this Bill would expand the use of live links in court and tribunal cases. They are introduced here in anticipation of the need to ensure court and tribunal cases can take place. We applaud this intention. The uncertainty over the outcome of any case can cause anxiety and hardship across all kinds of dispute. This is particularly acute in criminal cases. In addition, should an accused be remanded in custody, it is important that their guilt is determined as soon as possible. During a crisis such as this, remaining indefinitely within prison before a verdict is given could have severe mental health, employment, housing and family ramifications.
5. These clauses must also be seen in the context of guidance from the Courts that no new jury trials are taking place and many fewer summary trials. Civil hearings with witnesses are also adjourned. For other hearings in courts and tribunals, electronic means of hearings are to be used wherever possible with electronic service of documents and in some circumstances, use of written submissions.² These are valuable tools to reduce the burden on the courts at this difficult time. However, particularly in criminal cases, they risk leaving more people languishing in custody indefinitely, potentially beyond custody time limits. Review of decisions to remand in custody will be necessary in the trials that cannot go ahead and careful consideration given to appropriate alternatives.
6. JUSTICE considers that modernisation through video links, if done correctly, can offer potential practical benefits to the court and parties alike. However, careful consideration

¹ See SCTS Digital Strategy 2018-2023, available at <https://www.scotcourts.gov.uk/docs/default-source/aboutscts/reports-and-data/reports-data/scts-digital-strategy---final.pdf?sfvrsn=4>

² <https://www.scotcourts.gov.uk/coming-to-court/attending-a-court/coronavirus>

must be given to ensure that digitally excluded individuals and people who are vulnerable by circumstance or disability are not disadvantaged in its application. Likewise, technology must be of sufficient quality to ensure a fair trial. There has been much scrutiny over the possible operation of video link trials and the obstacles to a person appearing on a link being able to fully and effectively participate.³

7. As such, we consider that these measures are *only appropriate* for this emergency situation. Their effectiveness in achieving the aims of justice must be carefully evaluated, with their structure and procedure carefully thought through. Many of the current difficulties are due to the majority of the case participants being in a courtroom with one participant joining via a live video link. This can make that participant and their evidence seem less engaging, or difficult to follow if the technology is not working properly. For this reason, we think that the use of live link hearings during the pandemic should be considered in the following way:

- a. The presumption should be that hearings will be conducted in person. This is likely to be difficult during the coronavirus outbreak, but it should always be considered first.
- b. Should that not be possible, due to reasons relating to the pandemic, there should be a presumption that *all* parties appear via video link in a virtual courtroom (wherever the judge is located). This would be the fairest way to ensure that everyone can equally participate in the hearing.
- c. If the technology is not available for this to happen, the participants that are able should attend court, with the participants who are unable to attending via video link. This should only be contemplated if it is in the interests of justice that the hearing should go ahead and if there would be no significant injustice to the party who appears via video link.
- d. If it is not in the interests of justice to proceed, the hearing should be adjourned until it is possible for all parties to attend in person or all parties to attend via video link. Remand in custody would need to be reviewed in this situation.⁴

³ We considered these issues in our working party reports [Preventing Digital Exclusion from Online Justice](#) (2018) and [Understanding Courts](#) (2019) .

⁴ The Bill provides for “electronic means” to be used, which may include a live audio link. This is the least suitable mechanism for the participation of lay people, but may be necessary where the person has no other means of participating. It can be useful for case progression between legal professionals.

8. We understand that these are case management powers to be directed by the trial judge on a case by case basis and are not suitable for primary legislation. However, we do consider it necessary that Parliament consider and understand the implications of the legislation being proposed.
9. In a court environment, vulnerable individuals have many opportunities to seek advice and support from friends, their representatives or other professionals. These formal and informal mechanisms must continue to be accessible when parties appear via video link. Moreover, clients also require a direct and confidential line of communication with their representatives if they are to appear via video link. Proceedings must continue to be fair and accessible irrespective of the medium used. JUSTICE considers that with creativity and exploration of appropriate technology, fully video hearings can facilitate all of these needs.
10. Nevertheless, absent from the Bill are express **measures to enable the public to join proceedings**. Open justice is important to ensure a fair trial, pursuant to Article 6(1) European Convention on Human Rights (ECHR). In these exceptional circumstances, media and public scrutiny is essential to ensure proceedings are taking place fairly. This includes the pronouncement of judgment in public.⁵ We ask Scottish Government to *clarify* by what means the public will be able to take part in proceedings, and where this is not possible, what provision for recording and making that recording available is being made?⁶

Part 4 – Extension of Time Limits

11. Paragraph 10 extends several statutory limits governed by the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). It amends section 65 of the 1995 Act, which applies time limits in solemn trials.⁷ Paragraph 10(3) of the Bill extends these limits by six months, and also those in section 65(4), which specify the time limit within which an indictment must be served on any accused who is being held in custody pre-trial.

⁵ Note that Article 6(1) also provides “...the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” This would include usual reporting restrictions.

⁶ With offences for illegal recording of proceedings as appropriate – see Schedule 25 Coronavirus Bill 2020. Public broadcast is possible - Supreme Court Live enables the public to watch proceedings online <https://www.supremecourt.uk/live/court-01.html>, as, of course, does the Scottish Parliament.

⁷ Section 65(1) specifies the time limit within which a preliminary hearing or first diet must be commenced following the service of an indictment. It also sets out the time limit within which the trial must commence following the first appearance of the accused on petition.

12. The Bill modifies also section 136 of the 1995 Act, increasing the time limit for the commencement of a trial for any statutory offence that is only triable by summary procedure from 6 to 12 months. Paragraph 10 also amends section 147 of the 1995 Act.⁸ Subparagraph 10(5) of the Bill extends this time period from 40 days to 3 months.

13. We are extremely concerned by the blanket extension of detention proposed by these provisions, which we consider would violate the right to liberty provided in Article 5 ECHR:

*Domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty...As the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time frame applicable to each case.*⁹

14. Each case must therefore be reviewed to ascertain whether remand in custody continues to be appropriate. The 1995 Act already provides for judicial consideration and extension in these circumstances. In fact, as the briefing of the Scottish Criminal Bar Association (SCBA) indicates, the Crown and defence have already been agreeing appropriate extensions of time-limits in cases administratively due to the pandemic.

15. We therefore consider that **paragraph 10 should not form part of the Bill.**

16. As we indicate above, it is imperative that where cases cannot go ahead, either in person or by way of electronic means, a review of the decision to remand the accused in custody takes place. Given the risks of spread of infection in custody, we recommend in any event that consideration be given to the release (on temporary license or otherwise) of, at a minimum, the following kinds of prisoner:

- Those in open prison;
- Non-violent women;
- Non-violent/sexual risk men;
- Suitable remand prisoners to bail with appropriate conditions;
- Recall prisoners that were recalled for compliance as opposed to serious reoffending;

⁸ Section 147 provides that a person who is charged with an offence in summary proceedings shall not be detained at 40 days after the bringing of the complaint in court unless their trial is commenced within that period.

⁹ *McKay v UK* (2007) 44 EHRR 41 at [45].

- Children in secure accommodation;
- Immigration detainees;
- Requested persons in extradition cases.

Part 5 – Trials on Indictment

17. Paragraph 11 would give Scottish Ministers the power to make regulations that provide that solemn trials are to be conducted by judge alone. This is an incredibly significant provision. Jury trial is the cornerstone of a fair trial on indictment across common law nations. We note that the Coronavirus Bill that passed through the UK Parliament last week did not take this step.

18. Cabinet Secretary Mike Russel has today stated that the Government has looked at the practicalities of remote juries and believes it is not practical at this stage, but it will continue to look at the issue and may “be able to bring forward other ideas”. We welcome this intention. As we indicate above, we consider that every effort should be made to continue proceedings. JUSTICE is working currently to assess whether jury trial is indeed possible through fully video proceedings and will be very happy to share our research with Scottish Government.

19. However, we consider it important to underline that juries perform a fundamental constitutional role in ensuring and demonstrating legitimacy and transparency in the criminal trial process.¹⁰ In its review of the jury trial, the New Zealand Law Commission described their function as “reflecting democratic ideals of community participation in the justice system and bringing a range of experiences and values to the issues to be decided in a case.”¹¹ Jury trials ensure that the public are able to participate in, and have confidence in, the criminal justice system. Any proposal to alter the jury system, or in this case to temporarily remove the possibility of a jury trial, must therefore be subject to the utmost scrutiny.

20. As such, we consider that **paragraph 11(2) must include stronger safeguards**. The Bill proposes that Ministers are only to make regulations if they consider it to be *necessary and proportionate* in response to the effects coronavirus is having or is likely to have. This

¹⁰ See our Report *Complex and Lengthy Trials* (2015) <https://justice.org.uk/wp-content/uploads/2016/03/CLT-FINAL-ONLINE.pdf>

¹¹ New Zealand Law Commission, *Juries in Criminal Trials*, Part One: a discussion paper (1998), pp.4 and 5, at <http://www.nzlii.org/nz/other/nzlc/pp/PP32/PP32.pdf>

must meet the purpose of ensuring that the criminal justice system continues to operate effectively. We consider that the provision must also ensure that judge alone trials are taken only:

- a. where trial by electronic means has been considered and is not practicable;
- b. in the interests of justice; and
- c. as a measure of last resort.

21. Moreover, we consider that paragraph 11(3) – which requires Scottish Ministers to consult the Lord Justice General and any other person they consider appropriate - ought to expressly provide for consultation with the Faculty of Advocates, Law Society of Scotland and Crown Office and Procurator Fiscal Service. This will ensure proper and expert scrutiny of the measures proposed.

22. Finally, we agree with the SCBA that there should be a right of appeal from a decision to hold a trial by judge alone.

Part 6 – Evidence: Exceptions to the rule that hearsay is inadmissible

23. Paragraph 12 amends s259 of the 1995 Act. It adds a new exception to the normal rule that hearsay evidence is inadmissible. It provides that hearsay evidence will be admissible if it is not reasonably practicable for the person who made the statement to attend the trial or give evidence in any other competent manner because of a reason relating to coronavirus.

24. This again is a significant departure from the safeguards of criminal trial in this country. In *Al-Khawaja and Tahery v UK* [2011] 54 EHRR 23 the Grand Chamber of the European Court of Human Rights underlined the importance of ensuring confrontation of the witness' evidence by the accused, in order to ensure a fair trial. It referred to JUSTICE's observations that what appears reliable may fall apart under cross examination:

*The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.*¹²

¹² At para [147].

25. As such, we would recommend the addition of further safeguards to the proposed ss2A of the 1995 Act, to ensure that all possible routes are considered before extending the hearsay provisions in this way:

- a. “because of a reason relating to coronavirus” must be more specific – it must be that guidance issued by Scottish Government prevents the person attending court.
- b. The qualifier at the end of the paragraph “in any other competent manner” should be followed by “including by electronic means, live or pre-recorded”.

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