



Law Society
of Scotland

Memorandum of Comments by the Public Policy Committee

Comments on the House of Commons Scottish
Affairs Committee Coronavirus and Scotland Inquiry

May 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Public Policy Committee welcomes the opportunity to comment on the House of Commons Scottish Affairs Committee Coronavirus and Scotland Inquiry. The committee has the following comments to put forward for consideration.

General Comments

How well has your industry of sector recovered to pre-pandemic levels?

The justice system was heavily impacted by the pandemic, particularly court proceedings, where requirements around social distancing made it difficult to progress most types of case. Measures were put in place to mitigate these restrictions, particularly a transition to virtual hearings for many types of case, and the use of remote jury centres to allow the most serious criminal cases to progress. Despite these mitigations, a considerable backlog of cases accrued during the pandemic period. Audit Scotland's report, *Criminal Court Backlog*, highlights the impact of delays on solemn criminal cases, which is unlikely to clear before March 2026¹.

The delays to criminal cases have a significant impact on complainers and witnesses, with significant delays in the time taken to trial. In April 2023, Scottish Courts and Tribunals Service data shows the average time from pleading diet to trial is currently²:

- 49 weeks for High Court cases, compared to a pre-pandemic level of 22 weeks
- 44 weeks for Sheriff Solemn (Sheriff sitting with a jury), compared to a pre-pandemic level of 11 weeks
- 41 weeks for Sheriff Summary (Sheriff sitting without a jury), compared to a pre-pandemic level of 23 weeks

This also has a significant impact on accused and on the Scottish Prison Service, as a number of people are detained on remand pending trial. The number of people on remand, according to Scottish Government

¹ [Criminal courts backlog \(audit-scotland.gov.uk\)](https://audit-scotland.gov.uk)

² [Monthly information on Criminal Case Throughput for April 2023 \(scotcourts.gov.uk\)](https://scotcourts.gov.uk)

data for May 2023³, is currently 28% of the prison population, 2,140 people; in April 2020, the number of people on remand was 1,114.

The pandemic also had a significant impact on the legal aid system in Scotland. Legal aid providers are paid on a case-by-case basis, and the backlog affected cashflow and capacity across the sector. The pandemic also exacerbated some of the historic challenges faced by the sector, particularly the unsustainability of fees, their outpacing by inflation over a generation, and the lack of a regular, periodic fee review mechanism to address these factors. The cost of living crisis and the current high rates of inflation have compounded these challenges. The number of providers registered for legal aid continues to decrease, for instance, the number of criminal legal aid firms declined by 9% in the last year and the number of practitioners by 6% (and both have declined by over a third in the last decade). As the Audit Scotland report notes, this is a significant risk to ensuring that the backlog and wider criminal justice reform can progress effectively.

Other sectors of the legal profession in Scotland were also heavily affected by the pandemic, including solicitors involved in conveyancing, particularly residential where there were restrictions on the ability to view properties and, at least initially, to complete conveyancing electronically. As our member research shows^{4 5 6 7}, though these impacts have largely abated, the current economic climate has presented a new set of challenges for many sectors of the profession, where resilience has already been depleted because of the challenges of the pandemic. These were some of the factors that led us as an organisation to reduce practising certificate charges through the pandemic period, a measure that can no longer be sustained because of current inflationary pressures.

How adequate was UK Government and Scottish Government support for your industry or sector to get back to pre-pandemic levels?

For courts, Scottish Government introduced additional funding of around £100m to allow backlogs to be addressed and to facilitate virtual hearings, as detailed in the Audit Scotland report. There was broad collaboration between justice agencies to tackle the backlogs, and emergency measures introduced through legislation to facilitate court and other business through the pandemic. Many of these were successful, including a more permissive approach around digital signing of documents, interim payments for legal aid cases rather than at the conclusion of a case and the use of virtual hearings. Others proved more contentious, and we expressed concerns around the use of virtual custody hearings, because of concerns about effective participation for accused persons, particularly at this early and critical stage in

³ [Justice Analytical Services Safer Communities and Justice Statistics Monthly Data Report 25 May 2023 \(www.gov.scot\)](https://www.gov.scot)

⁴ [covid-19-financial-impact-survey-private-practice-preliminary-analysis.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk)

⁵ [november-2020-financial-impact-of-covid-private-practice-final-2-dec-2020.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk)

⁶ [covid-19-third-financial-impact-survey-report-november-2021.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk)

⁷ [law-society-of-scotland-members-survey-2022.pptx \(live.com\)](https://www.live.com)

proceedings, and the increases in the time limits for criminal prosecutions, particularly because of the impact on the remand population and the increasing delays faced by all participants in criminal trials.

For legal aid, a package of measures was introduced, including a resilience fund of £9m, an increase to fees for civil, children's and criminal legal aid of 10% (introduced in two 5% tranches in 2021 and 2022) and £1m for the implementation of a traineeship fund, allowing the part-funding of 40 new trainees into the sector over the course of their two year traineeship. These were important measures, necessary because of the financial shock through the pandemic, though as we note above, the number of practitioners providing legal aid continues to decline. This remains a significant concern, and structural change is required to bring our legal aid system onto a more agile and sustainable footing. In particular, the ad-hoc changes to fees by regulations needs to be replaced with a predictable, periodic review process that takes the impact of inflation into account to ensure that fees do not erode in real-terms over time. Inflation having been over 10% for most of the last 12 months clearly shows the need for this change.

There was also support from the UK Government through the pandemic, and many firms sought furlough, grant, VAT deferral and other support. The level of uptake for these schemes was included in our research reports into the impact of the pandemic in April/May 2020, October 2020 and September 2021.

How effective was UK Government and Scottish Government spending around the pandemic?

We think that spending by the Scottish Government was broadly effective in the context of the justice sector, and as scrutinised in the recent Audit Scotland report. We would also highlight that effectiveness was not solely a result of additional funding but also that a culture of collaboration, commitment and goodwill developed through the pandemic was a significant driver. There were some technical challenges around some of the measures introduced: for instance, the ability to claim interim fees for legal aid cases delayed by the pandemic did not see the level of uptake anticipated, partly because seeking payment mid-way through a case rather than at its conclusion crystallised the VAT liability for these fees at that interim stage; having the option, though, was an important step to take.

However, two particular challenges have emerged, first, that the pandemic exacerbated previous structural weaknesses, particularly underfunding to the legal aid sector; and, second, that the cost of living crisis emerged almost directly following the pandemic, which has placed significant stress across the justice sector.

Regarding the effectiveness of wider UK Government spending, as our research noted above shows, a number of firms sought one or more support measures, including the £10,000 grant, furlough support and other measures. Without that support, it is likely that more firms would have faced financial distress as a result of the pandemic.

How much did UK Government and Scottish Government financial support assist in the recovery of your industry or sector to pre-pandemic levels?

We refer to our responses above. For courts, it is anticipated that there will be a further three years before case scheduling returns to pre-pandemic levels, with a number of costs as a result, including the cost of maintaining a near-historic high in the number of prisoners on remand. For legal aid, despite the additional funding through the pandemic, there remain structural challenges that need to be addressed to arrest the decline in practitioners and ensure that access to justice can be maintained.

The move to virtual hearings during the pandemic period, the government funding to support this transition (as well as adaptations undertaken by firms themselves) has seen a shift to hybrid proceedings for the foreseeable future. We have expressed concerns about the use of virtual proceedings in some types of case or hearing, particularly virtual custodies, and we believe that further scrutiny in this area is important. It is not a given that the outcome of virtual and in-person hearings will achieve the same result, and that adaptation may be required to reduce any structural inequality of outcome. We know from research prior to the pandemic, for instance, in immigration bail hearings across the UK⁸, or in jurisdictions like the US⁹, where virtual hearings had become commonplace for immigration cases, that outcomes were generally poorer for people appearing virtually. Ensuring effective participation for all is crucial to our justice system, and funding should be allocated for further research in the post-pandemic period to evaluate case outcomes. The emergency legislative basis under which these proceedings currently operate¹⁰ should be replaced with legislation that can be subject to the detailed scrutiny that was not so readily available during the pandemic period.

We also highlight the support that we provided direct to members through the pandemic period¹¹, a £2.2m package of measures to support the profession through the pandemic period, including a reduction of 20% to the practising certificate (PC) fee for every solicitor, a reduction of 20% to the accounts fee paid by law firm partners will be reduced by 20% and setting the client protection fund contribution for law firm partners to zero.

⁸ [2nd-bop-report.pdf \(wordpress.com\)](#)

⁹ [Remote Adjudication in Immigration \(northwestern.edu\)](#)

¹⁰ For instance, the Coronavirus (Recovery and Reform) (Scotland) Act 2022

¹¹ [COVID-19 \(Coronavirus\) support for solicitors | Law Society of Scotland \(lawscot.org.uk\)](#)

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