



Law Society
of Scotland

Scottish Parliament – Justice Debate

Thursday- 10 June 2021

Briefing - Recover Renew and Transform

9 June 2021



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.

Our Criminal Law Committee welcomes the opportunity to consider and provide some suggested briefing in relation to the Scottish Parliament's Justice debate on Thursday 10 June 2021 on the Recover, Renew, Transform programme.

General

The Scottish Government's Recover, Renew, Transform programme aims at:

- Recover – returning to pre-pandemic capacity and addressing backlogs across the whole system
- Renew – prioritising the resolution of cases at the earliest opportunity and embedding new ways of working
- Transform – changing outcomes for those affected by the criminal justice system.

We recognise that the scale of the task lying ahead for Recover Renew, Transform programme is huge.

A start to addressing **Recovery** has been made in allocating budgetary cross justice funding of £50 million¹ to provide resources for the courts, Crown Office and Procurator Fiscal Service (COPFS), legal aid, Police Scotland, Community Justice, Prisons and the third sector. Just how that funding is utilised within these categories and prioritised has yet to be fully identified. That is important as we suggest that there is a not a simple “one size fits all solution.”

Ensuring an effectively funded legal aid system through the recovery process will be crucial. Further work is required to ensure that the resilience funds allocated to support the profession are provided to firms that have maintained services through the hugely challenging conditions of the pandemic. Where new ways of working are developed, the legal aid impact must be recognised, for instance, in ensuring fair remuneration for written representations, remote hearings or any other measure.

There are over-riding national matters on which to prioritise such as tackling the court backlog. However, in identifying solutions, across the justice sector, what is vital for the Scottish justice system is collaboration,

¹ <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2021/03/19/reducing-the-criminal-trials-backlog>

flexibility, early engagement and ongoing discussions with a view to adopting a positive solution-based approach. There may be local elements such as local justice that need to be respected too.

That means that we are moving forward from the immediate response -**Recover** and we are working towards developing and maintaining the new norm - **Renew** and towards what is to become the norm post pandemic -**Transform**. All involved have crucial, supportive and important roles to play.

There is a need to recognise that over the worst of the lockdown measures during which there was cessation of all court work that those involved across the justice sector continued to work on its restart, despite the enormous challenges faced personally and professionally, while requiring to respect the developing and ongoing requirements from public health advice.

Of over-riding importance in identifying solutions is to respect the interests of justice and what that means for the Scottish justice system. That requires:

- Each procedural and evidential requirement from the preliminary processes (including at detention at police stations) to the trial complies with the rule of law and human rights.
- All rights must be respected from the complainer testifying to the remanded accused.
- Equality of arms is ensured in fair trial taking place (Article 6 of the European Charter of Human Rights). That balances the procedural equality of the parties to present their case during the trial and everyone charged with an offence to have an equal opportunity to defend himself with that of the prosecution.

These parameters should be respected while maintaining safety for all involved in the court in accordance with ongoing and emerging health advice in ensuring the requirements for social distancing are and continue to be met.

Background to Recover Renew Transform

In March 2021, when the Covid -19 pandemic started, legislation in the UK and Scottish Parliament by way of the Coronavirus Act 2020, Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland)(No2) Act were all passed and whose provisions have remained in force, pending periodic statutory review.

These exceptional circumstances merited the use of emergency provisions to put extraordinary measures in place. That these measures were kept under review was vital and we encourage a systemic review of these measures to identify and evaluate what has been successful and should be retained as well as those aspects which are now redundant. This should form part of a wider review of the overall response to the Coronavirus pandemic – but there is merit too in a focused review that allows public debate to take place at the earliest opportunity which we highlight under the section on Transform and deaths investigation.

Notwithstanding, we now note with the Scottish Government's announcement today that it intends to introduce the Coronavirus Extension and Expiry (Scotland) Bill to update the legislation by removing what is no longer required and in maintaining those provisions to support the ongoing public health response to

COVID-19 beyond the original expiry date of 30 September 2021. Though this is not the debate on which to focus on that Bill's provisions yet to be published, there remain concerns about curtailing parliamentary time for a full debate using fast-tracking processes again over what is proposed to be retained.

There is to an extent reassurance, provided that it is not intended to introduce any new measures or that it is in respect of 'lockdown' rules which are under the UK Act (Coronavirus Act 2020). Further details on the Bill are of course awaited, and that debate can thereafter follow.

What is important is continued monitoring, evaluation and obtaining feedback as the effects of COVID-19 will remain with us for some indefinite time to come. It is still not the time to fundamentally change the Scottish criminal justice system without robust consultation and review as there is not a simple solution and change has significant consequences, requiring resourcing and can give rise to legal challenges. We would encourage this debate to focus on what has been helpful as well as flagging points where we suggest attention needs to focus.

Recover – returning to pre-pandemic capacity and addressing backlogs across the whole system

This **Recovery** is crucial, and we recognise that the process of recovery has already commenced. Though the court backlog has inevitably grown over the time of the pandemic, we highlight that the introduction of the remote juries is a success as it crucially allowed the High Court to start functioning in August 2020 and the Sheriff & Jury courts to follow suit in the late autumn of 2020.

That has meant, according to the Scottish Courts and Tribunal Service's (SCTS) quarterly figures² as at 3 June 2021 identify that the "latest quarterly crime figures show Sheriff and Jury trials [are] back to pre-COVID level." That, coupled with criminal court business opening up again, has allowed criminal court business at summary level to increase from April 2021. Now too, JP courts, as the final stage in the criminal justice system, have reopened on 7 June 2021.³

These important steps will allow the number of trials across all criminal business to increase and continue to tackle the backlog though we recognise more measures and resourcing is required as that on its own will not resolve the effect of the now 15-month disruption to the courts.

SCTS has already announced its plans to commence a court recovery programme from September 2021. That includes expansion of the remote jury centres and a daily increase of 4 additional High Courts, 2 additional Sheriff Solemn Courts, and up to 10 Sheriff Summary Courts.⁴ Final details of these additional courts are awaited. We stress that it is not only about producing extra courts and estate, but also about the

² <https://scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2021/06/03/latest-quarterly-crime-figures-show-sheriff-and-jury-trials-back-to-pre-covid-level>

³ <https://scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2021/06/03/justice-of-the-peace-courts-reopen-on-monday-7-june>

⁴ <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2021/03/19/reducing-the-criminal-trials-backlog>

staffing, location and resourcing which are all needed to underpin success in putting through and concluding long- outstanding cases.

Resourcing is needed across all sectors of the criminal justice system. We are aware of recruitment for the judiciary and indeed COPFS, but this needs to be supported by additional SCTS staff as well as from the legal profession. Exactly how the courts are going to be staffed and indeed adequately funded provided while ensuring effective access to justice needs to be carefully managed. There have already been the introduction of holiday courts and suggestions made of the use of Saturday or weekend courts. Considerable care and consultation are required were these to be long-term solutions as there is need for all involved in the process to be able to maintain a work/life balance.

Some observations include:

- COP26: We are aware too as Scotland approaches the COP26 conference which is scheduled to be held in Glasgow in November 2021 that there are significant implications for Police Scotland in resourcing that event which falls across the period of additional courts and measure to tackle the backlog. That needs to be managed in order that any backlog should not increase.
- Delay: Looking to the priorities for Recover, we highlight that the impact of the pandemic on the complainers/witnesses and accused has been huge as they await closure by giving evidence and by having the allegations against them resolved. That uncertainty/stress is not acceptable to either and their respective interests must be to the fore as solutions are identified towards recovery. As the then Cabinet Secretary Mr Yousaf recognised on delayed jury trials that *“victims, witnesses and accused, .. are all anxious to have their day in court and move on with their lives [with this] announcement bring[ing] us an important step closer to enabling this to happen in a manner which safeguards both the interests of justice and of public health.”* These considerations are still relevant.
- Remand: For those prisoners remaining on remand too for more than the normal statutory time periods for trials is an ongoing concern. The impact of Covid on the prisons which have required to lockdown from time to time in response to outbreaks of Covid as well as restricting access to family and visitors has had an inevitable effect on their well-being.
- Requirements: That has been particularly significant for those involved in multiple accused trials at both solemn and summary level as even with the systems in the courts as they adapted to Covid requirements has meant that they have not coped in trying to get many of these trials requiring additional facilities to be put in place.
- Vulnerable Covid has been recognised too to have had an adversely affect the most vulnerable in society both accused and witnesses. Their participation in remote or virtual courts had been a challenge restricting their ability to access justice and obtain legal advice during the pandemic. Groups such as those in prisons, immigration detention or care settings, disabled people, children and victims of domestic abuse have been disproportionately impacted. These should be prioritised.

There is also the need to consider the impact on civil cases. The civil justice system has not been affected to the same degree as criminal, and backlogs have not developed to the same extent. There has been a significant decline in the number of civil cases during the pandemic, for instance, with summary cause cases initiated in February 2021 at 20% of the level the year previous. This is largely the result of debt

forbearance measures and restrictions on rent arrears and eviction proceedings. As these measures cease, it is important to ensure that there is the capacity to deal with increasing numbers of cases effectively.

Renew – prioritising the resolution of cases at the earliest opportunity and embedding new ways of working

New systems of working have inevitably evolved over the pandemic with the use of virtual custody courts rendered possible with the investment in the use of technology in the courts which has included system such as WebEx. A few remote summary trials have taken place in addition to the solemn business in the remote jury centres. How much these are used in the future depends on the reduction in social distance requirements but have provide a source of information which can be assessed and evaluated moving forward. They cannot and should not become as was suggested the default.

They played their part in allowing courts to reopen and to start to process criminal business again. These measures remain in place and need to continue to respond to the scientific and medical advice as the pandemic develops.

We agree that there should be greater utilisation of obtaining evidence on commission, public being able to hear trials where conducted remotely, section 259 of the Criminal Procedure (Scotland) Act 1995), pre-recorded evidence and remote links at police stations for witnesses to give evidence. These should render the running of trials easier, reduce the need for attendance and in ensuring the necessary social distancing.

Transform – changing outcomes for those affected by the criminal justice system.

There are opportunities provided in going forward to embed and consolidate successful changes following the pandemic. That allows all to review and to learn lessons for the future. One of these such topics, we suggest, are the deaths resulting from Covid which include:

- those staff employed such as the NHS and care homes and potentially other front-line occupations where we do not have the figures of the number of deaths which have resulted.
- Those in prison which include not only prisoners but prison officers and staff.

All these deaths fall under the mandatory requirements of section 2 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (2006 Act)⁵ which requires the holding of a Fatal Accident Inquiry (FAI).

In addition, under section 4 of the 2016 Act, there is an opportunity to hold discretionary FAIs “where an inquiry is [held] into the death of a person which occurred in Scotland if the Lord Advocate (a) considers that the death (i) was sudden, suspicious or unexplained or (ii) occurred in circumstances giving rise to serious public concern, and (b) decides that it is in the public interest for an inquiry to be held into the circumstances of the death.”

In June 2020, the Lord Advocate announced his intention for an such an inquiry to be held into care home deaths.⁶ In doing so, he is undertaking responsibility on behalf of the State under Article 2 of ECHR (everyone’s right to life) which lies in Scotland with COPFS to investigate deaths, and where relevant to instruct and hold FAIs.

The number of mandatory FAIs to be held from Covid deaths has not been published nor if the intention is for all to be held separately or jointly as it may be too premature to establish this as yet. Similarly, no date has yet been announced as to when the inquiry into care home deaths or how many deaths will be covered is to take place for no doubt similar justifiable reasons.

However, learning lessons from Covid at the earliest opportunity is vital as is informing relatives of the statutory process and likely timescales for outcomes in addressing and meeting their expectations as to the circumstances of the death and if it might have been avoided and other relevant issues.

Delays in holding FAIs such as a death in 2012 in Orkney⁷ have been the source of public comment. There is also a delayed, due to Covid, further HM Inspectorate Report which indicated at a further review in 2019 that:

“Given the number of recommendations that remain in progress and the continuing concerns regarding delays in dealing with mandatory FAIs and the new recommendations made in this report, the Inspectorate plans to re-visit the investigation of FAIs in a further follow-up report next year.”⁸

Publicity and attention are already focused on the circumstances of these Covid related deaths. Whether there is a review of the deaths investigation process in Scotland⁹ as part of any wider review into the role of the Lord Advocate and Solicitor General, we suggest to promote confidence and transparency into the robust investigatory and necessary process that there should be an indication as to the process going

⁵ <https://www.legislation.gov.uk/asp/2016/2/section/2/enacted>

⁶ <https://www.copfs.gov.uk/media-site-news-from-copfs/1885-coronavirus-covid-19-information-for-bereaved-families#:~:text=The%20Lord%20Advocate%20has%20instructed%20that%20all%20deaths,possible%20to%20prevent%20future%20deaths%20in%20similar%20circumstances.>

⁷ <https://www.thetimes.co.uk/article/apology-for-inquiry-delay-over-sea-death-kxgm0mnks>

⁸ <https://www.gov.scot/news/inspectorate-of-prosecution-publishes-followup-report-on-fatal-accident-inquiries/>

⁹ In “Our Priorities for the 2021 elections” we highlighted a need for review into deaths <https://www.lawscot.org.uk/news-and-events/law-society-news/our-priorities-for-the-2021-scottish-parliament-elections/>



forward with definite timescales on the timing of when these FAIs/public inquiries will be held and their scope.



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