

Outline Views of the Scottish Human Rights Commission

1. The Commission notes that during consideration of the Coronavirus (Scotland) Bill, provisions allowing for solemn trials without a jury were withdrawn following criticism from various stakeholders, most notably in the legal profession. The Commission welcomes the Cabinet Secretary's approach in consulting key stakeholders to discuss workable solutions to the challenges the coronavirus pandemic poses to Scotland's criminal justice system. The Commission has engaged fully in that process, and will continue to do so.

2. The Commission and a number of other stakeholders attended a roundtable convened by the Cabinet Secretary on Wednesday 15 April, the purpose of which was to consider a discussion paper which set out a number of possible options for responding to the current crisis. In brief, the options set out in that paper were:
 - Option 1 – Having a smaller number of jurors
 - Option 2 – Holding jury trials in larger non-court locations to facilitate social distancing
 - Option 3 – Retain current court facilities but enable social distancing during jury trials
 - Option 4 – Having jurors in remote locations video-linked to court
 - Option 5 – Test jurors / other court attendees for COVID-19
 - Option 6 – Deal with the backlog with faster progress of jury trials at the end of the current health restrictions
 - Option 7 – Judge only solemn trials
 - Option 8 – Adjust the sentencing power of Sheriff Courts (summary and solemn)
 - Option 9 – Retain the status quo

3. In a statement to the Scottish Parliament on 21 April, the Cabinet Secretary confirmed that, based on discussions to date, the Scottish Government will focus on a number of options, including the potential for:

- Smaller numbers of jurors
- Social distancing measures within existing court facilities
- Measures to enable faster progression of jury trials to address the backlog following easing of public health restrictions; and
- Potentially adjusting the sentencing powers of Sheriff Courts

ECHR compliance

Article 5

4. The Scottish Government's paper outlines the substantial backlog that would accumulate if the status quo were to be retained. Given the emerging public health information that this situation is likely to last for some time, the Commission does not believe this is a workable option.

5. That said, even if some of the options are deployed that would allow jury trials to continue, delay appears inevitable and it is likely that some people accused of a crime will spend longer in custody awaiting trial. Article 5 of the European Convention on Human Rights ("ECHR") protects against arbitrary deprivation of liberty. Article 5(3) affords a right to a trial within a reasonable time or to be released pending trial. The question of whether a period of time spent in pre-trial detention is reasonable requires a case by case assessment, taking into account factors such as the presumption of innocence and the balance between the public interest and the

right to individual liberty.¹ There is no general time period above which a violation will occur; each case must be considered on its own merits.

Article 6

6. Article 6 ECHR protects the right to a fair trial. There are a number of requirements within Article 6, for example that there be a fair and public hearing, and that the hearing be conducted within a reasonable time. In assessing Article 6 compliance, the European Court of Human Rights is concerned with the fairness of proceedings as a whole.²
7. Article 6 includes the right to a trial within a reasonable time. It is important to note that each case must be considered on its own merits. Factors that will be taken into account in assessing whether the time period was reasonable are the complexity of the factual issues raised and the conduct of the parties (both the accused and the state authorities). Appropriate prioritisation of cases, particularly where an accused is on remand, will be required. In general, the Commission believes it is likely that the current health crisis would be regarded as justifying time periods that are longer than under normal circumstances.
8. The Commission notes that plans to allow solemn trials before a judge without a jury were removed from the Coronavirus (Scotland) Bill. Article 6 does not confer a right to a jury trial.³
9. In general, Article 6 also requires courts to give reasons for their judgment. Giving of reasons is implicit in the concept of a fair trial, as they inform parties for the basis of the decision and allow them

¹ See *McKay v United Kingdom* (App no 543/03) ECHR 3 October 2006

² *Taxquet v Belgium* (App no 926/05) ECHR 16 November 2010

³ *Twomey, Cameron and Guthrie v. the United Kingdom*, (App nos nos. 67318/09 and 22226/12) ECHR 28 May 2013, para 30

to exercise any appeal rights available; and they ensure the public understands the court's rationale for arriving at a particular decision. Historically, the duty to give reasons did not extend to determinations made by juries. The issue was revisited by the Grand Chamber in the *Taxquet* case; the accused must be able to understand the verdict and there must be a satisfactory procedural framework to provide sufficient safeguards for an individual to understand why they were found guilty by a jury. In the case of *Judge v UK*⁴, the Court considered that arrangements in Scots law met Convention requirements. If proceeding without juries, the duty on the sitting judge to give detailed reasons would be a necessary Article 6 safeguard. The Commission notes this was included in the Scottish Government's original proposals and it should be maintained if this option is progressed.

10. If the Scottish Government were to proceed with judge-only trials, the discussion paper sets out measures that could potentially strengthen the procedural framework. Notwithstanding the fact that a jury trial is not required by Article 6, Article 6 is concerned with a member's state's procedural framework as a whole. If the decision is made to proceed without juries in certain cases, a fundamental aspect of Scotland's criminal justice system will have been altered. The Commission believes it would be appropriate to introduce safeguards specifically linked to that change, as opposed to expecting existing mechanisms to operate. The Commission therefore believes that if judge-only trials are introduced in future, there should be an automatic right of appeal in those trials.

Rights of complainers/victims

11. The Commission recognises that the rights of victims, witnesses and others involved in the justice system must also be protected through the conduct of trials. Articles 2 and 3 ECHR impose

⁴ *Judge v UK (Admissibility)* (App no 35863/10) ECHR 8 February 2011

procedural obligations on the State to ensure the effective investigation and prosecution of crimes. Article 8 provides that States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.

Options for continuing with jury trials

12. The options under discussion present a number of practical and logistical issues, and the Commission will not comment on each option in detail.
13. While we note that jury trials are not specifically required by Article 6, they are a key part of Scotland's criminal justice system and the Commission believes that the viability of other options that could allow for modified jury trials to continue should be explored first.
14. As the Commission has stated in its previous briefings, the State has a duty to protect life. While the 'lockdown' period continues, the Commission questions whether it would be appropriate to compel individuals to sit on juries, notwithstanding any additional public health safeguards that may be introduced. The health and safety of others involved in the criminal justice system, such as court staff, witnesses and members of the judiciary are also of paramount importance. That said, in the coming stages of the pandemic, where lockdown is lifted but social distancing is still in place, it appears that a modified jury system is possible.
15. It appears to the Commission that a number of options taken together may go some way to addressing concerns. The option of empanelling smaller juries does not present human rights concerns, providing the jury is large enough to allow for sufficient deliberations and decision making. Similarly, the option of retaining social distancing by making use of the public gallery would appear feasible. Article 6 requires a fair and public hearing; however the Commission notes that the Scottish Government paper refers to press being present if possible. The Commission believes there

are other ways to ensure public scrutiny of the trial process, such as streaming to a separate media room if there is no space in the court room.

16. The Commission notes that Option 6 set out in the Discussion Paper is to progress the backlog at the end of the crisis. The Commission does not believe this is a standalone option, particularly given that we are not clear on when the crisis may end. However, the Commission believes it would be sensible to explore ways to progress trials, for example by bringing in recently retired members of the judiciary, as some level of delay and accumulating backlog appears inevitable.
17. The Commission will continue to engage with the Scottish Government and other stakeholders on these issues.

Scottish Human Rights Commission

30 April 2020