

FACULTY OF ADVOCATES

**Response from the Faculty of Advocates**

**to**

**Coronavirus (COVID-19) recovery - justice system, health and public services reform**

The Faculty of Advocates is grateful for the opportunity to respond to the Scottish Government consultation on whether particular relaxations and reforms introduced during the COVID-19 pandemic should be made permanent or, if not made permanent, extended for a further period. The reforms relate principally to public health measures, to public services and to the justice system, both civil and criminal. Some are administrative or regulatory, and others are more substantive.

In this response, proposals relating to the justice system are addressed specifically. The remaining matters were the subject of communication to the entire practising membership of the Faculty, and no comments were received about these changes. It therefore appears that there are no strong views on the remaining matters, although the lack of response may also reflect a dearth of practical experience of the changes.

**RESPONSE TO CHAPTER 3**

Topic P9

We do not consider these proposals should be extended or made permanent. This is because the purpose appears to be to have remote custody appearances as the default position. In any case where an individual’s right to liberty is to be removed from him it is imperative, in our view, that he/she has a proper opportunity to fully brief those instructed, hear clearly the arguments put forward and discuss the outcome and any appeal process with those instructed. Remote custody appearance does not provide this.

In the event that these proposals are proceeded with it should only be until such time as there is no continuing pandemic health risk.

Topic P13

We would support this proposal being made permanent.

**RESPONSE TO CHAPTER 4**

Topic J1

We consider that the provisions for Topic J1 (conduct of business by electronic means) should be extended beyond March 2022 and made permanent. In this digital age it makes sense for documents to be signed electronically and transmitted by email. It is difficult to see what circumstances would require actual signing and physical delivery.

There is also no objection to the proposal that documents normally sent to a party can be sent to the person’s solicitor. The only caveat in relation to that matter would be that it is vital that solicitors keep all parties advised of any change of agency and that the Crown and courts are alert to that possibility at all times.

Topic J2

We consider this proposal to be somewhat unclear. The provision appears to relate to accused and/or witnesses yet makes mention of the remote jury model. Dealing with remote juries, whilst no one would pretend they are the same as the previous arrangement, they have been essential in relation to justice being able to be done whilst the country has been in the wake of the pandemic. In the short to medium term we consider this ought to be continued until such time as it is safe to have them return to the courts. It should not be made permanent.

Thought should, however, be given to making the current balloting arrangements permanent. The current arrangements make it unnecessary for large numbers of members of the public to attend in person to await the outcome of the ballot. This makes sense and has worked well. The only caveat is that simply ignoring any telephone call from the clerk of court means that the person is withdrawn from the ballot. This makes it very easy to avoid the public duty of jury service. There ought to be some follow up procedure to investigate the reason for failing to respond and efforts made to include these people in a future ballot.

We do not think that the provisions for virtual attendance should be made permanent nor do we consider that should be the default position. There are potential hearings which are truly procedural which will not impact upon the accused’s position. In such circumstances there can be virtual (or indeed no) attendance. However any hearing which has a bearing upon the accused’s trial ought to be conducted in circumstances where he/she has a right to attend in person.

There are too many instances of accused persons appearing by remote link where they cannot participate because they cannot hear properly, cannot communicate with agents or counsel and do not have the opportunity to consult either before or after. The practical arrangements for any consultation are unwieldy. The time slots for linking up with prisons are understandably tight. The only possible opportunity to consult means the link has to be established and then the court has to be cleared. The same applies after the hearing, if required. In practice, to avoid this delay, people generally do not consult before, unless for a very brief period and rarely if ever afterwards. It is submitted that this is not justice being done or being seen to be done. We consider the default position for any court hearing ought to be personal appearance but with a provision for virtual appearance or no appearance if appropriate.

Outwith the prison system there are obvious technical difficulties for accused persons appearing virtually and again a system where personal appearance was required except where no appearance was necessary would avoid that situation.

Topic J3

We consider the provisions for early release of prisoners should be extended beyond March 2022 and made permanent if the Government and the prisons consider it to be appropriate. The justification for the extension is as set out in the proposals.

Topic J4

We consider the provisions for Topic J4 (expiry of undertaking) ought to be extended beyond March 2022 but see no reason, or justification, for them being made permanent. The rationale for extending the period when someone can appear on an undertaking to take account of potential isolation requirements makes sense. In this way any conditions attached to the undertaking can be continued. However, it would be hoped that the necessity for isolation will diminish with time and there will be no need for this provision to become permanent.

Topic J5

Whilst as a matter of principle we have concerns about fiscal fines, in that they may result in people accepting such fines without obtaining legal advice and accordingly accepting responsibility for something they may not be guilty of, the fact is that they exist as part of the legislation. Having regards to that and to the fact that the recommendation is for the extension of them but not for them to be made permanent we would agree with the proposal.

Topic J6

We consider this proposal to be much more relevant to the solicitor branch of the profession than ourselves. There are obvious potential advantages to the system but solicitors are already under immense pressure and having to travel to different venues across the country is likely to impact adversely upon them.

Topic J7(i)

As this proposal relates solely to the time limits for summary cases we would again defer to the views of the solicitors branch of the profession who are directly affected by this proposal.

Topic J7(ii)

Firstly it has to be recognised that Covid did not create the backlog. Prior to the pandemic the number of cases where remand prisoners had a trial in the High Court within 140 days of their full committal was, if not zero, very small. Such was the frequency of motions to extend that particular time bar it was almost never opposed. People spending the best part of a year in custody prior to trial was common place. It is, however, accepted that the pandemic made a regrettable situation even worse.

We accept that the current situation requires the current time limit extension to be extended beyond March 2022. However without proper parliamentary scrutiny and debate we do not consider it should be made permanent. That is not to say that there may not be an argument for altering the time limits in due course after full consideration but it ought not to be done as part of these provisions.

Topic J7(iii)

We would adopt the same position as for Topic J7(ii).

Topic J7(iv)

We consider these provisions should be extended beyond March 2022 but not made permanent.

Topic J8

We consider these provisions re Proceeds of Crime should be extended beyond March 2022 but not made permanent.

Edinburgh

7 November 2021