The Adaptation of Scottish Courts to the Pandemic: An Innovative New Chapter for the Justice System

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I. Opening Remarks

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Dear Professor Dr. Ian Forrester and dear Members of the Franco-British Lawyers Society, I would like to thank you very much for the opportunity to conduct this online seminar with the Franco-British Lawyers Society. I would like to thank Prof. Dr. Ian Forrester for his excellent coordination with your association. The main concern of today's Seminar is to reconcile the principle of openness in online proceedings with the protection of privacy and business secrets. Certainly, the concept of open justice, which is being discussed in the United Kingdom and Australia, is extremely important from the point of view of democracy and the rule of law in making online proceedings visible, but on the other hand, the protection of human rights and the privacy of the parties involved is also an important issue. If remote publication of court proceedings goes too far, companies and others could avoid the court process and resort to arbitration, which could result in a violation of the right to a trial. In this online seminar, we hope to learn a great deal from you about the current state of remote proceedings conducted by the Scottish courts.

II. Remote Trials in Scotland

Chair: Prof. Dr. Ian Forrester QC LLD President of the FBLS (Formerly Judge of the General Court of the European Union from 2015 to 2020)

Good morning to you all. Bonjour a tous et a toutes. Ohayogozaimasu / Konbanwa, Deguchi-sensei! Welcome to this webinar which will tell you about the small jurisdiction

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This is a transcript of an online seminar from April 22nd, 2022, organized by the Franco-British Lawyers Society / Association des Juristes Franco-Britanniques and Ritsumeikan University.

called Scotland, about how it coped with the Covid Pandemic and its constraints, and maybe what lessons are to be drawn for how we organise court proceedings in the future. This time we are partnering with Ritsumeikan University in Kyoto and I salute an old friend, Prof. Deguchi, who has gathered a number of students and academics from all over Asia. Scotland was an independent kingdom till 1603 when the Scottish king also became King of England. In 1707 the parliaments were joined and part of the deal was that Scottish law and education and religion would remain distinct from that of England. There is today a single supreme court which is competent for both Scottish and English appeals save in the area of crime. So, Scotland was free to seek its own solutions to the problems of swift justice during the pandemic. You are going to hear an extraordinarily distinguished group of judges and officials. First the Lord President, Colin, Lord Carloway who is the senior judge in Scotland. Then the Lord Justice Clerk, Lady Dorrian who presides mainly over criminal appeals. Then the leader of the Scottish Bar Roddy Dunlop QC, who will voice reservations about remote hearings. Then the head of the Crown Office, the prosecution service for serious crimes, Dorothy Bain QC, who holds the ancient office of Lord Advocate. Then we will hear how specialised tribunals handled appeals from Laura Dunlop QC who presides over Mental Health hearings which are both sensitive and urgent. Then we will have comments and question and we may hear from Sir David Edward, my predecessor as the first judge in what is now the General Court of the European Union. Questions can be put either by chat function or orally by raising your hand. Let us begin.

Scotland and England were separate kingdoms from mediaeval times, with frequently hostile relations and occasional wars. Scottish law students travelled to learn the civil law which applied in continental Europe, based upon versions of Roman or Civil Law (civil derives from the title of the code proclaimed by the Emperor Justinian, the Corpus Iuris Civilis). English law developed through the decisions and practices of the King's Justices, more pragmatic and not affected by continental doctrines. So, by 1600 the two legal systems were significantly different. In 1603 King James VI of Scotland succeeded his cousin Queen Elizabeth (who died with no children) as King James I of England and VI of Scotland.

During the next hundred years, the two kingdoms were governed separately, and Scotland was considerably poorer than England. After tense negotiations, the Treaty of Union was signed in 1707 and obtained the support of both parliaments. It provided that there would be a single parliament for the United Kingdom. It also provided that in the fields of education, religion and law Scotland would retain its pre-Union practices. So Scottish law remained distinct in terms of sources, civil and criminal law, family law and to some degree constitutional doctrine. Scotland is one of the "mixed jurisdictions" along with Louisiana, Quebec, South Africa and Israel, which rely on a combination of civil and common law. While Scots lawyers correctly note the different ancestors of modern law, the actual outcomes of particular controversies will often be very similar in Scotland and in England.

The Scottish courts are separate from English courts, although the ultimate appellate body in both nations is the UK Supreme Court. Judges are appointed after a successful career in practising law, not at the moment of entry into the legal profession. Thus, most judges have been appointed Queen's Counsel after 15 to 20 years of practice, and are then appointed to be Senator of the College of Justice. They handle both criminal and civil cases. There are two appellate courts of equal standing one presided over by the Lord President and the other by the Lord Justice Clerk. The Lord Justice Clerk by tradition supervises criminal cases mainly but not exclusively. The number of sitting judges depends on the difficulty and importance of an appeal and for example where the court plans to consider overturning a previous ruling.

Scottish legal tradition like England's, values oral argument. It is common for judges and counsel to debate vigorously, in a manner which is more intense than in the continental tradition. There are two colleges of practitioners, solicitors in the Law Society of Scotland and advocates in the Faculty of Advocates. Traditionally, solicitors prepare the early stages of a case and the pleading of the case is entrusted to the Bar, the advocates. In recent years, solicitors have got rights of audience in the higher courts so the distinction is less than it used to be.

This seminar will involve the most senior members of the profession. Lord President Carloway will describe the structure of the appellate courts briefly and will describe how the Scottish courts adapted to the challenges of Covid and the need to reconcile on the one hand the need for disputes to be decided promptly and the need to avoid face-to-face contact for Covid purposes. Lady Dorrian, the Lord Justice Clerk will describe the use of cinemas where jurors could sit and observe on the large screen the judge, the prosecutor and the accused. The Lord Advocate is both the head of the prosecution service and a source of legal advice to the Scottish government and the First Minister. She will describe some of the problems of respecting the need for swift justice and the need to respect rules on avoiding infection. She will also mention the particular problems of domestic violence during the confinement period.

Then we will hear from the Dean of the Faculty of Advocates, Roddy Dunlop QC, who considers that remote hearings have drawbacks and should not become routine. Finally, we will hear from the president of one of the specialised tribunals which have to take a wide range of decisions on highly regulated fields like immigration and in her case mental health, where persons may seek to challenge their physical detention and must be heard swiftly.

Questions

What are the three innovations which you have learned thanks to the Covid crisis? I believe that Scottish law used to set very short deadlines for the completion of the trial of those in custody. What is the current rule?

How does the Scottish experience compare with that of the English courts?

Are staff reluctant to go back to the former practices?
What is the backlog in months today and is it going down?

III. The Right Hon Lord Carloway

Lord Carloway was appointed as Lord President of the Court of Session and Lord Justice General of Scotland in December 2015. He has been Senator of the College of Justice since February 2000. He was appointed to the Second Division of the Inner House in August 2008, before becoming Lord Justice Clerk in August 2012. His report into criminal law and practice was published in November 2011.

The Scottish Court System and the Scottish Courts in the Post-Covid World

Thank you for the invitation to speak to you today. I am the Lord President of the Court of Session, which is Scotland's supreme civil court, and the head of the Scottish judiciary. The Lord President is also the Lord Justice General of Scotland and chairs the High Court of Justiciary, which is Scotland's supreme criminal court. I chair any civil or criminal bench of which I form part. Although both courts may sit in plenary session, at the appellate level they normally sit with benches of three judges, presided over either by myself or the Lord Justice Clerk, Lady Dorrian, from whom you will hear later.

The Scottish Civil Court System

The Scottish civil court system is divided into three main streams: cases raised in the Court of Session; cases raised in the Sheriff Courts; and those raised in the Tribunals.

The Court of Session

The Court of Session sits only in Edinburgh. It has jurisdiction extending throughout Scotland. The Court sits as both a first instance and an appeal court. Cases at first instance are heard by a single judge or, in rare cases, with a judge and a jury of 12 people. For first instance cases it only deals with cases which exceed £100,000 in value. That provision was introduced recently in order to remove low value cases from the court and to ensure that only cases of significance started in that court. The Court of Session deals with a wide range of issues including: personal injury claims; breaches of contract or of a general duty of care; disputes concerning land, divorce, child abduction; and, exclusively, the review of local or central government decisions and those of other administrative bodies, in what are commonly known as "judicial reviews". There are specialist judges in the Court to deal with commercial business.

Any appeal from a decision of the single judge will be heard by one of the Court's appellate divisions. There are two permanent divisions, but an extra division can be created if that is convenient. Some decisions of a Division can be appealed further to the UK

Supreme Court. Decisions which dispose of the cases entirely can be appealed, but only with the permission of the Division or the UK Supreme Court. Permission will be granted only if the appeal raises an arguable point of law of general public importance. Decisions which are not final can only be appealed with permission of the Division, again on these grounds.

Cases which are likely to go to the UK Supreme Court will include questions of UK taxation or interpretation of UK, rather than purely Scots, law. Traditionally, there are two Scottish judges in the UK Supreme Court. At present they are coincidentally the President and the Vice President. They will both sit on any case which does involve Scots law questions.

The Sheriff Court

The majority of civil business in Scotland is dealt with in the Sheriff Courts. These are local courts located throughout the country, including the Northern and Western islands and the urban centres of Glasgow, Edinburgh and Aberdeen. There are six administrative sheriffdoms. For administrative purposes, each sheriffdom is presided over by a Sheriff Principal. Within each sheriffdom there can be a number of Sheriff Court districts, each with its own court. These vary in size from those, such as one on the island of Lewis, having a part-time sheriff to Glasgow which has over 20.

The Sheriff Courts have exclusive jurisdiction in cases worth £100,000 or less. Generally, a particular Sheriff Court will have jurisdiction over a case where the defender is resident within that court's district although that varies, depending upon the type of case.

The business within the Sheriff Court is heard by sheriffs and summary sheriffs; the summaries only having the power to hear certain categories of less complex, more routine business. Sheriffs and summary sheriffs are all legally qualified judges who are recruited, usually in their late 30s, early 40s or older from those in private practice as solicitors or from the prosecution service.

Decisions of a sheriff or a summary sheriff may be appealed to the Sheriff Appeal Court. The SAC sits as a bench of, usually, three sheriffs, who are either specially appointed, or are one of the six Sheriffs Principal. Simple appeals may involve only one Sheriff Appeal Court sheriff, usually a sheriff principal. This intermediate appeal court was introduced in order to prevent appeals of little merit reaching the Court of Session.

It is possible to appeal from the Sheriff Appeal Court to the Court of Session, but only with the permission of the SAC or of the Court of Session. Permission will only be granted if the case raises an important point of principle or practice or there is some other compelling reason for the Court of Session to hear the appeal.

The fundamental principle, which stems from the reforms, which were carried out in 2014, is that a case should only be given the time and resource which is appropriate. Low value, or otherwise trivial, cases should not normally take up the time of the senior

judiciary.

Tribunals

Certain types of business must be raised in specialist tribunals. Some of these deal with devolved (Scottish Parliament) issues including education and health-related support needs, some social security and some tax. Others deal with reserved (UK Parliament) matters, including employment cases. A decision of a First-tier Tribunal may be appealed to the Upper Tribunal, but only on a point of law. Decisions of the Upper Tribunal can be appealed to the Court of Session, but again, only on a point of law, and only with the permission of the Upper Tribunal or the Court.

There are several independent first instance tribunals, including the Mental Health Tribunal, which will eventually transfer over to the First-tier Tribunal system. You will hear from Laura Dunlop QC, President of the Mental Health Tribunal, later.

The Scottish Criminal Court System: The High Court of Justiciary.

Criminal business is divided into summary (sheriff sitting alone) procedure, for less serious crimes, and solemn (sheriff or judge and jury) procedure, for more serious crimes; being those likely to attract a sentence of more than a year. The High Court hears the trials of the most serious cases committed in Scotland or in Scottish territorial waters. It has exclusive jurisdiction to hear cases of murder, rape and treason. The judges of the High Court are the same as those who sit in the Court of Session. Trial is always with a jury of 15 persons. Although there is no constitutional right to a jury trial, a time-limited pilot of single judge trials for rape has recently been proposed.

Like the Court of Session, the High Court sits as an appeal court as well as a court of first instance. A decision of a trial court can be appealed to an appellate division, consisting normally of a bench of three judges, although it could be more in cases of particular importance. Permission must be granted by a judge or judges before an appeal can proceed. There is a single ground of appeal; whether a miscarriage of justice has occurred. This may include an appeal based on new evidence or an unreasonable jury verdict. Most appeals concern misdirections of juries by the judge or an insufficiency of evidence.

The UK Supreme Court has a very limited jurisdiction to hear appeals from decisions of the High Court where the case raises a fundamental issue of whether Scots law is compatible with the European Convention on Human Rights or whether an Act of the Scottish Parliament is compatible with the devolution settlement.

The Sheriff Courts

Sheriffs can hear both summary and solemn cases, but summary sheriffs may only hear summary cases. In solemn procedure, trial is by sheriff and jury and the maximum sentence is five years.

Any appeal from a sheriff in solemn proceedings must be made to the High Court and

is subject to the same procedure as those emanating from trials in the High Court. If appealed, decisions of sheriffs or summary sheriffs in summary proceedings are heard by the Sheriff Appeal Court.

The Justice of the Peace Courts

Justices of the Peace are lay magistrates with jurisdiction to hear allegations of minor crimes, such as speeding, careless driving and breaches of the peace. As with appeals from decisions of a sheriff in summary procedure, decisions made by justices of the peace can be appealed to the Sheriff Appeal Court.

Changes to the Justice System as a result of Covid-19:

There were significant changes made to the manner in which criminal trials were conducted during the pandemic. The Lord Justice Clerk is going to talk to you about those in more detail shortly. I will confine myself to measures taken in the civil sphere.

In Scotland, as elsewhere, we have been conducting civil business almost entirely online since the first lockdown. We have no civil backlogs. As a generality, the judges and lawyers have been appearing from their own houses or chambers using the Cisco WebEx platform. The court buildings, as with government buildings, have been closed to the public and are only now re-opening. We are now returning gradually to in-person hearings in the Court of Session, but there are many areas in which we will continue to use the virtual model. The general consensus seems to be that, as the default, procedural hearings should be virtual whereas substantive hearings should normally be in-person, even if there can be exceptions to both or the use of a hybrid.

In the Sheriff Courts there is more enthusiasm for holding every hearing by WebEx. The difference stems partly from the nature of the cases and the split legal profession between advocates and solicitors. Court of Session cases will almost all involve specialist advocates. They are mostly based in Edinburgh, where the Court is. It suits their business model to conduct the cases in person. In the Sheriff Court, much of the work is conducted by solicitors from all over the country. It is easier for them, and others, to proceed remotely. You will be hearing later from the Dean of Faculty on this, amongst other, issues.

We are still deliberating on the virtual/in person divide, but the advantages and savings will be considerable if we move onto a largely virtual system, especially for low value cases. The ability to appear in every Sheriff Court from the Northern Isles to the English border, especially in procedural applications, has to be seen as a significant benefit, even if there are concerns about whether this is likely to diminish the business of the local High Street firms. That type of concern should not lightly be discounted, but the prospect of people in the less populated areas of Scotland having a much more immediate access to specialist advocacy services and to the courts is an attractive one.

What we thought would take years to achieve was realised within months of lockdown. Both the civil and criminal courts have gone almost entirely paperless. The commercial and

other first instance civil courts have been conducting evidential hearings by WebEx without much difficulty over the past two years. Witnesses have testified from their homes or offices to a court sometimes thousands of miles away and sometimes just around the corner. Many, if not most, of the judges, and even more of the advocates but fewer solicitors, have expressed a desire to get back into the physical courtroom. This is partly because that is the environment with which they are most familiar and in which they are most comfortable. I do not wish to minimise the importance of that. However, the lessons which we have learned, in relation to our ability to cope with screen time, point to a world in which we must use the virtual systems when they are convenient not just to the judges and lawyers but also to the witnesses and others who would not require to spend time coming to, and waiting for prolonged periods in, court buildings. Safeguards have to be considered but we really ought to be moving towards the use of the WebEx, Zoom or Teams models for far more purposes than we employed pre-pandemic and, over time, for far more than procedural business.

Appeals

Finally, and maybe for the longer term most interesting, we have seen how easy it now is to have testimony not only presented on screen but also recorded in audio-visual format. Some jurisdictions have had that facility for some time, but perhaps not of the quality which is now achievable. One of the consequences of this will be that the advantage, which the appellate courts have thought that the first instance judge has traditionally had from having seen and heard the witnesses, will be lost. The appellate court will be able to see and hear the witnesses in much the same manner as the fact finding judge. Will the scope of an appeal in a civil case escape from its present constraints into what might be a review of the primary findings in fact based upon the advantage which a three judge bench has over a single trial judge? It may be that the appellate courts will, with greater confidence, be able to reverse a first instance finding which it simply considers to be wrong. Is that not how justice is achieved?

IV. The Right Hon Lady Dorrian

Lady Dorrian was installed as Lord Justice Clerk and President of the Second Division of the Inner House of the Court of Session in April 2016. She was appointed a judge of the Supreme Courts in 2005, having served as a temporary judge since 2002. She was appointed to the Inner House in November 2012.

The 21st Century Court

Ian asked me to start with a whistle-stop tour of the Scottish legal landscape, focusing on the criminal process, so here goes: the main criminal courts are the Sheriff Court and the

HCJ; the sheriff can sit alone with a sentencing power in general of up to 1 year; but can also sit with a jury where the sentencing powers go up to 5 years – if these are insufficient the sheriff can also remit such cases to the HCJ for sentence. The HCJ has a first instance jurisdiction dealing with the most serious jury cases – murder, rape, and so on – with a sentencing power up to life imprisonment or an OLR. Appeals from the sheriff sitting alone go the Sheriff Appeal court; appeals from all jury cases go to the HCJ in its appellate capacity, which is basically the final appeal on substantive matters.

Scotland has an organised system of public prosecution in the form of the Crown Office and Procurator Fiscal Service. The LA is at the head of this, and High Court prosecutions are conducted by him or more usually by his appointees, known as Advocate deputies; in the Sheriff Court prosecutions are conducted by the procurator fiscal. It is worth stressing that we have had such a system of public prosecution for hundreds of years – the LA is first mentioned in this context in the early 15th C and the PF in the mid-16th C.

Finally, you will all know that we have three verdicts in criminal cases, Guilty, Not Guilty, Not Proven. What you may not know is that we operate a jury of 15 people, proceeding on the basis of a simple majority – i.e. 8 votes required for conviction. Such a large jury brings with it real difficulties when trying to conduct socially distanced trials.

Rather prophetically, as it turned out, in April 2019 I was asked to make a speech on the topic "Law in a time of change", during which I stated fairly modest aspirations for the immediate future. Who could have foreseen that less than a year on we would be faced with a Global pandemic and more crucially, that those modest aspirations would require to be expanded enormously, and implemented at a much faster pace than would normally occur, to ensure that judicial proceedings could continue during the pandemic? The reality is that in the last year we have had to develop new, and in some cases, radical ways of working which have transformed the legal landscape and taken us much further than we might have gone had it not been for the pandemic and the impetus provided by necessity.

General

We have had to become accustomed to working only from electronic papers, easier for some than for others. We also had to move very swiftly, and from almost a standing start, to a system of remote hearings, with the participants joining online from home.

Jury centres

One of the greatest challenges has been how to restart jury trials in Scotland in the safest and most comprehensive and guideline and legislation compliant way as possible. If this was likely to be difficult for a jury of 12, think what it would be like for a jury of 15, with the need for social distancing not only in the court but in the jury retiring rooms where they consider their verdicts. I chaired a working group to see how we could do this. We did consider whether dividing the jury box up with Perspex screens might work, but this was

not a solution. First, in many cases the jury box – usually built for Victorian jurors – was already a squeeze; and second, this would not resolve the issue of socially distancing in the retiring rooms, which were also mostly of a barely adequate size already. That led us to the introduction of remote jury centres, largely based in otherwise cinema complexes in Glasgow and Edinburgh and now across the country. This ensures the jury can all physically distance while hearing evidence and taking part in deliberations about the case. Jurors view the trial proceedings live on screen with the other trial participants – judge, counsel, accused and witness – attending the courtroom. The jury view a screen with a four-way split so they can see everything necessary, including the accused. There is a camera in front of each juror, and their images appear on one enormous screen which is placed above the jury box in the court room, so all the participants can see all the jurors.

It is fair to say that there was dubiety in some quarters about the development of this model, and concern about the risk of a trial seeming to become "entertainment", but once people saw what we were able to do in the locations, and the extent to which we could kit it out in ways which could maintain the dignity, formality and authority rightly to be expected from a courtroom setting, those concerns were eased. The model has been shown to work well and has enabled us to get back to running High court trials at pre-pandemic levels. Some trials have been able to take place with more than one accused, and we have now taken steps to reconfigure some of the bigger courts to conduct multi accused cases.

There are issues about developing a rapport with the jury, when they are in a remote location, and at first, I think people found it hard to work out how to engage with them. However, as time has gone on, this has diminished. The general consensus is that the system may not be perfect but it works extremely well, with no concerns that the fairness of the trial is impinged upon. I regularly get feedback from participants in these trials, and the level of satisfaction is fairly high, subject to the point that this is a matter of necessity rather than choice.

I should mention that we also had to develop a new way of empanelling juries: pre-pandemic we would normally bring about 120-150 people to court to be the pool for jury selection; that could not be done so we have had to devise an entirely new way of doing this.

It took a great deal of work to get this done, and a lot of money, and we were greatly supported by the response of the Scottish legal profession whose willingness to co-operate has been nothing short of excellent.

Ian passed me on a question about the security of witnesses in remote hearings. This does not arise in our criminal jury cases since the witness will be in the court, or giving evidence from another location under our own control, or their evidence will be played by pre-recorded video. The issue does arise in civil cases, where the risk may vary according to the nature of the case. In the majority of cases, putting the witness on oath, and asking some questions directed to establishing the nature of the location, the absence of others, etc should

probably suffice. In general, parties should also have a feel for whether there may be a particular issue arising with an individual witness, and could perhaps arrange to take their evidence on commission, in advance of the hearing. The idea of a full length mirror is an ingenious one, but not everyone will have one of those, and if they do it will probably be in a bedroom or other location not really suitable for the taking of evidence.

Future

For the future, we do not yet know how long requirements of social distancing and the like will be with us, but it looks like being for some time to come. The situation, as we can see across Europe and beyond, is not yet stable. However, we do need to start looking at how we plan to do business after the pandemic, to look at whether there are lessons from what we have been doing which can be translated to how we do business in the future. I agree with Roddy that procedural matters will probably generally continue to be done remotely. The extent to which, and circumstances in which, other cases may be done is something which requires to be examined with care, looking at what have been the downsides, as well as the benefits, because there is no doubt that both exist. We need to examine this with an open mind – neither wedded to how we have always done things, nor committed to change for the sake of it.

One area where a key benefit has resulted from moving hearings online is transparency and the ability to facilitate greater access by the public to the courts. The use of WebEx allows many more participants to attend in a virtual sense than could ever be accommodated within the court room. A few weeks back we had a hearing in which more than 300 people joined by WebEx with an additional 100 plus parties on the phone line listening in as well. Whatever happens once the pandemic is behind us, we need to find ways to maintain this greater public engagement.

V. Roddy Dunlop QC

Roddy Dunlop QC is the Dean of the Faculty of Advocates in Scotland. He was admitted to the Faculty in 1998 and took silk in 2010. His expertise covers a wide practice including media law, insurance law, human rights, and judicial review.

How to reconcile the advantages of face-to-face advocacy and the necessities of the pandemic

Thank you very much. I am primarily going to talk about civil cases because I am aware that I am speaking shortly before the Lord Advocate who will be addressing criminal matters, but it is perhaps appropriate to begin by recognising the solution, that was adopted in Scotland, of having jury sit remotely, in other words, in empty cinemas, has been rightly, in my opinion, lauded as world leading. I think I am right in saying Scotland was the first

jurisdiction to adopt that measure of dealing with the problem thrown up by the pandemic. While the Lord Justice Clerk, Lady Dorrian, is correct to say it is not perfect, it is as close to perfect as you can get in the situation we are faced with regarding COVID and the problems it threw up, and it has kept criminal justice moving in a way that would not otherwise be possible, because we will remember what happened in March 2020 when the pandemic landed and we had the potentially catastrophic impact on the justice system as well as all other aspects of society. There was in Scotland and across the United Kingdom a complete and instant lockdown with cancellations of cases at very short notice and at first no real indication as to how we could possibly keep things going. The Scottish Courts and Tribunal Service, which is a body that is headed up by Lord Carloway, had to deal with the unfolding problems this had thrown up in a very quick manner, and against the background of – I am not expecting Lord Carloway to agree with me and he may well contradict me – in a situation in which Scottish Courts probably suffered years of underfunding especially on the questions of information technology.

So, from a standing start, the system had to deal with this problem and frankly amazing efforts were made to react very quickly and within a matter of, I think, six weeks. We had a situation where the appellate civil justice system was back up and running with what their lordships described as the WebEx online platform allowing the Inner House, that's the Scottish appeal court, to resume business in a way that first seemed very odd but frankly has worked pretty well. That system was rolled out, again fairly quickly, to allow first instance business, procedural business, to resume over the WebEx platform and the result of this has been that civil justice in general has run on a largely unimpaired basis. There is no real backlog, certainly not in the Court of Session, the Scottish highest civil court with regard to civil business. Problems have arisen in crime, of course, because of the involvement of juries but there has been no real backlog so far as I see in terms of civil justice. The consequence of that has been that there have been many advances which are to the benefits of everyone. Frankly, I accept, in particular, procedural business, as his Lordship has indicated, is likely to be done remotely, going forward and for the foreseeable. The days of requiring practitioners to travel across Scotland for twenty-minute potentially uncontentious hearings are all gone. This gives accompanying savings of time and cost and allows practitioners, in a situation, or in a manner that has never been possible before, to appear in different courts across Scotland on the same day.

We've also seen the rapid move to electronic papers. Electronic papers are favoured by some in the profession including myself and some in the judiciary. But we have dinosaurs as old jurisdictions do and many are still favouring the idea of bundles of papers and pink tape and sticky notes and highlighter pens. People are still free to use those but in terms of court itself the move to electronic papers has been rapid and rapidly uptaken by the judiciary. In that regard, we had effectively a revolution that might have otherwise taken decades but now works very well. It is very clear that even the most reluctant of the judges

in this regard has now embraced the concept of electronic papers and are familiar with, and enabled to operate electronic bundles with the various advantages that carries, including, obviously storage not being required, security of these matters, and the ability to search documents that would otherwise require to be well thumbed. So, we have significant advantages and these advantages will not, and must not, be discarded as COVID recedes.

But again, as has been recognised by those preceding me, in particular, in Ian's comments, there are disadvantages in remote ways of working. We are fortunate in Scotland now to have arrived, I think, at what seems be a position at which the profession as a whole, solicitors, counsel and the judiciary are content and agreed. Looking forward, it would seem that the procedural business is likely to remain largely online but substantive hearings, hearings that are potentially dispositive of the case as a whole should take place in person as a norm and in each case the ability to delegate from that norm where appropriate. This seems to me to allow an appropriate balance between the pros and cons of each type of hearing. Here in Scotland, we have a flexible and dynamic solution to justice going forwards.

Of the difficulties I have expressed, concerns regarding virtual justice, they remain, and these are reasons why, I think, it has been largely agreed that we should resume so far as possible substantive hearings in person. The ability to engage with the judges is far easier with in person hearings, even after two years of experience of video hearings. Ultimately, we are in a business – we, the lawyers are in a business of humans trying to persuade humans. That is based on a situation where the essential human interaction is wholly unimpaired and not cut off across the screen. Those problems are particularly acute with witnesses. The interaction with witnesses, the ability to assess a witness, is, in my view, generally done best in person.

There is also the question of the loss of formality. Great efforts have been made by the court and practitioners to retain the fundamental importance of the dignity of the court, the formality of the court. I was struck by one of the leading Scottish judges, a leading family lawyer in our time of the Bar and now one of the Inner House's appeal judges. At Lady Wise's previous talk, she quoted a litigant to say, 'Are you really going to take my child away over an iPad?' That really reflects the point that for important matters like that, -- and most of the business in the Court of Session is accurately described as important, very important to the litigant, -- a formal hearing is an important part of feeling you had your day in court.

Looking to the profession itself, there are difficulties in remote working for the profession, that is, in Scotland and I am sure in the other jurisdictions watching it, collegiate to its very core. A busy court is an atmosphere that fosters debate and encourages discussion, facilitates exchange of knowledge and wisdom and oils the wheels for settlement. There is real loss of that, or at least an impairment of it, where the business is carried out remotely.

That has led to a significant number of my members reporting that they felt their mental health had worsened as a result of this new way of working. It has been particularly difficult, I think, for those new to the profession. Our pupils and trainees are called devils. Our devils had a particularly difficult time in 2020 and 2021 in their ability to learn court craft when frankly the people that they were learning from were themselves, learning, and learning rapidly how to deal with this new way of working.

All of this also feeds into this question of developing personal and professional relations. Any member of the Faculty of Advocates, whether still practising or now on the Bench would have developed very close relations in their training and in their practice thereafter. Lifelong friendships are formed, in particular, during the nine months or so of undertaking deviling. There are multiple facets to the relationship-building process, that is that between solicitor and counsel, between junior counsel and senior counsel, between solicitor and client, client and counsel, counsel to his or her opponent. The benefits to be gained from forming such relationships cannot be overstated. My view is that it is simply not realistic to suppose that such relations can be created, let alone developed, over a video screen. As with everything in life, it is about striking the right balance and in that regard, I hear and I endorse the comments from Lady Dorrian that 'if we can have our cake and eat it; if we can have the best of both worlds, then we should look to do that.'

In closing, it is appropriate to recognise how far we have come in such a short time. The pandemic has visited many horrors upon us but may well leave us with the justice system that is more flexible, more dynamic and more suited for modern life in Scotland and indeed beyond. As long as the importance of human interaction is never forgotten and as long as we recognise the various aspects that we need to take in view, that substantive hearings must be retained in person, substantive hearings must be retained going forward, I am convinced that going forward, the right balance will be struck. Thank you.

VI. The Right Hon Dorothy Bain QC

Dorothy Bain QC, the Lord Advocate (Head of Crown Office, prosecution system for serious crimes). Rt Hon Dorothy Bain QC was appointed Lord Advocate in June 2021. From 2002 to 2011, she served as an Advocate Depute in Crown Office. This culminated in her appointment as the Principal Advocate Depute in 2009; the first woman to be appointed to this post. As Principal Advocate Depute, she was Scotland's most senior prosecutor, conducting many complex and high-profile criminal prosecutions and appeals.

Thank you very much. Thank you for the invitation to speak here today. I am very privileged and pleased to be given an opportunity to speak to such a distinguished group of individuals about the prosecution system of Scotland and how it has been impacted upon by the COVID-19 pandemic. Today I will talk, in brief, about the role of Lord Advocate and procurator-fiscals, provide an overview of the decision-making process when cases are

reported to the Crown Office, and discuss how cases, including domestic abuse cases, have been impacted upon during the COVID-19 pandemic.

By way of some background, the criminal law in Scotland is based on both common law, which are laws dating back to the sixteenth and seventeenth centuries, and continue to be developed by the courts, and legislation passed by the Parliament known as Acts of Parliament. References to the Lord Advocate date back to the fifteenth century and references to the procurators-fiscal, lawyers working for the Crown, date back to the sixteenth century. You might ask what the Crown in Scotland does. The Crown Office and procurator fiscal service is Scotland's only prosecution service. I, as the Lord Advocate, am responsible for the investigation of relevant death. That means we investigate and prosecute crime; we investigate sudden, suspicious and unexplained deaths and we investigate criminal complaints against the police. The role of the Lord Advocate is potentially unique. The Lord Advocate holds two separate constitutional roles in Scotland. These roles are performed by me, independently of each other. I am Scotland's senior law officer and I am the principal legal adviser to the Scottish government. I am supported in that work by the standing junior counsel who I appoint and by government lawyers working for the Scottish government's legal department and the Lord Advocate's legal secretariat, and I am also supported by private office staff. I am also head of the systems for the investigation and prosecution of crime and investigation of deaths, and in this role, I hold ministerial responsibility for the work of the Crown Office, the sole prosecution authority in Scotland, prosecuting cases independently, fairly and in the public interest. In this role, I am supported by the Solicitor-General, Ruth Charteris QC, a highly respected senior member of the Faculty of Advocates. I am supported also by a team of advocate-deputes, who are drawn from the profession at large, and currently and predominantly from the criminal member of the Faculty Avocates. Many advocate-deputes who are members of the Faculty of Advocates have stepped aside from their private practice, both civil and criminal, taking on a financial sacrifice and accepting a period of time away from their often very successful practices, in order to undertake their period of public service and prosecuting serious crimes in the public interest, conducting the most complex and difficult cases in the High Court and the Court of Criminal Appeal of Scotland, and I am grateful to all of them for their public service. In addition, I am also supported by many talented lawyers and committed staff employed fulltime by the Crown Office. The Crown Agent is the principal solicitor employed fulltime by the Crown Office, and he is the principal legal adviser to the Lord Advocate on prosecution matters and the chief executive of the Crown Office and the procurator-fiscal service. The Crown Agent is supported by three Deputy Crown Agents.

So, it is important to understand the difference between the Crown counsel, advocate-deputes and procurator-fiscals. The team of Crown counsel or the advocate-deputes are the most senior lawyers within the Crown and they prosecute in the High Court doing, as I said, the most serious cases coming before Scotland's criminal courts. And historically, lawyers,

procurator-fiscals are located within each sheriffdom, and responsible for running day-to-day caseloads in each sheriffdom of Scotland. In modern times, procurator-fiscals are in charge of daily caseloads, and in addition to that, they have developed specialist teams such as the High Court Unit, or the Scottish Fatalities Investigation Unit, or the Serious and Organised Crime Unit, and Policy Engagement Unit, where they are specialised in the fields of particular types of prosecution work. Each procurator-fiscal in charge of each sheriffdom has a team of deputes who act on behalf of their procurator-fiscal. And Law Officers and the specialist casework units have different remits. The role of procurator-fiscals and their deputies depends on which unit they are in. Some deputes make decisions on cases including whether to start proceedings, and present cases to the court and other deputes draft policy and guidance which is published for staff. Specialisation is a very important part of the work of procurator-fiscals, and indeed, those prosecuting in the High Court, and in very recent years, it has come to be recognised that there is a profound need for specialisation in the prosecution of sexual offences work.

So, in order to help you a little bit more, how is it that the Crown decides when to take a criminal prosecution? So, criminal reports are submitted to the Crown in Scotland by the police and a procurator-fiscal will decide if there is sufficient evidence in law to prove the criminal charge. In Scotland the test is whether or not there is sufficient corroborated and admissible evidence to prove the criminal charge against the person. Corroborated evidence is evidence that comes from at least two separate and independent sources. If there is sufficient evidence against the accused person, the procurator-fiscal will decide whether criminal proceedings should be started or whether an alternative to criminal prosecution is available and appropriate. To make the decision, a procurator-fiscal will consider factors such as the background of the accused, the type of the offence, and the views of the victim. The Crown has published a prosecution code in Scotland which outlines factors which are taken into account by the prosecutor and I understand that our prosecution code was distributed prior to today's meeting. There are a number of alternatives to prosecution, such as a warning letter. In some cases, there is a decision that is made in order to really understand and deal with the root of offending. The diversion from prosecution is the best way to proceed, and indeed, in that regard, a procurator-fiscal can decide that the social work department should be contacted and the case would be sent to the social work department and they all decide how an accused person should be helped in order to address the fundamental root of their offending. If social workers cannot help, and there is not any support out with the prosecution process, the prosecutor might decide to start proceedings. There are also the opportunities to offer monetary penalties and that is known as a fiscal fine or a compensation order or indeed both, and the level of fine will depend on the level of offending. Before the COVID pandemic, the maximum fine available to fiscals to apply to cases was three hundred pounds. But that has been increased as a result of the corona virus legislation to the maximum level of five hundred pounds. This has allowed fiscal fines

to be used to respond appropriately and proportionately to offending in a wider category of cases. So, if the prosecutor decides that there is sufficient evidence to raise criminal proceedings against an accused person, the next decision is what court the case should go to. Sometimes the decision is already made. That is because the most serious types of cases like homicide and rape can only go to the High Court. For all other offences, the decision depends on a number of different factors. These include, but not limited to, the nature of the offence, the accused's previous convictions, and indeed, as I said, many of the other factors outlined in the prosecution code, if you are given a copy of it for today.

So, can I then touch on the challenges that have been presented by the pandemic? Lady Dorrian, the Lord Justice Clerk and Lord Carloway, the Lord Justice General, have explained in detail the very significant steps we take in order to try to ensure that the criminal justice system in Scotland continues notwithstanding the pandemic. They've explained the very difficult challenges presented by the system of justice we have at solemn level, serious levels of crime, where we have cases tried before a judge and jury. The judge and jury trials happen both in the High Court and in the Sheriff Court. There was undoubtedly fantastic response to that and the innovation of using juries from jury centres who are linked into the court buildings was a very successful operation and remains so today. But there is no doubt, absolutely none whatsoever, that the Scottish system of justice, the criminal prosecution, is very much dealing with a significant backlog of cases and this presents an enormous challenge.

I have been asked specifically to provide an overview of challenges facing prosecutors to prosecuting cases without excessive delay and the problem of domestic abuse during the pandemic. These two matters are related. Many challenges to delays come from domestic abuse cases and cases involving serious sexual offending. The backlog of cases and the timescale required of this, troubles me deeply. It impacts on accused persons who are awaiting trial; on victims and witnesses who are entitled to resolution, and lawyers and staff working within the Crown service. The backlog of delays in trials delays justice for everyone and consequently individuals and communities do not obtain the protection of the law that can be obtained through sentence to imprisonment, protective order, court orders, such as costs and qualifications and the like. This has necessitated the Crown working with partners across criminal justice system including the Scottish Courts and Tribunal Service, the Law Society of Scotland, Sheriff Principals and the senior judiciary to operate courts in line with public health guidance. To assist the Crown Office with the backlog of cases caused by the pandemic, the government allocated approximately fifty million pounds which the Crown will be able to access. The backlog is going to take several years to remove. The funding which has been made available will allow the Crown to start ten additional summary courts, two jury courts and sheriff courts and four additional high courts. However, the system related to develop a justice in more serious cases has been more significantly impacted by the pandemic. For many months, the criminal justice system was

not able to conduct any jury trial at all and in some areas of Scotland in the sheriff and jury trials, these cases simply could not run for the period of all the twelve months. But the programmes have been set up to assist in trying to deal with the backlog of cases and these include the increased level of maximum fiscal fines, which I referred to, and the introduction of pre-intermediate diets in the Sheriff Courts that bring cases into Sheriff Courts via early discussion in order to try and scrutinise cases and identify whether or not indeed they are going to trial. There has been the development of virtual summary pilot courts and the priority was given in these pilot courts to the prosecution of domestic abuse cases. These virtual trial pilots have recently been concluded and we are receiving feedback from the Sheriff Principals who are responsible for overseeing the pilot courts. There have been many successes in relation to these. They have demonstrated the advantage of reducing the number of people in court buildings where a social distancing rule is in place and the system of the participation of parties who might have difficulties attending to the trial court. A particular benefit for victims and witnesses of domestic cases is that they can give evidence from a remote location with no risk of contact with the accused. These have proved to be a very successful part of the virtual trial pilot schemes.

But as noted previously, I hold concerns about delays in certain types of cases. One of the challenges encountered during the pandemic, which is recognised by the Crown, is that the increased delays in calling for trial and uncertainty over whether or not the trial will proceed on an any given day has caused anxiety and stressed the victim's witnesses. In cases this has led to victims no longer wanting to participate in the criminal justice system. Some victims' groups have raised concerns about the impacts of delays in criminal proceedings. These include victims losing confidence in the criminal justice system and the reluctance by victims to report further offending. As the Lord Advocate, I am profoundly worried about these aspects of the pandemic and the impact on vulnerable victims and witnesses and I'm committed to tackle these concerns. But out of all the difficulties and challenges caused by the pandemic my main concern relates to those highly vulnerable victims of serious gender-based violence, predominantly women and girls whose cases are backed up in a system of prosecution and in the High Court where such serious cases are tried. The delays arising from the backlog predominantly and disproportionately affect women and girls. I understand the devastating impact of these crimes and the impact that the delays are having with the victims and the compounding effect of delay and uncertainty. We know it takes the courage and bravery for victims to come forward and report their experience of sexual abuse and I am committed to ensuring that those who do are treated with dignity and respect and appropriately supported through the prosecution service. But it is a professional challenge of a lifetime for the prosecution system in Scotland to deal with the impact of the pandemic on the victims of serious sexual violence and in relation to women and children in the Scottish system of justice.

Dealing with domestic abuse following on the coronavirus outbreak, the first lockdown

in Scotland began in March 2020 and further restrictions were in place during much of 2020 and the second lockdown took place in January 2021. In September 2021, I gave a commitment to have a renewed focus to efforts by Scotland's prosecutors to tackle domestic abuse and stalking as the justice system recovered from the effects of the coronavirus pandemic. This commitment falls on the statistics that were published by the Crown in relation to domestic abuse and stalking charges in Scotland and also I understand this document was circulated prior to today. Statistics show that in the year 2020-2021, there were 33,425 charges reported to the Crown relating to domestic abuse. This represented an increase of nine percent in the year from 2019 to 2020. These figures was the highest since the year 2015-2016. The most common types of charges reported to the Crown were offences under the Criminal Justice and Licensing (Scotland) Act. These include offences that relate to acting in a threatening or abusive manner to another person an act of violence. This increase followed four years with the number of domestic abuse charges reported to the Crown remained relatively steady at around thirty thousand a year. There were 570 serious assaults and attempted murder charges and 620 charges of rape or attempted rape which was the increase of thirty percent in the year 2019-2020. The number of domestic abuse charges was relatively high between April and July 2020. There were over three thousand domestic abuse charges reported in June 2020 and there were over three thousand three hundred domestic abuse charges reported to the Crown in July 2020. These are concerning figures and the increase in figures concerns anybody or any right-minded thinking person.

So, the Crown takes a rigorous approach to crimes of domestic abuse and stalking and we are committed to prosecuting these offences fairly and effectively. This includes a presumption in favour of prosecution where there is sufficient evidence to support criminal allegation. The Crown also recognises the significant impact that domestic abuse can have on victims and children. Domestic abuse cases are priority cases and this means that they should be started and completed within ten weeks of being reported to the Crown. Before the first lockdown, the average time for domestic abuse cases was 9.4 weeks. After the first, it was 20.2 weeks. The average time was still high and in January of this year, the average time was fourteen weeks. However, notwithstanding the challenges caused by the pandemic, in the year '20-'21, ninety-two percent of all domestic abuse cases reported to the Crown had criminal proceedings raised against the accused.

Let me therefore finish by saying while the pandemic has been a challenge for all of us, for victims of domestic abuse, the period of lockdown was particularly difficult and dangerous. Thank you very much.

Ian Forrester QC:

Well, I feel very … I think I must say privileged to have had that insight into how the prosecution of crimes unfolds in Scotland and I admire sharing at the very end there, the good news and the bad news about the statistics. Really, I think we must all, especially our

friends in Asia really, really feel privileged to have had that level of precision and frankness about the difficulties. Two little questions which I am going to put to you now. One is … in Scotland there is nomally no private prosecution, unlike in England. What happens, this is a question, what happens when an association like the society for the protection of animals or family disagrees with what the Crown Office has decided to do? What are their recourses? That’s one question.

Dorothy Bain QC:

Yeah. So, I think that there is a process of private prosecutions in Scotland but there has not been successful application for a private prosecution in Scotland since the case of Carol X, which was, I think, Lady Dorrian knows better than me because of her expertise in this area, but I think that was in the eighties… the early eighties if I am right about that. Because of the system of prosecution of crime in Scotland is one that is taken on by the public prosecutor acting in the public interest, all crimes in Scotland, I think I can put it in that way, are taken up by the Crown Office procurator-fiscal service as the prosecution authority in Scotland. There remains an opportunity to apply for a private prosecution, which is an application done by a process of bill for criminal matters that’s presented to the High Court of Justiciary and determined upon by three very senior judges of the High Court. And the most recent application was made, I think, in about 2015, 2016, which was a case following a very tragic incident in Glasgow known as the bin lorry tragedy in which six members of the public were killed when a bin lorry’s driver blacked out behind the wheel of his vehicle. That was the most recent effort at such a private prosecution. So, it is not readily available but where a decision is made not to prosecute the case, there is a victim’s right to review that decision. And so, the victim of a crime can apply to the prosecution service of Scotland for a review of the prosecutor’s decision-making process in their case, and an independent process is then applied to that request and there is an independent assessment of the previous decision process and an independent lawyer looks at what happened and decides whether or not the decision made not to prosecute was reasonable in all the circumstances and it is not unknown for these decisions to result in the previous decision not to prosecute to be taken up. But you have to come with a particular category of person in order properly to seek a review.

Ian Forrester QC:

And one, which I think there is a quick answer to. Can a ‘not proven’ verdict be reopened?

Dorothy Bain QC:

So, a ‘not proven’ verdict is an acquittal, just like a ‘not guilty’ verdict. In the sense of being reopened, only if there is a successful application under the double jeopardy statute of

prohibition we have in Scotland. This it is a very distinct, an exceptional set of circumstances. So, I think the general answer to that is it's a verdict of acquittal and it is the final verdict of the trial court.

VII. Laura Dunlop QC

Laura Dunlop QC is a practicing member of Scots Bar, the Faculty of Advocates. She was appointed Procurator to the General Assembly of the Church of Scotland in 2005. Today, she also is the President of the Mental Health Tribunal for Scotland.

Scotland has a well-established system of tribunals, which complement the courts. Within the tribunals system, some tribunals deal with devolved matters and others with reserved matters. This division reflects Scotland's constitutional position: in other words, whether the subject matter of an application is legislated on and governed from London or Edinburgh. All tribunals dealing with devolved matters sit in Scotland, as do most dealing with reserved matters relating to people in Scotland.

All the tribunals which operate in Scotland share the same basic design: chaired by a legally qualified member, with subject matter specialists as the other two members. Thus, in Mental Health Tribunals, we have legally-qualified conveners, medical members (who are all psychiatrists) and general members, who have experience of the care of people with mental disorder – either as patients themselves or because they care for someone with mental disorder or work in one of four specified health professions. Overall, tribunals deal with thousands of cases each year in Scotland: over 10000 for devolved tribunals alone. Subject matter includes housing and property, land rights, benefits appeals, juvenile justice, immigration, health and education, taxation, charities, employment and mental health. I know most about that, so my remaining remarks relate to it.

The MHT for Scotland was established by the Mental Health (Care and Treatment) (Scotland) Act 2003, one of the large pieces of legislation passed in the early years after the re-establishment of a Scottish Parliament in 1999. This marked a near total shift of decision-making in relation to compulsory care and treatment for mental disorder away from the courts and into the Tribunal. The Tribunal began handling cases in 2005 – being established so recently led to two clear advantages when COVID struck: case management is entirely electronic, and our rules already provided for hearings to take place by video or telephone, so long as this was fair in the individual case. MHTS remains currently an independent Tribunal.

The Annual caseload of MHTS is around 5200. We run with over 100 hearings each week for patients around Scotland; the weekly total of applications received is about the same number. Most of the cases relate to patients who are on 'civil' orders, but a proportion are on orders made by criminal courts and, of those, around 330 are CORO patients – people on an order authorising their detention without limit of time.

For the vast majority of people in receipt of compulsory care and treatment for mental disorder, that care and treatment begins with a 28-day detention certificate granted by a psychiatrist. People who progress to detention for longer periods can only do so via the Tribunal, which grants an order for an initial 6 months. Renewal thereafter is for a second 6 months period and then annually. Many patients leave hospital still on an order. All are entitled to periodic review by the Tribunal. The 3 commonest types of hearing are those relating to a first instance application for a 6-month order, to appeal against short-term detention, and to review of an existing order. It is important to emphasise that, in the first type of case, namely an application for a 6-month order (around 40% of our cases) if the patient is detained, as most are, there is generally a legal requirement that a hearing takes place within five working days after the application is lodged.

For obvious reasons, the hearings have always been held where the patients are. Pre COVID, most therefore occurred in special suites within hospitals. For patients not detained, a selection of community centres and other public buildings was in use. More than 65 such venues were involved.

When the pandemic started, initial thoughts in February 2020 were to concentrate hearings in a few hubs. That idea was quickly overtaken by events: it was clear that hearings involving people gathering together were not going to be possible. We met in our headquarters on Wednesday 18 March, at which point the only modality available to us for remote hearings was telephone. We therefore held our last in person hearings on Friday 20 March and switched to holding all by teleconference from Monday 23 March. It is right to acknowledge that priority within the Tribunals system was given to our hearings, due to the right to liberty of the people involved.

Since March 2020, we have held more than 10000 telephone hearings. We held our first in person hearing again in July 2020, and our first hearing by WebEx in August 2020. But the numbers of each are tiny compared to telephone hearings.

Advantages and reservations – I have five of each. To date, the advantages have clearly outweighed the drawbacks but, as we plan for the future, the balance is less straightforward.

Advantages

- Remote hearings enabled us to keep running. For the State to continue to detain patients without hearings would have been a breach of domestic law and likely to lead to claims in relation to Article 5 ECHR. There was no real alternative to the immediate adoption of a different type of hearing. We had no backlog at any point and we met the 5 day limit.
- Some patients prefer the telephone hearing. We were very concerned that patient attendance would fall dramatically. We measured it for the first year, and it had dropped only by 2.5% (from 55.4 to 52.9%). It seems likely that there was change in both directions: some who would have attended an in person hearing did not attend a

telephone one and some who attended a telephone hearing would not have attended in person. There is no clearer example than the patient who, in January 2022, phoned into his hearing to participate, despite having absconded from the hospital where he was detained some days before.

- Participation of other family members was, in some cases, increased. There were relatives from as far afield as Singapore and Colombia.
- Convenience for professionals – undoubtedly, doctors and social workers are able to deal with more cases if they do not have to travel to hearings.
- Financial. Our hearings are set down for half a day. Our multiple rate – namely whether the same three members sit on two hearings in a day – had been hovering in the low 60s in percentage terms for some years prior to lockdown. In the first year of telephone hearings, it rose to 77%. The reason is obvious – the removal of geography as a constraint. A morning hearing for a patient in hospital in Dumfries, in the south of Scotland, could be paired with an afternoon hearing for a patient in Inverness, in the Highlands and 368 kilometres away. No-one can seriously suggest that those efficiencies are irrelevant.

Reservations

- A source of material is unavailable. I do not term the missing element 'evidence' though, in some cases, it probably is. That someone is displaying particular behaviour or reactions is invisible. The clearest example is eating disorder patients – who form around 10 % of applications for compulsory orders. They are often highly articulate yet look very unwell. If they are seeking to be released from hospital, as most are, it is to their advantage not to be seen. And I recognise removal of visual information is not always bad, since it may reduce distraction and some types of unconscious bias. There is remarkable concentration on listening to evidence.
- Our hearings are often distressing for patients and relatives. For tribunal members in a remote location, there is less awareness of this factor and less ability therefore to moderate proceedings in response. This drawback is much reduced with video hearings, but not eliminated.
- It sometimes does not feel right for such an important decision to be taken on the basis of telephone discussion, at least where the patient is exercising their right to be heard and wishes that to be in person. I echo here Roddy Dunlop's reference on page 13 above to a litigant in a family case asking if their child would be removed from their care via an iPad.
- A significant proportion of people who are unwell with psychosis hold delusions relating to technology – that they are being monitored electronically. Telephone hearings – and more so video ones – play to that belief.
- For us, there is a problem of scale. Video hearings can appear a reasonable

compromise – and would allow us to preserve some of the advantages of telephone hearings. But WebEx requires us to offer a test for each participant in advance. Both the right equipment and a reliable internet connection are essential, and many people in our system are not well-provided for in those respects. We operate within strict deadlines for the majority of hearings and to offer both 100 hearings this week and rehearsals for the participants in next week's 100 hearings would be very demanding of resources.

So, in conclusion, what do I see when I look into the future? I see all three types of hearing featuring. Since last summer (though with a pause for Omicron) we have been building up our numbers of in person hearings. We are offering greater individual choice. Cake has been mentioned – I too have a food metaphor. From the overall point of view, running a system which offered only plat du jour (dish of the day) as was the case pre COVID was easier than planning for everyone attending every hearing to choose how they want to participate: the a la carte option. Table d'hote must be the answer – but will that allow us to cater for all dietary requirements?

VIII. Questions & Answers

Ian Forrester QC:

What an interesting talk! Thank you very, very much. Now, lots of questions are coming in from our friends in Asia. We have members from, or we could say witnesses, participants from Japan, Singapore, Korea, China, China Taiwan, and Indonesia. So, I am going to ask you, "please be very rapid, very concise in responding to these questions". First of all, I think this is for Lord Carloway. This is from Professor Takahashi. Are we learning, can we apply the learning from COVID and hearings to judicial co-operation? At the moment, for example in Japan, it's a quite burdensome process involving concerned officials, judges and so on. Do you think that we could learn some of the advantages of technology and apply it to judicial co-operation between countries?

Lord Carloway:

The short answer to that is yes. At the moment, and although practice differs, I think, slightly from England to Scotland, in civil cases, we would expect to be able to take evidence from witnesses in any country by video link if the witness agrees to that, in other words, there is no problem with the witness giving evidence. Difficulty arises, I think, where the witness declines to co-operate and one has to go through formal procedures. But I would agree entirely with the professor that we should be moving on to a system which simply enables direct communication over video link between the countries rather than having complex consular intervention.

Ian Forrester QC:

Thank you. Next question. I think this is for probably Laura Dunlop but might be for the Lord Advocate. Has there been litigation about church services and the interdiction of social gatherings. There have been lots of such cases in France, the United States, England, I guess there has been litigation in Scotland but I am not sure. Laura?

Laura Dunlop QC:

There was a judicial review in relation to the restrictions placed on worship and it was brought by a selection of smaller churches, actually. The Church of Scotland, as it happened, did not participate in that litigation, but the judicial review was successful. However, the restrictions were removed shortly afterwards. As usual in litigation, one could debate whether that was coincidental or not. But that is the position.

Ian Forrester QC:

Thank you. I might add that I attended an interesting discussion between Bruno Lasserre of the Conseil d'État and Robert Reed of the UK Supreme Court who discussed their respective experiences of judicial challenges to restrictions. And Bruno Lasserre said that of about eleven hundred challenges in France, some of them religious but not all, some were sports, others were other social events, the Conseil d'État accepted about thirty-five such applications and rejected about one thousand fifty.

Thank you. Next question. I think this is for Leeona, Lady Dorrian. What is your thinking about open justice? Or putting it differently, what is our learning, what should be our learning from the pandemic and so on and applying those learnings to the notion of open justice and related questions?

Lady Dorrian:

I mentioned the principle of open justice in my introduction. It is an issue of considerable importance. There have been both pros and cons during the pandemic. What we were able to do with hearings during the pandemic was "enable people to participate remotely". Press members were given an access to the video viewing of the proceedings, so viewing them live. Others were given the opportunity of hearing the proceedings that was not generally possible to allow viewing for large numbers of people. But the upshot of that was in certain cases, some of the more high profile cases – Roddy Dunlop was certainly in some of those – we were able to have people participating with us, essentially listening to the proceedings in numbers which far exceeded the number we would have been able to accommodate in the court. So, we had several hundreds in a number of cases listening or watching the proceedings. That's I think something of real interest to us because anything that can expand the access to the public is a good thing. Obviously, people could not come in person during the pandemic, but we were conscious, and we wanted to try to continue to

make sure that the proceedings were accessible to them. And that's why we were examining the issue of streaming for the future because that certainly would improve the openness of justice.

Ian Forrester QC:

Quickly just following up on a somewhat different question. Have you ever thought that the needs of speedy justice could put in doubt the desirability of maintaining juries?

Lady Dorrian:

There was a suggestion early in the pandemic that one step that could be taken to deal with the backlog of cases and to address the problems of social distancing with juries would be to have judge-only trials. But that found virtually no favour with the public, the profession, or the government. So, nothing came of it. There is a proposal for a judge-only pilot in relation to rape cases but that's a very special circumstance, which has its own rationale.

Ian Forrester QC:

Yes. Thank you. And this for Dorothy Bain, or possibly I contributed. I think there was a certain confusion about the notion of double jeopardy and what was the status of not guilty and not proven verdict. Could you just restate? Is it the case that after a not proven or not guilty verdict, it remains open to the Crown to have another go?

Dorothy Bain QC:

I think the straightforward answer is no, other than that where there is a specific change in circumstances that would indicate evidence that was not available to the Crown before becomes available. But there are very strict rules over whether or not the Crown can get a second go and they are set down in statute and they can be categorised on the basis of being double jeopardy provisions. But it would involve an application to the High Court and full explanation by the Crown Prosecution Service as to the circumstances in which fresh evidence has become available and why it is a case in which there should be an opportunity for a second prosecution. That application is made before a team of very senior judges sitting in the High Court of Appeal. The most recent case, the case of Sean Brennan, I think, if I am right, Lady Dorrian sat on that, I am not clear… Lady Dorrian, did you sit on that particular application?

Lady Dorrian:

I think so, yes.

Dorothy Bain QC:

So, the answer is no, other than very exceptional circumstances that involve an application to the High Court with full explanations as to why different evidence, fresh evidence now available to the Crown was not available at the time of the original prosecution.

Ian Forrester QC:

Thanks. There is a question to me because …

Lady Dorrian:

Just to say, Ian, we had about four applications in total, I think, in relation to the double jeopardy provisions.

Ian Forrester QC:

OK. Then, I had a question to me about how I describe the criminal rule about speedy trial. When I started at the Bar, the then applicable rule was the burglar who was taken into custody by the policeman and remained at the custody had to be tried inside I think it was a hundred and ten days plus a few days. That means if the case had to be prepared, he had to be accused, a jury had to be empanelled, and jury had to render its verdict and sentence passed within the fixed period. If not, the accused went free and could not be retried. And that was a very important energiser for all concerned to move briskly. Now, modern technology and needs of proper investigation have meant that that period has been extended in absolute terms and is routinely extended by agreement.

Lady Dorrian:

Perhaps, Ian, perhaps it should be explained to thus. The rule was one hundred ten days from being committed to trial and the trial had to be concluded within that period. The provision now is that there has to be preliminary hearing within that period. And also, in the old system, a person whose trial was not concluded within a hundred ten days the person would walk free. Now the preliminary hearing has to take place within a hundred ten days or the person is admitted to bail, and a trial must commence within a hundred forty days or the person is admitted to bail.

Ian Forrester QC:

Thank you. Good. Now, we have not heard from Professor Deguchi. We will hear from him in a moment. Is David Edward with us? David?

Sir David Edward:

Yes.

Ian Forrester QC:

Would you like to offer us any comment on this, for me extremely informative and interesting discussion? Sir David Edward was the first British judge in what became the General Court of the European Union and later became the third British judge of the Court of Justice.

Sir David Edward:

Professor Sir David Edward KCMG PC QC FRSE (born 14 November 1934) is a Scottish lawyer and academic, and former Judge of the Court of Justice of the European Communities. Edward is an Honorary Fellow of University College, Oxford; Honorary Professor of the University of Edinburgh and Fellow of The Royal Society of Edinburgh.

Just a few brief observations. First of all, all countries were faced with the same problem in relation to COVID and I think, looking ahead, all countries will be faced with the same problem with the advance of technology. Technology is going to change the world in various, rather unforeseeable ways and it does seem to me that the need to experiment will increase and this was a test of COVID. In the Scottish case, being a relatively small country, although widely dispersed, it was possible to reach answers quickly and as has been shown in the discussion, it was possible for a certain degree of experiment and changes to take place in the course of the time when COVID restrictions applied. The Scottish lawyers and the Scottish public have always been strongly attached to what the Germans call the principle of orality, but in a more personal sense, that ideally, judicial proceedings, civil and criminal, should take place in public, so that the public have the opportunity of seeing justice is done and because in person hearings there is a greater degree of personal rapport or understanding between those who are involved, that is protection for those who are involved, too, because the existence of public scrutiny does ensure that justice is done. But as Laura Dunlop has illustrated, there are cases where, really a question of justice, but proper procedure should to some extent go outside the public scrutiny, where deeply personal problems such as mental health are involved. I would simply say that, from my experience in the European Court, some of my colleagues found oral hearings extremely boring because they were not used to it, and as one of them said to me he had been accustomed to judging cases through his eyes from reading rather than through his ears from hearing people pleading. There will be a constant element in the future balance between orality and reading and between publicity of public hearing and private hearing or both private hearings and proceedings on paper. That’s the limit of my assistance.

Ian Forrester QC:

Thank you. There is another story about the anonymisation of judgments but we leave it for another day.

Finally, this is from Professor Omi Hatashin, who was called the English Bar, for Roddy Dunlop. I said you are the leader of the Scottish Bar, officially, the Dean of the Faculty of Advocates in Scotland. Do you represent those solicitors who have obtained the right of audience?

Roddy Dunlop QC:

No, I don't. Solicitors with extended rights of audience fall under the auspices of the Law Society of Scotland and not Faculty.

IX. Closing Remarks

Prof. Dr. Masahisa Deguchi:

Dear Professor Dr. Ian Forrester and dear members of the Franco-British Lawyers Society,

I would like to thank you very much for the opportunity to conduct this online seminar with the Franco-British Lawyers Society. My contact with Prof Forrester goes back to a visit to the Court of Justice of the European Union in Luxembourg when I was visiting with students.

As a result of this relationship, we invited Prof Forrester to Ritsumeikan University to give a seminar on Brexit and European law just before the Corona pandemic spread in February 2020. Since then, we have continued academic exchanges, but in an online format. I would like to thank Prof. Ian Forrester for his excellent coordination with your society.

In Japan, although court proceedings have been temporarily suspended since April 2020 due to the spread of the Corona pandemic, it is now possible to continue only preparatory proceedings online. However, under current law, the hearing itself must be held in open court. In an effort to electrify proceedings in civil cases, the Japanese government therefore decided at a cabinet meeting on 8 March 2022 to amend the Code of Civil Procedure to allow online filing of lawsuits and to permit the use of web conferencing during hearings. The proposed amendment will allow online procedures for filing actions and pleadings in court, which are currently limited to written documents, and require lawyers and other representatives to file online. In addition, the proposal allows the use of web conferencing for oral hearings so that parties do not have to appear in court, and also allows the use of web conferencing for the examination of witnesses in cases that have been approved by the court and the parties. In addition, the bill provides that the court will generally keep court files such as complaints and judgments in electronic form and that the parties and other interested parties will be able to view and download the files on the internet. The main issue here is to reconcile the principle of openness in online proceedings with the protection of privacy and business secrets. Certainly, the concept of open justice, which is being discussed in the UK and Australia, is extremely important from the point of

view of democracy and the rule of law when it comes to making online proceedings visible, but on the other hand, the protection of human rights and the privacy of the parties involved is also an important issue. If remote publication of court proceedings goes too far, companies and others could bypass the court process and resort to arbitration, which could lead to a violation of the right to a trial. In this online seminar, we were able to learn a lot from you about the current status of remote publication of court proceedings by the Scottish courts.

I would like to thank you again for your excellent reports from Scotland and also for all the participants from Europe and Asia! I hope that we can continue to organise such a fruitful academic exchange between Europe and Asia!