International Association of Prosecutors Conference 2022, Tbilisi, Georgia

Plenary Session One: Covid, Institutional Challenges and Response

11:45am – 1:00pm, Monday 26 September 2022

**Technology changes in the justice system for Covid 19: Scotland’s experience**

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Good morning. Thank you to Irakli and his colleagues for hosting the conference and the huge amount of work that involves. I thank you too for the opportunity to speak at this my first conference. It’s only when you get together with people that you realise, notwithstanding the saving grace of technology in the last few years, the importance of having that personal connection. I hope to speak with as many as possible of you during the next few days.

I am looking forward to hearing from others their experience of “getting through” Covid and pinning down the positives from such a challenging period.

I will not be the only senior prosecutor here today who took up post full of ideas about what I wanted to achieve, but who has since had cause to reflect on the truth of the words attributed to our former Prime Minister, Harold Macmillan, about what blows governments off course: “*Events, dear boy, events*”. We wish to shape how we respond to crime, get the best outcomes and create safer communities, but to an extent we do have to react to circumstances and play the hand we’re dealt. The pandemic has been a tragedy for millions and has had very serious consequences for criminal justice, but in some ways it has pressed the fast forward button on some changes many have welcomed. The challenge now is not to lose what has been gained.

**Challenges in the pre-Covid landscape**

Before I go into challenges that existed in Covid pre-pandemic, I should say a few words about the criminal justice landscape in Scotland. There are 3 separate jurisdictions within the UK, of which Scotland is one. In Scotland there is a single police force and a single public prosecutor, the Crown Office and Procurator Fiscal Service, which has the power to direct the police. There is no coroner and COPFS is also Scotland’s death investigation service.

In Scotland we were not on calm seas before Covid came along. The criminal justice system was already experiencing significant challenges:

* In the financial year 2020-21 there were almost 175,000 reports to COPFS (159,100 criminal reports and 15,700 death reports). This compares with almost 300,000 reports in 2013-14. So whilst the number of criminal cases reported to the Procurator Fiscal has reduced we are seeing an increase in the types of offences that require longer, more complex investigation, preparation and court hearings. There are more reports of serious sexual offending and major crime, both of which require significant expert resource to investigate and prosecute effectively. To give just one illustration of this, the volume of new High Court business increased by 46% in the three years prior to the pandemic;
* Prior to the pandemic there was increasing recognition of the impact on victims of sexual crime of participating in the criminal justice process and that there was a need to improve victims’ experiences. A cross-justice review group chaired by one of Scotland’s most senior judges, was convened to consider the management of sexual offence cases. This reported during the pandemic and made a number of recommendations which the government is committed to implementing. This is manifestly a good thing, and there are indications that the work of this group has encouraged victims to report. It will of course increase the work of and expectations on the prosecutor;
* We speak of the Covid backlog of criminal cases awaiting trial and, of course, Covid has led to a huge spike in work in progress which, on current modelling, is likely to take until the financial year 2026-27 to return to business as usual levels. However, there was a backlog pre-Covid of some 14,000 cases awaiting trial;
* In Scotland the Procurator Fiscal investigates sudden and suspicious deaths. Before the pandemic our role in relation to deaths was under scrutiny as never before. In the two years since Covid we have seen a huge increase in the numbers of deaths reported - around 40% higher than in previous years. Projections show that by the end of this year we will have some 7,000 Covid-related death reports which we have an obligation to investigate;
* We experienced 10 years of reduced funding in real terms of the prosecution service. We secured increased budget allocations for the last and current financial years but, given the increased pressures on us, we are faced with making difficult choices about our priorities in this year and for the years ahead.

**What did Covid mean for us?**

* **Covid in Scotland**

I imagine many of us had broadly similar experiences of the public health response to Covid. In Scotland we locked down initially for around 4 months, meaning we had to stay at home except for exercise, shopping and other essential purposes, meeting no one outside our household and staying 2 metres away from anyone else in public spaces. This obviously had implications for an adversarial system of trial on indictment by 15 jurors. When restrictions were eased in July 2020, things did not return to normal, for example 2 metre distancing was retained. From August 2020 restrictions returned in various degrees in different areas of the country, depending on the public health picture, until we were almost back to complete lockdown by Christmas. The second lockdown officially began in January 2021, and the court programme was curbed accordingly. Restrictions eased from late February 2021 but summary trials resumed only in late April and some restrictions remained until as late as August 2021. It was a long haul with significant consequences for individuals – more than 2 million Covid cases and more than 15,000 deaths - and for the criminal justice system.

* **Proceedings in court**

The public health restrictions introduced in March 2020 meant that all routine court business was put on hold, with the courts dealing only with accused persons reported from custody and, exceptionally, with the most urgent non-custody matters.

High Court trials were paused and restarted properly only in autumn 2020 with juries accommodated remotely from the court building in cinemas, viewing proceedings in the courtroom on the cinema screen by live video link. At an early stage, cinemas were identified as being well-placed to accommodate jurors. During lockdowns cinemas were unable to open to regular customers. They are in locations readily accessible to members of the public and their large size lent themselves to seating 15 jurors as far apart as the restrictions required. Large cinema screens could be split to show the different parts of the courtroom at the same time. The other parties who are normally present in the courtroom were still at court – judge and other court officials, prosecutor, defence counsel and solicitors and accused persons. Jurors are normally balloted in person at court. This had to be done administratively to avoid the need for large groups of people to assemble at remote centres.

Sheriff and Jury trials, again very serious cases which can result in sentences of up to 5 years’ imprisonment restarted only from December 2020, again using the remote model. Summary trials resumed in September 2020 but the summary court programme was again curbed by the impact of the Omicron wave in January 2021 and did not get back to normal until mid-April 2021.

Initially the government had proposed, as an emergency measure, conducting judge-only trials on indictment but did not pursue this in the face of significant opposition. Conducting jury trials using remote centres has been vital in keeping business going. It was however not a perfect solution.

At the start of the pandemic, the number of criminal cases reported to us dipped but, very quickly, by around May 2020, reports received were back at similar levels to previous years. All the while the backlog grew because, for months, no criminal trials took place. When they did restart trials took longer using the remote jury model and not all cases could progress to trial in a way that was in keeping with restrictions, even using the remote model. Here I am thinking of multiple accused cases which require the attendance of a relatively large number of key participants in the courtroom. Using cinemas to accommodate jurors was also very expensive and unsustainable in the longer term. Even now, and even in summary trials that are determined by a sheriff rather than a jury, with rising levels of infection, we are vulnerable to cases being adjourned because of the illness of key participants. More trials courts have been made available and are being used but they are still not running at full capacity for various reasons including unavailability of parties and the judiciary for Covid-related reasons – early this summer a further Covid wave saw 1 in 12 Scots infected with the virus.

The remote jury centres are now being decommissioned and the last trial using the remote model will be heard this month. We await complete data for the trial business conducted using the jury centres – almost 300 were conducted in the first year they were operational, showing how valuable and essential this resource was. The experience of conducting a trial using the remote centres has been the subject of independent evaluation and this indicated generally good levels of satisfaction with the arrangements both among jurors and legal professionals, particularly among jurors.

All of you will be familiar with the impact of the resulting delays on victims, witnesses and bereaved relatives, some of whom have now waited for years to give evidence and obtain an outcome in their cases. I know how difficult this is, particularly in the more serious cases including serious sexual crime, and how victims and families can feel their lives are on hold, and are increasingly stressed, while their case waits to be dealt with. I also recognise that, quite apart from their experiences in the criminal justice system, women and children are the groups most impacted and disadvantaged by the pandemic. There is a need for us to innovate further in this area to improve the experiences of victims in the criminal justice process. As I said earlier, COPFS was involved in pre-pandemic sector-wide review of the prosecution of sexual offences and we are currently engaged with government and partners across the system in taking forward proposals for improvement.

* **How did we respond to the pandemic ?**

I expect that most of you will have had the experience of leaving the office one day in March 2020, perhaps thinking that you might have to log in at the kitchen table for a few weeks but with no idea that you would not be able to return there for many months and that, when you did, it would be to a world of hybrid office and home working. Before the first lockdown we had some staff who worked remotely but it was rare for anyone to do so full time and the vast majority of our staff attended our offices each day. With Covid that was flipped on its head with the vast majority working from home and those attending offices for essential business only.

* **How did we cope?**

In Scotland Covid acted as a catalyst for changes and modernisations that were already in the pipeline. The immediate priority was keeping essential business going but, very early on, we were thinking ahead to what recovery would look like and recognising the opportunity to effect transformation in criminal justice. Some changes required emergency legislation, all required nimble responses, rapid engagement with colleagues across the criminal justice sector and dedicated colleagues working around the clock to keep us afloat. I know that I am not alone here today in having seen the best of people during the pandemic.

There are 6 key actions which we took and which I want to mention

1. Between February and April 2020 we ordered and distributed 2,000 laptops and 900 phones to enable everyone who did not have to attend an office for urgent business to work from home. This was not simply a matter of ordering and distributing new kit – devices had to be configured to enable staff to participate in virtual court hearings and systems were reconfigured to take account of emergency extension of time bars. I should say that prosecutors were already using iPads in court to record minutes of proceedings in the summary courts and there were some early adopters of this technology in the jury courts;
2. We enabled all staff to meet “face to face” with colleagues and with victims, witnesses and bereaved families on Microsoft Teams by 13 May 2020. This was transformative and an essential part of us being able to keep things working and to support victims;
3. We doubled down on our work on digital applications (apps) that will revolutionise the way we communicate with individuals and defence solicitors;
4. We engaged with the government about what we needed in emergency legislation to keep essential business going. This included:

* electronic signature and transfer of documents – here we were not starting from scratch – we already transferred materials to defence solicitors via a secure disclosure website;
* provisions allowing remote attendance at court hearings – here I would add that many vulnerable witnesses already gave evidence remotely, gave their evidence in advance of the trial before a judge, or had their video-recorded interview by the police used as their evidence in whole or in part;
* that emergency legislation established an ability to hold the first calling of a case in any court in the country
* and the extension of time limits - absolutely essential given the pause on most court business and delays when business did restart

1. We reviewed policy, most significantly by issuing revised guidance to the police on liberation from custody to ensure that only those who pose a risk to the community and the administration of justice are held in custody to appear at court;
2. By engaging with government and with colleagues across the criminal justice system we:

* created a Criminal Justice Board which, crucially, was led by heads of the operational parts of the criminal justice system, not by core government colleagues;
* provided advice to ministers on changes needed to keep the system going and to recover from the pandemic, and resource implications of this;
* worked through practical issues of some of the innovations, for example issues hindering communication between accused persons and their solicitors in remote first appearance from custody hearings;
* put impetus behind work that had begun pre-pandemic and that there was sense in accelerating in the pandemic. Here I would highlight work on summary justice reform. We worked hard to take the first steps in frontloading management of summary business so that those cases capable of resolving do so before the trial diet. It has not been easy to bring people with us on this. It’s a work in progress but I am encouraged by early green shoots seen since the pilot summary reform courts began earlier this month.
* **What did we learn?**

**We learned that Change for the better is possible.**

We had the benefit of a review of certain emergency measures and policy changes by HM Chief Inspector of Prosecution in Scotland. This review included a survey of professionals. Some changes, such as electronic signature and transfer of documents, had an overwhelmingly positive reception. There was a sense of, Why did it take a pandemic to get us to make this change? Why, in a twenty-first century justice system, were we not doing this already? Other measures, such as the ability to conduct summary trials and first appearance from custody virtually, were subject to much more criticism by the defence bar and HM Inspector highlighted to us the need for engagement and to bring people with us if we were looking to embed such emergency measures as part of transformation of the criminal justice system. Defence solicitors raised criticisms around their ability to communicate fully with their clients before and during these court diets and to take instructions from them. Despite great efforts, only a tiny number of summary trials were conducted on a fully virtual basis. That was because they required the consent of the defence. With that said, certain virtual hearings were routine and are accepted to have worked well – many Fatal Accident Inquiries and all hearings by the Appeal Court were conducted virtually during the pandemic.

**We learned that People can do remarkable things.**

As I’ve said before colleagues’ efforts were extraordinary. However, it can be difficult to sustain momentum over the life of such a long-running emergency and we are by no means back to business as usual. There is a lot of work to be done to deal with the backlog and we will be doing so in a challenging economic climate. One of the learning points from the pandemic is how much can be achieved by adjusting our appetite for risk. I would like us to be able to maintain that.

**We learned that Ahead lies cultural change not (just) technological improvement**

Digital solutions were key to getting us through the pandemic and have been important in first steps in summary justice reform. Here I would highlight the requirement that was introduced for prosecutors and defence solicitors to meet before a procedural diet to thrash out what issues were in dispute and whether a trial was necessary to resolve the case. Meetings were held remotely and we developed a digital application for defence solicitors to book a meeting with us. There is much more of this sort of thing ahead and work is ongoing on:

* The development of other digital applications that will simplify how we can engage with the defence bar and witnesses – with the aim to produce a complete defence agent service and witness portal;
* The establishment of a Digital Evidence Sharing Capability – this is a transformative, system-wide digital capability for secure evidence storage and transfer. This is a huge, multi-agency project that will take several years to complete;
* The replacement of our legacy electronic case management systems with a new twenty-first century model – work during this period by HM Inspector of Prosecution has highlighted the limitations of our legacy systems which lead to difficulties in maintaining complete case records and resource being expended in finding workaround solutions.

In conclusion, I would stress that I see this as not just technological upgrade: it is part of a transformation in the whole of the way we work, working smarter, more effectively, and improving the way we serve our community.

(3078 words = 19 mins)