

**Report to the Lord Justice General**  
**by**  
**The Virtual Trials National Project Board**

**January 2022**

## **Introduction**

[1] In May last year, the Scottish Courts and Tribunals Service set up a pilot project for virtual summary criminal trials to be conducted in Aberdeen and Inverness Sheriff Courts. The first trial – in Inverness – took place on 9 June 2020. After some more trials in both courts, an interim report was prepared by Sheriff Principal Pyle<sup>1</sup>. Thereafter the National Project Board was established where all the interested groups were represented.<sup>2</sup>

[2] It was decided to continue the pilot in Aberdeen, not least to test the viability of virtual trials for a specific type of crime – domestic abuse – and to test the use of a remote facility for witnesses under the supervision of Victim Support Scotland.

[3] The Board now considers that enough information has been obtained from the pilot to report in a meaningful way to the Lord Justice General, the Scottish Courts and Tribunals Service (SCTS) and the Cabinet Secretary for Justice and Veterans. The Board sets out what it considers are the options for decision makers and recommends the establishment of a virtual domestic abuse summary trial court in each sheriffdom. The Board also sets out the experience of and lessons learned from the pilot and some of the practical consequences in terms of resources and, if applicable, legislative change.

[4] This report is intentionally brief. The nuts and bolts of virtual summary trials can be explained on another day and, in any event, if for example it was decided that there be a virtual domestic abuse court in each sheriffdom the practicalities for its establishment and operation would be for each sheriff principal to determine to reflect local conditions within his or her sheriffdom.

## **Virtual Trials – the Practicalities**

[5] A virtual summary trial is one conducted by use of remote technology (WebEx). The sheriff, the sheriff clerk, the procurator fiscal and the witnesses are remote from each other, whether in court

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<sup>1</sup> <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/summary-criminal-virtual-trial-pilot-report-to-ljg.pdf?sfvrsn=4>

<sup>2</sup> The members of the Board are set out in Appendix 1.

buildings, offices or a domestic setting. The accused and his or her agent could be individually remote as well, but it was decided that both in the interests of justice and for practical reasons they should be in the same physical space. That could be in the agent's own office, but for the pilot a room in the sheriff court was provided. Police witnesses gave their evidence from police premises, while lay witnesses, including complainers and whether for the prosecution or the defence, gave their evidence from a separate building which was acquired by SCTS for the purposes of the pilot and where the witnesses were supported by Victim Support Scotland. The accused was also under the supervision of a court officer as would be the case in a court room for a traditional in-person trial.

[6] No virtual trials proceeded where audio or video evidence was required, but it is not envisaged that there will be any long term technical obstacle to such cases proceeding virtually. Again, productions or legal authorities cause no technical challenges, but if labels were required (ie physical items, such as a weapon or clothing) the trial could proceed virtually only by way of agreement on the presentation of such evidence by the parties. The use of interpreters will be able to be facilitated.

[7] The original Lord Justice General's Practice Note<sup>3</sup> made detailed provision for the preparations required for the virtual trial, but it was decided for the continued development of the pilot and to reflect the concerns of the defence Bar that a local sheriffdom Practice Note<sup>4</sup> be issued providing for virtual trials in all domestic abuse cases (but without prejudice to the statutory provisions in the Coronavirus (Scotland) Act 2020<sup>5</sup>) and with a much simpler set of rules.

[8] The technical side of the virtual trial was controlled by a sheriff clerk depute with back up from a member of the Change and Digital Innovation Unit (CDI) of SCTS. CDI provided local training for all participants in the trial.

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<sup>3</sup> [https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts-practice-note-no-3-of-2020-remote-conduct-of-summary-trials.pdf?sfvrsn=2da292d2\\_4](https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts-practice-note-no-3-of-2020-remote-conduct-of-summary-trials.pdf?sfvrsn=2da292d2_4)

<sup>4</sup> [criminal-courts-practice-note-no-3-of-2020-remote-conduct-of-summary-trials.pdf](https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts-practice-note-no-3-of-2020-remote-conduct-of-summary-trials.pdf) (scotcourts.gov.uk)

<sup>5</sup> Sched 4

[9] It was accepted as an important principle that trials should be public events and that any member of the professional media could observe the trial provided arrangements were made in advance. Concerned onlookers, whether family members or otherwise, could also observe the proceedings with the permission of the court. Ordinary members of the public were excluded, it being recognised that there were potential dangers in permitting it but that this issue would require to be resolved nationally.

[10] In the initial period of the pilot 9 trials proceeded. Since then 33 trials have been scheduled; 6 proceeded. A further 10 trials are scheduled up to late January. The low percentage of scheduled trials which proceeded is unsurprising and is in line with the general outcomes for traditional in-person trials over the years.

[11] Ten evaluation measures were set. The results are contained in Appendix 2.

### **Commentary**

[12] It is a fundamental principle of a modern democratic society that an accused person is entitled to a fair trial where the paramount rules are the presumption of innocence and that the charge must be proved beyond a reasonable doubt. Thus the fairness of the trial for the accused is the ultimate test of any technological innovation. There are subsidiary rights as well, not least those of the alleged victim, but the primacy of fairness to the accused must always be recognised.

[13] In the interim report there is quoted a comment made by Sheriff Wallace, which bears repeating:

“The accused actually becomes more of the centre of the trial in the virtual model... There was a positive move towards him being positioned on an equal footing to all participants as another image on the screen as opposed to being kept separate in the dock.”

Perhaps surprisingly, given the views expressed internationally, no member of the Board expressed a concern about assessing the credibility and reliability of witnesses. Indeed, as the Law Society stated, credibility can be assessed on a screen; juries do it every day – a reference to the use of cinemas for jury trials. Indeed, such assessment has been done for many years through the remote arrangements

for vulnerable witnesses. The sheriffs thought that an obstructive witness would be more difficult to control in a virtual trial. That was echoed by a local Aberdeen solicitor who commented that removing the accused from the courtroom removes him from influences (the presence of the sheriff etc) which will serve to control the accused's behaviour.

[14] The sheriffs thought that generally witnesses behaved appropriately and were engaged in the court process and as the technology improved during the course of the pilot (moving from being in the court building to a cinema and latterly to a bespoke remote building supported by Victim Support Scotland) the location and the audio and visual quality of the technology was good – indeed excellent for the latter. The Law Society recommended that there be set minimum standards for video and audio. The Board is satisfied that SCTS has delivered that and, subject to appropriate resourcing, can do so in the future.

[15] The agreement that the accused be in the same physical space as his solicitor was regarded as important. Practical issues about feedback were quickly resolved. It also dealt with a general concern, expressed locally and internationally, that virtual proceedings in whatever form run the risk of hindering confidential and timely discussions between the agent and his or her client. The need to separate them arose primarily because of the early experiences of the pandemic and to mitigate against infection. That should not be a long term issue.

[16] Victim Support Scotland reported that the complainers and witnesses whom they supported welcomed the opportunity to give evidence virtually from a remote site. Feedback was overwhelmingly positive. They found that the technology was easy to work.

[17] More generally, the Law Society reported that defence solicitors found that more work was required to prepare for and conduct a virtual trial, such that virtual trials may put further pressure on the amount of work required within the legal aid fixed fee. In contrast to the 2020 pilot, COPFS reported that the additional preparation required of trial deputies when compared to in-person trials

was minimal, although the normal trial preparation cycle did have to be amended to take account of the need to submit relevant paperwork to the court at an earlier stage than usual.

### **Options for the Future**

[18] The Board sets out what it considers are the options for decision makers and recommends the establishment of a virtual domestic abuse summary trial court in each sheriffdom to help mitigate the impact of the Coronavirus pandemic on victims and accused.

#### *Virtual Trials have no future*

[19] Can virtual trials ensure that the accused receives a fair trial? The Board's view is that they can. A more fundamental question might be whether post pandemic summary criminal business should return to the traditional model or whether all or any of the perceived benefits of technology should be embraced. Not to embrace technology in summary trials is inconsistent with the work being carried out by the Lord Justice-Clerk's Evidence and Procedure Review, given that, as the Law Society has observed, the move to virtual hearings comes at a stage that consideration of 'best evidence' was already being considered. Victims' organisations are strongly in favour of virtual trials. Victim Support Scotland consider that there is a place for virtual trials as part of a responsible justice system for a modern Scotland. For Scottish Women's Aid virtual trials address the particular challenges in domestic abuse cases due to the dynamic between the victim and the perpetrator. ASSIST consider that virtual trials should be viewed as core components of the justice system. They all also consider that they are an important means of dealing with the current backlog of cases, as well as supporting the agenda for climate change.

#### *Virtual trials are a useful tool in the box*

[20] The Board recognises the benefits of virtual trials where geography dictates long distances being travelled to attend court. That is also consistent with policies both present and future on climate

change. However, there are practical and budgetary issues. Such trials, if only occasional, will be difficult to programme, to provide sheriffs, sheriff clerks and prosecutors and for the defence agents to accommodate given their own diaries. Equally importantly, the cost in resources of maintaining a virtual trial system in sheriffdoms for only occasional use may not be regarded as an appropriate use of public funds when they could be more profitably expended elsewhere. That is not to exclude the use of a virtual trial court for such cases, but better to be in the context of a system which is being regularly used for other discrete areas of business.

#### *Virtual Trials as the default for all summary trials*

[21] This was the recommendation contained in Sheriff Principal Pyle's interim report. However, that was in the context of the state of the pandemic at that time. While rules and protocols for the pandemic are still in force, it has been possible for all courts to conduct in-person summary trials and that is likely to continue. There are no obvious efficiencies (apart from travel) in having the majority of summary trials conducted virtually; nor does the Board consider that of themselves virtual trials are a fairer form of judicial investigation than in-person trials, such as to justify a change across the system. That is not to rule out the deployment of virtual trials if the pandemic worsens and in-person trials are further restricted or if court accommodation is restricted further because of the need to cater for solemn business.

#### *Hybrid Trials*

[22] Scottish Government has requested that the Board give advice on "different models of remote witness evidence, and what would be involved in that – including any potential blockers". A hybrid trial model would involve witnesses giving evidence from a remote location, not dissimilar to the pre-Covid arrangements for vulnerable witnesses, but with much improved technology. Like virtual trials and the existing arrangements for vulnerable witnesses, witnesses would be supported by Victim Support Scotland in bespoke facilities away from the court building. Police and expert witnesses would give evidence from a location of their choice. Thus many of the perceived benefits of virtual trials,

particularly from the perspective of victims' organisations, would be achieved by this model. SCTS has confirmed that while there would be resource and capacity issues, not least in finding accommodation for the remote witness sites, from a technical perspective there is capacity within the WebEx system it operates to allow hybrid summary trials. The hybrid approach is already underway in the High Court and is likely to be available for sheriff and jury trials early next year.

Thus, hybrid trials would achieve many of the benefits which would arise from virtual trials. They would not of themselves assist in dealing with the backlog of trials arising from the pandemic.

#### *Virtual Trials for domestic abuse*

[23] This is the Board's recommended option. It is popular among victims' organisations, given the protection it affords to complainers and witnesses.

It is consistent with the general direction of policy in this and other accusatorial jurisdictions with the emphasis on the capturing of evidence at the earliest possible stage – with technology being an essential component of it.

There are c33,000 summary trials outstanding, compared to c14,000 pre-pandemic. Even the most optimistic forecast is that it will take until March 2024 to return to pre-pandemic levels. That could be longer if existing restrictions, such as physical distancing, continue in their present form – or even at a lower level. To treat domestic abuse as a separate type of business deserving of a discrete solution would be consistent with the longstanding policy of regarding such cases as a priority. It would also leave free in-person trial capacity for other cases – and thereby reduce the period before normality is returned.

Domestic abuse trials are easily identified, which, as the Law Society has emphasised, would ensure that there are clear criteria for the selection of cases to proceed by virtual summary trial, to manage expectations of all parties to proceedings and, where required, to raise objections to the forum selected for the case.

As the Law Society has also pointed out, there is international evidence that virtual models improve the attendance levels of accused and witnesses – a particular concern in domestic abuse cases.

The model would be a dedicated virtual domestic abuse trial court (or courts, depending on volume of cases) in each sheriffdom. It would offer the opportunity for the development of trauma informed practices and procedures, with the requisite training for all participants, similar to the approach recommended in Lady Dorrian’s recent report on the management of sexual offence cases<sup>6</sup>. Such courts would have their own programme and would allow the opportunity for the early fixing of trial diets (perhaps as low as four weeks from the first calling), with obvious benefits for accused (particularly those subject to stringent bail conditions) and complainers. It would also allow focussed use of scarce resources within community justice for the development of bespoke community remedies, such as the Caledonian programme, and the deployment of a problem solving approach through the use of structured deferred sentences.

About one quarter of all outstanding summary trials are domestic abuse cases. Taking such cases out of existing court programmes would not only deal with the specific problems of delay in such cases on the participants; it would also free up court time for other cases to be dealt with and thereby shorten the overall recovery period.

It would however not be without challenges. An additional court would in turn require additional sheriffs, sheriff clerks, prosecutors and defence agents. As the Law Society observe, defence firms have struggled to compete with the better-funded parts of the system, such as salary levels offered by Scottish Government and the Crown.

Across the justice system there are challenges in identifying suitably qualified and experienced personnel to resource the present recovery programme – “fishing in the same pool”. Virtual courts would add to that problem.

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<sup>6</sup> [Improving-the-management-of-Sexual-Offence-Cases.pdf \(scotcourts.gov.uk\)](#)

Defence agents would face additional cost in equipment and preparations for virtual trials. Indeed, the necessary funding will be required for all parts of the justice system to enable virtual trials to operate successfully.

For sheriffdom virtual domestic abuse trial courts to be effective it would require legislative change to create in effect a presumption in favour of domestic abuse trials by electronic means.<sup>7</sup>

Over time and once the sheriffdom courts were established and running effectively, there would be no reason in principle not to allow suitable trials in other areas of business to use the virtual trial resource if capacity is available and the parties wish it. That might be particularly suitable for some Road Traffic Act cases or where geography is an issue, albeit that should perhaps be considered only as an incidental benefit.

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<sup>7</sup> Sched 4, Coronavirus (Scotland) Act 2020, perhaps by amendment to para 2(2) by excepting trials for domestic abuse as defined; a less satisfactory option might be a formal practice note by the Lord Justice General.

*Appendix 1: National Project Board representation*

Sheriff Principal Derek Pyle

David Fraser – SCTS

Yvonne Taylor - SCTS

Andrew Shanks – COPFS

Mhairi McGowan, Scottish Women's Aid

Ann Fehilly, ASSIST

Kate Wallace – Victim Support Scotland

Judith Wright – Police Scotland

Gordon Roy – Scottish Prison Service

Gillian Mawdsley – Law Society of Scotland

Andrew Alexander – Law Society of Scotland

Stuart Munro – Law Society of Scotland

Fiona Cameron – Scottish Government

Marie-Louise Fox – Scottish Legal Aid Board

*Appendix 2: Evaluation Criteria*

Evaluation Measure		Achieved
<a href="#">1</a>	Average duration of virtual trials remains in line with the average duration of physical summary trials	PASSED
<a href="#">2</a>	No additional resourcing required for virtual trials when compared to physical trials	FAILED
<a href="#">3</a>	Witness attendance rate is the same or better than physical trials	PASSED
<a href="#">4</a>	Trials are successfully called at the same or better rate than physical trials	FAILED
<a href="#">5</a>	Average start time (compared to scheduled start time) is the same or better than physical trials	PASSED
<a href="#">6</a>	Virtual trials do not impact the outcome of trials	PASSED
<a href="#">7</a>	Virtual court schedule is fully utilised	FAILED
<a href="#">8</a>	Witnesses are fully supported throughout the process	PASSED
<a href="#">9</a>	No critical technology failures occurring preventing trials to be delayed or adjourned	PASSED
<a href="#">10</a>	All required capabilities deployed and tested	PARTIALLY PASSED
	<p>Note</p> <p>The Measure 4 achievement result includes cases where trials were converted to in-person trials and others where the pilot did not allow interpreters or video evidence – matters which would not apply after roll out. By the end of the pilot, the rate was the same as in-person trials.</p>	