Covid-19 and Criminal Justice: Temporary Fixes or Long Term Reform?

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I. Introduction

Countries across the globe have been struggling with the question of how to keep the wheels of justice turning during the Covid-19 pandemic. Accordingly, both the UK and Scottish governments have taken a number of measures to ensure the justice system does not grind to a halt despite rules requiring social isolation and social distancing. Most notably, they have moved court hearings (and even trials) online and the Scottish government has extended the exceptions to the hearsay rule to cover witnesses who cannot be in court because of Covid-19.

Undoubtedly, these moves were motivated[1] at least in part by the idea that "justice delayed is justice denied" which is guaranteed by article 6 of the European Convention on Human Rights (ECHR) which provides a right to a trial within a "reasonable time" as one of its rights to a fair trial. Delays in trials may extend pre-trial custody and exacerbate all the anxieties and other material consequences of having important decisions hanging over one's head. And it is not, of course, only the defendants who are affected by delays, but also witnesses, alleged victims, and all those with an interest in seeing justice done.

However, the right to speedy justice is by no means the only aspect of the right to a fair trial raised by the coronavirus crisis. In fact, it clashes with various other of the protections accorded to criminal accused as part of the "due process" model of criminal justice[2] which Herbert Packer defined as prioritising the protection of criminal suspects and accused through a variety of measures, such as the asymmetrical burden of proof, and the rights to silence, legal representation and to challenge prosecution evidence. Thus, recognising the power imbalances between the state and citizen which run throughout all aspects of the criminal justice system and the fact that wrongful decisions have more extreme consequences for convicted accused than acquittals have for the community, it has long been recognised that in Blackstone's celebrated aphorism 'it is better to let ten guilty men go free than to convict one innocent.'[3] In addition, the law has increasingly come to grant suspects certain civil liberties associated with the right to fair trial and fair treatment which are not simply party of the "overprotection" of suspects and accused but can also be seen as a recognition of the inherent value of human dignity and autonomy and/or the legitimacy and d integrity of criminal proceedings.

However, speedy justice is not just a civil liberty. It is also a core element of the competing "crime control" model of criminal justice which favours the quick and efficient processing

* We would like to thank Eamon Keane for his useful comments on this article.

[1] Cf Scottish Government, 'Covid-19 And Solemn Criminal Trials Scottish Government Discussion Document', April 2020, 7-8, https://www.gov.scot/publications/coronavirus-covid-19-options-for-progressing-the-most-serious-criminal-ca.

[2] Herbert Packer *The Limits of the Criminal Sanction* (Stanford Univ. Press, 1968).

[3] Blackstone, Commentaries (1765-1769) 4.27.

of suspected criminal activity, especially in the lower courts;[4] an orientation which has seen a re-emergence in recent years not least because of the rise of what has been called 'penal populism'[5] and 'managerialism'.[6] At the same time, however, changes to the operation of the criminal justice systems in both England and Wales, and Scotland have not just come from government. Lawyers have also had to adapt the way they represent clients including, as we discuss, those who are in police custody.

In this chapter we assess the impact of these changes on the procedural features and principles that have been developed over centuries in the two criminal justice systems, considering in particular whether they are merely a temporary necessary evil in the face of a dangerous pandemic or whether they might become – or even should become – more permanent features of the criminal justice landscape in England and Wales and in Scotland.

II. Early Access to Legal Representation

The right to a lawyer is an essential safeguard in criminal proceedings and is now protected by Article 6 of the ECHR. It ensures vulnerable citizens some semblance of equality of arms with powerful investigating and prosecuting authorities. Given that what happens in police stations can cast a long shadow over subsequent proceedings, potentially representing the difference between conviction and acquittal, the right to representation applies here as well as in court, operating as a safeguard against coercion and ill-treatment, and helping suspects understand their other rights, including the right to remain silent.[7] At least in principle, suspects in England and Wales had long enjoyed this right – a position which was put beyond doubt by the unambiguous decision of the European Court of Human Rights (ECtHR)in *Salduz v. Turkey*.[8] However, the same situation only came about in Scotland after the UK Supreme Court in *Cadder* v *HMA*[9] found that the Scottish system of police custody permitting suspects to be questioned for six hours without access to a lawyer breached their human rights. In response, the Scottish Government legislated to recognise suspects' right to privately consult with legal representatives before and at any other time during police questioning, but did not specifically provide a right to have them present during police questioning.[10]

After lockdown was imposed in mid-March, the question arose as to whether lawyers should continue to attend police stations to advise arrested clients. In England and Wales, some custody sergeants initially continued to insist that suspects who requested lawyers should be given face-to-face legal advice. However, this created understandable fears about obvious health dangers, particularly in the absence of appropriate PPE and facilities to allow for social

[4] Cf Doreen McBarnet's analysis of the "ideology of triviality" in terms of which cases in the lower courts are not regarded as serious enough to merit the full panoply of civil liberties protection: *Conviction* (Palgrave Macmillan, 1981), ch. 7.
[5] Peter Duff, 'Scottish Criminal Law Adrift?' in Peter Duff and Pamela Ferguson (eds) *Current Developments in Scottish Criminal Evidence Law* (Edinburgh Univ. Press, 2017), 227-34.
[6] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519.
[7] Cf *Beuze v Belgium*, App no. 71409/10 (Judgment of 9 November 2018), § 125-13.
[8] App. no. 36391/02 (27 November 2008).
[9] [2010] UKSC 43, following the decision of the European Court of Human Rights in *Salduz v. Turkey* [GC], App. no. 36391/02, 27 November 2008.
[10] Section 15A(3) Criminal Procedure (Scotland) Act 1995, as inserted by Section 1(4) Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010).

distancing.[11] Consequently, in early April a number of stakeholders met to agree guidance on police interviews. This provides that, in the vast majority of cases, if a police interview is required, it should be conducted with lawyers and other specialist support services (such as interpreters) attending remotely, with the disclosure and custody record provided electronically to lawyers in advance.[12] As a result, many lawyers are now conducting pre-interview consultations with their clients remotely (by phone or videolink) and attending the interview itself via videolink.

This arrangement might represent 'a situation which is as good as we could possibly have hoped to achieve',[13] but it may lead in future trials to questions about the fairness of convictions that rely in any substantial way on evidence obtained during police interview (or drawing adverse inferences from silence) when suspects were refused face-to-face legal support in the police station. Whether such evidence (or silence) can be relied on is likely to depend on a number of factors such as whether: (a) the accused is particularly vulnerable, for example by reason of age or mental capacity; (b) the evidence formed an integral or significant part of the probative evidence upon which the conviction was based; and (c) whether other rights were complied with at the time of arrest and in custody.[14] One would expect courts to be sympathetic to the exceptional circumstances of the pandemic and to admit evidence or inferences, where effective remote access to a lawyer was provided. Nevertheless, the police would be advised to take steps to pre-empt exclusion such as by: delaying arrest and interviews wherever possible and proportionate until health can be better protected; assessing the vulnerability of the suspect; ensuring that the technology is working properly; and ensuring social-distancing and PPE for face-to-face consultation and lawyer attendance at interview where the accused requests this or is vulnerable. Also relevant to potential exclusion are allegations by accused that they did not voluntarily waive the right to a lawyer (for example, where police wrongly state that lawyers are not available because of the pandemic).

In Scotland, guidance from the Legal Aid Board published in May merely states: 'Local Police Station Duty Solicitors will still be called on for any police station attendances in their local police stations.'[15] Even before the pandemic it was rare for solicitors to attend police stations in person in Scotland. As JUSTICE Scotland reported, 'the majority of requests for advice are concluded with the telephone call to a solicitor' and 'just 9% of people in detention received the advice and assistance of a solicitor present in person in the police station.'[16] Guidance by the Law Society of Scotland had encouraged solicitors to consider attending police

[11] See Vicky Kemp, 'Covid-19 and the Dangers of Providing Police Station Legal Advice in England and Wales', April 2020, https://www.fairtrials.org/news/commentary-covid-19-and-dangers-providing-police-station-legal-advice-england-and-wales.
[12] Interview Protocol between the National Police Chiefs Council, Crown Prosecution Service, Law Society, the Criminal Law Solicitors' Association and the London Criminal Courts Solicitors' Association, 24 April 2020, https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-covid-19-interview-protocol/.
[13] Ian Kelcey, 'Criminal Justice in a Pandemic: The Courts', Cambridge University Law Faculty, 28 May 2020, https://www.youtube.com/watch?v=tXMJzCTAVAs&feature=youtu.be.
[14] *Ibrahim and Others v. the United Kingdom* [GC], Apps. nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, § 274; *Beuze v. Belgium* [GC], App. no. 71409/10, 9 November 2018, § 150; *Sitnevskiy and Chaykovskiy v. Ukraine*, Apps. nos. 48016/06 and 7817/07, 10 February 2017, §§ 78-8.
[15] Scottish Legal Aid Board, 'Covid-19: Custody courts and duty solicitors', 26 March 2020, https://www.slab.org.uk/news/covid-19-custody-courts-and-duty-solicitors/.
[16] JUSTICE Scotland, 'Legal assistance in the police station,' 2018, 4, https://justice.org.uk/justice-scotland/our-work/legal-assistance-in-the-police-station/.

stations in person but, except for children or vulnerable adults, this was not binding.[17] Indeed, it seems that, having advised clients by telephone to remain silent in the interview, solicitors frequently discourage them from requesting the lawyer's in-person attendance during those interviews.[18] Therefore, it is possible that Covid-19 has not had as significant an impact on mechanisms for providing legal advice and representation in police stations in Scotland as it has South of the border.

Many pragmatic considerations seem to favour remote access to lawyers in police stations becoming - or in the case of Scotland, remaining - the norm. Lawyers have understandably long complained about the level of legal aid paid for police station attendance (which requires travel and often anti-social hours). It would not be surprising if demotivated and underpaid lawyers wanted to retain the increased efficiency of advising accused remotely from their homes or offices, perhaps even utilising centralised call centres. There may also be rights-based reasons for the long-term retention of suitable remote technologies to help suspects exercise their rights in the police station. Perhaps, in Scotland, videoconferencing might come to replace telephone consultations and encourage more solicitors to participate in interviews. In England and Wales, this could address the worryingly high number of people (around 50%) who were waiving their right to free legal assistance before the pandemic,[19] and concerns about the poor quality of advice provided and reliance on non-lawyer representatives.[20]

However, if one returns to the underlying rationale of the right to legal representation in the police station, it seems clear that attendance in person is the gold standard. Having a defence lawyer with you in person is far more effective in building some semblance of equality of arms and the physical presence of a lawyer is a more effective safeguard against coercion and ill-treatment.[21] A lawyer who meets clients in person may also be more effective at explaining their rights and assessing whether they are vulnerable and in need of medical or other forms of specialist support. Beyond this, in-person meetings help to establish effective lawyer-client relationships, including by giving the defendant confidence that conversations are confidential and that the lawyer represents their interests and by creating a safe space within which to gather the information needed to prepare for trial or argue for pre-trial release.

III. Remote Hearings

The public drama of the courtroom dominates representation of criminal justice in film, TV and literature: the austere architecture; the key protagonists brought together (often in costume); the grand oratory and gesturing; the high tension when conflicting versions

[17] The Law Society of Scotland, 'Police Station Interviews: Advice and Information from the Law Society of Scotland', https://www.lawscot.org.uk/media/8819/police-station-advice-and-information-march-2015-section-f-division-advice.pdf.
[18] JUSTICE Scotland (n. 16), p.8.
[19] Layla Skinns, 'The Right to Legal Advice in the Police Station: Past, Present and Future'[2011] Crim LR 19, 22.
[20] Cf 'The Good Lawyer', Transform Justice, July 2019, p.17; Vicky Kemp *Effective Police Station Legal Advice - Country Report 2: England and Wales Project Report* (University of Nottingham, 2018), (http://eprints.nottingham.ac.uk/51145/1/Country%20Report%20England%20and%20Wales%20Final%20.pdf); Legal Aid Agency, *Improving Your Quality: A Guide to Common Issues Identified through Peer Review* (4th edn) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490047/peer-review-quality.pdf).
[21] See eg *Hawkins v HMA* [2017] HCJAC 79 where a confession made after only telephone advice not to say anything was excluded as the result of police pressure on the accused to change his story.

confront each other.[22] While there is much dramatic license in these portrayals, hearings in open court play a central role in criminal justice. The public (directly or via the press), or those who witnessed or were victims of crime, can observe the serious spectacle of the rule of law in action and hopefully be satisfied that justice is done, thus legitimising the verdict.[23] Public hearings also provide important protections to the accused. Indeed, according to Bentham, without publicity all other guarantees of truth-finding are insufficient. 'Publicity' he wrote, 'is the soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.'[24] It is also thought to render witnesses less inclined to falsify,[25] especially if they have to face the gaze or questions of those who know the truth.[26] Moreover, having the accused physically brought to court soon after arrest, allows judges to see visible signs of mistreatment. Being physically present in court also allows the accused to better exercise their right to be heard by participating in the proceedings - seeing, hearing and responding to what is being said.[27] It also makes it easier for the accused to consult their lawyer and receive support from friends and family.

The dangers posed by Covid-19 place obvious obstacles in the way of normal courtroom hearings. Consequently, emergency legislation was passed permitting a wide range of court hearings to take place without the physical attendance of the accused, prosecution, defence or witnesses.[28] Much of the work of Crown Courts in England and Wales, for example, has been done remotely including sentencing hearings, urgent applications (such as applications for bail and to extend custody time limits) and pre-trial preparation and case management hearings. In Scotland, one key area in which remote attendance has increased has been hearings to determine whether suspects should be detained or released pending trial.[29] More generally in the UK, there has also been a huge increase in the use of video-link and telephone during court hearings. For example, the number of cases heard each day in England and Wales which use remote technology increased from under 1,000 in the last week of March 2020 to approximately 3,000 by mid-April (1/3 using video and 2/3 audio).[30]

In both England and Wales and Scotland, the question of what to do about jury trials during the pandemic posed particular problems. The large number of people involved in such trials (accused, judges, jurors, lawyers, witnesses, the public and press) make social distancing highly challenging. In Scotland, the Government initially proposed to move to

[22] See Donald Nicolson, *Evidence and Proof in Scotland: Context and Critique* (Edinburgh Univ Press, 2019), 165ff.
[23] Cf Anthony Duff, et al. *The Trial on Trial: Volume 3 – Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007).
[24] Quoted by Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd edn, 2006), 88-9.
[25] See Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol. 6, 435.
[26] See eg. *Coy* v.*Iowa* 487 US 1012, 1019 (1988).
[27] *Murtazaliyeva, v. Russia* [GC], Application no. 36658/05, 18 December 2018.
[28] Coronavirus Act 2020, Schedules 23 to 26 and Coronavirus (Scotland) Act 2020, Schedule 4, para 2.
[29] Cf Scottish Courts and Tribunals Service, 'Guidance in relation to Remote Hearings – Attendance by Electronic Means for Custody', 4 June 2020, https://www.scotcourts.gov.uk/docs/default-source/default-document-library/attendance-by-electronic-meansa5cacaa7898069d2b500ff0000d74aa7.pdf?sfvrsn=0.
[30] Her Majesty's Courts and Tribunals Service, 'Courts and Tribunals Data on Audio and Video Technology Use During Coronavirus Outbreak', 14 April 2020, last updated 30 April 2020, https://www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak).

judge only trials as an emergency measure for up to 18 months,[31] but the proposal was quickly withdrawn following a backlash by the legal profession and opposition parties.[32] Instead, as happened in England and Wales, jury trials were put on hold for several weeks.[33] With the gradual relaxation of lock-down restrictions, jury trials have resumed, but at a much lower volume. To allow for social distancing each trial is spread across several court rooms.[34] This has had a significant impact on backlog and delays. In Scotland, for example, the Chief Executive of the Scottish Courts and Tribunals Service has warned that there could be a backlog of 3,000 trials by March 2021.[35] In England and Wales, the Criminal Bar Association warn of a backlog of 40,000 cases, which will not be solved even if all Crown Courts are brought into service under physical distancing rules.[36] There has been some consideration of the feasibility of moving to online jury trials[37] but, while the use of technology in jury trials has increased, the wholesale move online for trials has not happened.

But even though the iconic jury trial has - so far at least[38] - been retained, the significant shift to the use of remote technologies is changing the way courts operate. This has succeeded in preventing the criminal justice systems grinding to a halt completely but at the expense of maintaining traditional safeguards for protecting suspects and accused. Research suggests that defendants in remote hearings are more likely to be unrepresented

[31] Kate Wallace, 'Jury-less trials are an opportunity to put victims at the centre of Scotland's justice system', *Holyrood*, 27 April 2020, https://www.holyrood.com/comment/view,juryless-trials-are-an-opportunity-to-put-victims-at-the-centre-of-scotland_15426.htm.

[32] Tom Peterkin, 'Legal profession and opposition vow to fight emergency plans to hold trials without juries in Scotland', *The Press and Journal*, 31 March 2020, https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/2114473/as-a-row-erupts-over-non-jury-trials-heres-your-guide-to-the-coronavirus-emergency-legislation-being-rushed-through-holyrood. Space constraints prevent detailed discussion; suffice to say that based on his recent study of evidence and proof the first named author is not convinced that this proposal should have been dropped so quickly: (See, Nicolson (n. 22), esp. at 172-4, 339-40). Thus, there is no evidence to suggest that juries are superior fact-finders to judges: the benefits of having wider social backgrounds are arguably counterbalanced by the apparent greater tendency of jurors to be swayed by persuasive stories lacking logical coherence. Similarly, the relatively strict control exercised by the courts and law over jurors means that they do not often act as safeguards against state tyranny and corruption, or to democratise and inject "lay acid" into adjudication by bringing an element of common sense, equity, flexibility, popular and community justice, and a human face to the austerity and harshness which may emanate from the strict application of law. Admittedly, from a due process perspective, jurors acquit slightly more frequently than judges. However, this needs to be balanced against the possibility that judges (and lay adjudicators who might be appointed to sit with them) can be better educated than jurors as to the problems with perception, memory and recall of observational witnesses and the unreliability of many forms of scientific evidence.

[33] Severin Carrell, 'Scotland Drops Plans to Suspend Jury Trials during Coronavirus Crisis', *The Guardian,* 1 April 2020.

[34] Jemma Slingo, 'Socially-distanced Jury Trial Went Like Clockwork, Says Chambers', *Law Society Gazette,* 29 May 2020.

[35] Reevel Alderson, 'Coronavirus: Covid-19 Could Lead to Court Backlog of 3,000 Trials", BBC, 19 May 2020.

[36] Owen Bowcott, 'England and Wales Face Backlog of 40,000 Criminal Cases Due to Coronavirus', *The Guardian*, 20 May 2020.

[37] Linda Mulcahy, Emma Rowden, and Wend Teeder, 'Exploring the Case for Virtual Jury Trials During the COVID-19 crisis: An evaluation of a pilot study conducted by JUSTICE', April 2020, https://justice.org.uk/wp-content/uploads/2020/04/Mulcahy-Rowden-Virtual-trials-final.pdf.

[38] The Lord Chief Justice in England and Wales has suggested that it may be necessary to move to juryless trials in respect of less serious, "either way" offences or to consider reducing the number of jurors, Owen Bowcott, 'Drop juries for less serious crimes in England and Wales, judges say', *The Guardian*, 16 June 2020.

and to receive a prison sentence or remand.[39] The ability of suspects and accused to follow the trial and meaningfully participate though video-link can be significantly impaired due to malfunctioning equipment, isolation, fragmented view of the proceedings, and the absence of a lawyer by their side to help navigate the proceedings. The effects of isolation, increased complexity of the procedure, and risks of not being able to understand the process are increased for unrepresented suspects or accused persons or those with special needs.[40]

Long before the pandemic, authorities in both jurisdictions had been looking to increase the use of technology in the courts to allow for remote attendance.[41] In England and Wales, for example, there had been a gradual move towards defendants participating in hearings via videolink from prisons and police stations, such that between June 2018 and March 2020 over 10,792 first appearance hearings took place remotely.[42] Despite the many concerns about the impact on fairness, many within the legal professions have celebrated how the move to remote technologies has been accelerated during the pandemic. As with remote attendance at police stations, the question which inevitably arises (or will do so) is whether these changes should remain in place after the pandemic. The Lord Chief Justice of England and Wales has already indicated that '[t]here will be no going back to where we were'.[43]

As with remote attendance at the police station, there may well be legitimate practical and principled reasons to facilitate more remote participation in hearings. Before doing so, however, it is crucial to fill the significant gaps in knowledge about the impact of remote attendance on outcomes and on procedural fairness. Is an accused person more or less likely to be detained or convicted if they appear in court via videolink? How many potential participants have the necessary technology and ability to use it? What happens when internet connections are slow or unstable? How does one ensure that witnesses giving evidence remotely are not intimidated or coached by those not in view?

IV. Hearsay Evidence in Scotland

By contrast to the situation with remote hearings, there is a much longer history of practice to draw upon in evaluating the justifiability of the Scottish Government's changes to the hearsay rule. This has been defined as '[a]n assertion other than one made by a person while giving evidence in the proceedings is inadmissible as evidence of any fact asserted.'[44] The common law has long recognised a number of exceptions to this, including those caused by witness unavailability In 1995, s. 259 (2) of the Criminal Procedure Act (Scotland) codified and slightly

[39] For example, Penelope Gibbs, 'Defendants on video – conveyor belt justice or a revolution in access?', Transform Justice, October 2017; Legal Education Foundation 'Briefing: Coronavirus Bill, Courts and the Rule of Law', 18 March 2020; Anne Wallace 'Courts and Coronavirus: Is Videoconferencing a Solution?', 18 March 2020, https://courttechbulletin.blogspot.com/2020/03/courts-and-coronavirus-is.html; Advocates Gateway 'Planning to question someone using a remote link', 20 March 2017, https://www.theadvocatesgateway.org/images/toolkits/9-planning-to-question-someone-using-a-remote-link-2017.pdf.

[40] 'Court Hearings Via Video 'Risk Unfairness For Disabled People', *The Guardian*, 22 April 2020.

[41] See Scottish Courts and Tribunals Digital Strategy 2018-2023, available at https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/scts-digital-strategy---final.pdf?sfvrsn=4.

[42] Monidipa Fouzder, 'Open Justice Campaigner Calls for Video Remand Data to be Published", *Law Society Gazette*, 30 March 2020.

[43] Select Committee on the Constitution, Uncorrected oral evidence: Constitutional implications of Covid-19, Wednesday 13 May 2020 (Q6).

[44] Rupert Cross and Colin Tapper, *Evidence* (Oxford UP, 7th edn, 1990), 42.

extended the latter exceptions to include the situations where witnesses are dead, unfit or unable to give evidence or outside the UK, unidentifiable, have been advised that they might incriminate themselves, or refuse to take the oath or give evidence. This provision has now been amended to include the situation where requiring the witness to attend the court would:

(a) …give rise to a particular risk to —
(i) to the person's wellbeing attributable to coronavirus, or
(ii) of transmitting coronavirus to others, and

(b) it is not reasonably practicable for the person to give the evidence in any other competent manner.[45]

If these circumstances apply and other conditions are met[46], the court can admit documents prepared by the witness or allow hearsay testimony from those who had the relevant facts reported to them.

Where such evidence is admitted, many of the traditional safeguards for ensuring the truth and accuracy of testimony are obviated without an alternative reason to trust the evidence, as applies in some of the common law exceptions to the hearsay rule.[47] But there are no reasons other than expediency to justify removal of the truth-supporting role of the oath, observation of witness demeanour, and dialectic immediacy and the cross-examination of those who observed the facts in question. Of these truth-supporting mechanisms, the first three may only operate to prevent dishonesty which is far less common than witness inaccuracy through problems of perception, memory and recall, and in any event are not uniformly supported by empirical evidence of their effectiveness.[48] By contrast, cross-examination can be used to challenge both witness honest and accuracy. Admittedly, it can be used to make 'the true look false and the false look true'.[49] Nevertheless, in the absence of effective lie detectors, better means for evaluating witnesses or the emergence of "smoking gun" evidence which self-evidently reveals true facts (in which cases there are likely to be guilty pleas), it seems that Wigmore was only slightly exaggerating when he said that cross-examination is the 'greatest legal engine ever invented for the discovery of truth.'[50] Indeed, its value extends beyond its instrumental "truth-certifying" role. By allowing those who face allegations an opportunity to test their veracity, cross-examination upholds principles of natural justice and makes participants more likely to accept adverse outcomes as legitimate.[51] As a result, the failure to allow cross-examination may breach article 6 of the ECHR, at least when the witness was the sole or determinant source of evidence supporting

[45] Coronavirus (Scotland) Act 2020, Schedule 5, Part 5.
[46] Out of court statements can only be "first hand" hearsay, their maker must have been competent at the time and that proof of their having been made would not itself require hearsay evidence, whereas notice must be given if they are going to be led.
[47] For instance, the unlikelihood of people manufacturing evidence in the heat of the moment justifies the *res gestae* exception.
[48] See Nicolson, (n. 22),134, 283-6.
[49] Murray Schwarz, 'On Making the True Look False and the False Look True' (1988) 41 *Southwestern Law Journal* 1135.
[50] *A Treatise on the Anglo-American System of Evidence in Trials at Common Law,* vol. 5, (1974), para. 13672. For supporting anecdotal and empirical evidence: see, respectively Francis Wellman, *The Art of Cross Examination* (Prentice Hall, 1903); Gwynn Davis, Steven. Cretney, and Jean Collins, *Simple Quarrels* (Clarendon Press, 1994), 246ff.
[51] See e.g., Genevra Richardson and Hazel Genn, 'Tribunals in Transition: Resolution or Adjudication' [2007] *Public Law* 116, 131.

the conviction and only when the authorities have not made all reasonable effort to produce the witness for cross-examination.[52]

Given this, while it is clearly not in anyone's interest to require witnesses to attend court if they have Covid-19 or are particularly vulnerable to succumbing to its effects, it is less clear why courts cannot always require remote testimony which will then be subject to cross-examination. Recovery times are not unduly long and in the sad cases where witnesses die, there is already an exception to the hearsay rule. There is also a danger that courts will not appropriately interrogate assertions of coronavirus health risks or assertions that remote testimony is not reasonably practicable,[53] for instance by requiring positive tests and medical certificates. While, the Scottish Government understandably felt that it needed to act quickly, we are not sure that the hearsay provision was necessary or adequately considered.

VI. Conclusion

There are many ways in which societies have changed in response to Covid-19 and the same is true of criminal justice systems. The three areas of change discussed in this chapter raise questions about whether these changes are, in fact, justifiable and whether, even as temporary fixes, they offer appropriate protections for defence rights. Some of the contemporary impetuses towards a more crime control, rather than due process, orientation towards criminal justice suggest some Covid-19 measures might become permanent. This is especially so given that there will be serious backlogs to clear and even less public money available to invest in due process protections. We would strongly argue that any decisions about long-term changes to criminal justice systems (and, indeed, the safety of convictions imposed during Covid-19, which may have life-long consequences for convicted people) are not based on convenience or cost-savings but on evidence, including on how the criminal justice systems in England and Wales, and in Scotland work in practice.

[52] *Van Mechelen and Others* v *Netherlands,* 1997-III; *Artner* v *Austria* (1992) A 242-A, paras 19-24.
[53] See Eamon Keane, 'Alarm Bells Ring Over Hearsay Proposals', *Scottish Legal News*, 1 April 2020, https://www.scottishlegal.com/article/eamon-keane-alarm-bells-ring-over-hearsay-proposals.