

Justice Committee

Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service

Written submission from the Edinburgh Bar Association

1. Please outline your views on the overall efficiency and effectiveness of the COPFS in its core role of considering reports about crime from the police and bringing prosecutions. Are there ways in which the services provided by the COPFS could be improved – for instance, through increased use of technology, further reforms to criminal procedure, or better case management? If so, do those changes also bring risks, in terms of the overall interests of justice or of access to justice (bearing in minds the differing needs of people across Scotland; urban and rural communities, economically disadvantaged people, vulnerable groups, etc)?

Before beginning, it is important to acknowledge the limitations in the scope of this response. Although members deal with cases in courts up and down the country, the overwhelming majority of our business is dealt with at the Sheriff and Justice of the Peace Courts of Edinburgh. This means that most of our dealings with COPFS are local and the opinions voiced herein relate to experiences in this jurisdiction. There are parts of COPFS – for example the summary and “sheriff and jury” (sheriff court level solemn business) teams – which individual solicitors deal with very frequently, and therefore can comment on fully. Others – for example the homicide team – are less commonly encountered and so little of utility can be offered. Hopefully the opinions voiced herein will be of assistance to the committee.

Overall, the E.B.A.’s impression of COPFS is of an organisation struggling manfully in difficult circumstances. The problem that displays itself in every department is under-staffing. Very few of the specific issues raised in this response could not be solved, or at least materially improved, with the assistance of additional personnel. Little criticism is made by members of individual procurator fiscal deputes or administration staff members. Frustration often has its root in something as simple as failure to return phone calls or respond to letters. In Edinburgh, it is more or less understood that a first letter to the Crown regarding a summary matter will never be answered. Frequently several letters regarding a single issue – perhaps a missing witness statement – can be sent, with no response ever being received. In the past, solicitors would send written requests to COPFS for disclosure in summary cases by Royal Mail, DX or Legal Post. COPFS now discourages this and prefers that proforma handwritten letters are completed and submitted to the P.F. depute at the first calling of the case in court. The reason? Mailed letters simply don’t get matched up with the correct sets of prosecution papers, resulting in failure or delays in disclosure (of which more is said below). The knock on effect of delayed or failed disclosure is that courts are clogged up with more procedural-type hearings and trials are often adjourned - all because COPFS does not have enough staff on the administrative side to deal with the volume of mail that they receive. The staff that the Edinburgh office does have are extremely helpful in the main, but it is clear that there just are not enough of them.

The same situation exists in relation to telephone calls. In recent years, COPFS has moved to a centralised national switchboard, through which all external queries are supposed to be routed. Solicitors making enquiries through the switchboard routinely hold waiting for first contact with an operator for lengthy periods. Once through, and having provided details of the nature and purpose of the call, the operator will seek to connect the agent with the relevant person or department. At this point the solicitor will usually be advised that either nobody at all is free in the relevant department or that all of the P.F. deutes are in court. If a solicitor wishes to make contact with a P.F. deute, the only real way is to have dealt with that particular deute on a prior occasion and for them to have provided their direct dial telephone number (which they are always happy to do). The problem is not a lack of willingness to assist, it is a lack of people.

Staffing issues have a real effect on witnesses, victims and accused persons. It is not a question of what is convenient for defence solicitors. Take as an example a case where – as is increasingly common – a prosecution effectively stands or falls on the basis of CCTV evidence. An allegation of assault has been made. The accused person was intoxicated at the time of the alleged incident and cannot recall what happened. They wish to adjust a plea of guilty if, when disclosed, the CCTV evidence shows them committing the assault. Now: if the CCTV is ingathered by COPFS from the police in a timely fashion, and it does show that accused committing the offence, an early plea can be tendered. This has a number of positive effects, some of which are:

- i) The accused receives a reduction in the penalty imposed by the court as he has saved court time and avoided witnesses having to attend court to give evidence;
- ii) Witnesses in general have been saved the inconvenience and in some cases the distress of attending court;
- iii) The victim of the assault receives justice more quickly; and
- iv) Court time and money is saved by avoiding an unnecessary trial.

Needless to say, if the CCTV demonstrates that the accused did not commit the offence, then a trial may also be avoided if COPFS agree to discontinue proceedings. What happens if CCTV is disclosed late? Cases are regularly continued to trial without CCTV ever having been received by COPFS or shown to the defence. Witnesses are cited to attend trial to give evidence. The Crown are obliged to meet their expenses, regardless of whether the trial goes ahead or not. The CCTV is produced on the morning of the trial, watched by Crown and defence. Either a plea of guilty is tendered or the prosecution is discontinued. All of the benefits listed above are lost. Time and money is wasted. Justice is delayed.

Some problems relate specifically to the efficiency of solemn prosecutions at Sheriff Court level. As the committee will be aware, trials in such cases are grouped together to call within two week long sittings of the court. Essentially a court will be convened for a two week period (an “assize”) with a single P.F. deute assigned to conduct all of the trials in that court. The accused in each case will know only that his trial should call at some point during that assize. The P.F. Deute will contact the defence late in the afternoon on the day before they intend to start the trial, so that the accused can be advised to attend the following day. The solicitor will clear whatever obligations they have for the following day (and days thereafter, as

appropriate) and attend to represent the accused. Unfortunately, when accused and solicitor attend in the morning for trial, it usually transpires that several other cases have been “called in” for trial. Numerous solicitors and accused will be present, unnecessarily. Given the pressure on court resources, it is well understood that there requires to be a back-up trial in case the priority matter unexpectedly cannot proceed. However, when it appears that five or even six “back-up” cases have been called in, it is clear that mismanagement is at play.

Disclosure is a serious issue in sheriff court solemn cases in the same way as for summary matters. In cases where an accused is on bail and a twelve month time limit is placed on the prosecution, many months will often elapse before disclosure of evidence is received. Letters may go unanswered. Cases may be continued to a trial and be adjourned at the end of the assize, on the express basis that there is insufficient time left for the trial to take place. It is a source of concern that many months later, prior to a second or even third attempt at running the trial, the Crown may seek to add further evidence to the lists on the indictment. Sometimes the evidence in question has been in the hands of the Crown since prior to the first trial assize, sometimes it is entirely new. Often it results in further enquiry being required of the defence and further delay and expense in the proceedings. Late disclosure of key evidence in solemn cases brings about the same negative consequences discussed above in relation to summary matters, but exacerbated by the greatly increased seriousness of the types of allegation being prosecuted and the potential penalties for the accused. Even where evidence is added or added and disclosed between shortly before the “first” trial, these effects are felt. Accused person can rightly feel aggrieved if advice from their solicitors changes late in proceedings because it has been based on a misunderstanding of the evidence occasioned by incomplete disclosure by the Crown. In part, all of this comes back to staffing levels. It appears to the Association that a large part of the preparation of solemn cases is left in the hands of non-legally qualified staff, without the necessary expertise or supervision to prevent problems like this arising.

These matters aside, the leeching away of the discretion of the procurator fiscal depute in court to take decisions on the prosecution is the greatest enemy to efficiency and effective management by COPFS. It is stated COPFS policy that in some types of case - predominantly matters of a domestic nature or involving an alleged aggravation of prejudice of some kind – the P.F. depute in court has no discretion as to whether or not to proceed with the case. This applies, it is understood, notwithstanding any proper professional views they may have formed based on the evidence available to them. This has to be a serious concern to the committee and the general public. This means that a P.F. depute in court would have discretion to discontinue an alleged serious, unprovoked assault involving a weapon (where the evidence was so flawed as to make that the correct decision), but not a charge involving a single utterance of racially offensive language in similar evidential circumstances. In cases where discretion does exist, there seems to be a culture of fear amongst deputies in exercising it. The common practice of employing P.F. deputies on short term contracts exacerbates this, as they do not want to be seen to “put their heads above the parapet”. Where a discretion does exist, one way of encouraging its use is to give Deputies proper time to prepare courts and individual cases. Anecdotally, being given time to prepare a court in advance is considered to be a rare privilege rather than an essential step in the proper prosecution of crime.

The exercise of COPFS discretion in the sense described above involves the question of whether a case should be prosecuted/continue to be prosecuted. Association members also raise concerns regarding the exercise of discretion as to whether non-appearance warrants should be enforced by police officers or not. Where the court grants a warrant for an accused persons arrest at a hearing prior to conviction, COPFS have the power to withdraw the warrant from the police and fix a hearing at which the accused is invited to attend rather than being arrested. Historically, where a good reason (medically certificated ill health, bereavement and so forth), could be demonstrated to COPFS, they would arrange such an invitation. Stated policy is now that no such invitations should be arranged. This can result in vulnerable people being arrested and held in custody unnecessarily, with all the distress that entails. Scarce police resources are also wasted.

2. Please outline how well you consider the COPFS works with other stakeholders in the criminal justice system, so as to provide a —joined up and complementary service that helps meet the ends of justice. Other stakeholders might, for instance, include the police, defence lawyers, the courts, the prison service, criminal justice social work, and third party organisations working with victims or offenders.

The Association's view of how well COPFS works with defence solicitors is dealt with in answering Question 1, above. A worry has been expressed by some members regarding the form in which disclosure is passed by police to COPFS. It may be that under guidance from COPFS to the police, these could be addressed. The worry relates to the disclosure of exculpatory evidence (evidence which would tend to exonerate the accused). In a small but notable minority of cases, exculpatory evidence appears to be disclosed to the defence later than evidence that is more incriminating. Often it requires more prompting. An example might be the disclosure of a single witness statement to the defence from a witness who gave two statements – with the later statement including some new information that is of assistance to the defence. Sometimes, where a question regarding some point is raised with COPFS by the defence, and that request is passed on to COPFS to police, a response comes back by way of a memo – rather than a witness statement. Memos are frequently not disclosed, whereas statements commonly would be.

It should be made clear as a positive that COPFS do take steps wherever possible to seek out the Association's views and to co-operate where possible. Semi-regular meetings are held between our office bearers and the management team at Edinburgh to try and trouble shoot the types of problem described in this response. A lack of resources, *inter alia*, often stymies these efforts however.

3. Does the COPFS as presently constituted have the resources and skillsets it needs to carry out its core role effectively? And is it appropriately —future-proofed – for instance to deal with new technologies available to criminals, changes in the overall profile of crime in 21st century Scotland, or withdrawal from the European Union? If not, what additional capacities does the COPFS need?

The Association's view in relation to the resources available to COPFS are well laid out in answer to questions raised above. The remaining aspects of this question should properly be addressed by agencies on the prosecution side.

4. How well does the COPFS respond to the needs of victims of crimes and to witnesses (especially vulnerable witnesses) in criminal cases and meet its legal obligations towards them?

Again, this is considered to be a question best answered by those who work with COPFS on the prosecution side, for example the police, EDACS, the social work department and so forth.

5. The Inspectorate of Prosecution in Scotland is the independent, statutory inspectorate for the COPFS. What is your awareness of the existence and role of the IPS and of its effectiveness in carrying out that role? How effective has it been in carrying out its role? Does it appear to have the resources it needs?

There is limited awareness of the work of the Inspectorate. Given the nature of its work, the Association does not have a view to offer on this subject.

Edinburgh Bar Association
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