

Justice Committee

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

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

This paper is in response to the Justice Committee's call for written evidence for the Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service ("COPFS"). We thank the Justice Committee for providing the Society with the opportunity to comment and provide input.

General Comments

The Law Society of Scotland is the professional body for Scottish solicitors and includes Procurator Fiscal deposes within COPFS, defence solicitors and other solicitors practising within and interacting with the Scottish criminal justice system. Prosecuting in the public interest and protecting the right to a fair trial are two critical elements of a justice system and the work that our members do, both prosecution and defence, requires skill, judgment, commitment and professionalism.

Over the last 10 years there have been a number of reforms to the substantive and procedural criminal law in Scotland, to which all participants within the criminal justice system have been required to react and adapt. This has taken place at a stage that there have been significant financial pressures on the justice system.

Question 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)?

In terms of structure and organisation of COPFS, while it is acknowledged that case marking hubs existed prior to full implementation of the National Initial Case Processing Hubs (NICP) at Stirling and Paisley, it is felt that full implementation of NICP and a general move to centralisation of some core functions (e.g. the potential for a national High Court function by 2018¹ and the centralised telephone system and national contact telephone number) means that it can, on occasions, be difficult to identify and contact the procurator fiscal dealing with a specific case. Prior to centralisation of certain functions contact could be made via the local procurator fiscal office. Whereas centralisation of certain functions may have financial, efficiency and consistency benefits to the organisation itself, this requires to be balanced against the ability for defence practitioners to be able to engage effectively with those dealing with the casework within COPFS. It should always be remembered that the key objective of the system is to uphold the interests of justice. Other of our members note that moves since April 2016 to refocus local business, namely summary and solemn (Sheriff & Jury) work under the Sheriffdom model and under a Sheriffdom Procurator Fiscal for all of that business, could be acknowledged as an improvement.

An example, raised by some of our defence solicitor members relates to the National Initial Case Processing Hubs and the marking of custody cases. As custody cases are marked centrally and not by Procurator Fiscal Deputies at local level, local demographics, and local knowledge may not be known by the marking deputy. On occasion Procurator Fiscal Deputies in a local Court do not know when custody papers will be available because they are not in control of them. There can be a delay in custody papers being made available to the Court, and accordingly a delay in custody cases being able to progress through the Court. This is not in the interests of the victim/complainer, the accused or other participants in the system.

In terms of access to justice, greater use of technology and the possible future reforms in criminal procedure will have an impact on the overall interests of justice, or access to justice. We note that the use of technology is a necessary aspect of the justice system as we go forward, however, care needs to be taken to ensure that issues such as internet poverty do not disadvantage certain groups in society². Careful consideration will require to be given on how best to ensure the service provided by COPFS and others within the criminal justice system is accessible and inclusive to all members of society. We approve of innovations led by COPFS, such as the electronic disclosure website, the piloting of electronic devices in court, and developments across the wider justice sector, such as the reforms suggested by the Criminal Evidence and Procedure Review.

Question 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.

¹ [COPFS Strategic Plan 2015 - 2018](#)

² [Carnegie UK Trust, Digital Participation and Social Justice in Scotland, Douglas White, September 2016](#) and [Citizens Advice Scotland, Internet Access in Glasgow's deprived areas, 2015](#)

A policy trend in recent years has been the development of wider coordination between various justice bodies. For instance, the creation of the National Justice Board comprising of representatives from the Scottish Government, COPFS, SCTS, the Scottish Legal Aid Board, the Scottish Prison Service, Police Scotland, the Scottish Fire and Rescue Service and the Children’s Reporter Administration³, was cited by Audit Scotland in a recent report as one of the ways in which joint working had improved⁴. We have observed previously and we wish to reiterate that the Law Society of Scotland should be represented on the National Justice Board and there should be wider representation for defence practitioners at local Justice Boards. The work of the Justice Board, as Audit Scotland noted, could be widened as it appears that awareness of new strategies and policies by operational staff could be improved.

The Scottish Court and Tribunal Service (“SCTS”) Evidence and Procedure Review Group⁵ are actively considering potential improvements to the summary justice system. The reforms, if implemented, would result in greater joint working between the principal criminal justice agencies, for example it is proposed that Police Scotland, COPFS, SCTS, the Judiciary and defence solicitors should all be party to and operate a case management system⁶. This could help to significantly reduce instances of delay in the criminal justice system.

Activity which strikes at criminal behaviour in our society goes wider than the courts and coordination has to be extended to include other agencies, for example local authorities and civic society bodies such as Scottish Women’s Aid, Victim Support Scotland and Rape Crisis Scotland.

Question 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?

In November 2014 the Procurators Fiscal Society section of the FDA Union provided written⁷ and oral evidence⁸ to the Justice Committee on the Scottish Government’s Draft Budget 2015-2016. The submissions highlight the issues faced by COPFS in terms of funding available and the many challenges faced by COPFS staff against a background of an increase in the number of serious and complex cases reported to COPFS, the particular types of crime that make up that increase and various legislative developments.

³ <http://www.gov.scot/Topics/Justice/justicestrategy/justice-board>

⁴ *Prosecuting cases in the criminal courts*, Audit Scotland, September 2015

⁵ [SCTS, Evidence and Procedure Review: Next Steps, 25 February 2016](http://www.gov.scot/Topics/Justice/justicestrategy/justice-board)

⁶ [SCTS, Evidence and Procedure Review: Next Steps, 25 February 2016 at pages 10-14](http://www.gov.scot/Topics/Justice/justicestrategy/justice-board)

⁷ http://www.parliament.scot/S4_JusticeCommittee/Inquiries/DB10_FDA_Union.pdf and http://www.parliament.scot/S4_JusticeCommittee/Inquiries/DB10a_FDA_Union.pdf and http://www.parliament.scot/S4_JusticeCommittee/Inquiries/DB11_FDA_PFS_Section.pdf

⁸ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9645&mode=pdf>

While the number of prosecutions resulting in court disposal has declined⁹ in the last five years, the complexity of the impact of recent legislation and complexity of certain types of cases reported means more preparation and court time is required. Presentation and preparation of certain types of crime require a more specialised and knowledgeable approach within COPFS, which ought to be matched by defence solicitors.

Lack of resources has had an impact on both preparation for and presentation of criminal prosecutions in our courts. As an example, previously most local COPFS offices employed “precognition officers” to assist in the preparation of solemn prosecutions. Essential witnesses were often personally interviewed prior to trial. Some of our defence solicitor members have observed that in most Sheriff and Jury trials this preparation no longer takes place, further we note that the FDA submission to the Justice Committee in November 2014 made reference to a reduction in the practice of taking pre-trial precognitions¹⁰. The role of the precognition officer assisted in the proper preparation of more serious criminal cases without which a Procurator Fiscal can be at a disadvantage. We believe that improved preparation can improve the experience of victims and witnesses, and lead to a more efficient process. Whilst a witness may not be precognosed, this should not be taken to mean that there is no level of engagement with victims and witnesses (as mentioned in the response to question 4).

Other of our members note that there are now specialist investigating teams within Police Scotland which have led to an overall improvement in the way these cases are investigated and reported to COPFS. The police statements form the basis for disclosure to the defence which in turn informs the preparation of the defence case. Where there were identified gaps in what the police had covered in full statements the practice was, and is, to task the police to take a further statement to cover that material which is then disclosed to defence solicitors.

Question 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?

COPFS prosecutes in the public interest, but has a significant role in engaging and consulting with victims and witnesses, this could be by Procurators Fiscal Depute, or, dependent on the type of criminal case, the COPFS Victim Information and Advice service (VIA)¹¹. In addition, there are a number of agencies outwith COPFS who engage with victims and witnesses with the criminal justice system, for example, Police Scotland, Victim Support Scotland and Scottish Women’s Aid.

In certain cases that proceed to trial, victims may be given the option of providing a “victim statement”¹² explaining the effect the crime has had on them. Where an accused has been found guilty or has pled guilty, if provided, the victim statement is made available to the Judge or Sheriff for consideration during the sentencing process.

⁹ [COPFS, Statistics on Case Processing Last 5 Years 2011-2016](#)

¹⁰ http://www.parliament.scot/S4_JusticeCommittee/Inquiries/DB10_FDA_Union.pdf

¹¹ <http://www.crownoffice.gov.uk/involved-in-a-case/victims>

¹² <http://www.gov.scot/Resource/0047/00477968.pdf>

Legislation¹³ allows for special measures to be sought for vulnerable adult and child witnesses to give their evidence at court. Recent changes¹⁴ extended existing powers in relation to special measures for vulnerable witnesses. One of the key changes is that additional categories of vulnerable victims (victims of sexual assault, domestic abuse, trafficking and stalking) and all witnesses under 18, are entitled to certain special measures.

The recommendations of the Criminal Evidence and Procedure Review, if implemented, may change the roles of those involved in the criminal courts and their engagement with witnesses in the criminal justice system, with evidence captured at an earlier stage and limitations on cross-examination, particularly for uncontentious evidence. Care must be taken to ensure that victims and witnesses feel as confident as they can in being involved in criminal cases.

Question 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?

We are not best placed to determine whether Her Majesty's Chief Inspector of Prosecution in Scotland ("HMCIPS") has the resources it requires. However, we note that HMCIPS is appointed by the Lord Advocate¹⁵. To reinforce the independence of the Inspector, the terms and conditions of the appointment should be transparent, for example the circumstances in which the Inspector may be removed from post should be clear and placed on a statutory footing.

HMCIPS submits to the Lord Advocate a report on any particular matter connected with the operation of COPFS which the Lord Advocate refers to the Inspector.¹⁶ HMCIPS is required to produce an annual report for the Lord Advocate, who must be presented with a draft and given an opportunity to comment on the report. The Lord Advocate must lay the annual report before the Scottish Parliament. The Lord Advocate is under no statutory duty to consider the HMCIPS recommendations. Although the legislation requires that HMCIPS is to remain independent from COPFS, given the Lord Advocate has statutory power to appoint the Inspector and determine matters for investigation improvements could be made to enhance that independence. Transparency could be improved if the inspectorate team comprised of a more representative group of non-solicitor and solicitor members, which would reinforce the independence which the statute requires.

Law Society of Scotland
19 October 2016

¹³ Vulnerable Witnesses (Scotland) Act 2004

¹⁴ Victims and Witnesses (Scotland) Act 2014

¹⁵ Section 78 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

¹⁶ Section 79 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.