

## **Justice Committee**

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

#### **Written submission from the Scottish Criminal Bar Association**

The Scottish Criminal Bar Association (SCBA) is the association for members of the Faculty of Advocates who have an interest in criminal law. The vast majority of the members are criminal practitioners with experience of both defending and prosecuting in all criminal courts, including the High Court of Justiciary.

The SCBA has chosen to limit its response to the Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service to consider the effectiveness and efficiency of the COPFS, and how well it works with other stakeholders in the criminal justice system. In our view, there are a number of recurring and sometimes interrelated issues that have arisen in consideration of these matters. Given the limited time available to respond, the SCBA has chosen to broadly highlight those issues and provide, where possible examples which have arisen in reported cases.

For reasons of preserving the anonymity of the accused, the detail of some unreported cases are mentioned, but not formally identified. If the Committee would like more information on those cases, that can be provided separately from this response.

The Committee may already be aware of the open letter sent from the Dean of Faculty to the newly appointed Lord Advocate.

The letter can be accessed here:

<http://www.scotsman.com/news/opinion/an-open-letter-to-the-lord-advocate-james-wolffe-qc-1-4227461>

#### **Lack of prosecutorial discretion**

The Scottish Criminal Bar Association endorses the comments made by the Dean in his letter, and agrees that it no longer seems to be the case that there is scope for discretion to be exercised by Procurators Fiscal, Procurator Fiscal Deputes and Advocate Deputes in the decisions to be made in marking cases.

This, combined with pressure on resources that results in only certain categories of cases being fully investigated, means that frequently, the first time that the inadequacies of a case, in terms of evidential sufficiency, become apparent is when the case is in court before a lay magistrate or a sheriff or a jury.

It cannot be in the public interest that cases in which there is an insufficiency of evidence or where the prosecution is aware that the quality of the evidence is such that it is unlikely ever to result in a conviction are placed before a court for adjudication.

A consideration of the current marking policy is useful in assessing the current situation.

In the past, when considering whether or not to prosecute a case, a Procurator Fiscal or Depute in a local office relative to the location of the offence, used “marking guidelines” that formed part of the Book of Regulations for the Procurator Fiscal Service and which were called “Case Marking Guidelines”.

Now, “Case Marking Instructions” require to be followed and other than for sexual offences which are custody cases, all case marking is carried out at a Central Unit.

The Procurators Fiscal who are marking cases have little or no local knowledge of the issues pertaining to the place in the jurisdiction where the alleged offence has occurred and Procurators Fiscal and Deputes now require to abide by “Case Marking Instructions”.

While the Prosecution policy in Scotland, in many areas of practice, is available on the Crown Office Website, Chapter 3 of the Book of Regulations which relates to case marking policy is not publicly available. This is in total contrast to the approach taken by the CPS where its marking policy is publicly available. There is no apparent reason why the Crown in Scotland continues to conceal its marking policy. There is now no discretion, despite the lack of local knowledge of the area and issues. It can be readily accepted that the issues that affect Forfar or Stornoway or Dumfries are not the same as those that affect Glasgow or Edinburgh or other cities.

Marking Instructions that do not have any regard to local circumstances are failing to meet the requirements and to perform the functions of the Procurator Fiscal acting in the public interest in the local area. A central marking unit that requires to comply with “Case Marking Instructions” fails to recognise and address the issues that affect diverse communities in Scotland.

The central marking of cases results in all of Scotland being dealt with as if they are Glasgow and Edinburgh and the other cities despite this not being reflective of the communities that require to be served and the issues in those local areas that are relevant and arise.

The removal from the local Procurator Fiscal of the right and responsibility to make decisions about the marking of cases in his jurisdiction has led to decisions being made that are at odds with the issues in the community that matter to the local community. That amounts to a denial of local justice and accountability. The unique and essential features of the local Procurator Fiscal to prosecute cases that affect the local community and address issues that are significant to that community have been lost.

With the existence of a central case marking unit, local communities have no relationship or engagement with the prosecution authorities. That has a significantly negative impact on the function of any community. Where the Procurator Fiscal Service has no engagement with the local community issues of crime which are important in that community have no outlet.

The way in which those issues are dealt with in and by the local community matter to the way in which local society operates.

The disengagement of the prosecution from the local community by the Procurator Fiscal Service, as a result of the centralisation of case marking, is a negative development and one that does not benefit the prosecution or the local community.

Further, the SCBA agrees with the Dean's statement that "victims and their relatives now seem to feel that the prosecutor is their lawyer acting for them". This is ably exemplified by one of the published responses to the enquiry ; see Teleconference with witness Y on 4<sup>th</sup> October 2016.

### **Lack of prosecutorial independence**

As stated above, there is a becoming more commonly held view that the Crown is the complainer's lawyer. This can, as identified by the Dean, have an effect on the prosecution case. The prosecutor ought to be and must be independent from all parties. He must prosecute in the public interest. Any lack of independence, perceived or otherwise, is not compatible with the prosecutor's role as a prosecutor in the public interest.

Reference is made to the reported case of COLLINS V HMA [2013] HCJAC 167 <https://www.scotcourts.gov.uk/search-judgments/judgment?id=18ab8aa6-8980-69d2-b500-ff0000d74aa7>

The opinion of the court includes the following paragraph:

*"[18] In the course of his submissions to us the advocate depute suggested that the basis for the decision not to seek any extension of time was the passage from the police note of a statement from the complainer on 30 July 2010, quoted in paragraph [6] above, to the effect that the complainer's personal feeling was that she would prefer that the matter be not pursued and that it was reasonable for the Crown to follow her wish; but that now the complainer's wishes were otherwise. Plainly, in exercising the judgment whether it is appropriate to prosecute, the Lord Advocate, as an independent prosecutor, may take into account the sentiments of a complainer; but a decision not to proceed is the decision of the Lord Advocate, who, as such independent prosecutor, is not in any sense a representative or agent of a complainer. If, having taken a decision in light of those sentiments, those sentiments or wishes change, that can hardly be a reason, consistent with the concept of an independent prosecutor, for sanctioning the reversal of a decision not to prosecute and undermining the finality intended by the legislature when enacting s 65 of the 1995 Act, and its statutory predecessors."*

### **The failure to obtemper statutory timelimits to prosecute**

There exists a fundamental problem, both in the Sheriff Court and High Court, of delay in bringing accused people before Court for trial within the time limits set down by Parliament. The lack of ability of the Crown to prepare case and indict well before the time limit means that extensions of time are regularly sought. One of our most senior QC's stated "*The wholesale departure from the statutory time limits of 140*

*days in custody cases is now oppressive* “. It is understood a freedom of information request has been made by another party requesting figures for the numbers of solemn trial cases ( at sheriff and high court level ) which had gone to trial within the statutory 140 day time period. The official response was that no figures were kept / available for this statistic. Experienced Counsel doing the bulk of high court work believe the figure to be very few. A QC stated “*Sheriffs are now routinely remanding people for in excess of 6 months, or 9 months or a year, Sheriffs are refusing bail to untried accused on a false assumption as to the length of that remand and the effect of the remand on the accused AND his/her family. This is being caused routinely by the inability of the Crown to provide the defence with a prepared prosecution case by service of the indictment.*” The effect can mean that those in custody spend considerably longer than the writers of the legislature ever intended, and also that complainers and witnesses wait longer to give evidence at trial. There are a number of factors involved in this problem, (inter-related for example with the closure of Courts around Scotland) but the Lord Advocate ought to make it clear to Government that in order to obtemper the statutory time limits, more is needed to be done to put such resources in place to prepare and produce indictments well within time limits and not up to the wire. Reference is made to the case of URUK to show the overcrowding of Scottish Courts and the effect it has on the criminal justice system ;

URUK V HMA [2014] HCJAC 46 which exemplifies the problem.

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=23b786a6-8980-69d2-b500-ff0000d74aa7>

It should be noted, however, that the Appeal Court has said ;

“Nevertheless, it may seem an unduly blunt instrument (see Lord Rodger's axe in *R v HM Advocate (supra)*), if the intention is really that the court should create what might otherwise be regarded as an injustice in a particular case, in a vain attempt to prompt the Government into allocating more money to either or both of the COPFS and the SCS with a view to expanding the judicial space into which trials can be accommodated.”

### **The failure to comply with disclosure duties\use of s67 notices**

There is a considerable problem with the implementation of the disclosure process, which goes to the heart of the trial process in Scotland. The 2010 legislature regime requires the Crown to carry out an assessment of the evidence and disclose all relevant evidence as soon as is practicable after an accused is placed on petition. Once the Defence has seen the disclosure it completes a defence statement which should cause the Crown to review the disclosed evidence and evaluate whether there is anything further to be disclosed. The difficulty is that Crown disclosure is routinely haphazard, sporadic and rarely is fully made before the requirement to complete the defence statement before the preliminary hearing (which should be the end point in preparation before trial.) SCBA members state that the use of s67 notices – to add witnesses and productions to the indictment – is absolutely routine in solemn cases. One member stated:

*“On day 1 of the trial the Crown moved notices 4 and 5 which we knew nothing about. This means that only Productions 1-40 were on the original indictment; the remaining 74 productions were added by section 67. Only 37 witnesses were on the indictment originally, 50 added by 67. Although a particularly bad example, late 67s, and adding half the case or more by 67 is routine and not used only where necessity dictates it.”*

The use of such notices with the last minute addition of witnesses and productions – along with additional late disclosure, means the process for the preparation and presentation of trials is disrupted, and the accused’s right to a fair trial is put in jeopardy.

### **Failure to properly communicate**

A recurring issue arising, particularly prevalent in Sheriff Court cases is the Crown failing to respond to contact from Agents, particularly letters written to the Crown. An SCBA member stated *“umpteenth letters are written to the Crown asking for disclosure of evidence (cctv etc) which go completely ignored and it is impossible to find the right person to talk to about a case to progress it or obtain information.”*

A member flagged up a particular example of the failure to communicate with the Defence in two cases that the Counsel was conducting, one where the accused was still a child. *“The Crown decided not to proceed with either prosecution but didn’t advise agents or accused about this. In fact, the instruction was to NOT tell agents or accused.”*

It is important for the proper administration of justice that lines of communication are strong, and the Crown clearly and promptly communicates decisions taken to legal representatives.

### **The lack of confidence in prosecutorial acts**

The SCBA considers that there have been a number of relatively recent instances where the Crown has been criticised in the way in which it conducts its duties as the public prosecutor, including that it has acted in a way that was considered oppressive. Reference is made to HMA v JRD [2015] HCJ 85 where the Court said :

*[10] “this is a blatant case of the Crown alleging serious sexual crimes by the accused at two addresses for which they had no supporting evidence. There is no way that the court can now remove the oppression created by the Crown in this trial.”*

Reference is also made to CLYDE AND CO LLP v HMA 2016 [HCJAC] 93 where the court said

*[16] I consider that the actions of the respondent in applying for the search warrant on the basis of his petition to have been oppressive. As I have attempted to explain, the petition was misleading, if not simply inaccurate. High standards of accuracy are always required of a party seeking a remedy ex parte. Separately from that, the very highest standards are always expected of the Crown. Were it otherwise our criminal practice would be different. Here the requisite standards were not met. If it be the case that the respondent proceeded on a police report which simply*

*reflected the detective constable's understanding of the issues, that was not good enough. The respondent was obliged to ensure the accuracy of his averments insofar as that was practical.*

Clearly it is essential that all parties to the legal process have confidence that the Crown, as a public body, is carrying out its role both effectively and efficiently.

Scottish Criminal Bar Association  
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