

**RESPONSE BY THE FACULTY OF ADVOCATES TO THE JUSTICE
COMMITTEE'S INQUIRY INTO THE ROLE AND PURPOSE OF THE CROWN
OFFICE AND PROCURATOR FISCAL SERVICE**

Introduction

[1] The Faculty of Advocates (the independent Bar in Scotland) contains members who have considerable experience, both as defence counsel and as Advocate-Deputes ["ADs"] acting on behalf of the Lord Advocate, in the preparation and conduct of cases in the High Court of Justiciary. In addition, members of Faculty have extensive experience as defence counsel in the preparation and conduct of solemn and summary cases in the Sheriff Court. The Faculty of Advocates welcomes the opportunity to provide written evidence to the Scottish Parliament Justice Committee as part of its inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service ["COPFS"].

1. The Effectiveness and Efficiency of COPFS.

[2] The Faculty believes that a lack of resources within COPFS has had a significant impact on the effectiveness and efficiency of the pre-indictment preparation of non-homicide and non-sexual cases. Cases are routinely indicted a short time before the expiry of statutory time limits. In some cases, this may be due to a need to carry out various enquiries, such as complex forensic investigations. However, in many cases this is simply due to a significant backlog of work within COPFS.

[3] This delay in cases being indicted is exacerbated by increased delays in the fixing of trials for persons remanded in custody and/or admitted to bail. As a result, the statutory time limits – for many years one of the cornerstones of the Scottish justice system – are now routinely extended. Such delays may also cause anxiety to complainers and make it more difficult for eye-witnesses to provide accurate evidence.

[4] Service of the indictment does not mark the end of the Crown's preparation for trial. Almost invariably, additional evidence is introduced by virtue of section 67 of the Criminal Procedure Scotland Act 1995 [a "s.67 notice"]. This can lead to further delays as the defence will need time to carry out its own inquiries in response. Rather than s.67 notices adding ancillary or largely inconsequential evidence, it is not uncommon for several such notices to be served in each case, adding considerable amounts of previously undisclosed and significant evidence. It is hoped that a regime for the early disclosure of evidence would obviate the need for the consequent delays.

[5] With regard to decision-making, there is a widespread feeling that there is an increasing reluctance to discontinue proceedings once they have been initiated. This can be due to a number of factors; but a recurring concern is the blurring of the public interest with the perceived interest or expectations of the complainer. If a trial is allowed to progress without there being any realistic hope of a conviction, the trauma of giving evidence and of a jury verdict of acquittal may have a more deleterious effect on the complainer than a decision to discontinue proceedings taken before trial.

[6] The Faculty is concerned that the practice of interviewing key witnesses - known as precognition - by experienced Precognition Officers ["POs"] has been largely abandoned. Instead, far greater reliance is placed on statements taken by police officers at or around the time of the event. Accounts given in these circumstances may not be altogether reliable. More importantly, experienced POs provided an essential check at a later stage in the process when a better assessment can be made of the reliability of witnesses and the realistic prospects of securing a conviction.

2. COPFS's work with stakeholders

[7] Members of Faculty have always enjoyed good working relationships with ADs and COPFS staff in general. However, efficient and effective communication is hampered by COPFS's continued reliance on the secure CJSJ email service provided by the Ministry of Justice for England and Wales. The CJSJ service is described,

almost universally, as being ineffective and slow. The Faculty believes that CJSM is not fit for purpose. In addition, COPFS currently operates a telephone system with '0844' numbers. The Faculty believes that it is inappropriate for COPFS, as a public prosecution service, to use premium rate telephone numbers. There is also a chronic failure to respond to correspondence, albeit this is encountered more at Sheriff Court level.

3. Resources and skillsets of COPFS

[8] There has also been a general deterioration in the standard of pre-indictment preparation in non-homicide and non-sexual offence cases. In High Court cases this has resulted in an increase in the workload of ADs. This increased workload has not been matched by an increase in either the number of ADs or the time made available to them for preparation. Instead, ADs due to be involved in preparation for Preliminary Hearings ["PHs"] are regularly required to undertake other duties, further reducing the amount of time available to check that the case is properly prepared.

[9] The Faculty also believes that earlier allocation of cases to particular ADs would assist in terms of case management. For example, following a PH in advance of trial, it is not uncommon for instructions given by the AD at the PH to be overlooked and disappear into something of a 'black hole'. This could be avoided by greater 'ownership' of cases at an earlier stage.

[10] Sexual offence cases are dealt with by the National Sexual Crime Unit, where ADs are involved at an earlier stage in the preparation of cases. However, the increased number of sexual offences has placed further demands on the limited resources of COPFS. As a greater proportion of sexual offence cases proceed to trial, so the backlog of cases awaiting trial has increased.

[11] The Faculty questions whether COPFS has the resources and expertise to prepare and present the prosecution of other complex cases. For example there is

considerable delay in indicting cases involving breaches of Health and Safety and environmental legislation, where it is known that resources at COPFS are limited. In the sphere of corporate crime, there is a concern that a lack of expertise coupled with a lack of resources may handicap effective prosecution, and the Crown's conduct in this area has recently been the subject of sharp judicial criticism. The unacceptable delay in holding Fatal Accident Inquiries continues to cause concern, though it is hoped that the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 and the accompanying rules, currently under consideration, will improve matters.

[12] The Faculty believes that an opportunity exists for far greater use to be made of existing courtroom technology to display documents in an electronic format. At present, paper copies of Crown documentary productions are usually prepared for the prosecution, defence and judge. In addition, paper copies are often prepared for the jury of key productions e.g. books of photographs and transcripts of the police interviews of the accused.

[13] The Faculty is not in a position to comment on whether COPFS has the resources and skillsets to be future-proofed. However, it is clear that the increased demands placed on COPFS's limited resources by the increased number of sexual and domestic abuse cases represent a significant challenge both to COPFS and to the criminal justice system. It is hoped that sufficient resources are put in place so that those challenges are met.

[14] The Faculty believes that it is premature to comment on whether COPFS is future-proofed to deal with withdrawal from the European Union. However, the loss of the European Arrest Warrant and the services of Europol and Eurojust would undoubtedly hamper the Scottish prosecuting authorities and it is hoped that they are giving this matter urgent and serious consideration.

[15] The preceding paragraphs have described a number of difficulties, but the Faculty wishes to acknowledge unreservedly the support provided to Advocate Deputes by the current Law Officers, Principal Crown Counsel, Deputy Principal Crown Counsel and Senior Advocate Deputes.

4. How COPFS protects and supports witnesses and victims of crime

[16] The Faculty believes that through applications for special measures, pre-court visits and the conduct of its officers, COPFS provides a very high level of professional support to witnesses and victims of crime. ADs who have regular dealings with members of the Victim Information and Advice service (known as VIA) recognise and appreciate the professionalism which they bring to this very important role.

[17] However, the Faculty is concerned about the apparent influence of complainers on the independence of prosecutorial decisions. There appears to be a widely held misconception that the prosecutor is the complainer's lawyer and not an independent public prosecutor. While it is important that the victims of crime are treated with compassion and respect, it is imperative that the duty of the prosecutor - to act at all times in the public interest - is re-enforced whenever and wherever possible, to serving prosecutors, witnesses and to the public at large.

5. Inspectorate of Prosecution in Scotland

[18] The Faculty is aware of the existence and role of the Inspectorate of Prosecution in Scotland ["IPS"]. The Faculty is not in a position to comment on its effectiveness.

[19] However, the Faculty notes the following finding in the IPS Annual Report for the period July 2014 to July 2015: *"We found there was a strong cultural awareness within COPFS of the importance of ensuring that solemn cases are progressed and prosecuted within statutory time limits. However, whilst COPFS has a strong track record of compliance with statutory time limits, the combination of an increasing volume of serious cases, the changing profile of serious offending including a substantial increase in the reports of sexual crime and an increase in multiple accused prosecutions as well as the greater complexity of such cases, all in the context of reducing budgets, has impacted on its ability to progress High Court cases expeditiously. This increases the risk that cases may be lost if time limits are not managed effectively."*

[20] The Faculty notes that the IPS was to undertake a follow-up inspection in 2016 to monitor the implementation and assess the impact of its recommendations. The Faculty is concerned that the position might have deteriorated since the publication of IPS 2014-2015 report. As described above, lengthy extensions of the statutory time limits in High Court and Sheriff and Jury trials have become the norm in custody and bail cases. It is respectfully suggested that the impact of this systemic failure to comply with statutory time limits is given urgent consideration.

Conclusion

[21] The new Lord Advocate, Solicitor General and Crown Agent should be given time to evaluate the situation. To improve their prospects of building a prosecution service that meets the needs of stakeholders, inspires public confidence, and satisfies the interests of justice it is essential, firstly, that they are given the resources that are required and secondly, that they themselves attempt to address the change in culture that is needed in respect of the concerns raised in this response and, doubtless, in others. It is hoped that this Inquiry provides the impetus to do both.

Parliament House
Edinburgh

21 October 2016