

## Justice Committee

### Criminal Justice (Scotland) Bill

#### Supplementary written submission from the Crown Office and Procurator Fiscal Service

At the Justice Committee hearing on 20 November 2013, the Lord Advocate and Catriona Dalrymple, Head of Policy, undertook to provide written details of matters discussed regarding (i) shadow marking exercises conducted by COPFS, and (ii) further information on additional safeguards in the trial process.

#### Shadow Marking Exercises

To assist with COPFS consideration of the impact of the proposal for the abolition of the requirement of corroboration three separate shadow marking exercises have been carried out. Firstly by the police to allow estimates in numbers of reports to the Procurator Fiscal; secondly by COPFS in relation to numbers of cases that would be taken up under any new prosecution test; and thirdly in relation to the impact on domestic abuse cases in particular. I will also provide detail of the marking exercise which was carried out for Lord Carloway's Review.

#### By the Police

1. In summary, five officers of the Police Service of Scotland considered about 1400 cases where a suspect had been identified, but the case had not been reported to COPFS due to a lack of corroboration. The officers assessed these cases applying draft guidance issued by COPFS based on our proposed new test for prosecution, and considered how many of the cases would be reported if the requirement for corroboration was abolished. A member of COPFS was involved in reviewing this exercise and was satisfied that the police were applying the COPFS guidance appropriately in relation to the evidence required to report the case. The results suggest that there is likely to be an increase of 1.5% in the number of cases reported to COPFS by the police.

2. In 2012-13, 280,942 criminal reports were received in total. Of these, around 248,000 were reported by the Police. So a predicted increase of 1.5% would imply that around an extra 3720 or so cases annually would be received from the police.

#### By COPFS

3. In order to assess the likely impact on the numbers and types of cases that would be taken up following a change in prosecution test, COPFS carried out its own internal shadow marking exercise. This was conducted by Scots prosecutors who understand the law of evidence and the definitions of crimes in Scotland. This is essential to the process. I attach a link to the letter COPFS sent to the Finance Committee outlining the detail of this shadow marking exercise:

[COPFS letter to Finance Committee - Detail of Shadow Marking](#)

4 The Crown Agent in her evidence to the Justice Committee on 29 October 2013 in relation to the Draft Budget Scrutiny 2014-2015 spoke in general terms about the results of the shadow marking exercise. During these discussions, reference was made to the 6% figure relating to Sheriff and Jury cases. To clarify the position, I would confirm that the figure of 6% in fact relates to all solemn cases, that is both High Court cases and Sheriff and Jury cases combined. Therefore the results of the shadow marking exercise suggest a 6% increase in overall solemn business which includes both High Court and Sheriff and Jury cases.

### **Annex A**

5. Annex A to the Carloway report featured analysis of a selection of cases which might be impacted by a change in prosecutorial test. Two experienced Scots lawyers looked at these cases and a two-stage test was applied. First, they considered for each case whether there would be sufficient evidence to prosecute if the corroboration requirement were removed. Secondly, they applied a qualitative test to the available evidence; looked at the credibility and reliability of the available evidence; and considered whether there was a reasonable prospect of securing a conviction.

6. At first glance the results from Annex A and the COPFS shadow marking exercise look different. For example, Annex A indicated that 58.5% of the solemn cases (268 of the 458) would meet a “reasonable prospect” test; and 67% of the sexual cases (95 of the 141) would also meet that test. However, the additional cases predicted by Annex A need to be considered in the context of the increase that they represent to the total number of solemn disposals that there would be during the year in question. Once that figure is calculated, it indicates that the results of Annex A actually suggest a 9% increase in solemn business. The shadow marking exercise predicted a 6% increase but within a range of a possible increase of between 2% and 10%. Accordingly, as far as comparison is possible, the results of Annex A and the shadow marking exercise are not inconsistent with one another.

### **Domestic Abuse**

7. COPFS also recently carried out another shadow marking exercise in respect of domestic abuse cases. In 2012-13, 2803 domestic abuse charges could not be taken up because there was insufficient admissible evidence. These 2803 charges related to 2210 cases (some of the cases feature a number of charges of domestic abuse). A statistically relevant sample of 328 of these domestic abuse cases was considered, and the new prosecutorial test applied to them. This provided an estimate of the proportion of cases (about 60 %) where action might be taken under the new prosecution test.

8. The outcome of this exercise suggests a yearly increase in domestic abuse prosecutions of around 1000 cases. The vast majority of these cases would proceed on summary complaint.

9. These results therefore indicate that a relatively large proportion of the net additional summary cases estimated in the main shadow marking exercise will be domestic abuse cases.

## Safeguards in Scotland's criminal justice system

10. There has been some discussion as to whether additional safeguards should be introduced if the requirement for corroboration is abolished. In what was a major review, Lord Carloway did not consider that additional safeguards were necessary. During his appearance before the Justice Committee on 20 November, the Lord Advocate explained that there are at present many safeguards in the trial process.

### Current Safeguards

11. The most important of these are that the accused is presumed innocent and that it for the Crown to establish that the accused is guilty of the offence charged beyond reasonable doubt. This criminal standard of proof is rightly a very high standard of proof.

12. There are many other existing safeguards in the trial process a number of which are outlined below:-

- The police and Crown are under a legal duty to thoroughly investigate all criminal allegations;
- The accused has the right against self incrimination and the right to legal advice before interview;
- The Crown is obliged by law to disclose to the defence all material information for or against the accused;
- The judiciary is independent and impartial;
- Criminal trials proceed in public;
- The trial process itself has regard to common law fairness;
- COPFS and the judiciary are both obliged to uphold an accused's Article 6 ECHR rights;
- Evidence irregularly or unlawfully obtained is *prima facie* inadmissible;
- Evidence obtained by coercion or unfairly obtained by police officers will be inadmissible;
- The accused's representative can challenge the admissibility of evidence;
- Defence agents and counsel can cross examine all witnesses;
- The accused can call his own witnesses and lead evidence in his or her defence;
- An accused can decide not to give evidence and no adverse inference can be drawn. He has the right to be legally represented if so wished;
- The law of evidence prohibits hearsay and collateral evidence subject to certain exceptions, prescribed by law;
- In solemn cases, judges provide clear directions to juries explaining to them how they must apply the law, and approach their task as masters of the facts;
- In solemn cases, a majority of the jury must be satisfied beyond reasonable doubt of the guilt of the accused; and there are two acquittal verdicts;
- If convicted, the accused has a right of appeal on the basis of any alleged "miscarriage of justice", or in solemn cases that the jury returned a verdict which no reasonable jury, properly directed, could have returned;

- The right of appeal is supplemented by the ability of the Scottish Criminal Cases Review Commission to refer cases to the High Court to be considered on grounds of a “miscarriage of justice” or “in the interests of justice”.

13. These safeguards ensure that there is a system of fair trials for accused persons, and compliance with the European Convention on Human Rights.

### **Other potential safeguards**

#### **Jury majorities**

14. Section 70 of the draft Bill proposes raising the number of jurors required for a guilty verdict from the present 8 to 10 of 15. COPFS is supportive of this proposal in line with the responses to the Scottish Government consultation on this matter.

15. In this regard, and in contrast to other jurisdictions, it is significant that Scotland has three verdicts open to jurors, with the “not proven” verdict functioning as a second verdict of acquittal.

#### **The Not Proven Verdict**

16. The Cabinet Secretary for Justice has indicated his intention to refer consideration of the Not Proven verdict to the Scottish Law Commission and this was welcomed by the Lord Advocate, as he stated when he gave his evidence on 20 November.

#### **Withdrawal of cases from juries by trial judges**

17. The Scottish Government also consulted on this proposal. COPFS consider that cases should be allowed to go to juries where there is a sufficiency of evidence. COPFS agrees with the position that was taken by Scottish Government in the consultation paper on safeguards namely that it would be very rare that, at the conclusion of a trial, the prosecution's case would rest on a single source of evidence of doubtful credibility. This is especially unlikely in light of the proposed prosecutorial test.

I trust that this information assists the Justice Committee and would be pleased to assist further if required

Catriona Dalrymple  
Head of Policy Division  
9 December 2013