

Crown Office and Procurator Fiscal Service

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Dear Convener

INQUIRY INTO THE ROLE AND PURPOSE OF THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

I would firstly like to thank the Justice Committee for the keen interest that it has shown in the work of the Crown Office and Procurator Fiscal Service (COPFS). We will use the evidence gathered during the inquiry to inform future action. I was heartened to read that the Committee concluded that the public can have confidence in an effective, rigorous, fair and independent COPFS. This is a tribute to the dedication and hard work of our staff.

I have now had some time to reflect on the report's recommendations and have discussed them with the Law Officers. The attached annex provides the COPFS response on each point and I hope this information is helpful ahead of the debate on the inquiry report in the Scottish Parliament on 6 June. It might also be helpful if I mention two matters which do not arise directly in response to the recommendations of the report.

The Committee noted in paragraph 43 of the report that as of mid-January 2017 the work in hand of our National Initial Case Processing team (NICP) was around 16,000 cases. This work in hand figure was consistent with us being able to achieve our published aim of taking decisions in 75% of cases within four weeks and I can confirm that we subsequently achieved this for the financial year 2016-17. As of 22 May, the work in hand was 13,300 cases. We are currently marking 84% of cases within four weeks, and I am confident that we will continue to meet our published aim in the current year as we have been able to do for a number of years.

As described at paragraph 51 of the Committee's report, we published four Corporate Strategies at the end of January and shared them with the Committee before the conclusion of its inquiry. One of those was our Estates Strategy which summarised its priorities as: Right Place, Right Size, Right Configuration, Right Condition and Right Price. The Strategy projected that the size of the organisation was likely to decrease and the number of offices would reduce to achieve a significant reduction in estates costs. No specific office locations were identified at that point and I can confirm that it remains the case that no decisions have yet been taken on how we will reduce the size of our estate. Some further detailed

analysis is being carried out and it is our intention to share the results of the analysis and a proposed direction with staff and stakeholders in the early part of the summer before decisions on individual offices are taken in the latter part of 2017.

Once again, I wish to record my appreciation to the Committee for its inquiry. COPFS is an organisation which has demonstrated a marked ability over the past fifteen years to make effective change, to do so in challenging circumstances and to listen to others as it seeks to improve. It is an organisation which is committed to working with other agencies on the systemic reforms necessary to provide those we serve with a justice system fit for Scotland's needs in the 21st century.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Harvie', written in a cursive style.

David Harvie
Crown Agent

Our Resources and Staffing

Paragraph 62

“The Lord Advocate and Crown Agent have acknowledged in evidence that there is a need to address staffing concerns dating back several years. Above average numbers of staff on short-term contracts, on sick leave, or in long-term temporary promotions are danger signs. The Committee is pleased the current leadership appears to recognise this, to be listening to staff, and to be looking for ways to deal with these issues. The Committee will continue to maintain a watching brief on COPFS staffing and expects an update on staffing matters from COPFS when it responds to this report”.

I am pleased to confirm that we have made significant progress in strengthening our staffing position in line with my evidence to the Committee in December and January. In particular, we have been able to reduce the number of staff on temporary promotion and fixed term contracts. We are conducting recruitment exercises which will see existing fixed term staff converted to permanent contracts and new recruits given permanent contracts over the course of the summer. Our current second year trainee solicitors are eligible to apply in our current recruitment round for Procurator Fiscal Deputes, so they too, subject to the recruitment process alongside external candidates, will have the opportunity to move to permanent contracts at the end of their traineeships.

Within a few weeks from now, my expectation is that almost 110 staff will have been permanently promoted and by the end of the summer approximately 150 administrative staff will have been offered permanent contracts in place of fixed term contracts.

We have also continued to make progress in reducing our levels of sickness absence, bringing it down from an average 10.2 days per person as noted by the Committee to 9.5 days by March 2017.

Our Fair Futures project continues to develop and we now have an established staff network of almost 80 staff who have volunteered to provide direct feedback from the front-line on issues which need to be addressed to improve wellbeing and working lives.

Our progress on all of these points is directly informed by the views of staff and will, I am sure, go some way to help address the issues which the committee has highlighted, as well as strengthening the engagement of our staff.

Paragraph 63

“The Committee seeks clarification from COPFS on the operational rationale for job losses and where they will fall”.

Whilst our focus will continue to be on driving down non staff costs, as outlined in our evidence to the Committee and in our Workforce Planning Strategy, and honouring the Scottish Government commitment to no compulsory redundancies, we anticipate we will not be able to deliver all the savings required through non-staff costs. We expect overall staff numbers to reduce and project that we will not replace all staff who leave voluntarily. The financial requirement to achieve some degree of staff cost savings does align, however, as the Committee was advised in evidence, with planned reforms across the criminal justice sector and with our own plans to modernise and improve the efficiency of our work. The

implementation of the Sheriff and Jury reform programme in 2017-18, the elimination of some manual working practices through further digitisation of our processes and more efficient working practices, and efforts to improve the quality of our engagement with victims and witnesses will all contribute to reduced demands on staff time. The extent of the success of cross-sector reforms which focus on increased early resolution of cases will also significantly impact on our ability to make further staff savings. Despite the need to make some degree of staff savings, our strategic goal is to continue strengthening our core operational work while maximising the proportion of the required savings from non-staff costs. You will recall that I advised the Committee in December that we had, since 2009, increased the number of deputies and senior deputy fiscals while significantly reducing the number of senior leaders in the Service. Such internal re-balancing of the structure of the Service has, become increasingly difficult. We will look to prioritise reforms which reduce churn and the need for repetitive manual work, improved customer service and outcomes and the modernisation of the justice system as a whole to deliver changes which will allow us to operate successfully with a reduced workforce.

The Efficiency and Effectiveness of the Prosecution Service

Paragraphs 106, 107

“...it should be within the capacity of COPFS to develop more efficient and effective means of notifying those whose attendance is no longer required at trial. The Committee calls on COPFS and SG to take forward “within the Justice Digital Strategy” more efficient and effective means of notifying those whose attendance is no longer required at a trial”

“...[The Committee] seeks clarification from COPFS and SG as to: what measures are in place to encourage and, if necessary, ensure witness attendance; the extent to which these measures are being used; and whether alternative approaches are being considered over and above whatever may emerge in due course from the Evidence and Procedure Review”.

COPFS continues to play a lead role in working with our justice sector partners to implement the Scottish Government’s Justice Digital Strategy (JDS). We are a core member of the programme direction group that is steering and driving this work. We will align our own COPFS digital strategy plans with the JDS to deliver innovation and improvements across the justice sector landscape.

In terms of notifying those whose attendance is no longer required at trial, we anticipate a number of recent and planned changes will improve the situation: we have already implemented a recommendation from our review of our VIA work which allows information in High Court cases to be shared in real-time with VIA staff in local offices who can then communicate it directly to victims and witnesses; for jury cases in the Sheriff Court, the new legislative reforms which come into effect this summer will result in fewer witnesses being cited for only those cases which cannot be resolved; and we are scoping the extension of our system of automatic SMS messaging for witnesses to provide immediate countermands in a more convenient manner.

Encouraging and ensuring witness attendance at trial continues to be a priority for the criminal justice system. A Police Witness Scheduler has been developed by Police Scotland with input from COPFS and the Scottish Courts and Tribunals Service (SCTS) to minimise disruption for police witnesses in terms of shifts and leave. The focus in sheriff and jury reform on only citing witnesses required for cases going to trial instead of citing all witnesses in all cases, resulting in thousands of countermands every month for cases which

subsequently resolve, will greatly reduce inconvenience for the majority of witnesses, many of whom will no longer be cited at all. Those who are cited in future will have greater certainty that their case is proceeding as planned. To help our engagement with witnesses, COPFS is designing a secure Witness Website which will allow witnesses to access their statements and monitor progress of their case as well as communicate directly with us in a more convenient way. For those witnesses who refuse to engage with the system, we will continue to seek the authority of the court in appropriate cases to enforce the witness' attendance. In 2016, just under 2,500 witness warrants were granted. We are also learning from local initiatives to identify lessons which can be applied across the Service. In Lanarkshire, for example, a Witness Protocol with the police and the court sees the police endeavour to execute a witness warrant on the same day it is granted by the court and the case will not be adjourned until it is known whether the police have managed to locate the witness.

Paragraph 108

“The Committee asks the Scottish Government, COPFS and SCTS whether it accepts evidence that the witness citation process is sometimes unreliable, and if so, what measures are being considered to address this, including for instance, the Sheriffs' Association suggestion of a dedicated COPFS unit to issue citations”.

We understand this relates to evidence about the reliability of the witness citation process submitted by the Sheriffs' Association at paragraph 98 of the report. We understand the reliability concern to which they refer to be a reference to the difficulty sometimes encountered by the police in securing a successful personal citation of witnesses who are difficult to trace or reluctant to engage with the criminal justice system. In addition, the volume of witness citations can make it a challenge, where personal service is required and witnesses cannot easily be traced, to effect service successfully and return the executions in time for the intermediate diet.

The submission from the Sheriffs' Association suggests that the use of COPFS process servers may benefit from being re-instated. For the avoidance of doubt, the personal service of citations has always been the responsibility of the police. COPFS has never had a dedicated unit comprised of process servers who physically cite witnesses. We have since clarified this point with the Sheriffs' Association.

Under the Criminal Procedure (Scotland) Act 1995 the service of a citation on a witness may be achieved through postal or personal citation. Service by postal citation is the responsibility of COPFS. Personal service of citations is the responsibility of the police. The method of citation selected will be dictated by a number of factors including the scheduling of the trial, the nature of the case and the known engagement of the witness.

We recognise the need to provide the court with as much information as possible about attempts which have been made to trace and cite witnesses, particularly where this is proving difficult for the police. To reduce the time taken for such information to be shared, we are exploring with Police Scotland whether daily updates can be provided electronically from the police database, reducing the current time taken from as much as five days to allow for real-time updates to be provided by the prosecutor in court.

Paragraph 160

“The Committee acknowledges that the criminal justice system has not always prioritised domestic abuse as it should have or treated it with the seriousness it deserves. It was

necessary for a clear message to be sent by public agencies working in the system that domestic abuse is unacceptable and would be tackled robustly, in order to give victims confidence that their case would be taken seriously. The COPFS/Police Scotland Joint Protocol on domestic violence has played an important role in that process. The Committee notes the differing views it has received during this inquiry as to the COPFS's application of the protocol, notes the Lord Advocate's response to it, and asks the COPFS and the Scottish Government to reflect further on the views that the Committee heard".

As the Committee heard in evidence, the COPFS domestic abuse policy and the Joint Protocol on Domestic Abuse between Police Scotland and COPFS are a necessary correction to an historic tendency to downplay domestic abuse within the criminal justice system. COPFS has worked closely with the police and other experts in the area to secure permanent change and to ensure that a crime that can have a devastating impact on every aspect of a victim's life is prosecuted robustly. Where sufficient evidence exists, there are strong presumptions in favour of prosecution and continuation of prosecution. It is for the Lord Advocate, and for the Lord Advocate alone, to set prosecution policy. Sometimes the policies he sets are not universally popular, and nor should they be. We are satisfied that our approach to domestic abuse is firm, rigorous and based on sound principle. We are committed to best practice and as such the protocol has been subject to regular review.

The Committee will be interested to note that the revised 4th edition of the Joint Protocol was launched on 24 March 2017. The revised Protocol provides enhanced guidance to police and prosecutors on the approach to be taken in tackling domestic abuse and was informed by the views provided to the Committee as well as the police and prosecution experience in tackling robustly this offending. The Protocol makes it clear that the police should only charge and report the accused to COPFS where there is sufficient evidence. It emphasises what sufficient evidence means, namely at least two separate sources of evidence to establish both that a crime has been committed and that the accused was the perpetrator. The Protocol further provides guidance on the use of undertakings as opposed to custody. It states that police officers must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody and provides a list of factors to be taken into account in arriving at this decision, including the ongoing risk to the safety of the victim or any children, the nature and circumstances of the offence, and whether the incident is reported as part of a course of conduct or pattern of behaviour. The Protocol provides guidance on the conditions of undertaking that should be imposed on the accused, such as conditions not to approach the victim. The Protocol also ensures that the impact on children will be more visible in the investigation and prosecution process.

Paragraph 178

"The Committee acknowledges the COPFS's evidence that it intends to build stronger relationships with third sector stakeholders in the prosecution of wildlife or environmental crime. The Committee asks the COPFS to respond to views heard in evidence that recommendations in the Scottish Government's 2008 report Natural Justice, particularly in relation to post-prosecution debriefings, have not been fully implemented, and to set out its plans to address this."

As I highlighted in my written evidence to the Committee, COPFS' whole approach to the prosecution of wildlife crime has changed dramatically since 2008. Since the establishment of the Wildlife and Environmental Crime Unit (WECU) in 2011 all reports of wildlife and environmental crime are handled by a team of dedicated specialist prosecutors. WECU staff are equipped with relevant knowledge and expertise to assess properly the applicable law to the facts and circumstances in each case. WECU prosecutors, and indeed more

senior colleagues, have over a number of years met with NGOs involved in wildlife crime investigations to discuss specific concluded cases and areas of significant concern to NGOs.

Consistent with my previous indication that we would seek to build stronger relationships, the Lord Advocate has recently offered the RSPB an opportunity to meet with senior COPFS officials to discuss wildlife crime cases involving alleged raptor persecution. We will continue with these efforts in order to ensure appropriate learning for all those involved in the detection, investigation and prosecution of wildlife and environmental crime is identified and implemented.

Paragraph 179

“The Committee is concerned by evidence of very low prosecution rates for failure to hold employer’s liability insurance, noting that the consequences of failing to be properly insured can be devastating for individuals and families. The Committee welcomes the COPFS’s commitment to explore the reasons behind the low number of referrals with relevant reporting agencies and requests an update from the COPFS”.

Whilst COPFS cannot direct non-police reporting agencies, we have an interest in working with them to ensure that effective enforcement action is taken. If the statutory enforcement agencies were to choose to report cases to COPFS in respect of failure to hold employer’s liability insurance, then any such reports would be considered and action would be taken where the evidence and the public interest so required. As promised in my letter to the Justice Committee on 13 January 2017, we have explored with the Health and Safety Executive (HSE) why COPFS receives very few cases relating to potential breaches of the 1969 Act. I am advised that HSE take the view that securing compliance with the legislation through working with employers is preferable to immediate reporting for breaching it.

HSE have a number of formal enforcement processes available, culminating in reporting a case for prosecution. The HSE has Visiting Officers who are warranted to enforce compliance with the 1969 Act. If information is received suggesting a failure to comply with the 1969 Act, a hierarchy of enforcement measures can be used. The employer will be written to with a copy of the HSE Guide for Employers on Employers Liability Compulsory Insurance and with a request to produce evidence of insurance. If this is not complied with a formal Notice to Produce can be served. If the employer still does not comply an Inspector may take formal enforcement action. The Enforcement Management Model utilised by HSE and several local authorities uses a risk gap analysis model to determine the appropriate enforcement action.

Paragraph 180

“The Committee seeks the COPFS’s view on whether there is merit in recruiting locum prosecutors to prosecute High Court cases turning on complex and specialist aspects of criminal law such as corporate fraud or health and safety breaches and, if so, whether this is part of its current practice”.

COPFS maintains a permanent cadre of 38 Advocate Deputes to prosecute cases in the High Court, to mark High Court cases, to issue instructions as required to COPFS and to assist the Law Officers in their prosecutorial functions as required.

Advocate Deputes are recruited from across the Bar, private practice and COPFS and have a wide range of specialist skills. They effectively prosecute the full range of serious crime in

the High Court. In addition, individuals are instructed from time to time as the need arises as ad hoc Advocate Deputes. Ad hoc Advocate Deputes likewise have a wide range of skills upon which the Crown can call when the need arises.

We consider that the current cadre of permanent and ad hoc Advocates Deputes have the necessary skills to prosecute complex and specialist cases. Nevertheless, I would not rule out, should the need arise, the recruitment of an Advocate Depute with particular skills where that is required.

Paragraph 183

“The Committee is concerned by evidence that the courts are sometimes being asked to take decisions on bail without access to the full range of relevant information. This may lead to decisions being made that are not necessarily in the public interest, for instance to refuse bail on the basis of the accused’s homelessness. Whilst the safety of the public and the integrity of the prosecution process must be the paramount considerations, the public interest is not served by individuals being remanded when more suitable alternatives may be available. The Committee asks the COPFS and Scottish Government, on behalf of the Scottish Prison Service, to respond to this Evidence”.

We agree with the Committee that the public interest is not served by individuals being remanded when more suitable alternatives may be available.

The comments from Social Work Scotland on which the Committee rely at paragraph 183 demonstrate the value of supervised bail, provided by local Social Work Services, as an alternative to remand and this is supported by COPFS. Where supervised bail is an available option, due consideration will be given by prosecutors within the very strict time limits imposed by the current system of custody operated in accordance with legislation. The availability of supervised bail is not uniform throughout Scotland. We anticipate that the pending legislative reform to introduce investigative liberation will, in many cases, allow the police and prosecution to prepare and present more detailed information to the court.

The decision whether or not to remand an individual in prison is one for the Court after having heard from both the Crown and the Defence. Accordingly, the accused’s defence agent always has the opportunity to make representations to the Court in respect of bail.

Paragraph 207

“The Committee seeks clarification from the COPFS that consideration of the autonomy and decision-making capacity of local fiscals is being taken forward in its current “Fair Futures” programme being developed in consultation with its staff”.

The “Fair Futures” programme is directed towards the wellbeing and working lives of COPFS staff and does not deal with operational issues such as prosecution decision making. This aspect of reform is addressed through other changes such as our Prosecution Policy Review (PPR), changes to our operational structure introduced as part of the Shaping the Future project and a reset of our internal approval levels to encourage local decision making by local prosecutors. These changes have been reinforced by the Lord Advocate who has repeatedly highlighted the work of the skilled and dedicated Procurators Fiscal prosecuting on his behalf. From almost his first day in office, the Lord Advocate has emphasised the responsibility of the individual prosecutor and his trust in their exercise of professional judgement and decision making.

Paragraph 209

“...the Committee asks the COPFS and Scottish Government as to what monitoring there is of the effectiveness of diversion from prosecution and whether and how the results of that monitoring are fed back to the COPFS for continuous improvement purpose”.

Diversion schemes are not provided or operated by COPFS. They are mainly provided by Local Authorities. There is a large variation in terms of both the provision of resource and the approach of different Diversion schemes across Scotland.

The introduction of the new Community Justice Partnerships should go some way to address this. COPFS is a statutory partner and is keen to ensure that diversion from prosecution is targeted in areas where it can make a difference. COPFS will seek to secure agreement that partnership planning takes account of the ever-increasing need to ensure that if a diversion scheme is to be utilised then it must be effectively evaluated and monitored. Engagement with Community Justice Partnerships is led at Sheriffdom Procurator Fiscal level within our Local Court function.

Victims and Witnesses and the COPFS

Paragraph 227

“The Committee considers that an effective, efficient and fair COPFS in everyone’s interests; accused, victims and witnesses alike. The Committee is therefore concerned by evidence that a lack of preparation time means that time limits in solemn trials are being “routinely” exceeded and seeks the COPFS’s response”.

In a very small number of cases, the statutory timescale for service of an indictment has required to be extended on Crown motion. This is rare, and is generally because either the case is of such complexity that it cannot be prepared within the statutory timescale (normally involving technical or scientific evidence that experts cannot provide to us in time), or new and unforeseen evidence is obtained close to the timescale. In the vast majority of cases the accused is indicted within the statutory timescale and the Crown can proceed to trial. Whilst there are often further extensions to the time limits, post service of the indictment, these are generally not to allow the Crown to prepare, but are for a wide variety of other reasons which would include finding a trial date suitable for witnesses, accommodating defence requests for further time, finding a date suitable for defence counsel or other matters arising that were not known prior to the preliminary hearing or first diet.

We do accept that disclosure material can on occasion be provided to the defence later than we would like, however this is usually due to evidence not having been received from third parties at an earlier stage. We continue to work with those third parties to find ways to secure such evidence earlier.

Paragraph 228

“The Committee also asks the COPFS to respond to evidence that its general policy is not to seek the withdrawal of warrants for arrest of an accused for non-attendance, even where there may be exculpatory or mitigating factors. The Committee accepts that non-appearance for a court hearing is a serious matter but asks the COPFS to respond to concerns that, if this is its policy, it may impact disproportionately on vulnerable people.”

It is a criminal offence punishable by imprisonment for an accused person to fail to attend court without reasonable excuse. Such failures impact significantly on victims and witnesses, often requiring them to attend court on multiple occasions. The frequency with which accused fail to attend court is one of the significant factors contributing to the churn of cases with which the Committee is rightly concerned.

Warrants to arrest an accused person are issued by the judge, not by the prosecutor. Before issuing a warrant, the accused's solicitor is given an opportunity to make representations on behalf of the accused, including any reasonable excuse which they may have at that stage for their non attendance, such as any vulnerability and the likely impact on the accused and their family of executing the warrant. The judge will take these representations into account when deciding whether or not to issue a warrant.

Against this background, the traditional approach by prosecutors was to consider, on an exceptional basis, whether new information justified allowing an accused an opportunity to appear at court rather than have the warrant executed. However, recent experience showed that representations were being made by defence solicitors on a significantly increased basis despite improved communications between accused and their solicitors, which made it increasingly unjustified for accused to fail to advise their solicitor in advance of a difficulty in attending court. For that reason, our Local Court function, starting in Lothian and Borders, has operated a pilot to re-emphasise the need for such information to be made available by the defence to the judge at the time the warrant is issued and not at a later stage. An exceptional discretion is retained to withhold execution of a warrant, but the general approach is one of encouraging a reduction of the number of warrants issued, if the defence can provide a satisfactory explanation, rather than processing an increased number of warrants.

There is some early encouraging data to show that, along with other changes introduced at Edinburgh Sheriff Court, this approach has helped to reduce the outstanding trials from 3,200 in February 2014 to 2,020 in April 2017 and the trial delay from 27 weeks in February 2014 to 12 weeks in April 2017 (around eight to ten weeks in domestic abuse cases).

This pilot is now being evaluated with a view to extending it to other courts in Scotland.

Paragraph 230

“The Committee asks the COPFS and the Scottish Government to clarify what information (if any) public agencies must provide to families and dependents of accused people and what measures are in place to ensure that the information is provided. The Committee seeks clarification from the COPFS and Scottish Government as to what measures are in place to ensure that family members of vulnerable adults accused or convicted of a crime are contacted and notified”.

COPFS is not responsible for providing information to families of accused persons. Should the accused wish their family to be advised of their imprisonment, the accused themselves, or their legal representative, would be the most appropriate communication route.

Paragraph 237

“The Committee considers that the safety and mental welfare of victims, balanced against the accused's right to a fair trial, should be at the forefront of consideration during the prosecution process. The Committee asks the COPFS and Scottish Government to confirm

whether it is their understanding that Victims and Witnesses (Scotland) Act 2014 imposes legal duties on the COPFS, and other agencies, in relation to the hostile cross-examination of witnesses during a criminal trial and, if so, to clarify what practices and policies are in place to ensure that relevant legal requirements are met”.

The Victims and Witnesses (Scotland) Act 2014 makes provision for certain rights and support for victims and witnesses. Section 1A requires that criminal justice agencies must have regard to the principle that victims should be protected from secondary or repeat victimisation or intimidation.

Section 9E of the 2014 Act relates to the victims’ right to protection of privacy. Section 9E(2) provides that a competent authority must take reasonable steps to protect the privacy of that person. The statutory definition of a competent authority includes the Lord Advocate. However, Section 9E(4) confirms that the Section 9E does not apply to the giving of evidence in criminal proceedings. Section 9E therefore does not apply to cross-examination of a victim.

There are rules in place for the Court to protect witnesses from hostile cross-examination. In certain cases, predominantly sexual offence cases, evidence of the character of or the sexual history of a complainer is inadmissible at trial. The rules are set out in s.274 of the Criminal Procedure (Scotland) Act 1995 and apply to a specified range of offences. The rules can also apply to other offences where the Court is satisfied there was a significant sexual element in the alleged commission of the offence. However, that evidence can be admitted by the Court if the three-stage test contained in section 275 of the Criminal Procedure (Scotland) Act 1995 is satisfied. Where the defence make an application to the Court to admit that evidence, the Crown will assess whether or not it meets the requirements of the three-stage test and, if not, the Crown will oppose the application. The granting or refusal of any such applications is a matter for the Court.

At common law there is also a general prohibition on leading evidence that is not relevant to the Crown or Defence case. The Judge or Sheriff is charged with ensuring all questioning in a trial over which he or she presides is conducted fairly, and that all questioning is appropriate, is relevant and is fair. Where the questioning is deemed to be improper, the Judge or Sheriff can intervene to prevent this. Whilst it is the task of the Judge or Sheriff to prevent improper questioning, nonetheless, the Crown may also object and address the Court when questioning by the defence is irrelevant or improper. The final decisions on what questions will be allowed are matters for the Court.

This issue was considered by Lord Carloway in the case of *Duncan William Begg or Dreghorn v HMA [2015] HCJAC 69* when he stated:

“[39] Due regard must be had to the right or privilege under domestic law to test a witness’s evidence by properly directed and focused cross-examination. That right, however, does not extend to insulting or intimidating a witness It also requires to be balanced against the right of a witness to be afforded some respect for her dignity and privacy (see Criminal Procedure (Scotland) Act 1995, s 275(2)(b)(i)). The court must be prepared, where appropriate, to interfere when cross-examination strays beyond proper bounds, both in terms of the nature of the questioning and the length of time for which a complainer can be expected to withstand sustained attack. [....]”

“[40] Sections 274 and 275 of the 1995 Act were designed to keep the examination and cross-examination of complainers in sexual offence cases within proper bounds because it was perceived that the common law rules of evidence, as they were being

applied in practice, had failed to do so. [...] it is important to emphasise that a trial judge has a power to control the nature and scope of questioning. He is entitled to stop questioning if he considers it to be “protracted, vexatious and unfeeling” ... or indeed “over rigorous”... The judge may place a limit on the time which can be taken. If a proper balance cannot be achieved by the representatives of the Crown and defence, the court may have a duty to intervene.”

Paragraph 243

“The Committee welcomes the Victims’ Code for Scotland and considers that the pamphlet should be available to all victims at their first point of contact with the criminal justice system. The Committee seeks clarification from the COPFS and Scottish Government as to current practices in relation to making the Code available”.

Section 3C of Victims and Witnesses (Scotland) Act 2014 specifies that it is for the Chief Constable to inform victims that they can request a copy of the code from any competent authority, including COPFS. Police are often the first point of contact that victims of crime have with the criminal justice system. The police therefore provide all victims of crime with a care card, which provides a link to the Code. The Code is a Scottish Government publication on which COPFS was consulted before publication. The Code is also available on the COPFS website. This part of our website is referred to in all of our VIA letters, with the web address included so that victims and witnesses can access the material. Published guidance for staff states that, where a victim requests a copy of the code from COPFS, it must be provided to them as soon as possible or they must be advised where a copy of the Code may be obtained.

Paragraph 268

“The Committee asks the COPFS to clarify the extent to which it takes into account the vulnerability of victims and witnesses, and the risk to them of a prolonged or delayed prosecution process, in determining the prioritisation of cases, in the light of evidence that delays in hearing cases can disproportionately damage the mental welfare of vulnerable adults”.

The vulnerability of victims and witnesses is an important, but not sole, consideration, when determining the prioritisation of cases. As the Committee will be aware, the timescale that a case takes to get to court is determined by a variety of factors, many of which are entirely outwith the control of COPFS. As a result of statutory time limits, cases in which the accused is remanded in custody are necessarily prioritised. In all cases, the factors taken into account include whether the accused is in custody, the seriousness of the offence, including the category of offence such as sexual offence cases, stalking, hate crime and domestic abuse, vulnerability or special interests of victims/witnesses, including child witnesses, and the age of the offence and the number of previous adjournments.

In the High Court, the seriousness of the offences mean that majority of cases will involve an accused who may present a risk to the public, or a vulnerable witness, which will require the case to be considered a priority. Many cases are custody cases and therefore require to be prioritised in order that the strict statutory timescales are complied with. In addition to vulnerable adults, prosecutors must also consider other features of a case when prioritising charges. Cases will often involve a child witness or accused and a degree of prioritisation must be therefore be afforded to such cases. If Evidence on Commission is required, the new High Court Practice Note states that the case must also be prioritised. Cases which have required a lengthy period of investigation by the police and COPFS before the

accused is placed on petition require to be prioritised. In addition, factors such as the size of case, the number of victims and any health issues that an accused or witnesses may have require to be taken into account. Similar considerations apply to cases prosecuted on indictment in the Sheriff Court.

For summary cases, summary legal guidance states that the vulnerability of victims and witnesses must be taken into account in the prioritisation of trials. The Crown is often balancing the priorities of a wide variety of victims/witnesses with competing vulnerabilities within the same summary court programme.

Paragraph 282

“Reforms under the Victims and Witnesses (Scotland) Act 2014 have significantly widened the duties owed to victims and witnesses and have been widely welcomed. The COPFS, in common with other public agencies, is still adjusting to these changes. The Committee is concerned by evidence appearing to indicate that some of the key rights secured by that legislation are not yet a reality for victims and witnesses in their journey through the criminal justice system. The Committee asks the COPFS and Scottish Government to respond to this evidence, and to evidence that victims and witnesses are not always aware of their rights.”

It is clear from some victim accounts provided in evidence to the Committee that their experience of the criminal justice system, and the service provided by COPFS, fell short of the standards that I expect and which I know that COPFS staff aim to deliver. As I outline under reference to paragraphs 309-311 below, the recent VIA Review looked at the way that VIA was structured and at its systems and processes. The Review made a number of recommendations which have now mostly been implemented. Feedback suggests that the challenges posed by the substantial increase in referrals to VIA following the implementation of the 2014 Act have largely been overcome due to the implementation of the recommendations of the Review.

Paragraph 289

“The Committee recommends that the COPFS carry out an audit of victims and witnesses entitled to special measures in order to determine (a) whether they are aware of their rights to ask for special measures, (b) whether reasonable requests for non-standard special measures are being met, and (c) the extent to which the provision of special measures actually assisted the individual in providing evidence and, if not, what lessons could be learned from this”.

We agree there would be benefit in such a review, albeit some elements of the Committee’s recommendation fall outwith the remit of COPFS. We have raised the matter with the Scottish Government and we understand that they will review any evidence offered to the Committee which suggests there are issues around both awareness of rights, and ability to secure these rights in practice, and thereafter discuss this with the relevant criminal justice organisations. In the meantime, we are in consultation with Rape Crisis to agree a process which would allow victims to feed back to COPFS their experience of the service we provide, allowing us to learn from victim experience and to drive improvements.

Additionally, the Inspectorate of Prosecution (IPS) is currently conducting a Review of the Investigation and Prosecution of Sexual Crimes. The Review includes an examination of processes and procedures to ensure that there is appropriate contact made with and information provided to complainers throughout the life of the case. This includes a review

of the interaction between VIA and victims in High Court cases involving sexual offences. We welcome this Review and will take account of the findings and any recommendations from it.

Paragraph 290

“Under the Victims and Witnesses (Scotland) Act 2014, the COPFS is required to take reasonable steps to enable victims and their families to avoid the accused during a trial. The Committee seeks clarification from the COPFS as to how it exercises that duty in practice and whether it makes victims and their families aware of its existence”.

Section 9D of the 2014 Act states that a competent authority must take reasonable steps to enable a person who is or appears to be a victim in relation to an offence or alleged offences, or any of that person’s family, to avoid contact with the person suspected, accused or convicted of the offence or alleged offence during a relevant interaction with a competent authority. The statutory definition of a competent authority includes the Lord Advocate. Subsection (2)(c) states that this right does not apply in relation to the giving of evidence by any person at a hearing in relevant criminal proceedings.

It is understood that there may be times when victims and their families come into contact with accused persons within the court building otherwise than during the course of a hearing. The Committee will appreciate that COPFS is not responsible for the court estate, including the facilities that exist in court buildings to ensure that victims and accused do not come into contact with each other. Where a victim or witness makes VIA staff aware of such an issue then we make every effort to ensure that the victim or witness does not come into contact with the accused, for example by including this detail on the referral to the Witness Service. Where it is known that there has been, or there exists, some potential for some form of harassment or confrontation, COPFS and SCTS work closely to explore what additional measures might be put in place. This may take the form of providing separate access or exit routes from the building, a separate waiting area, or liaising with police colleagues to stagger departure times from the building. This can be challenging depending upon the layout of individual courts.

Paragraph 300

“The Committee was concerned by evidence as to the lack of contact between victims and prosecutors during trial preparation, leading in some cases to a perception from victims that the Crown was not well prepared when it came to the trial. The Committee notes the explanation provided by the COPFS as to why, in the vast majority of cases, it is no longer considered appropriate to precognose victims and witnesses. However, the Committee also notes evidence that precognition by the Crown, amongst other things, may help evidence be agreed earlier, and thus help cases resolve more quickly, which is one of the main aims of the Evidence and Procedure Review. The Committee asks the COPFS to respond to this evidence”.

As previously explained to the Committee, we previously decided that the more appropriate method of obtaining clarification of a witness’ evidence would normally be by the police taking a further statement which would automatically be disclosed to the defence and could be used in evidence at trial. There remains a place for precognition, but it is more limited than in the past and that change has been driven by wider changes in the law and procedure in Scotland. Precognition of witnesses in solemn cases is no longer done as a matter of routine. We have never precognosed witnesses in summary cases. Precognition is now restricted to the cases and witnesses in which there is a clear benefit to

be gained from doing so. In practice, this means that all victims in sexual offence cases prosecuted in the High Court will be precognosced.

We do not accept the suggested link between precognition and the agreement of evidence. The key to agreement of evidence is the obtaining of clear and reliable witness statements taken by police officers and precognition by the Crown does not assist with this matter. In the same way that the defence are able to agree evidence without having precognosced witnesses, so too can the Crown.

Against this background, we do not consider that the lack of precognition of witnesses leaves prosecutors unprepared. On the contrary, unlike previous practice, both prosecutors and the defence now have police statements which are available for use at trial and this provides a better foundation for the agreement of evidence.

Paragraph 308

“The Committee requests a detailed response from the COPFS and the Scottish Government as to the main conclusions in the Review (by Dr Lesley Thomson QC), including which recommendations they propose to accept, and what legislative reforms may be necessary in the light of this. The Committee further requests from the COPFS and Scottish Government a timetable for implementing recommendations in the Review. The Committee also seeks their views on the Review’s proposal that victims should have access to a single point of contact providing advice and support during their journey through the criminal justice process.”

We welcome the publication of the Victim Review carried out by the former Solicitor General, Dr Lesley Thomson QC. The recommendations make it clear that no single organisation is currently providing the comprehensive and cohesive information and support that victims are looking for, but also that, within the current system, no single existing organisation *can* provide that service. The recommendation is for a “one front door” model and for further work across justice sector to examine the best way of delivering this. This is a conclusion with which we agree.

I have raised the review at the Justice Board which welcomed it and indicated that it would contribute to strengthening protections for victims and witnesses. We intend to work collaboratively with the Scottish Government and other justice agencies to assist in taking forward the recommendations of the Review. In partnership with the Scottish Government and justice partners, we will continue to develop options for further improving the support provided to victims by the criminal justice system, including ongoing work to record the evidence of children and vulnerable witnesses prior to trial.

Paragraphs 309 to 311

“The Committee notes that the number of referrals to the VIA service has risen sharply (by around 45% in seven years) and that the Thomson Review estimates an additional 4000 referrals per annum in future thanks to recent legislative reforms. The Committee considers that without additional resource for VIA, there will almost certainly be adverse consequences for its ability to work effectively.

The Committee calls for the COPFS to audit the work VIA currently undertakes in order to come to a view on where the main demands on its services come from and whether there are areas of unmet need.

The Committee makes these recommendations in the context of what it recognises as an ongoing debate as to the future role of the VIA service. The Committee considers that obtaining more information on VIA's current workload and on unmet need may help clarify next steps in relation to that debate".

I should clarify at the outset that there is no ongoing debate within COPFS as to the future role of VIA. VIA is considered to be an essential part of COPFS. The VIA review resulted in a restructure of VIA, as well as introducing more automated and streamlined processes. Particularly in light of the increase in victims and witnesses now referred to VIA following the 2014 Act, the service provided by VIA remains a critical part of our service delivery in this area.

In terms of an audit to establish if there is any unmet need, an analysis of VIA workload was carried out as part of our recent VIA review. We projected an increase of 20,000 applications as a result of the 2014 Act: 4,000 from the widened definition of a child witness and 16,000 from the new "deemed vulnerable" category. This projection allowed us to make certain planning assumptions and to take specific action. We streamlined, simplified and automated our processes. We removed outdated and time-consuming manual processes. We remodelled our staffing compliment to provide a greater level of administrative support to VIA officers. We provided some additional resourcing to allow us to provide VIA summary victims with bespoke support to understand their rights under the Victim Right to Review. We restructured our line management chain for VIA staff to provide them with more specialist management support and direct access to senior management boards across our Local Court and High Court functions. In addition we have established a Victims' Forum to provide VIA managers with an internal support network. We also increased the overall level of resource within VIA.

Building on this recommendation from the Committee and the implementation of our review of VIA, we will now, as a matter of good practice, look to analyse the impact of our changes and the extent of any remaining unmet need which falls within our remit. Further valuable assistance in this regard will also be provided by the ongoing review of the investigation and prosecution of sexual offences which is being carried out by the Inspectorate.

The Inspectorate of Prosecution in Scotland

Paragraphs 340 to 345

While it would be inappropriate for COPFS to comment on the constitutional position of the Inspectorate (IPS), its structure or working practices, I thought it would be helpful to emphasise for the Committee, ahead of the Parliamentary debate on 6 June, the value to COPFS of the inspection work which has been carried out over the last ten years. It has provided us with a valuable, constructive and, where necessary, challenging source of independent review. I am in no doubt that our work in critical and high priority areas has been improved due to the changes which have come about as a result of inspection.

COPFS
May 2017