



CROWN OFFICE
25 CHAMBERS STREET
EDINBURGH EH1 1LA

Telephone: 0300 020 3000

Margaret Mitchell, MSP
Convener of the Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP

By Email: justicecommittee@parliament.scot

8th July 2020

Dear Convenor,

Thank you for your letter of 18 June 2020. I am very glad to provide the follow-up information you have requested after my appearance with the Crown Agent before the Justice Committee on 16 June 2020.

1. The Crown Agent mentioned the work of a group with SPS, Police Scotland and others on custody cases and remote video links. It would be helpful to have more details on the work of this group and when it expects to conclude with an operational service.

The group to which the Crown Agent referred is the Virtual Custody Courts group, which is part of a new structure now established under the authority of the Justice Board and led by a Criminal Justice Board on which the chief executives of the key criminal justice organisations sit, to co-ordinate recovery activity in the criminal courts.

A number of groups (each one led by a senior member of one of the criminal justice organisations) have been established within that structure to address different aspects of the recovery process. The group dealing with virtual custody courts is led by a senior police officer and the group dealing with virtual trial courts is led by a senior member of the Scottish Courts and Tribunal Service (SCTS). Other groups are focusing on the summary criminal process, community justice and, in due course once the Lord Justice Clerk's working group has developed a model for jury trials in the High Court, jury trials in the Sheriff Court.

In custody cases, video links between police custody suites and the court have been used since the start of the pandemic. That service is currently operational and has



been throughout. The group dealing with virtual custody courts, which is the group to which the Crown Agent specifically referred is, focused on resolving practical issues, such as adapting the existing video custody links to allow for parties to appear remotely and maintaining appropriate health and safety measures with an increased number of prisoners using the system, all with a view to maximising the number of custody cases which can be dealt with in this way.

2. Data on the backlog of cases across all courts (so that we can have the figures Mr Harvie mentioned in writing). It would be particularly helpful to have precise details of the number of summary cases. It would also be helpful to have more detailed information on the stage at which cases are sitting. For example, in non-custody summary cases, are accused still being asked to plead and, if pleading guilty, are they still being sentenced?

As the Crown Agent explained to the committee on 16 June, there were 18,319 outstanding cases awaiting trial across summary and solemn courts at the end of March 2020. Approximately 17,500 of those were summary cases in which trials had been scheduled.

While the Scottish Government continues to develop more detailed modelling of the impact of the pandemic and court closures, the Service's working assumptions at this stage are that:

- a) In the High Court, the Service's estimated end of year position of approximately 860 cases awaiting trial by March 2021 will increase by almost 60 cases for every month in which the High Court has been closed. Every month during recovery in which the High Court is open but restricted because of social restrictions will see a slightly smaller increase as a small number of cases are dealt with, but it is difficult to be precise about the scale of increase until there is greater clarity about the number of jury trials which can be accommodated simultaneously whilst respecting public health guidance.
- b) A similar impact will be seen in the Sheriff Court where many more jury trials would normally take place than in the High Court, with approximately 260 indictments calling for trial every month before the pandemic. The Service would normally expect to register almost 1,400 new indictments in a three month period. It registered 538 in April and May 2020 adding to the 461 cases scheduled for trial at the end of March 2020.
- c) In the summary courts, the 17,500 outstanding cases at the end of March have increased with some 19,000 new summary complaints being served between April and the end of June. You will be aware that the Sheriffs Principal put in place arrangements for all court business to be adjourned at



the start of the lockdown. Precise details of the arrangements in each Sheriffdom are available on the SCTS website. In general, the only summary criminal cases which have been dealt with are new custody cases and the very small number of custody cases to which, as I have mentioned in previous correspondence, have been brought to trial. The SCTS would be able to provide detailed figures about the different stages at which cases were adjourned.

In non-custody summary cases, arrangements have been in place since early June to enable pleas of guilty to be dealt with. The SCTS has put in place a process¹ by which an accused's lawyer can make arrangements for the case to call in court and the accused to be sentenced. This process has been supported by prosecutors. The Crown Agent wrote to all solicitors in May, advising them that prosecutors will seek to resolve cases appropriately where that is possible and that, where that is not possible, the Crown would focus on agreeing evidence in order that cases are as focused and as well prepared as possible when a trial is able to take place.

It is still early days as far as this process is concerned. Although there has been good co-operation from the leadership of the profession, I would encourage all lawyers dealing with summary cases to engage in that process to ensure that, as we go into the recovery phase, the cases that would always have resolved still resolve, and we are left in the recovery phase focused firmly on those cases that should and will be going to trial.

3. On fiscal fines, it would be helpful to know the type of cases that now result in fiscal fines that did not before. In particular, if during lockdown any domestic abuse cases are being dealt with by way of fiscal fines as an alternative to solemn or summary procedure? Furthermore, what was the percentage of domestic abuse cases dealt with by solemn proceedings or by summary proceedings before lockdown as a proportion of all cases?

As I set out in my letter of 8 June, prosecutors are directed to consider offering a direct measure, in particular a fiscal fine, in relation to appropriate cases which would otherwise have proceeded in the Justice of the Peace court. The relevant offences prosecuted in the Justice of the Peace court are, by and large, the same sort of types of cases for which fiscal fines have traditionally been used for a number of years, including crimes of dishonesty, assault, public disorder and possession of drugs. Fiscal fines may also be offered in cases which would have been prosecuted in the sheriff summary court, where that secures an appropriate and proportionate outcome which serves the public interest; and, again, I would anticipate that, by

¹ <https://scotcourts.gov.uk/docs/default-source/rules-and-practice/coronavirus-temp-orders/coronavirus-miscellaneous/guidance-on-facilitating-pleas-of-guilty-in-summary-criminal-proceedings-05-06-20.pdf?sfvrsn=8>



and large, these will be cases in categories where fiscal fines are already used, albeit that the increase in the fiscal fine limit means that a wider range of such cases may be considered for that disposal. I would not expect fiscal fines to be offered in any case which would be appropriate for solemn procedure in the sheriff court.

As I explained in my letter of 20 May, domestic abuse cases will continue to be prosecuted vigorously and fairly during the coronavirus pandemic. The Crown's robust policies on domestic abuse are unchanged and its commitment to tackling domestic abuse remains firm, especially during this unprecedented time.

COPFS publishes annual statistics on domestic abuse and those from 2018-19 are available².

As the statistics show, the overwhelming majority of domestic abuse charges reported to COPFS by the police result in prosecution, with the percentage in 2018-19 being 90%. A small percentage of domestic abuse cases has always been dealt with by direct measures, although this represented only 2% of the charges reported in 2018-19, and the vast majority of those direct measures were warning letters or diversion and not fiscal fines. Statistics for 2019-20 are currently being prepared and will be published in the coming months.

Prosecution policy on domestic abuse is to the effect that prosecution in the Justice of the Peace Court will only be appropriate for domestic abuse cases in limited circumstances, and specifically not in cases involving violence, threats of violence or courses of abusive behaviour prosecuted under the Domestic Abuse (Scotland) Act 2018. The limited category of cases which would be appropriately prosecuted in that forum will continue to be considered for prosecution rather than a fiscal fine.

In 2018-19, of the domestic abuse charges prosecuted, 85% were summary proceedings and 15% were solemn.

4. Further information on the costs of employing additional staff and the posts filled, including the cost of the five additional Advocates Depute and whether any ad-hoc Procurators Fiscal (PFs) have been employed and if so how many and the cost involved. It would also be helpful to know the number of new PFs that have been appointed to deal with summary cases and the cost? These issues came up in the Committee's previous inquiry into COPFS in 2016.

2

<https://www.copfs.gov.uk/images/Documents/Statistics/Domestic%20abuse%20stats%202018-19/Table%201%20-%20Domestic%20abuse%20identifier%20-%202018-19.pdf>



As I explained to the Committee on 16 June, the five additional Advocate Depute posts represent only part of the additional need for more prosecutors and staff, reflected in the resource budget made available to COPFS in 2020-21. That resource need includes an additional 66 FTE posts for prosecutors, case preparers and Victim Information and Advice staff. The additional Advocate Depute posts will cost £0.6m per annum and the other posts will cost approximately £2.4m.

As a result of increased funding in recent budgets, there has been a very significant increase in the staffing of COPFS since the Committee's inquiry into the Service in 2016. The Service now has 1817 full-time equivalent (FTE) staff, comprising 543 prosecutors and 62 trainee solicitors, an increase of 65 prosecutors and 23 trainee solicitors since 2016. The Service's staffing is now at its highest ever level. That staffing level is a reflection of the needs of the Service if it is to respond effectively to the changing caseload, whilst at the same time meeting reasonable public expectations.

You will appreciate that Procurator Fiscal Deputes are not recruited only to prosecute summary cases. With training and experience, they may be expected to undertake the full range of duties of a prosecutor in Scotland. The recruitment of new staff has allowed more experienced colleagues to be deployed immediately into areas of complex work, which can then be resourced at a level commensurate with their importance.

The Service has not engaged *ad hoc* Procurators Fiscal (ie prosecutors engaged from the private sector on a daily rate to conduct a specific court) for many years.

If, in referring to *ad hoc* prosecutors, you are referring to Procurator Fiscal Deputes engaged on fixed term contracts, you will recall that the Crown Agent confirmed during the Committee's review in 2016 that his goal was to move away from the use of such contracts in favour of permanent contracts to give staff greater security and confidence in their employment. In May 2020 there were no prosecutors employed on fixed term contracts (not counting trainee solicitors), whereas in May 2016 there were 32.

- 5. Further details on the alternative venues and locations being considered to host trials to decrease the backlog of cases. Which ones have been identified or are still being considered in your discussions with the SCTS? What are the COPFS and SCTS doing to maximise the number of locations/buildings where summary proceedings can be held to get through the backlog as most of these cases don't have to be held in court rooms or within the court estate? Also, what is being done to get more temporary sheriffs, JPs, retired sheriffs and PFs into the system to address the backlog?**



The responsibility for considering alternative venues to existing courts is a matter for the Scottish Courts and Tribunal Service, as is the question of the number of judges. The Crown will continue to engage with SCTS in relation to the potential for alternative venues to be used, including in support of existing courts (for example, in the context of giving evidence remotely). The Committee will appreciate the constraints (including in respect of security) which the circumstances of a criminal trial place on the use of non-court venues. So far as solemn trials are concerned, the scope for use of additional venues will require to be considered in light of the experience of the trials which are expected to run in Edinburgh and Glasgow this month.

The Service has not yet taken any steps to re-employ retired prosecutors in order to address the backlog of casework. Such a measure would, having regard to the number of individuals potentially available, provide only a minimal short-term impact in relation to only one aspect of the work of a prosecution service, namely court appearances. At this time, as you know, the capacity of the court to hold hearings is very significantly constrained; and, accordingly, at this time there is no need for additional courtroom pleaders. The Service will, of course, keep the question of re-employing retired prosecutors under review as the situation becomes clearer.

However, it is clear that the situation facing the justice system is much more serious and complex and will last longer than could be alleviated by the recruitment of what would be a very small number of retired prosecutors. The fundamental problem which faces the criminal justice system is a very substantial, and growing, backlog of cases, along with a very serious constriction in the capacity of the court to conduct hearings, including, in particular, trials. That serious constriction in court capacity seems likely to be a feature of the system for some time.

In particular, in a situation where capacity is very significantly constrained (and the Committee has information from the Lord President and SCTS on those constraints), the real difficulty is that the throughput of cases through the courts is, and is likely to continue for some time to be, very much lower than the pre-pandemic level, and accordingly very much lower than the number of cases being reported to, and prosecuted by, the Crown. The immediate challenge is how to increase capacity in the courts again to a level at which the backlog does not continue to increase substantially month on month.

If, as part of a system-wide response the courts are resourced with a view to increasing capacity beyond the pre-pandemic level, with a view to reducing the backlog, COPFS will also need to be resourced appropriately to fulfil its part in that system-wide response. As I explained on 16 June, it would be necessary to address not only the number of courtroom pleaders required, but the staffing needs of the Service more generally to support the throughput of business in the courts.



I will continue to work with others across the justice system with a view to maximising the effect of all of the various options which are currently under consideration to seek to alleviate the situation. However, as the Lord President has made clear in correspondence with the Committee, there are significant limits to the likely effect of those options given the scale and nature of the problem. It follows that, notwithstanding the great efforts which are being made, and will continue to be made, by all those responsible for or involved in the administration of criminal justice in Scotland, a significant and growing backlog is likely to be a feature of our criminal justice system for some time.

6. More information on the issue you referred to regarding local authority provision of diversion services. You suggested that there were some issues here in terms of working with local authorities. What are these and what is being done to resolve them?

As I observed on 16 June, prosecutors continue to refer accused persons, in appropriate cases, for diversion services provided by local authorities. The impact of the pandemic has, unsurprisingly, lengthened the time required to carry out assessments and made the provision of relevant services more difficult. The experience of prosecutors is that diversion services have a greater impact and are more likely to address underlying issues or behaviours if they are provided quickly. Mediation, to which you specifically referred on 16 June, is only one diversion service. Many of the services seek to address complex behaviours or issues such as substance abuse and so do not lend themselves easily to being addressed through remote video links.

COPFS continues to work with Community Justice Scotland and local authorities during this time to share information and to seek to resolve practical problems presented by the pandemic and will support the work of the Community Justice and Prisons group established under the leadership of the Criminal Justice Board.

7. The Crown Agent gave a commitment to write with details costs on “mobile phones” purchased. It would be helpful to clarify the actual number and cost of the smartphones (as opposed to ‘mobile phones’) procured by COPFS, and how many of the 800+ ‘mobile phones’ referred to in correspondence are smartphones? Also, how much did the 1,500 laptops procured by COPFS cost?

The provision of laptops and smartphones to all staff reflected decisions taken in 2018 and 2019 as part of the Service’s Digital Strategy. They were originally intended for use in the autumn of 2020. As a result of additional capital funding of £2.9m provided to the Service in the final quarter of 2019/20, it was able to



purchase the devices prior to the pandemic. This meant that the devices were ordered and in transit ahead of the onset of the pandemic, enabling the Service to plan and react to working from home in line with government guidance in the earliest days of the restrictions.

The new laptops allow all staff to access COPFS corporate email, intranet and case management systems remotely and to take part in video conferencing. This has been the foundation of COPFS staff continuing to work from home. The smartphones, which are manufactured by Samsung, allow staff to access COPFS corporate emails while travelling and are a direct replacement for the BlackBerry devices which have been in use for a number of years. Unlike the BlackBerry devices, they will also allow secure video conferencing. A number of staff do not require the use of smartphones because they will either be working in an office or from home in future but it was recognised that they needed to keep in contact with witnesses by telephone and so a number of simpler mobile phones, manufactured by Nokia, which do not provide access to email or video conferencing, were purchased at the start of the pandemic.

In total, the 1,844 laptops cost £1.47m (incl. VAT) and the 349 smartphones cost £81,000 (incl. VAT). The 575 mobile phones cost £41,400. The devices were all purchased using the Scottish Government's procurement framework to ensure best value for money and the cost of the laptops includes the cost of servicing and maintenance.

8. It would also be helpful to receive details of the evaluation of the Aberdeen and Inverness remote summary cases and any follow-up action that is then taken by COPFS or others as a consequence.

The evaluation of the virtual summary cases is the responsibility of the judiciary and has been carried out by the Sheriff Principal of Grampian, Highland and Islands. His report to the Lord Justice General was published on the SCTS website on 3 July at <https://scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/07/03/extending-virtual-summary-trials-in-scotland>.

Yours sincerely

**Rt. HON W. JAMES WOLFFE, QC
LORD ADVOCATE**