

**Note by the clerk of informal meeting between members of the Justice Committee and two former employees of the Crown Office and Procurator Fiscal Service at the Scottish Parliament on 29 November 2016**

**Present: Margaret Mitchell (Convener), Rona Mackay (Deputy Convener), Mairi Evans, Mary Fee, John Finnie, Fulton MacGregor, Ben Macpherson, Liam McArthur, Douglas Ross, Stewart Stevenson**

*Biographical note: the two individuals providing testimony were practising solicitors, both former COPFS employees. Both had served a two-year traineeship, with one then remaining in employment with the COPFS on a fixed-term two-year contract, and leaving for private practice and the other not being kept on after their traineeship ended. They remain in contact with serving fiscals. Both had left the COPFS within the last five years. The views below represent the collective view of both individuals. They had requested anonymity to protect their privacy.*

### **Traineeships and short term contracts**

The COPFS provides an excellent traineeship. During the two years, experience includes a lot of opportunities to run cases; a varied workload; and a lot of responsibility that enables fiscals to gain in confidence quickly. In the second year of a 2-year traineeship entry level deputes can be “in court every day, all day”. A trainee is usually a “net contributor” to the service in terms of court work by the second year of their traineeship. Support does vary in different geographical areas and is dependent on workload and resources but it was generally good.

Fixed-term contracts began to proliferate at the COPFS around about the last recession. It appears that management wanted to find a way to control the number of permanent employees. They may also have wanted to break length of service. Posts were often re-advertised shortly after a person left. There are people at the COPFS who have had a succession of short term contracts. One of the two individuals was let go after 4 years – the only reason for doing so seemed to be to avoid full statutory employment rights kicking in. Their post was re-advertised shortly after. The other individual’s post was also re-advertised within months of the end of their traineeship. They applied for and were offered an interview, at which point they decided to stay in their new job.

During this period, the COPFS also stopped keeping trainees on after two years. Management at COPFS were at least upfront about this.

The overall effect of these employment policies was to decrease morale. It did not contribute towards a positive working atmosphere.

Not keeping on trainees and fixed-term employees means the COPFS has lost a lot of experienced, skilful and well-trained people. It has had to seek out people from other branches of the legal profession who then need to be effectively re-trained.

### **Preparation time and work pressure**

Fiscals need office time to prepare but this was not always possible: “you took the time you had and prepared the best you could”. It is not a job that can be done in normal office hours, and fiscals regularly took home work to avoid being ill-prepared. The individuals’ experience was that it was worse in big city offices. However, immediate bosses were supportive.

Fiscals always have several cases calling at the same time. Lots of cases end up not calling for a variety of reasons but fiscals generally need to prepare as if all the trials will call because it is hard to predict what will and will not go ahead.

Despite all this, the quality of prosecution and decision-taking was generally good. Fiscals are good at thinking on their feet – it is a necessary part of the job. It is nevertheless a fact that some summary cases will reach the wrong outcome because the prosecution was not properly prepared. If it's a typical summary trial, this will hardly be noticed other than by those directly involved in the case.

Pressures of work at the COPFS seem, if anything, worse nowadays because of further job cuts. Fiscals are now working under “tremendous pressure”.

It is a practice of the COPFS to centrally mark some cases as “advance notice trials”. These are complex cases involving more preparation (eg benefit fraud cases). Cases marked in this way should give local fiscals more office time to look at them. In practice, it doesn't really work out that way because the fiscal has no time to consider it before it calls.

### **Documentation and agreement of evidence**

This was and is an issue – defence documents sometimes do not find their way to the fiscal's desk. Short staffing and heavy workloads on the admin side seem to be the main reason for this. Fiscals would regularly appear in court and be asked about a document that had been sent to them but which they had not received. It is probably worse now with fewer trainees to help with tasks like reading legal mail.

The two individuals were aware of a push in some courts by the COPFS recently to have more evidence agreed in advance of a trial. If this has not entirely succeeded, it is sometimes because the COPFS's concept of “uncontroversial” evidence can be different to defence agents'. The COPFS is at least trying in some areas.

### **Erosion of discretion**

The biggest issue with the COPFS is perhaps the loss of local discretion. Experienced fiscals – high-calibre professionals trained to exercise their judgment – are generally the best people to decide whether and how to run cases in their local court. But discretion seems in a huge way to have been eroded. The local PFs know the case best but can't make a decision – or only can after receiving express authorisation from someone higher up in Edinburgh or Glasgow. The overall approach is both “risk averse” and “complaint averse”.

There has long been guidance and policy on what deposes can and can't do. Discretion was limited when the two individuals were serving fiscals – it was their experience that practically every case with a racial element had to be run – but it has been restricted further since then. Examples include domestic abuse and stalking cases. Both individuals had personal experience of having conversations about a case with the depute who said that they wanted to drop the case but felt they had no choice but to continue it.

The individuals agreed that the COPFS appeared to have a surfeit of chiefs, relatively remote from the day to day experience of running a busy local office dealing with summary trials. They are not as accessible to fiscals as under prior management structures; they are not in the same office to answer questions or give advice.

To the simple question “who is in charge of the prosecution in a sheriff court”, there is no longer a clear answer. It used to be the local PF. Restructuring partly removed these. Then they were reinstated but apparently without the same discretion.

The individuals were not certain whether a move to increased specialisation in prosecution had brought material benefit. Centralisation was around in a limited sense when the two individuals were fiscals eg dedicated deposes for football offences in some local areas. The trouble is when that person is unavailable.

### **Central marking of cases**

All police reports of investigations are now marked centrally at the COPFS. (On occasions, where there is an “overflow” of cases for marking, they may go to local offices; not necessarily the office where the case will call.) The marker decides whether to prosecute, including taking into account the public interest, and can say at that stage what plea would be acceptable. In custody cases, the marker also decides whether or not to oppose bail. The individuals saw this approach as going hand in hand with the loss of local discretion.

The previous system where cases were marked locally by local deposes with specialist support available as required generally worked fine. Centralisation seems to have been done strictly on resource grounds and it is not even clear that it has been beneficial on those terms. Centralisation may have enabled more specialisation in marking but the individuals were not clear that this had brought obvious benefits.

“Acceptable plea letters” were mentioned. These are meant to give early notice of the Crown position, to encourage early resolution of a case. Previously, this issue was largely at the discretion of the local fiscal. This meant that if additional information became available they could tailor their approach. This worked well. Now the policy seems to be to accept no deviation from what is in the letter, which emanates from central marking. The individuals mentioned a recent instance of local fiscals “acting like robots” for a period at the sheriff court, seemingly under strict instruction not to deviate from the instructions on pleas.

### **Use of IT**

The use of IT in criminal cases is not user-friendly. There is definite scope for improvement but it is probably misguided to see improved IT as a game-changer in itself.

### **Use of diversion schemes**

It is unlikely most fiscals operate with full awareness of the range of diversion schemes available locally. Central marking may also have a negative effect at times. An example given was of a person whose case had been centrally marked for a diversion scheme in an area which was unable or unwilling to provide it. The result was that nothing was done for months, which had a potential impact on the person’s life in view of their particular personal circumstances. That person was at least in the criminal justice system and therefore had a defence lawyer. The main worry would be over persons given an inappropriate diversion who are not represented.